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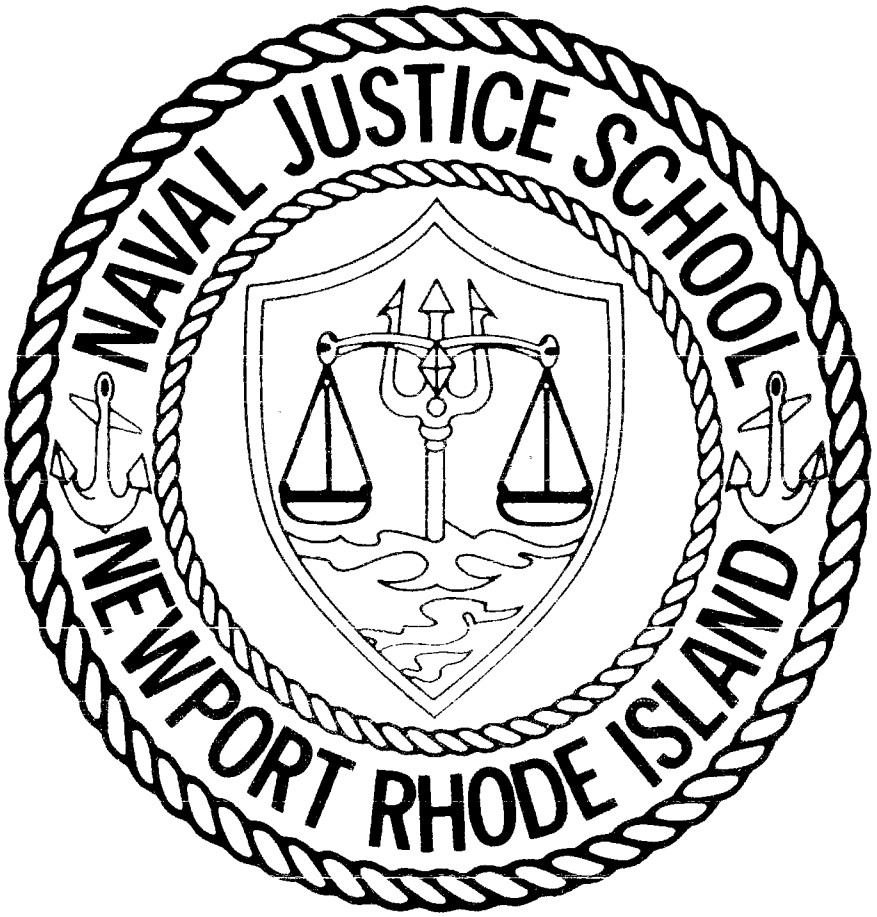

JUSTICE

HANDBOOK

101395

NAVAL JUSTICE SCHOOL

NEWPORT, RHODE ISLAND 02841

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PREFACE

The Basic Military Justice Handbook is divided into five separate sections as follows:

Section/Title	Divider Color
Section One - Evidence	Blue
Section Two - Procedure	Pink
Section Three - Criminal Law	Yellow
Section Four - Glossary of Words and Phrases	Green
Section Five - Common Abbreviations Used in Military Justice	Green

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

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SECTION ONE -- EVIDENCE

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 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 met those standards, certain rules of evidence evolved. Literally hundreds of years were consumed in this process, and, indeed, the process continues in our courts today. By a gradual process, as rules of evidence are developed to meet new situations, they are incorporated into the law of evidence.

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, scholarly writings, and administrative decisions -- to name some of the major sources.

B. Sources of the law of evidence. Because the chief focal point of our discussion of the law of evidence is its application in the military, an arm of the Federal Government, the basic source, as would be expected, is to be found in Article I, Section 8, of the U.S. Constitution: "The Congress shall have Power...To make Rules for the Government and Regulation of the land and naval Forces...." For anyone familiar with the Constitution, this might seem odd in view of the fact that Article III addresses itself to the judiciary. The answer lies in the fact that military courts are Article I courts, not Article III courts; in other words, they derive their existence -- at least indirectly -- from Article I of the Constitution, whereas a Federal District Court, which also tries criminal cases, derives its power from Article III of the Constitution.

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, is the key that opens the door to the military law of evidence. It vests the President of the United States with power to prescribe the rules of evidence for the military.

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

Where the Military Rules of Evidence do not prescribe an applicable rule, one may look to Mil.R.Evid. 101(b). This rule permits reference to the rules of evidence followed in U.S. district courts (the Federal Rules

of Evidence) or the rules of evidence at common law (the law of a country based on custom, usage, and judicial decisions) as long as these two sources are not inconsistent with or contrary to the provisions of the UCMJ or the MCM.

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

Finally, other sources of the law of evidence are to be found in Federal court decisions interpreting rules of evidence; opinions of the Judge Advocates General; various administrative publications such as U.S. Navy Regulations, 1973, the Manual of the Judge Advocate General of the Navy, the Naval Military Personnel Manual (for Navy) or the Marine Corps Individual Records Administration Manual (for Marines) 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 judiciary.

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 privileges found in sections III and V, are not applicable at article 32 pretrial investigations nor at proceedings conducted pursuant to Article 15, UCMJ. However, Part V, par. 4c, MCM, 1984, requires that the accused's rights against self-incrimination (art. 31b) be explained at mast or office hours.

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

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

Without the law of evidence, the criminal trial as we know it could be a very disorderly proceeding. Without it, information received at trial could be unreliable and many of the constitutional rights afforded an accused in a criminal proceeding might not be given full effect.

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

1. Oral evidence. Oral evidence is the 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 perjury. There are other forms of "oral" evidence. For example, if a witness makes a gesture or assumes a position in order to convey information, this too is considered "oral" evidence. Generally, witnesses will be able to relate what they actually saw, heard, smelled, felt, or tasted, and state certain conclusions they reached based upon these sensory perceptions.

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

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

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

E. Types of evidence. At trial, any form of evidence may be introduced to prove or disprove a fact in issue. All evidence will 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 other inferences, to prove or disprove a fact in issue. For example, a confession from the accused is direct evidence of the offense charged.

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

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

F. Admissibility of evidence. Apart from the forms and types of evidence is the subject of admissibility of evidence, with which the remainder of this course will concern itself. 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 the evidence. Authenticity simply means that a piece of evidence is what it purports to be. To illustrate, consider the three forms of evidence. First, with regard to oral evidence, consider the testimony of a witness. We know that his testimony is what it purports to be by virtue of the fact that he has taken an oath to tell the truth, the whole truth, and nothing but the truth. He identifies himself as John Jones. This is John Jones' testimony. Next, consider a piece of documentary evidence, a service record entry for example. How do we know that the service record entry is what it purports to be? Sometimes the custodian of the record, the personnel officer, will be called to "identify" the service record entry. He will testify under oath that he is the custodian of the record and that he has withdrawn a particular entry or page from the service record and that this is in fact that entry or page. Again, it is established that the service record entry is what it purports to be. With regard to real evidence, take, for example, a pistol which was recovered from the person of the accused as the result of a search by a police officer. The police officer is called and sworn as a witness. He gives testimony with regard to the circumstances of the search. Finally, he is presented with the pistol, and he identifies it, perhaps from the serial number, or perhaps from a tag he attached to the pistol at the time it was seized. His testimony establishes that the pistol is what it purports to be.

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

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: "Does the evidence aid the court in answering the question before it?"

To demonstrate the meaning of relevancy, consider a situation in which an accused is charged with theft of property of the United States. In most cases, the fact that he beat his wife regularly would probably have nothing to do with his theft of property of the United States. Therefore, any testimony to this effect would be objectionable as irrelevant.

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

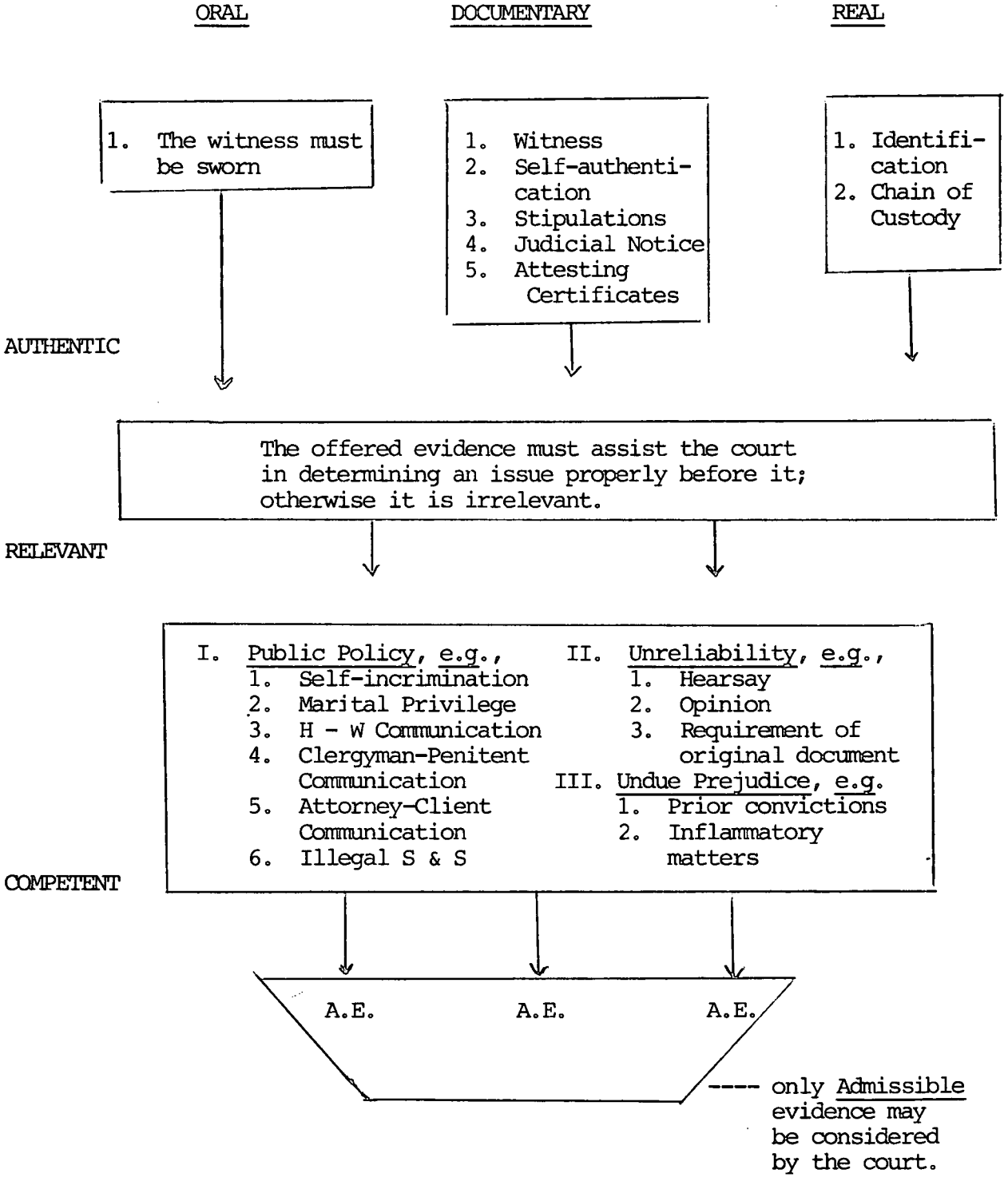
a. Public policy. First, the evidence sought to be introduced must not be obtained contrary to public policy. An "exclusionary rule" is a recognition by the courts that in certain instances there is a public policy that requires the exclusion of certain evidence because of a counterbalancing need to encourage or prevent certain other 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 Article 31, UCMJ (chapter III), and evidence obtained in violation of the law of search and seizure (chapter IV). Additionally, public policy sometimes acts to further certain relationships at the expense of excluding certain evidence; e.g., the husband-wife privilege precludes under certain circumstances the calling of one spouse to testify against the other. Similar privileges protect the relationships of attorney-client and clergyman-penitent. There is no such protection afforded in military law to a doctor and his patient.

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

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

ADMISSIBLE EVIDENCE FILTERS

Formula: A + R + C = AE



CHAPTER II

THE LAW OF PRIVILEGES

A. Introduction to the law of privileges

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

This section will explain several of the more common privileges recognized by the Military Rules of Evidence. Understanding these privileges is important because the law of privileges contained in Section V of the Military Rules of Evidence, unlike the other sections of the rules, does apply to nonjudicial punishment proceedings as well as to courts-martial.

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

1. As previously stated, the policy surrounding this privilege is that the societal need to prevent the destruction of the marital relationship is greater than the benefit that society would reap by the use of the testimony of one spouse against the other, or the use of statements made in confidence by one spouse to the other while married. Mil.R.Evid. 504 sets forth two distinct privileges. One relates to the capacity of one spouse to testify against the other (refusal to testify privilege). The other privilege relates to confidential communications between the spouses while married.

a. Refusal to testify. 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 contracted in accordance with the law of a State which recognizes common-law marriages. If, at the time of testifying, the parties are divorced, or if their marriage has been legally annulled, the privilege will not be available.

Assume, for example, 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. Divorce, legal annulment, or legal separation will negate the privilege.

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

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

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

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

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

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

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

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

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

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

b. by the client or the client's lawyer to a lawyer representing another in a matter of common interest.

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

4. As a general rule a "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to practice law. Both military judge advocates and civilian lawyers fall within this privilege. The privilege also may be applicable, however, in situations where the client reasonably believes that he/she is consulting in private with a person authorized to practice law even if the person consulted is not so authorized. It is therefore important that nonlawyers, and command legal officers not intentionally or inadvertently hold themselves out as persons authorized to practice law. Otherwise the consultation, counselling 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 privilege may be claimed by the client, or by the lawyer or lawyer's representative on behalf of the client. Unless the communication relates to the commission of a claim of malpractice or other breach of duty of the lawyer, only the client may waive the privilege.

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

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

2. The rule defines a clergyman as a minister, priest, rabbi, or other similar functionary of a religious organization, or an individual reasonably believed to be so by the person consulting a clergyman. This definition lends itself to a broad spectrum of interpretations. There are no military cases directly interpreting this language. It is therefore difficult to determine who may constitute a "similar functionary of a religious organization." Some guidance is provided by the Advisory Committee to the Federal Rules of Evidence. With respect to the proposed Federal Rule of Evidence concerning this clergyman-penitent privilege, the Advisory Committee noted that a "clergyman" is regularly engaged in activities conforming at least in a general way with those of a Catholic priest, Jewish rabbi, or minister of an established Protestant denomination, though not necessarily on a full time basis. The definition of "clergyman" in light of the Advisory Committee's considerations would not appear to be so broad as to include self-styled or self-determined ministers.

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

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

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

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

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

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

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

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

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

The Military Rules of Evidence do not recognize any doctor-patient privilege. Statements made by a military member to either a civilian or military physician are not privileged, and, assuming such statements are otherwise admissible, the statements may be disclosed and admitted into evidence at a courts-martial.

CHAPTER III

THE LAW OF SELF-INCRIMINATION

A. Article 31 of the Uniform Code of Military Justice

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

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

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

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

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

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

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

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

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

One Court of Military Appeals case indicated that if a person, out of personal curiosity, questioned a suspect over whom that person had some position of authority, the suspect must have been advised in accordance with article 31(b) for the government to later utilize the suspect's response. United States v. Dohle, 1 M.J. 223 (C.M.A. 1975). Therefore, the private capacity exception might not apply if the questioner is also in a known position of authority over the accused. This question of whether the interrogator is in a "position of authority" over the accused led to considerable confusion in determining when the rights warnings were required. The Court of Military Appeals clarified this situation 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. While the informant is acting in an official capacity, any discussion regarding the drug transaction is obviously a casual conversation rather than a response to official interrogation.

4. Application to other interrogations. The agents of the Naval Investigative Service and the Marine Corps' Criminal Investigation Division must comply with article 31(b) in all military interrogations. This rule applies with equal force to civilians acting as base or station police when acting as agents of the military, other civilian investigators, such as Federal and state investigators, must warn an accused or suspect of his article 31(b) rights. 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 U.S.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 also held, however, 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.

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

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

5. Who must be warned? Article 31(b) requires that an accused or suspect be advised of his rights prior to questioning or interrogation. A person is an accused if charges have been preferred against him or her. On the other hand, to determine when a servicemember is a suspect is more difficult. The test applied in this situation is whether suspicion has crystallized to such an extent that a general accusation of some recognizable crime can be made against this individual. This test is objective. 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. The warning 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.

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

8. Warning that anything said may be used against an accused or suspect

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."

9. Timing/cleansing warnings. As soon as an interrogator has reason to suspect a servicemember of an offense, the servicemember must be warned. When an interrogator obtains a confession or admission without proper warnings, subsequent compliance with article 31 will not make these statements or subsequent statements admissible. Why is this so? Initially, the accused or suspect made a confession or admission without proper warnings. This is called an "involuntary statement" due to the deficient warnings. Next, once properly advised, the accused made a second statement which, for the purpose of this illustration, could be identical to his prior "involuntary" statement. What assurance does the court have that the servicemember did not say: "What the heck, I have already confessed once; they know all about what I did; I might as well tell it again?" In this situation, there is no clear showing that the accused or suspect knew that the first statement could not be used. Thus, the second statement, even though preceded by warnings, probably will be inadmissible, unless the trial counsel makes a clear showing that the second statement was not influenced by the first.

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." This factor, i.e., a "cleansing warning," along with others showing an absence of the presumptive taint of the involuntary statement may permit the confession or admission to be received into evidence.

The United States Supreme Court recently declined to apply a presumptive taint from an unwarned statement and ruled that only proof of actual coercion would necessitate suppression of a second statement. While it is likely that this clarification of the need for "cleansing warnings" will eventually be made a part of military practice, until the Court of Military Appeals incorporates this decision, cleansing warnings should continue to be given in every situation where there has been a previously unwarned statement.

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

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

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

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

In addition to oral statements, some actions of an accused or suspect may be considered the equivalent of a statement and are thus protected by article 31. During a search, for example, a suspect may be asked to identify an item of clothing in which contraband has been located. If, as indicated, the servicemember is a suspect, these acts on his part may amount to admissions. Therefore, care must be taken to see that the suspect is warned of his article 31(b) rights or the identification of the clothing is obtained from some other source. In most cases, however, a request for the identification of an individual is not an "interrogation"; production of the identification is not a "statement" within the meaning of article 31(b), and therefore no warnings are required. Superiors and those in positions of authority may lawfully demand a servicemember to produce identification at any time without first warning the servicemember under article 31(b). Merely identifying oneself 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 U.S.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 U.S.C.M.A. 34, 39 C.M.R. 34 (1968), except 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.

11. 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 U.S.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. Under the Military Rules of Evidence, no article 31 warnings are required prior to taking urine specimens. 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 or 313 is a prerequisite for the admissibility in court of 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.

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

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

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

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.

13. Understanding the article 31(b) warning. At trial, the admissibility of the confession or admission will initially depend on whether the government can demonstrate that the accused understood his or her rights before making a confession or admission. This requirement can be satisfied by the testimony of the interrogator or other witnesses concerning what the accused was told. They may also testify as to what the accused told them regarding the accused's understanding of his rights. If a written advice and waiver of rights was used, it may be introduced in evidence to show what the accused saw, possibly read, and signed. This evidence shows circumstances from which the court may conclude that the interrogator complied with article 31 and that the statement was otherwise voluntary.

The defense may introduce evidence to the effect that the warnings were not properly given, that the accused did not understand or waive them, or that other factors show noncompliance with article 31(b). The defense also may make a further showing that the confession was not otherwise voluntary as required by article 31(d). The military judge will hear all of the evidence and determine the matter.

B. The right to counsel

1. Miranda/Tempia rights. 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 are known as counsel rights, and are sometimes referred to as Miranda/Tempia rights. These counsel rights, which are codified and somewhat extended by Mil.R.Evid. 305 include:

a. The right to consult with a lawyer prior to questioning and to have a lawyer present during questioning; and

b. the right both to retain (hire) a civilian lawyer at one's own expense; and to have a military lawyer appointed at no cost to the accused.

2. Counsel warnings. Rather than discuss the factual situations in Miranda v. Arizona, 348 U.S. 436 (1966), and United States v. Tempia, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967), it is enough to say that a military suspect or accused who is in custody must be advised of the right to counsel. These 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."

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.

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

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

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.

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.

4. The prosecution's burden. 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).

5. Understanding of rights. 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-n of the JAG Manual, could cause the interrogator to give an incomplete or incorrect warning. See page 3-15, infra.

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

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

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

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

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

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

6. Notice to counsel. In United States v. McOmber, 1 M.J. 380 (C.M.A. 1976), the Court of Military Appeals created a procedural rule affecting the admissibility of confessions and admissions. This has been codified in Mil.R.Evid. 305(e). If an interrogator knows or reasonably should know that an accused or suspect has an appointed or retained attorney with respect to an offense concerning which he or she is to be interrogated, the interrogator cannot question the accused or suspect without notifying the attorney and affording the attorney a reasonable opportunity to be present at the interrogation. Violation of this rule will make any resulting statement inadmissible.

C. Right to terminate the interrogation

Although not required by article 31, case law, or the Military Rules of Evidence, some courts have recommended that a suspect be advised that he or she has a right to terminate the interrogation at any time for any reason. Failure to give such advise probably will not render the suspect's

confession inadmissible. Still, advising a suspect that he or she has a right to terminate the interview should make for a strong government argument that any confession that the suspect gives is voluntary.

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

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

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

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

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

E. Consequences of violating the rights against self-incrimination

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

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

Thus, if Private Jones is found with marijuana in her pocket and interrogated without being advised of her article 31(b) rights and confesses to the possession of 1000 pounds of marijuana in her parked vehicle located on base, the 1000 pounds of marijuana as well as Private Jones' confession will be excluded from evidence. The reason: The 1000 pounds of marijuana were discovered by exploiting the unlawfully obtained confession.

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

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

The excerpt on pages 3-14 and 3-15 from the JAG Manual, appendix A-1-n, contains the suspect's or accused's article 31(b) rights and a statement indicating that the accused or suspect understands his or her rights and has chosen to waive those rights. Additionally, this form contains counsel rights, and an acknowledgement and waiver of these rights. This form should be used when the command desires to take a statement from a suspect in custody. The form will help ensure that appropriate rights warnings are given and that a record of the rights given and the acknowledgement and waiver of the same will be available if a dispute later arises. It is essential that these rights be read to the suspect or accused, that they be explained, that the individual be given ample opportunity to read them before signing an acknowledgement and waiver (if this is desired) and before making any statement or answering any questions.

F. 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, § 0130.

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, § 0130c.

2. Types of immunity

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

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

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

3. Forms. See JAGMAN, app. A-1-d(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, § 0130 and OPNAVINST 5510.1, require final approval by the DoD general counsel in all such cases. Furthermore, JAGMAN, §§ 0116 and 0130 discuss the requirement for coordinating with Federal authorities in any case involving a major Federal offense. The best advice that can be given is that higher headquarters should be notified before anything is done (e.g., referral, immunity, pretrial agreements) in any case involving national security, classified information, or a major Federal offense.

SUSPECT'S RIGHTS ACKNOWLEDGEMENT/STATEMENT (See section 0175)

Suspect's Rights Acknowledgement/Statement

FULL NAME (ACCUSED/SUSPECT)	FILE/SERVICE NO.	RATE/RANK	SERVICE (BRANCH)
ACTIVITY/UNIT	SOCIAL SECURITY NUMBER		DATE OF BIRTH
NAME (INTERVIEWER)	FILE/SERVICE NO.	RATE/RANK	SERVICE (BRANCH)
ORGANIZATION		BILLET	
LOCATION OF INTERVIEW		TIME	DATE

RIGHTS

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

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

_____ ☐

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

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

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

(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; ---------- 1

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

A-1-n(1)
Change 2

(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; ---------- 3

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

(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. ---------- 5

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)

A-1-n(2)
Change 2

CHAPTER IV

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 an exclusionary rule based on its language:

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

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

In deciding whether probable cause exists, one must first remember that conclusions of others do not comprise an acceptable basis for probable cause. The person who is called upon to determine probable cause must, in all cases, make an independent assessment of facts presented before a constitutionally valid finding of probable cause can be made. The concept of probable cause arises in many different factual situations. Numerous individuals in a command may be called upon to establish its presence during an investigation. Although the reading of the constitution 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.

Although the fourth amendment mandates that only information obtained under oath may be used as a basis for probable cause, military courts traditionally ignored this requirement. In United States v. Fimmano, 8 M.J. 197 (C.M.A. 1979), the Court of Military Appeals adopted the civilian practice of excluding from use all unsworn information used to determine probable cause. In United States v. Stuckey, 10 M.J. 347 (C.M.A. 1980), however, the Court of Military Appeals reversed its position in Fimmano and held that information is not required to be given under oath in order to use the information to make a determination as to the existence of probable cause. Still, the court in Stuckey strongly recommended that the information be given under oath. The oath is one factor that can add to the believability of the person given the oath, the importance of which will be discussed below.

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

The "exclusionary rule" of the fourth amendment is a judicially created rule based upon the language of the fourth amendment. The United States Supreme Court considered this rule necessary to prevent unreasonable searches and seizures by government officials. The sole basis for the law of search and seizure has been stated to be the protection of the individual's right to privacy from governmental intrusion. In more recent decisions the Supreme Court has reexamined the scope of this suppression remedy and concluded that the rule should only be applied where the fourth amendment violation is substantial and deliberate. Consequently, where

government agents are acting in an objectively reasonable manner (i.e, in "good faith") the evidence seized should be admitted despite technical violations of the fourth amendment.

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

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

B. The language of the law of search and seizure

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

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

(1) A quest for evidence;

(2) conducted by a government agent; and

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

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

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

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

(1) A crime has been committed; and

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

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

(a) Written statements;

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

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

d. 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. Accordingly, care must be taken to insure 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. Existing case law appears to recognize a "good faith" defense in such cases. 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. To date there have been no reported cases involving suits against military officials for alleged fourth amendment violations against civilians. In view of the Bivens case, however, such suits remain possibilities, especially in situations involving clearly illegal searches or seizures.

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 U.S.C.M.A. 689, 16 C.M.R. 236 (1954), the Court of Military Appeals upheld a Marine's larceny conviction where the evidence had been obtained by a co-worker's forcible entry into Volante's wall locker, after the co-worker was told that he might have to pay for the missing property if the thief were not found. This action clearly invaded a protected privacy area, but since it was taken by the co-worker for his own purposes, and not as an agent of the government, no exclusion of evidence at trial was warranted. The remedy for Volante would have been to sue his coworker 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) Foot lockers or wall lockers are presumed to carry with them an expectation of privacy; thus they can be searched only when the Military Rules of Evidence permit.

C. Categorization of searches

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

D. Searches based upon prior authorization

1. 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.

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

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

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

3. Jurisdiction to authorize searches. Before any competent military authority can lawfully order a search in any instance, he or she must have the authority necessary over both the place to be searched and the persons or property to be searched or seized. This authority, or jurisdiction, is most often a dual concept: jurisdiction over the place and over the person. We will explore these areas closely, as 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.

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

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

(2) Military. Mil.R.Evid. 315 indicates two categories of military persons who are subject to search by the authorization of competent military authority: members of that commanding officer's unit, and others who are subject to military law when in places under that commander's jurisdiction, e.g., aboard a ship or in a command area. There is military case authority for the proposition that the commander's power to authorize searches of members of his 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, in the civilian community. 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. Also, if such action is contemplated, the search must be for evidence connected with some military offense, prosecutable in a trial by court-martial.

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

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

(2) Property that is government-owned and that has a private use by military persons 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 UOPH room, UEPH space, MOQ, etc.

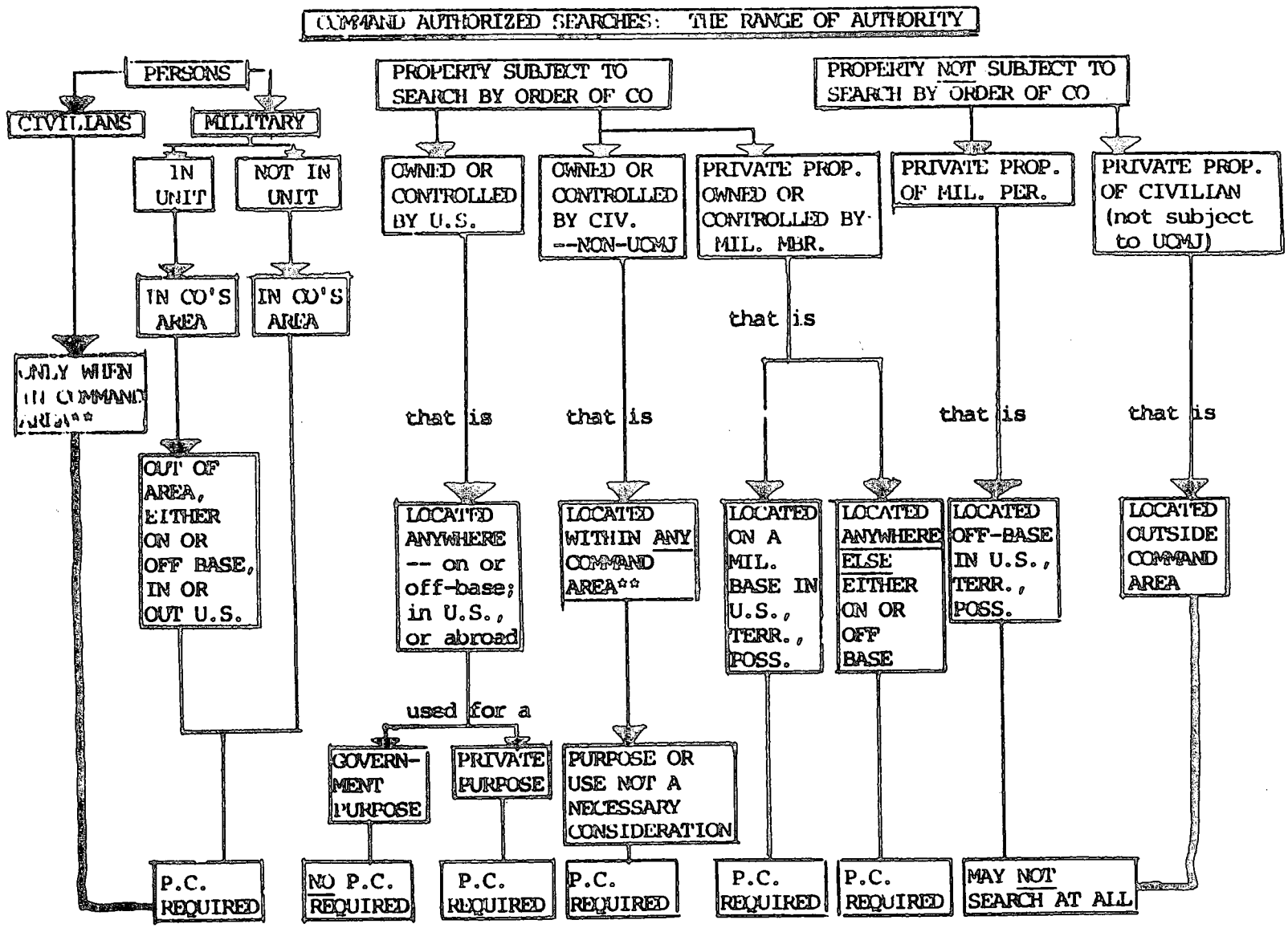
Mil.R.Evid. 314 attempts to remove the confusion concerning which kinds of government property involve expectations of privacy. The intent of the rule in this area is to affirm that there is a presumed right to privacy in walllockers, footlockers, etc., and in items issued for private use. With other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

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

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

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

On the next page is a chart that illustrates the concepts outlined above.



** INCLUDING SHIPS, AIRCRAFT, VEHICLES

E. Delegation of power to authorize searches

1. Traditionally, commanders have delegated their power to authorize searches to their chief of staff, command duty officer, or even the officer of the day. This practice was held 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 if full command responsibilities devolve to the XO, CDO, SDO, or OOD 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 responsbilities will not have devolved to the CDO, SDO, or OOD; and therefore, he or she could not lawfully authorize a search or seizure. Guidance on this matter has been promulgated by CINCLANTFLT, CINCPACTFLT, and CINCUSNAVEUR. Until the courts provide further guidance on this issue, readers should follow the guidance set forth by their respective CINC's/CG's.

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

F. The requirement of neutrality and detachments

1. 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 any search. The rules were 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.

G. The requirement of probable cause

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

a. There was a crime 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 a person 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.

The portion of Mil.R.Evid. 315 dealing with probable cause recognizes the proper use of hearsay information in the determination of probable cause, and allows such determinations to be based either wholly or in part on such information.

2. Probable cause and the subject matter of the search. When a search is authorized by appropriate authority the thing, or things, that are the objects of the search must be specified. This is the requirement of particularity mentioned in the language of the fourth amendment. For instance, if facts point to a knife or other sharp instrument as the instrumentality of a crime, the commanding officer or person authorizing the search should specify that an object of this type, and not a pistol, is to be sought. Likewise, if marijuana is the object of the search, it too must be specified in the search authorization.

Suppose, however, that a search for a knife is being conducted, and the person conducting the search happens to find a bag of marijuana in the locker which is being searched. Further, assume that the knife is not found. Could the marijuana be admitted in evidence against the accused? If the marijuana were discovered incident to the search for the knife, it will be admissible. If the commander authorizes a search for a knife, the person conducting the search could look in the locker for the knife, and any other item of evidence discovered would be admissible. Suppose, however, that while looking for the knife, the person conducting the search looked into an envelope containing only a letter belonging to the accused. Suppose that this letter contained information as to where the accused had drugs and that, as a result of this letter, the drugs were found. Neither the letter nor the drugs would be admissible. The reason is that the person conducting the search was authorized to look only for a knife. A search of boxes in which the knife could be located would be legal, but the knife could not be located in an envelope containing a letter. Hence, the subject matter, what is being sought in the search, controls where one may look.

Suppose a person is searching for a stolen pistol on the accused's premises and looks in a match box and finds heroin. Again, one could not expect to find the pistol in the match box. The search may not extend into areas where it would not be reasonable to expect to find the item sought.

The person conducting the search should also keep in mind the fact that once the item sought is located, the search should cease. Suppose one is looking for a pistol and finds it. The next drawer which contains two kilos of heroin must not be opened, because the search is complete. If the search is for an unspecified quantity of heroin, and some is found, the searcher may continue to look for more. This is why a search based on a drug detection dog's alert may continue even after some illegal drugs are found. We cannot be sure how much or how little of the contraband exists; only that "some" probably will be found.

3. Premises involved. Apart from specifying the subject matter of the search, the person authorizing the search must also specify the premises to be searched; by "premises," is meant the person, place, or thing.

Before the person authorizing the search can know what premises to specify, he must have information indicating that the subject matter of the search is located in a specific place. One cannot guess as to the location of the subject matter. Nor can the fact that probable cause exists in one place or premises justify a search in another place or premises merely because one is near the other. There must be some factual link for probable cause to exist.

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

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

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

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

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

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

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

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

(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.

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

The holding in United States v. Fimmano, 8 M.J. 197 (C.M.A. 1980), should be reviewed at this point. The court held in Fimmano 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.

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.

I. The use of drug detector dogs

1. There are several situations where detector dogs may be used to obtain evidence that should be admissible in a subsequent court-martial.

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

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

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

The facts of this case indicate that close attention must be given to establishing the reliability of the informers in this situation, i.e., the dog and doghandler. 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.

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:

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

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

J. 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 forms attached as appendices III and IV to this chapter. Should the exigencies of the situation require an immediate determination of probable cause, with no time to use the forms, make a record of all facts utilized and actions taken as soon as possible after the events have occurred.

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

K. Searches lawful without prior authorization but requiring probable cause

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

1. Exigency search. This type of search is permitted by Mil.R.Evid. 315(g) under circumstances demanding some immediate action to prevent removal or disposal of property believed, on reasonable grounds, to be evidence of crime. Although the exigencies may permit a search to be made without the requirement of a search authorization, the same quantum of probable cause required for search authorizations must be found to justify an intrusion based on exigency.

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

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

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

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

L. Searches not requiring probable cause

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

1. Searches upon entry to or exit from United States 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.

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

There is no absolute requirement that an individual who is asked for consent to search be told of the right to refuse such consent, nor is there any requirement to warn under article 31(b). 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. Part of the standard form from appendix A-1-m of the JAG Manual is reproduced as appendix V of this chapter for an example of a possible format. Appendix VI of this chapter provides a form which can be utilized for the consentual 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. He could only validly consent to a search of those places or areas where Seaman Jones has given him "control." Likewise, if Seaman Jones maintained her own private room within the residence, and Jack was not permitted access to the room by her, Jack could not give valid consent for a search of that room.

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

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

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

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

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

M. "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.

N. 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.

O. Inspections and inventories

1. General considerations. Although not within either category of searches (prior authorization/without prior authorization), there are other activities by agents of the government that may yield admissible evidence in trial by court-martial. These activities include administrative inspections and inventories. 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 UOPH 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) specific individuals are singled out for inspection; or (3) some people are "inspected" substantially more thoroughly than others, then the government must prove that the inspection was not actually a subterfuge search. As a practical matter, the rule expresses a clear preference for previously scheduled contraband inspections. Such scheduling helps ensure that the inspection is a routine command function and not an excuse to search specific persons or places for evidence of crime. The inspection should be scheduled sufficiently far enough in advance so as to eliminate any reasonable probability that the inspection is being used as a subterfuge. Such scheduling may be made as a matter of date or event. In other words, inspections may be scheduled to take place on any specific date (e.g., a commander may decide on the first of a month to inspect on the 7th, 9th, and 21st), or on the occurrence of a specific event beyond the usual control of the commander (e.g., whenever an alert is ordered, forces are deployed, a ship sails, the stock market reaches a certain level of activity, etc.). The previously scheduled inspection, however, need not be preannounced.

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

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

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

SAMPLE SEARCH AND SEIZURE INSTRUCTION

NAVBALCOM INSTRUCTION 5510.3A

Subj: SEARCHES AND SEIZURES

Ref: (a) Mil.R.Evid. 315

1. Purpose. To establish the authority of various members of the U.S. Naval Ballistics Command to order searches of persons and property and to promulgate regulations and guidelines governing such searches.

2. Cancellation. NAVBALCOM Instruction 5510.3 is hereby cancelled.

3. Objective. To insure that every search conducted by members of this command is performed in accordance with the law. For purposes of this instruction, "search" is defined as a quest for incriminating evidence.

4. Authority

(a) Reference (a), as modified by court decision, authorizes a commanding officer to order searches of:

(1) Persons subject to military law and to his authority;

(2) persons, including civilians, situated on or in a military installation, encampment, vessel, aircraft, vehicle, or any other location under his control;

(3) privately-owned property situated on or in a military installation, encampment, vessel, aircraft, vehicle, or any other location under his control;

(4) U.S. Government-owned or controlled property under his jurisdiction, which has been issued to an individual or group of individuals for their private use;

(5) all other U.S. Government-owned or controlled property under his jurisdiction; and

(6) in foreign countries, persons subject to military law and to his authority and any property of such persons located anywhere in the foreign country.

(b) As to property described in paragraph 4(a)(5) above, a search may be conducted at any time, by anyone in military authority on the scene, for any reason, or for no reason at all. Any property seized as a result of such a search will be handled in accordance with paragraph 7 herein.

(c) Items or other evidence seized as a result of a search of persons or property falling within paragraphs 4(a)(1), (2), (3), or (4), above, will be admissible in a subsequent court proceeding only if the search was based on probable cause. This means that before the search is ordered, the person ordering the search is in possession of facts and information, more than mere suspicion or conclusions provided to him by others, which would lead a reasonable person to believe that: (a) An offense has been committed; and (b) the proposed search will disclose an unlawful weapon, contraband, evidence of the offense or of the identity of the offender, or anything that might be used to resist apprehension or to escape.

(d) Before deciding whether to order any search of persons or property described in paragraphs 4(a)(1), (2), (3), or (4), above, the officer responsible is required to take all reasonable steps consistent with the circumstances to ensure that his source of information is reliable, and that the information available to him is complete and correct. He must then decide whether such information constitutes probable cause as defined above. In making this determination, the responsible officer is exercising a judicial, as opposed to a disciplinary, function.

(e) Ordinarily the Commanding Officer, U.S. Naval Ballistics Command, will be the officer responsible for authorizing searches of persons or property described in paragraphs 4(a)(1), (2), (3), or (4), above in this command. If the commanding officer is unavailable and full command responsibilities have devolved to another (normally the executive officer), that person then exercising full command responsibilities is permitted to authorize searches and seizures.

5. Criteria

(a) When so acting, the individual empowered to authorize searches will exercise discretion in deciding whether to order a search in accordance with the general criteria set forth above. No search will be ordered without a thorough review of the information to determine that probable cause, where required, exists. Due consideration will be given to the advisability of posting a guard or securing a space to prevent the tampering with or alteration of spaces while a further inquiry is conducted to effect a more complete development of the facts and circumstances giving rise to the request for a search.

(b) The following examples are intended to assist the responsible officer in placing the persons or property to be searched within the proper category (set forth in paragraph 4(a), above):

(1) Members of the armed forces and civilians accompanying armed forces in a combat zone in time of war;

(2) all persons, servicemembers and civilians, situated on or in a military installation, encampment, vessel, aircraft, or vehicle;

(3) automobiles, suitcases, civilian clothing, privately-owned parcels, etc., physically located on or in a military installation, encampment, etc., and owned or used by a servicemember or a civilian;

(4) lockers issued for the stowage of personal effects, government quarters, or other spaces or containers issued to an individual for his private use;

(5) the working spaces of this command, including restricted-access spaces, in the custody of one or a group of individuals where no private use has been authorized, for example, a wall safe, gear lockers, government vehicles, government briefcases, and government desks; or

(6) persons under the authority of this command and their personal property, including vehicles located on or off base when located in a foreign country.

6. Exception. In circumstances involving vehicles, the interests of the safety or security of a command, or the necessity for immediate action to prevent the removal or disposal of stolen property may leave insufficient time to obtain prior authorization to conduct a search. Under such circumstances, any officer of this command, on the scene in the execution of his military duties, is authorized to conduct a search without prior authorization from the commanding officer. When so acting, such officer is limited by all the requirements set forth above. He must determine that the person or property to be searched falls within one of the categories set forth, that his information is reliable to the extent permitted by the circumstances, and that probable cause, if required, is present. He shall inform the command duty officer of all the facts and circumstances surrounding his actions at the earliest practicable time.

7. Instructions

(a) If the circumstances permit, place the person requesting the authorization to search under oath or affirmation prior to giving such authorization. This oath or affirmation should be substantially in accordance with the one suggested in JAGMAN, app. A-1-l(3), par. 2.

(b) Any person authorizing a search pursuant to this instruction may do so orally or in writing, but in every case the order shall be specific as to who is to conduct the search, what person(s) or property are to be searched, and what item(s) or information are expected to be found on such person(s) or property. At the time the search is ordered, or as soon thereafter as practicable, the individual authorizing the search will set forth the time of authorization, the particular persons or property to be searched, the identity of the persons authorized to conduct the search, the items or information which was expected to be found, a complete discussion of the facts and information he considered in determining whether or not to order the search, and what effort, if any, was made to confirm or corroborate these facts and information. This report will be forwarded to the commanding officer and will be supplemented at the earliest practicable time by a written report, setting forth any items seized as a result of the search, together with complete details, including location of their seizure and location of their stowage after seizure.

(c) Where possible, searches authorized by this instruction will be conducted by at least two persons not personally interested in the case, at least one of whom will be a commissioned officer, noncommissioned officer, or petty officer.

(d) Once a search is properly ordered pursuant to this instruction, it is not necessary to obtain the consent of any individual affected by the search, however; such consent may be requested.

(e) Frequently, it will appear desirable to interrogate suspects in connection with an apparent offense. It is essential that the function of interrogation be kept strictly separate and apart from the function of conducting a search pursuant to this instruction. This instruction does not purport to establish any regulations or guidelines for the conduct of an interrogation.

(f) Personnel conducting a search properly authorized by this instruction will search only those persons or spaces ordered. If in the course of the search, they encounter facts or circumstances which make it seem desirable to extend the scope of the search beyond their original authority, they shall immediately inform the person authorizing the search of such facts or circumstances and await further instructions.

(g) Personnel conducting a search properly authorized by this instruction will seize all items which come to their notice in the course of the search which fall within the following categories:

(1) Unlawful weapons, i.e., any weapon the mere possession of which is prohibited by law or lawful regulation;

(2) contraband, i.e., any property the mere possession of which is prohibited by law or lawful regulation;

(3) any evidence of a crime, e.g., the fruits or products of any offense under the Uniform Code of Military Justice, or instrumentalities by means of which any such offense was committed; and

(4) any object or instrumentality which might be used to resist apprehension or to escape.

All such items shall be seized even if their existence was not anticipated at the time of the search.

(h) Any property seized as a result of a search shall be securely tagged or marked with the following information:

(1) Date and time of the search;

(2) identification of the person or property being searched;

(3) location of the seized article when discovered;

(4) name of person ordering the search; and

(5) signature(s) of the person(s) conducting the search.

(i) No person conducting a search shall tamper with any items seized in any way, but shall personally deliver such items to the senior member of the search team. In the event that size or other considerations preclude the movement of any seized items, one of the persons conducting the search shall personally stand guard over them until notification is made to the person authorizing the search and receipt of further instructions.

(j) No person acting to authorize a search under the provisions of this order shall personally conduct the search. Such persons should also avoid, where possible and practical, being present during its conduct.

(k) Any person authorizing a search based upon this instruction should be careful to avoid any action which would involve him in the evidence-gathering process of the search.

(l) The person conducting a search should, when possible, notify the person whose property is to be searched. Such notice may be made prior to or contemporaneously with the search. An inventory of the property seized shall be made at the time of a seizure or as soon as practicable. At an appropriate time, a copy of the inventory shall be given to a person from whose possesion or premises the property was taken.

(m) Nothing in this instruction shall be construed as limiting or affecting in any way the authority to conduct searches pursuant to a lawful search warrant issued by a court of competent jurisdiction, or pursuant to the freely given consent of one in the possession of property, or incident to the lawful apprehension of an individual. The Manual of the Judge Advocate General of the Navy contains suggested forms for recording information pertaining to the authorization for searches and the granting of consent to search. Use these forms whenever practicable.

(signed) COMMANDING OFFICER

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?

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)" *

* See appendix II-c on describing the area or person to be searched, and items to be seized.

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?

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."

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

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

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

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

RECORD OF AUTHORIZATION FOR SEARCH [see JAGMAN, § 0177a(3)]

1. At _____ (Time) on _____ (Date) I was approached by _____ in his capacity as _____ (Duty)[1] who, having been first duly sworn,[2] advised me that he suspected _____ (Name) of _____ (Offense) _____ and requested permission to search his/her _____ (Object or place)[3] for _____ (Items)[4]

2. The reasons stated to me for suspecting the above named person were:[5]

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

Appendix III(1)

RECORD OF AUTHORIZATION FOR SEARCH (Continued)

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

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

_____

Grade Signature Title

_____

Date and Time

INSTRUCTIONS

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

2. Other than his/her 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/her prior personal knowledge, consists of affidavits or other statements previously duly sworn to before another official empowered to administer oaths.)

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

4. A search may be authorized only for the seizure of certain classes of items: (1) Fruits of a crime (the results of a crime such as stolen objects); (2) Instrumentalities of a crime (example: search of an automobile for a crowbar used to force entrance into a building which was burglarized); (3) Contraband (items, the mere possession of which is against the law -- marijuana, etc.); (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, is being, or has been committed; and

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

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

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

If the information available does not satisfy the foregoing, additional investigation to produce the necessary information may be ordered.

REQUEST FOR AUTHORIZATION

TO CONDUCT SEARCH AND SEIZURE

WITH THE UNITED STATES ARMED FORCES

AT _____
(Location[1])

1. I, _____, _____,
(Name) (Organization or Address)

having first been duly sworn, state that[2] _____

_____

_____

_____

2. I further state that[3] _____

_____

_____

_____

_____

_____

_____

_____

3. In view of the foregoing, the undersigned requests that permission be granted for the search of[4] _____
(the person)

_____
(and) (the quarters or billets) (and)

_____, and seizure of _____
(the automobile) ( )

_____
(items searched for)

Appendix IV(1)

_____

_____

_____
(Signature)

_____
(Typed name and organization)

J U R A T

I, _____, do hereby certify that the foregoing request for authorization to conduct search and seizure was subscribed and sworn to before me this _____ day of _____, 19 ____, by

_____, who is known to me to be
(Name of person making statement)

_____[5]_____. And I do further certify that I am on this
(Status)

date empowered to administer oaths by authority of _____[6]_____.
(Authority)

_____
(Signature)

_____
(Typed name, grade, and Branch of Service)

_____
(Command or Organization)

INSTRUCTIONS

1. Insert Country, State, and County in which request is acknowledged. If military considerations preclude disclosure of exact place of execution, insert "In a Foreign Country" or "In a possession of the U.S. outside of the continental U.S."

2. In paragraph 1, set forth a concise factual statement of the offense that has been committed or the probable cause to believe that it has been committed. Use additional pages if necessary.

3. In paragraph 2, set forth facts establishing probable cause for believing that the person, premises, or place to be searched and the property to be seized are connected with the offense mentioned in paragraph 1, plus facts establishing probable cause to believe that the property to be seized is presently located on the person, premises, or place to be searched. The facts stated in paragraphs 1 and 2 must be based on either the personal knowledge of the person signing the request or on hearsay information which he has plus the underlying circumstances from which he has concluded that the hearsay information is trustworthy. If the information is based on personal knowledge, the request should so indicate. If the information is based on hearsay information, paragraph 2 must set forth some of the underlying circumstances from which the person signing the request has concluded that the informant, whose identity need not be disclosed, or his information was trustworthy. Use additional pages if necessary.

4. In paragraph 3, the person, premises, or place to be searched and the property to be seized should be described with particularity and in detail. The types of items which may be seized are set forth in Mil.R.Evid. 316(d), MCM, 1984.

5. "U.S. Armed Forces member on active duty," or "the spouse of a U.S. Armed Force member," or "a person serving with the Armed Forces," or other appropriate description of status.

6. "Manual of the Judge Advocate General of the Navy, section 2502a.(4)(b)," or "Art. 136, UCMJ," or other appropriate authority.

CONSENT TO SEARCH [see JAGMAN, § 0177a(3)]

I, _____, have been advised that inquiry is being made in connection with _____

_____.

I have been advised of my right to not 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)

to conduct a complete 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

_____
Signature

WITNESSES

_____

_____

Appendix V

URINALYSIS CONSENT FORM

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

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

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

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

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

_____
Signature

_____
Date

_____
Witness' Signature

_____
Date

Appendix VI

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 three 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); and

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

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

B. Methods of discovery

1. Right to interview witnesses. Article 46, UCMJ, provides that the "trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence. . . ." R.C.M. 701(e), MCM, 1984 [hereinafter cited as 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. The accused cannot be prohibited from talking to witnesses in his case.

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 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.

The accused and the counsel are entitled to be present at all sessions of the pretrial investigation and to be confronted by all witnesses who testify. 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, provides for discovery in six areas:

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

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

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

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

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

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

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

(7) the accused's service record.

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

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

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

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

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

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

4. Depositions. Article 49, UCMJ; R.C.M. 702.

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

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

5. Prior statements

The Jencks Act, 18 U.S.C. § 3500 (1982), requires the government to produce 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. R.C.M. 914 allows both the government and defense to request to examine any statement of a witness, except the accused, that relates to their testimony. Of practical importance is the fact that a possible sanction for failure to comply with the Jencks Act, Mil.R.Evid. 612, or R.C.M. 914 is for the military judge to strike the witnesses' testimony. Legal officers should take care to ensure that all notes of interviews with witnesses, handwritten statements, or drafts of statements are kept and turned over to the trial counsel prior to court-martial. Failure to preserve such items, as discussed, could result in lost cases at courts-martial.

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 evidentary objects. In the military, there is no distinction; the subpoena contained in Appendix 7 of the MCM, a copy of which appears on page 5-8, 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. 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). The following table illustrates when the subpoena power and depositions may be utilized.

LEGAL REFERENCES FOR COMPULSORY PROCESS

TYPE	SUBPOENA	DEPOSITION
NJP	No provision	Art. 49*, UCMJ
PTI	No provision (except for military witnesses), although payment is permitted to civilians requested to testify. See R.C.M. 702.	Art. 49*, UCMJ
SCM	Art. 46, UCMJ R.C.M. 703	Art. 49, UCMJ R.C.M. 702
SPCM	Art. 46, UCMJ R.C.M. 703	Art. 49, UCMJ R.C.M. 702
GCM	Art. 46, UCMJ R.C.M. 703	Art. 49, UCMJ R.C.M. 702
Court of Inquiry	Art. 135(f), UCMJ JAGMAN, § 0417	Art. 49*, UCMJ JAGMAN, § 0421b
Other Factfinding Bodies	No provision See JAGMAN, § 0509	Art. 49*, UCMJ JAGMAN, §§ 0506, 0605

* Deposition may be used before these bodies and may be taken if charges have been signed. See Article 49(a), UCMJ; R.C.M. 702.

SUBPOENA

The President of the United States, to Mr. James E. Pinelli
(Name and Title of Person being Subpoenaed)

You are hereby summoned and required to appear on the 1st day of October, 19 84, at 0 o'clock A M, at Bldg 13, Rm 4, U.S. Naval Station, Oakton, FL (Place of Proceeding), XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX (Name and Title of Deposition Officer), XXXXXXXXXXXXXXXXXXXX general court-martial of the United StatesXXXXXXXXXXXXX appointed by General Court-Martial Convening Order No. 10 (Identification of Convening Order or Convening Authority), dated 1 September 19 84, to testify as a witness in the matter of United States v. Roberts (Name of Case)

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX)
(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 (XXXXXXXXXXXXXXXXXXXXXXXXX) 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 Naval Station, Oakton, FL this 1st day of September 19 84

Roberta Mueller, LT, JAGC, USN
(Signature. See R.C.M. 703(e)(2)(C))

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

I hereby accept service of the above subpoena.

____
Signature of Witness

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

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

____________________ Grade

____________________ Signature

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

____________________ Grade

____________________ Official Status

____________________ Signature

DD FORM 453, 1 AUG 84 — EDITION OF OCT 80 IS OBSOLETE.

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. Trial counsel may not take action on his own with respect to prosecution witnesses on the merits (the issue of guilt or innocence) unless satisfied that the prosecution witness concerned is both relevant and necessary. Also, with respect to prosecution witnesses on the issue of presentencing, the trial counsel will not take such action unless further satisfied that the production of the witness is appropriate under R.C.M. 1001(e).

b. Defense witnesses. Trial counsel has the authority to deny a request for a defense witness. If the trial counsel denies the defense witness request before trial, the defense can renew the matter at trial with 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 and 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 already provided; 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) A synopsis of the expected testimony of the witness; and

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

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

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

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

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

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

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

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

c. Action taken to produce required witness

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

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

In the event that a military witness is located at a place other than the location of the trial, and travel at government expense is required, "the appropriate superior will be requested to issue the necessary orders." Practically speaking, the convening authority will contact the command to which the witness is attached and will furnish the accounting data for the witness. "The cost of travel and per diem of military personnel and civilian employees of the Department of the Navy . . . will be charged to the operation and maintenance allotment which supports temporary additional duty travel for the convening authority of the court-martial." JAGMAN, § 0136(a)(1).

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

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

For both Navy and Marine Corps convening authorities, costs for military or civilian witnesses are charged to the operating budget which supports the temporary additional duty travel for the convening authority. JAGMAN, § 0136(a)(2).

BASIC MILITARY JUSTICE HANDBOOK

SECTION TWO -- PROCEDURE

CHAPTER VI

MILITARY JUSTICE INVESTIGATIONS

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

PRELIMINARY INVESTIGATION OF SUSPECTED OFFENSES

A. Initiation of charges

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

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

Note: It is important to differentiate between initiating a complaint and preferring charges. The latter is accomplished by signing and swearing to charges on page 2 of the charge sheet by a person subject to the UCMJ.

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

a. The complaint of a victim or his parents or friends or a spectator;

b. receipt of a Shore Patrol report;

c. receipt of an investigative report from NIS;

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

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

f. receipt of a locally prepared report chit.

4. Duty to report offenses. Article 1139, U.S. Navy Regulations, 1973, requires personnel of the naval service to report to proper authority offenses committed by persons in the naval service which come under their observation.

5. To whom made

a. 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.

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

B. Action upon receipt of complaint

1. 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.

2. 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.

a. Investigation by the Naval Investigative Service. SECNAVINST 5520.3 of 16 July 1975.

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

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

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

(b) actual, potential, or suspected sabotage, espionage, subversive activities, or defection;

(c) loss, compromise, leakage, unauthorized disclosure, or unauthorized attempts to obtain classified information;

(d) incidents involving ordnance;

(e) incidents of perverted sexual behavior;

(f) damage to government property which appears to be the result of arson or other deliberate attempt;

(g) incidents involving narcotics, dangerous drugs, or controlled substances;

(h) thefts of personal property when ordnance, contraband, or controlled substances are involved, 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;

(i) 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

(j) fire or explosion of questionable origin affecting property under Navy or Marine Corps control.

Note: Most, if not all, of the incidents listed in (b) through (j) would constitute major criminal offenses as defined in subparagraph (a) above, but these incidents are separately enumerated in SECNAVINST 5520.3 as matters which must be referred to NIS.

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

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

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

(a) 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).

(b) If the U.S. Attorney declines prosecution, NIS may resume investigation, and the command may prosecute.

(c) 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.

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

b. Factfinding bodies

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

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

(a) The primary purpose of a factfinding body is to provide convening and reviewing authorities with adequate information on which to base decisions in the matters involved. JAGMAN, § 0201b. Under appropriate circumstances they may constitute the ideal method of investigating an alleged or suspected offense. A factfinding body will not be utilized in lieu of a preliminary inquiry if the only basis for a factfinding body is to determine disciplinary action. JAGMAN, § 0203b.

(b) JAG Manual investigations are covered extensively in the Civil Law portion of the course.

C. The preliminary inquiry

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

a. Upon receipt of a report of an offense, the discipline/legal officer should draft charge(s) and specification(s) against the accused (in court-martial specification language whenever possible) using information set forth on the locally prepared report chit (or Shore Patrol report or base police report), and Part IV, MCM, 1984 for guidance. These charges should then be set forth on the NAVPERS 1626/7 for the Navy or the UPB for the Marine Corps. See pages 6-9 through 6-11 for sample forms.

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

c. 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 4, MCO P5800.8B (LEGADMINMAN). Alternatively, a locally prepared preliminary inquiry report form may be used and later appended to the UPB.

d. 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 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.

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

f. The accused is called in for a personal interview with the discipline/legal officer for the 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.

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

(2) 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, 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.

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

2. 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 preliminary to 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 preliminary inquiry officer, 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.

a. 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 preliminary inquiry officer merely to prepare a case against the accused. R.C.M. 303, Discussion.

b. After being given all of the information in the hands of the discipline officer, the preliminary inquiry officer should obtain the following:

(1) 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.);

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

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

(4) 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 preliminary inquiry officer is the division officer, he should so indicate.

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

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

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

d. 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 preliminary inquiry officer. He should attach to the NAVPERS 1626/7 the statements and documents collected during his investigation.

(1) The preliminary inquiry officer should prepare, sign, and swear to 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 referred to as "preferring charges" and is accomplished by filling out a charge sheet.

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

e. 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.

f. As a further aid in the proper completion of preliminary disciplinary matters, see the sample instruction included at page 6-13 of this chapter. This instruction describes the functions and duties of a preliminary inquiry officer. While such an instruction on procedure may be too formal for a small command, it clearly sets forth the minimum prerequisites of premast or court-martial inquiry in compliance with R.C.M. 303.

D. Final premast screening

1. After the preliminary inquiry officer 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.

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

3. 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.

4. 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.

5. 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.

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

REPORT AND DISPOSITION OF OFFENSE(S)
NAVPERS 1626/7 (REV. 8-71) S/N 0106-LF-010-2054

To: Commanding Officer, _____ Date of Report: _____

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

PLACE OF OFFENSE(S)	DATE OF OFFENSE(S)

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.):*

NAME OF WITNESS	RATE/GRADE	DIV/DEPT	NAME OF WITNESS	RATE/GRADE	DIV/DEPT

(Rate/Grade/Title of person submitting report) *(Signature of person submitting report)*

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

Witness: _____ *(Signature)* Acknowledged: _____ *(Signature of Accused)*

PRE-TRIAL RESTRAINT

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

☐ NO RESTRICTIONS

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

INFORMATION CONCERNING ACCUSED

CURRENT ENL. DATE	EXPIRATION CURRENT ENL. DATE	TOTAL ACTIVE NAVAL SERVICE	TOTAL SERVICE ON BOARD	EDUCATION	GCT	AGE

MARITAL STATUS	NO. DEPENDENTS	CONTRIBUTION TO FAMILY OR DEPN ALLOWANCE (Amount required by law)	PAY PER MONTH (Including sea or foreign duty pay, if any)

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

PRELIMINARY INQUIRY REPORT

From: Commanding Officer Date: _____

To: _____

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.)*

NAME OF WITNESS	RATE/GRADE	DIV/DEPT	NAME OF WITNESS	RATE/GRADE	DIV/DEPT

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 service record entries in UA cases, items of real evidence, etc.)*

_____
(Signature of Investigation Officer)

ACTION OF EXECUTIVE OFFICER

☐ DISMISSED ☐ REFERRED TO CAPTAIN'S MAST

SIGNATURE OF EXECUTIVE OFFICER

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 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)

☐ 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

☐ DETENTION: TO HAVE $_____ PAY PER MO. FOR (1, 2, 3) MO(S) DETAINED FOR _____ MO(S)

☐ AWARDED SPCM ☐ AWARDED SCM

DATE OF MAST:	DATE ACCUSED INFORMED OF ABOVE ACTION:	SIGNATURE OF COMMANDING OFFICER

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 15 days.

SIGNATURE OF ACCUSED DATE

I have explained the above rights of appeal to the accused.

SIGNATURE OF WITNESS _____ 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: _____ *(Initials)*

FILED IN UNIT PUNISHMENT BOOK:

DATE: _____ *(Initials)*

☆U.S. Government Printing Office: 1982—505-106/8486 2-1

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

4. UNIT

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

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)_____ (Signature of accused)_____

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)_____ (Signature of immediate CO of accused)_____

8. FINAL DISPOSITION TAKEN AND DATE

9. SUSPENSION OF EXECUTION OF PUNISHMENT, IF ANY.

10. FINAL DISPOSITION TAKEN BY (Name, grade, title)

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 final disposition in 8 and 9) _____

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

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

(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.

(Date) (Signature of accused)

15. DATE OF APPEAL, IF ANY.

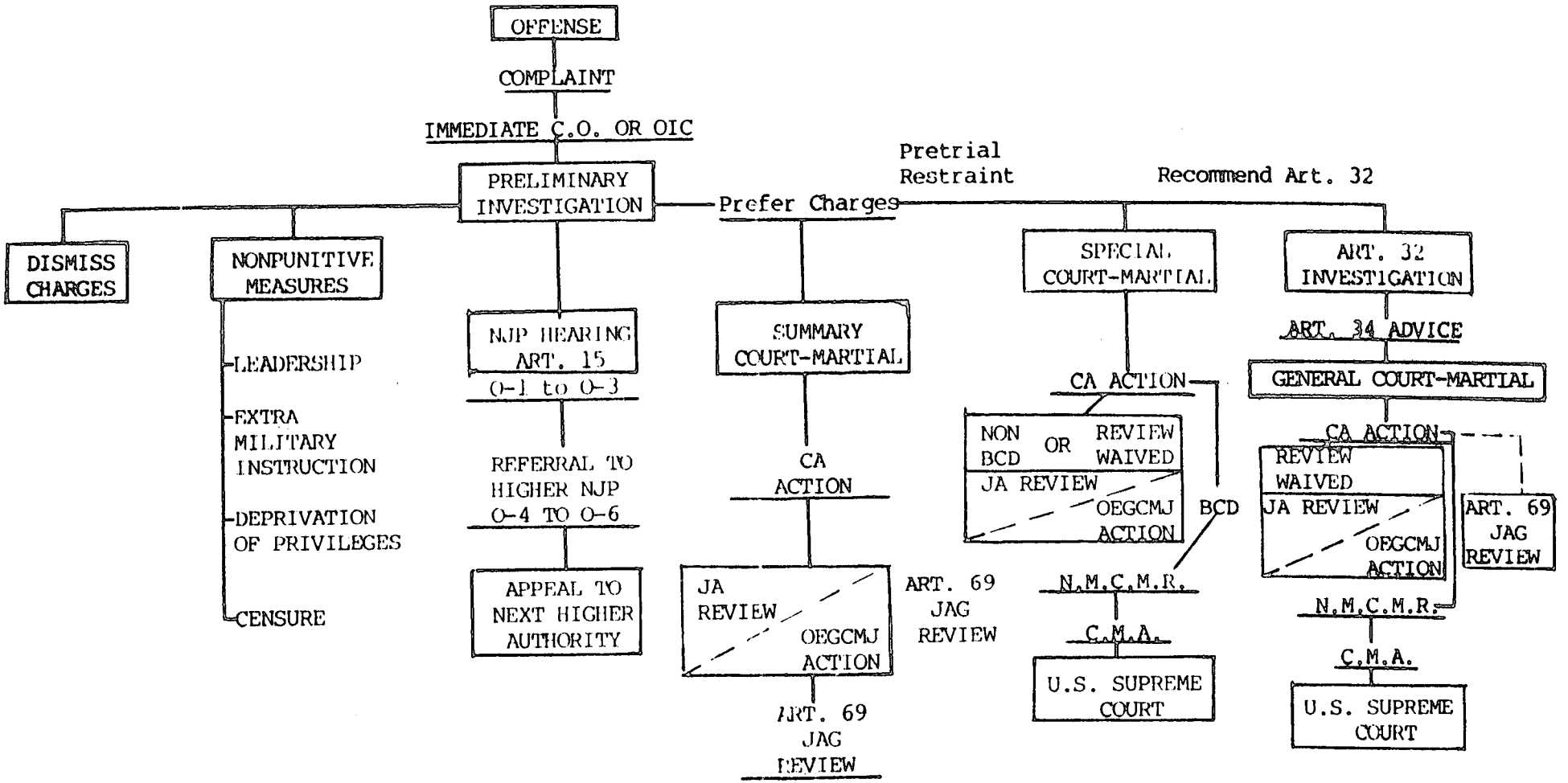
16. DECISION ON APPEAL (IF APPEAL IS MADE), DATE THEREOF, AND SIGNATURE OF CO WHO MADE DECISION.

(Date) (Signature of CO making decision on appeal)

17. DATE OF NOTICE TO ACCUSED OF DECISION ON APPEAL.

18. REMARKS

19. Final administrative action, as appropriate, has been completed.



OVERVIEW OF MILITARY JUSTICE

DEPARTMENT OF THE NAVY
NAVAL JUSTICE SCHOOL
NEWPORT, RHODE ISLAND 02841

NAVJUSTSCOLINST 5811.1B
AD:SAR:llo
12 June 1984

NAVJUSTSCOL INSTRUCTION 5811.1B

Subj: Duties of preliminary inquiry officers

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

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

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

2. Cancellation. NAVJUSTSCOL Instruction 5811.1A is hereby cancelled.

3. Information.

a. Reference (a) requires the commanding officer, upon receipt of charges or information indicating that a member of his command has committed an offense punishable under reference (b), to cause to be made a preliminary inquiry into the case sufficient to enable him to make 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. His options include dismissal of the charges(s), imposition of nonpunitive measures, a nonjudicial punishment hearing, referral to trial by court-martial, and referral to a formal pretrial investigation. If the commanding officer determines a nonjudicial punishment hearing is appropriate, the preliminary inquiry report will assist him 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, and a pretrial investigating officer in preparing to discharge their duties.

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. He 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.

DENNIS F. McCOY

Distribution:
NAVJUSTSCOLINST 5216.3
List 2

INSTRUCTIONS FOR
PRELIMINARY INQUIRY OFFICERS

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

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

b. a 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 his rights, a signed sworn statement by the accused; or a summary of interrogation of the accused, signed and sworn to by the accused; or both; and

g. any additional comments by the investigator as desired.

2. Objectives.

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

b. The secondary objective of the PIO is to collect information about the accused which will aid the commanding officer in making a proper disposition of the case and, in the event nonjudicial punishment is to be imposed, what the appropriate punishment, if any, should be. Items of interest to the commanding officer include: the accused's currently assigned duties; evaluation of his performance; his 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 he has 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 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 the relevant information from him. One method is to start with a general survey question, asking him to relate everything he knows about the subject of inquiry, and then following up with specific questions. After conversing with the witness, the PIO should assist him 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 witnesses; 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 his 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, etc., 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 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 must familiarize himself completely with the Military Rules of Evidence concerning rules on 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 should be taken of it. 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 rights during interrogation.

a. Before questioning the accused, the PIO should also have the accused sign the acknowledgement line of 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 the 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 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 preliminary inquiry officer.

7. Interrogate the accused.

a. The accused may be questioned only if he has knowingly and intelligently waived all of his constitutional and statutory rights. Such waiver, if made, should be recorded on NJS Form 5811/3 (Suspect's Statement). If the accused asks whether he should waive his rights, the PIO must decline to answer or give any advice on that question. He must leave the decision to the accused. Other than advising the accused of his rights as stated in paragraph 6b above, the PIO should never give any other form of legal advise to the accused. If he desires a lawyer, the Naval Legal Service Office military lawyers are available to give legal advice.

b. If the accused has waived all his rights, the PIO may then question him. It is suggested that the PIO begin in a low-key manner so as not to disquiet the accused. If the accused is inclined to lie or distort, permit him to do so at this point. Once he has spoken his piece, the PIO may probe with pointed questions and confront the accused with inconsistencies in his 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 against him, a confession or admission which was obtained through the use of coercion, unlawful influence, or unlawful inducement is not voluntary.

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, make sure the accused has acknowledged and waived all of his rights. While the PIO may help the accused to draft the statement, he must be meticulous in refraining from putting words in the accused's mouth or from tricking the accused into saying something which he does not intend to say. If the draft is typed, the accused should read it over carefully and be permitted to make any changes he wishes. 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 statement to writing, the PIO must attach a certified summary of the interrogation to his report. Where the accused has reduced less than all of his 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.

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 his rights. Yes_____ No_____
11. Accused made statement (only when #10 is Yes), and

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

b. /___/ Summary of interrogation attached.

Encl (2)

WITNESS' STATEMENT
NJS Form 5811/2

Name _____ Rank/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) is true to my knowledge or belief.

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

Sworn to before me this date.

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

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

_____
(Date)

FULL NAME (ACCUSED/SUSPECT) SOCIAL SECURITY NUMBER RATE/RANK

INTERVIEWER SOCIAL SECURITY NUMBER RATE/RANK

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 military lawyer 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 military lawyer 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_____

(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----------Initial_____

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

Encl (4)

(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_____

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)

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 1133.1 of 27 July 1979, Subj: Authority of Officers and Petty Officers; par. 1300.1b, Marine Corps Manual.

The term "nonpunitive measure" is used to refer to various leadership techniques which can be used to develop acceptable behavorial standards in members of a command. Nonpunitive measures generally fall into three areas: nonpunitive censure, extra military instruction, and administrative withholding of privileges. Commanding officers and officers-in-charge are authorized and expected to use nonpunitive measures to further the efficiency of their command. See R.C.M. 306(c)(2), MCM, 1984; JAGMAN, § 0111.

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, § 0111a. This chapter discusses the various types of nonpunitive measures and provides guidelines for their correct application.

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

A sample nonpunitive letter of caution is set forth in Appendix A-1-a of the JAG Manual. It should be noted that such letters are private in nature and copies may not be forwarded to the Commander, Naval Military Personnel Command (CNMPC) or to Headquarters Marine Corps (HQMC). JAGMAN, § 0101c(3). Additionally, such letters may not be quoted in or appended to fitness reports or evaluations, included as enclosures to JAG Manual or other investigative reports, or otherwise included in the official departmental records of the recipient. However, the deficient performance of duty or other facts which led to a letter of caution being issued can be mentioned in the recipient's next fitness report or enlisted evaluation. In this regard, the requirements of the JAG Manual are met by avoiding any reference to the fact that a nonpunitive letter of caution was issued.

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

C. Extra military instruction. The term "extra military instruction" (EMI) is used to describe the practice of assigning extra tasks to a servicemember who is exhibiting 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 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 extra military instruction is punishment. The resolution of this problem requires some thought, but the analysis involved is not complex and should be used to avoid legal complications.

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

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

For example, what extra task could be assigned to correct one who inadvertently leaves windows unsecured? Perhaps an assignment to close all the windows in the command area each night for two weeks--or is that task indicative of a punishment motive? How about close order drill? Close order drill logically has nothing to do with windows. On the other hand, if a failure to close windows is the result of lack of knowledge of one's duty (ignorance being the deficiency), it would not be illogical to

require the subordinate to study the pertinent security orders for an hour or two each night until he learns his responsibility. Perhaps the delivery of a short lecture by the individual would demonstrate his new knowledge of this responsibility.

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

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

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

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

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

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

4. Judicious quantity. Assuming all other factors indicate a valid training purpose, EMI may still be construed by the courts as punishment if the quantity of instruction is excessive. JAGMAN 0111b indicates that no more than two hours of instruction should be required each day; instruction should not be required on the individual's Sabbath; the duration of EMI should be limited to a period of time required to correct the deficiency; and after completing each day's instruction the subordinate should be allowed normal limits of liberty. In this connection, EMI, since it is training, can lawfully interfere with normal hours of liberty. One should not confuse this type of training with a denial of privileges (discussed later), which cannot interfere with normal hours of liberty. The commander must also be careful not to assign instruction at unreasonable hours. What "reasonable hours" are will differ with the normal work schedule of the individual involved, but no great interference with normal hours of liberty should be involved.

5. Authority to impose. The authority to assign EMI to be performed during working hours is not limited to any particular rank or rate but is inherent in authority vested in officers and noncommissioned petty officers. The authority to assign EMI to be performed after working hours rests in the commanding officer or officer-in-charge, but may be delegated to officers, petty officers, and noncommissioned officers. See par. 4(3) of OPNAVINST 1133.1 of 27 July 1979, Subj: Authority of Officers and Petty Officers; par. 1300.1b, Marine Corps Manual.

For the Navy, OPNAVINST 1133.1 discusses EMI in detail and clearly states that the delegation of authority to assign EMI outside normal working hours is to be encouraged. Ordinarily such authority should not be delegated below the chief petty officer (E-7) level. However, in exceptional cases, as where a qualified petty officer is filling a CPO billet in a unit which contains no CPO, authority may be delegated to a mature senior petty officer. There is no Marine Corps order which is equivalent to the Navy's OPNAVINST 1133.1.

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

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

D. Denial of privileges. A third nonpunitive measure that may be employed to correct minor deficiencies is denial of privileges. A "privilege" is defined as a benefit provided for the convenience or enjoyment of an individual. JAGMAN, § 0111c. Denial of privileges is a more severe leadership measure than either censure or EMI because denial of privileges does not necessarily involve or require an instructional purpose. Examples of privileges that may be withheld can be found in JAGMAN, § 0111c. They include such things as special liberty, 72-hour liberty, exchange of duty, special command programs, hobby shops, parking privileges, and access to base or ship movies, enlisted or officers' clubs. It may also encompass such things as withholding of special pay, and commissary and exchange privileges, provided such withholding complies with applicable rules and regulations, and is otherwise in accordance with law. See, e.g., DOD Directive 5524.4 of 2 November 1981, as it applies to enforcement of traffic laws on DOD installations.

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

Normal liberty is not technically a "right," but custom and regulation have made liberty a quasi-right. Thus, while one can be denied privileges, such a denial cannot extend to a deprivation of normal liberty. JAGMAN, § 0111c. So, too, is it unlawful to deny liberty in order to prevent a subordinate from committing an offense the commander thinks he might commit if allowed to go on liberty. In each case, the denial of privilege relates to liberty, and liberty cannot be interfered with except as authorized by law. Always distinguish denial of privileges related to liberty (which cannot be lawfully done) from extra military instruction (training) which can lawfully interfere with normal liberty to a reasonable degree. Also note that the extension of working hours is recognized in JAGMAN, § 0111c and, if done properly, is not an unlawful denial of liberty.

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

Chapter VIII

NONJUDICIAL PUNISHMENT

INTRODUCTION. The terms "nonjudicial punishment" and "NJP" are used interchangeably to refer to certain limited punishments which can be awarded for minor disciplinary offenses by a commanding officer or officer in charge to members of his command. In the Navy and Coast Guard, nonjudicial punishment proceedings are referred to as "captain's mast" or simply "mast." In the Marine Corps, the process is called "office hours," and in the Army and Air Force, it is referred to as "Article 15." Article 15 of the Uniform Code of Military Justice (UCMJ), Part V of the Manual for Courts-Martial, 1984 (MCM), and Part A of Chapter I of The Manual of the Judge Advocate General 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.

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

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

1. Request mast (Articles 1107 and 0727c, U.S. Navy Regulations, 1973) is a hearing before the CO, at the request of service personnel, for the purpose of making requests, reports, and statements, and airing grievances.

2. Meritorious mast (Article 0727d, U.S. Navy Regulations, 1973) is held for the purpose of publicly and officially commending a member of the command for noteworthy performance of duty.

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

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

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

2. afford the accused a hearing as to such offenses;

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

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

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

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

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

NATURE AND REQUISITES OF NONJUDICIAL PUNISHMENT

A. The power to impose nonjudicial punishment

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

a. A commanding officer

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

(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 0855-0866, U.S. Navy Regulations, 1973, 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, § 0101b; see also Art. 0901, U.S. Navy Regulations, 1973.

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. Art. 15(a), UCMJ; JAGMAN, § 0101c.

(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. A copy of such designation must be furnished to the Commander, Naval Military Personnel Command or the Commandant of the Marine Corps, as appropriate, and to the Judge Advocate General. JAGMAN, § 0101d.

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, § 0101e.

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, 1984.

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 nonjudicial punishment may be imposed

1. 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, § 0102a(1).

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, § 0102a(2).

c. Personnel of another armed force

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

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

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

4. Imposition of NJP on embarked personnel

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, § 0103a. 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 nonjudicial punishment authority.

The authority of the commanding officer of a vessel to impose NJP on persons embarked on board is further set forth in Articles 0609-0611, U.S. Navy Regulations, 1973.

b. Similar policy provisions apply to the withholding of the exercise of the authority to convene SPCMs or SCMs by the commanding officer of the embarked unit. JAGMAN, § 0116b.

5. 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 section 0102c of the JAG Manual, Article 3420320, MILPERSMAN, and MCO P1001R.E (Marine Corps Reserve Administration Manual) discuss the nonjudicial punishment of reservists. However, the case of United States v. Caputo, 18 M.J. 259 (C.M.A. 1984) raises some uncertainty as to the validity of section 0102d of the JAG Manual. In Caputo, the majority of the court held that the language of paragraph 11a, MCM, 1969 (Rev.) prohibited court-martial of a reservist for

an offense committed during a period of active duty for training (ACDUTRA) from which he had been released. It is possible that this rationale may, by analogy, prohibit the nonjudicial punishment of a reservist after his release from either active duty for training or inactive duty for drill training, even if that nonjudicial punishment was imposed during a subsequent inactive duty drill period. It remains to be seen whether, as suggested by Senior Judge Cook, the omission of the language of paragraph 11a from MCM, 1984, has now removed this jurisdictional bar in cases arising after 1 August 1984. Until the jurisdictional uncertainty is resolved by either further judicial interpretation or Congressional action amending Article 2, UCMJ, the following courses of action should be considered by commanding officers/officers in charge imposing nonjudicial punishment upon reservists:

(1) Hearing procedures accomplished. If the reservist did not waive his right to a hearing, and all aspects of the procedures specified by Article 15, UCMJ, and paragraph 4 of Part V, MCM 1984, which requires the presence of the accused, are conducted prior to termination of the inactive duty drill/training period or active duty training period during which the act of misconduct occurs, the imposition of punishment may occur at a subsequent inactive duty drill/training period or active duty for training period at which the reservist is present.

(2) Hearing procedures waived. If the reservist, after being advised of the rights and procedures specified by Article 15, UCMJ, and paragraph 4 of Part V, MCM 1984, waives his/her right to a hearing before the commanding officer/officer in charge prior to termination of the inactive duty drill/training period or active duty training period during which the misconduct occurred, the commander may impose nonjudicial punishment after the termination of the inactive duty drill/training period or active duty for training period. The commander need not delay the imposition of punishment until a subsequent inactive duty or active duty training period at which the accused is present.

(3) Hearing not accomplished or waived. If the commanding officer/officer in charge was not able to accomplish the hearing and/or the reservist did not waive his/her right to a hearing as discussed above, and the commander is considering nonjudicial punishment of the reservist during a later inactive duty drill/training period or active duty for training period, the commander must serve notice to the reservist of his intention to dispose of the matter at a hearing pursuant to Article 15, UCMJ. This notice should be accomplished at a minimum by completing the Accused's Notification and Election of Rights Form (JAG Manual Appendix A-1-r, A-1-s, or A-1-t as appropriate.)

c. Until the uncertainty surrounding the imposition of nonjudicial punishment upon reservists in resolved, commanders and officers in charge should seek guidance in this area from their respective staff judge advocates.

d. As a matter of policy, corporeal restraint pending NJP, or imposed at NJP, will not extend beyond the normal time of termination of a drill or training period. Article 3420320.6a, MILPERSMAN; MCO P1001R.1E.

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

a. Article 15a, UCMJ, and Part V, par. 3, MCM, 1984, provide another limitation on the exercise of NJP. Except in the case of a person attached to or embarked in a vessel, an accused may demand trial by court-martial in lieu of NJP. 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. See also Off The Record, No. 85, enclosure (10).

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 or UPB Form NAVMC 10132) 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 on 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.

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

a. Maximum penalty. Begin the analysis with a consultation of punitive articles (Part IV, MCM, 1984) and determine the maximum possible punishment for the offense. Although the MCM does not so state, it appears that if the authorized confinement is thirty days to three months, the offense is most likely a minor offense; if the authorized confinement authorized is six months to a year, the offense may be minor; and if authorized confinement is one year or more, the offense is usually not minor.

b. Nature of offense. The Manual for Courts-Martial, 1984, also indicates in Part V, par. 1e that, in determining whether an offense is minor, the "nature of the offense" should be considered. This is a significant statement and often is misunderstood as referring to the seriousness or gravity of the offense. Gravity refers to the maximum possible punishment, however, and is the subject of separate discussion in that paragraph. In context, nature of the offense refers to its character, not its gravity. In military criminal law there are two basic types of misconduct, disciplinary infractions and crimes. Disciplinary infractions are breaches of standards governing the routine functioning of society. Thus, traffic laws, license requirements, disobedience of military orders, disrespect to military superiors, etc., are disciplinary infractions. Crimes, on the other hand, involve offenses commonly and historically recognized as being particularly evil such as robbery, rape, murder, aggravated assault, larceny, etc. Both types of offenses involve a lack of self-discipline, but crimes involve a particularly gross absence of self-discipline amounting to a moral deficiency. They are the product of a mind particularly disrespectful of good moral standards. In most cases, criminal acts are not minor offenses, and usually the maximum imposable punishment is great. Disciplinary offenses, however, are serious or minor depending upon circumstances, and thus, while some disciplinary offenses carry severe maximum penalties, the law recognizes that the impact of some of these offenses on discipline will be slight. Hence, the term "disciplinary punishment" used in the Manual for Courts-Martial, 1984, is carefully chosen.

c. Circumstances. The circumstances surrounding the commission of a disciplinary infraction are important to the determination of whether such an infraction is minor. For example, willful disobedience of an order to take ammunition to a unit engaged in combat can have fatal consequences for those engaged in the fight and hence is a serious matter. Willful disobedience of an order to report to the barbershop may have much less of an impact on discipline. The offense must provide for both extremes, and it does because of a high maximum punishment limit. When dealing with disciplinary infractions the commander must be free to consider the impact of circumstance since he is considered the best judge of it; whereas in disposing of crimes, society at large has an interest coextensive with that of the commander, and criminal defendants are given more extensive safeguards. Hence, the commander's discretion in disposing of disciplinary infractions is much greater than his latitude in dealing with crimes. Where the commander determines the offense to be minor, a statement is recommended on the NAVPERS 1626/7 (Navy) and is required on the UPB NAVMC 10132 (Marine Corps), indicating that the commander, after considering all facts and circumstances, has determined that the offense is minor.

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, par. 1e, MCM, 1984 and page 8-30, infra.

3. The statute of limitations is applicable to NJP

Article 43(c), UCMJ, prohibits the imposition of NJP more than two years after the commission of the offense. This is true notwithstanding the receipt of sworn charges by the officer exercising summary court-martial jurisdiction, which normally tolls the running of the statute of limitations for purposes of trial by court-martial.

4. Cases previously tried in civil courts

a. Sections 0103b and 0116d of the JAG Manual permit the use of nonjudicial punishment to punish an accused for an offense for which he has been tried (whether acquitted or convicted) 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 nonjudicial punishment).

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, §§ 0103b, 0116d(4).

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 nonjudicial punishment. JAGMAN, §§ 0103b and 0116d(4). However, the last point at which cases may be withdrawn from court-martial before findings with a view toward nonjudicial punishment is presently unclear. See e.g., Dobzynski v. Green, 16 M.J. 84 (C.M.A. 1983). Jones v. Commander, Naval Air Force, U.S. Atlantic Fleet, 18 M.J. 198 (C.M.A. 1984).

5. Offenses not service connected

a. In O'Callahan v.Parker, 395 U.S. 258 (1969), the U.S. Supreme Court held that court-martial jurisdiction over military personnel cannot constitutionally be extended to offenses which are not in some sense service connected. The service connection limitation on the exercise of court-martial jurisdiction has no application to the imposition of punishment under article 15, except in Hawaii. JAGMAN, § 0102b.

b. OPNAVINST 11200.5B and MCO 5110.1B 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 or the UPB Form NAVMC 10132 is filled out. (This inquiry is discussed in Chapter VI, supra.) The Navy NAVPERS 1626/7 functions as an investigation report as well as a record of the processing of the nonjudicial punishment case. The Marine Corps NAVMC 10132 is a document used to record nonjudicial punishment only (MCO P5800B provides details for the completion of the UPB form). The appropriate report and allied papers are then forwarded to the commander. The ensuing discussion will detail the legal requirements and guidance for conducting a nonjudicial punishment hearing.

2. Prehearing advice. If, after the preliminary inquiry, the commanding officer determines that disposition by nonjudicial punishment is appropriate, the commanding officer must cause the accused to be given the following advice. Part V, par. 4, MCM, 1984. The commanding officer need not give the advice personally but may assign this responsibility to the legal officer or another appropriate person. The advice must be given, however.

a. Contemplated action. The accused must be informed that the commanding officer is considering the imposition of nonjudicial punishment for the offense.

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 nonjudicial punishment; of the maximum punishment which could be imposed at nonjudicial punishment; 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. 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 nonjudicial punishment 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. The accused's Notification and Election fo Rights Form (see JAGMAN appendices A-1-r, A-1-s, or A-1-t, 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 0104 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.

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 nonjudicial punishment hearing. At such hearing the accused is entitled to:

(1) Be informed of his rights under Article 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 nonjudicial punishment to impose;

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

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

(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-r, A-1-s, and A-1-t of the JAG Manual, are designed to comply with the above requirements. Appendix A-1-r is to be used when the accused is attached to or embarked in a vessel. Appendix A-1-s 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 nonjudicial punishment will not be admissible for any purpose at any subsequent court-martial.) Appendix A-1-t is to be used when an accused is not attached to or embarked in a vessel, and the command does afford the accused the right to consult with a lawyer to decide whether to accept or reject NJP. Use and retention of the proper form are essential. Copies of these forms are provided at appendices 8-3,8-4, and 8-5.

4. Hearing requirement. Except as noted below, every nonjudicial punishment 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, par. 4c(2), MCM, 1984, provides that if the accused waives his right to personally appear before the commanding officer, he may choose to submit written matters for consideration by the commanding officer prior to the imposition of nonjudicial punishment. 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 nonjudicial punishment hearing, he may be ordered to attend the hearing if the officer imposing nonjudicial punishment 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 officer. Normally, the officer who actually holds the nonjudicial punishment hearing is the commanding officer of the accused. Part V, par. 4c, MCM, 1984, allows the commanding officer or officer in charge to delegate his authority to hold the hearing to another officer under extraordinary circumstances. These circumstances are not detailed but they must be unusual and significant rather than matters of convenience to the commander. This delegation of authority should be in writing and the reasons for it detailed. It must be emphasized that this delegation does not include the authority to impose punishment. At such a

hearing, the officer delegated to hold the hearing will receive all evidence, prepare a summarized record of matters considered, and forward the record to the officer having nonjudicial punishment 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 factfinding 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, par. 4d, MCM, 1984; JAGMAN, § 0104e.

(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 elements of the mast hearing, plus additional procedural safeguards, such as assistance of counsel. See JAGMAN, § 0304.

(2) If the record of a JAG Manual investigation or other factfinding 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 factfinding body for further proceedings to accord the accused all rights of a party. JAGMAN, 0104e.

d. Burden of proof. The commanding officer or officer in charge must decide that the accused is "guilty" by a preponderance of the evidence. JAGMAN, 0104c.

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, par. 4c(1)(F), MCM, 1984. It should be noted, however, that no authority exists to subpoena civilian witnesses for an NJP proceeding.

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

i. Command observers. Section 0104d of the JAG Manual encourages the attendance of representative members of the command during all nonjudicial punishment proceedings to dispel erroneous perceptions concerning the fairness and integrity of the proceedings.

j. Publication of nonjudicial punishment. Commanding officers are authorized to publish the results of nonjudicial punishment under section 0107 of the JAG Manual. Within one month following the imposition of nonjudicial punishment, the name of the accused, his rate, offense(s), and their disposition may be published in the plan of the day, provided it is intended for military personnel only, posted upon command bulletin boards, and announced at daily formations (Marine Corps) or morning quarters (Navy).

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

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 a 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 nonjudicial punishment, par. 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 nonjudicial punishment 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. 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; 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, par. 1f(3), MCM, 1984.

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, par. b(1)(B), MCM, 1984; JAGMAN, § 0101c.

(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 1 month's pay per month for two months.

b. By officers O-4 to O-6. Part V, par. 5b(1), MCM, 1984; JAGMAN, § 0105.

(1) Admonition or reprimand.

(2) Restriction: not more than 30 days.

c. By officers O-1 to O-3. JAGMAN, § 0150.

(1) Admonition or reprimand.

(2) Restriction: not more than 15 days.

d. By officer in charge: none.

2. Enlisted accused. Part V, par. 5b(2), MCM, 1984; JAGMAN, § 0105.

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.

(3) Correctional custody: not more than 30 days and only on grades E-3 and below.

(4) Forfeiture: not more than 1/2 of 1 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.

(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 paygrade; not imposable on E-7 and above (Navy) or E-6 and above (Marine Corps).

(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 0106 and appendices A-1-b and A-1-c of the JAG Manual. See also SECNAVINST 1920.6 series. These procedures must be complied with. It should be noted that reprimand is considered more severe than admonition.

2. Arrest in quarters. The punishment is imposable only on officers. Part V, par. 5c(1), MCM, 1984. It is a moral restraint, as opposed to a physical restraint. It is similar to restriction, but has much narrower limits. The limits of arrest are set by the officer imposing the punishment and may extend beyond quarters. The term "quarters" includes military and private residences. The officer may be required to perform his regular duties as long as they do not involve the exercise of authority over subordinates. JAGMAN, § 0105a(6).

3. Restriction. Restriction also is a form of moral restraint. Part V, par. 5c(2), MCM, 1984. Its severity depends upon the breadth of the limits as well as the duration of the restriction. If restriction limits are drawn too tightly, there is a real danger that they may amount to either confinement or arrest in quarters, which in the former case cannot be imposed as nonjudicial punishment, 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 1154.1 of U. S. Navy Regulations, 1973, 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, par. 5c(8), MCM, 1984. Forfeitures are effective on the date imposed unless suspended or deferred. Where a previous forfeiture is being executed, that forfeiture will be completed before any newly imposed forfeiture will be executed. JAGMAN, § 0105b(1).

5. Detention of pay. Effective 1 August 1984, detention of pay is no longer an authorized punishment in the military.

6. Extra duties. Various types of duties may be assigned, in addition to routine duties, as punishment. Part V, par. 5c(6), MCM, 1984, however, prohibits extra duties which constitute a known safety or health hazard, which constitute cruel and unusual punishment, or which are not sanctioned by the customs of the service involved. Additionally, when imposed upon a petty or noncommissioned officer (E-4 and above) the duties cannot be demeaning to his rank or position. Section 0105a(4) of the JAG Manual indicates that the immediate commanding officer of the accused will normally designate the amount and character of extra duty, regardless of who imposed the punishment, and that such duties normally should not extend beyond 2 hours per day. Guard duty may not be assigned as extra duties and, except in cases of reservists performing inactive training or active duty for training for periods of less than 7 days, extra duty shall not be performed on Sunday although Sunday counts as if such duty was performed.

7. Reduction in grade. Reduction in pay grade is limited by Part V, par. 5c(7), MCM, 1984, and section 0105a(5) of the JAG Manual to one grade only. The grade from which reduced must be within the promotional authority of the CO imposing the reduction. NAVMILPERSMAN 3420140.2; MARCORPROMAN, Vol. 2, ENLPROM, par. 1200.

8. 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, par. 5c(4), MCM, 1984. Specific regulations for conducting correctional custody are found in OPNAVINST 1640.7 and MCO 1626.7B. Time spent in correctional custody is not "lost time." Correctional custody cannot be imposed on grades E-4 and above. See JAGMAN, § 0105a(2). 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.

9. 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. Diminished rations is a restricted diet of 2100 calories per day, and instructions for its use are detailed in SECNAVINST 1640.9 series. This punishment cannot be imposed upon E-4 and above.

D. Execution of punishments

1. General rule. As a general rule, all punishments, if not suspended, take effect when imposed. Part V, par. 5e, MCM, 1984; JAGMAN, § 0105b. 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 nonjudicial punishment 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 0105b(2) 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 nonjudicial punishment. Part V, par. 7d, MCM, 1984, provides that a servicemember who has appealed from nonjudicial punishment 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 nonjudicial punishments. The execution of any nonjudicial (or court-martial) punishment involving restraint will normally be interrupted by a subsequent nonjudicial punishment 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, § 0105b(2). This rule does not apply to forfeiture of pay which must be completed before any subsequent forfeiture begins to run. JAGMAN, § 0105b(1).

d. Interruption of punishments by unauthorized absence. Service of all nonjudicial punishments will be interrupted during any period that the servicemember is UA. A punishment of reduction may be executed even when the accused is UA. JAGMAN, § 0105b.

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

TABLE ONE

LIMITS OF PUNISHMENTS UNDER UCMJ, ART. 15

Imposed by	Imposed on	Confinement on B&W or Dim Rats (2)	Correctional Custody (3)	Arrest in Quarters (1)	Forfeiture (6) (5)	Reduction (6) (8)	Extra Duties (4)	Restrictions to Limits (4)	Admonition (6)	Reprimand (6)
General Officers in Command	Officers	No	No	30 days	½ one mo. for 2 mos.	No	No	60 days	Yes	Yes
	E-4 to E-9	No	No	No	½ one mo. for 2 mos.	1 grade	45 days	60 days	Yes	Yes
	E-1 to E-3	3 days	30 days	No	½ one mo. for 2 mos.	1 grade	45 days	60 days	Yes	Yes
O-4 to O-6	Officers	No	No	No	No	No	No	30 days	Yes	Yes
	E-4 to E-9	No	No	No	½ one mo. for 2 mos.	1 grade	45 days	60 days	Yes	Yes
	E-1 to E-3	3 days	30 days	No	½ one mo. for 2 mos.	1 grade	45 days	60 days	Yes	Yes
O-3 below and OinC's (7)	Officers	No	No	No	No	No	No	15 days	Yes	Yes
	E-4 to E-9	No	No	No	7 days	1 grade	14 days	14 days	Yes	Yes
	E-1 to E-3	3 days	7 days	No	7 days	1 grade	14 days	14 days	Yes	Yes

(1) May not be combined with restriction

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

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

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

(5) Shall be expressed in whole dollar amounts only

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

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

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

COMBINATIONS OF PUNISHMENTS

A. General rules. Part V, par. 5d, MCM, 1984, provides that all authorized nonjudicial punishments 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;

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 nonjudicial punishments 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 nonjudicial punishments 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;

c. forfeiture of 7 days' pay (based upon the reduced rate); and

d. fourteen days restriction and extra duties to be served concurrently.

CLEMENCY AND CORRECTIVE ACTION ON REVIEW

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

B. Authority to act. Part V, par. 6a, MCM, 1984, and section 0110 of the JAG Manual indicate that after the imposition of nonjudicial punishment the following officials have authority to take clemency action or remedial corrective action:

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

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

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

4. the commanding officer or officer in charge of a unit, activity or command to which the accused is properly transferred after the imposition of punishment by the first commander. JAGMAN, § 0110b; and

5. the successor in command of the latter.

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

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

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

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

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

(1) Arrest in quarters to restriction;

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

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

(4) extra duties to restriction.

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

c. Example: As was mentioned, in mitigating nonjudicial punishments 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 4 months after the date of execution. Part V, par. 6b, MCM, 1984.

4. Suspension of punishment. Part V, par. 6a, MCM, 1984. This is an action to withhold the execution of the imposed punishment for a stated period of time pending good behavior on the part of the accused. Only subsequent misconduct during the probationary period will cause the suspension to be vacated (revoked) and this misconduct must constitute an offense under the UCMJ. This action can be taken with respect to

unexecuted portions of the punishment, or, in the case of a reduction in rank or a forfeiture, such action may be taken even though the punishment has been executed.

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

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

c. There is no known authority for the imposition of conditions of probation which could not ordinarily be made the subject of a lawful order.

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 only be based upon an offense under the UCMJ committed during the probationary period.

(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, (i.e., O-4 to O-6 CO punishment) in which case the accused should, unless impracticable, be given an opportunity to appear before the officer contemplating vacation to submit any matters in defense, extenuation, or mitigation of the offense on which the vacation action is to be based.

(3) Vacation of a suspension is not punishment for the misconduct that triggers the vacation. Accordingly, misconduct may be punished and also serve as the reason for vacating a previously suspended punishment imposed at mast. Vacation proceedings are often handled at NJP. First, the suspended punishment is vacated. Then the commanding officer can impose NJP for the new offense. If NJP is imposed for the new offense, the accused must be afforded all of his hearing rights, etc. (E.g., at NJP an accused is reduced from E-3 to E-2 but the reduction is suspended; the accused commits another offense during the period of suspension; an NJP hearing is held and the suspended reduction is vacated; therefore he is an E-2 and may then be reduced to E-1 as nonjudicial punishment for the new offense.)

(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 a nonjudicial punishment appeal. JAGMAN, § 0110d.

e. The probationary period cannot exceed six months from the date of suspension and terminates automatically upon expiration of current enlistment. Part V, par. 6a(2), MCM, 1984. The running of the period of suspension will be interrupted, however, by the unauthorized absence of the accused or the commencement of any proceeding to vacate the suspended punishment. The running of the period of probation resumes again when the unauthorized absence ends or when the suspension proceedings are terminated without vacation of the suspended punishment. JAGMAN, § 0110c.

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, par. 4c(4)(B)(iii), MCM, 1984; JAGMAN, § 0104f and app. A-1-v. See appendix 8-6. 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, § 0109. 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, § 0108b.

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, § 0109a.

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 chain of command to the officer who imposed the punishment; e.g., an appeal from company office hours should be submitted to the battalion commander. JAGMAN, § 0109b.

3. When the officer who imposed the punishment has been designated a commanding officer for naval personnel of a multiservice command pursuant to JAGMAN, § 0101d, the appeal will be made in accordance with JAGMAN, § 0109c.

4. A flag or general officer in command may, with the express prior approval of the Commander, Naval Military Personnel Command or the Commandant of the Marine Corps, delegate authority to act on appeals to a principal assistant. JAGMAN, § 0109d.

5. An officer who has delegated his NJP power to a principal assistant under JAGMAN, § 0101c may not act on an appeal from punishment imposed by that assistant.

B. Time. Appeals must be submitted in writing within 5 days of the imposition of nonjudicial punishment or the right to appeal shall be waived in the absence of good cause shown. Part V, par. 7d, MCM, 1984. (Note: for nonjudicial punishment proceedings initiated before 1 August 1984, the appeal period is 15 days.) The appeal period begins to run from the date of the imposition of nonjudicial punishment even though all or any part of the punishment imposed is suspended. This presumes that the accused was notified of the specifics of the nonjudicial punishment awarded and his rights of appeal on the same day nonjudicial punishment was imposed. If not, the 5-day period begins when such notice is given to the accused. In computing the 5-day period, allowance must be made for the time required to transmit the notice of imposition of NJP and the appeal itself through the mails. In the case of an appeal submitted more than 5 days after the imposition of NJP (less any mailing delays), the officer acting on the appeal shall determine whether "good cause" was shown for the delay in the appeal. JAGMAN, § 0108a(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-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, § 0108a(2).

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

C. Contents of appeal package. Sample nonjudicial punishment 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.

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 nonjudicial punishment (date, offense, who imposed it, and punishment imposed) and detail the specific grounds for relief. There are only two grounds for appeal: the punishment was unjust, or the punishment was disproportionate to the offense committed. The grounds for appeal are broad enough to cover all reasons for appeal. Unjust punishment exists when the evidence is insufficient to prove the accused committed the offense; when the statute of limitations (Article 43(c), UCMJ) prohibits lawful punishment; or when any other fact, including a denial of substantial rights, calls into question the validity of the punishment. Punishment is disproportionate if it is, in the judgment of the reviewer, too severe for the offense committed. An offender who believes his punishment is too severe thus appeals on the ground of disproportionate punishment, whether or not his letter artfully states the ground in precise terminology. Note, however, that a punishment may be legal but excessive or unfair considering circumstances such as: the nature of the offense; the absence of aggravating circumstances; the prior record of the offender; and any other circumstances in extenuation and mitigation. The grounds for appeal need not be stated artfully in the accused's appeal letter, and the reviewer may have to deduce the appropriate ground implied in the letter. Inartful draftsmanship or improper addressees or other administrative irregularities are not grounds for refusing to forward the appeal to the reviewing authority. If any commander in the chain of addressees notes administrative mistakes, they should be corrected, if material, in that commander's endorsement which forwards the appeal. Thus, if an accused does not address his letter to all appropriate commanders in the chain of command, the commander who notes the mistake should merely readdress and forward the appeal. He should not send the appeal back to the accused for redrafting since the appeal should be forwarded promptly to the reviewing authority. The appellant's letter begins the review process and is a quasi-legal document. It should be temperate and state the facts and opinions the accused believes entitles him to relief. The offender should avoid unfounded allegations concerning the character or personality of the officer imposing punishment. See Article 1109, U.S. Navy Regulations, 1973. The accused, however, should state the reasons for his appeal as clearly as possible. Supporting documentation in the form of statements of other persons, personnel records, etc., may be submitted if the accused desires. In no case is the failure to do these things lawful reason for refusing to process the appeal. Finally, should the accused desire that his restraint punishments or extra duties be stayed pending the appeal, he should specifically request this in the letter.

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 0108c of the JAG Manual requires that his endorsement should normally include the following information. Marine Corps units should also refer to LEGADMINMAN, chapter 2 for more specific information.

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 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 nonjudicial punishment was imposed on the basis of the record of a court of inquiry or other factfinding body, a copy of that record, including the findings of fact, opinions, and recommendations, together with copies of any endorsements thereon; and

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

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

3. Endorsement of the reviewing authority. There are no particular legal requirements concerning the content of the reviewer's endorsement except to inform the offender of his 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.

5. Accused's endorsement. The last endorsement should be from the accused to the commanding officer holding the records of the nonjudicial punishment. The endorsement will acknowledge receipt of the appeal decision and forward the package for filing.

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, § 0104c.

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, par. 1h, MCM, 1984. Thus, if an offender was not properly warned of his right to remain silent at the hearing, but made no statement, he has not suffered a substantial injury. If an offender was not informed that he had a right to refuse nonjudicial punishment, 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 nonjudicial punishment hearings. Evidentiary errors, except for insufficient evidence, will not normally invalidate punishment. If the reviewer believes the evidence insufficient to punish for the offense charged, but believes another offense has been proved by the evidence, the best practice would be to return the package to the commanding officer who imposed punishment and direct a rehearing on the other offense. The reviewer should then review the new action and complete his review. Such a practice, though not required, comports with the basic due-process-of-law notion that an accused is entitled to fair notice as to what he must defend against. This guidance does not apply where the other offense is a lesser included offense of the offense charged. Note that although the rules of evidence do not apply at NJP, Article 31, UCMJ, should be complied with at the hearing. Part V, par. 4c(3), MCM, 1984.

3. Lawyer review. Part V, par. 7e, MCM, 1984, requires that before taking any action on an appeal from any punishment in excess of that which could be given by an O-3 commanding officer, the reviewing authority must refer the appeal to a lawyer for consideration and advice. The advice of the lawyer is a matter between the reviewing authority and the lawyer and does not become a part of the appeal package. Many commands now require that all nonjudicial punishment 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, par. 7e, MCM, 1984. Such inquiries are time consuming and should be avoided by requiring thorough appeal packages from the officer imposing punishment.

5. Delegation of authority to action appeals. Pursuant to Part V, par. 7f(5), MCM, 1984, and section 0109d of the JAG Manual, an officer exercising general court-martial jurisdiction or an officer of general or flag rank in command may delegate his power to review and act upon NJP appeals to a "principal assistant" as defined in section 0101d of the JAG Manual. The officer who has delegated his NJP powers may not act upon an appeal from punishment imposed by the principal assistant. In other cases, it may be inappropriate for the principal assistant to act on certain appeals (as where an identity of persons or staff may exist with the command which imposed the punishment), and such fact should be noted by the command in the forwarding endorsement. JAGMAN, § 0109d.

E. Authorized appellate action. Part V, par. 7f, MCM, 1984; JAGMAN, § 0109. 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 on an uncharged but supported offense, or on the same offense, if there has been a substantial procedural error not amounting to a finding of insufficient evidence to impose NJP. At the rehearing, however, the punishment imposed may be no more severe than that imposed during the original proceedings unless other offenses which occurred subsequent to the date of the original proceeding, are added to the original offenses. If the accused, while not attached to or embarked in a vessel, waived his right to demand trial by court-martial at the original proceedings, he may not assert this right as to those same offenses at the rehearing but may assert the right as to any new offenses at the rehearing. JAGMAN, § 0109e.

Upon completion of action by the reviewing authority, the servicemember shall be promptly notified of the result.

IMPOSITION OF NJP AS A BAR TO FURTHER PROCEEDINGS

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

B. Imposition of NJP as a bar to further NJP

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

a. 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, 1984. But, a superior may not withhold or limit the exercise of a subordinate's NJP authority without the express authorization of the Secretary of the Navy. See JAGMAN, § 0101e.

C. Imposition of NJP as a bar to subsequent court-martial. R.C.M. 907b(2)(D)(iv), MCM, 1984 would prohibit an accused from being tried at court-martial for a minor offense for which he has already received NJP. Part V, par. 1e, MCM, 1984, defines "minor" offenses, in part, as "offense(s) for which the maximum sentence imposable would not include a dishonorable discharge or confinement for longer than one year if tried by general court-martial." The rule further provides, however, that the commanding officer imposing punishment has the discretion to consider as "minor" even certain offenses carrying punishments in excess of that provided in the rule. See e.g., Capello v. United States, 624 F.2d 976 (Ct.Cl. 1980) (possession of heroin); United States v. Rivera, 45 C.M.R. 582, n.3 (N.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 nonjudicial punishment. See e.g., Hagarty v. United States, 449 F.2d 352 (Ct.Cl. 1971); United States v. Fretwell, 11 U.S.C.M.A. 377, 29 C.M.R. 193 (1960); United States v. Vaughn, 3 U.S.C.M.A. 92, 11 C.M.R. 121 (1953).

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 nonjudicial punishment 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 Dobynski 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 198-199.

D. Cases arising after 1 August 1984. Significantly, both Dobynski, supra and Jones, supra, involved offenses committed and punished prior to 1 August 1984. For cases arising after this date, the provisions of section 0116(d)(4) of the JAG Manual would apply. This section provides that "[p]ersonnel who have been tried by courts which derive their authority from the United States, such as U.S. District Courts, shall not be tried by court-martial or be awarded nonjudicial punishment for the same act or acts" (emphasis added). Assuming that the term "tried" as used in JAGMAN, § 0116(d)(4) means that point in the trial after which jeopardy would attach and prevent the retrial of charges to a subsequent forum, the rule would appear to be consistent with that mandated by Dobynski, supra and Jones, supra. Thus, NJP would be barred for an offense previously referred to court-martial at which jeopardy had attached and which could not be re-tried at a subsequent court.

S A M P L E

N A V Y A P P E A L P A C K A G E

O F

N O N J U D I C I A L P U N I S H M E N T

APPENDIX 8-1

S A M P L E

5800
8 Jul 19cy

FOURTH ENDORSEMENT on RDSN John P. Williams ltr of 27 Jun 19cy

From: RDSN 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 second endorsement on my appeal from nonjudicial punishment.

2. The appeal and all attached papers are returned for file with the record of my case.

JOHN P. WILLIAMS

5800
Ser /
6 Jul 19cy

From: Commanding Officer, USS BENSON (DD-895)
To: RDSN John P. Williams, USN, 434-52-9113

Subj: APPEAL FROM PUNISHMENT IN THE CASE OF RDSN JOHN P. WILLIAMS

1. Returned for delivery.

S. O. DUNN

5800
Ser /
1 Jul 19cy

SECOND ENDORSEMENT on RDSN John P. Williams' ltr of 27 Jun 19cy

From: Commander, Cruiser-Destroyer Flotilla FIVE
To: RDSN John P. Williams, USN, 434-52-9113
Via: Commanding Officer, USS BENSON (DD-895)

Subj: APPEAL FROM PUNISHMENT IN CASE OF RDSN JOHN P. WILLIAMS

1. Returned, appeal (granted) (denied).

2. Your appeal has been referred to a lawyer for consideration and advice prior to my action.

3. (Statement of reasons for action on appeal, and remarks of admonition and exhortation, if desired.)

4. You are directed to return this appeal and accompanying papers to your immediate commanding officer for file with the record of your case.

M. J. HUGHES

S A M P L E

5800
Ser /
29 Jun 19cy

FIRST ENDORSEMENT on RDSN John P. Williams' ltr of 27 Jun 19cy

From: Commanding Officer, USS BENSON (DD-895)
To: Commander, Cruiser-Destroyer Flotilla FIVE

Subj: APPEAL FROM PUNISHMENT IN CASE OF RDSN JOHN P. WILLIAMS, USN, 434-52-9113

Encl: (4) NAVPERS 1626/7 with attachments thereto
(5) SR Accused's Service Record (Record of Performance)

1. Forwarded for action. Enclosures (4) and (5) are attached in amplification of the appeal.

2. (Statement of facts or circumstances or other matters which are not contained in appellant's letter of appeal and which would aid the command acting on appeal in arriving at a proper determination. This should not be argumentative nor in the form of a "defense" to the matters stated in appellant's letter of appeal.)

S. D. DUNN

See JAGMAN 0108c

5800
27 Jun 19cy

From: RDSN John P. Williams, USN, 434-52-9113
To: Commander, Cruiser-Destroyer Flotilla FIVE
Via: Commanding Officer, USS BENSON (DD-895)

Subj: APPEAL FROM NONJUDICIAL PUNISHMENT

Ref: (a) Art. 15(e), UCMJ
(b) Part V, par. 7, MCM, 1984
(c) JAGMAN, § 0108

Encl: (1) (Statements of other persons of facts or matters in mitigation which support the appeal)
(2) " " "
(3) " " "

1. As provided by references (a) through (c), appeal is herewith submitted from nonjudicial punishment imposed upon me on 25 June 19cy by CDR S. D. Dunn, Commanding Officer, USS BENSON (DD-895) as follows:

a. Offenses

Charge: Violation of Article 134, UCMJ

Specification: In that RDSN John P. WILLIAMS, USN, did on board the USS BENSON (DD-895) on or about 16 June 19cy unlawfully carry a concealed weapon, to wit: a switchblade knife.

b. Punishment: Forfeiture of $50.00 pay

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.

JOHN P. WILLIAMS

REPORT AND DISPOSITION OF OFFENSE(S)
NAVPERS 1626/7 (REV. 8-81) S/N 0106-LF-016-2600

To: Commanding Officer, USS BENSON (DD-895) Date of Report: 16 June 19cy

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

NAME OF ACCUSED	SERIAL NO.	SOCIAL SECURITY NO	RATE/GRADE	CO. & CLASS	DIV/DEPT
WILLIAMS, John P.	NA	434 52 9113	RDSN	USN	OPS

PLACE OF OFFENSE(S): Quarterdeck, USS BENSON DD-895

DATE OF OFFENSE(S): 16 June 19cy

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

Violation of Art. 134, UCMJ. In that RDSN John P. WILLIAMS, USN did on board the USS BENSON DD-895, on or about 16 June 19cy unlawfully carry a concealed weapon, to wit: a switch blade knife.

NAME OF WITNESS	RATE/GRADE	DIV/DEPT	NAME OF WITNESS	RATE/GRADE	DIV/DEPT
Harold B. Johnson	CPO	OPS			
Robert A. Hudson	WO1	ENG			

OMC, USN (Date/Grade/Title of person submitting report) /s/ Harold B. Johnson (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 question 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-TRIAL RESTRAINT

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

☒ NO RESTRICTIONS

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

INFORMATION CONCERNING ACCUSED

CURRENT ENL. DATE	EXPIRATION CURRENT ENL. DATE	TOTAL ACTIVE NAVAL SERVICE	TOTAL SERVICE ON BOARD	EDUCATION	CCY	AGE
24 May xx	23 May 19xx	1 yr 1 mo	10 mos	HS	57	19 yrs.

MARITAL STATUS	NO. DEPENDENTS	CONTRIBUTION TO FAMILY OR OTHER ALLOTMENT (Amount required by law)	PAY PER MONTH (Including sea or foreign duty pay, if any)
Never married	none	none	$612.00

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

None

PRELIMINARY INQUIRY REPORT

From: Commanding Officer
Date: 20 June 19cy

To: ENS David S. Willis, USNR

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

REMARKS OF DIVISION OFFICER (Performance of duty, etc.):
Seaman 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, and this is the first trouble he has been in aboard ship.
s/s LT Garry V. Brown

NAME OF WITNESS	RATE/GRADE	DIV/DEPT	NAME OF WITNESS	RATE/GRADE	DIV/DEPT

RECOMMENDATION AS TO DISPOSITION:

[ ] REFER TO SPCM FOR TRIAL OF ATTACHED CHARGES (Complete Charge Sheet (DD Form 458) through Page 2)

[X] DISPOSE OF CASE AT MAST

[ ] DO POSITIVE ACTION NECESSARY TO DESIGNATE

[ ] OTHER

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

SN Williams was discovered to be carrying a switchblade knife with a 5" blade by QMC H. B. Johnson when he was the JOOD on 16 June. SN Williams was about to depart the ship on liberty at approx. 1630, when QMC Johnson noticed a bulge in his front pocket. The knife was discovered when Chief Johnson had Williams empty his pocket. Chief Johnson reported the incident to the OOD, WO1 R. A. Hughes, who directed that Williams be put on report. Chief Johnson, WO1 Hudson and SN Williams

(Signature of Investigation Officer)
/s/ David S. Willis

ACTION OF EXECUTIVE OFFICER

[ ] DISMISSED [X] REFERRED TO CAPTAIN'S MAST

SIGNATURE OF EXECUTIVE OFFICER
/s/ R. D. Line, LCDR, USN

WAIVER OF 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

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
[X] FORFEITURE: TO FORFEIT $ 50.00 PAY PER MO. FOR 1 MO
[ ] CONF. TO _____ 1, 2, OR 3 DAYS
[ ] CORRECTIONAL CUSTODY FOR _____ DAYS
[ ] DEDUCTION TO DEBT INFERIOR PAY GRADE
[ ] DEDUCTION TO PAY GRADE OF _____
[ ] EXTRA DUTIES FOR ____ DAYS
[ ] PUNISHMENT SUSPENDED FOR _____
[ ] ART. 32 INVESTIGATION
[ ] RECOMMENDED FOR TRIAL BY GCM

[ ] AWARDED SCM [ ] AWARDED SPCM

DATE OF MAST:	DATE ACCUSED INFORMED OF ABOVE ACTION:	SIGNATURE OF COMMANDING OFFICER
25 June 19cy	25 June 19cy	/s/ S. D. Dunn, CDR, USN

It has been explained to me and I understand that if I feel this imposition of nonjudicial punishment to be unjust or disproportionate to the offenses charged against me, I have the right to immediately appeal my conviction to the next higher authority within 15 days.

SIGNATURE OF ACCUSED: John P Williams DATE: 25June cy

I have explained the above rights of appeal to the accused.
SIGNATURE OF WITNESS: W. O. Hughes DATE: 25June cy

FINAL ADMINISTRATIVE ACTION

APPEAL SUBMITTED BY ACCUSED
DATED: 27 June 19cy
FORWARDED FOR DECISION ON: _____

FINAL RESULT OF APPEAL:

APPROPRIATE ENTRIES MADE IN SERVICE RECORD AND PAY ACCOUNT ADJUSTED WHERE REQUIRED
DATE: 25 June 19cy /s/ Leg Off (Initials)

FILED IN UNIT PUNISHMENT BOOK:
DATE: 25 June 19cy /s/ Leg Off (Initials)

NAVPERS 1080/7 (REV. 8-61)(DACH)

☆ U.S. Government Printing Office: 1962—603-103/2400 8-9

(CAPTAIN'S MAST) (OFFICE HOURS)
ACCUSED'S NOTIFICATION AND ELECTION OF RIGHTS -
ACCUSED ATTACHED TO OR EMBARKED IN A VESSEL -
(SEE SECTION 0104a)

Notification and election of rights concerning the contemplated imposition of nonjudicial punishment in the case RDSN John P. Williams
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, 1984, you are hereby notified that the commanding officer is considering imposing nonjudicial punishment on you because of the following alleged offenses:

Article 134: Unlawfully carrying a concealed weapon on 16 June 19cy.

2. The allegations against you are based on the following information: Statement of QMC Harold B. Johnson, USN dated 18 June 19cy, which alleges that you possessed a switch-blade knife (5 inch blade) in your pants pocket on the quarterdeck of USS BENSON at approximately 1630, 16 June 19cy.
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.

Appendix A-1-r(1)

(4) To be permitted to examine documents or physical objects against you that the commanding officer has examined in the case and on which the commanding officer intends to rely in deciding whether and how much nonjudicial punishment to impose.

(5) To present matters in defense, extenuation, and mitigation orally, in writing, or both.

(6) To have witnesses attend the proceeding, including those that may be against you, if their statements will be relevant and they are reasonably available. A witness is not reasonably available if the witness requires reimbursement by the United States for any cost incurred in appearing, cannot appear without unduly delaying the proceedings, or, if a military witness, cannot be excused from other important duties.

(7) To have the proceedings open to the public unless the commanding officer determines that the proceedings should be closed for good cause. However, this does not require that special arrangements be made to facilitate access to the proceeding.

ELECTION OF RIGHTS

4. Knowing and understanding all of my rights as set forth in paragraphs 1 through 3 above, my desires are as follows:

a. Personal appearance. (Check one)

JW ✓ I request a personal appearance before the commanding officer

_____ I waive a personal appearance (Check one)

(Note: The accused's waiver of personal appearance does not preclude the commanding officer from notifying the accused, in person, of the punishment imposed.)

✓ I do not desire to submit any written matters for consideration

_____ Written matters are attached

b. Elections at personal appearance. (Check one or more)

_____ I request that the following witnesses be present at my nonjudicial punishment proceeding:

NONE

✓ I request that my nonjudicial punishment proceeding be open to the public.

Appendix A-1-r(2)

D. M Witness
(Signature of witness)

John P. Williams
(Signature of accused)

25 June 19 69
(Date)

Appendix A-1-r(3)

(CAPTAIN'S MAST) (OFFICE HOURS)
ACCUSED'S ACKNOWLEDGEMENT OF APPEAL RIGHTS

I, RDSN 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 198 :

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 five-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;

(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, or restriction for 14 days, 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 & Date)

25 June 19cy

/s/ I. M. Witness
(Signature of Witness & Date)

25 June 19cy

A-1-v

18 June 19cy

I, Harold B. Johnson, QMC, USN, have been asked by Ens. D.S. Willis to make the following statement:

On 16 July 19cy I was the JOOD on board the USS Benson (DD 897). At approximately 1630, I was on the quarterdeck and RDSN John P. Williams passed me in civilian clothes. He had on a tight pair of double-knit pants and I noticed an oblong bulge in the right-hand front pocket. I suspected that he might have a knife in his pocket. I knew that a number of the crew had bought knifes when we were in the Med.

I told Williams to ~~stop~~ HBJ-DSW stop and asked him what he had in his pocket. He started to stutter and so I told him to empty his right-hand pocket. He did and he handed me a switch-blade knife. I asked him what he planned to do with the knife and he said he did not intend to use it but just wanted to have it with him in case of trouble. I then took the knife and Williams to the OOD, WO1 Hudson. He told me to put Williams on report. I turned the knife which had a 5-inch blade over to the legal officer, LTjg Kay.

Harold B. Johnson
QMC, USN

Witness:

David S. Willis
Ens, USNR

18 June 1984

I, Robert A. Hudson, WO-1, USN, have been asked by Ens. D. S. Willis to make the following statement:

On 16 June 1984, I was the OOD on board the USS Benson. My JOOD was Chief Harold B. Johnson At approximately 1645 Chief Johnson brought RDSN Williams to me and showed me a switch blade knife which he said he had found on Williams. I asked Williams if he had anything to say and he said he had no intention of using the knife but was only carrying it to protect himself.

I told Chief Johnson to put Williams on report and instructed Williams to report to the legal office the next morning after quarters.

Robert A. Hudson
WO-1, USN

Witness: David S. Willis
ENS., USNR

SUSPECT'S RIGHTS ACKNOWLEDGEMENT/STATEMENT (See section 0149)

Suspect's Rights Acknowledgement/Statement

FULL NAME (ACCUSED/SUSPECT)	FILE/SERVICE NO.	RATE/RANK	SERVICE (BRANCH)
John P. Williams	NA	RDSN	USN
ACTIVITY/UNIT	SOCIAL SECURITY NUMBER		DATE OF BIRTH
USS BENSON DD895	434 52 9113		22 May 19 xx
NAME (INTERVIEWER)	FILE/SERVICE NO.	RATE/RANK	SERVICE (BRANCH)
D. S. Willis	725873	ENS	USNR
ORGANIZATION		BILLET	
USS BENSON DD895		PIO	
LOCATION OF INTERVIEW		TIME	DATE
USS BENSON DD895		1000	19 Jun 19 cy

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. ---------- JPW

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

WAIVER OF RIGHTS

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

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

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

A-1-n(1)
Change 2

(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; ----------

(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
John P. Williams	1015	19 Jun cy
SIGNATURE (INTERVIEWER)	**TIME**	**DATE**
David L. Williams	1015	19 Jun cy
SIGNATURE (WITNESS)	**TIME**	**DATE**
attached hereto and		

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.

John P. Williams
SIGNATURE (ACCUSED/SUSPECT)

A-1-n(2)
Change 2

19 JUN 1964

I, JOHN P. WILLIAMS, RDSN, USN, having been advised of my Rights by ENS. DAVID S. WILLIS, which I have acknowledged on the attached rights form, make the following statement, freely and voluntarily, understanding my right to remain silent and to consult a lawyer.

I bought the knife that Chief Johnson took from me during the ship's last med. deployment. I bought it for my own protection. I never intended to use it on anyone. I did not know that just carrying a knife around was a crime.

When Chief Johnson stopped me I had intended to mail the knife home to my father and have him keep it for me to use when we go fishing. It was a good knife and I did not want to just throw it away.

John P. Williams

Witness: David S. Willis
ENS, USNR

S A M P L E

M A R I N E C O R P S A P P E A L P A C K A G E

O F

N O N J U D I C I A L P U N I S H M E N T

APPENDIX 8-2

UNITED STATES MARINE CORPS
Schools Company, Schools Battalion
Marine Corps Base
Camp Pendleton, California 92055

5812
21 July 19cy

From: Private John Q. Adams 456 64 5080/0311 U.S. Marine Corps
To: Commanding Officer, Schools Battalion, Marine Corps Base, Camp Pendleton, California 92055
Via: Commanding Officer, Schools Company, Schools Battalion, Marine Corps Base, Camp Pendleton, California 92055

Subj: APPEAL OF NONJUDICIAL PUNISHMENT

Ref: (a) MCM, 1984

1. In accordance with reference (a), I am appealing the punishment awarded me at company office hours on 18 July 19cy.

2. Because this was my first offense, I feel that the punishment handed down to me at office hours was too hard and disproportionate to the offense that I committed. Additionally, I feel that my commanding officer did not consider my state of mind at the time I went UA.

JOHN Q. ADAMS

UNITED STATES MARINE CORPS
Schools Company, Schools Battalion
Marine Corps Base
Camp Pendleton, California 92055

5812
23 Jul 19cy

FIRST ENDORSEMENT on Pvt. J. A. Adams' ltr 5812 of 21 Jul cy

From: Commanding Officer
To: Commanding Officer, Schools Battalion, Marine Corps Base, Camp Pendleton, California 92055

Subj: APPEAL OF NONJUDICIAL PUNISHMENT

Ref: (a) JAGMAN
(b) LEGADMINMAN

Encl: (1) Unit Punishment Book
(2) Summary of Hearing
(3) Acknowledgment of Rights Forms

1. In accordance with the provisions of references (a) and (b), the following information setting forth a summary recitation of facts of the office hours' proceedings and a summary of the assertion of facts made by Private Adams are submitted:

a. Summary of recitation of facts

(1) Private ADAMS appeared at Company Office Hours on 18 July 19cy for the following offense:

Article 86, UA 1300, 5 July 19cy to 2344, 15 July 19cy, from Schools Company, Schools Battalion, Marine Corps Base, Camp Pendleton, California 92055.

(2) The offense was read to Private Adams and then discussed with him. He was asked at least twice if he understood the offense, and he replied that he did.

(3) Private Adams' rights were explained to him and thereafter he signed item 6 on enclosure (1).

(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 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).

ANDREW JACKSON
Major USMC

Copy to:
Pvt 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 50 80

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) 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) 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 $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 final disposition in 8 and 9) 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 (Date) — Andrew Jackson (Signature of CO who took final action in 11)

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

18 Jul cy (Date) — John Q Adams (Signature of accused)

15. DATE OF APPEAL, IF ANY.

21 Jul cy

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

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

24 Jul cy (Date) — Martin Van Buren (Signature of CO making decision on appeal)

17. DATE OF NOTICE TO ACCUSED OF DECISION ON APPEAL.

24 Jul cy

18. REMARKS

18 Jul - Intent to appeal indicated.

19. Final administrative action, as appropriate, has been completed.

TB

Encl (1)

18 July 19

Pvt. John O. Adams 456 64 50 80 USMC

Summary Of evidence presented.

The accused admitted to the offense contained on item 3. Accordingly, the accused was found guilty of the single offense.

Extenuating or mitigating factors considered:

Pvt. Adams stated, relating to the UA that he had received a phone call from his brother stating that his [redacted] 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 recommendations of his 1st Sgt. Platoon Sgt. and his past record the punishment appearing in block 8 was imposed.

Encl (2)

(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 SECTION 0104a)

Notification and election of rights concerning the contemplated imposition of nonjudicial punishment in the case Pvt. John Q. Adams, SSN 456-64-5080, assigned or attached to ScolsCo, ScolsBn, MCM, CamPen.

NOTIFICATION

1. In accordance with the requirements of paragraph 4 of Part V, MCM, 1984, you are hereby notified that the commanding officer is considering imposing nonjudicial punishment on you because of the following alleged offenses:

Art. 86 UA 1300 5 July 19~~cy~~-2344 15 July 19cy fr ScolsCo, ScolsBn, MCB, CamPen.

2. The allegations against you are based on the following information: Statement of Pvt. John Q. Adams, USMC dtd 16 July 19cy acknowledges he was absent during period alleged and that his absence was unauthorized.

3. You have the right to demand trial by court-martial in lieu of nonjudicial punishment. If trial by court-martial is demanded, charges could be referred for trial 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.

Appendix A-1-t(1)
Encl (3)

(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.

(7) To have the proceedings open to the public unless the commanding officer determines that the proceedings should be closed for good cause. However, this does not require that special arrangements be made to facilitate access to the proceeding.

5. In order to help you decide whether or not to demand trial by court-martial or to exercise any of the rights explained above should you decide to accept nonjudicial punishment, you may obtain the advice of a lawyer prior to any decision. If you wish to talk to a lawyer, a military lawyer will be made available to you, either in person or by telephone, free of charge, or you may obtain advice from a civilian lawyer at your own expense.

ELECTION OF RIGHTS

6. Knowing and understanding all of my rights as set forth in paragraphs 1 through 5 above, my desires are as follows:

a. Lawyer. (Check one or more, as applicable)

_____ I wish to talk to a military lawyer before completing the remainder of this form.

_____ I wish to talk to a civilian lawyer before completing the remainder of this form.

__✓__ I hereby voluntarily, knowingly, and intelligently give up my right to talk to a lawyer.

I. M. Witness
(Signature of witness)

John D. Adams
(Signature of accused)

17 July 19 cy
(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)

N/A
(Signature of accused)

_____
(Date)

b. Demand for trial by court-martial. (Check one)

_____ I demand trial by court-martial in lieu of nonjudicial punishment

✓ I accept nonjudicial punishment

(Note: If the accused demands trial by court-martial 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)

(Note: The accused's waiver of personal appearance does not preclude the commanding officer from notifying the accused, in person, of the punishment imposed.)

✓ I do not desire to submit any written matters for consideration

Appendix A-1-t(3)

_____ Written matters are attached

d. Elections at personal appearance. (Check one or more)

_____ I request that the following witnesses be present at my nonjudicial punishment proceeding:

NONE

_____

_____

_____

_____

_____

/ I request that my nonjudicial punishment proceeding be open to the public.

J. M. Witness
(Signature of witness)

John A Adams
(Signature of accused)

17 July 19 84
(Date)

Appendix A-1-t(4)

(CAPTAIN'S MAST) (OFFICE HOURS)
ACCUSED'S ACKNOWLEDGEMENT OF APPEAL RIGHTS

I, 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 July 19cy:

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 five-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;

(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, or restriction for 14 days, 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	/s/ I. M. Witness
(Signature of Accused & Date)	(Signature of Witness & Date)
18 July cy	18 July cy

A-1-v

UNITED STATES MARINE CORPS
Schools Battalion, Marine Corps Base
Camp Pendleton, California 92055

5812
Ser /
23 Jul 19cy

From: Commanding Officer
To: Staff Judge Advocate, Marine Corps Base, Camp Pendleton, California 92055

Subj: REVIEW AND ADVICE OF NJP APPEAL IN THE CASE OF PRIVATE JOHN Q. ADAMS 456 64 5080/0311 USMC

Ref: (a) MCM, 1984

Encl: (1) NJP Appeal Package

1. In accordance with reference (a), enclosure (1) is forwarded for review and advice by a judge advocate.

2. It is noted that the Commanding Officer, Schools Company, Schools Battalion, has the authority to promote up to and including the grade of E-3.

MARTIN VAN BUREN
LtCol USMC

UNITED STATES MARINE CORPS
Marine Corps Base
Camp Pendleton, California 92055

5812
24 Jul 19cy

MEMORANDUM ENDORSEMENT

From: Staff Judge Advocate
To: Commanding Officer, Schools Battalion, Marine Corps Base, Camp Pendleton, California 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.

WILLIAM H. HARRISON
LtCol USMC

NOTE: Once the Battalion Commander has received a reply from a judge advocate, his letter requesting review and advice and the reply are not provided to the Marine. This correspondence is retained by the Battalion.

UNITED STATES MARINE CORPS
Schools Battalion, Marine Corps Base
Camp Pendleton, California 92055

5812
Ser /
24 Jul 19cy

SECOND ENDORSEMENT on Pvt. J. Q. Adams' ltr 5812 of 21 Jul 19cy

From: Commanding Officer
To: Private John Q. Adams, 456 64 5080/0311 U.S. Marine Corps
Schools Company, Schools Battalion, Marine Corps Base,
Camp Pendleton, California 92055
Via: Commanding Officer, Schools Company, Schools Battalion,
Marine Corps Base, Camp Pendleton, California 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. 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.

MARTIN VAN BUREN
LtCol USMC

UNITED STATES MARINE CORPS
Schools Company, Schools Battalion
Marine Corps Base
Camp Pendleton, California 92055

5812
Ser /
25 Jul 19cy

THIRD ENDORSEMENT on Pvt. J. Q. Adams' ltr 5812 of 21 Jul 19cy

From: Commanding Officer
To: Private John Q. ADAMS, 456 64 5080/0311 USMC

Subj: APPEAL OF NONJUDICIAL PUNISHMENT

1. Returned.

2. Action has been taken on your appeal, and your attention is invited to the second endorsement for the final results.

3. Inasmuch as the original correspondence is to be filed in the Unit Punishment Book, you are provided with a copy of your appeal.

ANDREW JACKSON
Major USMC

Copy to:
Pvt 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.

(CAPTAIN'S MAST) (OFFICE HOURS)
ACCUSED'S NOTIFICATION AND ELECTION OF RIGHTS -
ACCUSED ATTACHED TO OR EMBARKED IN A VESSEL -
(SEE SECTION 0104a)

Notification and election of rights concerning the contemplated imposition of nonjudicial punishment in the case _____, SSN _____, assigned or attached to _____.

NOTIFICATION

1. In accordance with the requirements of paragraph 4 of Part V, MCM, 1984, you are hereby notified that the commanding officer is considering imposing nonjudicial punishment on you because of the following alleged offenses:

(NOTE: Here describe the offenses, including the article(s) of the code allegedly violated)

2. The allegations against you are based on the following information:

(NOTE: Here provide a brief summary of that information)

3. You may request a personal appearance before the commanding officer or you may waive this right.

a. Personal appearance waived. If you waive your right to appear personally before the commanding officer, you will have the right to submit any written matters you desire for the commanding officer's consideration in determining whether or not you committed the offenses alleged, and, if so, in determining an appropriate punishment. You are hereby informed that you have the right to remain silent and that anything you do submit for consideration may be used against you in a trial by court-martial.

b. Personal appearance requested. If you exercise your right to appear personally before the commanding officer, you shall be entitled to the following rights at the proceeding:

(1) To be informed of your rights under Article 31(b), UCMJ.

(2) To be informed of the information against you relating to the offenses alleged.

(3) To be accompanied by a spokesperson provided or arranged for by you. A 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.

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APPENDIX 8-3

(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.

(7) To have the proceedings open to the public unless the commanding officer determines that the proceedings should be closed for good cause. However, this does not require that special arrangements be made to facilitate access to the proceeding.

ELECTION OF RIGHTS

4. Knowing and understanding all of my rights as set forth in paragraphs 1 through 3 above, my desires are as follows:

a. Personal appearance. (Check one)

_____ I request a personal appearance before the commanding officer

_____ I waive a personal appearance (Check one)

_____ I do not desire to submit any written matters for consideration

_____ Written matters are attached

(Note: The accused's waiver of personal appearance does not preclude the commanding officer from notifying the accused, in person, of the punishment imposed.)

b. Elections at personal appearance. (Check one or more)

_____ I request that the following witnesses be present at my nonjudicial punishment proceeding:

_____

_____

_____

_____

_____ I request that my nonjudicial punishment proceeding be open to the public.

Appendix A-1-r(2)

(Signature of witness)	(Signature of accused)
(Name of witness)	(Date)

Appendix A-1-r(3)

(CAPTAIN'S MAST) (OFFICE HOURS)
ACCUSED'S NOTIFICATION AND ELECTION OF RIGHTS -
ACCUSED NOT ATTACHED TO OR EMBARKED IN A VESSEL -
RECORD CANNOT BE USED IN AGGRAVATION IN EVENT OF LATER COURT-MARTIAL
(SEE SECTION 0104a)

Notification and election of rights concerning the contemplated imposition of nonjudicial punishment in the case _____, SSN _____, assigned or attached to _____.

NOTIFICATION

1. In accordance with the requirements of paragraph 4 of Part V, MCM, 1984, you are hereby notified that the commanding officer is considering imposing nonjudicial punishment on you because of the following alleged offenses:

(NOTE: Here describe the offenses, including the article(s) of the code 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 demand trial by court-martial in lieu of nonjudicial punishment. If trial by court-martial is demanded, charges could be referred for trial 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.

(7) To have the proceedings open to the public unless the commanding officer determines that the proceedings should be closed for good cause. However, this does not require that special arrangements be made to facilitate access to the proceeding.

ELECTION OF RIGHTS

5. Knowing and understanding all of my rights as set forth in paragraphs 1 through 4 above, my desires are as follows:

a. Demand for trial by court-martial. (Check one)

_____ I demand trial by court-martial in lieu of nonjudicial punishment

_____ I accept nonjudicial punishment

(Note: If the accused demands trial by court-martial, the matter should be submitted to the commanding officer for disposition.)

Appendix A-1-s(2)

b. 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.)

c. Elections at personal appearance. (Check one or more)

_____ I request that the following witnesses be present at my nonjudicial punishment proceeding:

_____

_____

_____

_____

_____

_____ I request that my nonjudicial punishment proceeding be open to the public.

_____ _____

(Signature of witness) (Signature of accused)

_____ _____

(Name of witness) (Date)

Appendix A-1-s(3)

(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 SECTION 0104a)

Notification and election of rights concerning the contemplated imposition of nonjudicial punishment in the case _____, SSN _____, assigned or attached to _____.

NOTIFICATION

1. In accordance with the requirements of paragraph 4 of Part V, MCM, 1984, you are hereby notified that the commanding officer is considering imposing nonjudicial punishment on you because of the following alleged offenses:

(NOTE: Here describe the offenses, including the article(s) of the code 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 demand trial by court-martial in lieu of nonjudicial punishment. If trial by court-martial is demanded, charges could be referred for trial 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.

(7) To have the proceedings open to the public unless the commanding officer determines that the proceedings should be closed for good cause. However, this does not require that special arrangements be made to facilitate access to the proceeding.

5. In order to help you decide whether or not to demand trial by court-martial or to exercise any of the rights explained above should you decide to accept nonjudicial punishment, you may obtain the advice of a lawyer prior to any decision. If you wish to talk to a lawyer, a military lawyer will be made available to you, either in person or by telephone, free of charge, or you may obtain advice from a civilian lawyer at your own expense.

ELECTION OF RIGHTS

6. Knowing and understanding all of my rights as set forth in paragraphs 1 through 5 above, my desires are as follows:

a. Lawyer. (Check one or more, as applicable)

_____ I wish to talk to a military lawyer before completing the remainder of this form.

Appendix A-1-t(2)

_____ 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)

a. Demand for trial by court-martial. (Check one)

_____ I demand trial by court-martial in lieu of nonjudicial punishment

_____ I accept nonjudicial punishment

(Note: If the accused demands trial by court-martial, 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.)

Appendix A-1-t(3)

c. Elections at personal appearance. (Check one or more)

_____ I request that the following witnesses be present at my nonjudicial punishment proceeding:

_____

_____

_____

_____

_____

_____ I request that my nonjudicial punishment proceeding be open to the public.

_____ _____

(Signature of witness) (Signature of accused)

_____ _____

(Name of witness) (Date)

Appendix A-1-t(4)

(CAPTAIN'S MAST) (OFFICE HOURS)
ACCUSED'S ACKNOWLEDGEMENT OF APPEAL RIGHTS

I, _____ (Name and grade of accused) _____, SSN _____ assigned or attached to _____, have been informed of the following facts concerning my rights of appeal as a result of (captain's mast) (office hours) held on _____:

a. I have the right to appeal to (specify to whom the appeal should be addressed).

b. My appeal must be submitted within a reasonable time. Five days after the punishment is imposed is normally considered a reasonable time, in the absence of unusual circumstances. Any appeal submitted thereafter may be rejected as not timely. If there are unusual circumstances which I believe will make it extremely difficult or not practical to submit an appeal within the five-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:

(2) The punishment was disproportionate to the offense(s) for which I was imposed.

e. If the punishment imposed included reduction from the paygrade of E-4 or above or was in excess of: arrest in quarters for 7 days, correctional custody for 7 days, forfeiture of 7 days' pay, extra duties for 14 days, restriction for 14 days, or detention of 14 days' pay, then the appeal must be referred to a military lawyer for consideration and advice before action is taken on my appeal.

_____ (Signature of Accused & Date)

_____ (Signature of Witness & Date)

CHAPTER IX

INTRODUCTION TO THE COURT-MARTIAL PROCESS

A. Introduction. Many of the rules and procedures utilized in courts-martial closely resemble those employed in state and federal criminal courts. This close parallel is dictated by Article 36, UCMJ, which states:

> [P]rocedures, including the modes of proof, ... in cases before courts-martial . . . may be prescribed by the President by regulations which shall, so far as ... practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the U. S. district courts, but which may not be contrary to or inconsistent with this Chapter.

The result of this delegation of authority by the Congress to the President is the Manual for Courts-Martial, 1984. Military necessity has dictated certain procedures in the MCM which are quite different than civilian Federal practice. These differences are implicitly recognized and authorized by the last phrase of Article 36, UCMJ, quoted above. The chief ways in which these differences manifest themselves are in the procedural steps necessary to create a court-martial and to bring a case before the court.

B. Prerequisites to court-martial jurisdiction. "Jurisdiction" is the power to hear and to decide a case. In a criminal prosecution in state and federal courts, the jurisdiction of these courts is specified by statutes which generally focus upon the geographical area within which the offense must occur. In the military, however, jurisdiction of the court is established by five prerequisites which are unique to the military. See R.C.M. 201(b), MCM, 1984 [hereinafter cited as 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., the offense must be one which has a "service connection."

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

Note that, unlike the jurisdiction of a Federal court, the jurisdiction of a court-martial is not totally dependent upon where the offense was committed, since Article 5, UCMJ, states that the UCMJ is applicable "in all places." Offenses committed off base may entail so little "service interest" or "connection," however, that they do not meet the prerequisites of paragraph 4, above.

C. Discussion. Proper convening procedures and the constitution of summary, special, and general courts-martial are discussed in detail in the following chapters, as these requirements and procedures vary with each type of court-martial. The requirements of jurisdiction over the person and jurisdiction over the offense vary only slightly among the three types of courts. These differences are discussed in detail below as well. It is important to note at this point that certain minimum criteria must be met before a criminal offense may be brought before any court-martial, i.e., jurisdiction of the court must exist over the person and the offense. Only if these two prerequisites are met can the decision be made as to which of the three courts should decide a particular case.

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

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

(1) voluntary submission to military authority;

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

(3) receipt of military pay or allowances; and

(4) performance of military duties.

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

b. Discharge. The possibility of the exercise of military jurisdiction ends with the delivery of a discharge certificate with the intent to effect separation. This is true even though the offense was committed while on active duty.

Three potential exceptions exist to the general rule that delivery of a discharge certificate with the intention to separate the member ends military jurisdiction over the person. First, in the very unusual case contemplated by Article 3(a), UCMJ (serious offenses committed off base overseas), jurisdiction will continue into a subsequent enlistment. Second, when a person is discharged before the expiration of his term of enlistment for the purpose of reenlistment (and, thus, there has been no interruption of his active service), court-martial jurisdiction exists to try the member for offenses committed during the prior enlistment. Note, however, that jurisdiction is terminated by a discharge at the end of an enlistment even though the servicemember immediately reenters the service. Third, if a person fraudulently obtains the delivery of the discharge papers, jurisdiction is not lost.

To meet this problem, the government must insure that an individual suspected of an offense is not discharged. Processing of the individual for a discharge must cease and the government must also take certain steps to retain jurisdiction over an individual. Examples of actions which are sufficient to retain jurisdiction beyond the expiration of enlistment date are: apprehension, arrest, confinement, and filing charges. R.C.M. 202(c)(2). Congress originally attempted to authorize the military to try persons for certain serious offenses, even though they had since been discharged and had become civilians. See, for example, Article 3, UCMJ, and the accompanying note. This and similar attempts, however, generally have been held to be unconstitutional.

2. Jurisdiction over the offense. Article 5, UCMJ, states that the Code applies "in all places." The drafters of the Code in 1950 and legal authorities for the next 19 years assumed that a person who committed an offense was subject to the UCMJ solely because of the fact that that person was on active duty in the armed forces at the time of the offense. In 1969, the U.S. Supreme Court held that although the Code applied "in all places," it did not confer jurisdiction over all offenses committed in all places: the military should have jurisdiction over only those offenses which were "service connected." The Supreme Court reasoned that in a military trial an accused loses two key constitutional rights enjoyed in federal courts: the right to an indictment by a grand jury and the right to a jury trial. Therefore, it concluded, an accused should not be forced to forfeit these rights unless the military has a particular interest in the case which justifies the application of its procedural rules (which deny such rights). In effect, the accused should be tried in civilian courts whenever possible. O'Callahan v. Parker, 385 U.S. 258 (1969). Two clear exceptions to this limiting rule were immediately forthcoming from the Court of Military Appeals.

a. If the offense occurred outside the territories of the U. S., O'Callahan does not apply, no matter where the offense is tried. The rationale of this exception is that the key constitutional rights specified in the O'Callahan decision are not available in these foreign countries in any case and, hence, the accused loses none by virtue of a court-martial.

b. If the offense is "petty," it may be tried by the military, no matter where it occurred. The rationale for this exception is that the constitutional rights to indictment and jury trial are not applicable in such cases even in civilian courts, and hence the accused loses none by virtue of his trial by court-martial. These two exceptions shed little light upon what the Supreme Court would recognize as sufficient "service connection" to justify the exercise of military jurisdiction. To clarify this uncertainty, the Court subsequently specified twelve factors which are to be considered in determining which offenses have a sufficient "service connection":

(1) Whether the accused was on authorized leave or liberty, or was UA, at the time of the offense;

(2) whether the offense occurred on base;

(3) whether it occurred at a place under military control;

(4) whether it occurred within the territorial limits of the U.S., or in a foreign country;

(5) whether it occurred in peace time;

(6) whether there was any connection between the offense and the accused's military duties;

(7) whether the victim was in the military and, if so, whether he or she was performing any duties at the time;

(8) whether civilian courts are available to prosecute the case;

(9) whether the offense involved a flouting of military authority;

(10) whether it involved any threat to a military post;

(11) whether there was any violation of military property; and

(12) whether the offense is among those traditionally prosecuted in civilian courts. Relford v. Commandant, 401 U.S. 355 (1971).

It should be emphasized that no one of these factors (with the possible exception of on-base offenses) is sufficient in and of itself to justify military jurisdiction. Thus, the fact that the government was a victim, that another servicemember was a victim, that the accused used his military status to facilitate commission of the offense, that he wore a uniform, or that he committed the offense during duty hours, are all factors which bear upon the issue, but none of these are entirely determinative of the question of jurisdiction. Similarly, no particular type of offense -- other than purely military crimes such as UA, disrespect, disobedience, etc. -- are automatically the basis of military jurisdiction. Until 1976, drug-related offenses were regarded as so

special and important to the maintenance of military discipline that they were properly tried before courts-martial no matter where or how they occurred. Then, the U.S. Court of Military Appeals held that drug offenses were no longer a special category; they were to be treated as all other offenses in resolving the question of jurisdiction. More recently, the Court of Military Appeals has decided that since drugs have such a significant effect on military preparedness, almost every involvement of service personnel with drugs is service connected and subject to prosecution by the military. It is to be noted that this is not an absolute rule and in unusual circumstances, such as use of marijuana while on a lengthy leave away from the military community or sale of user amounts only to civilians, there may not be service connection. Ultimately, in deciding whether there is service connection in a particular case, advice should be sought from a NLSO, law center or staff judge advocate.

CHAPTER X.

THE SUMMARY COURT-MARTIAL

INTRODUCTION. A summary court-martial is the least formal of the three types of courts-martial and the least protective of individual rights. The summary court-martial is a streamlined trial process involving only one officer who theoretically performs the prosecutorial, defense counsel, judicial, and member functions. The purpose of this type of court-martial is to dispose promptly of relatively minor offenses. The one officer assigned to perform the various roles incumbent on the summary court-martial 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 summary court-martial is a streamlined procedure providing somewhat less protection for the rights of the parties than other forms of court-martial, the maximum imposable punishment is very limited. Furthermore, it may try only enlisted personnel who consent to be tried by summary court-martial.

As the summary court-martial 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 truly adversary proceeding. The United States Supreme Court examined the summary court-martial procedure in Middendorf v. Henry, 425 U.S. 25 (1976). Holding that an accused at summary court-martial 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.

CREATION OF THE SUMMARY COURT-MARTIAL

A. Authority to convene. A summary court-martial is convened (created) by an individual authorized by law to convene summary courts-martial. Article 24, UCMJ, R.C.M. 1302a, MCM, 1984, and JAGMAN, § 0115 indicate those persons who have the power to convene a summary court-martial. Commanding officers authorized to convene general or special courts-martial are also empowered to convene summary courts-martial. Thus, the commanding officer of a naval vessel, base, or station, all commanders and commanding officers of Navy units or activities, commanding officers of Marine Corps battalions, regiments, aircraft squadrons, air groups, barracks, etc., have this authority.

The authority to convene summary courts-martial is vested in the office of the authorized command and not in the person of its commander. Thus, Captain Jones, U.S. Navy, has summary court-martial 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 summary courts-martial 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 summary courts-martial 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 summary courts-martial may request such authority by following the procedures contained in JAGMAN, § 0115b.

B. Restrictions on authority to convene. Unlike the authority to impose nonjudicial punishment, the power to convene summary and special courts-martial may be restricted by a competent superior commander. JAGMAN, § 0116a(1). Further, the commander of a unit which is attached to a naval vessel for duty therein should, as a matter of policy, refrain from exercising his summary or special court-martial convening powers and should refer such cases to the commanding officer of the ship for disposition. JAGMAN, § 0116b. This policy does not apply to commanders of units which are embarked for transportation only. Finally, JAGMAN, § 0116d requires that the permission of the officer exercising general court-martial jurisdiction over the command be obtained before imposing nonjudicial punishment or referring a case to summary court-martial 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, § 0116d(4).

It is important to note that even if the convening authority or the summary court-martial officer is the accuser, the jurisdiction of the summary court-martial 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), MCM, 1984 [hereinafter cited as R.C.M. _____].

C. Mechanics of convening. Before any case can be brought before a summary court-martial, the court must be properly convened (created). It is created by the order of the convening authority detailing the summary court-martial officer to the court. R.C.M. 504(d)(2) requires that the convening order specify that it is a summary court-martial and designate the summary court-martial 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, § 0121 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 summary court-martial by a notation on the charge sheet signed by the convening authority, the better practice is to use a separate convening order for this purpose. Appendix 6b of the Manual for Courts-Martial, 1984, contains a suggested format for the summary court-martial 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 summary court-martial officer. The issuance of such an order creates the summary court-martial which can then dispose of any cases referred to it. Confusion can be avoided by maintaining a standing summary court-martial convening order to insure that a court-martial exists before a case is referred to it. The basic rule is that a court-martial must be created first and only then may a case be referred to that court.

D. Summary court-martial officer. A summary court-martial 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 summary court-martial 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 summary court-martial. When the convening authority is the only commissioned officer in the unit, however, he may serve as summary court-martial 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 summary court-martial officer from outside the command, as the summary court-martial officer need not be from the same command as the accused.

The summary court-martial 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).

E. Jurisdictional limitations: persons. Article 20, UCMJ, and R.C.M. 1301(c) provide that a summary court-martial has the power (jurisdiction) to try only those enlisted persons who consent to trial by summary court-martial. The right of an enlisted accused to refuse trial by summary court-martial is absolute and is not related to any corresponding right at nonjudicial punishment. No commissioned officer, warrant officer, cadet, aviation cadet and midshipman, or person not subject to the UCMJ (Article 2, UCMJ) may be tried by summary court-martial. The forms at pages 10-16 to 10-18, infra, may be used to document the accused's election regarding his right to refuse trial by summary court-martial.

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.

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

An offense also must be "service connected"; otherwise, the court-martial lacks jurisdiction over the offense. See Chapter IX, supra.

In 1977, the United States Court of Military Appeals ruled that the jurisdiction of summary courts-martial 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 summary courts-martial 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 1984

SUMMARY COURT-MARTIAL CONVENING ORDER 1-84

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

Able B. Seweed

ABLE B. SEEWEED
Commander, U. S. Navy
Commanding Officer, USS FOX
FPO New York, 09501

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

REFERRAL TO SUMMARY COURT-MARTIAL

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

B. Preliminary inquiry. Every court-martial case begins with either a complaint by someone that a person subject to the UCMJ has committed an offense or some inquiry which results in the discovery of misconduct. See Chapter VI, supra. In any event, R.C.M. 303 imposes upon the officer exercising immediate nonjudicial punishment (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.

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

1. Personal data. Block I of page 1 of the charge sheet should first be completed. The information relating to personal data can be found in pertinent portions of the accused's service record, the preliminary inquiry, or other administrative records.

2. The charges. Block II of page 1 of the charge sheet is then completed to indicate the precise misconduct involved in the case. Each punitive article found in Part IV, MCM, 1984, contains sample specifications. A detailed treatment of pleading offenses is contained in the criminal law portion of the course.

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

4. Oath. The oath must be administered to the accuser and the affidavit so indicating must be executed by a person with proper authority. Article 136, UCMJ, authorizes commissioned officers who are judge advocates, staff judge advocates, legal officers, law specialists, summary courts-martial, adjutants, and Marine Corps and Navy commanding officers, among others, to administer oaths for this purpose. JAGMAN, § 2502a(3)

further authorizes officers certified by the Judge Advocate General of the Navy as counsel under Article 27, UCMJ, all officers in pay grade O-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. For example:

III. PREFERRAL

11a. NAME OF ACCUSER (Last, First, MI)	b. GRADE	c. ORGANIZATION OF ACCUSER
HOOVER, Jay E.	PN1	USS FOX (DD-983)

d. SIGNATURE OF ACCUSER: Jay E. Hoover — e. DATE: 5 July 1984

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 5th day of July, 19 84, 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.

John MITCHELL	USS FOX (DD-983)
Typed Name of Officer	*Organization of Officer*
Lieutenant	Legal Officer
Grade	*Official Capacity to Administer Oath (See R.C.M. 307(b)—must be commissioned officer)*

John MitChell
Signature

DD FORM 458 AUG — EDITION OF OCT 80 IS OBSOLETE. — S/N 0102-LF-008-4002

D. Informing the accused. Once formal charges have been signed and sworn to, the preferral process is completed when the charges are submitted to the accused's immediate commanding officer. Normally, the legal officer or discipline officer will actually receive these charges and, indeed, may have drafted them. Often in the Navy, the accused's immediate commanding officer for Article 15, UCMJ, purposes is also the summary court-martial 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 summary court-martial 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 summary court-martial.

Assuming that the legal/discipline officer of the summary court-martial convening authority has the formal charges and the preliminary inquiry report, the first step which must be taken is to inform the accused of the charges against him. The purpose of this requirement is to provide an accused with reasonable notice of impending criminal prosecution in compliance with criminal due process of law standards. R.C.M. 308 requires the immediate commander of the accused to have the accused informed as soon as practicable of the charges preferred against him, the name of the person who preferred them, and the person who ordered them to be preferred.

The important aspect of this requirement is that notice must be given from official sources. The accused should appear before the immediate commander or other designated person giving notice and should be told of the existence of formal charges, the general nature of the charges, and the name of the person who signed the charges as accuser. A copy of the charges can also be given to the accused, although not required by law at this time. No attempt should be made to interrogate the accused. After notice has been given, the person who gave notice to the accused will

execute item 12 at the top of page 2 of the charge sheet. If not the immediate commander of the accused, the person signing on the "signature" line should state their rank, component, and authority. The law does not require a formal hearing to provide notice to the accused but the charge sheet must indicate that notice has been given. A failure to properly record the notice to the accused will not necessarily void subsequent processing steps or trial, but care should be taken to avoid such possibilities. For example:

12

On 5 July 19 84, the accused was informed of the charges against him and of the name of the accuser known to me. (See R.C.M. 308(a)) (See R.C.M. 308 if notification cannot be made.)

Able B. Seaweed — USS FOX (DD-983)
Typed Name of Immediate Commander — Organization of Immediate Commander

Commander, USN
Grade

M B Jenks — M.B. Jenks, LN1, USN By direction
Signature

E. 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 summary court-martial 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 summary court-martial 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, the USS Brownson, on 1 October 1982. 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 summary court-martial jurisdiction by 2400, 30 September 1984, article 43 prohibits trial for that offense unless the accused knowingly agrees to be tried notwithstanding the bar.

Periods of time during which the accused was in the hands of the enemy, in the hands of civilian authorities for reasons relating to civilian matters, or absent without authority in territory where the United States could not apprehend him do not count in computing the limitations set forth in Article 43, UCMJ. Thus, the receipt certification is extremely important and must be completed in exacting detail to preserve the right to prosecute the accused.

Where the accused is absent without leave at the time charges are sworn, it is permissible and proper to execute the receipt certification even though the accused has not been advised of the existence of the charges. In such cases, a statement indicating the reason for the lack of notice should be attached to the case file. When the accused returns to military control, notice should then be given to him. The receipt certification need not be executed personally by the summary court-martial convening authority and is often completed for him by the legal officer, discipline officer, or adjutant. For example:

13.

The sworn charges were received at 1300 hours, 5 July 19 84 at
Designation of Command or

COMMANDING OFFICER, USS FOX (DD-983)
Officer Exercising Summary Court-Martial Jurisdiction (See R.C.M. 403)

FOR THE[1] Commanding Officer

Johnny Mitchell
Typed Name of Officer

Legal Officer
Official Capacity of Officer Signing

Lieutenant, U. S. Navy
Grade

Johnny A. Mitchell
Signature

F. The act of referral. Once the charge sheet and supporting materials are presented to the summary court-martial convening authority and he makes his decision to refer the case to a summary court-martial, he must send the case to one of the summary courts-martial 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 1-82 dated 15 January 1982." This language precisely identifies a particular kind of court-martial and the particular summary court-martial 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 summary court-martial officer. For example:

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY	b. PLACE	c. DATE
USS FOX (DD-983)	At Sea	5 July 1984

Referred for trial to the summary court-martial convened by my summary court-martial convening order number 1-84

dated 1 July 19 84, subject to the following instructions:[2] none.

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

By XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
Command or Order

Able B. Seaweed
Typed Name of Officer

Commanding Officer
Official Capacity of Officer Signing

Commander, U.S. Navy
Grade

Able B. Seaweed
Signature

PRETRIAL PREPARATION

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

B. Preliminary preparation. Upon receipt of the charges and accompanying papers, the summary court-martial 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 summary court-martial 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 summary court-martial 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 summary court-martial officer should continue his examination of the charge sheet to determine the correctness and completeness of the information on pages 1 and 2 thereof:

1. The accused's name, social security number, rate, unit, and pay grade;

2. pay per month;

3. initial date and term of current service;

4. data as to restraint, including the correct type and duration of pretrial restraint;

5. signature, rank or rate, and armed force of the accuser;

6. signature and authority of the officer who administered the oath to the accuser;

7. date of receipt of sworn charges by the officer exercising summary court-martial jurisdiction (important as it stops the running of the statute of limitations);

8. block V, referring charge(s) to a specific summary court-martial for trial (compare with convening order to ensure proper referral); and

9. the charge(s) and specification(s). Check for proper form and determine the elements of the offense. "Elements" are facts which must be proved in order to convict the accused of an offense. Part IV, MCM, 1984, contains some guidance in this respect, but for more detailed guidance consult the Military Judge's Benchbook, DA Pam. 27-9. The summary court-martial 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.

C. Pretrial conference with accused. After initial review of the court-martial file, the summary court-martial 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 summary court-martial officer should follow the suggested guide found in appendix 9, MCM, 1984, and should document the fact that all applicable rights were explained to the accused by completing blocks 1, 2 and 3 of the form for the record of trial by summary court-martial found at appendix 15, MCM, 1984. Both forms are also included at the end of this chapter.

1. Purpose. The purpose of the pretrial conference is to provide the accused with information concerning the nature of the court-martial, the procedure to be used, and his 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 summary court-martial 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.

2. Advice to accused — rights. R.C.M. 1304(b) requires the summary court-martial to advise the accused of the following matters:

a. That the officer has been detailed by the convening authority to conduct a summary court-martial;

b. that the convening authority has referred certain charge(s) and specification(s) to the summary court for trial. (The summary court-martial 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. For example:

10.

On 8 July , 19 84 , I (caused to be) served a copy hereof on (the) the above named accused.

John H. Smith. — Typed Name of Trial Counsel

LT. USN — Grade or Rank of Trial Counsel

John H. Smith — 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.

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

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

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

The accused should then be advised that he has the following legal rights:

(1) The right to refuse trial by summary court-martial;

(2) 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;

(3) the right to cross-examine all witnesses called to testify against him or to have the summary court-martial officer ask a witness questions desired by the accused;

(4) the right to call witnesses and produce any competent evidence in his own behalf and that the summary court-martial officer will assist the accused in securing defense witnesses or other evidence which the accused wishes presented at trial;

(5) 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;

(6) rights concerning representation by counsel (see subparagraph 3 below);

(7) that if the accused refuses summary court-martial the convening authority may take steps to dismiss the case or refer it to trial by special or general court-martial;

(8) 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

(9) the maximum punishment which the summary court-martial could adjudge if the accused is found guilty of the offense(s) charged.

(a) E-4 and below. The jurisdictional maximum sentence which a summary court-martial may adjudge in the case of an accused who, at the time of trial, is in paygrade E-4 or below extends to reduction to the lowest paygrade (E-1); forfeiture of two-thirds of

one-month's pay [convening authority may apportion collection over three months; JAGMAN, § 0145a(4)] or a fine not to exceed two-thirds of one month's pay; confinement at hard labor not to exceed one month; hard labor without confinement for forty-five days (in lieu of confinement at hard labor); and restriction to specified limits for two months. Also, if the accused is attached to or embarked in a vessel and is in paygrade E-3 or below, he may be sentenced to serve 3 days confinement on bread and water/diminished rations and 24 days confinement at hard labor in lieu of 30 days confinement at hard labor. R.C.M. 1301(d)(1), MCM, 1984.

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

(b) E-5 and above. The jurisdictional maximum which a summary court-martial could impose in the case of an accused who, at the time of trial, is in pay grade E-5 or above extends to reduction to the next inferior pay grade, 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 summary court-martial an E-5 cannot be sentenced to confinement at hard labor 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).

3. Advice to accused regarding counsel

a. 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).

b. The Supreme Court in Middendorf v. Henry, 425 U.S. 25, 96 S.Ct. 1281, 47 L.Ed.2d 556 (1976), held that a summary court-martial 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 summary court-martial 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.

c. 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 summary court-martial.

d. While the Manual for Courts-Martial, 1984 created no statutory right to detailed military defense counsel at a summary court-martial, the convening authority may still permit the presence of

such counsel if the accused is able to obtain such counsel. The MCM, 1984 has created a limited right to civilian defense counsel at summary court-martial, however. R.C.M. 1301(e) now provides that the accused has a right to hire a civilian lawyer and have that lawyer appear at trial, if such appearance will not unnecessarily delay the proceedings and if military exigencies do not preclude it. The accused must, however, bear the expense involved. If the accused wishes to retain civilian counsel, the summary court-martial officer should allow him a reasonable time to do so.

e. Booker warnings

(1) Although holding that an accused had no right to counsel at a summary court-martial, the C.M.R. ruled in Booker, supra, that if an accused was not given an opportunity to consult with independent counsel before accepting a summary court-martial, the summary court-martial will be inadmissible at a subsequent trial by court-martial. The term "independent counsel" has been interpreted to mean a lawyer qualified in the sense of Article 27(b), UCMJ, who, in the course of regular duties, does not act as the principle legal advisor to the convening authority. (Note that these provisions mirror the provisions with respect to the right to consult with counsel prior to NJP). See Chapter VIII, supra.

(2) 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:

(a) The accused was advised of his right to confer with counsel prior to deciding to accept trial by summary court-martial;

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

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

(3) If an accused has been properly advised of his right to consult with counsel and to refuse trial by summary court-martial, as well as the legal ramifications of these decisions, his elections and/or waivers in this regard should be made in writing and should be signed by the accused. Recordation of the advice/waiver should be made on page 13 (Navy) or page 11 (Marine Corps) of the accused's service record with a copy attached to the record of trial. The forms found at pages 10-16 to 10-18, infra., may be utilized to comply with the requirements of United States v. Booker, supra. The "Acknowledgement of Rights and Waiver," properly completed, contains all the necessary advice to an accused, and properly executed will establish a voluntary, knowing, and intelligent waiver of the accused's right to consult with counsel and/or his right to refuse trial by summary court-martial. The "Waiver of Right to Counsel" may be used to establish a voluntary, knowing, and intelligent waiver of counsel at a summary court-martial. Should the accused elect to waive his rights but refuse to sign these forms, this fact should be recorded on page 13 of the service record with a copy attached to the record of trial.

(4) Assuming that the requirements of Booker have been complied with (proper advice and recordation of election/waivers), evidence of the prior summary court-martial will be admissible at a later trial by court-martial as evidence of the character of the accused's prior service pursuant to R.C.M. 1001(b)(2). Unless the accused was actually represented by counsel at his summary court-martial or affirmatively rejected an offer to provide counsel, however, the summary court-martial would not be considered a "criminal conviction" and would not be admissible as a prior conviction under R.C.M. 1001(b)(3), nor for purposes of impeachment under Mil.R.Evid. 609, MCM, 1984. See United States v. Booker, 3 M.J. 443, 448 (C.M.A. 1977). See also United States v. Rivera, 6 M.J. 535 (N.C.M.R. 1978); United States v. Kuehl, 9 M.J. 850 (N.C.M.R. 1980); United States v. Cofield, 11 M.J. 422 (C.M.A. 1981). While these cases would seem to allow a prior summary court-martial's use as a "conviction" to trigger the increased punishment provisions of R.C.M. 1003(d) if the accused had been actually represented by counsel or had rejected the services of counsel provided to him, the discussion following R.C.M. 1003(d) opines that convictions by summary court-martial may not be used for this purpose. As the discussion and analysis sections of MCM, 1984 have no binding effect and represent only the drafters' opinions, this issue remains unresolved.

SUMMARY COURT-MARTIAL
ACKNOWLEDGMENT OF RIGHTS AND WAIVER

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

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

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

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

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

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

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

   e. the right to be represented at trial by a civilian lawyer provided by me at my own expense.

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 at hard labor 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 at hard labor for _____ months;

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

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

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

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

_____
Signature of accused and date

_____
Signature of witness and date

WAIVER OF RIGHT TO COUNSEL

SUMMARY COURT-MARTIAL

I have been advised by the summary court-martial officer that I cannot be tried by summary court-martial without my consent. I have also been advised that if I consent to trial by summary court-martial I may be represented by civilian counsel provided at my own expense. If I do not desire to be represented by civilian counsel provided at my own expense, a military lawyer may be appointed to represent me upon my request and, if such appearance will not unreasonably delay the proceedings and if military exigencies do not preclude it. It has also been explained to me that if I am represented by a lawyer (either civilian or military) at the summary court-martial, or if I waive (give up) the right to be represented by a lawyer, the summary court-martial will be considered a criminal conviction and will be admissible as such at any subsequent court-martial. On the other hand, if I request a military lawyer to represent me and a military lawyer is not available to represent me, or is not provided, and I am not represented by a civilian lawyer, the results of the court-martial will not be admissible as a prior conviction at any subsequent court-martial. I further understand that the maximum punishment which can be imposed in my case will be the same whether or not I am represented by a lawyer. Understanding all of this, I consent to trial by summary court-martial and I waive (give up) my right to be represented by a lawyer at the trial.

_____
Signature of Summary Court-Martial

_____
Signature of Accused

_____
Date

_____
Typed Name, Rank, Social Security Number of Accused

D. Final pretrial preparation

1. Gather defense evidence. At the conclusion of the pretrial interview, the summary court-martial officer should determine whether the accused has decided to accept or refuse trial by summary court-martial. If more time is required for the accused to decide, it should be provided. The summary court-martial 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 summary court-martial 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 summary court-martial 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 summary court-martial 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 summary court-martial and must be followed.

2. Subpoena of witnesses. The summary court-martial 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 summary court-martial officer will follow the same procedure detailed for a special or general court-martial trial counsel in R.C.M. 703(c) and JAGMAN, § 0137. Appendix 7 of the Manual for Courts-Martial, 1984, contains an illustration of a completed subpoena while JAGMAN, § 0137 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.

TRIAL PROCEDURE. Appendix II at page 10-22, infra, is a summary court-martial guide reproduced from app. 9, MCM, 1984.

POST-TRIAL RESPONSIBILITIES OF THE SUMMARY COURT-MARTIAL

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

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

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

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

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

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

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

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

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

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

a. 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

b. the right to request review of any final conviction by summary court-martial by the Judge Advocate General in accordance with R.C.M. 1201(b)(3);

3. 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)];

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

5. prepare the record of trial in accordance with R.C.M. 1305, using the form in appendix 15, MCM, 1984, and reproduced at page 10-21, infra;

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

7. 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 summary courts-martial are discussed in chapter XIV, infra.

RECORD OF TRIAL BY SUMMARY COURT-MARTIAL

1a. NAME OF ACCUSED (Last, First, MI)	b. GRADE OR RANK	c. UNIT OR ORGANIZATION OF ACCUSED	d. SSN

2a. NAME OF CONVENING AUTHORITY (Last, First, MI)	b. RANK	c. POSITION	d. ORGANIZATION OF CONVENING AUTHORITY

3a. NAME OF SUMMARY COURT-MARTIAL (If SCM was accuser, so state.)	b. RANK	c. UNIT OR ORGANIZATION OF SUMMARY COURT-MARTIAL

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

6. At the trial proceeding held on _____ 19, _____, the accused, after being given a reasonable time to decide, ☐ did ☐ did not object to trial by summary court-martial.

(Note: The SCM may ask the accused to initial this entry at the time the election is made.) _____ *(Initial)*

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

b. NAME OF COUNSEL (Last, First, MI)	c. RANK (If any)

d. COUNSEL QUALIFICATIONS

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

CHARGE(S) AND SPECIFICATION(S)	PLEA(S)	FINDINGS *(Including any exceptions and substitutions)*

9. The following sentence was adjudged:

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

☐ YES ☐ NO

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

☐ YES ☐ NO

12. AUTHENTICATION

Signature of Summary Court-Martial *Date*

13. ACTION BY CONVENING AUTHORITY

Typed Name of Convening Authority *Position of Convening Authority*

Rank

Signature of Convening Authority *Date*

DD Form 2329 Reverse, 84 AUG

Appendix I(2)

APPENDIX 9

GUIDE FOR SUMMARY COURTS-MARTIAL

[General Note to SCM: It is not the purpose of this guide to answer all questions which may arise during a trial. When this guide, chapter 13 of the Rules for Courts-Martial, and other legal materials available fail to provide sufficient information concerning law or procedure, the summary court-martial should seek advice on these matters from a judge advocate. *See* R.C.M. 1301(b). If the accused has obtained, or wishes to obtain, defense counsel, *see* R.C.M. 1301(e). The SCM should examine the format for record of trial at appendix 15. It may be useful as a checklist during the proceedings to ensure proper preparation after trial. The SCM should become familiar with this guide before using it. Instructions for the SCM are contained in brackets, and should not be read aloud. Language in parentheses reflects optional or alternative language. The SCM should read the appropriate language aloud.]

Preliminary Proceeding

Identity of SCM

SCM: I am _____. I have been detailed to conduct a summary court-martial (by Summary Court-Martial Convening Order (Number _____), Headquarters, _____, dated [see convening order]).

Referral of charges to trial

Charges against you have been referred to me for trial by summary court-martial by ([*name and title of convening authority*]) on ([*date of referral*]) [see block IV on page 2 of charge sheet].

[Note 1. Hand copy of charge sheet to the accused.]

Providing the accused with charge sheet

I suggest that you keep this copy of the charge sheet and refer to it during the trial. The charges are signed by [see first name at top of page 2 of charge sheet], a person subject to the Uniform Code of Military Justice, as accuser, and are properly sworn to before a commissioned officer of the armed forces authorized to administer oaths. (_____ ordered the charges to be preferred.) The charges allege, in general, violation of Article _____, in that you _____ (and Article _____, in that you _____). I am now going to tell you about certain rights you have in this trial. You should carefully consider each explanation because you will soon have to decide whether to object to trial by summary court-martial. Until I have completed my explanation, do not say anything except to answer the specific questions which I ask you. Do you understand that?

ACC: _____.

Duties of SCM

SCM: As summary court-martial it is my duty to obtain and examine all the evidence concerning any offense(s) to which you plead not guilty, and to thoroughly and impartially inquire into both sides of the matter. I will call witnesses for the prosecution and question them, and I will help you in cross-examining those witnesses. I will help you obtain evidence and present the defense. This means that one of my duties is to help you present your side of the case. You may also represent yourself, and if you do, it is my duty to help you. You are presumed to be innocent until your guilt has been proved by legal and competent evidence beyond a reasonable doubt. If you are found guilty of an offense, it is also my duty to consider matters which might affect the sentence, and then to adjudge an appropriate sentence. Do you understand that?

ACC: _____.

Right to object to SCM

SCM: You have the absolute right to object to trial by summary court-martial. If you object the appropriate authority will decide how to dispose of the case. The charges may be referred to a special or general court-martial, or they may be dismissed, or the offenses charged may be disposed of by (nonjudicial punishment [if not previously offered and refused] or) administrative measures. [*See* R.C.M. 306.] Do you understand that?

ACC: _____.

Right to inspect allied papers and personnel records

SCM: You may inspect the allied papers and personnel records. [Hand those documents which are available to the accused for examination in your presence.] (You may also inpsect [*identify personnel records or other documents which are not present*] which are located at _____. You may have time to examine these if you wish.)

Witnesses/other evidence for the government

SCM: The following witnesses will probably appear and testify against you: _____. The following documents and physical evidence will probably be introduced: _____.

Right to cross-examine

After these witnesses have testified in response to my questions, you may cross-examine them. If you prefer, I will do this for you after you inform me of the matters about which you want the witness to be questioned. Do you understand that?

ACC: _____.

Right to present evidence

SCM: You also have the right to call witnesses and present other evidence. This evidence may concern any or all of the charges. (I have arranged to have the following witnesses for you present at the trial.) I will arrange for the attendance of other witnesses and the production of other evidence requested by you. I will help you in any way possible. Do you understand that?

ACC: _____.

Evidence to be considered

SCM: In deciding this case, I will consider only evidence introduced during the trial. I will not consider any other information, including any statements you have made to me, which is not introduced in accordance with the Military Rules of Evidence during the court-martial. Do you understand that?

ACC: _____.

Right to remain silent

SCM: You have the absolute right during this trial to choose not to testify and to say nothing at all about the offense(s) with which you are charged. If you do not testify, I will not hold it against you in any way. I will not consider it as an admission that you are guilty. If you remain silent, I am not permitted to question you about the offense(s).

Right to testify concerning the offense(s)

However, if you choose, you may be sworn and testify as a witness concerning the offense(s) charged against you. If you do that, I will consider your testimony just like the testimony of any other witness.

[Note 2. Use the following if there is only one specification.]

If one specification

If you decide to testify concerning the offense, you can be questioned by me about the whole subject of the offense. Do you understand that?

ACC: _____.

[Note 3. Use the following if there is more than one specification.]

If more than one specification

SCM: If you decide to testify, you may limit your testimony to any particular offense charged against you and not testify concerning any other offense(s) charged against you. If you do this, I may question you about the whole subject of the offense about which you testify, but I may not question you about any offense(s) concerning which you do not testify. Do you understand that?

ACC: _____.

Right to testify, remain silent or make an unsworn statement in extenuation and mitigation

SCM: In addition, if you are found guilty of an offense, you will have the right to testify under oath concerning matters regarding an appropriate sentence. You may, however, remain silent, and I will not hold your silence against you in any way. You may, if you wish, make an unsworn statement about such matters. This statement may be oral, in writing, or both. If you testify, I may cross-examine you. If you make an unsworn statement, however, I am not permitted to question you about it, but I may receive evidence to contradict anything contained in the statement. Do you understand that?

ACC: _____.

Maximum punishment

SCM: If I find you guilty (of the offense) (of any of the offenses charged), the maximum sentence which I am authorized to impose is:

[Note 4. For an accused of a pay grade of E-4 or below, proceed as follows.]

E-4 and below

(1) reduction to lowest enlisted pay grade; and
(2) forfeiture of two-thirds of 1 month's pay; and
(3) confinement for 1 month (or, [if the accused is attached to or embarked in a vessel] to confinement on bread and water or diminished rations for 3 days and confinement for 24 days).

[Note 5. For an accused of a pay grade above E-4, proceed as follows.]

E-5 and above

(1) reduction to the next inferior pay grade; and
(2) forfeiture of two-thirds of 1 month's pay; and
(3) restriction to specified limits for 2 months.

SCM: Do you understand the maximum punishment which this court-martial is authorized to adjudge?

ACC: _____.

Plea options

SCM: You may plead not guilty or guilty to each offense with which you are charged. You have an absolute right to plead not guilty and to require that your guilt be proved beyond a reasonable doubt before you can be found guilty. You have the right to plead not guilty even if you believe you are guilty. Do you understand that?

ACC: _____.

SCM: If you believe you are guilty of an offense, you may, but are not required to, plead guilty to that offense. If you plead guilty to an offense, you are admitting that you committed that offense, and this court-martial could find you guilty of that offense without hearing any evidence, and could sentence you to the maximum penalty I explained to you before. Do you understand that?

ACC: _____.

Lesser included offenses

SCM: [Examine the list of lesser included offenses under each punitive article alleged to have been violated. See Part IV. If a lesser included offense may be in issue, give the following advice.] You may plead not guilty to Charge _____, Specification _____, as it now reads, but plead guilty to the offense of _____, which is included in the offense charged. Of course, you are not required to do this. If you do, then I can find you guilty of this lesser offense without hearing evidence on it. Furthermore, I could still hear evidence on the greater offense for purposes of deciding whether you are guilty of it. Do you understand that?

ACC: _____.

SCM: Do you need more time to consider whether to object to trial by summary court-martial or to prepare for trial?

ACC: _____.

SCM: [If time is requested or otherwise appropriate.] We will convene the court-martial at _____. When we convene, I will ask you whether you object to trial by summary court-martial. If you do not object, I will then ask for your pleas to the charge(s) and specification(s), and for you to make any motions you may have.

Trial Proceedings

Convene

SCM: This summary court-martial is now in session.

Objection/consent to trial by SCM

SCM: Do you object to trial by summary court-martial?

ACC: _____.

Entries on record of trial

[Note 6. If there is an objection, adjourn the court-martial and return the file to the convening authority. If the accused does not object, proceed as follows. The accused may be asked to initial the notation on the record of trial that the accused did or did not object to trial by summary court-martial. This is not required, however.]

Readings of the charges

SCM: Look at the charge sheet. Have you read the charge(s) and specification(s)?

ACC: _____.

SCM: Do you want me to read them to you?

ACC: _____.

[If accused requests, read the charge(s) and specification(s).]

Arraignment

SCM: How do you plead? Before you answer that question, if you have any motion to dismiss (the) (any) charge or specification, or for other relief, you should make it now.

ACC: _____.

Motions

[Note 7. If the accused makes a motion to dismiss or to grant other relief, or such a motion is raised by the summary court-martial, do not proceed with the trial until the motions have been decided. *See* R.C.M. 905–907, and R.C.M. 1304(b)(2)(c). After any motions have been disposed of and if termination of the trial has not resulted, have the accused enter pleas and proceed as indicated below.]

Pleas

ACC: I plead: _____.

[Note 8. If the accused refuses to plead to any offense charged, enter pleas of not guilty. If the accused refuses to enter any plea, evidence must be presented to establish that the accused is the person named in the specification(s) and is subject to court-martial jurisdiction. *See* R.C.M. 202, 1301(c).]

[Note 9. If the accused pleads not guilty to all offenses charged, proceed to the section entitled "Procedures-Not Guilty Pleas."]

[Note 10. If the accused pleads guilty to one or more offenses, proceed as follows.]

Procedures-guilty pleas

SCM: I will now explain the meaning and effect of your pleas, and question you so that I can be sure you understand. Refer to the charge(s) and specification(s). I will not accept your pleas of guilty unless you understand their meaning and effect. You are legally and morally entitled to plead not guilty even though you believe you are guilty, and to require that your guilt be proved beyond a reasonable doubt. A plea of guilty is the strongest form of proof known to the law. On your pleas of guilty alone, without receiving any evidence, I can find you guilty of the offense(s) to which you have pleaded guilty. I will not accept your pleas unless you realize that by your pleas you admit every element of the offense(s) to which you have pleaded guilty, and that you are pleading guilty because you really are guilty. If you are not convinced that you are in fact guilty, you should not allow anything to influence you to plead guilty. Do you understand that?

ACC: _____.

SCM: Do you have any questions?

ACC: _____.

SCM: By your pleas of guilty you give up three very important rights. (You keep these rights with respect to any offense(s) to which you have pleaded not guilty.) The rights which you give up when you plead guilty are:

First, the right against self-incrimination. This means you give up the right to say nothing at all about (this) (these) offense(s) to which you have pleaded guilty. In a few minutes I will ask you questions about (this) (these) offense(s), and you will have to answer my questions for me to accept your pleas of guilty.

Second, the right to a trial of the facts by this court-martial. This means you give up the right to have me decide whether you are guilty based upon the evidence which would be presented.

Third, the right to be confronted by and to cross-examine any witnesses against you. This means you give up the right to have any witnesses against you appear, be sworn and testify, and to cross-examine them under oath.
Do you understand these rights?

ACC: _____.

SCM: Do you understand that by pleading guilty you give up these rights?

ACC: _____.

SCM: On your pleas of guilty alone you could be sentenced to _____ _____.

[Note 11. Re-read the appropriate sentencing section at notes 4 or 5 above unless the summary court-martial is a rehearing or new or other trial, in which case *see* R.C.M. 810(d).]

Do you have any questions about the sentence which could be imposed as a result of your pleas of guilty?

ACC: _____.

SCM: Has anyone made any threat or tried in any other way to force you to plead guilty?

ACC: _____.

Pretrial agreement

SCM: Are you pleading guilty because of any promises or understandings between you and the convening authority or anyone else?

ACC: _____.

[Note 12. If the accused answers yes, the summary court-martial must inquire into the terms of such promises or understandings in accordance with R.C.M. 910. *See* Appendix 8, Note 35 through acceptance of plea.]

[Note 13. If the accused has pleaded guilty to a lesser included offense, also ask the following question.]

Effect of guilty pleas to lesser included offenses

SCM: Do you understand that your pleas of guilty to the lesser included offense of _____ confess all the elements of the offense charged except _____, and that no proof is necessary to establish those elements admitted by your pleas?

ACC: _____.

SCM: The following elements state what would have to be proved beyond a reasonable doubt before the court-martial could find you guilty if you had pleaded not guilty. As I read each of these elements to you, ask yourself whether each is true and whether you want to admit that each is true, and then be prepared to discuss each of these elements with me when I have finished.

The elements of the offense(s) which your pleas of guilty admit are _____.

[Note 14. Read the elements of the offense(s) from the appropriate punitive article in Part IV. This advice should be specific as to names, dates, places, amounts, and acts.]

Do you understand each of the elements of the offense(s)?

ACC: _____.

SCM: Do you believe, and admit, that taken together these elements correctly describe what you did?

ACC: _____.

[Note 15. The summary court-martial should now question the accused about the circumstances of the offense(s) to which the accused has pleaded guilty. The accused will be placed under oath for this purpose. See oath below. The purpose of these questions is to develop the circumstances in the accused's own words, so that the summary court-martial may determine whether each element of the offense(s) is established.]

Oath to accused for guilty plea inquiry

SCM: Do you (swear) (affirm) that the statements you are about to make shall be the truth, the whole truth, and nothing but the truth (so help you God)?

ACC: _____.

SCM: Do you have any questions about the meaning and effect of your pleas of guilty?

ACC: _____.

SCM: Do you believe that you understand the meaning and effect of your pleas of guilty?

ACC: _____.

Determination of providence of pleas of guilty

[Note 16. Pleas of guilty may not be accepted unless the summary court-martial finds that they are made voluntarily and with understanding of their meaning and effect, and that the accused has knowingly, intelligently, and consciously waived the rights against self-incrimination, to a trial of the facts by a court-martial, and to be confronted by the witnesses. Pleas of guilty may be improvident when the accused makes statements at any time during the trial which indicate that there may be a defense to the offense(s), or which are otherwise inconsistent with an admission of guilt. If the accused makes such statements and persists in them after questioning, then the summary court-martial must reject the accused's guilty pleas and enter pleas of not guilty for the accused. Turn to the section entitled "Procedures-Not Guilty Pleas" and continue as indicated. If (the) (any of the) accused's pleas of guilty are found provident, the summary court-martial should announce findings as follows.]

Acceptance of guilty pleas

SCM: I find that the pleas of guilty are made voluntarily and with understanding of their meaning and effect. I further specifically find that you have knowingly, intelligently, and consciously waived your rights against self-incrimination, to a trial of the facts by a court-martial, and to be confronted by the witnesses against you. Accordingly, I find the pleas are provident, and I accept them. However, you may ask to take back your guilty pleas at any time before the sentence is announced. If you have a sound reason for your request, I will grant it. Do you understand that?

ACC: _____.

If any not guilty pleas remain

[Note 17. If no pleas of not guilty remain, go to note 26. If the accused has changed pleas of guilty to not guilty, if the summary court-martial has entered pleas of not guilty to any charge(s) and specification(s), or if the accused has pleaded not guilty to any of the offenses or pleaded guilty to a lesser included offense, proceed as follows.]

Witnesses for the accused

SCM: If there are witnesses you would like to call to testify for you, give me the name, rank, and organization or address of each, and the reason you think they should be here, and I will arrange to have them present if their testimony would be material. Do you want to call witnesses?

ACC: _____.

[Note 18. The summary court-martial should estimate the length of the case and arrange for the attendance of witnesses. The prosecution evidence should be presented before evidence for the defense.]

Calling witnesses

SCM: I call as a witness_____.

Witness oath

SCM: [To the witness, both standing] Raise your right hand.

Do you swear (or affirm) that the evidence you shall give in the case now in hearing shall be the truth, the whole truth, and nothing but the truth (, so help you God)? [Do not use the phrase, "so help you God," if the witness prefers to affirm.]

WIT: _____.

SCM: Be seated. State your full name, rank, organization, and armed force ([or if a civilian witness] full name, address, and occupation).

WIT: _____.

[Note 19. The summary court-martial should question each witness concerning the alleged offense(s). After direct examination of each witness, the accused must be given an opportunity to cross-examine. If the accused declines to cross-examine the witness, the summary court-martial should ask any questions that it feels the accused should have asked. If cross-examination occurs, the summary court-martial may ask questions on redirect examination and the accused may ask further questions in recross-examination.]

[Note 20. After each witness has testified, instruct the witness as follows.]

SCM: Do not discuss this case with anyone except the accused, counsel, or myself until after the trial is over. Should anyone else attempt to discuss

this case with you, refuse to do so and report the attempt to me immediately. Do you understand that?

WIT: _____.

SCM: [To the witness] You are excused.

Recalling witnesses

[Note 21. Witnesses may be recalled if necessary. A witness who is recalled is still under oath and should be so reminded.]

[Note 22. After all witnesses against the accused have been called and any other evidence has been presented, the summary court-martial will announce the following.]

SCM: That completes the evidence against you. I will now consider the evidence in your favor.

Presentation of defense case

[Note 23. Witnesses for the accused should now be called to testify and other evidence should be presented. Before the defense case is terminated the summary court-martial should ask the accused if there are other matters the accused wants presented. If the accused has not testified, the summary court-martial should remind the accused of the right to testify or to remain silent.]

Closing argument

SCM: I have now heard all of the evidence. You may make an argument on this evidence before I decide whether you are guilty or not guilty.

Deliberations on findings

[Note 24. The court-martial should normally close for deliberations. If the summary court-martial decides to close, proceed as follows.]

SCM: The court-martial is closed so that I may review the evidence. Wait outside the courtroom until I recall you.

[Note 25. The summary court-martial should review the evidence and applicable law. It must acquit the accused unless it is convinced beyond a reasonable doubt by the evidence it has received in court in the presence of the accused that each element of the alleged offense(s) has been proved beyond a reasonable doubt. *See* R.C.M. 918. It may not consider any facts which were not admitted into evidence, such as a confession or admission of the accused which was excluded because it was taken in violation of Mil.R.Evid. 304. The summary court-martial may find the accused guilty of only the offense(s) charged, a lesser included offense, or of an offense which does not change the identity of an offense charged or a lesser included offense thereof.]

Announcing the findings

[Note 26. The summary court-martial should recall the accused, who will stand before the court-martial when findings are announced. All findings including any findings of guilty resulting from guilty pleas, should be announced at this time. The following forms should be used in announcing findings.]

Not guilty of all offenses

SCM: I find you of (the) (all) Charge(s) and Specification(s): Not Guilty.

Guilty of all offenses

I find you of (the) (all) Charge(s) and Specification(s): Guilty.

Guilty of some but not all offenses

I find you of (the) Specification (_____) of (the) Charge (_____): Not Guilty; of (the) Specification (_____) of (the) Charge (_____): Guilty; of (the) Charge (_____): Guilty.

Guilty of lesser included offense or with exceptions and substitutions

I find you of (the Specification (_____) of (the) Charge (_____): Guilty, except the words _____ and _____; (substituting therefor, respectively, the words _____ and _____;) of the excepted words: Not Guilty; (of the substituted words: Guilty;) of the Charge: (Guilty) (Not Guilty, but Guilty of a violation of Article _____, UCMJ, a lesser included offense).

Entry of findings

[Note 27. The summary court-martial shall note all findings on the record of trial.]

Procedure if total acquittal

[Note 28. If the accused has been found not guilty of all charges and specifications, adjourn the court-martial, excuse the accused, complete the record of trial, and return the charge sheet, personnel records, allied papers, and record of trial to the convening authority.]

Procedure if any findings of guilty

[Note 29. If the accused has been found guilty of any offense, proceed as follows.]

Presentence procedure

SCM: I will now receive information in order to decide on an appropriate sentence. Look at the information concerning you on the front page of the charge sheet. Is it correct?

[Note 30. If the accused alleges that any of the information is incorrect, the summary court-martial must determine whether it is correct and correct the charge sheet, if necessary.]

[Note 31. Evidence from the accused's personnel records, including evidence favorable to the accused, should now be received in accordance with R.C.M. 1001(b)(2). These records should be shown to the accused.]

SCM: Do you know any reason why I should not consider these?.

ACC: _____.

[Note 32. The summary court-martial shall resolve objections under R.C.M. 1002(b)(2) and the Military Rules of Evidence and then proceed as follows. *See also* R.C.M. 1001(b)(3), (4), and (5) concerning other evidence which may be introduced.]

Extenuation and mitigation

SCM: In addition to the information already admitted which is favorable to you, and which I will consider, you may call witnesses who are reasonably available, you may present evidence, and you may make a statement. This information may be to explain the circumstances of the offense(s), including any reasons for committing the offense(s), and to lessen the punishment for the offense(s) regardless of the circumstances. You may show particular acts of good conduct or bravery, and evidence of your reputation in the service for efficiency, fidelity, obedience, temperance, courage, or any other trait desirable in a good servicemember. You may call available witnesses or you may use letters, affidavits, certificates of military and civil officers, or other similar writings. If you introduce such matters, I may receive written evidence for the purpose of contradicting the matters you presented. If you want me to get some military records that you would otherwise be unable to obtain, give me a list of these documents. If you intend to introduce letters, affidavits, or other documents, but you do not have them, tell me so that I can help you get them. Do you understand that?

ACC: _____.

Rights of accused to testify, remain silent, and make an unsworn statement

SCM: I informed you earlier of your right to testify under oath, to remain silent, and to make an unsworn statement about these matters.

SCM: Do you understand these rights?

ACC: _____.

SCM: Do you wish to call witnesses or introduce anything in writing?

ACC: _____.

[Note 33. If the accused wants the summary court-martial to obtain evidence, arrange to have the evidence produced as soon as practicable.]

[Note 34. The summary court-martial should now receive evidence favorable to the accused. If the accused does not produce evidence, the summary court-martial may do so if there are matters favorable to the accused which should be presented.]

SCM: Do you wish to testify or make an unsworn statement?

ACC: _____.

Questions concerning pleas of guilty

[Note 35. If as a result of matters received on sentencing, including the accused's testimony or an unsworn statement, any matter is disclosed which is inconsistent with the pleas of guilty, the summary court-martial must immediately inform the accused and resolve the matter. *See* Note 16.]

Argument on sentence

SCM: You may make an argument on an appropriate sentence.

ACC: _____.

Deliberations prior to announcing sentence

[Note 36. After receiving all matters relevant to sentencing, the summary court-martial should normally close for deliberations. If the summary court-martial decides to close, proceed as follows.]

Closing the court-martial

SCM: This court-martial is closed for determination of the sentence. Wait outside the courtroom until I recall you.

[Note 37. *See* Appendix 11 concerning proper form of sentence. Once the summary court-martial has determined the sentence, it should reconvene the court-martial and announce the sentence as follows.]

Announcement of sentence

SCM: Please rise. I sentence you to _____.

[Note 38. If the sentence includes confinement, advise the accused as follows.]

SCM: You have the right to request in writing that [name of convening authority] defer your sentence to confinement. Deferment is not a form of clemency and is not the same as suspension of a sentence. It merely postpones the running of a sentence to confinement.

[Note 39. Whether or not the sentence includes confinement, advise the accused as follows.]

SCM: You have the right to submit in writing a petition or statement to the convening authority. This statement may include any matters you feel the convening authority should consider, a request for clemency, or both. This statement must be submitted within 7 days, unless you request and the convening authority approves an extension of up to 10 days. After the convening authority takes action, your case will be reviewed by a judge advocate for legal error. You may suggest, in writing, legal errors for the judge advocate to consider. If, after final action has been taken in your case, you believe that there has been a legal error, you may request review of your case by the Judge Advocate General of _____. Do you understand these rights?

ACC: _____.

Adjourning the court-martial

SCM: This court-martial is adjourned.

Entry on charge sheet

[Note 40. Record the sentence in the record of trial, inform the convening authority of the findings, recommendations for suspension, if any, and any deferment request. If the sentence includes confinement, arrange for the delivery of the accused to the accused's commander, or someone designated by the commander, for appropriate action. Ensure that the commander is informed of the sentence. Complete the record of trial and forward to the convening authority.]

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) _____.

Appendix III(1)

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 1984.)

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.)

Appendix III(2)

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.))

Appendix III(3)

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.

Appendix III(6)

SAMPLE INQUIRY INTO THE FACTUAL BASIS OF A PLEA OF GUILTY TO THE OFFENSE OF UNAUTHORIZED ABSENCE

1. Assumption. Assume the accused has entered pleas of guilty to the following charge and specification:

Charge: Violation of the Uniform Code of Military Justice, Article 86

Specification: In that Seaman Virgil A. Tweedy, U.S. Navy, on active duty, Naval Justice School, Newport, Rhode Island, did, on or about 5 July 19--, without authority, absent himself from his unit, to wit: Naval Justice School, Newport, Rhode Island, and did remain so absent until on or about 23 July 19--.

2. Procedure. The summary court-martial officer, after he has completed the inquiry indicated in the TRIAL GUIDE as to the elements of the offense, should question the accused substantially as follows:

SCM: State your full name and rank.

ACC: Virgil Armond Tweedy, Seaman.

SCM: Are you on active duty in the U.S. Navy?

ACC: Yes, sir.

SCM: Are you the same Seaman Virgil A. Tweedy who is named in the charge sheet?

ACC: Yes, sir.

SCM: Were you on active duty in the U.S. Navy on 5 July 19--?

ACC: Yes, sir.

SCM: What was your unit on that date?

ACC: The Naval Justice School.

SCM: Is that located in Newport, Rhode Island?

ACC: Yes, sir.

Appendix III(7)

SCM: Tell me in your own words what you did on 5 July that caused this charge to be brought against you.

ACC: I stayed at home.

SCM: Had you been at home on leave or liberty?

ACC: Yes, sir.

SCM: Which one was it?

ACC: I had liberty on the 4th of July.

SCM: When were you required to report back to the Naval Justice School?

ACC: At 0800 on the 5th of July.

SCM: And did you fail to report on 5 July 19--?

ACC: Yes, sir.

SCM: When did you return to military control?

ACC: On 23 July 19--.

SCM: How did you return to military control on that date?

ACC: I took a bus to Newport and turned myself in to the duty officer at the Naval Justice School.

SCM: When you failed to report to the Naval Justice School on 5 July, did you feel you had permission from anyone to be absent from your unit?

ACC: No, sir.

SCM: Where were you during this period of absence?

ACC: I was at home, sir.

SCM: Where is your home?

ACC: In Blue Ridge, West Virginia.

SCM: Is that where you were for this entire period?

ACC: Yes, sir.

SCM: During this period, did you have any contact with military authorities? By "military authorities" I mean not only members of your unit, but anyone in the military.

ACC: No, sir.

SCM: During this period, did you go on board any military installations?

ACC: No, sir.

SCM: Were you sick or hurt or in jail, or was there anything which made it physically impossible for you to return?

ACC: No, sir.

SCM: Could you have reported to the Naval Justice School on 5 July 19-- if you had wanted to?

ACC: Yes, sir.

SCM: During this entire period, did you believe you were an unauthorized absentee from the Naval Justice School?

ACC: Yes, sir; I knew I was UA.

SCM: Do you know of any reason why you are not guilty of this offense?

ACC: No, sir.

SAMPLE SUBPOENA (MCM, 1984, app. 7)

SUBPOENA

The President of the United States, to Mr. James E. Pinelli
(Name and Title of Person being Subpoenaed)

You are hereby summoned and required to appear on the 1st day of October, 19 84, at 9 o'clock A.M., at Bldg 13, Rm 4, U.S. Naval Station, Oakton, FL
(Place of Proceeding), [illegible]
(Name and Title of Deposition Officer)

[illegible] general court-martial of the United States [illegible] appointed by General Court-Martial Convening Order No. 10, dated 1 September 19 84, to testify as a witness in the matter of United States v. Roberts
(Identification of Convening Order or Convening Authority)
(Name of Case)

[illegible]
(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 [illegible] 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 Naval Station, Oakton, FL this 1st day of September 19 84.

Roberta Muller, Lt, JAGC, USN
(Signature (See R.C.M. 703(a)(2)(C))

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

I hereby accept service of the above subpoena.

_____
Signature of Witness

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

Personally appeared before me, the undersigned authority, _____,

who, being first duly sworn according to law, deposes and says that at _____, on _____

19 _____, he personally delivered to _____ in person a duplicate of this subpoena.

_____ _____
Grade *Signature*

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

_____ 19 _____.

_____
Grade

_____ _____
Official Status *Signature*

DD FORM 453 AUG 84 EDITION OF OCT 68 IS OBSOLETE.

TRAVEL ORDER

Payment of travel allowances is authorized pursuant to 10 U.S.C. § 847 and 28 U.S.C. § 1821. You should travel from _____ in sufficient time to arrive at _____ on the date and at the time specified. You will be paid fees and expenses for attendance at the specified hearing and travel directly to and from that place. You may travel by ☐ rail, ☐ commercial or military aircraft, ☐ bus, or ☐ privately owned automobile.

You ☐ have ☐ have not been given a "Government Transportation Request" to exchange for commercial tickets. No mileage will be paid for any transportation provided by the Government in kind or by Government Transportation Request. If a Government Transportation Request is not given to you and you travel by commercial carrier at personal expense, reimbursement for your cost of transportation will be limited to:

a. The least costly regularly scheduled air service between the points involved; or

b. The cost of the rail fare and a lower berth, or the lowest first-class rail accommodation available at the time reservations were made; or

c. Actual cost of commercial bus fare.

If you travel by private automobile, you will be reimbursed at the rate of *(twenty cents $.20))* _____ a mile, plus the cost of necessary parking fees, bridge, ferry, and other highway tolls incurred while traveling under this travel order. The total reimbursement will be limited to the cost of travel by the usual mode of common carrier, including per diem. Receipts and ticket stubs will be required to support your claim for cost of transportation and subsistence for each item in excess of *($15.00)* _____ .

☐ You will be traveling to a high-cost area.

The travel regulations designate certain cities as high cost areas. Because your attendance requires travel to one of these cities, you will be authorized an actual expense allowance instead of a per diem allowance. You will be reimbursed for the actual expenses incurred, not to exceed the maximum amount prescribed for the city involved. The expenses may include lodgings; meals, tips to waiters, bellboys, maids, porters; personal laundry, pressing and dry-cleaning; local transportation *(including usual tips)* between places of lodging and duty; and other necessary expenses. You must itemize your daily actual expenses on your claim and receipts for lodging and any items over *($15.00)* _____ are required.

☐ You will not be traveling to a high-cost area.

Because you are not traveling to a high-cost area, you will be entitled to a per diem allowance to cover your expenses for lodging, meals, and incidentals. While traveling and attending the specified hearing within the continental United States, you will be authorized a per diem equal to the daily average you pay for lodging, plus *($23.00)* _____ per day for meals and incidentals, rounded off to the next dollar. If the resulting amount is more than the maximum per diem allowable, which is *($50.00)* _____ , then you will be reimbursed only the maximum per diem authorized. You are required to state on your reimbursement claim that the per diem claimed is based on the average cost to you for lodging while on required travel within the continental United States during the period covered by the claim. Receipts are required for lodging. The per diem allowance for travel overseas is based on rates set by the Department of State or by the Department of Defense, and you will be reimbursed the amount specified for the particular overseas area involved.

You are entitled to an attendance fee of *($30.00)* _____ per day under 28 U.S.C. § 1821.

Address any inquiries regarding the matter to: _____

_____

This is travel order number _____ , dated _____ ,
issued by *(headquarters)* _____ .
TDN. Accounting Citation _____ .

FOR THE COMMANDER

_____	_____
Typed Name of Approving Official	*Typed Name of Authenticating Official*
_____	_____
Signature of Approving Official	*Signature of Authenticating Official*

CHAPTER XI

THE SPECIAL COURT-MARTIAL

A. Introduction. The special court-martial is the intermediate level court-martial created by the Uniform Code of Military Justice. The maximum penalties which an accused may receive at a special court-martial are generally greater than those of a summary court-martial but less than those of a general court-martial. The rights of an accused at a special court-martial are also generally greater than the rights he/she would have at a summary court-martial but less than the rights he/she would have at a general court-martial. Basically, the special court-martial is a court consisting of at least three members, trial and defense counsel, and a judge. The maximum imposable punishment extends to a bad-conduct discharge, six months confinement at hard labor, 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, § 0115 prescribe who has the power to convene (create) a special court-martial. Specifically, 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, air wings, air groups, stations, etc., have this authority. The authority to convene special courts-martial is vested in the office of the authorized command, not in the person of its commander. Thus, Captain Jones, U.S. Navy, has special court-martial 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.

The power to convene special courts-martial is nondelegable and, in no event, can a subordinate exercise such authority. When Captain Jones is on leave from his ship, his authority to convene special courts-martial devolves upon his temporary successor-in-command (usually the executive officer) who, in the eyes of the law, becomes the commanding officer. Thus, signature titles such as "Acting Commanding Officer" and "Executive Officer" should be avoided on legal documents regardless of the validity of such titles on other administrative correspondence.

The commander of a unit embarked on a naval vessel, who is authorized to convene special courts-martial, should refrain from exercising such authority and defer instead to the desires of the ship's commander. JAGMAN, § 0116b.

2. Mechanics of convening. Before any case can be brought before a special court-martial, such a court-martial must have been convened. The special court-martial is created by the written orders of the convening authority (CA) which also details the members. These written convening orders can in one sense be thought of as rosters listing the personnel of the court. The lawyer participants (military judge, trial counsel and defense counsel) are, under the new Manual for Courts-Martial, 1984, detailed separately through JAG channels and not by the CA. R.C.M. 503, MCM, 1984 [hereinafter cited as R.C.M. ___].

Because different combinations of members are possible, the format of a special court-martial convening order, unlike that of the summary court-martial, may vary. These different combinations will be discussed in more detail, but, in general, there are two ways that a special court-martial may lawfully be constituted: (1) trial counsel (prosecutor), a defense counsel, a court (jury) of at least three members, and a military judge; or (2) a trial counsel, a defense counsel, and a court of at least three members. This second format, trial without a military judge, is a very rare occurrence in modern practice. The vast majority of cases are presided over by a military judge. Moreover, once a court-martial has been convened with a military judge, the accused may then ask to have the members excused and have his/her case tried by the judge alone.

R.C.M. 504 and JAGMAN 0121 contain guidance for the preparation of the convening order. Basically, the order should be under the command letterhead, be dated and serialized, and be signed personally by the CA. The order should specify the names and ranks of all members detailed to serve on the court. When a proper convening order is executed, a special court-martial is created and remains in existence until dissolved. A sample convening order is set forth at page 11-10, below.

3. Amendment of convening orders

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

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 1-84 could be amended by serial 1-84A, 1-84B, or 1A-84, 1B-84, or any other combination of letters and numbers. These serializations are important and must be carefully organized. A sample amendment to a convening order which changes the identity of a member is set forth at page 11-11. A copy of each convening order and amendment should be distributed to court personnel concerned.

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 pay grade E-1. In other words, in ordinary circumstances, a punitive discharge may not be adjudged.

Article 19, UCMJ, does allow a three-member-type special court-martial to adjudge a bad-conduct discharge where the accused is represented by an Article 27(b), UCMJ, certified lawyer and a military judge could not be assigned to the case because of physical conditions or extraordinary military exigencies. Such conditions will be extremely rare. In the event that the convening authority desires that such a court-martial be authorized to adjudge a discharge he must attach a detailed statement to the record of trial explaining the extraordinary circumstances and why the trial had to be held at that time and place, notwithstanding the absence of a military judge. Normally a CA would not attempt to proceed with such a court on a punitive discharge case since the president of the court, a nonlawyer who is responsible for conducting the trial according to established rules, must referee the arguments of counsel, at least one of whom (the defense counsel) must be a lawyer.

Where a three-member-type court-martial is utilized, the CA must include in the referral block on the charge sheet instructions that a bad-conduct discharge is not an authorized punishment if no physical conditions or extraordinary military exigencies would excuse the decision not to detail a military judge, or if in his discretion the CA chose not to allow the court to award such a punishment. Such a precaution removes the possibility that the court would erroneously impose a sentence involving a punitive discharge.

2. Military judge and members. This type of special court-martial involves counsel, at least three members, and a military judge. The members' role is similar to that of a civilian jury. They determine guilt or innocence and impose sentence. The senior member is, in effect, the jury foreman who presides during deliberations. The military judge functions as does a civilian criminal court judge. He resolves all legal questions that arise and otherwise directs the trial proceedings. This form of special court-martial is authorized by Article 19, UCMJ, to adjudge a punitive discharge, provided the accused is represented by a Article 27(b), UCMJ, certified lawyer. This type of special court-martial 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 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. The administrative details requisite to such a request should be completed prior to trial. A court-martial so configured is authorized to impose a sentence extending to a punitive discharge if the accused is represented by an Article 27(b), UCMJ, lawyer.

D. Qualifications of members

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

2. Enlisted members. Article 25(c), UCMJ, gives an enlisted accused an 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. A sample request is included at page 11-12. 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). Accordingly, the convening order, or amendment, which assigns enlisted personnel to the court should also indicate the unit of each member. For example:

MEMBERS

Commander Roy Bean, U.S. Navy
Lieutenant William Bonney, U.S. Navy
Yeoman Chief Matthew Dillon, U.S. Navy, USS Zilch
Yeoman Chief Cole Younger, U.S. Navy, USS Tubb

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

3. Selection of members. The CA has the ultimate legal responsibility to select the court members. It is a judicial action and 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.

There are no definitive procedural guidelines for the selection of particular court members. It clearly is improper for a CA to attempt to "stack" the court. Beyond that, almost any system for fair selection of court personnel is lawful. A good method is to have the personnel officer select ten or fifteen officers at random (if available), submit those names to the legal officer for screening as to best qualified, and then send the list to the CA with the legal officer's recommendations for selection. The CA should then select the five or six who, in his judgment, are best qualified.

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

F. Improper constitution of the court. Requisite to the power of a court-martial to try a case are jurisdiction over the offense, jurisdiction over the defendant, proper convening, and proper constitution. A deficiency in any of these requisites renders the court powerless to adjudicate a case lawfully. The rules relating to constitution of the court must therefore be scrupulously observed. In the context of improper constitution of the court-martial there are several commonly occurring difficulties which relate to either the judge or members of the court.

1. Lack of quorum. Article 16, UCMJ, indicates that a special court-martial must consist of at least three qualified persons unless the accused elects trial by judge alone. There must be at least three qualified members present at all times or the trial cannot lawfully proceed. If at any time there are not at least three members present (or, if applicable, at least one-third enlisted members), the trial must be

delayed until a quorum is present or the CA details new members to the court. Membership cannot be changed after the court is assembled for trial except for extraordinary reasons which must be explained in writing. If a military judge has been detailed to the case and is not present the trial cannot lawfully proceed.

2. Failure to detail a military judge to a BCD court. A "BCD" special court-martial is a special court-martial which is authorized to adjudge a bad-conduct discharge as a sentence. When the CA creates a court without a military judge, the trial may proceed but no bad-conduct discharge can lawfully be adjudged (unless there exist the extraordinary circumstances discussed on page 11-3, above). The error in this situation limits the sentencing power of the court but does not deprive the court of authority to try the case.

3. No written request for judge alone. The absence of a written request, personally signed by the accused, for trial by judge alone used to deprive the court of the power to try a case by judge alone. R.C.M. 903(b)(2) has relaxed this stringent requirement and now permits the request for a judge alone trial to be made orally.

4. No written request for enlisted members. The absence of a written request, personally signed by the accused, for enlisted membership on the court prohibits a court composed with any enlisted members from lawfully proceeding, even if the accused made an oral request for such membership. See R.C.M. 903(b)(1).

5. Nondetailed member or judge participating. Participation in the trial by a member or judge not properly detailed by the CA invalidates the proceedings. Only lawfully appointed personnel can participate in court-martial proceedings.

6. Members or judge not sworn. Article 42(a), UCMJ, requires court members and military judges to be sworn. The form of the oaths and method of administration are detailed in JAGMAN 0126 and R.C.M. 807(b)(2), Discussion. The failure properly to swear each court member and military judge renders the court-martial proceedings null and void.

7. Unqualified member or judge. Failure of the military judge to meet the requisite legal qualifications stated in Article 26, UCMJ, renders the trial proceedings void. As far as age, experience, judicial temperament, or other aspects of members' qualifications are concerned, the law is not settled on the effect a defect has on trial proceedings. The presence of unrequested enlisted members, however, will void a court's proceedings. The presence of a civilian member or some other defect respecting the grade of the member will also render the proceedings void.

G. Qualifications of counsel. Articles 19 and 38, UCMJ, describe the accused's right to counsel at court-martial. R.C.M. 506 discusses the subject in detail. Article 27, UCMJ, details 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. The assignment of an enlisted servicemember or noncommissioned warrant officer as trial counsel is legal error but not sufficient grounds to invalidate the proceedings.

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

a. Detailed defense counsel

(1) Article 27(c), UCMJ, describes the qualifications for detailed counsel at special courts-martial. An Article 27(b) defense counsel must be detailed at no cost to the accused unless, due to military exigencies or physical conditions, one cannot be obtained. If Article 27(b) counsel cannot be detailed, the special court-martial may proceed; however, it cannot lawfully adjudge a punitive discharge as part of the sentence.

(2) If Article 27(b) counsel is not detailed, the CA must forward to the court, for attachment to the record of trial, a comprehensive statement indicating in specific detail the reasons why an Article 27(b) defense counsel could not be detailed and why the trial must be held at that time and place as opposed to postponing it or moving it to another place where Article 27(b) counsel could be furnished.

(3) Doctrine of equivalent qualification. Article 27(c), UCMJ, sets forth the requirement that the detailed defense counsel must have, as a minimum, qualifications equal to that of the trial counsel. Equivalent qualification does not mean equal skill, experience, education, rank, etc., but means equality in terms of Article 27, UCMJ, qualifications of counsel. Thus, if trial counsel is qualified to practice before general courts-martial (certified under Article 27(b), UCMJ) then the detailed defense counsel must also be so certified. If trial counsel is a member of the bar of a Federal court or the highest court of any state, a law specialist, or a judge advocate, then the detailed defense counsel must be similarly qualified.

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." On 20 November 1981, Article 38(b), UCMJ, was amended by Congress to provide the service secretaries with authority to establish procedures for determining whether a military counsel requested by an accused is, in fact, reasonably available to represent an accused. JAGMAN 0120b(2)(b)(ii) provides that a Navy or Marine Corps military counsel is "reasonably available" to represent an accused if the requested counsel:

-1- is assigned to an activity within the same Navy-Marine Corps trial judiciary circuit, or within 100 miles of where the trial will be held; and

-2- is not one of the following persons: a flag or general officer; a trial or appellate military judge; a trial counsel; an appellate defense or government counsel; a principal legal advisor to a command; an instructor or student at a military or civilian school; a commanding officer, executive officer, or officer-in-charge; or a member of the staff of certain high-level DoD and Navy organizations.

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

An attorney-client relationship exists when counsel and the accused have had a conversation which is privileged and counsel has engaged actively in the preparation and pretrial strategy of the case. JAGMAN 0120b(2)(b)(iii). In situations where there is an existing attorney-client relationship, the requested military counsel should ordinarily be made available to act as IMC.

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

-1- the ability of other counsel to assume the workload of the requested counsel during his/her absence;

-2- the nature and complexity of the charges or legal issues involved in the case and any special qualifications possessed by the requested counsel; and

-3- the experience level and qualifications of detailed defense counsel.

If the commanding officer of the requested counsel concludes that his subordinate is unavailable, his rationale must be set down in writing and provided to the CA and the accused. This determination is a matter within the discretion of that commanding officer, although the accused may appeal an adverse decision to the immediate superior of the decisionmaker. In every case where the IMC request has been denied, and the appeal also has been denied, the detailed defense counsel can request the trial judge to allow an offer of proof to show that the denying authority has abused his/her discretion. In no case, however, can the military judge dismiss the charges or delay the trial because an IMC request has been denied.

c. Recapitulation -- right to counsel. At a special court-martial, the accused has the right to be represented by civilian counsel if provided at no expense to the government, and either detailed Article 27(b) military counsel or individual military counsel of the accused's own selection if reasonably available. The accused is not entitled to be represented by more than one military counsel.

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.

H. The court reporter. The court reporter is a person assigned to a particular case for the purpose of preparing a record of the proceeding. A reporter must be assigned to BCD special courts-martial because Article 19, UCMJ, requires that a BCD may not be approved unless a word-for-word (verbatim) record is made of everything which transpired during the proceedings. The CA need not detail a reporter to a non-BCD special court-martial (since a summarization of proceedings is all that is required in the record of trial), but as a practical matter one is usually detailed. The reporter is not detailed on the convening order but is orally assigned to a case by the CA or one of his subordinates. As a practical matter, the court reporter usually comes from the local naval legal service office or law center and is not assigned by the CA at all. The reporter must be sworn, although a one-time oath may be utilized. See JAGMAN 0126d.

NAVAL EDUCATION AND TRAINING CENTER
Newport, Rhode Island 02840

23 August 1984

SPECIAL COURT-MARTIAL CONVENING ORDER 4-84

A special court-martial is hereby convened. It may try such persons as may properly be brought before it, and shall meet at Naval Education and Training Center, Newport, Rhode Island, unless otherwise directed. The court-martial will be constituted as follows:

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 Boatswain W3 Samuel F. Prescott, U.S. Navy.

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

NAVAL EDUCATION AND TRAINING CENTER
Newport, Rhode Island 02840

25 August 1984

SPECIAL COURT-MARTIAL AMENDING ORDER 4A-84

Commander Roy Beane, U.S. Navy, is hereby detailed as a member of the special court-martial convened by my Special Court-Martial Convening Order 4-84, dated 23 August 1984, vice Lieutenant Lance Q. Lawrence, U.S. Navy, who is hereby relieved.

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

SAMPLE REQUEST FOR ENLISTED COURT MEMBERS

SPECIAL COURT-MARTIAL

NAVAL JUSTICE SCHOOL
NAVAL EDUCATION AND TRAINING CENTER
NEWPORT, RHODE ISLAND 02840

United States of America v. William H. BONNEY, Seaman 444 44 4444 U.S. Navy	Request for Enlisted Membership on Special Court-Martial 10 August 1984

I, Seaman William H. Bonney, the accused in the above case, being first advised by defense counsel and mindful of my right to request enlisted membership on my forthcoming special court-martial, do hereby request the convening authority to detail to said court-martial a sufficient number of fair-minded enlisted persons to constitute said special court-martial with at least one-third enlisted membership.

CLARENCE R. ZIMMER
LT, JAGC, U. S. Naval Reserve
Defense Counsel

WILLIAM H. BONNEY
Seaman, U. S. Navy

NOTE: See R.C.M. 503(a) for further details.

I. 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 block IV on 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. It might serve well to recall that a clear and concise serial system is essential to proper referral. The referral should identify a particular court to hear the case, that is, it should relate to a specific convening order. Care must always be taken in preparing convening orders and referral blocks to avoid confusion and legal complications at trial. For example:

IV. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY	b. PLACE	c. DATE
Naval Justice School	Newport, Rhode Island	5 August 1984

Referred for trial to the special court-martial convened by my special court-martial convening order number 4-84 dated 29 February 19 84, subject to the following instructions:[2] none.

[redacted]
Command or Order

ABLE SEEWEED — Typed Name of Officer
COMMANDING OFFICER — Official Capacity of Officer Signing

CAPTAIN, U.S. Navy — Grade

Able Seewed — Signature

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

3. Withdrawal of charges. Withdrawal of charges is a process by which the CA takes from a court-martial a case previously referred to it for trial. The CA cannot withdraw charges from one court and rerefer them to another without proper reasons or, in legal terminology, "good cause." This "good cause" must be articulated in writing by the CA and this writing included in the record of trial when the case is tried by the second court. The CA may withdraw charges for the purpose of dismissing them for any reason deemed sufficient to him. Mechanically, the withdrawal is accomplished by drawing a diagonal line across the referral block on page 2 of the charge sheet and having the CA initial the line-out. It is also advisable to write "withdrawn" across the endorsement and date the action.

a. Disestablishment of the court. Perhaps the most frequently occurring withdrawal problem is presented when the CA wants to disestablish the court and create another to take its place. This usually happens when several members or counsel 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 "good cause." Prior to trial, or prior to a request by the accused for trial by military judge alone, a withdrawal will, in absence of contrary evidence, be deemed to be predicated on "good cause." 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 not being referred to the new court. Remember, only the court to which a case is specifically referred can try it. There are two methods by which the old cases can be transferred to the new court. First, the CA can withdraw each case from the old court (by lining out the referral block) and then rerefer 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.

The second method is a less complex solution. A saving clause can be inserted in the convening order of the new court which directs that all cases of the old court be brought to trial before the new court. Remember, though, that only cases in which proceedings have not begun or in which the accused has not requested trial by military judge alone can be transferred. In these cases transferred members or counsel must be replaced by an amendment to the old convening order. The language used in the savings clause is inserted after the designation of members and above the signature of the CA. For example:

> All cases in the hands of trial counsel of the special court-martial convened by my convening order serial 4-84 of 1 August 1984, in which trial proceedings have not begun or in which the accused has not requested trial by military judge alone, will be brought to trial before the court hereby convened.

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 initialling the old referral block on the charge sheet and executing a new block 14 rereferring 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 after proceedings commence. Withdrawal after the accused has requested trial by military judge alone or after trial proceedings commence is lawful only where "good cause" is shown. This means that the CA must attach to the record of trial a comprehensive statement of the reasons necessitating the withdrawal. Good cause has been found not to exist where a commanding officer withdrew a case from a

court-martial after a pretrial hearing had begun because he became aware of sentences of that court in previous cases which, in his view, were excessively lenient. Good cause, on the other hand, might exist where the CA discovers (after a request for trial by judge alone had been submitted) that a charge failed to allege an offense under the UCMJ. After evidence has been received on the guilt or innocence of the accused, withdrawal cannot lawfully be accomplished unless an urgent military necessity or some other cause exists requiring such action in the manifest interest of justice. Such circumstances would be exceedingly rare.

4. Amendment of charges. In some instances an amendment to a specification will necessitate further administrative action with respect to the charge sheet. Minor changes in form or correction of typographical errors normally will require no more administrative action than lining out and initialling the erroneous data and substituting the correct data. This can be accomplished by use of pen-and-ink interlining, or by redrafting the same specification in the original block 10 of the charge sheet. In the latter case the erroneous specification is lined out and initialled by the one who makes the correction, normally the accuser or trial counsel. If, on the other hand, the contemplated change involves any new person, offense, or matter not fairly included in the charges as originally preferred, the amended specification must go through the preferral-referral process or the accused can exercise his right to object to trial on unsworn charges.

As a general rule, when rereferral is necessitated by an amendment to a specification, the amended charge can be drafted in the original block 10 of the charge sheet and the old one lined out and initialled. A new page 2 of the charge sheet is then drafted. The new page 2 is then taped over the old page 2 to allow inspection of both pages. This kind of amendment can also be accomplished by drafting a completely new charge sheet and accomplishing its referral to trial in the normal manner.

5. Avoiding statute of limitations problems. Article 43, UCMJ, provides that most offenses must have sworn charges formally receipted for within two 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. Some offenses, such as desertion in peacetime, and those prohibited by Articles 119 through 132, have a three-year 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.

When a new charge sheet is prepared--for example, to amend a specification--care must be taken to avoid statute of limitations problems. Consider a case involving a prolonged UA. Article 86 has a two-year statute of limitations; i.e., to preserve the government's right to prosecute an article 86 offense, the officer exercising summary court-martial authority over the accused must formally receive the sworn charge within two years of the offense and record that fact in block 13 of the charge sheet. Once this action is taken, the statute of limitations has been tolled, and the accused can be tried for the article 86 offense, regardless of when he/she ultimately returns to military control, so long

as the original charge sheet is retained and utilized throughout the trial. If the original charge sheet is lost or destroyed, and the accused has been UA for more than two years, jurisdiction over the UA offense will be lost.

Assume for the sake of discussion that an accused has been UA for four years, but action has been taken to preserve jurisdiction over his offense. Now, however, the original charge must be amended to include the date and method of his return to military control. The law will allow such an amendment so long as the original charge sheet is utilized and, since new matter is included by the amendment, the amendment should be sworn to by an accuser and sent through the referral process. The old page 2 must not be lined out, however, but must remain attached to the original charge sheet.

6. Additional charges. If an accused awaiting trial on certain charges commits new offenses, or other previously unknown offenses are discovered, the charge sheet can be amended to include the new offenses. In most cases the simplest procedure is to draft the additional charges on page 1 of the charge sheet beneath the old charges and execute a new page 2 since the referral process is accomplished in the normal manner. The new page 2 is taped over the old page 2 which is not removed, lined out or destroyed. If there are no statute of limitations problems, an entirely new charge sheet may be prepared. In this case, 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.

J. Trial procedure

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

2. Service of charges. Article 35, UCMJ, states that in time of peace no person can be brought to trial in any special court-martial until three days have elapsed since the formal service of charges upon that person. In computing the three-day period neither the date of service nor the date of trial count. Sundays and holidays do count, however, in computing the statutory period. Thus, if the accused is served on Wednesday, one must wait Thursday, Friday, and Saturday before compelling trial. Trial in the foregoing example could not be compelled before Sunday and, as a practical matter, not before Monday. The date of service of charges upon the accused is demonstrated by a certificate in block 15 at the bottom of page 2 of the charge sheet. Trial counsel executes this certificate when he presents a copy of the charge sheet to the accused personally. He must do this even though the accused has previously been informed of the charges against him. This service of a copy of the charge sheet may also be accomplished by the command at any time after referral as

long as the service is to the accused personally. Any accused can lawfully object to participation in trial proceedings before the three-day waiting period has expired. The accused may, however, waive the three-day period, so long as he understands the right and voluntarily agrees to go to trial earlier.

3. Pretrial hearings. Any time after elapse of the three-day waiting period, a military judge may hold sessions of court without members for the purpose of litigating motions, objections, and other matters not amounting to a trial of the accused's guilt or innocence. The accused may be arraigned and his pleas taken and determined at such a hearing. Art. 39(a), UCMJ; JAGMAN 0127. At such hearings the judge, trial counsel, defense counsel, accused, and reporter will be present. Several such hearings may be held if desired.

4. Preliminary matters. At trial, if such matters have not previously been taken care of at a 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. Following this procedure the judge (or president of the court if there is no judge) announces that the court is assembled. Assembly of the court for trial cuts off carte blanche changes in court personnel by the CA.

5. 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. 502-503 list numerous grounds which, if shown, disqualify a court member from participation in the trial. Mechanically, both trial and defense counsel will be given an opportunity to question each member to see if a ground for challenge exists. In this connection there are two types of challenges: challenges for cause and peremptory challenges. A challenge, if sustained by the judge who rules upon it (or by a majority of the court if no judge is present), 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. 502-503. The law places no limit on the number of challenges for cause which can be made at trial. A peremptory challenge is a challenge that can be made for any reason. The government is limited to one peremptory challenge per trial, while the defense is limited to one peremptory challenge per accused. Art. 41, UCMJ. The student should become familiar with the grounds for challenge and avoid detailing to courts-martial members who are likely to be disqualified.

6. Motions. Following this challenge procedure, the military judge (or president) will advise the accused that his pleas are about to be requested and that if he desires to make any motions he should now do so. Many times all such motions (attacking jurisdiction, sufficiency of charges, speedy trial, etc.) will have been litigated at a previous

pretrial hearing. Nevertheless, the accused may have decided to make additional motions and must be allowed to do so. If there are motions they will be litigated at this time. If there are no motions the trial will proceed to the arraignment.

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

8. Pleas. The arraignment is the process of asking the accused to plead to charges and specifications. The responses of the accused to each specification and charge are known as the pleas. The recognized pleas in military practice are "guilty," "not guilty," guilty to a lesser included offense, and, under some circumstances, a conditional plea of guilty. Any other pleas--such as nolo contendere--are improper, and the military judge will enter a plea of not guilty for the accused.

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

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

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

9. Findings. Following the guilty pleas of the accused (or, if not guilty pleas are entered, after the evidence has been presented), the court will deliberate to arrive at findings of "not guilty," "guilty," or guilty of a lesser included offense. In order to convict an accused at a special court-martial, two-thirds of the members present at trial must agree on each finding of guilty. In computing the necessary number of votes to convict, a resulting fraction is counted as one. Thus, on a court of five members, the mathematical number of votes required to convict is 3 1/3 or, applying the rule, four votes. In a trial by military judge alone, the required number of votes is one, the judge's. In contested member cases, after all evidence and arguments of counsel have been presented, the judge (or president if no judge is present) will instruct the members of the court on the law they must apply to the facts in reaching their verdict. For a detailed discussion of the instruction process, see R.C.M. 920, 1005.

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

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

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

a. Contents--verbatim record. Appendix 14, MCM, 1984 contains specific guidance for the preparation of special court-martial records of trial when a verbatim record is required. In addition, R.C.M. 1103 and JAGMAN 0144 contain further detail. The student should become familiar with these references.

b. Contents--summarized record. Appendix 13, MCM, 1984 contains a guide for the preparation of summarized records of trial. In addition, R.C.M. 1103 and JAGMAN 0144 should be consulted.

c. Authentication of record. Article 54, UCMJ, and R.C.M. 1104 indicate that each record of trial must be authenticated after its preparation and before signature. Authentication is accomplished by means of a certificate and, when executed by the appropriate person, represents that record as being a true and accurate verbatim or summary transcript of all matters required to be recorded. The record of trial will be authenticated by the military judge who presided at the conclusion of trial. If the military judge cannot authenticate the record because there was no judge at the trial, or because of death, disability, or absence, the trial counsel who was present at the conclusion of proceedings shall authenticate the record. If trial counsel is unable to authenticate the record due to death, disability, or absence, a member of the court will authenticate the record. In trials by military judge alone where the judge cannot authenticate the record because of death, disability, or absence, the court reporter must authenticate it. After the record has been authenticated, a copy must be given to the accused. The record is also served on the defense counsel at this point in time, if doing so will not cause undue delay.

d. Notes or recordings of proceedings. Notes, recordings, tapes, etc., from which a summarized record of trial is prepared, must be retained until completion of appellate review. See JAGMAN 0144.

K. 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. JAGMAN 0105 and Part IV, MCM, 1984, also address punishment power. Each punitive article of the UCMJ contains the statutory 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 at hard labor for six months, forfeiture of two-thirds pay per month for six months, and reduction to pay grade 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. Part IV, MCM, 1984, lists 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, UCMJ), assault (Art. 128, UCMJ), and larceny

(Art. 121, UCMJ) is subject to a maximum sentence determined by totalling the maximum punishment for each offense.

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 cannot lawfully be adjudged unless a lawyer certified under Article 27(b), UCMJ, was detailed to the court and, as a general rule, unless a military judge also was detailed to the case. A bad-conduct discharge is a separation from the service under conditions other than honorable, and is designed as a punishment for bad conduct rather than as a punishment for serious military or civilian offenses. It is also appropriate for an accused who has been convicted repeatedly of minor offenses and whose punitive separation appears to be necessary. R.C.M. 1003(b)(10)(C). The practical effect of this type of separation is less severe than a dishonorable discharge, where the accused automatically becomes ineligible for almost all veterans' benefits. The effect of a bad-conduct discharge on veterans' benefits depends upon whether it was adjudged by a general or special court-martial, whether the benefits are administered by the service concerned or by the Veterans' Administration, and upon the particular facts of a given case.

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

(1) Confinement. Confinement involves the physical restraint of an adjudged servicemember in a brig, prison, etc. Under military law, confinement automatically includes hard labor but the law prefers that the sentence be stated as confinement 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 at hard labor upon an enlisted servicemember but may not impose any confinement upon an officer or warrant officer. Part IV, MCM, 1984, limits this punishment to an even lesser period for certain offenses; e.g., failure to go to appointed place of duty (violation of Art. 86, UCMJ) has a maximum confinement punishment of only one month.

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

(3) Restriction. Restriction is a moral restraint upon the accused to remain within certain specified limits for a specified time. Restriction may be imposed on all persons subject to the UCMJ, but not in excess of two months. Restriction is a less severe form of deprivation of liberty than confinement or hard labor and may be combined with any other punishment. The performance of military duties can be required while an accused is on restriction. See R.C.M. 1003(b)(6).

c. Confinement on bread and water/diminished rations. As its name suggests, this punishment involves confinement coupled with a diet of bread and water or diminished rations. A diet of bread and water allows the accused as much bread and water as he/she can eat. Diminished rations is food from the regular daily ration constituting a nutritionally balanced diet but limited to 2100 calories per day. No hard labor may be required to be performed by an accused undergoing this punishment. Confinement on bread and water/diminished rations may be imposed only upon enlisted persons in pay grades E-1 to E-3 who are attached to or embarked in a vessel and then only for a maximum of three days. Further, both the prisoner and the confinement facility must be inspected by a medical officer who must certify in writing that the punishment will not be injurious to the accused's health and that the facility is medically adequate for human habitation. R.C.M. 1003(b)(9).

d. Monetary punishments. The types of monetary punishment authorized by R.C.M. 1003(b) include forfeiture and fine. Detention of pay is no longer an authorized court-martial punishment.

(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 an accused is to be sentenced to confinement, he no longer is eligible for sea or foreign duty pay so that money cannot be utilized as a 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 imposed. JAGMAN 0105b(1).

(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 at hard labor 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 or unless the accused is being punished for contempt of court. For example, an accused convicted of fraud against the government (Art. 132, UCMJ) by filing and collecting upon a false travel claim has been unjustly enriched to the extent the claim was paid. This accused may properly be fined. A fine cannot exceed the total of the amount of money which the court could have required to be forfeited. See R.C.M. 1003(b)(3). The court may, however, award both a fine and forfeitures, so long as the total monetary punishment amount does not exceed the amount which could have been required to be forfeited. United States v. Harris, 19 M.J. 331 (C.M.A. 1985).

e. Punishment affecting grade. There are two punishments affecting grade authorized for special court-martial sentences. These are reduction in grade and loss of numbers.

(1) Reduction in grade. This form of punishment has the effect of taking away the pay grade of an accused and placing him in a lower pay grade. Accordingly, this punishment can only be utilized against enlisted persons in other than the lowest pay grade; officers may not be reduced in grade. A special court-martial may reduce an enlisted servicemember to the lowest pay grade regardless of grade before sentencing. A reduction can be combined with all other forms of punishment. See R.C.M. 1003(b)(2).

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 0145a(7). Under the provisions of this section, a court-martial sentence of an enlisted member in a pay grade above E-1, as approved by the CA, that includes a punitive discharge or confinement in excess of 90 days (if the sentence is awarded in days) or 3 months (if awarded in other than days) automatically reduces the member to the pay grade E-1 as of the date the sentence is approved. As a matter within his sole discretion, the CA or the supervisory authority may retain the accused in the pay grade held at the time of sentence or at an intermediate pay grade and suspend the automatic reduction to pay grade E-1 which would otherwise be in effect. Additionally, the CA may direct that the accused serve in pay grade E-1 while in confinement but be returned to the pay grade held at the time of sentence or an intermediate pay grade upon release from confinement. Failure of the CA to address automatic reduction will result in the automatic reduction to pay grade E-1 on the date of the CA's action.

(2) Loss of numbers. Loss of numbers is the dropping of an officer a stated number of places on the lineal precedence list. Lineal precedence is lost for all purposes except consideration for promotion. This exception prevents the accused from avoiding or delaying being passed over. Loss of numbers does not reduce an officer in grade nor does it affect pay or allowances. Loss of numbers may be adjudged in the

case of commissioned officers, warrant officers, and commissioned warrant officers. This punishment may be combined with all other punishments. See R.C.M. 1003(b)(4).

f. Punitive reprimand. A special court-martial may also adjudge a punitive reprimand against anyone subject to the UCMJ. A reprimand is nothing more than a written statement criticizing the conduct of the accused. In adjudging a reprimand the court does not specify the wording of the statement but only its nature. JAGMAN 0145a(6) contains guidance for drafting the reprimand.

5. Multiplicity. As a general rule, an accused convicted of more than one offense at a trial is subject to a maximum sentence computed by aggregating the maximum punishments for each offense. R.C.M. 1003(c)(1)(C) states the rule that the accused can be punished in the maximum for each of two or more separate offenses even though arising out of a series of acts. What is essentially a single transaction, however, may not be subject to multiple punishment simply because the circumstances can be characterized as more than one offense. To allow an aggregation in the latter case would be to subject an accused to a higher maximum for one offense. The determination of when two or more offenses are separate is not easy. The Court of Military Appeals has applied many tests for separateness, and no single test can be relied upon. Some examples:

a. Separate elements. Offenses are separate if each requires proof of an element not required to prove the other.

b. One offense included in the other. If one offense is a lesser included offense of the other, the offenses may not be separate.

c. Evidence sufficient to prove one also proves the other. If the evidence which is sufficient to prove one offense also is sufficient to prove another offense, the two may not be separate.

d. Single impulse. Where both offenses were prompted by a single impulse, the two offenses may not be separate. This test is particularly difficult to apply inasmuch as fast moving circumstances of some offenses make impulse determination difficult.

e. Single transaction. A single transaction is a combination of a single objective and a continuous flow of events. If several offenses are committed in the course of accomplishing a single purpose, they are probably not separate. One who steals an automobile and its contents is punished for only one offense since the purpose is singular (steal property) and the events are integrated. One who wrongfully appropriates the auto and then later steals the contents, however, commits separate offenses.

f. Summary. If two or more offenses are multiplicious, the accused can lawfully be punished only for the maximum authorized for the most severe offense. In no event may the jurisdictional limitations of the special court-martial be exceeded. To minimize multiplicity problems, apply the facts of each case to all of the foregoing tests. If each test results in a determination of separateness, the offenses are probably not multiplicious.

6. Maximum punishments. The 1969 edition of the Manual for Courts-Martial (MCM) has a Table of Maximum Punishments (par. 127c), which lists the maximum permissible sentence for all offenses contemplated by the UCMJ and MCM. As of 1 August 1984, with the advent of the 1984 edition of the MCM, this Table of Maximum Punishments is no longer valid. In the new MCM, the maximum limits for the authorized punishments of confinement, forfeitures, and punitive discharge (if any) are set forth separately for each offense listed in Part IV, MCM, 1984.

Despite the great detail contained in Part IV, MCM, 1984, some offenses are not specifically listed. If the unlisted offense is "closely related" to a listed offense, or else "included in" a listed offense, then by analogy the listed offense sets the maximum punishment. R.C.M. 1003(c)(1)(B)(i). If the unlisted offense is both "closely related" and "included in" listed offenses, then the maximum punishment shall be the same as the least severe of the listed offenses.

If, however, the unlisted offense is neither closely related to, or included in, a listed offense, then the maximum punishment is the punishment prescribed in the United States Code or the punishment authorized by custom of the service. A "closely related" offense is not easy to determine. Normally, if the gravamen of each offense is the same, they are sufficiently related. A close relationship is contemplated, however, not simply any relationship.

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

a. Three or more convictions. If an accused is convicted of an offense for which Part IV, MCM, 1984 does not authorize a dishonorable discharge, proof of three or more previous convictions by court-martial during the year preceding the commission of any offense of which the accused is convicted will allow a special court-martial to adjudge a bad conduct discharge, forfeiture of 2/3 pay per month for six months and confinement at hard labor for six months, even though the offense per se does not otherwise authorize that much punishment. In computing the one year period, any unauthorized absence time, if shown by the findings or by evidence of previous conviction, is excluded. Nonjudicial punishments may not be considered as convictions, nor may periods of unauthorized absence evidenced by nonjudicial punishment be excluded. R.C.M. 1001(d)(1). Whether summary court-martial findings of guilty are convictions for escalator clause purposes is a question that has not been clearly answered. There is support for classifying summary cour findings of guilty as convictions if the accused was represented by counsel or waived the right to such representation. See United States v. Alsup, 17 M.J. 166 (C.M.A. 1984). For example:

Trial (1 Jun 77)	1 Feb 77	1 Sep 76	1 May 76	1 Apr 76
convicted of UA 1 Apr 77 to 1 May 77 (30 days)	special court conviction	special court conviction	special court conviction for larceny committed on 1 Mar 76	1 year prior to present UA commission

In this case all three convictions can be considered and the escalator applies. The one year period runs from 1 April 77 (commission of instant offense) to 1 April 76 (one year previous).

Trial (1 Jun 77)	1 Feb 77	1 Sep 76	1 Jul 76	1 Feb 76
UA 1 Apr 77 to 1 May 77; larceny 1 Mar 77	special court conviction	special court conviction (UA 1 Jul 76 to 1 Aug 76)	special court conviction	1 year limit

In this example, the one year time limit for using the escalator clause would normally run from 1 Mar 77 (commission of earliest offense) to 1 March 76. The 1 Sep 76 conviction for 1 month UA, however, moves the one-year limit back to 1 Feb 76. Thus, all convictions can be considered and the escalator applies.

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

Trial: 1 Jun 77	1 Feb 76	15 Mar 74
Convicted of Larceny 1 Apr 77	summary court conviction for UA: 1 Dec 75 to 1 Jan 76	summary court conviction for disrespect to superior commissioned officer

In this situation, the escalator does not apply. Why? The three-year period runs to 1 April 1974. For this escalator clause, the period is not extended by the period of unauthorized absence.

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

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, MI)	2. SSN	3. GRADE OR RANK	4. PAY GRADE
James, Reiben J.	111-11-1111	PFC	E-3

5. UNIT OR ORGANIZATION	6. CURRENT SERVICE	
	a. INITIAL DATE	b. TERM
Co A, 1st Battalion, 61st Inf Bde, Fort Blank, MO	1 April 1983	3 years

7. PAY PER MONTH			8. NATURE OF RESTRAINT OF ACCUSED	9. DATE(S) IMPOSED
a. BASIC	b. SEA/FOREIGN DUTY	c. TOTAL		
$500	None	$500	Restriction	1 August 1984

II. CHARGES AND SPECIFICATIONS

10. CHARGE: I VIOLATION OF THE UCMJ, ARTICLE 86

SPECIFICATION: In that Private Firt Class Reuben J. James, U.S. Army, Company A, 61st Battalion, 1st Infantry Brigade, Fort Blank, Missouri, on active duty, did, on or about 15 July 1984, without authority, absent himself from his unit, to wit: Company A, 1st Battalion, 61st Infantry Brigade, located at Fort Blank, Missouri, and did remain so absent until on or about 30 July 1984.

Charge II: Violation of the UCMJ, Article 112a

Specification: In that Private First Class Reuben J. James, U.S. Army, Company A, 1st Battalion, 1st Infantry Brigade, Fort Blank, Missouri, on active duty, did at Fort Blank, Missouri, on or about 12 July 1984, wrongfully possess 10 grams of marijuana.

III. PREFERRAL

11a. NAME OF ACCUSER (Last, First, MI)	b. GRADE	c. ORGANIZATION OF ACCUSER
Richards, Jonathan E.	Captain	Co A, 1st Bn, 61st Inf Bde

d. SIGNATURE OF ACCUSER: Jonathan E. Richards

e. DATE: 1 August 1984

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 1st day of August, 19 84, 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.

Will M. Wilson
Typed Name of Officer

61st Bn, 1st Inf Bde
Organization of Officer

Captain
Grade

Adjutant
Official Capacity to Administer Oath
(See R.C.M. 307(b)—must be commissioned officer)

Will M. Wilson
Signature

DD FORM 458 04 AUG

EDITION OF OCT 69 IS OBSOLETE.

12.
On 2 August, 19 84, 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.)*

Jonathan E. Richards — *Typed Name of Immediate Commander*

Co A, 1st Bn, 61st Inf Bde — *Organization of Immediate Commander*

Captain — *Grade*

Jonathan E. Richards — *Signature*

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13.
The sworn charges were received at 1100 hours, 2 August 19 84 at 1st Battalion, 1st Inf Brigade — *Designation of Command or*

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

FOR THE[1] COMMANDER

Will M. Wilson — *Typed Name of Officer*

Adjutant — *Official Capacity of Officer Signing*

Captain — *Grade*

Will M. Wilson — *Signature*

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY	b. PLACE	c. DATE
1st Infantry Brigade	Fort Blank, Missouri	7 August 1984

Referred for trial to the special court-martial convened by CMCO number 12 dated _____

_____, 1 August 19 84, subject to the following instructions:[2] None

_____

_____ By _____ By _____
Command or Order

Carl E. Nevins — *Typed Name of Officer*

Commander, 1st Inf Brigade — *Official Capacity of Officer Signing*

Colonel — *Grade*

Carl E. Nevins — *Signature*

15.
On 8 August, 19 84, I caused to be served a copy hereof on ~~(each of)~~ the above named accused.

Hamilton Burger — *Typed Name of Trial Counsel*

Captain, JAGC — *Grade or Rank of Trial Counsel*

Hamilton Burger — *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.

CHAPTER XII

POTENTIAL LEGAL PROBLEMS OF THE SPECIAL COURT-MARTIAL CONVENING AUTHORITY

A. Introduction. The unique responsibilities of a court-martial convening authority--to act as both a judicial officer and a commanding officer--frequently create potentially serious legal problems for the convening authority who tries to be true to both roles. There is no getting around the fact that it is extremely difficult for an aggressive commanding officer to discharge his responsibilities of command, and at the same time, remain completely impartial in his attitude toward each wrongdoer. Frequently the necessity for decisive command action clashes directly with legal rights designed to protect the individual from arbitrary or unjust action. In this chapter the relationship of command and convening authority responsibility will be explored through the discussion of common legal problems. If commanders are sensitive to both the principles of command and the principles of convening authority responsibility, the apparent friction between the two roles can be minimized.

B. Accuser concept problems. The Uniform Code of Military Justice is structured to give the convening authority extensive areas of permissible involvement in the military justice system. For example, he may administer nonjudicial punishment; 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), 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 nonjudicial punishment. Article 24(b), UCMJ; R.C.M. 1302(b), MCM, 1984. The accuser concept is applied to summary court-martial in the Coast Guard. Section 306-1, MJM. In the Navy and Marine Corps, 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 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 top of page 2 of the charge sheet. The effect of this signature, and the subsequent oath, is to represent that the allegations contained in the charges are true. A person who makes such a manifest judgment of the facts of the case in its preliminary stages cannot reasonably be expected to be impartial when making quasi-judicial decisions at later stages of the trial process. The circumstance of the convening authority preferring charges is very rare; e.g., when a subordinate officer succeeds to command after having signed the charge sheet as the accuser.

2. Direct nominal signing of charges. A convening authority may become an accuser by ordering another to sign charges as an accuser. In such a situation the law concludes that the convening authority is doing indirectly that which he cannot do directly. The obvious cases are easily distinguishable, but some accuser problems arise in subtle ways. A convening authority may, in many instances, be the commander who first receives information that the accused has committed an offense. It is entirely lawful and appropriate for the convening authority to direct a subordinate to investigate the complaint with a view toward preferring whatever charges the subordinate deems appropriate. Such action is strictly official and involves no accuser concept problems unless the convening authority directs the subordinate to prefer certain specific charges against a certain accused. In the latter circumstances, the convening authority may be an accuser in fact.

There are two common practices that involve this basic problem. In the first instance, a criminal investigation report may be submitted to the convening authority by the Naval Investigative Service or some other organized investigating unit. The convening authority may then read the report, decide upon the propriety of certain charges, and order his legal officer to ". . . take this report and prepare a charge sheet on Jones charging him with larceny and have it on my desk for referral to special court-martial this afternoon." The other situation exists when a subordinate commander forwards a case, without a charge sheet, to a superior commander for NJP. The superior commander, also a convening authority, decides to refer the case to trial and issues an order to his legal officer similar to that issued in the first instance. While, in a sense, the convening authority's interest in these cases is, in fact, official, he, nevertheless, has given an order which amounts to a directive to the legal officer or his subordinate to prefer certain charges against a certain person. In such a posture, the convening authority technically may have become an accuser and disqualified from convening a court-martial in the affected cases. To avoid this problem, it behooves the convening authority to have all potential criminal cases forwarded through his legal officer or, if he has none, the executive officer. By working together

closely, 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. See Art. 34(b), UCMJ. This rule is also applicable to summary and special courts-martial. If a convening authority receives a charge sheet in due course which contains charges which do not conform to available evidence, he may lawfully direct a subordinate to amend the charge sheet in order that there be accurate charges. The convening authority may do this for this limited purpose only and not for any other reason. The rule in this situation is consistent with the notion that the convening authority may act in the interest of justice on charges preferred by others because it protects the accused from trial on baseless charges and protects the interest of the government in ensuring justice.

b. Orders to subordinates. When the convening authority discovers that a subordinate commander is about to impose NJP or that other administrative action is about to be taken against an accused, and the convening authority believes such action is inappropriate, he may lawfully direct that an investigation be conducted and appropriate charges be forwarded to him for action. This is also an example of a convening authority acting impartially on charges preferred by others. He may do so in this instance because senior commanding officers have overall responsibility for justice and discipline within their commands. Other kinds of orders are more dangerous, however. Policy letters or directives which indicate that certain offenders or kinds of offenses will be prosecuted by court-martial or by a specific level of court-martial are nothing more than orders to prefer charges as the law views them. Historically, thieves, bad check artists, and various firearm offenders have been targets of such directives. Command guidance is sometimes issued for the control of certain problem offenders, but should never contain references to the disposition of such cases. Such letters are of dubious value and ought to 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 later 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, sections 0119a and b of the JAG Manual 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 illegal 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 illegal 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 illegal 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. As opposed to the accuser concept, command influence is improper regardless of whether it affects a court or nonjudicial punishment. 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 Article 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 Article 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. Where this kind of communication is involved military courts will presume the existence of unlawful command influence unless the existence is clearly and specifically rebutted in the record of trial. That is, evidence must show that no personal views relating to the court-martial process were communicated to any group including the court personnel. Furthermore, military courts require the record to rebut the appearance of evil which is considered as serious as the evil itself. This burden is almost impossible to discharge as a practical matter, so convening authorities must be sensitive to this problem to prevent its appearance in the first place.

In regard to the specific problem of addressing prospective court members, theoretically the law recognizes the propriety of convening authorities making sure that court personnel understand their duties and court-martial procedure. In practice it is difficult for a communication or lecture to avoid the expression or apparent expression of personal views respecting the court-martial process. Before embarking on such education methods, the convening authority should seek the advice of a lawyer. The safest practice is to avoid this type of communication, if possible.

3. Trial counsel influence. This type of unlawful influence is not the direct result of an act by the convening authority. It occurs when the trial counsel, in an effort to insure a conviction or a severe sentence, injects the personal or command view of the convening authority through evidentiary procedures or by way of argument. Historically, most of these cases have involved various department level policies regarding homosexuals and thieves but many have involved local policies. To be sure, the trial counsel errs when he argues to the court that ". . . the convening authority considers the accused worthy of a punitive discharge." A convening authority cannot control the words of others so as to preclude inadvertent interjection of his personal views or policies, but he can avoid public expressions of these views by keeping his views to himself. He can only avoid this kind of unlawful influence by realizing that his convening authority responsibilities necessitate more closely held views and policies on military criminal matters.

4. Court's independent knowledge. Another form of unlawful influence exists when a court member is aware of certain personal views of the convening authority through some independent source rather than through the trial counsel or through direct policy statements. This influence problem usually arises from wardroom expressions of the convening authority, or a staff member, which detail certain views or policies regarding certain offenses, severity of sentences, a certain case, etc. A person who hears these views may be unduly influenced by those views when he sits on a related case as a court member. A court member so influenced is not an impartial member. Accordingly, when the challenge procedure discloses to the judge such knowledge by a member, the law treats the matter as relating to the qualification of the member in the particular case, and the court member would be discharged from sitting on the case. Moreover, if it appears that the convening authority has been using an informal setting deliberately to affect the trial process, then he may be involved with criminal command influence, and he would force the trial counsel to disprove such influence or the appearance of it. The best solution to the problem is for the convening authority to keep his personally held views and policies between himself and his legal officer. He should not discuss criminal cases or problems at staff conferences, meetings, social hours, etc. Article 6, UCMJ, was designed to restrict such conversations to commanders and legal officers and to discourage public discussion of these important matters.

D. Pretrial restraint problems. The term "pretrial restraint" is used to refer to the practice of restricting the freedom of movement of an accused, prior to his trial, to insure his presence at that trial or for other permissible grounds. R.C.M.'s 304 and 305 discuss the various forms of such restraint.

1. Forms of restraint

a. Confinement. See R.C.M. 304(b), 305. Confinement is the physical restraint of an accused in a correctional facility, detention cell, or other areas by means of walls, locked doors, guards, or other devices. Confinement is a status which commences when the accused is delivered to the facility with an order to confine him. This form of restraint is the most severe, and it is not surprising that the rules governing its use are stringent. Commissioned officers, warrant officers, and civilians (when subject to military jurisdiction) can be confined only on order of their commanding officer. In these cases, the commanding officer's authority cannot be delegated. Enlisted persons can be ordered into confinement by any commissioned officer. A commanding officer may lawfully delegate his authority to confine enlisted persons to warrant officers, petty officers, or noncommissioned officers of his command. In such cases, those possessing delegated authority may confine enlisted persons of that command, meaning enlisted persons assigned to, attached to, or temporarily in the jurisdiction of the command, e.g., on-base, onboard ship, on-post, etc.. As a practical matter, however, confinement normally is ordered only by the commanding officer, executive officer, or command duty officer. Note that when an accused is placed in pretrial confinement, his commanding officer must submit a written memorandum to the initial review officer which states the reasons for his conclusion that an offense triable by court-martial has been committed; that the accused committed it; that confinement is necessary because it is foreseeable that the accused will not appear at trial or will engage in serious criminal misconduct; and that less severe forms of restraint are inadequate.

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 accused exceeds the rate for those who are not confined. In addition, a confined accused may be more likely to receive additional confinement as a sentence than a released accused. Because of these consequences, a neutral and detached "initial review officer" (IRO) has been mandated to decide whether an individual should be confined pending his court-martial. The IRO will normally make this determination after the accused has already been confined by the accused's commanding officer. The IRO will make a determination based upon materials presented to him by the command and the accused at an informal proceeding. If he determines pretrial confinement is not warranted, there is no administrative appeal from his decision. Details of the IRO system are outlined in R.C.M. 305(e)-(i) and JAGMAN 0117. See also pages 12-11 through 12-14, below.

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, he required to take part in routine training and duties and to perform normal housekeeping duties. Authority to order an accused into the status of arrest is governed by the same principles applicable to confinement. However, the decision to place the accused in the status of arrest is not reviewed by an IRO.

d. Restriction. Restriction is the moral restraint of an accused within limits which are broader than arrest. Authority to order an accused into the status of restriction is governed by the same principles applicable to confinement. The decision to restrict is not reviewed by an IRO.

e. Conditions on liberty. This form of pretrial restraint was first authorized by the 1984 revision of the Manual for Courts-Martial. See R.C.M. 304(a). It is imposed by orders directing the accused to do or refrain from doing specified acts. Such conditions may be imposed in conjunction with other forms of pretrial restraint or separately. Examples are orders to report periodically to a designated officer, not to go to a specific place (such as the scene of the alleged crime), or not to associate with specific persons (such as the alleged victim). Conditions on liberty must not hinder pretrial preparation, however, and if imposed, must be sufficiently flexible to permit pretrial preparation. Authority to impose conditions on liberty as a form of partial restraint is governed by the same principles applicable to confinement. The decision to impose conditions on liberty is not reviewed by an IRO.

2. Basis for restraint. Pretrial restraint is the subject of five separate articles of the UCMJ, more than any other single subject covered in the Code. This fact is a significant indication of the gravity of congressional concern over the use of pretrial restraint and an indication of the gravity which should attend any decision to impose pretrial restraint. Each case must be viewed on its own merits by the restraining authority. Blanket policies of restraining all long absence offenders, all thieves, etc., are patently unlawful. Before any form of pretrial restraint may be imposed, probable cause is required--i.e., the person imposing the restraint must have reasonable grounds to believe: (1) that an offense triable by court-martial has been committed; (2) that the person to be restrained committed it; and (3) that the restraint ordered is required by the circumstances. Personal knowledge is not necessary. Restraint may be imposed based upon statements by witnesses.

a. Necessity for pretrial confinement. In order to impose pretrial confinement lawfully, the commander imposing the confinement must have reasonable grounds to believe that it is necessary because it is foreseeable that either: (1) the prisoner will not appear at a trial, pretrial hearing, or investigation; or (2) the prisoner will engage in serious criminal misconduct (including intimidation of witnesses, seriously injuring others, or other offenses which pose a serious threat to the safety of the community or effectiveness of the command). In addition, the

commander must believe upon probable cause that less severe forms of restraint are inadequate. These are the only grounds on which pretrial confinement may be imposed. It is illegal to confine an accused, for example, solely because there is probable cause to believe he has committed a serious offense or because he is a discipline problem (a pain in the neck).

In determining whether pretrial confinement is necessary to insure the presence of the accused, the imposing individual should consider all the facts and circumstances relating to the case. These factors would include the prior disciplinary history of the accused (particularly relevant would be prior unauthorized absence offenses and whether the accused had been released prior to disciplinary action on previous cases); his reputation, character, and mental condition; his family ties and relationships (whether he has a family and whether his family members are in the area); any economic connection to the area (such as home ownership); the presence or absence of responsible members of the military or of the civilian community who can vouch for his reliability; the nature of the offense charged; the apparent probability of conviction; the likely sentence; any statements made by the accused; and any other factors indicating the likelihood of his remaining for his court-martial or his fleeing prior to court-martial.

b. Necessity for restriction. The same grounds that would justify pretrial confinement or arrest will justify pretrial restriction.

3. Severity of restraint. Article 13, UCMJ, indicates that pretrial restraint shall not be more rigorous than the circumstances require to insure the accused's presence. Implicit in this principle is the notion that the accused is not to be punished prior to trial, only detained to insure his presence at trial. In no event will a pretrial confinee be required to perform punitive labor or wear a uniform other than that prescribed for unsentenced prisoners. Military courts have included other criteria for determining whether the accused is compelled to work with sentenced prisoners: whether duty hours or work schedules are the same as those for sentenced prisoners; whether the type of work assigned is the same as that for sentenced prisoners; whether the facility policy is to have all prisoners subject to the same set of instructions; and any other factors indicating that pretrial confinees are treated as sentenced prisoners. Though these principles apply specifically to confinement they are also relevant to other forms of pretrial detention. Superior competent authority can impose further restrictions on the use of pretrial restraint. SECNAVINST 1640.9A (Navy Corrections Manual) promulgates the decision of the Secretary of the Navy that no person shall remain in pretrial confinement more than thirty days without the written approval of the officer exercising general court-martial jurisdiction over the accused. Article 10, UCMJ, also 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. Pre-Mast 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 at hard labor 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 nonjudicial punishment, confinement normally is not authorized. Arrest would be covered by the same general prohibitions. Restriction is, however, authorized as a form of restraint prior to nonjudicial punishment.

5. Relief from pretrial restraint. The special court-martial convening authority, through his legal officer, is the best check of the pretrial restraint process. By taking direct command action to correct errors of law or judgment, a convening authority can save much difficulty at trial and insure appropriate use of pretrial restraint as indicated by Congress. In this connection, the convening authority should not await application for relief by the accused, but should initiate corrective action where appropriate. There are other alternatives for relief available to an accused. He may request mast to superior authority; he may petition for relief under Article 138, UCMJ; he may request the initial review officer to reconsider his decision; or he could petition the Navy-Marine Corps Court of Military Review or the Court of Military Appeals for relief. If an accused has been restrained illegally, he is, at a minimum, entitled to administrative credit on any confinement at hard labor adjudged by a court-martial. This administrative credit would be computed at the rate of one day of credit for each day of illegal confinement served. Note also that the accused will receive administrative credit at the rate of one day of credit for each day of legal pretrial confinement, in accordance with Federal civilian sentence-computation procedures which have been specifically adopted by the Department of Defense. See United States v. Allen, 17 M.J. 126 (C.M.A. 1984). Although it may only involve psychological relief to the accused, it is possible for the person ordering illegal pretrial confinement to be prosecuted under Article 97, UCMJ (maximum sentence is dismissal or dishonorable discharge and three years confinement at hard labor).

INITIAL REVIEW OFFICER PROGRAM

(R.C.M. 305, MCM, 1984; JAGMAN 0117)

I. Who must appoint?

A. All officers exercising general court-martial jurisdiction over a shore activity having a place of confinement.

B. All area coordinators exercising authority over a shore activity who have made arrangements with civil authorities for the confinement of military personnel in civilian facilities.

II. Applicability of pretrial confinement review procedures

A. These rules apply to members of the naval service confined ashore in naval places of confinement or in civilian confinement pursuant to an authorized agreement, including individuals in naval places of confinement awaiting transportation to their parent commands (unless confined for less than 72 hours in any particular facility).

B. Members of the naval service confined afloat shall be transferred as soon as practicable to the nearest shore command having an approved confinement facility. The required report must be forwarded to the initial review officer (IRO) immediately upon this transfer.

C. The confinement of members of the naval service confined in naval places of confinement in connection with foreign criminal proceedings shall not be reviewed under the terms of this program.

D. The review of the pretrial confinement of members of the naval service confined in places of confinement under the jurisdiction of other armed forces shall be governed by the IRO regulations of the armed force that has jurisdiction over the place of confinement.

E. The review of the pretrial confinement of members of the Army, Air Force, or Coast Guard confined in naval places of confinement shall be in accordance with the IRO regulations of the member's own armed force, but if no action is taken within 72 hours by an IRO of that armed force, then the review shall be promptly conducted by a naval service IRO as if the confinee were a member of the naval service.

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 offenses 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);

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.

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 service member 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 to the GCM authority.

E. Speedy trial problems. The accused has both a constitutional and a statutory right to a speedy trial. The best way of defining this legal problem is the use of the words themselves. The government is under an obligation to proceed with prosecution 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 par. 2, below) or face dismissal of the charges. In connection with this subject, the student must be familiar with the provisions of Articles 10, 30(b), and 33, UCMJ, and R.C.M. 707. Since the essence of a denial of speedy trial is delay, an analysis of the issue must begin with the period of time for which the government is responsible.

1. Raising the issue. The issue of denial of speedy trial normally is raised at trial by the accused by a motion to dismiss charges. In support of this motion the accused need only show that the trial has been delayed. The issue may also be presented prior to trial by request to the convening authority. Once the issue is raised, the burden is upon the government to show by a preponderance of evidence that the delay was not unreasonable - i.e., that the government proceeded to trial with due diligence, or that the accused was not harmed (prejudiced) by the delay.

2. Commencement of accountability. The period of time for which the government must account begins either upon the imposition of any form of pretrial restraint under R.C.M. 304, other than conditions on liberty, or the date when the accused was notified of the preferral of charges, whichever occurs first. By Executive Order No. 12550 of 19 February 1986, the President amended the MCM, 1984. Included within that directive was a change directing that, effective 1 March 1986, "conditions on liberty" will no longer trigger the 120-day speedy trial clock. The reason for the alternative rule is that the denial of speedy trial can exist even where no pretrial restraint is involved. 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. Also, if a military accused is held by civilian authorities on civilian charges, the government is under an obligation to make bona fide attempts to secure the accused's release for military trial. If no such effort is made, the government is accountable for the period of civilian confinement. 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, does not terminate until trial commences, i.e., a plea of guilty is entered or presentation to the factfinder of evidence on the merits begins.

4. Excludable periods. R.C.M. 707(c) states that certain periods will be excluded when determining whether the 120-day rule has been satisfied; e.g., periods of delay resulting from other proceedings in the case (psychiatric evaluation, hearing on pretrial motions), unavailability of military judge, defense-requested continuance, accused's absence, unusual operational requirements and military exigencies.

5. Prejudice per se. When an accused has been subjected to pretrial confinement in excess of 90 days, the law will presume prejudice to the accused and that he has been denied his right to a speedy trial. Unless the government can demonstrate extraordinary circumstances beyond manpower shortages, mistakes in drafting, or illnesses and leave that contributed to the delay, the charges against the accused will be dismissed. In computing the 90 days for these purposes, days of delay attributable to the defense and for its benefit will not be counted. This is known as the Burton speedy trial rule (so named after the Court of Military Appeals case that first announced the rule in 1971). Operational demands, combat environment, or a particularly complex offense or series of offenses are examples of "extraordinary circumstances" that might justify delay over three months. So far this principle has not been applied to other forms of restraint but it may very well apply if the restriction or arrest is so severe as to be tantamount to confinement. In practical application, the Burton rule has made it very difficult for the government to justify delays beyond the 90th day. It is therefore imperative that an accused in pretrial confinement be brought to trial by the 90th day. While many delays will be beyond the control of the line commander, others may be shortened by expeditious processing. The preliminary inquiry and article 32 investigation (where applicable) should be done thoroughly and quickly. Before witnesses are sent on leave, liaison should be made with the trial counsel in the case. Since the time spent in a civilian confinement facility while awaiting return to military control may be counted as part of the 90 days, reasonable efforts should be made to return an accused to military control as quickly as possible. It should also be noted that it is still permissible to release an accused from pretrial confinement if it appears unlikely that he can be brought to trial within 90 days. This may, however, subject the officer ordering release to some judicial "second-guessing" as to the initial necessity for pretrial confinement.

6. Resolving other speedy trial claims. In addition to the 90-day (pretrial confinement) and 120-day (general) rules, it is possible for a denial of the right to speedy trial to occur when the accused is under no form of pretrial restraint and the case is tried in well under 120 days. In such cases, the court will consider several factors in determining whether the accused was denied his right to speedy trial.

a. Length of delay. The longer the delay, the greater the likelihood that a denial of the right has occurred. No strict guidelines can be given. In one case, a delay of less than 90 days involved a denial of the right to speedy trial.

b. Defense requests for trial. Has the accused made demands for speedy trial? This factor may be particularly relevant if the accused has been in pretrial confinement for less than 90 days. In that situation it may require the government to proceed more expeditiously towards trial. Demands for speedy trial should always be answered, preferably after consultation with the trial counsel assigned to the case.

c. Complexity of case. How much time was reasonably necessary to process the case is largely contingent on its complexity. A simple absence case can be processed much more rapidly than a bad check case where the accused passed bad checks in several states over a long period of time. Also relevant is the number of witnesses required to be interviewed by investigators, workload and office strength of the processing section of the command, and the necessity for laboratory tests and the like. This does not mean that production of smooth copies of investigative reports, the waiting for lab reports which only reinforce other evidence, or "shelving" of investigative work pending psychiatric evaluation of the accused will justify delay. In any case, good faith, inexperience, or ignorance of government personnel are not factors justifying delay.

d. Oppressive or arbitrary delay. A delay, if coupled with a deprivation of one or more due process rights of the accused, may amount to a denial of speedy trial. A failure to respond to demands for trial indicates that the commander does not appreciate his quasi-judicial responsibilities. Delay in immediately informing the accused of charges against him when ordered into pretrial restraint (Art. 10, UCMJ) is a denial of due process as is failure to submit the investigation and charges (or the letter of explanation) to the convening authority within eight days of ordering pretrial restraint (Art. 33, UCMJ) and a denial of access to counsel where a restrained accused requests counsel. Oppressive or arbitrary delay exists when the government deliberately or carelessly causes a delay and allows witnesses to get away from military jurisdiction, evidence to be lost, etc.

e. Pretrial restraint. The duration and nature of pretrial restraint are also important factors relating to reasonable diligence of prosecution. The more severe the restraint on the accused, the more diligently the government must proceed to trial. In this connection, any unlawful or punitive restraint will multiply the effect of the duration of pretrial restraint on this issue.

f. Prejudice to the accused. The most important factor to consider is what prejudice the accused has suffered because of the delay. His witnesses may no longer be available or they may have lost their memory. A long delay under the threat of prosecution may cause emotional strains on an accused. Pretrial restraint, in addition to the prejudice from loss of liberty, may prejudice the accused in the preparation of his case.

7. Recapitulation. The strictures relating to speedy trial are such that commanders must be ever mindful of them to avoid untoward dismissal of criminal cases. In practice, speedy trial should be viewed as a limitation on the use of pretrial restraint as much as a limitation on time of trial. The law does not demand unusual action in a case until pretrial restraint is imposed. At that point the government must proceed with all reasonable speed. Thus the commander/convening authority should insure that pretrial restraint is utilized only when necessary, as opposed to convenient or desirable. Difficulties in obtaining service records or other documents held by department level offices will have to be resolved by bringing to bear as much command pressure as possible. If the convening authority realizes he is about to run over the three month limit on

pretrial confinement, release of the accused will not necessarily solve the problem. Courts are likely to view the late release as a negation of the basis for the imposition of the restraint in the first place. 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. The speedy trial issue is not waived (given up) by an accused's guilty pleas if the record of trial shows no justifiable cause for delay and there is a denial of due process. Articles 10 and 33, UCMJ. Appellate courts will, in such cases, grant relief notwithstanding the pleas of the accused at trial.

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 acts regarding the trial by court-martial. R.C.M. 705 and section 0129 of the JAG Manual detail procedures for negotiating pretrial agreements and define the rules pertaining to them. Appendices A-1-e and A-1-f of the JAG Manual contain suggested forms for the finalized agreement, but these forms will require careful tailoring in all cases as the agreement must be clear, precise, and should cover all contingencies.

1. Negotiations. The offer to enter into a pretrial agreement must originate with the accused and his defense counsel. After initiation by the defense, the convening authority, the staff judge advocate or the trial counsel may then negotiate the terms and conditions with the defense counsel unless the accused is not represented. 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, however, 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 non-capital;

(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 not be prohibited:

(a) a promise to enter into a stipulation of fact concerning offenses to which a plea of guilty or confessional stipulation will be entered;

(b) a promise to testify as a witness in a trial of another person;

(c) a promise to provide restitution;

(d) a promise to conform the accused's conduct to certain conditions of probation before action of the convening authority as well as during any period of suspension of the sentence (subject to the requirements concerning vacations of suspensions found in R.C.M. 1109); and

(e) a promise to waive procedural requirements such as the article 32 investigation, the right to trial by members, the right to request trial by military judge alone and the opportunity to obtain the personal appearance of witnesses at sentencing proceedings.

3. Prohibited terms and conditions. R.C.M. 705(c)(1) provides that any term or condition to which the accused did not freely and voluntarily agree will not be enforced. Additionally, any term or condition which deprives the accused of certain substantial rights will not be enforced. Among these rights are: the right to counsel; the right to due process; the right to challenge the jurisdiction of the court-martial; the right to a speedy trial; the right to complete sentencing proceedings; and the right to complete and effective exercise of posttrial and appellate rights. Since ambiguous, vague, or arguably improper provisions in pretrial agreements will generally be interpreted strictly against the government, it is suggested that, before signing any pretrial agreement, the convening authority consult with the trial counsel so that his understanding of the agreement is placed in the proper legal form and terminology. The convening authority should always consult with the trial counsel directly or through his own staff judge advocate if one is assigned.

4. Pitfalls. The offer to plead guilty cannot be accepted if there is reason to believe that there is insufficient evidence to convict the accused of the offense concerned. Also, unreasonably multiplying offenses from an essentially single offense to coerce a pretrial agreement is improper. Also unlawful is the practice of pleading a baseless major offense on the charge sheet in order to induce a pretrial agreement on a lesser included offense. The agreed sentence aspect of the agreement must be clear, precise, and provide for all contingencies. In this connection, it is essential to obtain the trial counsel's (prosecutor's) advice before drafting or approving any pretrial agreement. Such agreements are technically complex, and the JAG Manual format does not cover all situations.

5. Binding effect of the agreement. In general, the accused may always withdraw from a pretrial agreement. The convening authority may withdraw at any time before the accused begins performance of promises contained in the agreement. Additionally, the agreement will be void in the following circumstances:

a. when the accused fails to fulfill any material promise or condition in the agreement (e.g., fails to plead guilty, withdraws a guilty plea, renders a guilty plea improvident, etc.);

b. when inquiry by the military judge discloses a disagreement as to a material term in the agreement; or

c. when findings are set aside because a plea of guilty entered pursuant to the agreement is held improvident on appellate review.

6. Judicial supervision. The military judge must inquire into the existence and the provisions of the pretrial agreement to be sure the accused acted voluntarily and knowingly in executing the agreement. Normally, a misunderstanding of the terms of an agreement will cause rejection of guilty pleas and the entry of not guilty pleas. If the intent of the parties at the time the agreement was executed can be determined that interpretation will control the agreement.

In spite of the effect of the pretrial agreement on the trial, the court members may not be informed of any negotiations, of any existing agreement, or of any agreement made but subsequently rejected. If trial is by military judge alone, he may not examine the sentencing provisions prior to his verdict on the sentence in the case.

7. Major Federal offenses. In some cases, the misconduct which subjects the military member to trial by court-martial also violates other Federal laws and subjects the member to prosecution by civilian authorities in the Federal courts. In these cases, decisions must be made as to which forum the case should go and as to which agency will conduct the investigation. In order to ensure that actions by military convening authorities do not preclude appropriate action by Federal civilian authorities in such cases, JAG Manual 0129b requires that convening authorities shall ensure that appropriate consultation under the Memorandum of Understanding between the Department of Defense and Justice (MCM, 1984, app. 3) has taken place prior to any trial by court-martial or approval of any pretrial agreement in cases likely to be prosecuted in the Federal courts.

CHAPTER XIII

PRETRIAL ASPECTS OF THE GENERAL COURT-MARTIAL

A. Introduction. The general court-martial is the highest level of court-martial in the military justice system. Such a court-martial may impose the greatest penalties provided by law for any offense. The general court-martial is composed of a minimum of five members, a military judge, and lawyer counsel for the government and the accused. In some cases the court is composed of a military judge and counsel. The general court-martial is created by the order of a flag or general officer in command in much the same manner as the special court-martial is created by subordinate commanders. Before trial by general court-martial may lawfully occur, a formal investigation of the alleged offenses must be conducted and a report forwarded to the general court-martial convening authority. This pretrial investigation (often referred to as an article 32 investigation) is normally convened by a summary court-martial convening authority. This chapter will discuss the legal requisites of the pretrial investigation.

B. Nature of the pretrial investigation

1. Scope. The formal pretrial investigation (Art. 32, UCMJ) is the military equivalent of the grand jury proceeding in civilian criminal procedure. The purpose of this investigation is to inquire formally into the truth of allegations contained in a charge sheet, to secure information pertinent to the decision on how to dispose of the case, and to aid the accused in discovering the evidence against which he must defend himself. Basically, this investigation is protection for the accused. It is a shield which protects him from trial on baseless but infamous charges, the very existence of which are detrimental to the accused's reputation and respectability. The investigation is also a sword for the prosecutor who may test his case for its strength in such a proceeding and seek its dismissal if too frail or if groundless. Such an investigation can be a proving ground for witnesses who, for the first time, are subject to cross-examination. By affording the accused and the prosecutor the opportunity to protect their own interests, the government usually can be certain that only the truly serious and meritorious cases are referred to trial by general court-martial.

2. Authority to convene. An Article 32, UCMJ, investigation may be convened (created) by one authorized by law to convene summary courts-martial or some higher level of court-martial. Article 24, UCMJ, and section 0115 of the JAG Manual 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 Rule for Courts-Martial 405(c), MCM, 1984, [hereinafter cited as R.C.M.___], the authority to convene 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 referred to as the pretrial investigation] vests in the office of the commander. See Chapter X, Authority to convene, page 10-1, above.

3. Mechanics of convening. When the summary court-martial or higher convening authority receives charges against an accused which are serious enough to warrant trial by general court-martial, the convening authority convenes a pretrial investigation. This is done by written orders of the convening authority which assign personnel to participate in the proceedings. At the time the investigation is ordered, the charge sheet will have been completed up to, but not including, the referral block on page 2. Unlike courts-martial, pretrial investigations are created as required and standing convening 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. When the investigation is complete and the report submitted, the pretrial investigation is dissolved unless subsequent orders of the convening authority dictate additional proceedings. The original appointing order is forwarded to the assigned investigating officer along with the charge sheet, allied papers, and a blank investigating officer's report form (DD Form 457; see also MCM, 1984, app. 5).

4. Investigating officer. The pretrial investigation is a formal one-officer investigation into alleged criminal misconduct. The investigating officer must be a commissioned officer who should be a major/lieutenant commander or above, or an officer with legal training. The advantages of appointing a judge advocate (when available) to act as the investigating officer are substantial, especially in view of the increasingly complex nature of the military judicial process. Neither an accuser, prospective military judge nor prospective trial or defense counsel for the same case may act as investigating officer. Further, the investigating officer must be impartial and cannot previously have had a role in inquiring into the offenses involved (e.g., as provost marshal, public affairs officer, etc.). Mere prior knowledge of the facts of the case will not, alone, disqualify a prospective investigating officer. If such knowledge imparts a bias to the investigating officer, then he obviously is not the impartial investigator required by law. The law contemplates an investigating officer who is fair, impartial, mature, and with a judicial temperament. It is the responsibility of the convening authority to see that such an officer is appointed to pretrial investigations.

Case law has reemphasized that the duty of the investigator is to perform a judicial function. This means that he must be neutral, detached and independent in conducting the investigation. The C.M.A. has specifically condemned the practice of the pretrial investigating officer engaging in private conversations about the case with the military lawyer whom the investigator knew would ultimately prosecute the case. United States v. Payne, 3 M.J. 354 (C.M.A. 1977). This case demonstrates the importance of selecting an individual who is capable of conducting the investigation without excessive, and perhaps impermissible, assistance from other advisers.

If it is necessary for a nonlawyer investigating officer to obtain advice regarding the investigation, that advice should not be sought from one who is likely to prosecute the case.

5. Counsel for the government. While the pretrial investigation need not be an adversarial proceeding, current practice favors having the convening authority detail a lawyer to represent the interests of the government, especially where the investigating officer is not a lawyer. The assignment of a counsel for the government does not lessen the obligation of the investigating officer to investigate the alleged offenses thoroughly and impartially. As a practical matter, however, the presence of lawyers representing the government and the accused make the pretrial investigation an adversarial proceeding. Counsel for the government functions much as a prosecutor does at trial and presents evidence supporting the allegations contained on the charge sheet.

6. Defense counsel. The accused's rights to counsel are as extensive at the pretrial investigation as at the general court-martial. More specifically, an accused is entitled to be represented by civilian counsel, if provided by the accused at no expense to the government, and by a detailed military lawyer, certified in accordance with Article 27(b), UCMJ, or by a military lawyer of his own choice at no cost to the accused if such counsel is reasonably available. See Chapter XI, pages 11-7 through 11-9, above, regarding an accused's right to defense counsel. Detailed defense counsel at a pretrial investigation must be a certified (Art. 27(b), UCMJ) lawyer and should be designated by the appointing order. Individual counsel, military or civilian, is normally not detailed on the appointing order. An accused is 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. Sample appointing order. The order directing a pretrial investigation may be drafted in any acceptable form so long as an investigation is ordered and an investigating officer and counsel are detailed. A suggested format follows.

PRETRIAL INVESTIGATION
SAMPLE APPOINTING ORDER

NAVAL JUSTICE SCHOOL
NEWPORT, RHODE ISLAND 02840

10 August 1984

In accordance with Rule for Courts-Martial 405, Manual for Courts-Martial, 1984, Lieutenant Commander Carl Giese, U.S. Navy, is hereby appointed to investigate the attached charges preferred against Seaman John G. Guildersleeve, U.S. Navy. The charge sheet and allied papers are appended hereto. The investigating officer will be guided by the provisions of Rule for Courts-Martial 405, Manual for Courts-Martial, 1984, and pertinent case law relating to the conduct of pretrial investigations. In addition to the investigating officer hereby appointed, the following personnel are detailed to the investigation for the purposes indicated.

COUNSEL FOR THE GOVERNMENT

Lieutenant Andrew Bailey, JAGC, U.S. Naval Reserve, certified in accordance with Article 27(b), Uniform Code of Military Justice.

DEFENSE COUNSEL

Lieutenant Bernard Bridges, JAGC, U.S. Navy, certified in accordance with Article 27(b), Uniform Code of Military Justice.

THOMAS HART
Captain, U.S. Navy
Commanding Officer

C. The hearing procedure

1. Prehearing preparation. When the pretrial investigation officer (PTIO) receives his order of appointment, he should first study the charge sheet and allied papers to become thoroughly familiar with the case. The charge sheet should be reviewed for errors and any needed corrections should be noted. Only minor changes may be made by the PTIO. See Chapter XI, above, regarding amendments to charges. If counsel for the government has been appointed, the investigating officer should contact him to determine what additional information, if any, is available. The PTIO should then deliver a copy of the charge sheet to the accused and his counsel. No attempt should be made to interrogate the accused at this time. Prospective witnesses should then be interviewed and items of physical or documentary evidence located and either obtained by the PTIO or properly preserved in order to protect the chain of custody or unique identifying features. Once the PTIO is satisfied that he has obtained all available relevant evidence, he should consult with accused, counsel, witnesses, and the legal officer of the convening authority to set up a specific hearing date. It is 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 available witnesses who appear reasonably necessary for a thorough and impartial investigation are required to be called before the article 32 investigation. Transportation and per diem expenses are provided for both military and civilian witnesses. See R.C.M. 405(g). Witnesses are "reasonably available," and therefore subject to production, when the significance of the testimony and personal appearance of the witness outweighs the difficulty, expense, delay and effect on military operations of obtaining the witness' appearance. R.C.M. 405(g)(1)(A). This balancing test means that the more important the expected testimony of the witness, the greater the difficulty, expense, delay, or effect on military operations must be to permit nonproduction. Similar considerations apply to the production of documentary and real evidence.

For both military and civilian witnesses, the PTIO makes the initial determination concerning availability. For military witnesses, the immediate commanding officer of the witness may overrule the PTIO's determination. The decision not to make a witness available is subject to review by the military judge at trial.

A civilian witness whose testimony is material must be invited to testify, although he or she cannot be subpoenaed or otherwise compelled to appear at the investigation. Thus, the PTIO should make a bona fide effort to have such civilian witnesses appear voluntarily, offering transportation expenses and a per diem allowance if necessary. R.C.M. 405(g)(3).

3. Statements. The PTIO has a number of alternatives to live testimony. When a witness is not reasonably available, even if the defense objects, the PTIO may consider that witness' sworn statements. Unless the defense objects, a PTIO may also consider, regardless of the availability of the witness, sworn and unsworn statements, prior testimony, and offers of proof of expected testimony of that witness.

Upon objection, only sworn statements may be considered. Since objections to unsworn statements are generally made, every effort should be made to get sworn statements. All statements considered by the PTIO should be shown to the accused and counsel. The same procedure should be followed with respect to documentary and real evidence.

4. Testimony. All testimony given at the pretrial investigation must be given under oath and is subject to cross-examination by the accused and counsel for the government. The accused has the right to offer either sworn or unsworn testimony. If undue delay will not result, the statements of the witnesses who testified at the hearing should be obtained under oath. In this connection, the PTIO is authorized to administer oaths in connection with the performance of his duties. JAGMAN 2501a(2).

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, UCMJ, warnings, or similar legal issues, is fully developed at the investigation. Since the rules of evidence do not strictly apply, cross-examination of witnesses may be very broad and searching and should not be unduly restricted.

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.

NOTE: A detailed hearing guide for use in pretrial investigations follows. The guide also contains instructions for completing the article 32 investigation form, much of which may be compiled as the proceedings take place.

FORMAL PRETRIAL INVESTIGATION
PROCEDURAL GUIDE

I.O.: This hearing will come to order.

I.O.: This investigation is convened by order of (grade and name), Commanding Officer, (organization), to inquire into the truth of the matters set forth on the charge sheet, to examine the form of the charges, and to secure information that will be helpful in determining the disposition of the case of the United States against (grade and name of the accused). Copies of the charge sheet and appointing order have been furnished to the accused, defense counsel, (counsel for the United States), and the reporter.

I.O.: Present at this hearing are the detailed investigating officer, (grade and name), (accused), (defense counsel), (government counsel), and (grade and name of reporter), who has been detailed reporter for this hearing.

I.O.: The detailed reporter will now be sworn.

NOTE: At this time both the investigating officer and the reporter will rise, face each other, and lift their right arms in the manner customary for taking an oath. The format for the oath should be the following.

I.O.: Do you swear to faithfully perform the duties of reporter for this investigation, so help you God?

REP: I do.

NOTE: The oath has now been properly administered. All may resume their seats. The investigating officer should then proceed to formally check the appointing order for accuracy.

I.O.: (Accused), I am (grade and name of investigating officer) and have been appointed to investigate certain allegations against you. Before proceeding with the investigation, however, I want to be sure you understand certain rights.

First, I am going to explain your rights to be represented by a lawyer at this hearing. Do you understand that you have the right to be represented by civilian counsel provided by you? (Accused: yes/no.) Do you also understand that in addition to civilian counsel you have the right to be represented, at no expense to yourself, by either your detailed defense counsel, or a military lawyer of your own selection if reasonably available? (Accused: yes/no.) Finally, do you understand that, if you wish, you may waive, or give up, your right to counsel during this investigation? (Accused: yes/no.)

Do you wish to be represented by civilian counsel? (Accused: yes/no.) Do you want to be represented by a military lawyer of your own selection? (Accused: yes/no.) By whom do you wish to be represented? (Accused: _____.)

NOTE: The accused will, at this point, almost always be represented by a detailed military attorney. If the accused desires to retain civilian counsel, or requests individual military counsel, the investigating officer should take the following action.

If the accused desires civilian counsel, recess the investigation for a reasonable time to afford the accused a fair opportunity to retain a civilian lawyer. Good judgment is the rule here. Some accused may use this right as a device to prolong unduly the investigation.

If the accused requests individual military counsel, the investigating officer should report the matter to the officer convening the investigation.

If the accused indicates a desire to waive the assistance of counsel during the investigation, the investigating officer should ensure, by careful questioning, that the accused is knowingly exercising this option.

I.O.: Are the legal qualifications of counsel correctly stated in the appointing order?

NOTE: If accused is represented by individual counsel, request that counsel's legal qualifications in terms of Art. 27(b), UCMJ, be stated. It is not necessary to obtain a recital of legal education and training.

If accused is represented by civilian counsel, request that such counsel state before what state or federal bars he/she has been admitted to practice law.

D.C.: My legal qualifications are/are not correctly stated in the appointing order.

Ass't D.C.: My legal qualifications are/are not correctly stated in the appointing order.

NOTE: At this point the investigating officer should have sufficient data to complete blocks 5-9 of the investigating officer's report form (DD Form 457). For example:

5. THE ACCUSED WAS REPRESENTED BY COUNSEL (If not, see 8 below)			
6. COUNSEL WHO REPRESENTED THE ACCUSED WAS QUALIFIED UNDER R.C.M. 405(d)(2), 502(d)			
7a. NAME OF DEFENSE COUNSEL (Last, First, MI)	b. GRADE	8a. NAME OF ASSISTANT DEFENSE COUNSEL (If any)	b. GRADE
Harvey Wallganger, LT, JAGC, USN	O-3	I.M. Helperbee, LT(jg), JAGC, USN	O-2
c. ORGANIZATION (If appropriate)		c. ORGANIZATION (If appropriate)	
Naval Legal Service Office		Naval Legal Service Office	
d. ADDRESS (If appropriate)		d. ADDRESS (If appropriate)	
Norfolk, VA		Norfolk, VA	
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			

I.O.: (Accused), you are advised that the nature of each offense alleged on the charge sheet (exhibit #1) is _____.

The charge(s) was/were preferred by (name, grade, and organization of accuser), a person subject to the Uniform Code of Military Justice.

You are further advised that you have the right to remain silent and say nothing at all about these allegations--no one can lawfully compel you to incriminate yourself. If you choose to make any statement, then any statement you make may lawfully be used against you at a trial by court-martial. Before making any statement you may consult with your counsel. Do you understand what I have just told you?

ACC: Yes/no.

I.O.: The purpose of this investigation is to inquire formally into the allegations contained on the charge sheet in order to secure information which will help the convening authority decide how to dispose of this case. You have the right to be present throughout the taking of evidence during this hearing.

So far as known by me, the witnesses against you are: _____.

Other evidence known to me includes: _____.

In addition to the rights already mentioned, you have the right to cross-examine all available witnesses and to see the sworn statements of witnesses who are not available to testify. Do you understand?

ACC: Yes/no.

I.O.: Further, you have the right to call available witnesses to testify at the hearing and also the right to have all other available evidence presented.

You also have the right to present anything you desire to subject in your own behalf as a defense or in extenuation and/or mitigation. This includes the right to make a statement yourself, and your statement may be sworn or unsworn and in any form. Do you understand?

ACC: Yes/no.

NOTE: The investigating officer should now be able to complete block 10 of DD Form 457.

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	

I.O.: Before proceeding further ____(accused)____, do you have any questions concerning your rights at this investigation?

ACC: Yes/No.

I.O.: I now call the first witness ____(name of witness)____, who will be sworn.

I.O.: Do you swear that the evidence you are about to give in the case now in hearing is the truth, the whole truth, and nothing but the truth, so help you God?

WIT.: I do.

NOTE: The manner of examining witnesses depends upon whether a counsel for the government has been detailed. It is customary for government counsel to conduct the direct examination. In any event, the investigating officer may, at his discretion, conduct the initial examination of the witness and must do so if no counsel has been detailed to represent the United States. Where counsel for the government is present, he should examine the witness first, followed by the defense counsel (If several defense counsel appear, only one should be allowed to question a witness.), followed by the investigating officer until the examination of the witness is complete. Each witness should be asked to identify himself and if he/she can identify the accused. The testimony of each witness should be marked as an exhibit whether it is recorded verbatim or simply summarized by the investigating officer. After all available witnesses have testified, the investigating officer should proceed to consider the sworn statements of unavailable witnesses.

I.O.: I will next consider the sworn statement of (identify witness), an unavailable witness. I have marked the statement as exhibit # ____. I now show a copy of the statement to the accused and his counsel.

NOTE: After all sworn statements of unavailable witnesses have been marked as exhibits and considered by the investigating officer, he should then explain the reasons for the nonavailability of any witness requested by the defense. The investigation should then proceed to the consideration of documentary evidence. For example:

I.O.: I have before me (the original) (page __) from the service record of the accused and, I intend to consider this/these document(s) in my investigation. It/they will be appended to my report as exhibit(s) #____, and I now show it/them to the accused and counsel.

NOTE: After all documentary evidence has been considered, items of real evidence should be marked. Real evidence includes items such as guns, knives, drugs, etc., and they will almost always be marked and considered in connection with the examination of witnesses or the consideration of sworn statements in view of the need for identifying the evidence and determining its relevance.

If a confession or admission of the accused is to be considered, the investigating officer should look into the circumstances to determine compliance with Art. 31, UCMJ, and Miranda-Tempia rights.

This may mean the examination of witnesses or the consideration of the sworn statement of the one taking the confession.

After all evidence has been received, blocks 9-10 of DD Form 457 can be completed.

After all evidence has been accounted for up to this point, the investigating officer should allow the accused to exercise his right to make a statement.

I.O.: (Accused), I previously advised you that, while you cannot be compelled 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 of your decision.

ACC: I do/do not desire to make a statement.

NOTE: If the accused makes no statement, the investigation may close. If a statement is made it should be recorded and appended as an exhibit.

I.O.: The investigation is closed.

NOTE: After the hearing has been completed, the investigating officer should complete block 14 of DD Form 457 regarding the mental condition of the accused (see R.C.M. 908 and 915(k) for a discussion of mental responsibility or capacity and how to deal with this issue). It is important to note, however, that a mere assertion of insanity by accused or his counsel is not necessarily a basis for referring the accused to a psychiatric board and thereby delaying the investigation. There should exist some tangible evidence of a lack of mental responsibility or capacity. If such grounds do exist, then the matter should be referred to the convening authority. If a medical report is thereafter received on the issue, it should be attached as an exhibit to the report (DD Form 457).

Although the investigating officer is not required to rule on defense objections during the proceedings, the defense may properly request that such objections be noted in the investigative report. See block 15 of DD Form 457.

Next, the investigating officer completes block 16 of DD Form 457, indicating whether essential witnesses -- prosecution or defense -- will be available. Matters such as impending transfer, separation from service, death, etc. should be noted as appropriate opposite the name of the witness involved.

In block 17, the investigating officer indicates whether the charges and specifications are in proper form. If not, the investigating officer should specify any deficiencies. In addition, based on the evidence disclosed at the hearing, the investigating officer may believe that other charges should be preferred, either against the accused or against other persons.

In block 18, the investigating officer finally has an opportunity to indicate his overall assessment of the charges. If "reasonable grounds" do not exist to show that the accused committed the offense(s) alleged, the investigating officer should explain his/her conclusions.

In block 19, the investigating officer should affirm that he is not aware of any grounds which would disqualify him/her from acting as investigating officer.

Finally, in block 20, the investigating officer should indicate at what level of court-martial, if any, the case should be tried.

Block 21 is a general remarks section for explaining any "no" answers on the rest of the form. In addition, the investigating officer should account for any delays in the investigation. As a matter of routine practice, most investigating officers keep a detailed chronology of the investigation in the event that a speedy trial issue is litigated later. A sample page 2 of DD Form 457 follows.

12a. THE FOLLOWING WITNESSES TESTIFIED UNDER OATH (Check appropriate answer)

NAME (Last, First, MI)	GRADE (If any)	ORGANIZATION ADDRESS (Which is appropriate)	YES	NO
CDR Carl Giese, USN		96602 USS BROWNSON, FPO San Francisco	X	
LT Stule Pigeon, USN		96601 USS SING SING, FPO San Francisco	X	
Greta Gotcha		41 Va Voom Street, Oceanside, CA	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)		
Page 13, Service record of accused	USS BROWNSON, FPO San Francisco 96602		

b. EACH ITEM CONSIDERED, OR A COPY OR RECITAL OF THE SUBSTANCE OR NATURE THEREOF, IS ATTACHED	X	
14. THERE ARE GROUNDS TO BELIEVE THAT THE ACCUSED WAS NOT MENTALLY RESPONSIBLE FOR THE OFFENSE(S) OR NOT COMPETENT TO PARTICIPATE IN THE DEFENSE (See R.C.M. 909, 916(b).)	X	
15. THE DEFENSE DID REQUEST OBJECTIONS TO BE NOTED IN THIS REPORT (If Yes, specify in Item 21 below.)		X
16. ALL ESSENTIAL WITNESSES WILL BE AVAILABLE IN THE EVENT OF TRIAL		X
17. THE CHARGES AND SPECIFICATIONS ARE IN PROPER FORM	X	
18. REASONABLE GROUNDS EXIST TO BELIEVE THAT THE ACCUSED COMMITTED THE OFFENSE(S) ALLEGED	X	
19. I AM NOT AWARE OF ANY GROUNDS WHICH WOULD DISQUALIFY ME FROM ACTING AS INVESTIGATING OFFICER. (See R.C.M. 405(d)(1).)	X	

20. I RECOMMEND

a. TRIAL BY ☐ SUMMARY ☐ SPECIAL ☒ GENERAL COURT-MARTIAL

b. ☐ OTHER (Specify in Item 21 below)

21. REMARKS (Include, if necessary, explanation for any delays in the investigation, and explanation for any "no" answers above.)

Block 15: Greta Gotcha eloped two days after her testimony at the hearing, and her present whereabouts are unknown.

22a. TYPED NAME OF INVESTIGATING OFFICER	b. GRADE	c. ORGANIZATION
I.M. Snooper, LCDR, JAGC, USN		NavLegSvcOffice, Norfolk, VA

d. SIGNATURE OF INVESTIGATING OFFICER

e. DATE

DD Form 457 Reverse, 84 AUG

D. Posthearing procedures. After the investigating officer has submitted his report to the convening authority (usually it is delivered via legal officer), the procedure to be followed depends upon the level of court-martial convening authority possessed by the officer ordering the pretrial investigation.

If the officer convening the pretrial investigation does not possess general court-martial convening authority then he, if he deems a general court-martial appropriate, must forward the report to the officer exercising general court-martial convening authority. This is accomplished by means of an endorsement which includes the recommendations of the officer convening the pretrial investigation, the recommendations of the investigating officer, a detailed and explanatory chronology of events in the case, and any comments deemed appropriate. Regardless of the number of intervening commanders, the case should be forwarded directly to the general court-martial convening authority to avoid speedy trial problems. A sample endorsement follows on page 13-16.

If the commander who ordered the investigation is also a general court-martial convening authority, then he/she may refer the case to trial by general court-martial if he/she believes the charges are warranted by the evidence and such disposition is appropriate. In such an event, however, the case must first be referred to the staff judge advocate for review and a written legal opinion on the sufficiency of the evidence and advisability of trial. This written legal opinion is referred to as the pretrial advice.

The advice of the staff judge advocate shall include a written and signed statement which sets forth that person's:

1. conclusion whether each specification on the charge sheet alleges an offense under the UCMJ;

2. conclusion whether each allegation is substantiated by the evidence indicated in the article 32 report of investigation;

3. conclusion whether a court-martial would have jurisdiction over the accused and the offense(s); and

4. recommendation of the action to be taken by the convening authority.

The staff judge advocate is personally responsible for the pretrial advice and must make an independent and informed appraisal of the charges and evidence in order to render the advice. Another person may prepare the advice, but the staff judge advocate is responsible for it and must sign it personally.

The advice need not set forth the underlying analysis or rationale for its conclusions. Ordinarily, the charge sheet, forwarding letter and endorsements, and report of investigation are forwarded with the pretrial advice. In addition, the pretrial advice should include when appropriate: a brief summary of the evidence; discussion of significant aggravating, extenuating, or mitigating factors; and any previous recommendations, by commanders or others who have forwarded the charges, for disposition of the case. There is no legal requirement to include such information, however, and failure to do so is not error.

SECOND ENDORSEMENT on CO, HELSUPPRON SIXTEEN ltr Ser 11/132 of 2 Aug 1984

From: Commanding Officer, Naval Air Station, Pensacola, Florida
To: Chief of Naval Education and Training, Pensacola, Florida

Subj: PRETRIAL INVESTIGATION ICO SEAMAN JOE TANGLEFOOT, 123 45 6789

Ref: (a) UCMJ, Art. 33
(b) R.C.M. 405, MCM, 1984

Encl: (1) Chronology of events, subject case

1. In accordance with references (a) and (b), subject report of investigation is forwarded herewith for review and appropriate action.

2. The investigating officer recommends trial by general court-martial on a reduced charge of absence without leave (Art. 86, UCMJ) vice desertion (Art. 85, UCMJ) and dismissal of Charge II, Specification 1.

3. I concur with the investigating officer and recommend trial by general court-martial.

4. A detailed chronology of this case is attached as enclosure (1) hereto. All material witnesses, excepting Greta Gotcha, will be available for trial.

B. A. SKIPPER

Copy to:
CO, HELSUPPRON SIXTEEN
Accused

CHAPTER XIV

REVIEW OF COURTS-MARTIAL

INTRODUCTION

This chapter describes the review of trials by summary, special and general courts-martial. A summary of the chapter follows.

Upon the 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 non-capital courts-martial in which appellate review has been waived, will be reviewed by a judge advocate assigned, in most cases, to the staff of an officer exercising general court-martial jurisdiction. This written review will generally terminate the mandatory review process, although in certain cases the officer exercising general court-martial jurisdiction himself will have to take final action.

General courts-martial and those special courts-martial which include a bad-conduct discharge after initial review by the convening authority, will normally be reviewed further by the Navy-Marine Corps Court of Military Review. Under certain circumstances the case will thereafter be considered by the Court of Military Appeals and, possibly, the United States Supreme Court.

SEQUENCE OF REVIEW

A. 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 0143. Additionally, if the sentence includes confinement at hard labor, 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-w for a recommended form.

B. The record of a trial by court-martial

1. When proceedings at the trial court level have been completed, a record of trial must be prepared. If the accused has been acquitted by withdrawal or dismissal of the charges prior to findings, the record of trial consists only of the original charge sheet, a copy of the convening order, and sufficient information to establish jurisdiction over the person and the offense(s), if not shown on the charge sheet. R.C.M. 1103(e), MCM, 1984 [hereinafter cited as 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 0144. (See Chapter X, above, 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 MCM, 1984, app. 13. The record of trial for all other courts-martial must be verbatim if, in the case of a general courts-martial, the sentence exceeds that which could be adjudged at a special courts-martial or if, in the case of either a general or special court-martial, the sentence includes a bad-conduct discharge. See MCM, 1984, app. 14. Once prepared, the record of trial will be authenticated by the signature of a person who thereby declares that the record accurately reports the proceedings. Except in unusual circumstances, this person will be the military judge or summary court-martial officer. R.C.M. 1104(a).

2. R.C.M. 1104 requires that a copy of the record of trial be served on the accused as soon as the record has been authenticated. This is to provide him with the opportunity to submit any written "matters" which may reasonably tend to affect the convening authority's decision whether or not to approve the trial results. R.C.M. 1105. The content of such "matters" is not subject to the Military Rules of Evidence and could include:

a. allegations of error affecting the legality of the findings of sentence;

b. matters in mitigation which were not available for consideration at the trial; and

c. clemency recommendations. The defense may ask any person for such a recommendation, including the members, military judge, or trial counsel.

This option of the accused to submit matters to the convening authority must be exercised within specifically defined time periods:

a. For a general court-martial and a special court-martial involving a bad-conduct discharge, the accused must submit matters within 30 days after the sentence is announced or within 7 days after the record of trial has been served upon him, whichever is later. Both time periods may be extended for good cause by the convening authority. The 30-day time period may be extended for not more than 20 additional days and the 7-day period may be extended for not more than 10 additional days.

b. For other special courts-martial the accused must submit matters within 20 days after announcement of sentence or within 7 days after service of the record of trial. For good cause either period may be extended for not more than 10 additional days.

c. The accused at a summary court-martial must submit matters within 7 days after sentence is announced, but this period, for good cause, may be extended for a period not to exceed 10 additional days.

3. In addition to the input from the accused, the convening authority must receive a written recommendation from his SJA or LO prior to taking action on a general court-martial or a special court-martial case involving a bad-conduct discharge. R.C.M. 1106. 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 legal officer, 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:

a. the findings and sentence adjudged;

b. the accused's service record, including length and character of service, awards and decorations, and any records of nonjudicial punishment and previous convictions;

c. the nature of pretrial restraint if any;

d. obligations imposed upon the convening authority because of a pretrial agreement; and

e. a specific recommendation as to the action to be taken by the convening authority on the sentence.

Identifying legal error is not one of the required goals of this recommendation. The only time when possible legal error must be discussed is in response to an allegation of legal error by the accused under paragraph 2 above, and then, only if the recommendation is prepared by an SJA. The response may consist of a statement of agreement or disagreement and need not be accompanied by a written analysis or rationale. None of the above comments, however, should be interpreted so as to prohibit the SJA or LO from including any additional matters deemed appropriate under the circumstances.

To assist the SJA or LO in preparing the recommendation, JAGMAN A-1-x provides a sample form. That form is included 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.

4. Prior to forwarding the recommendation to the convening authority, the SJA or LO must serve a copy on the accused's defense counsel. The defense counsel will then have five (5) days in which to submit, for the convening authority's consideration, a written response to the recommendation . Although the 5-day time period may be extended for an additional 20 days for good cause, failure to submit a response within the applicable period will waive any errors in the recommendation, except those amounting to plain error.

C. 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 0145 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 0145 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.

D. 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 insure 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, MCM, 1984 contains sample forms of actions for summary, special, and general courts-martial. One or more of these forms is appropriate to implement the decisions of the convening authority in virtually every case. Deviation from the forms is risky and usually leads to trouble unless the draftsman is experienced. If there is any question as to the form of action necessary to effectuate the convening authority's decisions, assistance should be obtained from the nearest law center.

After taking his action, the convening authority will publish the results of trial and the CA's action in a legal document called a promulgating order.

Specific guidance concerning the responsibilities of the convening authority in reviewing records of trial, drafting CA's actions in particular classes of cases, and publishing the results in the promulgating order, is provided later in this chapter.

E. Subsequent review

1. Mandatory review

The CA's action for every trial by court-martial is reviewed by higher authority. Certain reviews are mandatory; once these mandatory reviews are completed, the case is "final." Other reviews are discretionary; for example, the accused and his counsel must decide whether to petition the Court of Military Appeals for review of the case, whether to petition for review by the Judge Advocate General, or whether to petition for a new trial.

The terms mandatory and discretionary review imply opposite concepts: in the former case, the review will happen regardless of the accused's wishes; in the latter case, further review will happen only if the accused or some other person takes some positive action. The mutually exclusive nature of these two concepts has been diluted somewhat by the Military Justice Act of 1983. By adding the concepts of waiver and withdrawal, the Act gives an accused the option, except in a case involving the death penalty, to avoid what was formerly mandatory appellate review in all general courts-martial, and special courts-martial involving a bad-conduct discharge.

R.C.M. 1110 governs waiver and withdrawal: "After any general court-martial, except one in which the approved sentence includes death, and after any special court-martial in which the approved sentence includes a bad-conduct discharge the accused may waive or withdraw appellate review." According to the Rule, the waiver or withdrawal must be a written document establishing that the accused and defense counsel have discussed the accused's right to appellate review; that they have discussed the effect that waiver or withdrawal will have on that review; that the accused understands these matters; and that the waiver or withdrawal is submitted voluntarily. An accused must file a waiver within 10 days after being served a copy of the CA's action, unless an extension is granted. A withdrawal may be submitted any time before appellate review is completed. In either case, however, once appellate review is waived or withdrawn, it is irrevocable and the case will thereafter be reviewed locally in the same manner as a summary court-martial or a special court-martial not involving a bad conduct discharge.

2. Summary courts-martial, special courts-martial not involving a bad-conduct discharge, and all other noncapital courts-martial where appellate review has been waived.

a. 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 0146 further requires this officer to be the staff judge advocate 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 staff judge advocate 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.

b. The judge advocate's review is a written document containing the following:

(1) a conclusion as to whether the court-martial had jurisdiction over the accused and over each offense for which there is a finding of guilty which has not been disapproved by the convening authority;

(2) 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;

(3) a conclusion as to whether the sentence was legal;

(4) a response to each allegation of error made in writing by the accused; and

(5) in cases requiring action by the 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.

c. After the judge advocate has completed his review, most cases will have reached the end of mandatory review and will be considered final within the meaning of Article 76, UCMJ. If this is the case, the judge advocate review will be attached to the original record of trial and a copy forwarded to the accused. The review is not final, and a further step is required, however, in the following two situations:

(1) the judge advocate recommends corrective action; or

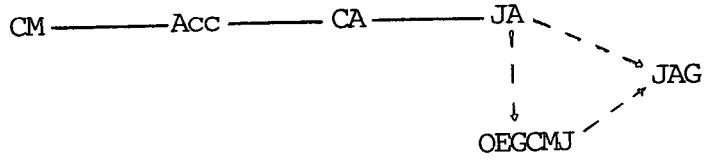
(2) the sentence as approved by the convening authority includes a dismissal, a dishonorable or bad-conduct discharge, or confinement for more than six months.

The existence of either of these two situations will require the staff judge advocate 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 of 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.

The entire review process of 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 or withdrawn is shown graphically:



3. Special courts-martial involving a bad-conduct discharge

a. Assuming that appellate review has not been waived or withdrawn by the accused, a special court-martial involving a bad-conduct discharge, whether or not suspended, will be sent directly to the Office of the Judge Advocate General of the Navy. R.C.M. 1111. After detailing appellate defense and government counsel, the case will then be forwarded to the Navy-Marine Corps Court of Military Review (NMCMR). R.C.M. 1201, 1202. NMCMR has review authority similar to that of the convening authority, except that it may not suspend any part of the sentence. It is also limited to reviewing only those findings and sentence which have been approved by the convening authority. In other words, it may not increase the sentence approved by the convening authority, nor may it approve findings of guilty already disapproved by the convening authority. In considering the record of trial, NMCMR may weigh the evidence, judge the

credibility of witnesses, and determine controverted questions of fact, giving due weight, of course, to the fact that the trial court saw and heard the witnesses. Finally, NMCMR may affirm only those findings of guilty and the sentence which it finds correct in law and fact, and which NMCMR concludes should be approved on the basis of the entire record. A finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused. Article 59, UCMJ.

b. After review by NMCMR, the case will go to the Court of Military Appeals (C.M.A.) for review in the following two instances:

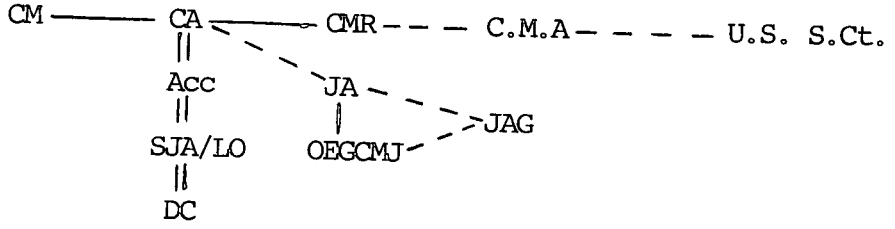
(1) if certified to the C.M.A. by JAG;

(2) if the C.M.A. grants the accused's petition for review. R.C.M. 1204.

In any case reviewed by it, the C.M.A. may act only with respect to the findings and sentence as approved by the convening authority, and as affirmed or set aside as incorrect in law by NMCMR.

c. Finally, review by the United States Supreme Court is possible under 28 U.S.C. §1259 and Article 67(h), UCMJ.

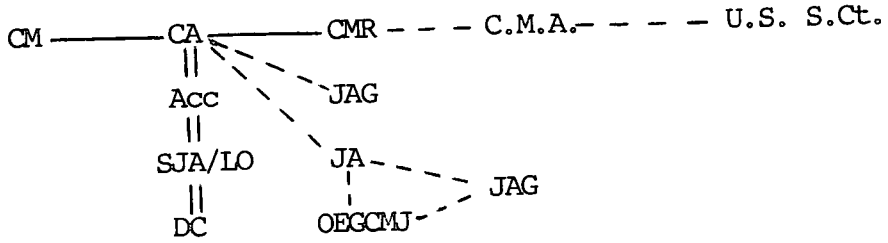
d. The entire review process of a special court-martial involving a bad conduct discharge is shown graphically:



4. General court-martial

a. 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 3, above. Cases involving death are reviewed in a similar fashion, except that review by C.M.A. is mandatory. Other general court-martial cases -- those not involving death, dismissal, punitive discharge, or confinement of one year or more -- are reviewed in the Office of the Judge Advocate General under Article 69(a), UCMJ, and R.C.M. 1201(b). The JAG may modify or set aside the findings or sentence or both, if he finds any part of the findings or sentence to be unsupportable in law, or if reassessment of the sentence is appropriate. As an alternative measure, the JAG may forward the case for review to NMCMR. In this latter case, however, no further review by C.M.A. is possible unless the JAG so directs.

b. The entire review process of a general court-martial is shown graphically:



5. Review in the Office of the Judge Advocate General

Article 69(b), UCMJ, provides that certain cases may be reviewed in the Office of the Judge Advocate General and that the findings or sentence, or both, may be vacated or modified by the JAG on the grounds of newly discovered evidence, fraud on the court, lack of jurisdiction, or error prejudicial to the substantial rights of the accused. Review under this article may only be granted in a case which has been "finally" reviewed, but has not been reviewed by NMCMR. Even then, such review by the JAG is not automatic. The accused must petition JAG to review the case and JAG may or may not agree to review it. If the case is reviewed, the JAG may or may not grant relief.

6. New trial

a. 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.

b. There are only two grounds for petition:

(1) newly discovered evidence; and

(2) fraud on the court.

c. Sufficient grounds will be found to exist only if it is established that an injustice has resulted from the findings or sentence and that a new trial would probably produce a substantially more favorable result. R.C.M. 1210.

ISSUES AND OPTIONS FOR THE REVIEWING AUTHORITY

The reviewing authority has many options available to him when he takes his 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. Though much of the discussion will be applicable to all authorities within the chain of review, the primary emphasis will be upon the action of the convening authority.

A. Types of error and their effect

1. Generally. There are numerous errors which can affect court-martial proceedings. Some are easily correctable in that they only involve the trial record and its failure to reflect accurately what happened at trial. See Certificates of correction, p. 14-16, below. Others involve improper or inconsistent action by the court, but which can be corrected without material prejudice to the accused. See Proceedings in revision, p. 14-16, below. Still others are of such a substantial nature that they affect the propriety of the trial itself, in whole or in part, and will result in a declaration of disapproval or nullity. It is the errors requiring declarations of disapproval or nullity to which this section is dedicated. Three broad areas will be covered: lack of jurisdiction, denial of military due process, and all other errors which may prejudice the substantial rights of the accused.

It merits repeating that a convening authority is not required to identify errors when he takes action. Appellate authorities, however, are tasked with such responsibility and they may ultimately direct the convening authority to correct error anyway. In order to avoid this from happening after a lengthy passage of time, a convening authority may choose, in his discretion, to identify and correct errors early and before his own CA's action.

2. Lack of jurisdiction. To have jurisdiction to act, a court-martial must:

a. be properly convened;

b. be properly constituted;

c. be properly referred;

d. have jurisdiction over the person; and

e. have jurisdiction over the offense.

Otherwise, the trial is a nullity. (See Chapter IX for a detailed discussion of the requisites for court-martial jurisdiction.) If the court-martial lacked jurisdiction over the person or the offense, the charge(s) will be dismissed. If, however, the court was improperly convened, constituted or referred, a subsequent proceeding may be ordered by the same or a different convening authority. The term used for the subsequent trial when the first court lacked jurisdiction is "another trial." Failure of a specification to state an offense is treated as a jurisdictional defect, and "another trial" may be ordered in this case as well. Note, however, that an accused cannot be required to stand trial a second time for an offense of which he was acquitted, even if the initial proceedings are set aside as the result of a jurisdictional defect. United States v. Culver, 22 U.S.C.M.A. 141, 46 C.M.R. 141 (1973). For a discussion of the procedure required to conduct "another trial" see "Another trial", p. 14-19, below.

3. Denial of military due process. Except for errors of jurisdiction, the results of trial may not be overturned on the basis of an error of law unless that error "materially prejudices the substantial rights of the accused." Article 59(a), UCMJ. Under this standard, errors are usually tested for specific prejudice; i.e., a specific cause-and-effect relationship must be shown between the error and the results of trial. In other cases, however, the error may be so fundamental as to be considered presumptively prejudicial. This is the case with a denial of a right guaranteed by the Constitution or the UCMJ. This is considered to be a denial of due process and the accused is entitled to relief. All findings of guilty affected by the error must be disapproved. The convening authority may then either dismiss the charges or order a subsequent proceeding, known as a rehearing. Some examples of due process errors follow.

a. Pretrial investigation rights. Chapter XIII discusses the accused's rights in connection with the formal pretrial investigation mandated by Article 32, UCMJ. In United States v. Ledbetter, 2 M.J. 37 (C.M.A. 1976), and United States v. Chestnut, 2 M.J. 84 (C.M.A. 1976), the C.M.A. set aside the findings and sentence because the accused was denied the opportunity to cross-examine available witnesses at the article 32 investigation. In United States v. Worden, 17 U.S.C.M.A. 486, 38 C.M.R. 284 (1968), the findings and sentence were set aside because the accused's counsel was not allowed to prepare for the article 32 investigation, either

by consulting with the accused or by interviewing the witnesses. In commenting on the need for reversal in such cases, Judge Fletcher has written:

> This Court again must emphasize that an accused is entitled to the enforcement of his pretrial rights without regard to whether such enforcement will benefit him at trial. Thus, Government arguments of "if error, no prejudice" cannot be persuasive.

United States v. Chestnut, supra, at 85 n.4.

b. The right to counsel at trial. The accused's right to counsel, including the military lawyer of his choice if reasonably available, is discussed in Chapter XI. The denial of a request for individual military counsel is reviewed for an abuse of discretion. If an abuse of discretion is found in the denial of such a request, reversal will surely follow. Chief Judge Darden, writing for a unanimous Court of Military Appeals, has written: "The occurrence of such error dictates reversal without regard to the existence or amount of prejudice sustained." United States v. Andrews, 21 U.S.C.M.A. 165, 186, 44 C.M.R. 219, 222 (1972).

c. Confessions and admissions. If a statement obtained from the accused, in violation of his rights, is admitted in evidence at trial, reversal is required, "regardless of the compelling nature of the other evidence of guilt." United States v. Kaiser, 19 U.S.C.M.A. 104, 106-107, 41 C.M.R. 104, 106-107 (1969).

d. Errors founded solely on the U.S. Constitution. Errors of this type do not precisely fit our definition of due process errors, as the possibility exists that reviewing authorities could find a constitutional error harmless. On the other hand, constitutional errors are not tested for specific prejudice to the accused; the government must demonstrate that the error was harmless beyond a reasonable doubt to avoid reversal. United States v. Ward, 1 M.J. 176 (C.M.A. 1975), and cases cited therein, illustrate these principles. In Ward, stolen tools seized from the accused's automobile had been admitted into evidence; the Air Force Court of Military Review found the search of the auto was not based on probable cause, but affirmed the conviction. The C.M.A. reversed, reasoning that the physical appearance of the tools lent credibility to the testimony of the government's key witness; and therefore the court was unable to declare its belief that the error was harmless beyond a reasonable doubt.

4. Materially prejudicial errors other than due process error. Errors other than denial of due process errors are tested for specific prejudice to the accused in accordance with Article 59(a), UCMJ. The test is whether the competent evidence of record is of such quantity and quality that a court of reasonable and conscientious men would have reached the same result had the error not been committed. If this question is answered in the affirmative, the error is said to have been harmless, or, more properly, the error is said not to have materially prejudiced the substantial rights of the accused. The so-called compelling evidence rule

is, in reality, just another way of saying an error was harmless, or that the error did not materially prejudice the substantial rights of the accused. The presence of compelling evidence of guilt leads to the conclusion that a court of reasonable and conscientious men would have reached the same result had the error not been committed. The list of possible errors in a contested criminal trial is almost endless; the following discussion covers some of the important issues which have been addressed by the Court of Military Appeals.

a. Command influence and control. The C.M.A. has enunciated various standards for judging the prejudicial effect of command influence. Among these are: appearance of impropriety, United States v. Hawthorne, 7 U.S.C.M.A. 293, 22 C.M.R. 83 (1956); rebuttable presumption of prejudice, United States v. Johnson, 14 U.S.C.M.A. 548, 34 C.M.R. 328 (1964); and reasonable doubt as to the impact of the influence, United States v. Greene, 20 U.S.C.M.A. 232, 43 C.M.R. 72 (1970). If unlawful command influence or control may have infected the trial, a judge advocate should be consulted. Chapter XII also discusses this problem.

b. Defense requests for witnesses. When a defense request for a witness is erroneously denied, the record is examined for specific prejudice to the accused. In making this assessment, the C.M.A. has weighed various factors, such as:

(1) the military status of the witness ["... the opinion of a serviceman's commanding officer occupies a unique and favored position in military judicial proceedings." United States v. Carpenter, 1 M.J. 384, 386 (C.M.A. 1976)];

(2) whether the witness' expected testimony would go to the core of the defense [United States v. McElhinney, 21 U.S.C.M.A. 436, 45 C.M.R. 210 (1972)];

(3) whether the witness' expected testimony would have been merely cumulative of that of other witnesses (Id.);

(4) the probable impact of the witness' expected testimony on the findings and sentence (Id.); and

(5) as to sentence, whether the convening authority has exercised clemency with regard to the adjudged sentence, such that any possible prejudice has been cured. Id.

c. Cumulative error. Numerous violations of fundamental rules which, if considered individually, would probably have no measurable effect on the court, may, in cumulative effect, constitute prejudicial error. There are many cases which could be cited as examples of this type of error.

(1) In United States v. Yerger, 1 U.S.C.M.A. 288, 3 C.M.R. 22 (1952), the first cumulative error case under the UCMJ and widely cited since, involved a trial wherein the trial counsel repeatedly used leading questions after several times being admonished by the ruling officer. The ruling officer received substantial amounts of hearsay

evidence over objection of the defense counsel, and the prosecution repeatedly referred to uncharged misconduct.

(2) In United States v. Esposito, 13 U.S.C.M.A. 169, 32 C.M.R. 169 (1962), an entire Shore Patrol investigative report was received in evidence, as was the testimony of a witness who claimed he saw a certain log which was material to the case, but who did not make any of the entries himself, and whose testimony was shown to be erroneous in several instances when the log itself was admitted into evidence.

(3) In United States v. Walters, 4 U.S.C.M.A. 617, 16 C.M.R. 191 (1954), the law officer fraternized with the members during a recess, the law officer had several conversations with trial counsel outside of the presence of the accused, and there were several conferences with counsel and the law officer outside of the accused's presence. In addition, the law officer suggested that it might not be a bad idea if the civilian defense counsel were to "return to law school," and he requested the defense counsel to render a legal opinion in regard to West German laws, which were in issue in the case, which the defense counsel refused to do, placing him in an embarrassing position. The court held this case to be "well within the ambit of the doctrine of cumulative error..." and reversed conviction of the offense tainted by the errors.

d. Remedies for prejudicial error

(1) If a prejudicial error affects all findings of guilty, then the findings and sentence must be disapproved. A rehearing may be ordered if there is sufficient evidence of record to support the findings of guilty. R.C.M. 1107(e)(1)(C). See Rehearings, p. 14-17, below.

(2) If the error affects some, but not all, findings of guilty, the findings affected by the error are disapproved. The convening authority then has two options, namely:

(a) dismiss the disapproved findings and reassess the sentence on the basis of the remaining findings or guilty; or

(b) order a rehearing. See Rehearings, p. 14-17, below.

B. Post-trial sessions

1. Generally. This section will discuss the means to resolve various court-martial errors. In some cases the error can be corrected without overturning the trial results. If so, a certificate of correction, proceeding in revision, or Article 39(a) hearing may apply. Other errors are more substantial and may require overturning the case because of material prejudice to the substantial rights of the accused (Article 59(a), UCMJ). In such cases, a rehearing may be possible. Still others may affect the jurisdictional status of the court and result in the trial being declared a nullity. Even then, however, "another trial" may be possible.

2. Certificates of correction

a. In examining the record, the convening authority may find that it is incomplete in some material respect. The court may have performed its duties properly but, due to clerical error or inadvertence, the record does not reflect what actually occurred at the trial. Before he takes action, the convening authority may return the record to the military judge, president of a special court-martial without a military judge, or the summary court-martial for a certificate of correction. Notice shall be given to all parties with an opportunity to examine and respond to the proposed correction. R.C.M. 1104.

b. The certificate is prepared in accordance with Appendix 13 or 14, MCM, 1984. It corrects the record of trial and states the reasons for the error in the original. It is then authenticated in the same manner as the record of trial, a copy is served on the accused, and the certificate is appended to the record directly after the original authentication.

c. The certificate may be used only to make the record correspond to what actually occurred at trial. It cannot in any way rectify trial errors.

3. Proceedings in revision

a. Where there is an apparent error or omission in the record, or where the record shows improper or inconsistent action by a court-martial which can be rectified without material prejudice to the substantial rights of the accused, the convening authority may return the record to the court for appropriate action. In no case, however, may the record be returned:

(1) for reconsideration of a finding of not guilty of any specification, or a ruling which amounts to a finding of not guilty;

(2) for reconsideration of a finding of not guilty of any charge, unless the record shows a finding of guilty to a specification laid under that charge which sufficiently alleges a violation of some article of the UCMJ; or

(3) for increasing the severity of the sentence, unless the sentence prescribed for the offense is mandatory. Art. 60, UCMJ.

b. A court-martial may also be reconvened for revision proceedings on the initiative of the military judge before the record is authenticated.

c. To summarize, three conditions must exist before revision proceedings may be used:

(1) there is an apparent error or omission in the record, or improper or inconsistent action by the court;

and

(2) such defect affects the findings or sentence; and

(3) the defect can be corrected without material prejudice to the substantial rights of the accused.

Note: The error referred to is not a reporter's error whereby the record does not correctly reflect what actually occurred. See Certificates of correction, p. 14-16, above. Instead, this action is taken when the record correctly shows what happened, but what happened amounts to a defect.

d. Procedure. The convening authority returns the record to the trial counsel, pointing out the defect in writing and directing proceedings in revision. Or, as noted earlier, the court may reconvene on its own motion. R.C.M. 1102.

4. Article 39(a) sessions. R.C.M. 1102 authorizes a post-trial Article 39(a) hearing for the purpose of inquiring into and resolving any matter which may arise after trial and which may substantially affect the legal sufficiency of any finding of guilty or sentence. Basically it is intended to be a factfinding mechanism. For example, such a session may be called to examine allegations of misconduct by a member or by counsel.

5. Rehearings.

a. The convening authority may order a rehearing on the findings and sentence whenever the findings and sentence are disapproved because of prejudicial error occurring at the trial. The convening authority must determine, however, that there will be sufficient admissible evidence available to support a finding of guilty at the rehearing. A rehearing may also be ordered only as to the sentence where, for example, some findings of guilty have been dismissed and the sentence is no longer appropriate, or where prejudicial error occurred at the sentencing stage of the trial.

A rehearing cannot be ordered as to any offense of which the accused was acquitted, nor may a rehearing be ordered if any part of the sentence is approved. The sentence is always disapproved when any rehearing is ordered. R.C.M. 1107.

The convening authority may take a reasonable length of time to decide whether a rehearing is practical. DeChamplain v. United States, 22 U.S.C.M.A. 211, 46 C.M.R. 211 (1973). But, if the accused is confined, the convening authority must comply with the Burton speedy trial mandate or the accused will be entitled to dismissal of the charges.

b. Rules relating to rehearing

(1) Steps in accomplishing a rehearing. The convening authority takes action, disapproving the entire sentence and ordering trial before a court to be designated later. A statement of the reasons for disapproval is included in the convening authority's action. R.C.M. 1107.

The convening authority designates the court and forwards to the trial counsel:

(a) the charges and specifications upon which the rehearing shall be held;

(b) the record of the first trial;

(c) all pertinent papers accompanying the record of the original trial; and

(d) a statement of the convening authority setting forth his reasons for disapproving the original sentence. (The reason for sending all this matter to the trial counsel is to inform him of the error made at the first trial which necessitated the rehearing.) See R.C.M. 810(c) Discussion.

The rehearing may be held as to any offense of which the accused was found guilty at the first trial or a lesser included offense (LIO) thereof. If the accused was found guilty at the first trial of only a LIO of an offense charged, the rehearing can only be ordered as to such LIO or an even lower LIO. Additional charges may also be referred to trial with the offenses for which a rehearing has been ordered.

(2) Rehearing procedure. The procedure of the rehearing is the same as any trial and just as complete. No person who acted as a member at the first trial may act as a member at the rehearing. The military judge, trial counsel and defense counsel at the first trial may act in the same capacity at the rehearing. R.C.M. 810.

(3) The sentence at a rehearing. The court at the rehearing cannot adjudge a greater sentence than that adjudged at the original trial as properly reduced by reviewing authorities, except:

(a) where additional charges are referred to the rehearing (To compute the maximum punishment in such a case, add the punishment imposable for the additional charges to the original sentence adjudged as reduced on review. Be aware, however, of the situation where the first court finds the accused guilty of two charges but, on rehearing, a not guilty finding was entered on one of these. The maximum would have to be reduced accordingly. Also, be aware of the jurisdictional maximum of the court.);

(b) where a mandatory sentence is prescribed by the UCMJ; and

(c) where the convening authority reduced the adjudged sentence in compliance with a pretrial agreement and where the accused at the rehearing fails to plead guilty in compliance with the agreement. In such a case the sentence at the rehearing is not limited by the CA's action, but by the adjudged sentence. Art. 63, UCMJ; R.C.M. 810.

(4) Record of the rehearing. The record of the rehearing is prepared and authenticated just as in any trial. The accused is given a copy, etc. The record of the original proceedings should be appended to the record of the rehearing. R.C.M. 1103.

(5) The convening authority's action. The convening authority takes the initial action upon the record and may approve it without regard to whether any portion of the sentence adjudged at the original trial was executed or served by the accused.

(a) However, in computing the punishment the accused must serve under the new sentence, any portion of the original sentence served by the accused must be credited to him. See United States v. Blackwell, 19 U.S.C.M.A. 196, 41 C.M.R. 196 (1970) and R.C.M. 1107.

(b) To insure that the accused will be administratively credited with the portion of the original sentence served by him, the convening authority should state the following in his action at the rehearing:

"The accused will be credited with any portion of the punishment served from 1 January 1984 to 1 March 1984 under the sentence as adjudged at the former trial of this case." MCM, 1984, app. 16, form 21.

6. "Another trial." When the convening or higher authority finds a jurisdictional error, the entire trial is declared invalid. At the subsequent trial, persons who participated in the former trial are ineligible to act as court members, but the same military judge may preside. The accused may request trial by military judge alone even though the original trial was with members. The procedure at the subsequent trial is the same as at the original trial. R.C.M. 810. The sentence is limited to that adjudged at the previous trial, or, if the sentence was reduced by the convening or other authority, then the sentence as reduced forms the basis of the limitation. This is true except when the convening authority has reduced the adjudged sentence in compliance with a pretrial agreement and where the accused at the rehearing fails to plead guilty in compliance with the agreement. In such a case the sentence at the rehearing is not limited by the convening authority's action, but by the adjudged sentence. Art. 63, UCMJ; R.C.M. 810. Whatever the sentence limitation may be, the court is not informed of its basis or rationale. R.C.M. 810. If the accused is convicted and sentenced at the subsequent trial, the convening authority may approve the sentence; but when the sentence is executed, the accused must be credited with any portion of the original sentence which was served or executed. R.C.M. 1107.

C. Findings

1. Generally. It merits repeating that the convening authority is not required to take action with respect to findings of guilty. On the other hand, issues of legal error or factual sufficiency may have to be considered by subsequent reviewing authorities. For example, the Court of Military Review may affirm only such findings of guilty as it finds correct in law and fact and determines, on the basis of the entire record, should

be approved. R.C.M. 1203. Occasionally, the court may discover error and order corrective action or dismissal of the charges. In order to avoid this from happening after a lengthy passage of time, a convening authority may choose, in his discretion, to review the findings with the intention of correcting discovered errors at an early stage. R.C.M. 1107.

This section discusses some of the issues which are considered when reviewing findings of guilty.

2. Reviewing findings of guilty

a. In acting upon findings of guilty, a reviewing authority would consider a number of issues:

(1) Did the court have jurisdiction in all respects?

(2) Did the accused have

(a) mental responsibility, i.e., was sane at the time of the offense; and

(b) mental capacity, i.e., was sane at the time of trial?

(c) Note: If the issue of insanity is not raised at the trial, the presumption of sanity satisfies both questions.

(3) Did the specifications of which the accused has been found guilty state offenses under the UCMJ?

(4) 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 an LIO, the convening authority may approve a finding of the LIO.

(5) Are there any errors which materially prejudice the substantial rights of the accused as to the findings which are approved? See the previous section on Types of errors and their effect, p. 14-11, above.

b. 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.

D. Sentence

1. Generally. As long as the sentence is within the jurisdiction of the court-martial and does not exceed the maximum limitations prescribed for each offense in Part IV (Punitive Articles), MCM, 1984, it is a legal sentence and may be approved by the 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.

2. 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.

3. Reducing and changing the nature of the sentence

a. Mitigation. When a sentence is reduced in quantity (e.g., 4 months confinement to 2 months confinement) or reduced in quality (e.g., 30 days confinement to 30 days restriction), the sentence is said to have been mitigated.

b. Commutation. When a sentence is changed to a punishment of a different nature (e.g., bad-conduct discharge to confinement), the sentence is said to have been commuted.

c. General rules. In taking action on the sentence, the convening authority must observe certain rules.

(1) When mitigating forfeitures, the duration and amounts of forfeiture may be changed as long as the total amount forfeited is not increased and neither the amount nor duration of the forfeitures exceeds the jurisdiction of the court-martial.

(2) When mitigating confinement on bread and water or diminished rations, confinement, or hard labor without confinement, the convening authority should use the equivalencies at R.C.M 1103(b)(6), (7), and (9) as appropriate. For example, confinement on bread and water may be changed to confinement at the rate of 1 day of confinement on bread and water equaling 2 days of confinement.

(3) The sentence may not be increased in severity or duration.

(4) No part of the sentence may be changed to a punishment of a more severe type.

(5) The sentence as approved must be one which the court-martial could have adjudged.

d. Application

(1) A punitive discharge cannot be commuted to an administrative discharge, as the latter could not have been adjudged by the court-martial.

(2) Example. 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 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.

(3) 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.

(4) 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.

(5) An unsuspended reduction in rate can be commuted to a suspended reduction and an unsuspended forfeiture of pay.

(6) It is often difficult to compare two authorized punishments of different types and decide which is less severe. For example, is the loss of 500 lineal numbers more or less severe than forfeiture of $25 per month for 12 months? The C.M.A. has opted for "...affirmance of [the CA's] judgment on appeal, unless it can be said that, as a matter of law, he has increased the severity of the sentence."

4. Suspending the sentence

a. When used

(1) R.C.M. 1108 states: "Suspension of a sentence grants the accused a probationary period during which the suspended part of an approved sentence is not executed, and upon the accused's successful completion of which the suspended part of the sentence shall be remitted." Simply stated, the accused is being given an opportunity to show, by his 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.

(2) 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 0145a(3).

b. Automatic reduction to pay grade E-1. In accordance with the power granted in Art. 58(a), UCMJ, the Secretary of the Navy has determined that automatic reduction under Art. 58(a), UCMJ, shall be effected in the Navy and Marine Corps in accordance with JAGMAN 0145a(7). Under the provisions of JAGMAN 0145a(7), a court-martial sentence of an enlisted member in a pay grade 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 pay grade 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 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 convening authority 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 convening authority to address automatic reduction will result in the automatic reduction to pay grade E-1 on the date of the CA's action.

c. Requirements for a valid suspension of a sentence

(1) The conditions of the suspension must be in writing and served on the accused in accordance with R.C.M. 1108. Unless otherwise stated, an action suspending a sentence includes as a condition that the probationer not violate any punitive article of the UCMJ.

(2) The suspension period must be for a definite period of time which is not unreasonably long. This period shall be stated in the CA action.

(3) A provision must be made for it to be remitted at the end of the suspension period, without further action. This provision shall be included in the CA's action.

(4) A provision must be made for permitting it to be vacated prior to the end of the suspension period. This provision shall be included in the CA action.

Note: Vacating means to do away with the suspension. See Proceedings to vacate suspension, p. 14-24, below.

d. 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:

(1) the officer exercising general court-martial jurisdiction who takes action under R.C.M. 1112 (see Subsequent review, p. 14-6, above);

(2) 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 0149); and

(3) 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 (2) above, this power only extends to unexecuted portions of the sentence. JAGMAN 0149a(3).

e. Proceedings to vacate suspension

(1) General requirements. An act of misconduct, to serve as the basis for vacation of the suspension of a sentence, must occur within the period of suspension. The order vacating the suspension must be issued prior to the expiration of the period of suspension. The running of the period of suspension is interrupted by the unauthorized absence of the probationer or by commencement of proceedings to vacate the suspension. R.C.M. 1109 indicates that vacation of a suspended sentence may be based on a violation of the UCMJ (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.

(2) Hearing requirements. Procedural rules for hearing requirements depend on the type of suspended sentence being vacated.

(a) Sentence of any GCM or a 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 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.

(b) 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. 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.

(c) Who must hold the hearing? When the accused is entitled to a formal hearing [see (a) and (b) 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.

(d) 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.

(e) 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 0150 indicates that this officer should be one who is appointed to review pretrial confinement under R.C.M. 305.

E. Post-trial restraint pending completion of appellate review

1. Status of the accused. The accused's immediate commander must initially determine whether the accused will be placed in post-trial restraint pending review of the case. Specifically, 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.

2. 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.

3. The nature of post-trial restraint. The Navy Corrections Manual (SECNAVINST 1640.9 series) was recently 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 at hard labor 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.

F. Deferment of the confinement portion of the sentence

1. Definition. As indicated in the previous section, the confinement portion of a sentence runs from the date the sentence is adjudged. Art. 57(b), UCMJ. Deferment of a sentence to confinement is a postponement of the running and service of the confinement portion of the sentence. It is not a form of clemency. R.C.M. 1101(c).

2. Who may defer? Only the 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).

3. When deferment may be ordered. Deferment may be considered only upon written application of the accused. If the accused has requested deferment, it may be granted anytime after the adjournment of the court-martial, as long as the sentence has not been executed. R.C.M. 1101(c).

4. Action on the deferment request. The decision to defer is a matter of command discretion. As stated in R.C.M. 1101(c)(3), "the accused shall have the burden to show that the interests of the accused and the community in release outweigh the community's interest in confinement." Some of the factors the convening authority may consider include:

a. the probability of the accused's flight to avoid service of the sentence;

b. the probability of the accused's commission of other offenses, intimidation of witnesses, or interference with the administration of justice;

c. the nature of the offenses (including the effect on the victim) of which the accused was convicted;

d. the sentence adjudged;

e. the effect of deferment on good order and discipline in the command; and

f. the accused's character, mental condition, family situation, and service record.

Although the decision to grant or deny the deferment request falls within the convening authority's sole discretion, that decision can be tested on review for abuse of discretion. In a recent decision, the Court of Military Appeals held that the CA abused his discretion by denying deferment where the accused (an Air Force captain who was a physician) showed that he had no prior record, that his conviction was not based on any act of violence, that he had made no previous attempt to flee, that he had custody of a minor child, and that he had substantial personal property in the area.

5. Imposition of restraint during deferment. No restrictions on the accused's liberty may be ordered as a substitute for the confinement deferred. An accused may, however, be restrained for an independent reason; e.g., pretrial restraint resulting from a different set of facts. R.C.M. 1101(c)(5).

6. Termination of deferment. Deferment is terminated when:

a. the CA takes action, unless the CA specifies in the action that service of the confinement after the action is deferred (In this case, deferment terminates when the conviction is final.);

b. the sentence to confinement is suspended;

c. the deferment expires by its own terms; or

d. the deferment is rescinded by the officer who granted it or, if the accused is no longer under his 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).

7. Procedure. Applications must be in writing and may be made by the accused or by his defense counsel at any time after adjournment of the court. The granting or denying of the application is likewise in writing.

8. 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.

G. Execution of the sentence. An order executing the sentence directs that the sentence be carried out. In the case of confinement, it directs that it be served; in the case of a punitive discharge, that it be delivered. The decision as to execution of the sentence is closely related to other post-trial decisions involving suspension, deferment of confinement, and imposition of post-trial restraint.

1. Execution authorities

a. No sentence may be executed by the 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.

b. A punitive discharge may only be executed by:

(1) the officer exercising general court-martial jurisdiction who reviews a case when appellate review has been waived under R.C.M. 1112(f); or

(2) 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 staff judge advocate as to whether retention of the accused would be in the best interest of the service. The advice shall include:

(a) the findings and sentence as finally approved;

(b) an indication as to whether the servicemember has been on active duty since the trial and, if so, the nature of that duty; and

(c) a recommendation whether the discharge should be executed. R.C.M. 1113(c)(1).

c. Dismissal may be ordered executed only by the Secretary of the Navy or by such Undersecretary or Assistant Secretary as the Secretary may designate. R.C.M. 1113(c)(2).

d. Death may be ordered executed only by the President. R.C.M. 1113(c)(3).

e. Though a punitive discharge may have been ordered executed, it shall not in fact be executed until all provisions of SECNAVINST 5815.3 series, concerning Naval Clemency and Parole Board action, have been complied with. JAGMAN 0148d.

2. 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 P1050.3f, 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.

3. Automatic reduction to pay grade E-1. In accordance with the power granted in Art. 58(a), UCMJ, the Secretary of the Navy has determined that automatic reduction under Art. 58(a), UCMJ, shall be effected in the Navy and Marine Corps in accordance with JAGMAN 0145a(7). Under the provisions of JAGMAN 0145a(7), a court-martial sentence of an enlisted member in a pay grade 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 pay grade 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 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 convening authority 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 convening authority to address automatic reduction will result in the automatic reduction to pay grade E-1 on the date of the CA's action.

4. Execution of confinement

a. The convening authority designates the place of confinement in his CA's action. R.C.M. 1113.

b. 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:

(1) periods in which the confinement is suspended or deferred;

(2) periods during which the accused is in custody of civilian authorities under Art. 14, UCMJ, if the accused was convicted in the civilian court;

(3) periods of unauthorized absence, escape or release through fraudulent misrepresentation;

(4) 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

(5) 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.

H. Speedy Review

1. The accused has a right to have his case reviewed promptly and without unnecessary delay. The Court of Military Appeals has expressed great interest in protecting this right. As formerly applied, a presumption of prejudice to the accused arose whenever he was in 90 days of continuous confinement without the OEGCMJ taking action. The presumption placed a heavy burden on the government to show due diligence, and in the absence of such a showing, the charges were dismissed. Dunlap v. Convening Authority, 23 U.S.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.

2. The C.M.A. appears to be aware, however, of the need to be vigilant in finding prejudice whenever lengthy post-trial delay in review occurs. Consider, for example, the case of United States v. Clevidence, 14 M.J. 17 (C.M.A. 1982). In this case, the accused was sentenced to a bad-conduct discharge, confinement at hard labor, and forfeitures for 3 months for two specifications of failing to go to his appointed place of duty, one specification of disrespect and four specifications of failure to obey lawful orders. The accused spent 77 days in post-trial confinement and thereafter was given appellate leave. The record of trial was not authenticated by the military judge, however, until 200 days after the sentence had been adjudged. Moreover, the supervisory authority's action was not accomplished for an additional 113 days. In reversing the accused's conviction, the C.M.A. held that:

> [w]e are reluctant to dismiss charges because of errors on the Government's part and we would especially hesitate to do so if the case involved more serious offenses. However, it seems clear that unless we register our emphatic disapproval of such "inordinate and unexplained" delay in a case like this, we would be faced in the near future with a situation that would induce a return to the draconian rule of Dunlap.
>
> Since it appears that under the circumstances of this case, the delay in post-trial review was prejudicial to Clevidence and since we are sure that, in the exercise of our

> supervisory authority over military justice, we must halt the erosion in prompt post-trial review of courts-martial, we reverse the decision, ..., set aside the findings and sentence, and dismiss the charges against appellant.

In United States v. Gentry, 14 M.J. 209 (C.M.A. 1982), the court set aside findings of guilty and dismissed two charges involving the use of marijuana by a lieutenant (junior grade) when the convening authority did not take his post-trial action in the case until 490 days after sentence was announced. The court noted:

> That no reason appears in the record -- nor is any alleged -- explaining the inordinate delay in the post-trial processing of this routine case....
>
> It further appearing that appellant -- a lieutenant (junior grade) -- was not confined after trial and remained on active duty; that he was shunned by his commander and ordered by him to stay off station and to maintain a low profile; that he was not promoted due to the pendency of the convening authority's action, notwithstanding that he was selected for promotion one and one-half years before that action and was selected each year thereafter; and
>
> That appellant, anticipating prompt action by the convening authority and early dismissal, nevertheless had to reject two civilian job offers only after withholding decision on each for as long as possible;
>
> [T]his case is another example of the "erosion of prompt post-trial review of courts-martial" which must be halted. United States v. Clevidence, 14 M.J. 17, 19 (C.M.A. 1982)....

COMPOSITION OF CONVENING AUTHORITY'S ACTION AND PROMULGATING ORDER

A. Convening authority's action

1. Overview. In cases resulting in conviction, the document known as the convening authority's action (CA's action) is made up of various parts, a list of which follows. Those marked with an asterisk (*) are always included in cases of conviction; the others are used only when appropriate. The format of the CA's action is specified in Appendix 16 of the Manual for Courts-Martial, 1984.

a. Statement of disapproval or modification of findings;

* b. statement of approval, modification or disapproval of sentence;

c. declaration of invalidity of proceedings;

d. order of rehearing or dismissal of charges or order of another trial;

e. statement of reasons for disapproval, if a rehearing or another trial is ordered;

f. order of execution or suspension of sentence;

g. statement concerning automatic administrative reduction to E-1;

h. order of deferment of confinement or rescission of deferment;

i. designation of place of confinement;

j. credit for illegal pretrial confinement or confinement served at a former trial;

k. reprimand;

l. statement regarding companion case;

m. synopsis of accused's conduct;

n. statement of facts in aggravation, extenuation and mitigation;

o. statement as to accused's opportunity to rebut adverse matter;

p. statement forwarding record of trial; and

* q. signature and authority to act.

The following is a discussion of these individual parts of the CA action and some suggested language for each.

2. Statement of disapproval or modification of findings

a. 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.

b. Examples:

(1) Some findings disapproved: "In the case of _____, the finding of guilty to Specification 2, Charge II is disapproved...." MCM, 1984, app. 16, form 15.

(2) 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 1984 to 3 March 1984, in violation of Article 86)." MCM, 1984, app. 16, form 16.

3. Statement of approval, modification or disapproval of sentence

a. 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.

b. Examples:

(1) "In the case of _____, the sentence is approved ...." MCM, 1984, app. 16, form 1.

(2) "In the case of _____, only so much of the sentence as provides for _____ is approved ...." MCM, 1984, app. 16, form 2.

(3) "In the case of _____, the sentence is approved but _____ months of the approved period of confinement is changed to forfeiture of $_____ pay per month for ____ months ...." MCM, 1984, app. 16, form 3.

(4) "In the case of _____, it appears that the following error was committed: (evidence of a previous conviction of the accused was erroneously admitted) ( ). This error was prejudicial as to the sentence. The sentence is disapproved ...." MCM, 1984, app. 16, form 10.

4. Declaration of invalidity of proceedings

a. This action is used in any case in which the court lacked jurisdiction or where one or more specifications fails to state an offense. A statement of disapproval is not proper in these cases because such a statement implies validity of the proceedings.

b. Examples:

(1) Lack of jurisdiction: "In the case of _____, it appears that the (members were not detailed to the court-martial by the convening authority) ( ). The proceedings, findings and sentence are invalid ...." MCM, 1984, app. 16, form 19.

(2) One charge fails to state an offense: "The findings and proceedings as to Charge I and its specification are invalid ...." (No form)

5. Order of rehearing or dismissal of charge or order of another trial

a. If the convening authority's action disapproves any findings of guilty, the action must state either:

(1) that the charge and the specification(s) thereunder are dismissed; or

(2) 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.

b. A rehearing on sentencing alone is possible only after the entire sentence has been disapproved. R.C.M. 1107(f)(4).

c. "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, par. 4, above.

d. Examples:

(1) Charges dismissed: "In the case of _____, the findings of guilty and the sentence are disapproved. The charges are dismissed." MCM, 1984, app. 16, form 20.

(2) Some findings disapproved; sentence approved or reassessed: "In the case of _____, the finding of guilty of Specification 2, Charge I is disapproved. Specification 2, Charge I is dismissed. (The sentence is approved ....) (Only so much of the sentence as provides for _____ is approved ....)" MCM, 1984, app. 15, forms 15 and 16.

(3) Rehearing with respect to disapproved findings: "The findings of guilty as to Specifications 1 and 2 of Charge II and the sentence are disapproved. A combined rehearing is ordered before a court-martial to be designated." MCM, 1984, app. 16, form 17.

(4) Sentence disapproved: "This error was prejudicial as to the sentence. The sentence is disapproved. A rehearing is ordered before a ( ) court-martial to be designated." MCM, 1984, app. 16, form 10.

(5) Jurisdictional error: "In the case of _____, it appears (that the members were not detailed to the court-martial by the convening authority) ( ). The proceedings, findings, and sentence are invalid. Another trial is ordered before a court-martial to be designated." MCM, 1984, app. 16, form 19.

6. 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.

a. 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.

b. Examples:

(1) Disapproval of sentence: "In the case of _____, it appears that the following error was committed: (evidence of a previous conviction of the accused was erroneously admitted) ( ). This error was prejudicial as to the sentence. The sentence is disapproved. A rehearing is ordered before a ( ) court-martial to be designated." MCM, 1984, app. 16, form 10.

(2) Some findings disapproved: "In the case of _____, it appears that the following error was committed: (Exhibit 1, a laboratory report, was not properly authenticated and was admitted over the objection of the defense) ( ). This error was prejudicial as to Specifications 1 and 2 of Charge II, and the sentence is disapproved. A combined rehearing is ordered before a court-martial to be designated." MCM, 1984, app. 16, form 17.

(3) All findings disapproved: "In the case of _____, it appears that the following error was committed: (evidence offered by the defense to establish duress was improperly excluded) ( ). This error was prejudicial to the rights of the accused as to all findings of guilty. The findings of guilty and the sentence are disapproved. A rehearing is ordered before a court-martial to be designated." MCM, 1984, app. 16, form 18.

b. 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.

c. 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.

d. 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.

7. Order of execution or suspension of sentence

a. If the convening authority decides to suspend part or all of a sentence, he must state his decision in the convening authority's action. If he is authorized to execute any part of the sentence and he desires to do so, he should so state in the action. R.C.M. 1107(f)(4). No part of a sentence may be suspended unless it has been approved first. Language should be included in the CA action providing that unless the suspension is sooner vacated, the suspended portion of the sentence shall be remitted at the end of the suspension period. R.C.M. 1108.

b. Examples:

(1) Entire sentence executed: "In the case of _____, the sentence is approved and will be executed." MCM, 1984, app. 16, form 1.

(2) Part of sentence executed: "In the case of _____, only so much of the sentence as provides for _____ is approved and will be executed." MCM, 1984, app. 16, form 12.

(3) Entire sentence suspended: "In the case of _____, the sentence is approved. Execution of the sentence is suspended for ____ months at which time, unless the sentence is sooner vacated, the sentence will be remitted without further action." MCM, 1984, app. 16, form 5.

(4) Part of sentence suspended: "In the case of ____, the sentence is approved and will be executed, but the execution of that part of the sentence extending to (confinement) ( ) is suspended for ____ months, at which time, unless the suspension is sooner vacated, the suspended part of the sentence will be remitted without further action." MCM, 1984, app. 16, form 6.

(5) Cases of discharge, dismissal, or death: "In the case of _____, the sentence is approved and, except for the (part of the sentence extending to death) (dismissal) (dishonorable discharge) (bad-conduct discharge), will be executed." MCM, 1984, app. 16, form 11.

8. Statement concerning automatic administrative reduction to E-1

a. Automatic administrative reduction to pay grade E-1 is discussed on p. 14-29, above. In his sole discretion, the convening authority may retain the accused at his present pay grade and suspend the automatic reduction. Additionally, the convening authority 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 sentencing, or an intermediate pay grade, 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.

b. Examples:

(1) "In the case of _____, the sentence is approved (and will be duly executed) but (the execution of so much thereof as provides for reduction to pay grade _____ and) automatic reduction to pay grade 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 pay grade _____ unless the suspension of the (reduction to pay grade _____ and) automatic reduction is vacated, in which event the accused at that time will be reduced to the pay grade of E-1." JAGMAN 0145.

(2) "In the case of _____, the sentence is approved (and will be duly executed). The accused will serve in pay grade E-1 from this date until released from confinement at which time he/she will be returned to pay grade _____." JAGMAN 0145.

9. Order of deferral of confinement or rescission of deferral

a. 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).

b. Examples:

(1) Confinement deferred pending final review: "In the case of _____, the sentence is approved and, except for that portion extending to confinement, will be executed. Service of the sentence to confinement (is) (was) deferred effective _____ 19__, and will not begin until (the conviction is final) (_____), unless sooner rescinded by competent authority." MCM, 1984, app. 16, form 7.

(2) Deferment of confinement terminated: "In the case of _____, the sentence is approved and will be executed. The service of the sentence to confinement was deferred on _____ 19__." MCM, 1984, app. 16, form 8.

(3) Deferment of confinement terminated previously: "In the case of _____, the sentence is approved and will be executed. The service of the sentence to confinement was deferred on _____ 19__, and the deferment ended on _____ 19__." MCM, 1984, app. 16, form 9.

10. Designation of place of confinement

a. 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).

b. Examples:

(1) "_____ is designated as the place of confinement." MCM, 1984, app. 16, form 1.

(2) "Pending completion of appellate review, the accused will be confined in _____"; or "The place of temporary confinement will be _____" (No form).

11. Credit for illegal pretrial confinement or confinement served from a former trial

a. 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.

b. Examples:

(1) Credit for illegal pretrial confinement: "In the case of _____, the sentence is approved and will be executed. The accused will be credited with ____ days of confinement against the sentence to confinement." MCM, 1984, app. 16, form 4.

(2) Credit for previously executed or served punishment: "In the case of _____, the sentence is approved and will be executed. The accused will be credited with any portion of the punishment served from _____ 19__ to _____ 19__ under the sentence adjudged at the former trial of this case." MCM, 1984, app. 16, form 21.

12. 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 0145a(6).

13. Statement regarding companion case

a. 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 0145a(2). This statement alerts reviewing authorities to look for the companion case and enables them to evaluate the relative appropriateness of the sentences.

b. Example: "This is a companion case to that of SN Mark Fortenberry, USN, 999 99 9999, tried by special court-martial by this command on 31 May 1984."

14. Synopsis of accused's conduct

a. In any case in which the convening authority approves a punitive discharge, whether or not suspended, he must include a synopsis of the accused's conduct during the current enlistment and extension thereof. This synopsis should include a chronological list of all nonjudicial punishments and court-martial convictions including dates, offenses, and sentences. The synopsis should also include information of a favorable nature such as medals and awards. JAGMAN 0145a(5).

b. The convening authority may, in any case in which he deems it appropriate, include a synopsis of conduct in his action. JAGMAN 0145a(5). The purpose of including a synopsis of conduct in the action is to afford higher reviewing authorities an additional basis for determining the appropriateness of the sentence approved by the convening authority.

c. Example: "A synopsis of the accused's service record during his current enlistment, or extension thereof, considered by the convening authority in connection with his action on the sentence in this case, is as follows:

12 Jan 1983 NJP for UA from 1 Jan 1983 to 5 Jan 1983; awarded 14 days restriction.

5 Mar 1983 SCM for UA from 1 Feb 1983 to 20 Feb 1983; sentenced to one month CHL; CA approved.

The accused is entitled to the following medals and awards: Sea Service Deployment Ribbon."

15. Statement of facts in aggravation, extenuation, and mitigation not in record of trial

a. In his action, the convening authority must include a statement of any facts which tend to extenuate, mitigate, or aggravate the offense if:

(1) the convening authority approves a punitive discharge, whether or not he suspends it; and

(2) the case involves a conviction of larceny or other offense involving moral turpitude; and

(3) they do not otherwise appear in the record of trial.

b. 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 0145a(8).

c. 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 syhopsis 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.)"

16. Statement as to accused's opportunity to rebut adverse matter

a. 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:

(1) the information which was considered; and

(2) that the accused was afforded an opportunity to rebut such matter; and

(3) that the accused did or did not make such a rebuttal statement.

b. If the accused makes a statement in rebuttal, a copy of it should be appended to the convening authority's action. JAGMAN 0145a(8).

c. 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.)"

17. Statement forwarding the record of trial

a. 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 0146a(3).

b. Example: "The record of trial is forwarded to the Staff Judge Advocate, Commander, Naval Base, Norfolk, for review under Article 64(a), UCMJ."

18. Signature and authority. The CA's action must be signed personally by the convening authority. Below his signature he must indicate his rank and authority to take action, e.g., commanding officer. R.C.M. 1107(f).

B. Promulgating orders (i.e., court-martial orders)

1. In general. A promulgating order publishes the results of the court-martial, the convening authority's action, and any subsequent action with regard to the case. It is a method of record-keeping and informing all those officially interested in the progress of the case. R.C.M. 1114; JAGMAN 0147.

2. When used

a. A promulgating order is not issued for summary courts-martial.

b. A promulgating order is issued for every special court-martial and general court-martial, including those resulting in acquittal.

3. 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 0147. 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 0147.

4. Form and content of the order. The form for promulgating orders is set out in Appendix 17 of the Manual for Courts-Martial, 1984.

Each promulgating order published by a command during the calendar year is numbered consecutively with the year following the number of the order. For example, the 10th special court-martial published by a command during 1984 would be "Special Court-Martial Order No. 10-1984." 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 1984, the date of the court-martial order would also be 15 March 1984.

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 3-84 of 1 March 1984....

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 3-84 of 1 March 1984, was

arraigned and tried: BOATSWAIN'S MATE SEAMAN MARK FORTENBERRY, U.S. NAVY, 999-99-9999, NAVAL JUSTICE SCHOOL, NEWPORT, RHODE ISLAND.

The court-martial order next sets forth the charge(s) and specification(s) upon which the accused was arraigned. The specifications should be summarized indicating specific factors such as value, amount, duration, and other circumstances which affect the maximum punishment. The specification may be reproduced verbatim if necessary. Findings should be indicated in parentheses after each charge and specification. For example:

> The accused was arraigned on the following offenses and the following findings or other dispositions were reached:
>
> Charge I: Article 86 (guilty).
>
> Specification 1: Unauthorized absence from unit from 1 January 1984 to 15 February 1984 (guilty).
>
> Specification 2: Failure to repair 18 February 1984 (dismissed on motion of defense for failure to state an offense).
>
> Charge II: Article 121 (not guilty).
>
> Specification: Larceny of property of a value of $150.00 on 27 January 1984 (not guilty).

The plea(s) section follows the charge(s) and specification(s) section of the court-martial order. For example:

> The finding of guilty as to Charge I, Specification 1 was based on the accused's plea of guilty. The accused pleaded not guilty to the remaining charge and specification.

If the accused was acquitted of all charges and specifications, the date of the acquittal should be shown: "The findings were announced on _____ 19__."

If the accused was convicted of one or more specifications, it is necessary to include the sentence in the court-martial order.

> The (military judge) (members) adjudged the following sentence on _____ 19__:
>
> Forfeitures of $100.00 pay per month for six months, confinement at hard labor for 6 months, and reduction to pay grade 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 02840

15 March 1984

In the case of Boatswain's Mate Mark Fortenberry, U.S. Navy, Naval Justice School, Newport, Rhode Island, the sentence is approved and will be executed. The Naval Brig, Newport, Rhode Island, is designated as the place of confinement. The record of trial is forwarded to the Staff Judge Advocate, Commander, Naval Education and Training Center, Newport, Rhode Island, for action under Article 64(a), UCMJ.

/s/ I.M. LAW
I.M. LAW
Captain, JAGC, U.S. Navy
Commanding Officer

At the end of the court-martial order is the "authentication" section. This section simply contains the signature of the authority issuing the court-martial order or the signature of a subordinate officer designated by him to sign "by direction." The name, rank, 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, rank, title, and organization of the person issuing the order.

5. Distribution of the order

a. The original goes in the record of trial.

b. A duplicate original is placed in the accused's service record only if the accused has been convicted.

c. Certified or plain copies go to many places. See JAGMAN 0147a(5).

6. 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 0147.

From: Legal Officer/Staff Judge Advocate
To: Commanding Officer,

Subj: RECOMMENDATION IN THE SPECIAL/GENERAL COURT-MARTIAL CASE OF _____

Ref: (a) R.C.M. 1106, MCM, 1984
(b) §0145c JAGMAN

Encl: (1) As appropriate

1. Pursuant to references (a) and (b), the following information is provided:

(a) Offenses, pleas and findings:
Charges and specifications Pleas Findings

(b) Sentence adjudged:

(c) Clemency recommendation by court or military judge:

(d) Summary of accused's service record:
(1) Length of service
(2) Character of service (average pros and cons, average of evaluation traits)
(3) Awards and decorations
(4) Records of prior nonjudicial punishment
(5) Previous convictions
(6) Other matters of significance

(e) Nature and duration of pretrial restraint:

(f) Judicially ordered credit to be applied to confinement, if any:

(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.

(h) Optional information — any recommendations for clemency (from division officer, company commander, immediate supervisor, etc.) or any other matters which are deemed appropriate. Note: If any matters adverse to the accused are presented to the CA from outside the record of trial, with knowledge of which the accused is not chargeable, the accused shall be notified and be given an opportunity to rebut.

2. For Staff Judge Advocate only: State whether corrective action on the findings or sentence is appropriate based upon allegations of error raised by the accused after sentence is adjudged or when otherwise deemed appropriate by the staff judge advocate. See R.C.M. 1106(d)(4), MCM, 1984.

3. A specific recommendation as to the action to be taken by the convening authority on the sentence.

(Appendix A-1-x, JAGMAN)

SECTION THREE -- CRIMINAL LAW

SECTION THREE

FOREWORD

This section is provided for use by the commander and his/her legal officer as a basic reference to commonly encountered offenses under the Uniform Code of Military Justice [hereinafter cited as UCMJ]. Although this section reflects general principles of military criminal law as of the revision date, its coverage is not exhaustive, and military law is always changing. Thus, it is always wise to consult a judge advocate before taking action on a criminal law problem.

This section reflects the provisions of the Manual for Courts-Martial, 1984 [hereinafter cited as MCM, 1984]. MCM, 1984, became effective 1 August, 1984. Accordingly, the discussion herein may not necessarily apply to offenses committed prior to 1 August, 1984 [which are governed by the Manual for Courts-Martial, 1969 (Rev.)].

CHAPTER XV

BASIC CONCEPTS OF CRIMINAL LIABILITY

A. Introduction. Although this section of the Basic Military Justice Handbook 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 will be forced to suffer a criminal penalty (such as a fine, imprisonment, or even death) for his/her acts. To convict an accused of a crime, the prosecution, representing the government, must prove beyond a reasonable doubt that he/she committed certain specific acts which constitute an offense. Many offenses also require the prosecution prove that when the accused committed the required acts, he/she had a specific intent or state of mind. Therefore, underlying each offense are two specific concepts which together constitute criminal liability: (1) Specific acts, and (2) the accused's state of mind. In every case the question of whether the accused committed a crime will turn upon these two concepts.

B. Elements of the offense. Each specific offense, e.g., larceny, assault, or unauthorized absence, is defined in terms of specific facts that the prosecution must prove in order to convict the accused. Such specific facts are called the elements of the offense.

This text lists the elements of each offense discussed. Another generally reliable source of the elements of offenses is Part IV of MCM, 1984, which provides a discussion of most of the offenses under the UCMJ and contains a listing of elements for each offense discussed. Caution is required when using Part IV of the Manual, however. The Manual does not discuss all possible UCMJ offenses. Also, the Manual may not reflect recent judicial interpretations of certain offenses, which would take precedence over the Manual's provisions. A third generally reliable reference on the elements of the various offenses is the Military Judges' Bench Book (DA Pam. No. 27-9, 1982).

C. State of mind. In addition to the accused's acts, the concept of criminal liability also involves the accused's state of mind or intent. This mental element of criminal liability is often referred to as mens rea, or "mind at fault." Criminal offenses may be classified according to the type of intent or state of mind required for conviction. Among the states of mind or intents recognized by military law are: (1) General intent, (2) specific intent, (3) negligence, (4) knowledge, and (5) willfulness.

1. General intent offenses. In order to convict an accused of a general intent offense, the prosecution need not prove that he/she entertained any specific intent or state of mind. The fact that the accused committed a prohibited act will give rise to an inference that he/she intended to commit the offense. The law recognizes that people usually intend the natural and probable consequences of their actions. This inference, however, may be rejected by the court where the evidence suggests that the accused's actions were accidental. Thus, where the accused threw a ball and hit a child who suddenly walked out onto the playing field, the accused intended to throw the ball but did not intend to hit the victim. It was an accident that the victim was hit; therefore, the accused is not guilty of assault and battery.

2. Specific intent offenses. Specific intent offenses are those which require that the accused had a specific intent or state of mind. Specific intent involves a further purpose than mere commission of the act. For example, the intentional taking of property from another represents only a general intent. Such an act, however, could be accompanied by a further purpose, or specific intent, to deprive that person of the property permanently. Such a taking with that specific intent constitutes larceny, a specific intent offense.

3. Negligence offenses. Under certain circumstances a person may be criminally liable for unintentional conduct. Negligence is unintentional conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm. It can also be defined as the failure of a person to exercise the care that a reasonably prudent person would exercise under similar circumstances. The UCMJ recognizes a number of negligence offenses. The degree of negligence required for conviction varies depending upon the offense. There are three degrees of negligence: simple negligence, culpable negligence, and wantonness.

a. Simple negligence. Simple negligence is the less severe form of negligence. All that is required to convict an accused of such an offense is proof beyond a reasonable doubt that the accused failed to recognize a substantial unreasonable risk which a reasonably prudent person in similar circumstances would have recognized. For example, a person who is involved in an accident while operating a military vehicle while drunk, may be guilty of damaging government property through neglect. Negligent homicide and dereliction of duty are two other examples which require only simple negligence.

b. Culpable negligence. Culpable negligence is a degree of negligence greater than simple negligence. Another term used for culpable negligence is recklessness. This form of negligence exists where an accused recognizes a substantial unreasonable risk yet consciously disregards that foreseeable risk. Thus, a person who practices fast draws with a loaded .45 pistol and as a result unintentionally shoots a bystander, has acted in a culpably negligent manner. It is reasonably foreseeable that the bystander would be hit by an accidental discharge of the weapon. Therefore, the would-be fast draw artist is guilty of aggravated assault and battery. Even simple assault and battery requires culpable negligence rather than simple negligence.

c. Wanton offenses. Wantonness is an act or omission done with a heedless disregard or indifference for known, probable, serious consequences. For example, throwing a live grenade into a group as a joke to watch everyone scatter shows a wanton disregard for human life. It is highly probable that when the grenade goes off, people might be injured or killed. Should death result, even though "unintended," the accused would be guilty of murder. It is disregard for the probable consequences.

4. Knowledge offenses. Closely related to the concept of specific intent is knowledge. Some offenses require that the accused possess certain knowledge at the time he/she commits or omits 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 that he/she was 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

A. Introduction. A party to a crime is one who because of his/her 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 by his/her own hand or through an inanimate or innocent human agent. Obviously a person who plants a poisonous snake in an enemy's mailbox is a perpetrator. However, one would also be a perpetrator by mailing the snake to the enemy, using the postal service as an innocent 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 he/she observes being committed. However, a person such as a guard or night watchman, 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. He/she 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 principals' plan. For example, suppose that A and B agree to rob a bank. A will go into the bank and steal the money at gun-point, while B waits outside in the getaway car. When A goes inside, the bank guard attempts to stop the robbery, and A shoots and kills him. A, the perpetrator, is of course guilty of murder. B is also guilty of murder as an aider and abettor because it was reasonably foreseeable that the bank robbery might result in someone getting shot and even killed. Moreover, B would be guilty even if she and A had agreed that there would be no shooting, because a shooting was foreseeable despite the agreement. On the other hand, suppose that while he is in the bank, A rapes one of the tellers. Certainly rape is not a natural and probable consequence of a bank robbery. Unless B knew that A was a sex maniac, B could not have reasonably foreseen the possibility of a rape. Therefore, B would not be an aider and abettor to the rape, although she would be guilty as an aider and abettor of the robbery.

D. Withdrawal by accessory before the fact and aider and abettor. An accessory before the fact or an aider and abettor may escape criminal liability by unequivocally disassociating himself/herself from the crime before the perpetrator commits the offense. For the withdrawal to be effective three requirements must be met. First, the accused must effectively countermand or negate any assistance, etc., previously given. Second, the accessory or aider and abettor must communicate his/her 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 from the crime to which he/she was an accessory. 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 his/her crime must be one that is recognized by the Code. 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.

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: he/she may have learned about it from third parties.

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 1139, U.S. Navy Regulations, 1973, chargeable under Article 92, UCMJ, or Misprison of a Felony under Article 134, UCMJ.)

5. The accessory's intent. Accessory after the fact is a specific intent offense. The prosecution must prove beyond reasonable doubt that the accused assisted the principal because he/she wanted to help the principal avoid apprehension, trial, or punishment. The type of assistance given may be strong circumstantial evidence of the accused's criminal

intent. It is almost impossible, for example, to infer any innocent intent on the part of a person who helps a principal dismember a corpse with a chainsaw. On the other hand, the principal's wife, who washes his shirt, thereby destroying traces of the victim's blood which would be important evidence, may have done so for perfectly innocent reasons.

6. Reduced punishment. Although a party to the crime, an accessory after the fact's involvement is considered less serious than that of the principal. Therefore, the maximum confinement for an accessory after the fact is one-half that authorized for the principle offense, but not more than ten years. The death penalty may not be imposed. The accessory is subject to the same maximum sentence with respect to punitive discharge, forfeitures, and reduction in pay grade as the principal.

F. Pleading offenses by principals and by accessories after the fact

1. Principals. An offense by any type of principal is pleaded as if he/she were 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 by his/her own hand. Article 77, itself, is a nonpunitive descriptive article and is never charged as the basis of any substantive offense. Sample specifications for each offense are produced in Part IV, MCM, 1984.

2. Accessories after the fact

a. General guidelines. Follow the format of the sample specification in Part IV, par. 3f, MCM, 1984. Be sure to include appropriate information concerning personal and subject-matter jurisdiction. (See chapter XIX of this section for a detailed discussion of pleading jurisdictional information.) Note that the specification must state the specific offense committed by the principal as well as the specific acts by the accused that assisted the principal.

b. Sample pleading

Charge: Violation of the Uniform Code of Military Justice, Article 78.

Specification: In that Seaman John Helper, U.S. Navy, USS Seaslug, on active duty, knowing that on board USS Seaslug, located at Perth Amboy, New Jersey, on or about 10 April 1985, Seaman Harry Horse, U.S. Navy, had committed an offense punishable by the Uniform Code of Military Justice, to wit: assault upon Yeoman First Class Wilbert Smeen, U.S. Navy, did, on board USS Seaslug, located at Perth Amboy, New Jersey, on or about 10 April 1985, in order to prevent the apprehension of the said Seaman Horse, assist the said Seaman Horse by permitting Seaman Horse to hide in his wall locker and by falsely telling said Yeoman First Class Smeen that Seaman Horse had left the ship.

CHAPTER XVII

REQUESTING, 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 four distinct types of criminal acts which fall short of the completed crime, and which occur chronologically before the completed crime: Requesting commission of an offense, solicitation, conspiracy, and attempt.

B. Requesting Another to Commit an Offense.

-- Concept of requesting. Requesting is the advice, direction, suggestion, or request to another that an offense recognizable under the UCMJ be committed. It is wrongful if it is made in a manner or under circumstances which the accused could reasonably expect the person(s) to whom it was made to take seriously and act upon. This offense differs from solicitation (see next section) in that for this offense the accused need not have specifically intended that the offense be committed. Para 101c Part IV, MCM 1984.

C. Solicitation

1. Concept of criminal solicitation. A criminal solicitation is any statement or conduct which constitutes a serious request or advice to another to commit an offense. The gravamen of the offense is the "corruption" caused by "planting the seed" or idea to commit a crime. This is a specific intent offense which requires that the accused actually intended that the act solicited be carried out. The offense of solicitation, however, is completed as soon as the advice or request is made. The fact that the solicited crime was not attempted or completed is no defense.

2. Prosecution under articles 82 and 134. Two separate articles of the UCMJ prohibit solicitation. Article 82 is limited to solicitations to commit one of four specific crimes: Desertion, mutiny, misbehavior before the enemy, and sedition. Solicitation to commit 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. For the various maximum punishments under article 82 (which may include the death penalty in certain cases), see Part IV, par. 6e, MCM, 1984.

5. Pleading. Pleading formats under articles 82 and 134 are essentially similar. See Part IV, par. 6f, MCM, 1984 for article 82 solicitations. See Part IV, par. 105f, MCM, 1984 for solicitations under article 134. In article 82 pleadings, the intended offense is merely referred to by name and Code article. In article 134 pleadings, the intended offense is described more specifically. The following sample pleading for an article 134 solicitation demonstrates the general format for pleading both article 134 and article 82 solicitations.

> Charge: Violation of the Uniform Code of Military Justice, Article 134.
>
> Specification: In that Seaman Apprentice Roger Seeker, U.S. Navy, USS Plankton, on active duty, did, on board USS Plankton, located at San Diego, California, on or about 6 July 1985, wrongfully solicit Seaman Innocent Dupe, U.S. Navy, to steal one 1951 Hudson sedan, of a value of about $200, the property of Ensign Andrew Teek, U.S. Navy, by saying to said Seaman Dupe, "If you'll steal Teek's old Hudson for me, I'll give you fifty bucks," or words to that effect.

D. Conspiracy

1. Concept of conspiracy. A conspiracy is an agreement by two or more persons to commit an offense against the UCMJ, accompanied by the performance of an act by at least one of the conspirators to accomplish the criminal object of the conspiracy. Conspiracy is a separate and distinct offense from the intended crime. Thus, the fact that the intended crime was never committed is no defense. On the other hand, if the intended crime is completed, the conspirators are criminally liable for both the intended crime and for the separate offense of conspiracy in violation of article 81 of the Code. The maximum authorized punishment for conspiracy is the same as for the intended crime, except that the death penalty may not be imposed for conspiracy.

2. Elements of the offense. In order to convict an accused of conspiracy, in violation of article 81, the prosecution must prove beyond reasonable doubt that:

a. At the designated time and place, the accused entered into an agreement with a certain named person or persons to commit an offense under the UCMJ; and

b. while the agreement continued to exist, and while the accused remained a party to the agreement, the accused or a co-conspirator performed one or more overt acts, as alleged in the specification, with the purpose of effecting the criminal object of the agreement.

3. Form of the agreement. The required agreement need not be a detailed "master plan." No specific form of agreement is required. The agreement to commit a crime need not specify the means to be used nor the part each conspirator is to play. All that is required to satisfy the agreement requirement is that the conspirators agree to commit an offense against the Code. Thus, if A says to B, "Let's rob the liquor store tonight," and B says "Okay," A and B have entered into an agreement within the meaning of article 81. However, mere idle talk about committing some indefinite crime in the future is not, under most circumstances, a sufficient agreement. Whether or not the alleged conspirators actually entered into an agreement to commit an offense is a factual question to be decided by the members of the court or, in a judge-alone trial, by the military judge.

4. Parties to the agreement. At least two persons are required for a conspiracy. None of the accused's fellow conspirators need be persons subject to the UCMJ. Thus, Seaman A can be convicted of conspiracy even though all his co-conspirators were civilians. (Of course, all the requirements for subject-matter jurisdiction over the conspiracy must be met.) If the only other member of a conspiracy is a government agent or informant, however, there can be no conspiracy.

5. The overt act. The second element of conspiracy requires that one of the conspirators must commit an overt act in furtherance of the conspiracy. The overt act must be something other than the mere act of agreeing to commit the crime. Any act in preparation for the crime is sufficient. Also, any attempt to commit the intended crime, or the commission of the crime itself, will likewise satisfy the requirement for

an overt act. The overt act need not be one committed by the accused: an overt act by any of the alleged members of the conspiracy will suffice. The law considers the act of one conspirator in furtherance of the conspiracy to be the act of all the conspirators. Suppose, therefore, that A and B agree to burn down the Naval Justice School. B buys a gallon of gasoline to start the fire. Both A and B are guilty of conspiracy to commit arson. Even though A may have committed no overt act himself, B's act in furtherance of the conspiracy will be imputed to A.

6. Relationship to intended crime

a. Criminal liability of conspirators. Conspiracy is a separate offense from the intended crime. The fact that the intended crime was never attempted or completed is no defense to a conspiracy charge. If the intended crime is committed, however, all conspirators will be criminally liable not only for the conspiracy, but also as principals for the completed crime. Suppose, therefore, that A, B, and C conspire to murder D. A and B provide C with the pistol, a disguise, and a stolen getaway car. C goes off by herself and kills D. A, B, and C will all be guilty of both conspiracy to commit murder and murder itself, even though only C did the actual killing. Thus, all conspirators are accessories before the fact to the completed crime, and are considered principals. Moreover, all conspirators are liable as principals for any other foreseeable 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 his/her 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/she 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 his/her 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, par. 5f, MCM, 1984.

Charge: Violation of the Uniform Code of Military Justice, Article 81.

Specification: In that Fireman Taki Prop, U.S. Navy, USS Sandlance, on active duty, did, on board USS Sandlance, located at Sandusky, Ohio, on or about 13 May 1985, 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, 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 locker.

D. Attempts

1. Concept of criminal attempts. Article 80, UCMJ, defines a criminal attempt as an act, done with the specific intent to commit an offense against the Code, which amounts to more than mere preparation and which would tend to result in the intended crime being completed. The maximum authorized punishment for an attempt is the same punishment authorized for the intended crime; however, confinement may not exceed twenty years and the death penalty may not be imposed.

2. Elements of the offense. In order to convict an accused of an attempt, the prosecution must prove beyond reasonable doubt that:

a. The accused did a certain overt act;

b. the act was done with the specific intent to commit a certain offense under the UCMJ;

c. the act amounted to more than mere preparation; i.e., it was a direct movement toward the commission of the intended offense; and

d. the act apparently tended to result in the commission of the intended offense; i.e., the act would have resulted in the actual commission of the intended offense except for a circumstance unknown to the accused or the unexpected intervention of a circumstance which prevented completion of the offense.

3. Specific intent to commit an offense. The accused must have intended to commit an offense against the Code. Proof of this specific intent poses several problems.

a. Proof of intent. Proof of the accused's intent to commit an offense may be accomplished by direct or circumstantial evidence. (See chapter I of this text for a detailed discussion of direct and circumstantial evidence.) Very seldom is direct evidence available.

Therefore, attempt prosecutions usually rely on circumstantial evidence. The overt act that the accused performed may itself be strong circumstantial evidence of his/her criminal intent. The law assumes that people normally intend the natural and probable consequences of their acts. If the accused engages in conduct which normally leads to the commission of an offense, his/her intent to commit the crime may be inferred from his/her actions. Such an inference is not absolute or mandatory, and can be accepted or rejected by the trier of fact.

b. Factual impossibility. Suppose that A intends to murder B. A enters B's room at night and shoots at what appears to be B's sleeping form. In fact, the "victim" turns out to be a dummy that B placed in his bed in order to fool A. A has committed attempted murder. He intended to commit murder. His overt act, shooting the gun, was more than mere preparation and would normally result in the murder being completed. Even though one cannot murder a dummy, a crime has been committed because A reasonably believed he was shooting B. The law recognizes that one is guilty of a criminal attempt if he purposely engages in conduct which would constitute the intended crime if the attendant circumstances were as he mistakenly believed them to be. Another common example of factual impossibility is the attempted drug sale. Suppose A sells B a substance that she reasonably believes is heroin; but it turns out to be a mixture of sugar and talc. A is not guilty of an actual distribution of heroin, because the substance wasn't actually heroin. Because A reasonably believed it was heroin, however, she will be guilty of attempted distribution of heroin.

4. The overt act. The overt act required for an attempt must be more than mere preparation. Distinguish, therefore, the overt act required for a conspiracy, an act which can be merely preparatory, and that required for attempts. The overt act in an attempt must be one which would normally result in the completion of the crime. In other words, the act sets in motion a sequence of events which will result in the completion of the crime, unless someone or something unexpectedly intervenes. Whether the required overt act has been committed is often a close question. For example, suppose that B wants to blow up a commercial airliner on which A is to travel. B obtains plans for an altitude-triggered bomb. He purchases the necessary supplies and constructs the bomb. He places the bomb in a suitcase and takes it to the airport. When B arrives at the airport, he checks the suitcase aboard the flight A is going to take. At what point did B's acts rise to the level of an attempt? Certainly obtaining the plans and supplies and constructing the bomb would be merely preparatory acts. Checking the suitcase aboard the flight would obviously be more than mere preparation. However, intelligent arguments can be made for either side about the act of taking the suitcase to the airport. The question will be decided by the members of the court or, in a judge-alone trial, by the military judge.

5. Relationship to completed offense. An attempt is usually a lesser included offense of a completed crime. (For a detailed discussion of lesser included offenses, see chapter XVIII of this section of this text.) Therefore, when charging an accused with a completed crime, there is no need to separately charge him/her with 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 offene 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), and attempt-type assault (article 128).

b. Sample specification

Charge: Violation of the Uniform Code of Military Justice, Article 80.

Specification: In that Hull Technician Third Class Jacob Want, U.S. Navy, USS Weakfish, on active duty, did, on board USS Weakfish, located at Norfolk, Virginia, on or about 1 August 1984, attempt to steal a Little Giant vacuum sweeper, of a value of about $65, the property of Seaman Kirby Hoover, U.S. Navy.

E. The spectrum of crime. This chapter has discussed the legal principles that also make it a crime for a serviceperson to request or 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 requests, 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.

Requesting	Solicitation	Conspiracy	Attempt	The Completed Crime	Accessory After the Fact

(NOTE: Not every crime may possess all of these attributes.)

F. The spectrum of criminals. The spectrum of crime outlined above can be applied to the parties of crime discussed in chapter XVI. The spectrum of criminals may be visualized as follows.

Accessory Before the Fact	Conspirator	Aider and Abettor	Perpetrator	Accessory After the Fact

Generally, a person who counsels, procures, commands, or causes another to commit an offense becomes an accessory before the fact and is guilty of the crime of solicitation if the crime is not completed. Upon completion of the crime, the accessory before the fact becomes liable as a principal for the completed crime, the crime of solicitation, absent a separate time and place factor, merging with the completed crime. Should the accessory before the fact go to the scene of the crime and participate in the commission of the crime, he/she also becomes an aider and abettor, and guilty of the crime completed. If the crime is not completed, but an act beyond mere preparation has been committed, the accessory before the fact/aider and abettor is guilty of solicitation and attempt. On the other hand, because conspiracy and the completed crime never merge, the conspirator is always guilty of conspiracy, and depending upon whether the crime is completed or not, he/she may also be guilty of solicitation, attempt, and the completed crime.

CHAPTER XVIII

LESSER INCLUDED OFFENSES

A. Basic concept. If the evidence introduced at trial fails to prove the offense charged, but does prove beyond a reasonable doubt another offense that is included in the one charged, the accused may be convicted of that lesser included offense. For example, suppose that A is charged with robbery. Robbery is defined as the larceny of property from the person or presence of another person, through the use of force, violence, or threat of violence. At A's trial, the evidence shows that A stole B's property, but she didn't use any force, violence, or threat. In fact, she took the property from B's parked car while B was in the liquor store. A is not guilty of robbery, but she can be convicted of the included offense of larceny. The offense of larceny is included in the legal definition of robbery.

B. Patterns of lesser included offenses. Lesser included offenses fall into four general patterns.

1. Missing element(s). All of the elements of the lesser offense are included and necessary parts of the greater offense, but the lesser included offense lacks at least one element contained in the greater offense. For example:

	DESERTION		UNAUTHORIZED ABSENCE
a.	Absence from unit, organization, place of duty	a.	Same
b.	Without proper authority	b.	Same
c.	With intent to remain away therefrom permanently		

2. One element factually less serious. All of the elements of the lesser offense are included and necessary parts of the greater offense, but at least one element of the lesser offense is factually less serious. For example:

	BURGLARY		HOUSEBREAKING
a.	Breaking and entering	a.	Unlawfully entering (no breaking, hence, factually less serious)
b.	Dwelling house in nighttime	b.	Building or structure (does not have to be a dwelling house and can be at any time, night or day)
c.	With intent to commit a serious offense (art. 118 through 128) therein	c.	With intent to commit any criminal offense

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

4. Fairly embraced. Although the elements of two offenses are different, these different elements are so factually similar that they are fairly embraced in the allegations and they may stand in the relationship of greater and lesser offenses. For example:

BREAKING RESTRICTION	UNAUTHORIZED ABSENCE
Ordered into restriction	Appointed place of duty
Knowledge of limits	Without authority
Went beyond limits	Left unit, organization
C to P, SD	

C. Attempts as lesser included offenses. An attempt to commit an offense is usually a lesser included offense. Likewise, an attempt to commit a lesser included offense is itself a lesser included offense of the charged offense.

D. Commonly included offenses. In the discussion paragraphs of each offense listed in Part IV, MCM, 1984, there is a mention of commonly included offenses of the offense under discussion. The particular facts of a given case may raise lesser included offenses not listed in Part IV or may negate the existence of one or more of the listed lesser included offenses.

E. Guilty findings to lesser included offenses. The mechanics of finding an accused guilty of a lesser included offense can be complicated. The accused must be found guilty by "exceptions and substitutions." For example, suppose the accused is charged with the following larceny specification:

> Charge: Violation of the Uniform Code of Military Justice, Article 121.
>
> Specification: In that Private John A. Smith, U.S. Marine Corps, A Company, Schools Battalion, Marine Corps Base, Camp Pendleton, California, on active duty, did, at Marine Corps Base, Camp Pendleton, California, on or about 18 January 1985, steal a wrist watch of a value of $125, the property of Private James S. Willis, U.S. Marine Corps.

The evidence at trial proved that the accused only wrongfully appropriated the watch, because he did not intend permanently to deprive Private Willis of the watch, but did intend to keep it temporarily. A guilty finding to the lesser included offense of wrongful appropriation would be announced as follows:

> . . . the court finds you, of the specification, guilty, except for the word "steal", substituting therefor the word "wrongfully appropriate", of the excepted words, not guilty, of the substituted words, guilty, and of the charge, guilty.

F. Pleading. As a general rule, lesser included offenses are not separately pleaded in addition to the greater offense. The specification alleging the greater offense automatically alleges all lesser included offenses. Occasionally, however, it may be wise to plead separate specifications alleging the lesser included offenses in order to facilitate announcing guilty findings. Such separate pleadings would be advisable only when there is a fair risk that the court members might become unduly confused despite the military judge's instructions on findings by exceptions and substitutions.

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 three-fold purpose. First, they formally notify the accused of the nature of the accusations. Second, pleadings provide specific information about the alleged offense, so that the accused and the accused's attorney may prepare a defense. Finally, because they specify a particular offense, pleadings protect the accused against double jeopardy, i.e., being tried twice for the same offense.

B. The charge and specification. Military pleadings are drafted in the format of a charge and a specification. Together the charge and specification provide specific information about the alleged offense and also about the factual basis for court-martial jurisdiction over the accused and over the alleged offense.

1. The charge. The charge merely cites a specific article of the UCMJ which the accused allegedly violated.

Example:

> Charge: Violation of the Uniform Code of Military Justice, Article 121.

The various subdivisions of a charge are not listed. Thus, "article 86(1)" is improper: simply write "article 86."

2. The specification. The specification contains two types of information. First, it contains the specific facts which constitute the alleged offense. As a general rule, the specification must allege all the elements of the offense. The specification also contains jurisdictional allegations, i.e., the facts which give rise to court-martial jurisdiction over the accused and over the offense. Sample pleadings are provided throughout this section. Each specification relates to one separate offense. Therefore, if the accused committed five separate larcenies, the pleading would contain one charge ("Violation of the Uniform Code of Military Justice, Article 121.") and five specifications, numbered one through five, under the one charge.

3. Numbering of charges and specifications. If there is only one charge, or only one specification under a charge, that single charge or single specification is not numbered. When there are multiple charges, they are numbered with Roman numerals (Charge I, Charge II, etc.), and are usually listed in the order of articles of the Code violated. For example, a violation of article 86 would be listed before a violation of article 87, even though the latter may have occurred first. Specifications are numbered with Arabic numerals (Specification 1, Specification 2, etc.), and are usually listed in the chronological order that 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. Abbreviations are improper in military pleadings. The only exceptions to this rule are the abbreviations "U.S." and "USS" and middle names. Hull numbers of naval vessels are not necessary; ZIP codes and social security numbers are not used. The accused's rate, rank, and service should always be written in full, not abbreviated, nor need a last name be typed completely in upper case letters.

C. Contents of specifications. Specifications contain two types of information: (1) Facts concerning the alleged offense; and (2) facts showing why a court-martial has jurisdiction over the accused and over the offense.

1. Information about the offense

a. General considerations. A specification must include a simple, concise statement of the facts constituting the offense. These facts must include, either expressly or by reasonable implication, all elements of the offense charged. In other words, when the specification is read, it must describe acts that are clearly and unequivocally an offense.

(1) Use of Part IV form specifications. Part IV, MCM, 1984, contains sample formats for specifications for the commonly encountered offenses under the UCMJ. These samples should be used as a basic guide for drafting specifications. The form specifications must be used with care, however. Each specification must be tailored to fit the facts of each case. Thus, some of the language in a Part IV form may not be appropriate. Finally, it is possible that future appellate decisions will find some of the Part IV forms to be incomplete or insufficient. It is therefore important to seek periodic updates from a judge advocate.

(2) Elements of the offense. The specifications must include a simple, concise statement of the basic facts that are the elements of the offense. As a general rule, all of the elements must be pleaded, either expressly or by reasonable implication. Part IV form specifications are generally reliable guides. Where a specific intent or state of mind is an essential element of the offense, it must be included in the specification.

(3) Words importing criminality. Words such as "wrongfully", "unlawfully", "without authority", and "dishonorably" are words importing criminality, because they describe the circumstances under which an otherwise innocent act is considered criminal. For example, see Part IV, par. 54f(2), MCM, 1984. This sample assault specification contains the language "...did...unlawfully strike." "Unlawfully" is a word importing criminality. If "unlawfully" were deleted, the remaining language would describe an act that might or might not be criminal: "...did...strike...". (Not all strikings of another person are criminal. The accused may have acted in lawful self-defense, or the alleged victim may have lawfully consented to the striking.) The importance of words importing criminality is self-evident. Without words importing criminality, the specification fails to state an offense and is fatally defective. Careful use of Part IV form specifications is the best way to ensure that all the necessary words importing criminality are included.

(4) Aggravating facts and circumstances. For many offenses, the maximum authorized punishment is determined by the circumstances under which the offense occurred. Such circumstances are known as matters in aggravation. For example, the maximum punishment for simple assault is forfeiture of two-thirds pay per month for three months and confinement for three months. If the assault is aggravated by the use of a dangerous weapon (other than a loaded firearm), the maximum punishment is increased to a dishonorable discharge, total forfeitures, and confinement for three years. For the increased punishment to be applicable, however, the aggravating facts or circumstances which trigger the increased punishment must be pleaded in the specification.

> Example: Petty Officer Remington shoots her .45 pistol at another person. The specification, however, alleges only simple assault, and omits the fact that the assault was with a dangerous weapon. Because of this omission, the maximum punishment that can be imposed on Remington is only that authorized for the simple assault.

Remember, the aggravating circumstances must be pleaded in order to trigger the increased maximum punishment.

b. Specific contents of the specification

(1) Description of the accused. The accused should be clearly identified by rank, name, armed force, and unit or organization. The service 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, 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 1984 to 5 May 1985. This was essentially one continuing offense. Therefore it is proper to allege the date as "during the period of 26 December 1984 to 5 May 1985."

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 1985 and 30 June 1985, 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 1985 to about 30 June 1985."

The better practice, however, is to use "on or about" pleading whenever it is possible to make a reasonable approximation of the date of the offense.

(c) Ordinarily, the place of the offense need only be pleaded as a general location, such as "on board USS Woonsocket, located at Newport, Rhode Island" or "at Naval Air Station, Jacksonville, Florida." Greater detail, such as a street number or building number, is seldom advisable. (There are rare instances where the accused's act is an offense only if committed in a particular place. In such a case, an attorney should be consulted for advice on how much more detail is necessary.) Two common exceptions are "failure to go" and "going from" offenses in violation of article 86, both of which require the accused's specific place of duty to be alleged.

(3) Description of accused's role as a principal. If the accused is a principal to the offense, the specification does not have to specify whether the accused was the perpetrator, an aider and abettor, or an accessory before the fact. The specification is written as if the accused committed the crime personally.

> Example: Seaman Smith induced Seaman Jones to steal a car for him. The larceny specification against Smith would read: "In that Seaman Smith...did steal a 1957 Edsel...."

(4) Description of victim. If the offense is a crime against the person or property of another, the victim should be clearly identified. The victim's full name and any aliases should be used. If the victim is a military person, rank and branch of service should be included. A full, complete identification of the victim will protect against possible unforeseen developments at trial.

(a) Victim's rank and military status. The victim's rank and status as a person subject to the UCMJ may be critical in some cases. For example, disrespect to and willful disobedience of commissioned officers require that the victim was a superior. The victim's rank is essential to establish this element. Other offenses, such as use of provoking words, require that the victim be a person subject to the UCMJ. Therefore, pleading the victim's rank and branch of service is necessary to allege the victim's status properly. If the victim of provoking words was a reservist, the specification should also allege that he/she was on active duty.

(b) The unknown victim. Occasionally the exact identity of the victim may be uncertain. For example, an assault specification which identifies the accused's victim only as "a military policeman" is sufficient because of the other specific information in the specification about the time, date, place, and manner of commission of the offense. Nonetheless, vague descriptions of the victim are unwise. It becomes easier for the accused to assert that the pleading is defective because he/she has been misled in preparing a defense. When the exact identity of the victim is unknown, he/she should be described by alias, if any, or by a general physical description.

> Example: Private Slugworthy assaults an unidentified person. The assault specification may describe the victim as "a Caucasian adult male of unknown identity."

(5) Description of property. Usually generic terms such as "a knife" or "a typewriter" are sufficient. Sometimes, however, greater detail is advisable. Common sense is the pleader's best guide.

> Example: Corporal "Hot" Carr steals five different automobiles on five different occasions. Each of the five larceny specifications should avoid confusion by describing the stolen car by year, make, and model: "a 1978 Ford Fairmont 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." 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; one camera, value $220; 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, par. 45f(1), MCM, 1984.

> Example: Seaman Bogus is charged with wrongful possession of a pass. A photocopy of the pass should be inserted in the specification. See Part IV, par. 77f(3), MCM, 1984.

(b) General orders. When the offense alleged constitutes a violation of a general order or regulation (article 92(1), UCMJ), the specification should clearly identify the particular directive and indicate clearly the part of it which the accused allegedly violated. This may be done by referring to it by its title, article, section or paragraph, and date of the directive. For example, "... Article 1139, U.S. Navy Regulations, dated 26 February 1973 ...." It is generally 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 quoted verbatim in the specification. If it is not quoted, or there is more than one way to violate the order, the specific misconduct constituting the violation must be alleged. For example, "... USS Tincan Order 395, dated 28 February 1981, which states in pertinent part: "All hands shall take cold showers before going on liberty in the port of Olongapo, Republic of the Phillipines, ..." 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 1977 decision in United States v. Alef, the Court of Military Appeals mandated that a specification contain the factual basis for court-martial jurisdiction over the accused and over the offense. Therefore, once the specification has been drafted in accordance with the sample format, the pleader must then tailor the specification so that it adequately pleads personal and subject-matter jurisdiction. To date, there is no uniformly accepted practice or format for jurisdictional pleading. Considerable variety exists among the various services and even within the Navy and Marine Corps. The exact format for jurisdictional pleading is of only secondary importance. Appellate courts examine the substance of the specification, not its style, to determine whether it is legally sufficient. The method of jurisdictional pleading presented in this text is not the only correct way. However, it strikes a balance between what is only barely adequate and the opposite extreme of very detailed, specific factual averments.

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 Support Activity, Philadelphia, Pennsylvania, on active duty, who was lawfully ordered on 11 January 1985 to a period of forty-five days active duty for training to commence on 2 February 1985, did....

c. Jurisdiction over the offense. The specification must clearly indicate that there is court-martial jurisdiction over the offense alleged. Therefore, after the information about the offense and the information about personal jurisdiction have been drafted, the specification must be reviewed to determine what additional information is necessary to establish that the court-martial has jurisdiction to try the offense. Sometimes extensive additional language will be necessary. Most of the time, however, virtually no additional language will be required; e.g., when the offense occurred on a military installation, or involves drugs, or the offense involves a purely military offense such as unauthorized absence or disobedience of orders.

(1) Specific jurisdictional factors. Subject-matter jurisdiction is evaluated in terms of the following specific factors:

(a) Whether the accused was on authorized leave or liberty, or was an unauthorized absentee, at the time of the offense;

(b) whether the offense occurred onbase;

(c) whether it occurred at a place under military control;

(d) whether it occurred within the territorial limits of the United States or its possessions, or in a foreign country;

(e) whether it occurred in peace time or during war;

(f) whether there was any connection between the offense and the accused's military duties;

(g) whether the victim was in the military, and if so, whether the victim was performing any official duties at the time;

(h) whether civilian courts are available to prosecute the case;

(i) whether the offense involved a flouting of military authority;

(j) whether it involved any threat to a military post;

(k) whether there was any violation of military property; or

(l) whether the offense is among those traditionally prosecuted in civilian courts.

The specification should plead jurisdiction by alleging all facts which fall into the twelve factual categories described above. The following discussion presents guidance about pleading the most significant specific factors.

(2) First step: review the specification. The first step in determining what, if any, additional language is necessary to plead subject-matter jurisdiction is to review the specification already drafted. In most cases, the pleader will be able to identify facts which constitute important jurisdictional factors.

(3) Where did the offense occur? If the offense occurred on a military installation, this single fact will usually satisfy the requirements of subject-matter jurisdiction. No additional language will be necessary; the information about the offense, drafted in accordance with Part IV, MCM, 1984, will be sufficient. If the offense occurred overseas, outside the territorial limits of the United States and its possessions, there will also usually be court-martial jurisdiction over the offense. Again, no additional language will be necessary; in other words, the language of the pleading will be the same as if the offense had occurred on-base. Some additional language may be advisable, however, where the offense occurs within the United States in an off-base area under military jurisdiction such as an off-base (outside the gate) housing area.

> Example: "...did, at 130 Jones Street, Middletown, Rhode Island, on lands under the military jurisdiction of the United States...."

It should also be noted that some offenses are prosecutable in U.S. courts even if they are committed overseas. Hence, for those few offenses, such as theft of U.S. property, additional jurisdictional language may be required.

(4) Offenses outside area of military control. If the offense occurs outside an area under military control, and not overseas, other jurisdictional factors must be present in order for the court-martial to have jurisdiction to try the offense. At this point in the drafting of the specification, the specification already contains a significant amount of information about the offense. These facts should be reviewed to determine which jurisdictional factors they include.

(a) For example, a strictly military offense such as disrespect involves a flouting of military authority and is not prosecuted in civilian courts. Therefore, the information about the offense, drafted in accordance with Part IV, MCM, 1984, will be sufficient for the disrespect specification to allege subject-matter jurisdiction. The facts about the offense speak for themselves.

(b) For another example, the offense of dereliction of duty involves several jurisdictional factors. First, there is an inherent connection between the offense and the accused's military duties. Dereliction of duty involves the failure to perform military duties properly. Second, civilian courts are not available to prosecute a dereliction of duty. Third, dereliction of duty is a strictly military offense not traditionally prosecuted in civilian courts. Therefore, the information about the offense, drafted in accordance with Part IV, MCM, 1984, will be sufficient for the dereliction specification to allege subject-matter jurisdiction. Again, the facts speak for themselves.

(c) On the other hand, very extensive modifications and additions to the Part IV format will generally be necessary when the military attempts to prosecute an off-base offense that is not strictly military in nature and occurs in the United States. As a practical matter, such offenses are seldom prosecuted at a court-martial because of the great difficulty in establishing subject-matter jurisdiction. One very important exception to this general principle involves drug offenses. In the 1980 case of United States v. Trottier, the Court of Military Appeals held that almost every involvement of service personnel with the "commerce of drugs" is "service-connected" and is appropriately the subject of prosecution and punishment by the military. The court noted that "only under unusual circumstances, then, can it be concluded that drug abuse by a serviceperson would not have a major and direct untoward impact on the military." The only major exception the court noted was the use of marijuana by service personnel while on a lengthy period of leave away from the military community. Even this exception has been substantially undermined by subsequent cases which indicate that if the accused has detectable amounts of drugs in his/her urine, even after a lengthy leave period, the military courts have jurisdiction. The next paragraph, which demonstrates the proper method of drafting pleadings, illustrates the extent to which a specification must be modified in order to allege jurisdiction over an off-base offense.

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 the USS Angeldust, meets with his shipmate, Seaman Ben Gay, USN, on 6 November 1984 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, par. 47f, MCM, 1984, will be used for the basic format. At this point the charge and specification should look like this:

> Charge: Violation of the Uniform Code of Military Justice, Article 122
>
> Specification: In that Seaman Ben Z. Drine, U.S. Navy, USS Angeldust, did at Middletown, Rhode Island, on or about 7 November 1984, by means of force and violence steal from the persons of Mr. James E. Sandcrab and Yeoman Second Class I. Am Victimized, U.S. Navy, against their will, $10,000 in U.S. currency, the property of the U.S. Navy.

3. Step Two: Add information about jurisdiction over the persons

As noted earlier, adding the words "on active duty" is usually sufficient to allege jurisdiction over an accused. The pleading would look like the following once this is accomplished:

> Charge: Violation of the Uniform Code of Military Justice, Article 122
>
> Specification: In that Seaman Ben Z. Drine, U.S. Navy, USS Angeldust, on active duty, did at Middletown, Rhode Island, on or about 7 November 1984, by means of force and violence, steal from the persons of Mr. James E. Sandcrab and Yeoman Second Class I. Am Victimized, U.S. Navy, against their will, $10,000 in U.S. currency, the property of the U.S. Navy.

4. Step Three: Review the specification for subject-matter jurisdiction

At this point, the specification alleges an off-base robbery of U. S. currency. Other service connecting factors discernible from the specification as currently written include the facts that the victims of the offense include an armed force (Navy), a military employee and a servicemember. Whether these facts alone would provide a jurisdictional basis for a court-martial to act might be disputed since civilian courts traditionally handle robbery cases and a federal district court would be available to try the accused under these circumstances. Consequently, the specification should have additional jurisdictional language added to avoid any jurisdictional challenge to the pleadings. Other significant facts include:

a. All the planning was done aboard ship;

b. the conspiracy was entered into during the accused's duty hours;

c. the accused planned to return to the ship with any proceeds; and

d. the crime had a significant effect upon the military community.

5. Step Four: Incorporate the additional jurisdictional facts into the specification, as needed. The facts of the case which give rise to court-martial jurisdiction should be pleaded. Avoid general conclusions, such as, "this offense posed a threat to the security of the military community." Just as importantly, do not provide a long recitation of minor details. Applying these principles to the case at hand, the specification should look something like this:

> Charge: Violation of the Uniform Code of Military Justice, Article 122
>
> Specification: In that Seaman Ben Z. Drine, U.S. Navy, USS Angeldust, on active duty, did at Middletown, Rhode Island, on or about 7 November 1984, by means of force and violence, steal from the persons of Mr. James E. Sandcrab, Navy civilian employee, and Yeoman Second Class I. Am Victimized, U.S. Navy, who were then pursuing their Navy duties, against their will, $10,000 in U.S. currency, the property of the U.S. Navy; the plans, time and place of said robbery having been agreed upon by the said Seaman Drine and Seaman Ben Gay, U.S. Navy, during duty hours and while the aforementioned Drine and Gay were in a duty status aboard the USS Angeldust, on 6 November 1981, and the said Drine and Gay having intended to secrete the said U.S. currency aboard the USS Angeldust.

6. A final 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 against him/her, enable him/her to prepare his/her defense, and protect him/her 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.

> Example: An unauthorized absence specification alleges that the absence began on 1 May 1982 and ended on 4 July 1985. The specification is not preferred and receipted for until 10 August 1984. The two-year statute of limitations on unauthorized absence expired on 1 May 1984, so prosecution is barred. The inception date in the specification cannot be changed from 1 May 1982 to 1 May 1983 to bring the offense within the two-year period.

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 wrist watch of a value of $75, the property of Harry Smith." If the specification were amended to allege the theft of "$75 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 been actually misled.

F. Common defects in pleading

1. Fatal and non-fatal defects. Pleading defects fall into two general categories: Fatal and non-fatal 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 non-fatal defect in a pleading will not result in such a drastic result. Most non-fatal 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 non-fatal 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 non-fatal defect, which can be remedied by merely making the appropriate correction to the charge.

3. Failure to allege an offense. When a specification omits a necessary element of the offense or omits necessary words importing criminality, it fails to allege any offense at all. Failure to state an offense is a fatal defect. The specification will usually be dismissed at trial. If the defect is not detected and the accused is convicted, the conviction will often be overturned on appeal.

4. Lack of specificity. If a specification properly alleges an offense, but is vague or ambiguous in its factual allegations, it lacks specificity. Lack of specificity is fatal only when the specification is so vague that the accused is unable to prepare a defense, and the lack of specificity cannot reasonably be corrected by amendment. In most cases, however, the military judge will merely order the specification be amended to make it more definite and the trial will continue. Even though it is seldom a fatal defect, lack of specificity is serious. It can result in substantial delay because the defense will be entitled to a continuance if additional time is needed to prepare in light of the changes in the specification.

5. Duplicity. Each specification should allege only one offense. Duplicity occurs when two or more separate offenses are combined in one specification. For example, Smith assaults Jones and Baker on separate days. If there is only one assault specification alleging an assault against both victims together, it is duplicitous. Two separate crimes have been committed: an assault against Jones and an assault against Baker. Two assault specifications should be pleaded. Duplicity is not fatal, unless the specification is so convoluted and confusing that the accused is unable to prepare a defense.

6. Unreasonable multiplication. One transaction or event, or what is substantially one transaction, should not be made the basis for an unreasonable number of charges. What is reasonable or unreasonable depends on the particular facts of each case and is largely a matter of judgment. Unreasonable multiplication is pleading run rampant: alleging so many charges and specifications, both serious and trivial, that the accused is unable to prepare a proper defense against the serious ones. The accused in such a case may be entitled to some form of relief, such as severance (referral of some of the charges to a different court) or even outright dismissal of some of the charges. This problem can be avoided by charging the accused with the most serious offenses only. On the other hand, if the minor charges serve to explain the major offenses, they should be added to the charge sheet.

> Example: Seaman Grabb goes on a shoplifting spree at the Navy Exchange one Saturday afternoon. In the course of an hour he steals six watches, seven cameras, and three shirts. To charge Grabb with sixteen

separate specifications of larceny (one for each item) would be unreasonable multiplication, because what is involved is essentially one transaction, one criminal impulse. He should be charged with only one specification.

Example: One Saturday afternoon Seaman Grabb goes on a shoplifting spree at the Navy Exchange, the Commissary, the MiniMart, and the Automobile Accessories Store of the Navy Exchange, all located at various points on the base. In the course of the afternoon he steals six watches, seven cameras, and three shirts, two quarts of milk, five steaks, a case of beer and two tires. To charge Grabb with twenty-six separate specifications of larceny (one for each item) would be unreasonable multiplication, but to charge him with four specifications of larceny (one for larceny of the six watches, seven cameras, and three shirts; one for the two quarts of milk and five steaks, one for the case of beer, and another for the two tires) may not be unnecessary multiplication because, though occurring during the same afternoon, there are sufficient time and place differences to constitute four different transactions. He should be charged with four specifications of larceny.

Sometimes the line between unreasonable multiplication and duplicity is hard to distinguish. Once again, common sense and professional legal advice will be the pleader's best guide in avoiding unreasonable multiplication.

G. Conclusion. Military pleading has traditionally been the task of the nonlawyer. The pleader's goal should be to draft a legally sufficient charge and specification that adequately informs the accused of the accusation, enables the accused to prepare a defense, and offers double jeopardy protection. Common sense, attention to detail, and an appreciation of clear, concise language will help the pleader achieve this goal and avoid the occasional legal pitfalls in pleading.

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)];

3. willful disobedience of the lawful orders of superiors and/or of petty officers, noncommissioned officers, and warrant officers [articles 90(2)) and 91(2)].

Closely related to orders offenses is the offense of dereliction of duty (article 92(3)). Both orders offenses and dereliction of duty involve the accused's failure to perform a military duty. In an orders violation, the duty is imposed by a lawful order. In dereliction of duty, the duty is imposed by a lawful order or regulation or by the custom of the service.

B. The lawful order. Before an accused can be convicted of an orders offense, that particular order must be proven to be lawful. General orders and regulations, other orders requiring the performance of a military duty, and orders from superiors may be inferred to be lawful. This inference of lawfulness merely means that the prosecution need not introduce specific evidence to prove that the order is lawful. If the defense contests the lawfulness of the order, however, the prosecution must prove beyond reasonable doubt that the order was lawful. The concept of lawfulness involves several issues, which are discussed below.

1. Punitive orders and regulations. Before violation of an order or regulation can be a basis for prosecution (other than for dereliction of duty), the order or regulation must be punitive, that is, it must subject the violator to the criminal penalties of the UCMJ. Therefore, the order or regulation must be more than a mere policy statement or administrative guideline. It must impose a specific duty on the accused to perform or refrain from certain acts. The order may be oral or written, or a combination of both. It cannot require further implementation by subordinates.

a. Nonpunitive orders and regulations. The Armed Forces have published millions of pages of technical and administrative instructions, regulations, directives, and manuals. Their purpose is to standardize operations, especially in administrative areas. Some of these regulations are merely policy statements; others detail rather complicated, specific procedures. Nonpunitive regulations are not intended to define individual conduct which will be considered criminal and which will result in prosecution under the UCMJ.

b. Punitive or nonpunitive? A frequent issue -- especially in cases involving written orders -- is whether the alleged order was a specific mandate or merely a nonpunitive regulation. The issue is always decided on a case-by-case basis. The court will examine the purported order and the context in which it was issued. No single factor is decisive, but the issue will be determined by considering the following factors:

(1) Purpose. If the stated purpose of the directive uses language such as "provide guidance," "establish policy" or "promulgate guidelines and procedures," the directive is most likely nonpunitive. If the stated purpose uses language such as "establish individual duties and responsibilities," the directive is most likely punitive.

(2) Specificity. If the directive expressly commands or forbids specific acts, it is probably punitive. If it promulgates only general procedures or guidelines, it is probably nonpunitive. If the directive expressly or impliedly allows individual discretion in its implementation, it is probably nonpunitive. Specificity of language is an extremely important factor.

(3) Sanctions. A nonpunitive directive will seldom provide sanctions for violations. If the directive indicates that violators will be subject to disciplinary action, the directive is probably punitive.

(4) Implementation. If the directive provides that its provisions shall be implemented by subordinates, it is probably not punitive. Language such as "subordinate commanders will ensure compliance" or "as implemented by subordinate commanders" indicates that the directive is probably nonpunitive.

(5) Intent. Sometimes it will be necessary to produce evidence of the intentions of the authority promulgating the directive. For example, if the directive in question is a ship's instruction, the commanding officer who promulgated the instruction may have to testify about whether the directive was intended to be a punitive order. Any notes or memoranda that were written while the directive was being drafted may also be helpful. Intent is not a decisive factor by itself; but it permits the court to look behind the sometimes ambiguous language of a directive. Evidence of the original intent of the directive allows the court to make a more accurate determination of whether it is punitive.

2. Was the order issued by a proper authority? The person issuing the order must have legal authority to do so. The authority to issue orders may arise by law, regulation, or custom of the service. Generally, a superior has authority to issue orders to a subordinate. A commanding officer has authority to issue orders to all persons subordinate in the chain of command, even those who may hold a higher military rank. Therefore, a rear admiral (O-8) temporarily attached to Naval Justice School while attending a Senior Officer Course is subordinate in the chain of command to the Justice School's commanding officer, a captain (O-6). The captain would have authority to issue orders (very politely!) to the rear admiral. A person in the execution of military police or shore patrol duties may issue orders related to law enforcement duties to all personnel, regardless of rank.

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 commander of a military aircraft orders all passengers and crew to jettison personal property. If the purpose of the order is to lighten a disabled aircraft so it can make the base, the order is lawful. If, on the other hand, the commander gives the order to enable the plane to fly faster so that the commander won't be late for her date, the order does not relate to a military duty and is unlawful.

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 service member'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 service member 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 pre-existing duty nor repeat another order already in effect. For example, if a sailor is already in a restricted status and fails to muster as the restriction orders require, the ultimate offense is failure to go in violation of article 86 and not violation of the written orders in violation of article 92.

C. Violation of general orders or regulations (article 92(1))

1. General order. Part IV, par. 16c(1)(a), MCM, 1984, defines general orders or general regulations as those orders or regulations generally applicable to an armed force. General orders or regulations may be promulgated by the following authorities:

a. President of the United States;

b. Secretary of Defense (Secretary of Transportation for the U.S. Coast Guard);

c. Secretary of a military department, (e.g., Secretary of the Navy);

d. flag or general officers in command; and their superior commanders; and

e. officers possessing general court-martial convening powers and their superior commanders. (Not every such commander has such authority. For example, the UCMJ gives commanders of overseas naval bases GCM authority; however, some cases have held that this grant alone is insufficient authority to issue general orders. Other factors such as the rank of the commander, and the position of the base in the echelon of command must also be considered.)

2. Elements of the offense. The prosecution must prove beyond reasonable doubt that:

a. A certain lawful general order or regulation was in effect; and

b. the accused had a duty to obey the order; and

c. at the time and place alleged, the accused failed to obey the order.

3. Discussion

a. The order was in effect. Normally, an order is effective when published. Sometimes, however, an order may provide that its provisions will not go into effect until a certain date after publication.

Also, an order may be later superceded, amended, or cancelled. The specification should, therefore, clearly allege that the general order was in effect at the time of the offense. Usually, merely indicating the effective date of the order will be sufficient. At trial, the prosecution will be required to prove beyond reasonable doubt that the order was in effect and properly published to the command.

b. The accused had a duty to obey. Not only must the general order be lawful (as discussed in paragraph 2 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. If the order commands certain specific acts, the accused violates 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 provisions -- or even of the existence -- of the general order 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, par. 16f(1), MCM, 1984. The general order or regulation need not be quoted verbatim, but must be clearly identified by citations such as serial number, article number, paragraph, or subject. The effective date should be included. The order must be described as a "general order" or "general regulation". The accused's conduct which violated the order should be described clearly and concisely. If the order provides for exceptions under specified conditions, it is unnecessary to allege that the accused's conduct did not come within the terms of one of the exceptions.

b. Sample pleading

Charge: Violation of the Uniform Code of Military Justice, Article 92.

Specification: In that Seaman Eye W. Harper, U.S. Navy, USS Seagram. on active duty, did, on board USS Seagram, at sea, on or about 15 July 1985, violate a lawful general regulation, to wit: Article 1150, U.S.

Navy Regulations, dated 26 February 1973, by wrongfully possessing alcoholic liquors for beverage purposes.

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 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 at quarters when the accused was present, or the order being posted on a bulletin board that the accused normally read daily. The accused's lack of knowledge of the order is a complete defense to prosecution under article 92(2).

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, pars. 16f(2) and (3),

MCM, 1984. The order, or the specific part of the order, that the accused allegedly violated must be quoted verbatim. If the order was oral, 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. 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 following sample pleading involves an order which could be violated in more than one way. The accused's specific mode of violating the order is described.

b. Sample pleading

Charge: Violation of the Uniform Code of Military Justice, Article 92.

Specification: 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, which states in part, "no personnel shall possess, store, or consume food in the berthing spaces", an order it was her duty to obey, did, on board USS Tubb, at sea, on or about 8 August 1985, fail to obey the same by possessing food in her berthing space.

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 can not be violated by a commissioned officer. To establish these offenses the prosecution must prove beyond reasonable doubt that:

a. (For article 91 offenses only) that 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) that 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 paragraph 2 of this chapter for a discussion of the lawfulness of orders. The order must be directed to the accused personally. For example, "Seaman Jones, report to the OOD at once" is directed to Jones personally. "Jones, Smith, and Brown will report to the Executive Officer immediately" is also directed to Jones personally (as well as to Smith and Brown). "All nonrated personnel will muster at 0900" is not directed personally to any specific individual.

The order may be passed through an intermediary and still 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. Form of the order. The exact language of the 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, would you please file these before you go" is just as much an order as "Jones, file these before you go."

c. Specificity. The order must direct the accused to perform a specific act, whether that act is to do or stop doing something. Vague orders are not enforceable. For example, an order "to go train" or to "do your duty" cannot be the basis for a successful prosecution under most circumstances.

d. 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 pre-existing 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. 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).

e. 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. However, an Air Force general is not superior in rank to a Navy seaman recruit, 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.

f. 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.

g. The accused willfully disobeyed. The accused's failure to comply with the order must show an intentional defiance of the victim's authority. Failure to comply with an order because of forgetfulness or carelessness is not willful disobedience, although it may constitute an article 92 other-lawful-orders violation. Willful disobedience connotes an intentional flouting of the authority to issue an order to the accused. 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, pars. 14f(4) and 15f(2), MCM, 1984.

b. Sample pleadings

(1) Willful disobedience of superior commissioned officer

Charge: Violation of the Uniform Code of Military Justice, Article 90.

Specification: In that First Lieutenant Real E. Tough, U.S. Marine Corps, Naval Justice School, Newport, Rhode Island, on active duty, having received a lawful command from Captain Kill R. Instinct, U.S. Marine Corps, his superior commissioned officer, then known by the said Tough to be his superior commissioned officer, to "get into the truck," or words to that effect, did, at the Naval Education and Training Center, Newport, Rhode Island, on or about 3 April 1985, willfully disobey the same.

(2) Willful disobedience of warrant, noncommissioned, or petty officer

Charge: Violation of the Uniform Code of Military Justice, Article 91.

Specification: In that Seaman Simone N. Sezz, U.S. Navy, USS Tubb, on active duty, having received a lawful order from Yeoman First Class Roger Dodger, U.S. Navy, a petty officer, then known by the said Seaman Jones to be a petty officer, to "empty the waste basket" 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 1985, 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, par. 16c(3), MCM, 1984, for a more detailed discussion.

2. Elements of the offense. The prosecution must prove beyond reasonable doubt that:

a. The accused had a certain prescribed duty; and

b. the accused knew of the duty; and

c. the accused was derelict in the performance of that duty (either willfully, or 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. In order to commit an offense under this article, actual knowledge of the duty must be pleaded and proved beyond a reasonable doubt.

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, and whether the accused's dereliction was willful, negligent, or culpably inefficient.

b. Sample pleading

Charge: Violation of the Uniform Code of Military Justice, Article 92.

Specification: In that Private First Class Lute N. Pillage, U.S. Marine Corps, Company A, 1st Battalion, 9th Marines, 3rd Marine Division, Fleet Marine Force Pacific, on active duty, at Camp Fuji, Japan, on or about 20 November 1984, having knowledge of his duties, was derelict in the performance of those duties in that he negligently failed to perform routine inspection and cleaning on the M-16 rifle in his custody, as it was his duty to do.

G. Common defenses to orders offenses and dereliction of duty. Three defenses which are especially applicable to orders violations and derelection 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 paragraph B of this chapter. The most common attacks on the alleged lawfulness of an order will be in the areas of the order not relating to a military duty, the order being contrary to superior law, and the order unlawfully infringing on individual rights. Whenever the defense raises any issue about the order's lawfulness, the prosecution must prove beyond reasonable doubt that the order was lawful. The accused's erroneous belief that the order was unlawful will not be a defense; i.e., an accused disobeys at his/her own risk.

2. Impossibility. Impossibility may be a defense to orders violations and dereliction of duty when a physical or financial inability prevented the accused from complying with an order or properly performing a duty. For example, suppose that Jones is ordered to drive the command vehicle to the airport to meet a visiting dignitary. The car breaks down on the way, making it impossible for Jones to comply with the order. Jones is not guilty of an orders violation nor of dereliction of duty because of the impossibility.

Impossibility is not a defense to article 92(1) and 92(2) orders violations or to dereliction of duty if the impossibility was the accused's own fault. Thus, in the example above, if it was impossible to comply with the order to drive to the airport because Jones carelessly lost the key, Jones will be unable to defend on the grounds of impossibility. In willful disobedience cases, however, impossibility will be a defense regardless of whether the accused was at fault. Willful disobedience requires a willful noncompliance. Nothing less, not even gross negligence, will suffice. Of course, if the "impossibility" is deliberately created by the accused for the specific purpose of avoiding compliance with an order, this contrived impossibility will not be a defense.

3. Subsequent conflicting orders. When a subordinate receives an order from a superior, and that order is subsequently countermanded or modified by an order from another superior, the accused is not guilty of a violation of the original order. This is so whether or not the officer who issued the second order is superior to the officer who issued the first order or was authorized to countermand the first order. See U.S. Navy Regulations for specific guidance.

CHAPTER XXI

DISRESPECT

A. Overview. The Uniform Code of Military Justice prohibits two distinct disrespect offenses. Article 89 prohibits disrespect toward a superior commissioned officer. Article 91(3) prohibits disrespect toward a warrant (W-1), noncommissioned, or petty officer -- whether or not the victim is the superior -- who is in the execution of office. (Note also that only warrant officers (W-1) and enlisted persons can violate article 91.) The concept of superiority is identical to that in willful disobedience, as discussed in chapter XX of this text: superior in rank or superior in chain of command.

B. What is disrespect? A common element of the two disrespect offenses is that the accused's language or conduct was, under the circumstances, disrespectful to the victim. Whether the accused's behavior was disrespectful is a factual question, to be determined by evaluating all the facts and circumstances of each case.

1. The accused's behavior. Disrespect may consist of words, acts, failures to act respectfully, or any combination of the three. Disrespect connotes contempt. The accused's disrespectful behavior detracts from the respect and authority rightfully due the position and person of a victim. The accused's disrespectful language may attack the victim's military performance, e.g., "Colonel, you're a nice woman, but you couldn't lead a regiment out of a paper bag." It may also be a personal insult, unrelated to military matters, e.g., "Commander, you're an outstanding officer, but a mindless buffoon at poker." The fact that the accused's statement is true is no defense. Disrespect may also consist of contemptuous behavior, such as deliberately refusing to perform military courtesies.

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, par. 13c(4), MCM, 1984, counsels that "... ordinarily one should not be held accountable under this article for what was said or done in a purely private conversation." A private conversation is one conducted outside the course of government business and not in public. The victim concerned must not be party to the conversation. If the conversation is loud enough that others can overhear, the conversation is usually not a private one. For example, two sailors on liberty are conducting a gripe session in a bar. They are talking in a very low voice. One sailor says, "Ensign Smeen is such a turkey that he has to hide every Thanksgiving." This would be a purely private conversation. If, however, the sailor shouts her statement, the conversation would not be a purely private one.

c. Directed toward the victim? The disrespectful language or conduct must be directed towards the victim. Contemptible language or gestures which are not directed towards the "victim" may not be disrespectful, even if said or done in the victim's presence. However, a superior commissioned officer need not be present for disrespectful language to be "directed toward" him or her.

C. Disrespect toward a superior commissioned officer (article 89)

1. Elements of the offense. The prosecution must prove beyond reasonable doubt that:

a. At the alleged time and place, the accused did, or failed to do, certain acts, or used certain language; and

b. the accused's behavior was directed toward a superior commissioned officer of the accused; and

c. the accused knew that the superior commissioned officer was his or her superior commissioned officer; and

d. the accused's behavior, under the circumstances, was disrespectful to the superior commissioned officer.

2. Discussion. There are three significant distinctions between disrespect to a superior commissioned officer and disrespect to a warrant, noncommissioned, or petty officer. First, the commissioned officer must be the accused's superior. Second, the alleged disrespect to the superior commissioned officer need not occur in the presence of the commissioned officer. Third, the superior commissioned officer need not be in the performance of official duties when the disrespect occurs. Thus, if Seaman Smith makes a disrespectful remark about Commander Jones, Smith will be guilty of disrespect even though the remark was made out of the presence of Jones and while the two were both on liberty.

3. Pleading

a. General considerations. See Part IV, par. 13f, MCM, 1984. The specification should include a clear, concise description of the accused's behavior. If the disrespect consisted of a statement, the statement should be quoted verbatim. If the statement was oral, the phrase "or words to that effect" should be added at the end of the quotation. If the disrespect included conduct, the accused's actions should be described with enough specificity to indicate that they were disrespectful.

b. Sample pleading

Charge: Violation of the Uniform Code of Military Justice, Article 89.

Specification: In that Private Mel Content, U.S. Marine Corps, Marine Barracks, Charleston, South Carolina, on active duty, did, at U.S. Naval Base, Charleston, South Carolina, on or about 10 December 1984, behave himself with disrespect toward Rear Admiral I. M. Comsix, U.S. Navy, his superior commissioned officer, then known by said Private Content to be his superior commissioned officer, by saying to her, "Hey, stupid, can't you read? I don't care if you are some big-shot admiral. That stop sign at the gate applies to you, too, dummy." or words to that effect.

D. Disrespect toward warrant (W-1), noncommissioned, or petty officer (article 91(3))

1. Elements of the offense. The prosecution must prove beyond a reasonable doubt that:

a. The accused was a warrant officer (W-1) or enlisted person; and

b. at the alleged time and place, the accused did, or failed to do certain acts, or used certain language; and

c. the accused's behavior was directed toward a warrant (W-1), noncommissioned, or petty officer of the accused; and

d. the accused's behavior was within the sight or hearing of the warrant, noncommissioned, or petty officer to whom it was directed; and

e. the accused then knew that the victim was a warrant, noncommissioned, or petty officer; and

f. the warrant, noncommissioned, or petty officer was in the execution of his or her office at the time; and

g. the accused's behavior, under the circumstances, was disrespectful to the superior warrant, noncommissioned, or petty officer.

(Note: If the victim was the superior of the accused, add the following elements):

h. That the victim was the superior noncommissioned, or petty officer of the accused; and

i. that the accused then knew that the victim was the accused's superior noncommissioned or petty officer.

2. Discussion. Unlike disrespect to a superior commissioned officer, disrespect to a warrant, noncommissioned or petty officer must occur within the sight or hearing of the victim of the disrespect. The warrant, noncommissioned, or petty officer must also be in the execution of office at the time. "Execution of office" means that the person is on duty or is performing some military function. Most examples of execution of office are obvious, but some require careful analysis. For example, a petty officer who is drinking at a bar after working hours is certainly not in the execution of office. Such a petty officer cannot be the subject of an unlawful disrespect. However, if the petty officer acts to quell a disturbance in the bar that involves military members, he or she would assume a status of being in the execution of office. (Note: Article 7, UCMJ, authorizes a warrant, noncommissioned, or petty officer to quell such disturbances.) The victim need not be the accused's superior. If it is alleged and proved that the victim was the accused's superior noncommissioned or petty officer, however (superiority being irrelevant when the victim is a warrant officer (W-1)), the maximum punishment is increased.

3. Commissioned Warrant Officers. Disrespect to superior commissioned warrant officers (W-2 through W-4) is normally charged under article 89.

4. Pleading

a. General considerations. See Part IV, par. 15f(3), MCM, 1984. The guidelines applicable to article 89 disrespects also apply to disrespect to a warrant, noncommissioned, or petty officer. Differences between the terms "behave himself/herself with disrespect," "treat with contempt," and "disrespectful in language and deportment," have no legal significance.

b. Sample pleading

Charge: Violation of the Uniform Code of Military Justice, Article 91.

Specification: In that Yeoman Third Class Brigrat Striker, U.S. Navy, USS Little Compton, on active duty, on board USS Little Compton, at sea, on or about 15 November 1984, was disrespectful in language and

deportment toward Chief Yeoman Dirk T. Oldman, U.S. Navy, a superior petty officer, then known by said Striker to be a superior 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 commissioned officer	Anyone junior to victim	Need not be present nor in execution of office	Of superior status - must plead and prove
	91(3)	Disrespect to (superior) WO, NCO, PO	Enlisted	Must be present and in execution of office	Of (superior) status - must plead and prove
ORDERS VIOLATIONS	92(1)	General order	Anyone		Of order - need not be pleaded nor proved
	92(2)	Other lawful order	Anyone		Of order - must plead and prove
	92(3)	Dereliction of duty	Anyone		Of duty - must plead and prove
WILLFUL DISOBEDIENCE	90(2)	Willful disobedience of superior comm'd off'r	Anyone junior to victim		Of superior status - must plead and prove
	91(2)	Willful disobedience of WO, NCO, PO	Enlisted		Of status - must plead and prove
ASSAULT	90(1)	Assault on superior comm'd off'r	Anyone junior to victim	Must be in execution of office	Of superior status - must plead and prove
	91(1)	Assault on (superior) WO, NCO, PO	Enlisted	Must be in execution of office	Of (superior) status - must plead and prove
	128	Assault on officer, WO, NCO, PO	Anyone	Need not be superior or in execution of office	Of comm'd, WO, NCO, PO status - must plead and prove

(See discussion in chapter XXV paragraph 7)

CHAPTER XXII

ABSENCE OFFENSES

A. Overview. The UCMJ prohibits four major types of absence offenses. Despite the factual variations among the offenses, all absence offenses are based on one common fact: The accused, without proper authority from anyone competent to grant leave or liberty, was absent from a place where the accused was required to be in the course of his/her military duty. The four basic types of absence offenses are:

1. Failure to go to, or going from, an appointed place of duty [articles 86(1) and 86(2)];

2. unauthorized absence from unit or organization [article 86(3)];

3. missing movement (article 87); and

4. desertion (article 85).

B. Failure to go to, or going from, an appointed place of duty [articles 86(1) and 86(2)]

1. General concept. The two least serious absence offenses are failure to go to an appointed place of duty [article 86(1)] and going from an appointed place of duty [article 86(2)]. Both offenses involve the accused's unauthorized failure to be at a specific location. Although each offense is separate and distinct from the other, the two offenses share common legal principles.

2. Elements of the offenses. The prosecution must prove beyond a reasonable doubt that:

a. Lawful authority appointed a certain time and place of duty for the accused; and

b. the accused knew that he or she was required to be present at the appointed time and place of duty; and

c. that at the alleged time and place, the accused, without proper authority:

(1) [Article 86(1)] failed to go to the appointed place of duty; or

(2) [article 86(2)] left the appointed place of duty after having reported to it.

3. Discussion

a. Lawful authority. The accused must have been lawfully ordered to be at the appointed place of duty at the prescribed time. An order by a military superior may be inferred to be lawful, absent evidence to the contrary. The order may be directed to the accused individually or as a member of a group. See chapter XX of this text for a detailed discussion of the concept of lawfulness of orders.

b. Appointed place of duty. The appointed place of duty must be a specific location to which the accused must report at a specific time. A location such as "USS Cambria County" or "Naval Station, Norfolk, Virginia" is too general to be an appointed place of duty. Articles 86(1) and 86(2) contemplate a specific location such as "the mess decks" or "Building 17." [Therefore, when the accused fails to report to a command or leaves his/her unit, the absence should be prosecuted as unauthorized absence from the unit or organization, in violation of article 86(3).] The specific location must be alleged.

c. A precise time. A precise time must be appointed for the accused to report. Thus, an order to "report to Building M-6 when your duties are finished" is too general as to time. "Report to Building M-6 at 1400" is sufficiently precise. The precise time must also be alleged.

d. Knowledge. The prosecution must prove beyond 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. A 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, par. 10e(3)-(5), MCM, 1984, authorizes substantially increased maximum punishments when the failure to go to, or going from, an appointed place of duty occurs under certain aggravating circumstances. These additional aggravating circumstances must be pleaded and proven beyond a reasonable doubt in order to trigger the greater maximum punishment.

a. Absence from watch or guard. If the accused's appointed place of duty is a watch, guard, or duty section, the maximum sentence to confinement and two-thirds forfeitures is increased from one month to three months. The fact that the accused's appointed place of duty was a watch, guard, or duty section must be clearly alleged in the specification.

b. Intentionally abandoning watch or guard or avoiding maneuvers or field exercises. If the accused fails to go to, or goes from, a watch, guard, or duty section with any such intent, the maximum punishment is increased to total forfeitures, six months' confinement, and a bad conduct discharge. In addition to the elements of the offense, the prosecution must also prove beyond a reasonable doubt that the accused knew the absence would occur during the aggravating event, and that the accused intended to abandon or avoid the event. The accused's intent may be proven by either direct or circumstantial evidence.

5. Pleading

a. General considerations. See Part IV, par. 10f(1), MCM, 1984. Note that the MCM form does not expressly allege that the accused had actual knowledge of the appointed place of duty. The military appellate courts have never ruled that the knowledge element must be expressly pleaded. This apparent exception to the rule that all elements must be pleaded may be explained by interpreting the language "his [her] appointed place of duty" as fairly implying that the accused had actual knowledge. The prescribed time at which the accused was to go to the appointed place of duty must be alleged in failure to go specifications, and the precise place of duty must be alleged in either case.

b. Sample pleadings

(1) Failure to go to appointed place of duty [article 86(1)]

Charge: Violation of the Uniform Code of Military Justice, Article 86.

Specification: In that Seaman Bullwinkle J. Moose, U.S. Navy, USS Pottsylvania, on active duty, did, on board USS Pottsylvania, at sea, on or about 3 September 1984, without authority, fail to go at the time precribed to his appointed place of duty, to wit: the 0600 restricted muster on the fantail.

(2) Going from appointed place of duty [article 86(2)]

Charge: Violation of the Uniform Code of Military Justice, Article 86.

Specification: In that Seaman Bilba Baggins, U.S. Navy, USS Mordor, on active duty, did, on board USS Mordor, located at Possumtrot, Louisiana, on or about 3 September 1984, without authority, go from her appointed place of duty, to wit: the ship's post office.

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 service member's unit or organization. UA, as this offense is commonly called, is an instantaneous offense, complete the moment the accused becomes absent without authority. It is also an offense of duration, because the length of an absence is an important aggravating circumstance. If the unauthorized absence is (1) three days or less, (2) more than three days but no more than thirty days, or (3) more than thirty days, the maximum authorized punishment differs. While the maximum authorized punishment does not change where the unauthorized absence is in excess of thirty days, the length of the absence will serve, practically speaking, as an important factor in determining the amount of confinement to be imposed upon the accused. In addition, if an absence of over thirty days is terminated by apprehension, the maximum punishment is increased even further. Thus, the two most important aspects of any unauthorized absence are its inception and termination.

2. Elements of the offense. The prosecution must prove beyond reasonable doubt that:

a. At the alleged time and place, the accused was absent from his or her unit, organization, or place of duty; and

b. this absence was without proper authority from anyone competent to grant the accused leave or liberty; and

c. the accused 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, however. 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 subunit 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 (New London, Connecticut, Branch Office) ...."

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. 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 Ft. Ord, California, to terminate her UA status.

(a) Physical presence. Merely writing or telephoning military authorities is not sufficient.

(b) Disclosure of status. In order to end the unauthorized absence, the absentee must disclose his or her status of unauthorized absence. Suppose that Seaman Jones is an unauthorized absentee. Jones visits his recruiter to ask about what will happen to "a friend" who is an absentee. Jones' visit will not be a surrender because Jones did not disclose his status, nor did he disclose enough facts to alert the recruiter to the fact that Jones might be an unauthorized absentee.

(c) Actual submission to military control. The absentee must actually submit (or demonstrate a willingness to submit) to military control. The surrender must constitute a present, physical submission to military control. "Casual presence" aboard a military installation will not end an unauthorized absence. Suppose that Corporal Smith is an unauthorized absentee. Smith returns to the base to patronize the liquor store, visit the enlisted club, and purchase cigarettes at the PX. This "casual presence" will not constitute a surrender: the unauthorized absence continues.

(2) Apprehension by military authorities. If military authorities apprehend someone they know to be an unauthorized absentee, the absence terminates. Even if the military authorities are unaware of the person's status, the absence will terminate if the authorities could have determined the person's unauthorized absence status by reasonable diligence. Usually, when military authorities apprehend a military member, they will be able to determine through reasonable inquiries and efforts if the person is an unauthorized absentee. If, however, the apprehended absentee deliberately conceals or misrepresents his or her status to the military authorities, and they reasonably rely on the absentee's statements and release the absentee, the absence will not usually be considered terminated.

(3) Apprehension by civilian authorities. An unauthorized absence often ends in an arrest by civilian police and subsequent delivery to military authorities. The point at which the unauthorized absence terminates depends upon the circumstances of the civilian arrest.

(a) General rule: Termination upon notification. As a general rule, the unauthorized absence terminates when the civilian authorities notify the military that the absentee is in custody and is available to be returned to military control. Suppose, therefore, that the civilian police arrest Private Smith on a civilian charge. Smith informs the police that he is an unauthorized absentee from the Marine Corps. Rather than prosecute Smith for the civilian charge, the police decide to return Smith to the Marines. The unauthorized absence terminates when the police notify military authorities that Smith is in custody and is available for return to the military. Even if the Marines wait three weeks before taking custody of Smith, the unauthorized absence ends when they were notified that Smith was available to them.

(b) Exception: Civilian arrest pursuant to military request. When military authorities request civilian authorities to apprehend an unauthorized absentee, the unauthorized absence will terminate when the person is apprehended pursuant to the request. After a servicemember has been an unauthorized absentee for a certain period of time, his or her command will issue a Form DD-553, "Absentee Wanted by Armed Forces" to the Federal Bureau of Investigation and to state and local authorities near the absentee's home of record. This flyer requests (and authorizes) civilian authorities to apprehend the absentee. Whenever a military member is taken into civilian custody because of a Form DD-553, his or her unauthorized absence terminates immediately upon apprehension. By arresting the absentee, the civilian police have merely acted as agents of the military.

Whether the civilian arrest was pursuant to military request depends on the reason why the civilian police took the absentee into custody. Suppose, for example, that Seaman Jones is stopped by local police for a traffic offense. When the police officer checks Jones' license and registration with headquarters, a Form DD-553 is discovered. The officer takes Jones into custody. Seaman Jones' unauthorized absence has terminated because the arrest was the result of the DD-553 request. Had the police officer not discovered the DD-553

against Jones, Jones would not have been taken into custody for a traffic offense. On the other hand, suppose that Jones is arrested for armed robbery, and the Form DD-553 against him is discovered. Seaman Jones' unauthorized absence is not terminated, because the arrest was not pursuant to the DD-553. Jones was suspected of a serious crime. The arresting officer would have taken Jones into custody regardless of his absentee status.

(4) Apprehension or surrender? Sometimes it is difficult to determine whether an absence ended by apprehension or surrender. An accused who is arrested for minor civilian offenses has nonetheless surrendered for military purposes if he/she freely and voluntarily discloses his/her military status. On the other hand, if one discloses his/her 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. For 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, 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 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 1985 until 1 December 1985. If the proof adduced at trial only shows that the absence ended 1 December 1985, the accused can be convicted only of a one-day UA on 1 December 1985. Or suppose the proof shows that the absence began when charged (1 January 1985) but the proof fails to establish when the UA ended. The accused can be convicted for a one-day (1 January 1985) UA only. If, however, there is proof that the accused went UA initially on 2 January 1985, returned on 1 February 1985, again went UA on 1 March 1985 and remained absent until 1 December 1985, 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 1985).

5. Aggravating factors. In addition to the length of absence and manner of termination, article 86(3) cases may be aggravated by the same factors which aggravate article 86(1) and (2) offenses. See par. B.4., supra.

6. Pleading

a. General considerations. See Part IV, par. 10f(2), MCM, 1984. Extra care must be taken to allege the accused's correct unit or organization at the time of absence and the exact inception and termination dates. Hours of the day need not be alleged unless it is necessary to establish that the absence is more than three days (72 hours) or thirty days. See Part IV, par. 10e for a discussion of the duration of the absence and its effect on permissible punishment.

b. Sample pleading

Charge: Violation of the Uniform Code of Military Justice, Article 86.

Specification: In that Seaman Ovur D. Hill, U.S. Navy, Naval Education and Training Center, Newport, Rhode Island, on active duty, did, on or about 6 May 1985, 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 1985.

D. Missing movement (article 87)

1. General concept. Missing movement is an aggravated form of unauthorized absence from a unit or organization. The accused, while an unauthorized absentee, misses a significant movement of a ship, aircraft, or unit. The accused may have intended to miss the movement, or did so through carelessness or neglect.

2. Elements of the offense. The prosecution must prove beyond a reasonable doubt that:

a. The accused was required in the course of duty to move with a certain ship, aircraft, or unit; and

b. the accused actually knew of the movement; and

c. at the alleged time and place, the accused missed the movement; and

d. the accused missed the movement by design or through neglect.

3. Discussion

a. What is a movement? A movement under article 87 is a significant move of a ship, aircraft, or unit. Whether a particular operation is a significant movement is a factual issue, to be decided by evaluating all the facts and circumstances of each case. A movement usually involves an operation over a substantial period of time. Under some circumstances, however, an important operation or mission of less than a day may be a movement under article 87. Distance is also an important factor. Merely changing berthing space in a shipyard is not a movement. Under certain circumstances, however, local operations may be important enough to constitute a movement. The nature of the mission and the existence of a combat environment must also be considered. Even personnel shortages and budgetary restraints may be relevant, if these problems were such that the movement would not be made unless it was significant. All of the circumstances must be considered.

b. Individual or group travel. If the accused misses a significant movement of his or her command, article 87 applies. Article 87 also applies, under certain circumstances, to other instances where the military member is required to perform individual or group travel. The term "unit" not only includes a permanent military component, such as a company, platoon, or squadron, but also a group organized solely for purposes of group travel. For example, 200 Marines, commanded by an officer, organized into a replacement company for transportation to Okinawa, constitute a unit under article 87, even though the unit will be disbanded upon arrival in Okinawa and its members distributed among several commands. On the other hand, several enlisted members listed on a standard transfer order assigning them to a new permanent command do not constitute a unit, because there is no organizational structure and the mode of travel for each individual may vary.

c. Military or commercial transportation? If the accused misses a movement, the mode of transportation used, military or commercial, is irrelevant. The mode of transportation may be important, however, when the accused is ordered to perform individual travel. If the individual travel was to be by military transportation (including civilian transportation leased by the military), the accused will usually be guilty of missing movement regardless of whether he or she was a crew member or merely a passenger. If the accused misses commercial transportation, however, the accused will not usually be guilty of missing movement.

d. Knowledge of the movement. The prosecution must prove beyond reasonable doubt that the accused actually knew the approximate time and date of the upcoming movement. This knowledge is usually proven by circumstantial evidence, such as the planned movement being announced at quarters or a formation at which the accused was present.

e. Missing movement by design. Missing movement by design is a specific intent offense: the accused missed movement because he or she specifically intended to do so. The accused's intent may be proven by direct evidence, such as the accused's statement to a shipmate that he or she won't make the movement. It can also be proven by circumstantial evidence, such as the accused having had severe family problems and the fact that the ship was about to deploy for eleven months. As a practical matter, unless there is direct evidence of the accused's intent, it is difficult to prove missing movement by design at trial.

f. Missing movement through neglect. Missing movement through neglect is the lesser included offense of missing movement by design. Neglect connotes a failure to make reasonable efforts to make the movement. It also includes careless actions undertaken without considering the reasonable possibility that they might prevent the accused from making the movement. In the typical missing movement case, proof beyond reasonable doubt that the accused knew about the scheduled movement, but was an unauthorized absentee when the movement occurred, will prove missing movement through neglect. Even if the prosecution is unable to prove the accused's knowledge beyond a reasonable doubt, the accused may be convicted of missing movement's lesser included offense of unauthorized absence from unit or organization.

4. Pleading

a. General considerations. See Part IV, par. 11f, MCM, 1984. The word "neglect" may be substituted for "design" where appropriate. Note that the sample form in the MCM does not expressly allege knowledge of the movement. The specification reasonably implies knowledge, however. "Through design" implies that the accused knew of the movement and intended to miss it. (If only "through neglect" were to be alleged, however, it would be prudent to also allege that the accused had knowledge of the movement.)

b. Sample pleading

Charge: Violation of the Uniform Code of Military Justice, Article 87.

Specification: In that Fireman Stokes D. Blaze, U.S. Navy, USS Puddlestopped, on active duty, did, at Mayport, Florida, on or about 12 November 1984, through design, miss the movement of the USS Puddlestopped with which he was required in the course of duty to move.

E. Desertion (article 85)

1. General concept. Desertion is the most serious type of absence offense. Like missing movement, desertion is an aggravated form of unauthorized absence from the unit or organization. Article 85 provides for two types of desertion. Article 85a(a) prohibits unauthorized absence with the intent to remain away permanently from the unit or organization. Article 85a(2) prohibits unauthorized absence with the intent to avoid

hazardous duty or to shirk important service. Of the two forms, article 85a(1) desertion is the more commonly encountered.

2. Elements of article 85a(1) desertion. In order to convict the accused of desertion with the intent to remain away permanently in violation of Article 85a(1), UCMJ, the prosecution must prove beyond reasonable doubt that:

a. At the alleged time and place, the accused was absent from his or her unit, organization or place of duty; and

b. this absence was without proper authority from anyone competent to grant the accused leave or liberty; and

c. the accused intended at the time the absence began, or at some time during the absence, to remain away permanently from his or her unit, organization, or place of duty; and

d. the accused remained an unauthorized absentee until the alleged termination date.

(Note: When the desertion was terminated by the accused's apprehension, add as a fifth element)

e. the accused's absence was terminated by apprehension.

3. Discussion of article 85a(1) desertion

a. Relationship to unauthorized absence. Desertion with the intent to remain away permanently is merely an aggravated form of unauthorized absence from the unit or organization. The additional element in article 85a(1) desertion is the intent to remain away permanently from the unit or organization. Thus, article 85a(1) desertion is merely unauthorized absence plus specific intent.

b. Intent to remain away permanently. The accused must specifically intend to remain away permanently from his or her unit or organization. This intent may exist when the unauthorized absence begins, or it may be formed at a later time. Once the intent is formed, the offense of desertion is complete. A change of heart is no defense. The fact that the accused always intended to return to military control is no defense, if the accused nonetheless never intended to return to the unit or organization the accused left. An intent to return to the unit at some indefinite time in the future is a defense to article 85a(1) desertion, as is an intent to return when a certain event occurs. Thus, the unauthorized absentee who always intends to return to his or her unit "someday" or "when things get better financially" is not guilty of desertion with the intent to remain away permanently.

Intent is sometimes proven by direct evidence, such as the accused's statement that "I'm glad they caught me because I never would have come back on my own." More frequently, however, the intent to remain away permanently is proven by circumstantial evidence. Length of absence is the most important fact, but, by itself, will not be sufficient to convict an accused of desertion. Other important facts include: The fact that the accused destroyed his or her uniforms, ID card, or military gear; the fact that the accused's absence was terminated by apprehension; the fact that the accused left the country; the accused's use of an alias while an absentee; and the fact that while an absentee, the accused stayed far away from any military installation. All the facts and circumstances surrounding the reasons for the accused's absence, as well as the accused's life while an absentee, must be considered.

c. Termination by apprehension. If the accused's absence is terminated by apprehension, the authorized maximum sentence to confinement is increased from two years to three years. The apprehension must be pleaded and proven beyond reasonable doubt. "Apprehension," as used in article 85 cases, means that the accused's return to military control was involuntary, caused by events beyond the accused's control; that is, neither the accused nor persons acting at the accused's request voluntarily initiated the accused's return. Where an accused deserter is arrested by civil authorities for a civilian offense and makes his military status known when required to fully identify himself by the civilian police or to escape punishment at the hands of the civilian authorities, his absence is not terminated by surrender, but by apprehension. On the other hand, if the accused's disclosure of status was completely free and voluntary, the accused's absence was not terminated by apprehension. Whether the unauthorized absence was terminated by apprehension is a factual issue decided by the court-martial members or, in a judge-alone trial, by the military judge.

4. Desertion with intent to avoid hazardous duty or to shirk important service [article 85a(2)]

a. General concept. Article 85a(2) desertion is merely unauthorized absence plus one of two specific intents: The intent to avoid hazardous duty or the intent to shirk important service. Article 85a(2) desertion also contains elements of knowledge not present in desertion with intent to remain away permanently.

b. Elements of the offense. In addition to the elements of the offense of unauthorized absence [article 86(3)], the prosecution must also prove beyond reasonable doubt that the accused knew that he or she would be required to perform a hazardous duty or important service, and that the accused's unauthorized absence was with the specific intent to avoid such hazardous duty or important service.

c. "Hazardous duty" and "important service." "Hazardous duty" involves danger, risk or peril to the individual performing the duty. Hazardous duty need not involve combat. Even some training exercises would qualify as hazardous duty. "Important service" denotes service that is of substantially greater consequence than ordinary everyday military service. Whether a given service is "important" depends upon all the facts and circumstances of each case.

5. Article 85a(3). Article 85a(3), UCMJ, provides that any member of the armed forces who:

> "without being regularly separated from one of the armed forces enlists or accepts an appointment in the same or another one of the armed forces without fully disclosing the fact that he has not been regularly separated, or enters any foreign armed service except when authorized by the United States . . . is guilty of desertion."

The U.S. Court of Military Appeals has held that article 85a(3) does not create a third type of desertion offense. Article 85a(3) merely describes a specific factual situation which constitutes desertion with intent to remain away permanently.

6. Pleading

a. General considerations. See Part IV, par. 9f, MCM, 1984. The specific intent to remain away permanently and, if applicable, termination by apprehension must be pleaded.

b. Sample pleading

Charge: Violation of the Uniform Code of Military Justice, Article 85.

Specification: In that Yeoman Second Class Runyon A. Way, U.S. Navy, Naval Support Activity, Philadelphia, Pennsylvania, on active duty, did, on or about 1 January 1985, without authority and with intent to remain away therefrom permanently, absent himself from his unit, to wit: USS Hoboken, located at Bayonne, New Jersey, and did remain so absent in desertion until he was apprehended on or about 9 October 1985.

Note: In cases of desertion not terminated by apprehension, omit the words "he(she) was apprehended."

F. Common defenses to absence offenses

1. Ignorance or mistake of fact. Ignorance or mistake of fact is a complete defense to the various absence offenses. The conditions under which ignorance or mistake of fact is available as a defense vary from one absence offense to another. To be a defense to a general intent offense, such as an article 86(3) unauthorized absence, the ignorance or mistake of fact must be both honest and reasonable. An honest ignorance or mistake of fact is one occurring in good faith. It is not feigned ignorance, nor is it a mistaken belief which the accused knows is erroneous. A reasonable ignorance or mistake of fact is one which a reasonable person would make under similar circumstances. Thus, in an unauthorized absence case if the accused claims that he or she believed that someone in military authority had authorized or excused the absence, the prosecution need prove beyond reasonable doubt only either that the accused's mistake of fact was not

honest or was not reasonable. Some other absence offenses are specific intent offenses. For example, in a "missing movement through design" case, the ignorance or mistake of fact need only be honest. It need not be reasonable. However, the fact that the accused's mistake of fact was wildly unreasonable may be relevant to show that there was no good faith, honest ignorance or mistake.

To illustrate the operation of the defense of ignorance or mistake of fact, suppose that the accused is charged with desertion with intent to remain away permanently. The accused testifies that at the beginning and all throughout the absence, the accused honestly believed that she had been discharged from the service. The evidence establishes, however, that this mistake of fact was unreasonable under the circumstances. The accused was informed of the "discharge" by a junior enlisted member, made no effort to verify the "discharge" before leaving the command, and never received a discharge certificate. Nonetheless, if the accused's testimony is believed, the accused is not guilty of the specific intent offense of desertion. The accused is, however, guilty of the lesser included offense of unauthorized absence, because the mistake was not reasonable.

Mistake of fact must never be confused with ignorance or mistake of law. Ignorance of the law is no excuse. If the accused knew that the absence was without proper authority, but didn't know that unauthorized absence was an offense, the accused is nonetheless guilty.

2. Impossibility. When unforeseen circumstances beyond the accused's control prevent the accused from being at the appointed place of duty, unit, or organization when required, the accused has a defense of impossibility. The accused must not be at fault, nor can the accused contribute to the creation of the circumstances which make it impossible to be at the appointed place of duty, unit, or organization.

a. Three requirements for impossibility. In order to constitute a defense of impossibility, the circumstances must satisfy three requirements. These are factual issues, to be decided by the court-martial members or, in a judge-alone case, by the military judge.

(1) Unforeseen circumstances. The impossibility must result from circumstances or events that were not reasonably foreseeable. For example, if an accused leaves home to return from liberty at the last minute when a severe snowstorm has been predicted, it is not unforeseeable that the weather will make it impossible for the accused to return on time. Whether the circumstances were not reasonably foreseeable is decided by evaluating all the facts in each case.

(2) Beyond the accused's control. The accused cannot contribute to the creation of the circumstances which caused the impossibility to arise. For example, if an automobile breakdown occurs because the accused has been negligent in properly maintaining the car, the defense of impossibility will not be available. The ultimate issue is whether the accused was at fault.

(3) The circumstances must cause actual impossibility. In order to be a defense, it must be actually impossible for the accused to be at the appointed place of duty, unit, or organization, not just inconvenient. An accused whose car breaks down and who fails to take other reasonably available forms of transportation, usually will not have a defense of impossibility. The inability must be the accused's own inability. Thus, the fact that the accused's absence was occasioned by a spouse's heart attack does not create impossibility, although it is a strong extenuating circumstance. Finally, the circumstances must have actually made it impossible for the accused to avoid unauthorized absence. Thus, if the accused is already an unauthorized absentee when the impossibility arises, impossibility will not be a defense. Impossibility is a defense only when the only reason why the accused was absent was the unforeseen circumstance or event.

b. Types of impossibility. Impossibility may be an unforeseen act of God, the accused's physical or financial inability, or the unforeseen acts of third persons. "Acts of God" include sudden, unexpected, unforeseen occurrences such as floods, blizzards, hurricanes and other natural disasters. If the accused is injured, ill, or destitute, and such condition was not reasonably foreseeable and was not the accused's fault, the accused's condition will be a defense if it makes it impossible for the accused to avoid being an unauthorized absentee. Unforeseen acts of third persons which make it impossible for the accused to avoid unauthorized absence will also give rise to a defense if the acts were not caused or provoked by the accused's acts.

c. Impossibility caused by civilian arrest. A very common type of impossibility by acts of third persons arises when the accused is unable to return when required to the unit or organization because the accused has been arrested and is in the custody of civilian authorities. Such circumstances may be a defense, depending upon the time of the arrest and the reason for the arrest.

(1) Accused in status of unauthorized absence. If the civilian arrest occurs while the accused is already an unauthorized absentee, there is no defense. The arrest did not make it impossible for the accused to avoid unauthorized absence. The rule of "Once UA, always UA" governs. The accused's unauthorized absence will continue until the accused is made available to military authorities. This is the rule whether the arrest subsequently results in a conviction or the accused is acquitted.

(2) Accused on duty, leave, or liberty. An accused who is turned over to civilian authorities by the military is not UA while held by the civilians under that delivery. If a military turnover is not involved, and if the accused is on duty, leave, or liberty when the arrest occurs, the key issue is whether the accused was at fault.

(a) Accused convicted of civilian charge. If the accused is convicted of the civilian charge, the time in civilian custody is an unauthorized absence. If the arrest prevented the accused from returning from leave or liberty, the accused's unauthorized absence begins only at the time and date the leave or liberty was to expire. Impossibility is not a defense because the accused's arrest was his or her own fault, as evidenced by the conviction.

(b) Accused acquitted of civilian charges. If the accused is acquitted of all the civilian charges, the period in civilian custody is an excused absence. It was impossible for the accused to avoid the absence because of the civilian arrest. The fact that the accused was acquitted of all civilian charges is conclusive proof that the accused was not at fault. An acquittal is a not guilty verdict after a civilian trial, or judicial action which is tantamount to a not guilty verdict. Remember, this rule does not apply where the accused is an unauthorized absentee at the time of the civilian arrest.

(c) Accused returned to military without disposition of civilian charges. If the accused is returned to the military without having been tried for the civilian charges, the accused can be found guilty of the absence only if the prosecution, at the accused's court-martial, can prove beyond a reasonable doubt that the accused actually committed the civilian crimes. In other words, the prosecution must prove a crime within a crime. Because litigating the issue of the accused's guilt of the civilian crime can be expensive and complicated, such prosecutions are often impractical.

3. 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

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RELATIONSHIP BETWEEN UA STATUS AND CIVILIAN CRIMINAL CHARGE

SITUATION	UA	NOT UA	DURATION
UA, civ. arrest; acquit	X		for the entire period
UA, civ. arrest; no trial	X		for the entire period
UA, civ. arrest; convict	X		for the entire period
On Leave; arrest; acquit		X	no "unauthorized" absence
On Leave; arrest; no trial	X*		* if trial counsel proves accused "at fault" (for all the time over leave)
Leave; arrest; convicted	X**		**all the time over leave
Military turnover to civilians		X	always "authorized"

THE USUAL RULE: ONCE UA, ALWAYS UA

CHAPTER XXIII

THE GENERAL ARTICLE: ARTICLE 134

A. Overview. Unlike most of the other punitive articles of the UCMJ, article 134 does not identify or define specific acts. Instead, its language is general and somewhat vague:

> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital ... shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of that offense, and shall be punished at the discretion of that court.

This language has already resulted in more than sixty separate, specific offenses, each with its own elements of proof, substantive legal principles, and authorized maximum punishment. Article 134 offenses fall within three general categories of offenses: (1) Conduct prejudicial to good order and discipline; (2) service-discrediting conduct; and (3) Federal non-capital 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 non-capital crimes not specifically covered by the UCMJ.

C. Conduct prejudicial to good order and discipline. The first clause of article 134 prohibits "all disorders and neglects to the prejudice of good order and discipline in the armed forces." The accused's conduct must directly prejudice or tend to prejudice good order and discipline. The act must have a substantial relationship to military activity. Although every act of misconduct by a military member arguably affects military activity at least remotely, article 134 requires direct, palpable impact.

D. Service-discrediting conduct. The second clause of article 134 prohibits "all conduct of a nature to bring discredit upon the armed forces". "Discredit" means an injury to the reputation of the armed forces. Actual discredit need not be proven. It is sufficient if the accused's conduct reasonably tends to injure the reputation of the armed forces.

E. Proof that conduct is prejudicial to good order and discipline or service-discrediting. Whether the accused's conduct was service-discrediting or prejudicial to good order and discipline is a factual issue. The prosecution seldom offers any special evidence on this issue. Expert witnesses, such as generals or admirals, are not called to testify about the effect 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 non-capital crimes. The third clause of article 134 prohibits "crimes and offenses not capital." This phrase refers to Federal, non-capital crimes, not specifically mentioned elsewhere in the UCMJ. Federal non-capital 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.
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 prohibits the possession of drug paraphernalia. Seaman Stoned is aboard a military base over which the Federal government has exclusive jurisdiction. Stoned possesses certain items of drug paraphernalia. Although the paraphernalia is not covered by any Federal statute or by the Code, the law of the state in which the base is located does forbid the possession of the exact items Stoned has. The Federal Assimilative Crimes Act would therefore adopt the state law and make it Federal law also. Stoned could therefore be prosecuted under article 134(3) for violation of a noncapital Federal crime.

I. Pleading. See Part IV, pars. 60-113, MCM, 1984. Note that none of the forms involve Federal noncapital crimes. Pleading a violation of a Federal noncapital crime, under the third clause of article 134, is extremely technical. It usually requires research of civilian Federal case law materials not normally available to the command without a lawyer. Specifications alleging a Federal noncapital crime should be drafted only by an attorney.

CHAPTER XXIV

CONDUCT UNBECOMING AN OFFICER AND GENTLEMAN

A. Overview. The offense of conduct unbecoming an officer and gentleman, under article 133, is closely related to theories of prosecution under article 134. Both articles 133 and 134 prohibit general types of conduct rather than specifically defined acts. Like article 134, article 133 is the product of ancient traditions in military discipline. Unlike article 134, however, article 133 includes offenses specifically mentioned elsewhere in the UCMJ, as well as those unmentioned offenses which are nonetheless established in military tradition. Offenses listed elsewhere in the Code may be charged under Article 133, as long as the terminal element of conduct unbecoming an officer can also be proven beyond a reasonable doubt.

B. Elements of the offense. The prosecution must prove beyond reasonable doubt that:

1. The accused is a commissioned officer, cadet, or midshipman, and did, or failed to do, certain alleged acts; and

2. under the circumstances, the accused's acts or omissions constituted conduct unbecoming an officer and gentleman (or gentlewoman).

C. Discussion

1. Status of the accused. Article 133 applies only to commissioned officers, cadets, and midshipmen.

2. Accused's conduct. To constitute an offense under article 133, the accused's conduct must have a double significance. First, it must unbecome the accused as an officer by compromising his/her standing in the military profession. Second, it must also unbecome the accused as a gentleman/gentlewoman by impugning his/her honor or integrity or otherwise subjecting the accused to social disgrace. While the conduct in question need not be criminal, article 133 does not address every departure from the moral attributes common to the ideal officer and perfect gentleman: only serious departures are covered. For example, A, an officer, desiring time off from work for personal reasons, falsely tells his supervisor that he needs to go to the clinic. The resulting brief unauthorized absence, while clearly diminishing his standing as an officer, does not (in peacetime, at least) seriously affect A socially, and does not, therefore, constitute a violation of article 133. Lying, however, epitomizes dishonor both in the military and in society. Accordingly, A's intentional deception of his superior does constitute a violation of article 133. Similarly, conduct such as public association with known prostitutes or failure to support

one's dependents -- which might not otherwise be criminal -- could nonetheless violate article 133 under circumstances evidencing substantial personal and professional discredit.

3. Relationship to other offenses. Article 133 covers a wide range of acts and omissions, including acts that are themselves offenses under other articles of the Code. An accused should not, however, be charged with a violation of article 133 as well as with a violation of the underlying offense. It is usually simpler to charge such offenses as violations of their respective articles, and not as article 133 offenses. For example, if the unbecoming conduct was a theft, it should usually be charged as a violation of article 121, not under article 133. Little is gained, practically speaking, by charging the theft as unbecoming conduct, and the prosecution under article 133 is somewhat complicated by the requirement to prove as an additional element the fact that the conduct was unbecoming. If both the underlying offense and conduct unbecoming are charged, they will be considered multiplicious for findings. The two specifications will be merged, requiring dismissal of the non-133 specification.

4. Punishment. See Part IV, par. 59e, MCM, 1984. An officer tried by general court-martial for an article 133 violation may be dismissed, forfeit all pay and allowances, and be confined at hard labor for the amount of time authorized for the offense listed in the MCM, 1984, which is most analogous to the crime committed. If there is no listed analogous offense, confinement can be no more than one year, but dismissal is always authorized.

5. Pleading. See Part IV, par. 59f, MCM, 1984. The MCM provides only two sample specifications for unbecoming conduct. Most article 133 specifications must be custom drafted to fit the facts and circumstances of each case. The specification need not expressly allege that the accused's conduct was unbecoming, unless the acts would also constitute a separate offense under another article of the Code. Then the specification should expressly state that the conduct was "unbecoming an officer and a gentleman" or "unbecoming an officer and a gentlewoman" in order to prevent confusion. If the alleged unbecoming conduct was noncriminal in nature, such as publicly insulting another officer, the conduct should be described as dishonorable and wrongful.

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. that the accused did so by committing certain alleged acts; and

c. that the attempt or offer was done with unlawful force or violence.

3. Discussion

a. Attempt-type assault. The attempt-type simple assault occurs when the accused attempts to strike or do bodily harm to another person. Hence, there is no such crime as "attempted assault"; as soon as an attempt is made, an assault has been committed. The accused must specifically intend to strike or do bodily harm to the other person. The intended victim need not be aware of the attempt. Like any other attempt, the accused's act must be more than mere preparation. For example, if Smith picks up a railroad tie, intending to bash it over Jones' head, an attempt-type assault has not yet occurred. If Smith swings at Jones' head and misses, the attempt-type assault has been committed because Smith's act is now more than mere preparation. The accused must also have the apparent present ability to strike or harm the intended victim. If Johnson fires a pistol with maximum range of 100 yards, intending to hit Baker who is standing on the next mountain six miles away, an attempt-type assault has not occurred. Johnson's act would not have normally resulted in a crime being completed because Baker was too far away.

b. Offer-type assault. An offer-type simple assault involves an unlawful demonstration of violence which causes another person to reasonably apprehend imminent bodily harm. The accused need not intend to actually harm anyone. The offer may merely be a culpably negligent act that appears menacing or threatening. A culpably negligent act is the result of more than ordinary carelessness or neglect. It involves a wrongful disregard for the foreseeable consequences of one's actions. Thus, waving a loaded pistol around in a crowded room would constitute culpable negligence. In the offer-type assault, it is the victim's state of mind that is important. The victim must reasonably anticipate that bodily harm is imminent. The victim need not actually be afraid. The test is whether a reasonable person, in the same circumstances, would believe that unlawful force or violence was about to be applied to his or her person. Thus, waving around an unloaded pistol could constitute an offer-type assault if the victim reasonably apprehends imminent bodily harm. The victim probably wouldn't know that the gun was empty. On the other hand, if the victim knows that the accused is waving only a toy pistol, there is no reasonable apprehension of harm. Menacing or threatening words, by themselves, do not constitute an offer-type assault.

c. Conditional offers of violence. Sometimes the accused's apparently threatening gestures may be accompanied by statements which seem to negate any intent by the accused to actually carry out the threat. For example, suppose the accused raises his clenched fist towards another person and says, "Smith, if you weren't my brother-in-law, I'd slug you." This is a conditional offer of violence. Despite the accused's menacing gestures, the accused's language indicates that no harm is intended. Under such circumstances, a reasonable person will not usually expect to be struck or harmed. Therefore, no offer-type assault has occurred.

d. Unlawful force or violence. In the context of simple assaults, "force or violence" refers to actions that are of a violent nature or that threaten imminent violence. An act of force or violence is unlawful if it is done without legal justification or excuse. Examples of legal justification or excuse include situations such as the proper performance of a lawful military duty or self-defense.

4. Pleading

a. General considerations. See Part IV, par. 54f(1), MCM, 1984. The specification need not indicate whether the simple assault was an offer-type or an attempt-type. The accused's unlawful actions should be clearly and concisely described.

b. Sample pleading

Charge: Violation of the Uniform Code of Military Justice, Article 128.

Specification: In that Lance Corporal George D. Barwrecker, U.S. Marine Corps, Marine Barracks, New London, Connecticut, on active duty, did, on board Naval Education and Training Center, Newport, Rhode Island, on or about 10 July 1985, assault Seaman Wimpy Squid, U.S. Navy, by throwing a beer bottle at him.

C. Assault consummated by a battery (article 128)

1. General concept. An assault consummated by a battery is merely a simple assault which results in bodily harm or a striking of the victim.

2. Elements of the offense. The prosecution must prove beyond a reasonable doubt that:

a. At the alleged time and place, the accused did bodily harm to the alleged victim;

b. the accused did so by committing the alleged acts; and

c. the bodily harm was done with unlawful force or violence.

3. Discussion

a. Bodily harm. A battery is the unlawful application of force or violence to another person. "Bodily harm" includes any physical injury to, or offensive touching of, another person however slight. There is no requirement for bloodshed or pain.

b. Accused's state of mind. A battery may be committed by the accused's intentional act or through culpable negligence. The accused need not intend to inflict any particular kind of bodily harm, nor does the accused's intent have to be directed toward any specific victim. The battery itself proves the assault, so no attempt-offer analysis is necessary. For example, if Smith intends to strike Jones, but misses and strikes Johnson instead, Smith is nonetheless guilty of an assault consummated by a battery. A battery may also be a result of culpable negligence. Suppose the accused is practicing fast draws with a loaded pistol. The pistol accidentally discharges, injuring a bystander. The accused is guilty of an aggravated assault consummated by a battery. Even though the accused didn't intend to injure anyone, the accused's actions were at least culpably negligent. It was reasonably foreseeable that the pistol might accidentally fire and injure someone. Culpable negligence is significantly more serious than simple negligence. Simple negligence, which is merely the failure to exercise ordinary care, is insufficient to result in an assault.

4. Pleading

a. General considerations. See Part IV, par. 54f(2), MCM, 1984. The specific act that constituted the battery must be clearly and concisely alleged. The accused's actions must be expressly described as "unlawful."

b. Sample pleading

Charge: Violation of the Uniform Code of Military Justice, Article 128

Specification: In that Airman Recruit Boyle R. Maker, U.S. Navy, Naval Air Technical Training Center, Lakehurst, New Jersey, on active duty, did, on board USS Relic, located at Bayonne, New Jersey, on or about 22 February 1985, unlawfully strike Seaman E. Z. Targette, U.S. Navy, on the shoulders and arms with his fists.

D. Assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm (article 128)

1. General concept. One of the most common aggravated forms of assault is assault with a dangerous weapon or means likely to produce death or grievous bodily harm. Like all other aggravated forms of assault, this offense is merely a simple assault plus the aggravating circumstance of the nature of the weapon, means, or force used in the assault. The assault need 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 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; and

b. the accused did so by committing certain alleged acts; and

c. the accused did so with a certain alleged weapon, means, or force; and

d. the attempt, offer, or bodily harm was done with unlawful force or violence; and

e. the weapon, means, or force was used in a manner likely to produce death or grievous bodily harm.

Note: When a loaded firearm was used, add as an additional element

f. the weapon was a loaded firearm.

3. Discussion

a. Bodily harm not required. Assault with a dangerous weapon or means likely to produce grievous bodily harm may arise from a simple offer-type or attempt-type assault, or it may involve an assault consummated by a battery. Bodily harm is 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. It also includes the use of other instruments, devices, means, or forces that are dangerous when used in the way the accused used them. The weapon, means, or force must actually be dangerous. Thus, an unloaded rifle pointed at a victim is not a dangerous weapon. Even if both the accused and the victim believe that

dangerous weapon because of the way it is used. A means or force is likely to produce grievous bodily harm when the natural and probable result of the accused's use of the means or force would be serious physical injury. The key is the way in which the accused used the means or force. Although each is relatively harmless in itself, a bottle, rock, boiling water, drug, can opener, fist, or foot could all be used in a way likely to produce grievous bodily harm. Whether the particular means used by the accused was likely to produce grievous bodily harm is a factual issue to be decided by the court-martial members or, in a judge-alone trial, by the military judge.

c. Grievous bodily harm. "Bodily harm" includes any physical injury to, or offensive touching of, another person. "Grievous" bodily harm is more than minor injuries, bruises, or cuts. It requires fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, or other grave physical injuries.

4. Pleading

a. General considerations. See Part IV, par. 54f(8), MCM, 1984. The specification should expressly allege that the means used was a dangerous weapon or means likely to produce bodily harm. The weapon or means should be described with enough detail to identify it as dangerous. If the instrument or means used by the accused was not in itself dangerous (e.g., a rock or bottle), the accused's actions should be described with enough detail to show that the way in which the means was used made it dangerous. If the dangerous weapon was a loaded firearm, this should be expressly alleged, since it increases the maximum confinement by five years.

b. Sample pleading

Charge: Violation of the Uniform Code of Military Justice, Article 128.

Specification: In that Airman Recruit Boyle R. Maker, U.S. Navy, Naval Air Technical Training Center, Lakehurst, New Jersey, on active duty, did, on board Naval Air Station, Lakehurst, New Jersey, on or about 1 March 1985, commit an assault upon Airman Apprentice Baer Lee Alive, U.S. Navy, by striking him on the head with a means likely to produce death or grievous bodily harm, to wit: a baseball bat.

E. Intentional infliction of grievous bodily harm (article 128)

1. General concept. The offense of intentional infliction of grievous bodily harm is one of the three aggravated forms of assault that require that bodily harm actually be inflicted. (Assault consummated by a battery was the first.)

2. Elements of the offense. The prosecution must prove beyond reasonable doubt that:

a. At the alleged time and place the accused assaulted the alleged victim; and

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; and

b. that grievous bodily harm was thereby inflicted upon such person; and

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 now 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, par. 54f(9), MCM, 1984. The specification must allege that the accused's acts were intentional and should describe the victim's injuries. If the grievous bodily harm is inflicted with a loaded firearm, this should be expressly alleged, since it increases the maximum confinement by five years.

b. Sample pleading

Charge: Violation of the Uniform Code of Military Justice, Article 128.

Specification: In that Lance Corporal Mame N. Dismember, U.S. Marine Corps, Marine Barracks, Charleston, South Carolina, on active duty, did, on board U.S. Air Force Base, Charleston, South Carolina, on or about 20 December 1984, commit an assault upon Airman First Class Benton Broken, U.S. Air Force, by repeatedly striking him on the head and shoulders with a pinball machine, and thereby did intentionally inflict grievous bodily harm upon him, to wit: a fractured skull, six smashed vertebrae, a fractured clavicle, and two dislocated shoulders.

F. Assault upon certain officers [articles 90(1) and 91(1)]

1. General concept. Assault upon certain military authorities is one of several aggravated forms of assault where the principal aggravating circumstance is the status of the victim. Article 90(1) prohibits assaults upon superior commissioned officers in the execution of their office. Article 91(1) prohibits assaults upon warrant or noncommissioned and petty officers in the execution of office. Violation of article 90(1) during time of declared war is a capital offense. (See chart "Offenses Against Authority," chapter XXI).

2. Elements of the offenses. The elements of the two types of assaults are similar. Note, however, that only enlisted persons and warrant officers (W-1) can violate article 91(1). The prosecution must prove beyond a reasonable doubt that:

a. At the time and place alleged, the accused attempted, offered to do, or actually did, bodily harm to the alleged victim; and

b. that the accused did so by committing certain alleged acts; and

c. the offer, attempt, or bodily harm, was done with unlawful force or violence; and

d. at the time, the alleged victim was the accused's warrant, superior commissioned, or (superior) noncommissioned or petty officer; and

e. at the time, the accused knew that the alleged victim was his or her warrant, superior commissioned, or (superior) noncommissioned or petty officer; and

f. at the time, the alleged victim was in the execution of his or her office.

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, pars. 15f(1), (2), (3) and 16f(1), MCM, 1984. Note the different language used in the various specifications. Assaults on superior commissioned officers are styled as "strike," "draw or lift up a weapon," or "offer violence against." Assaults on warrant, non-commissioned, 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."

b. Sample pleadings

Charge I: Violation of the Uniform Code of Military Justice, Article 90.

Specification: In that Seaman Runyon Amuck, U.S. Navy, USS Fall River, on active duty, did, on board USS Fall River, located at Newport, Rhode Island, on or about 13 August 1984, unlawfully strike Ensign Noah Count, U.S. Navy, his superior commissioned officer, then known by said Seaman Amuck to be his superior commissioned officer, who was then in the execution of his office, on the arm with a broom.

Charge II: Violation of the Uniform Code of Military Justice, Article 91.

Specification: In that Seaman Runyon Amuck, U.S. Navy, USS Fall River, on active duty, did, on board USS Fall River, located at Newport, Rhode Island, on or about 13 August 1985, assault Yeoman Second Class Penn N. Inque, U.S. Navy, a superior petty officer, then known by said Seaman Amuck to be a superior petty officer, who was then in the execution of his office, by throwing a knife at him.

G. Assault consummated by a battery upon a child (article 128)

1. General concept. A very serious aggravating circumstance arises when the victim is a child under age sixteen. This offense is one 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 that 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; and

b. the bodily harm was done with unlawful force or violence; and

c. the alleged victim was then a child under the age of sixteen years.

3. Discussion

a. Bodily harm. This offense requires that bodily harm actually occur. Remember, however, that bodily harm includes any physical injury to or offensive touching of the victim, however slight.

b. Unlawful force or violence. This offense is commonly used to prosecute child-abuse cases. The bodily harm must be unlawful, i.e., without legal justification or excuse. A parent is authorized by law to administer corporal punishment to his or her child. The privilege to administer corporal punishment is limited, however, and does not include unreasonable physical abuse. Thus, a routine spanking, producing no injury, would not be an offense. If corporal punishment unreasonably results in physical injuries requiring medical attention, however, or if corporal punishment is unreasonably repeated, the parent may be guilty of assault.

c. Child under sixteen. At the time of the assault, the victim must be under age sixteen. The accused's knowledge or belief about the child's age is immaterial. Even if the accused reasonably believed that the victim was older than sixteen, the accused can be found guilty.

4. Pleading

a. General considerations. See Part IV, par. 54f(7), MCM, 1984. The specification must allege an assault consummated by a battery. It must also specifically allege that the victim was under the age of sixteen years.

b. Sample pleading

Charge: Violation of the Uniform Code of Military Justice, Article 28.

Specification: In that Chief Boatswain's Mate Steven A. Dore, U.S. Navy, USS Reluctant, on active duty, did, on board Naval Base, Charleston, South Carolina, on or about 14 December 1984, unlawfully strike Payne N. DeNeck, a child under the age of sixteen years, in the face with his hand.

H. Other assaults aggravated by the victim's status (article 128)

1. General concept. Part IV, par. 54e, MCM, 1984, provides for increased maximum punishments when the victim of the assault falls within one of several other classes. These other classes of victims are:

a. Commissioned officers (not in the execution of office);

b. warrant, noncommissioned, and petty officers (not in the execution of office);

c. persons in the execution of police duties; and

d. sentinels and lookouts.

Bodily harm need not be inflicted on any of the above individuals. A simple offer-type or attempt-type assault will suffice.

2. Elements of the offenses. The elements of the assault offenses involving the above four categories of victims are the same. The prosecution must prove beyond reasonable doubt that:

a. At the time and place alleged, the accused attempted, offered to do, or did bodily harm to the alleged victim; and

b. the accused did so by committing certain alleged acts; and

c. the attempt, offer, or bodily harm, was done with unlawful force or violence; and

d. the victim was a person who was:

(1) A commissioned officer; or

(2) a warrant, noncommissioned, or petty officer; or

(3) a person in the execution of police duties; or

(4) a sentinel or lookout; and

e. the accused knew of the victim's status as one of the above.

3. Discussion

a. Commissioned, warrant, noncommissioned, or petty officer. Unlike the assaults prosecuted under articles 90(1) and 91(1), assaults on commissioned, warrant, noncommissioned, or petty officers under article 128 do not require that the victim be in the execution of office, and

superiority is never an element. Thus, an admiral who assaults an ensign is guilty of an assault upon a commissioned officer. An ensign who assaults a chief petty officer is guilty of assault upon a petty officer. The article 128 assault upon a commissioned, warrant, noncommissioned, or petty officer is a lesser included offense of assault upon a superior under articles 90(1) or 91(1).

b. Person in the execution of police duties. A person is in the execution of police duties whenever engaging in any law enforcement act or service authorized by statute, regulation, superior order, or military custom. The victim must perform the police duties in a lawful manner. Thus, a law enforcement officer who uses unreasonable, excessive force while apprehending an unresisting suspect is not in the execution of police duties.

c. Sentinel or lookout. A sentinel or lookout is one who is assigned to a duty requiring extra alertness to constantly watch for the approach of an enemy, to look for danger, to maintain security of the perimeter of an area, or to guard stores.

d. Accused's knowledge. The accused must actually know of the victim's status. Constructive knowledge, i.e., that the accused should have known, will not suffice.

4. Pleading

a. General considerations. See Part IV, pars. 54f(3), (4), (5) and (6), MCM, 1984.

b. Sample pleading

Charge: Violation of the Uniform Code of Military Justice, Article 128.

Specification: In that Lieutenant Gene N. Tonic, U.S. Navy, USS Plankton, on active duty, did, on board USS Plankton, at sea, on or about 1 December 1984, 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 reasonable doubt that:

a. At the alleged time and place, the accused assaulted the alleged victim; and

b. the accused did so by committing certain alleged acts; and

c. the accused's acts were with unlawful force or violence; and

d. at the time of the assault, the accused intended to commit one of the following crimes: Murder, voluntary manslaughter, rape, robbery, sodomy, arson, burglary, or housebreaking; and

e. under the circumstances, the accused's conduct was to the prejudice of good order and discipline in the armed forces, or was of a nature to bring discredit upon the armed forces.

3. Discussion. The accused must specifically intend to commit murder, voluntary manslaughter, rape, robbery, sodomy, arson, burglary, or housebreaking. The accused's intent is usually proven through circumstantial evidence involving all the accused's actions before, during, and after the assault. Thus, if an accused commits an assault immediately prior to or during the course of committing arson, it is usually reasonable to infer that the accused committed the assault with an intent to commit arson.

4. Pleading

a. General considerations. See Part IV, par. 64(f), MCM, 1984. Notice that the terminal element of prejudicial or service-discrediting conduct need not be alleged. The specification must state the exact crime the accused intended. Do not allege the intended crime in the alternative, e.g., as "with intent to commit murder or sodomy." If it is uncertain which of several crimes were intended by the accused, or if the evidence suggests that the accused intended to commit several crimes, separate specifications should be alleged for each intended crime.

b. Sample pleading

Charge: Violation of the Uniform Code of Military Justice, Article 134.

Specification: In that Seaman Brigrat Striker, U.S. Navy, Naval Justice School, Newport, Rhode Island, on active duty, did, on board Naval Justice School, Newport, Rhode Island, on or about 1 July 1985, with intent to commit rape, commit an assault upon Ensign O. O. Dee, U.S. Navy, by striking her on the head with a telephone receiver.

J. Relationships among assault offenses. Since the more complicated forms of assaults are based on a simple assault or an assault consummated by a battery, there will frequently be several possible lesser included offenses for any aggravated form of assault alleged. Part IV, MCM, 1984, discusses each of the assault offenses. In the discussion for each offense there is a list of commonly included offenses. These lists are merely general guides, however; under certain circumstances some of the listed included offenses may not be appropriate. In other situations, offenses other than those listed may be lesser included offenses. Whether or not a certain lesser included offense is raised by the evidence is a matter that the military judge must decide after reviewing all the evidence in the case.

K. Common defenses to assault offenses

1. Legal justification. An act of force or violence committed during the proper performance of a lawful duty is legally justified. This defense of legal justification has two requirements. First, the accused must be performing a lawful duty, which may be imposed by a statute, regulation, superior order, or custom of the service. Thus, a Marine who shoots an enemy during combat is not usually guilty of assault. The Marine was merely performing a lawful military duty. Even when an order to commit an act of force or violence is not lawful, the accused has a defense if the accused honestly believed the order to be lawful, and if a person of ordinary understanding would not have known that the order was unlawful. Second, the duty must be performed in a proper manner. The accused may use only enough force reasonably necessary to carry out the duty. Thus, the Marine who shoots an unresisting, unarmed prisoner of war is guilty of assault. The Marine did not perform the lawful duty in a lawful manner.

2. Self-defense. One who is free from fault may use reasonable force, even deadly force if necessary, to defend against unlawful bodily harm. Self-defense will excuse an accused's acts only when both of the following questions are answered in the affirmative.

a. Was the accused free from fault? Self-defense will not excuse the accused's acts when the accused intentionally started the altercation. However, suppose that the accused provoked the other party's hostile actions and then withdrew, intending to avoid any further hostility. If the other party continues the attack, even after the accused's withdrawal, the accused may then act in self-defense. The other party has become the aggressor. Likewise, an accused who willingly engages in mutual combat, such as a barroom free-for-all, may not successfully claim self-defense. If the opponent should unexpectedly resort to deadly force (e.g., pulls a knife), thereby secalating 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 cases where the accused intended to inflict death or grievous bodily harm (deadly force)

(a) The accused reasonably believed that death or grievous bodily harm 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 where less than grievous bodily harm was inflicted on the victim (non-deadly force)

(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 deadly force. In order to deter an assailant, the accused may offer, but not actually apply or attempt, such means or force which might likely cause death or grievous bodily harm. Such deadly force may be threatened even though the accused only reasonably anticipated only minor bodily harm.

4. Defense of another. One may lawfully use force in defense of another person under the same conditions that self-defense could be invoked. The person aided must not be the aggressor nor a willing mutual combatant. The accused is limited to the use of that degree of force reasonably necessary to protect the victim. Mistake of fact as to who was really the aggressor is not a defense.

5. Consent. An accused is not guilty of an alleged assault consummated by a battery if the alleged victim lawfully consented to the battery. The victim's consent must be freely given before the striking or offensive touching. Consent obtained by threats, duress, or fraud is not lawful consent. Some individuals, such as infants and mental incompetents, are categorically unable to give lawful consent. No one can lawfully consent to a battery that is likely to produce death or serious physical injury, except where the act is necessary to save the victim's life. Thus, a person who is choking to death may lawfully consent to having an opening cut into his or her windpipe. No one can lawfully consent to any act that constitutes an unlawful breach of the peace. Finally, the victim's consent may be limited. If the battery goes beyond the extent to which the victim consented, the battery will be unlawful. For example, a football player, by entering the game, consents to such physical contact as is customary in a football game. A football player doesn't consent, however, to being bashed over the head with a crowbar.

6. Duress. Duress is available as a defense to any crime less serious than murder when the accused's acts were not voluntary, but the result of a reasonable, well-grounded fear that if he or she didn't commit the assault, the accused, a member of the accused's family, or any innocent person would be immediately killed or seriously injured.

7. Accident. In an assault case the accused will not be guilty if his or her acts were unintentional and not due to culpable negligence. An accident is an unintentional act which occurs while the accused is otherwise acting lawfully. It is not the unexpected consequence of a deliberate act. Suppose that Seaman Jones is roaring drunk, driving 80 m.p.h. in a 35 m.p.h. 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.

combatant. The accused is limited to the use of that degree of force reasonably necessary to protect the victim.

5. Consent. An accused is not guilty of an alleged assault consummated by a battery if the alleged victim lawfully consented to the battery. The victim's consent must be freely given before the striking or offensive touching. Consent obtained by threats, duress, or fraud is not lawful consent. Some individuals, such as infants and mental incompetents, are categorically unable to give lawful consent. No one can lawfully consent to a battery that is likely to produce death or serious physical injury, except where the act is necessary to save the victim's life. Thus, a person who is choking to death may lawfully consent to having an opening cut into his or her windpipe. No one can lawfully consent to any act that constitutes an unlawful breach of the peace. Finally, the victim's consent may be limited. If the battery goes beyond the extent to which the victim consented, the battery will be unlawful. For example, a football player, by entering the game, consents to such physical contact as is customary in a football game. A football player doesn't consent, however, to being bashed over the head with a crowbar.

6. Duress. Duress is available as a defense to any crime less serious than murder when the accused's acts were not voluntary, but the result of a reasonable, well-grounded fear that if he or she didn't commit the assault, the accused, or a member of the accused's family, 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 m.p.h. in a 35 m.p.h. 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.

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

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; and

b. the accused and at least two others mutually intended to assist one another in carrying out a certain undertaking, plan, or enterprise, against anyone who might oppose them; and

c. the group, or some of its members, in furtherance of the group's common purpose, committed certain violent or turbulent acts which constituted an unlawful tumultuous disturbance of the peace; and

d. these acts terrorized the public in general by causing, or intending to cause, public alarm or terror.

2. Discussion. A riot must consist of at least three persons. If fewer than three are involved, only breach of peace or disorderly conduct is committed. The "common purpose" is an intention, object, plan, or project shared by the group, and it is immaterial whether the act intended is unlawful. This common purpose need not exist before the violence begins. It can be formed even after the group begins the tumultuous acts. Thus, what started as merely disorderly conduct can escalate into a riot. Although "public alarm or terror" appears vague, it refers to a disturbance so violent or potentially disruptive that members of the community would have cause to be concerned for the safety of themselves or their property. The community may include a military community such as a vessel or shore installation.

3. Pleading

a. General considerations. See Part IV, par. 41f(1), MCM, 1984. When in doubt about whether the accused's acts constituted a riot or merely a breach of peace, charge the offense as riot. Breach of the peace and disorderly conduct are lesser included offenses of riot.

b. Sample pleading

Charge: Violation of the Uniform Code of Military Justice, Article 116.

Specification: In that Seaman Hugh N. Cry, U.S. Navy, USS Woonsocket, on active duty, did, on or about 15 June 1985, at the Naval Correctional Center, Naval Education and Training Center, Newport, Rhode Island, 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 terrorization 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, par. 41f(2), MCM, 1984. Note that some of the examples of violent acts used in the sample specification may not be breaches of the peace under all circumstances. For example, "wrongfully engaging in a fist fight in the dayroom" would be a breach of the peace only under some circumstances. However, when in doubt about whether an accused's acts constituted breach of the peace or only disorderly conduct, plead the offense as breach of the peace.

b. Sample pleading

Charge: Violation of the Uniform Code of Military Justice, Article 116.

Specification: In that Fireman Wake D. Towne, U.S. Navy, USS John L. Sullivan, on active duty, did, on board Naval Education and Training Center, Newport, Rhode Island, on or about 15 June 1985, participate in a breach of the peace by wrongfully engaging in a fist fight outside Unaccompanied Officer Personnel Housing #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. that, 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, par. 73f, MCM, 1984, provides the general format for disorderly conduct specifications, but is insufficient in several respects. The form specification does not allege the specific acts which constituted the disorderly conduct. As a matter of good practice, these acts should be briefly described. If the accused was disorderly under circumstances that would bring discredit upon the military, this is an aggravating fact which significantly increases the maximum authorized punishment providing it is alleged. The sample specification below illustrates a preferable method. The place where the accused was disorderly ("in quarters," "on station," "in camp," or "on board ship") is traditionally used in disorderly conduct pleadings.

b. Sample pleading

Charge: Violation of the Uniform Code of Military Justice, Article 134.

Specification: In that Staff Sergeant Gene N. Tonic, U.S. Marine Corps, Marine Corps Recruiting Station, Norfolk, Virginia, on active duty, was, at Marine Corps Recruiting Substation, Virginia Beach, Virginia, on or about 1 December 1984, disorderly on station under service-discrediting circumstances by urinating in public while in uniform.

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; and

b. the communication was made to a certain other person; and

c. the language used by the accused, under the circumstances, constituted a threat to injure the person, property, or reputation of another person; and

d. the communication was wrongful, without justification or excuse; and

e. under the circumstances, the accused's conduct was prejudicial to good order and discipline in the armed forces, or was of a nature to bring discredit upon the armed forces.

2. Discussion

a. Threat. The threat may be to the person, property, or reputation of another. It must involve an avowed present intent to injure, either now or in the future. A conditional threat may not always be an offense. Thus, "If you weren't so old, I'd beat you to a pulp" is not a threat. The condition ("If you weren't so old...") negates any present intent to injure. On the other hand, "If you don't cooperate, we'll kill you" does constitute a threat. The condition ("If you don't cooperate...") is one the accused is not entitled to impose and doesn't negate the intent to injure, but merely explains the circumstances under which the threat will be carried out. A malicious bomb threat increases the maximum punishment by two years. Whether the accused's words constituted a threat is a factual issue, to be decided by analyzing all the facts and circumstances of each case. Thus, words which all parties understand to have been said in jest would not constitute a threat.

b. Communication. The threat must be communicated to another person. The threat does not have to be communicated to the intended victim, however. Thus, if A tells B, "I'm going to beat up C," a threat has been communicated for purposes of this offense.

c. Intent. The accused need not specifically intend to carry out the threat. The gist of the offense is communication of the threatening words, not the actual intent of the speaker. The fact that the accused said the words in jest is no defense if the person to whom they were communicated believed or understood the words to be an actual threat.

d. Wrongful. The threat must be wrongful, without legal justification or excuse. Not all threats are wrongful. For example, if a witness to a crime threatens to report the perpetrator to the authorities, the threat is not wrongful, even though it will certainly injure the perpetrator's reputation if carried out. On the other hand, if the accused threatens to falsely report another person, the threat is wrongful. There is no legal justification for false accusations of crime. If a person mistakenly believes that another person has committed a crime, the threat to report the supposed criminal is not wrongful, provided the mistaken belief was both honest and reasonable.

3. Pleading

a. General considerations. See Part IV, par. 110f, MCM, 1984. Note that the exact language constituting the threat need not be alleged. Under many circumstances, the threat will consist of more than just a sentence or two. It may involve the manifestation of the accused's intent during the course of a lengthy conversation. Therefore, only the nature of the threat need be alleged.

b. Sample pleading

Charge: Violation of the Uniform Code of Military Justice, Article 134.

Specification: In that Seaman Ratlin Sabres, U.S. Navy, USS Manayunk, on active duty, did, on board USS Manayunk, located at Newport, Rhode Island, on or about 7 September 1984, 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 words 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; and

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, par. 42f, MCM, 1984. The words or gestures used should be clearly described in the specification.

b. Sample pleading

Charge: Violation of the Uniform Code of Military Justice, Article 117.

Specification: In that Ensign Rude N. Boorish, U.S. Navy, USS Mooseburger, on active duty, did, on board USS Mooseburger, at sea, on or about 31 October 1984, 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.

CHAPTER XXVII

CRIMES AGAINST PROPERTY

A. Overview. The UCMJ prohibits a broad range of crimes against property. This chapter will discuss the more common property offenses:

1. Larceny and wrongful appropriation (article 121);

2. receiving stolen property (article 134);

3. robbery (article 122);

4. burglary, housebreaking, and unlawful entry (articles 129, 130, 134);

5. arson (article 126);

6. offenses against military property (article 108);

7. damage or destruction of nonmilitary property (article 109); and

8. bad check offenses (articles 123a and 134).

B. Larceny and wrongful appropriation (article 121)

1. General concept. Article 121 prohibits larceny and its lesser included offense of wrongful appropriation. The only difference between the two crimes is the required intent. Both crimes are specific intent offenses. In larceny, the accused specifically intends to deprive the owner permanently of the property stolen. In wrongful appropriation, the accused intends to deprive the owner of the property only temporarily.

2. Elements of the offenses. The elements of larceny and wrongful appropriation are identical, except for the required intent. The prosecution must prove beyond reasonable doubt that:

a. At the time and place alleged, the accused wrongfully took, obtained, or withheld certain property; and

b. the property belonged to, or was in the lawful possession of, another person; and

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 or she honestly believes to be his or her own.

b. Taking. Article 121 describes three types of larceny: wrongful taking, wrongful obtaining, and wrongful withholding. A "taking" requires two acts by the thief. First, the thief must exercise physical dominion so as to impair the owner's control over the property. This usually occurs when the thief picks up the property. Second, the thief must remove the property. Any movement, however slight, will usually suffice. Both dominion and removal are necessary.

Suppose a thief wants to steal a radio from the Navy Exchange. The thief picks up the radio from the shelf. The thief has moved the property, but as she starts for the door, she is stopped by the chain securing the radio to the shelf. The thief has been unable to gain dominion over the property so as to impair the Exchange's control of the radio. Therefore, no larceny has been committed, only attempted larceny. Suppose, however, that the radio isn't chained and the thief starts for the door with it. If before she leaves the Exchange, the thief conceals the radio under her coat, the crime of larceny will be complete. The act of concealment will be dominion sufficient to impair the owner's right to control the radio.

c. Obtaining. Wrongful obtaining is larceny by fraud. The thief makes a deliberate misrepresentation which induces the owner to give the property voluntarily to the thief. The misrepresentation must have all of the following characteristics.

(1) It must be a material misrepresentation. The thief's misrepresentation must concern an important matter in the relationship or dealings between the thief and the victim. It must relate directly to the transaction and not involve some incidental or tangential matter. The misrepresentation is material if a reasonable person would rely upon it, at least in part, in deciding whether to give the property to the thief.

(2) It must be a misrepresentation of present or past fact. A statement such as "This watch lists for $500," or "This bridge coat was worn by Admiral Nimitz" could form the basis for a wrongful obtaining. On the other hand, a statement such as "This coin isn't worth much now, but will be worth a fortune someday" is not a statement of present or past fact. The statement that "This is the most beautiful picture in the world" is merely a statement of opinion. If, however, the thief says, "The art critic for the New York Times says that this is the most beautiful painting in the world" the thief has made a representation of fact, i.e., the fact that the art critic has expressed that opinion. A present fact includes the thief's present intentions. Thus, if the thief states "I will gladly pay you Tuesday for a hamburger today," the thief has stated the fact of his or her present intention to pay for the hamburger in the future.

(3) The representation must be false.

(4) The accused must not believe that the misrepresentation is true. Any one of three possible states of mind will satisfy this requirement. First, the accused may know that the representation is untrue. Second, the accused may believe that it is untrue, without actually knowing whether it is untrue. Third, the accused may have no actual knowledge or belief about whether the statement is true or false.

Under certain circumstances, silence can constitute a misrepresentation. Suppose that the accused makes a misrepresentation of fact to the victim, but believes that the statement is true. Later, before the victim gives the property to the accused, the accused learns that the statement is actually false. The accused will be under a legal obligation to retract or correct his or her prior statement. The accused's silence, once it is known that the representation is untrue, will be considered as a misrepresentation.

(5) The misrepresentation must induce the victim's transfer of the property to the thief. The victim must actually rely on the thief's misrepresentation as a basis for giving the property to the thief or to the thief's agent. The misrepresentation usually must be made before, or simultaneously with, the transfer. Although the misrepresentation must induce the transfer, it need not be the only reason why the victim parted with the property.

(6) Monetary loss irrelevant. There is no requirement that the victim suffer a monetary loss as a result of the transaction. Suppose, for example, that a person uses a forged prescription to buy drugs. By presenting the prescription, the accused represents that the drugs have been lawfully prescribed. Relying on this representation, the pharmacist transfers the drugs to the accused. Without the prescription, the pharmacist would not have parted with the drugs. Therefore, the accused has committed a wrongful obtaining type larceny. The fact that the accused paid full value for the drugs is immaterial.

d. Withholding. In taking and obtaining types of larceny, the thief unlawfully comes into possession of the property. In wrongful withholding, however, the thief's initial possession of the property is usually lawful. Acts which constitute the offense of unlawfully receiving, buying or concealing stolen property, or being an accessory after the fact, however, are not included within the meaning of "withholds." For example, the thief may be a renter, borrower, or custodian of the property. The larceny occurs when the thief wrongfully withholds the property from its rightful owner. The act of withholding may take several forms. The thief may fail to return borrowed or rented property when lawfully required to do so. The thief may be a custodian, who fails to account for, or deliver, the property to its owner when legally required to do so. Still another example of wrongful withholding would be the custodian of property who converts the property to his or her own use or benefit, or who uses it in an unauthorized manner to the detriment of the owner's rights. Acts which constitute the offense of unlawfully receiving, buying, or concealing stolen property or of being an accessory after the fact, however, are not included within the meaning of "withhold." Because what is a withholding can often be a very complicated legal question, it will often be wise to consult an attorney before prosecuting a wrongful withholding form of larceny.

e. Property. The law divides property into two general classes: Real property and personal property. Real property includes land, buildings, and permanent fixtures attached to the land. Real property cannot be the subject of a larceny. Personal property may be defined as any property that is not real property. Personal property includes tangible property, which has a physical existence, and intangible property, such as contract rights, patents, and rights to services.

"Property" for purposes of article 121 is limited to tangible personal property, money, and negotiable instruments such as checks. Services, such as telephone service or labor, cannot be the subject of larceny. Theft of services may be prosecuted under article 134 when the accused wrongfully obtained the services. [See also Part IV, par. 93, MCM, 1984 (theft of mail).]

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.

h. Value. Value has a two-fold 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 factfinder.

(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.

(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 non-negotiable, 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, however, 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 factfinder.

i. 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.

j. 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 factfinder. 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.

k. 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 amd 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.

1. 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 the 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, par. 46f, MCM, 1984. For suggestions on pleading value and describing property, see chapter XIX of this text.

b. Pleading multiple larcenies. One of the most puzzling pleading problems in larceny cases is whether the theft of several items should be pleaded in one or several specifications. Unreasonable multiplication must be avoided. What is essentially one continuing theft, arising from one single criminal impulse, must not be broken down into an unreasonable number of specifications. On the other hand, several different larcenies should not be aggregated into a single specification.

Common sense, not abstract legal rules, is the pleader's best guide. If the evidence suggests that the accused committed several distinct thefts, each motivated by its own criminal impulse, separate specifications should be pleaded. Separate specifications should also be pleaded when the stolen items belonged to different persons. However, if the evidence suggests that the accused's acts were really part of one continuing criminal enterprise, a single specification will be appropriate. Common-sense analysis of the facts of each case is necessary before drafting the pleadings, because at trial the sufficiency of the pleadings will be decided by the same analysis.

c. Sample pleading

Charge: Violation of the Uniform Code of Military Justice, Article 121.

Specification: In that Seaman Clarence C.

Stickyfingers, U.S. Navy, USS Valentine, on active duty, did, on board USS Valentine, at sea, on or about 25 September 1984, steal a toy rubber duck, of a value of $5.00, the property of Commander Bertram N. Erny, U.S. Navy.

C. Receiving, buying, or concealing stolen property (article 134)

1. General concept. Although closely related to larceny, receiving stolen property is not a lesser included offense of larceny. Thus, whenever there is doubt about whether the accused was the thief, or merely a receiver of stolen property, a receiving stolen property charge must be preferred in addition to the larceny charge.

2. Elements of the offense. The prosecution must prove beyond reasonable doubt that:

a. The accused unlawfully received, bought, or concealed certain property;

b. the property belonged to another person;

c. the property had been stolen by someone other than the accused;

d. the accused knew the property was stolen at the time he/she received, bought, or concealed the property;

e. the property had a certain value; and

f. under the circumstances, the conduct was to the prejudice of good order and discipline in the armed forces, or was of a nature to bring discredit upon the armed forces.

3. Discussion

a. Unlawfully received, bought, or concealed. The accused must have received, bought, or concealed the goods without the rightful owner's consent and without legal justification or excuse. One who buys stolen goods in order to return them to their rightful owner has not unlawfully bought stolen property. Any control over the property is sufficient to constitute receipt of the property. Property is therefore "received" if it is delivered personally to the accused, the accused's agent, or the accused's residence. An accused who steals from a thief is not guilty of receiving stolen property, but is guilty of larceny.

b. Stolen property. The property must actually be stolen property. Thus, a person who receives property erroneously believing that it is stolen is not guilty of receiving stolen property. He or she may be guilty of an attempt to receive stolen property, however. The property must have been stolen by someone other than the receiver. A thief cannot receive stolen property he or she has stolen.

c. Knowledge. At the time the accused receives the property, the accused must actually know that the property is stolen.

4. Relationship to larceny. Although closely related to larceny and wrongful appropriation, receiving stolen property is not a lesser included offense of either crime. Nor does receiving stolen property merge into a wrongful withholding type of larceny when the receiver fails to return the property to its owner. For example, suppose that Seaman A gives Seaman B a radio that B knows is stolen. Several days later, Petty Officer C sees the radio, identifies it as the one stolen from her, and demands that B return it. B refuses. Although B is guilty of receiving stolen property, he cannot be guilty of larceny. Seaman B did not wrongfully take or obtain the radio from Petty Officer C. Seaman B's refusal to return the radio cannot constitute a wrongful withholding type larceny, because Seaman B's initial possession of the radio was not lawful, and a wrongful withholding type larceny always requires that the accused's initial possession be lawful.

5. Pleading

a. General considerations. See Part IV, par. 106f, MCM, 1984.

b. Sample pleading

Charge: Violation of the Uniform Code of Military Justice, Article 134.

Specification: In that Seaman Recruit Aloysius F. Fagin, U.S. Navy, USS Fencehaven, on active duty, did, at Naval Justice School, Newport, Rhode Island, on or about 25 December 1984, unlawfully receive a wrist watch, 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; and

b. the taking was against the victim's will; and

c. the taking was accomplished by force, violence, or threat of force or violence; and

d. the property belonged to the victim; and

e. the property was of a certain value; and

f. the accused took the property with the intent to deprive the victim permanently of its use and benefit.

(Note: If the robbery was committed with a firearm, add as an additional element)

g. that the means of force or violence or of putting the person in fear was a firearm.

3. Discussion. Many of the concepts of larceny law also apply to robbery. Robbery has several other distinct principles which are discussed below.

a. From the victim's person or presence. The robber must take the property from the victim's person or must take property in the victim's presence. Property is in the victim's presence when the victim has immediate control over it. Suppose, for example, the robber ties up the victim in the kitchen and then steals property from the victim's bedroom. The stolen property would be in the victim's presence for purposes of the offense of robbery.

b. Against the victim's will. The taking must be without the victim's freely given consent. Acquiescence at gunpoint is not consent.

c. Force and violence. The wrongful taking must be accomplished by force, violence, or threat of force or violence. This is the assault component of robbery. The accused's force or violence need only be enough to overcome the victim's resistance. The force or violence may precede or accompany the taking. Thus, a robber who hits the victim with a club and then takes the victim's wallet has committed robbery. Likewise, the purse snatcher who suddenly grabs the victim's purse, pushes the victim to the ground, and runs away, also commits robbery. There is no requirement that the victim offer resistance.

d. Threats of force or violence. Robbery may also be accomplished by putting the victim in fear of force or violence. The threat may be to the victim's person or property. The threat may also be one which places the victim in fear of force or violence to the person or property of a relative or of another person in the victim's company. For purposes of robbery, "fear" means a reasonably well-founded apprehension of immediate or future injury. While there need not be any actual force or violence, the threat must include demonstrations of force or menacing acts which reasonably raise an apprehension of impending harm.

4. Lesser included offenses. Both larceny and assault are lesser included offenses of robbery. Suppose, for example, that the accused is charged with robbery. The evidence clearly establishes that the accused stole the victim's property, but it fails to prove that the accused did so through force, violence, or threats. The accused should be found not guilty of robbery, but guilty of the lesser included offense of larceny under article 121. In another robbery prosecution, suppose that there is no evidence that the accused intended to steal property. The accused should be found not guilty of robbery, but guilty of the lesser included offense of assault under article 128.

5. Pleading

a. General considerations. See Part IV, par. 47f, MCM, 1984. Be sure to allege that the taking was by force, violence, or threats. Also be sure to include that the theft was from the victim's person or presence and against the victim's will. These allegations are necessary to state the offenses of robbery. Note that pleading (and proving) use of a firearm increases the maximum authorized punishment by five years.

b. Sample pleading

Charge: Violation of the Uniform Code of Military Justice, Article 122.

Specification: In that Seaman Apprentice Muggs D. Victim, U.S. Navy, USS Skullsmasher, on active duty, did, at Naval Air Station, Fly, Ohio, on or about 30 September 1984, by means of force and violence, to wit: by pointing a firearm at him, 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, par. 55f, MCM, 1984. The elements of (a) unlawfully breaking and entering, (b) the dwelling house, (c) at night, and (d) the intended offense, must be expressly pleaded.

(2) Sample pleading

Charge: Violation of the Uniform Code of Military Justice, Article 129.

Specification: In that Seaman Morris D. Katz, U.S. Navy, USS Hohokus, on active duty, did, at Naval Education and Training Center, Newport, Rhode Island, on or about 1 December 1984, 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. An automobile, however, cannot be the subject of housebreaking. The premises need not be occupied or in use at the time of the housebreaking. The unlawful entry can occur at any time, not just at night. Finally, the accused may intend to commit any crime except strictly military offenses.

b. Lesser included offense. Housebreaking's principal lesser included offense is unlawful entry under article 134.

c. Pleading

(1) General considerations. See Part IV, par. 56f, MCM, 1984. The intended crime must be alleged in the specification.

(2) Sample pleading

Charge: Violation of the Uniform Code of Military Justice, Article 130.

Specification: In that Corporal Wiley N. Slighe, U.S. Marine Corps, Marine Barracks, Norfolk, Virginia, on active duty, did, on board USS Easypickens, located at Norfolk, Virginia, on or about 15 December 1984, unlawfully enter the Ship's Post Office, the property of the United States Government, with intent to commit a criminal offense, to wit: larceny, therein.

4. Unlawful entry (article 134)

a. General concept. Unlawful entry occurs when the accused, without lawful consent or legal justification, enters a building or structure of another person. All those types of structures previously discussed with respect to burglary and housebreaking may be the subject of an unlawful entry. Since unlawful entry is an article 134 offense, the accused's actions must also be prejudicial to good order and discipline or service-discrediting. Note that the offense of unlawful entry does not require proof of an intent to commit any other offense once inside.

b. Pleading

(1) General considerations. See Part IV, par. 111f, MCM, 1984. It is unclear today whether orchards and vegetable gardens, two examples in the form, may be the subject of an unlawful entry.

(2) Sample pleading

Charge: Violation of the Uniform Code of Military Justice, Article 134.

Specification: In that Yeoman Third Class Lester Baggadonutz, U.S. Navy, USS Charleroi, on active duty, did, on board USS Charleroi, at sea, on or about 7 May 1985, 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; and

b. the accused's act was done without proper authority; and

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 military departments of the United States Government. Thus, all property owned or used by the Department of the Navy, from paper clips to aircraft carriers, is covered by article 108. The appellate military courts have also held that retail exchange merchandise owned or used by a non-appropriated 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. However, if the accused honestly and reasonably believed that the sale or disposition was authorized, the accused will not be guilty of an article 108 violation.

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, par. 32f, MCM, 1984. Note that the three types of article 108 pleadings vary. Each type of pleading will require careful tailoring to the facts of each case. Because of the differences among the various types of article 108 offenses, four sample pleadings are provided below. They illustrate the major patterns in article 108 pleading.

b. Sample pleadings

Charge: Violation of the Uniform Code of Military Justice, Article 108.

(1) Wrongful sale or disposition

Specification 1: In that Seaman Roland R. Redeye, U.S. Navy, USS Fogbound, on active duty, did, on board USS Fogbound, at sea, on or about 20 November 1984, 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 1984, without proper authority, through neglect, damage by dropping on the deck one electric typewriter, 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 1984, 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 1984, without proper authority, through neglect, suffer a sextant, of a value of $145.00, military property of the United States, to be lost by being thrown overboard.

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 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; and

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 United States Government. Article 109 property would therefore include nonmilitary government property, private property, and property owned by corporations and associations, and military exchange inventory.

b. Wasting or spoiling real property. Damage to real property may be either intentional or the result of the accused's recklessness. More than simple negligence is required, however.

c. Damaging or destroying personal property. Damage or destruction of personal property must be intentional. No form of negligence will suffice.

d. Value. As in article 108 offenses, one of the elements of an article 109 offense is that the property had a certain value. Value is also an aggravating factor for purposes of increasing the authorized maximum punishment.

4. Relationship of article 109 to article 108. The offenses in articles 108 and 109 are often confused. Actually, the distinctions between the two types of offenses are rather simple. The following checklist will be helpful.

a. Is the property military property of the United States?

(1) If yes, the accused may be convicted for either intentional or negligent sale, disposition, damage, destruction or loss. The accused may also be prosecuted for allowing someone else to commit an offense against the military property. The property may be either real or personal property.

(2) If no, the type of the nonmilitary property must be determined.

b. Is the nonmilitary property real property or personal property?

(1) If real property, the wasting or spoiling may be caused either intentionally or through recklessness.

(2) If personal property, the damage or destruction must be intentional.

5. Pleading

a. General considerations. See Part IV, par. 33f, MCM, 1984. "Waste" and "spoil" refer to damage to real property. "Destroy" and "damage" describe injury to personal property.

b. Sample pleading

Charge: Violation of the Uniform Code of Military Justice, Article 109.

Specification: In that Seaman Runyona Muck, U.S. Navy, USS Reluctant, on active duty, did, on board USS Reluctant, at sea, on or about 22 August 1984, willfully and wrongfully destroy, by smashing with a sledge hammer, one wristwatch, of a value of $75.00, the property of Lieutenant Hubert C. Slowwrist, U.S. Navy.

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. The service-connection requirements of

subject-matter jurisdiction prevent military authorities from prosecuting most off-base check offenses. 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; and

(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; and

(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, noninterchangable 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, par. 49f(1), MCM, 1984. The specification should contain a photocopy of the check, draft, or money order. Be certain to allege that the instrument was used to procure an article of value and that it was with the intent to defraud. The two article 123a check offenses are not lesser included offenses of each other.

(2) Sample pleading

Charge: Violation of the Uniform Code of Military Justice, Article 123a.

Specification: In that Seaman Claude D. Paperhanger, U.S. Navy, USS Trenton, on active duty, did, at Naval Education and Training Center, Newport, Rhode Island, on or about 16 October 1984, with intent to defraud and for the procurement of lawful currency, wrongfully and unlawfully make a certain check for the payment of money upon the Bank of America, in words and figures as follows, to wit:

CLAUDE D. PAPERHANGER
IRMA A. PAPERHANGER
123 Fonebone Street
Oakland, CA 98901

No. 667

16 October 19 84

PAY TO
THE ORDER OF Navy Exchange $ 100.00

One Hundred and no/100 DOLLARS

BANK OF AMERICA
SAN FRANCISCO, CA

C. D. Paperhanger

---

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 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, non-interchangeable 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, par. 49f(2), MCM, 1984. As with article 123a(1) pleadings, a photocopy of the instrument should be incorporated into the specification.

(2) Sample pleading

Charge: Violation of the Uniform Code of Military Justice, Article 123a.

Specification: In that Commander Ruth Badcheck, U.S. Navy, USS Scuttlefast, on active duty, did, at Naval Air Station, Jacksonville, Florida, on or about 1 December 1984, with intent to deceive and for the payment of a past-due obligation, to wit: an overdue balance on a uniform charge account, wrongfully 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:

No. 1988

RUTH BADCHECK
P.O. Box 6169
Titusville, PA 15088

December 1 1984

PAY TO
THE ORDER OF NEX $ 39.50

Thirty Nine and 50/100 DOLLARS

OIL CITY FARMERS'
NATIONAL BANK
Oil City, PA

Ruth Badcheck

then knowing that she, the maker thereof, did not, or would not, have sufficient funds in, or credit with, such bank for the payment 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 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, par. 68f, MCM, 1984. A copy of the check should be incorporated into the specification.

(2) Sample pleading

Charge: Violation of the Uniform Code of Military Justice, Article 134.

Specification: In that Ensign Larsen E. Pettifogger, U.S. Navy, USS Minnow, on active duty, did, at Naval Base, Charleston, South Carolina, on or about 1 May 1985, make and utter to the Navy Exchange, Charleston, South Carolina, a certain check, in words and figures as follows, to wit:

LARSEN E. PETTIFOGGER
404 Swampsmell Street
Charleston, SC

No. 98

1 May 1985

PAY TO
THE ORDER OF _____ $329.00

Three hundred twenty-nine and no/100 DOLLARS

SOUTH CAROLINA NATIONAL BANK
CHARLESTON, SC .

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for the purchase of a wrist watch, 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.

(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, non-interchangeable 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.

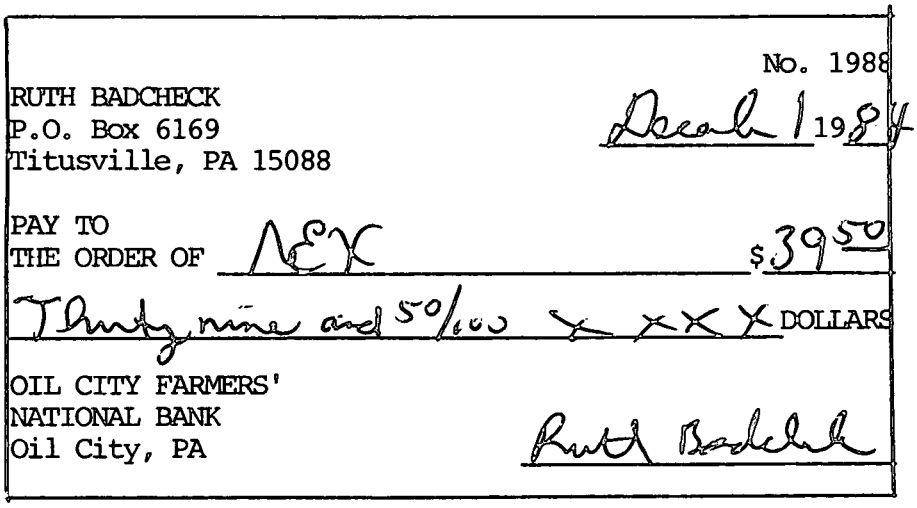
c. Pleading

(1) General considerations. See Part IV, par. 49f(2), MCM, 1984. As with article 123a(1) pleadings, a photocopy of the instrument should be incorporated into the specification.

(2) Sample pleading

Charge: Violation of the Uniform Code of Military Justice, Article 123a.

Specification: In that Commander Ruth Badcheck, U.S. Navy, USS Scuttlefast, on active duty, did, at Naval Air Station, Jacksonville, Florida, on or about 1 December 1984, with intent to deceive and for the payment of a past-due obligation, to wit: an overdue balance on a uniform charge account, wrongfully 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:



then knowing that she, the maker thereof, did not, or would not, have sufficient funds in, or credit with, such bank for the payment 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 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, par. 68f, MCM, 1984. A copy of the check should be incorporated into the specification.

(2) Sample pleading

Charge: Violation of the Uniform Code of Military Justice, Article 134.

Specification: In that Ensign Larsen E. Pettifogger, U.S. Navy, USS Minnow, on active duty, did, at Naval Base, Charleston, South Carolina, on or about 1 May 1985, make and utter to the Navy Exchange, Charleston, South Carolina, a certain check, in words and figures as follows, to wit:

LARSEN E. PETTIFOGGER
404 Swampsmell Street
Charleston, SC

No. 98

May 1 1985

PAY TO
THE ORDER OF Navy Exchange Charleston $1000

One Thousand and NO/100 DOLLARS

SOUTH CAROLINA NATIONAL BANK
CHARLESTON, SC

L E Pettifogger

for the purchase of a wrist watch, 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

A. Overview

1. Background. By Executive Order 12383 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 12383. (Although article 112a did eliminate the need to prove in each case that drug abuse is either prejudicial to good order and discipline or service-discrediting. This was a necessary element under article 134, though in practice, this additional element was virtually self-proving.) Thus, article 112a has not significantly altered the military law of drugs which immediately preceded it. Drug offenses occurring before 1 August 1984, would still be prosecuted under article 134.

B. Article 112a. Article 112a, as implemented in Part IV, par. 37, MCM, 1984, prohibits the wrongful use, possession, manufacture, distribution, importing, exporting, introduction into a military installation, vessel, vehicle, or aircraft, or possession, manufacture, or introduction with intent to distribute, of any controlled substance. Punishment is increased if these acts occur on a ship, aircraft, or missile launch facility, or are done by persons performing certain duties.

1. Definitions

a. Wrongfulness. To be punishable under article 112a, acts involving drugs must be wrongful. Such acts are wrongful if done without legal justification or excuse. Such acts would not be wrongful if done pursuant to legitimate law enforcement activities, or pursuant to authorized medical duties, or without knowledge of the contraband nature of the substance. Possession, use, distribution, introduction, or manufacture of a substance may be inferred to be wrongful in the absence of evidence to the contrary.

b. Marijuana. Marijuana is defined as all parts of the plant cannabis sativa L. (except mature stalks). It would also include derivatives such as hashish and any other species of the plant.

c. Controlled substance. A "controlled substance" is any substance listed in Schedules I through V as established by the Controlled Substances Act of 1970 [21 U.S.C. § 812 (1982)] as updated and republished under the provisions of that Act (or by the President for purposes of article 112a). These five schedules are periodically updated by the Attorney General. These schedules classify drugs according to their recognized medical use, potential for abuse, and potential danger:

(1) Schedule I substances are drugs that have no recognized medical use in the United States, are dangerous even if used under medical supervision, and have the highest potential for physical or psychological dependence. Marijuana, heroin, and lysergic acid diethylamide (LSD), are examples of substances currently on Schedule I. The status of heroin and marijuana as Schedule I substances may change in the future due to growing medical acceptability of those substances in treating terminal cancer patients and glaucoma cases, respectively.

(2) Schedule II substances also have a high abuse potential, and are highly likely to result in physical or psychological dependence, but they do have a recognized medical use in the United States. Opium, amphetamine, cocaine, and opiate derivatives are examples of Schedule II substances.

(3) Schedules III, IV, and V are characterized by decreasing abuse potentials, medical acceptability, and relatively limited potential for dependence.

d. Possession. "Possession" is the knowing exercise of control. Possession of a drug can be either direct physical custody, such as holding a drug in one's hand, or constructive, such as storing it in a locker in a bus terminal while keeping the key. Possession must be "exclusive" in the sense of having the authority to preclude control by others, but more than one person may possess a drug simultaneously. Possession does not require ownership (title).

e. Use. "Use" includes smoking, ingesting, injecting, swallowing, or any other act with the drug which provides a chemical effect in the body.

f. Distribution. "Distribution" is the delivery of possession to another. Distribution replaces the previously defined drug offenses of sale and transfer. As such, the agency principle (in which one accused of sale might establish a defense by showing he/she was merely acting as the buyer's agent) has, for all practical purposes, been eliminated.

g. Manufacture. "Manufacture" is the production, preparation, and processing of a drug. Manufacture can be accomplished either directly or indirectly. It can be effected by extraction from a substance of natural origin or independently by chemical synthesis. "Manufacture" also includes the packaging or repackaging of a substance and the labeling or relabeling of a container. "Production" includes planting, cultivating, growing, or harvesting.

h. Introduction. "Introduction" is the act of bringing a drug or causing a drug to be brought into or onto a military unit, base, station, post, ship, or aircraft. Introduction is more serious than simple possession.

i. Intent to distribute. The presence of an intent to distribute increases the severity of possession, manufacture, or introduction. An intent to distribute is generally inferred from circumstantial evidence. Indicia supporting such an intent would be the possession of a quantity of drugs in excess of a normal quantity for personal use; the market value of a substance; the manner in which a substance was packaged; and the fact that an accused was not normally a user. The fact that an accused was addicted to or was a heavy user of a substance 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. For negligible amounts, however, it is not necessary to allege the specific amount, and a specification is sufficient if it alleges "some," "traces of," or "an unknown quantity of" a controlled substance.

2. Relationships among the prohibited acts

a. Under the previous drug law, transfer and possession were 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, distribution, possession with intent to distribute, and introduction. Therefore, it is normally not necessary to plead use and possession in separate specifications. They would be multiplicious for findings and one specification would be dismissed before findings. Some very recent case law suggests, however, that if the accused possesses a separate "stash" of drugs which is kept hidden and remote from the drugs which are distributed, separate specifications alleging possession and distribution are appropriate.

b. The courts have indicated that introduction and distribution offenses are separate and are not multiplicious with each other or use.

3. Proof of the substance's identity. At trial, the prosecution must prove beyond a reasonable doubt that the substance the accused distributed, used, possessed, manufactured, imported, exported, or introduced was marijuana or a controlled substance. Of course, the most reliable evidence of the substance's identity and composition will be the results of chemical analysis. Nonexpert testimony may also be admissible sometimes to prove the substance's identity. A person who has used the same substance on previous occasions and is familiar with its appearance and effects may give his or her opinion about the substance's identity. Such testimony is rather common in marijuana cases. Where the substance is less common, it may be less likely that a nonexpert witness could accurately identify the substance merely by its appearance and effects. Many drugs look and act alike. In such a case, nonexpert identification will usually be inadmissible, and expert testimony or scientific evidence will be required.

4. Punishments. The maximum punishments prescribed by Part IV, par. 37e, MCM, 1984, are as follows:

a. Wrongful use, possession, manufacture, or introduction of amphetamine, cocaine, heroin, LSD, marijuana (except possession of less than 30 grams or use of marijuana), methamphetamines, opium, phencyclidine, secobarbital, and Schedule I, II, and III controlled substances: Dishonorable discharge; forfeiture of all pay and allowances; and confinement at hard labor not to exceed 5 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 at hard labor not to exceed 2 years.

c. Wrongful distribution of, or with intent to distribute, wrongful possession, manufacture, or introduction of amphetamine, cocaine, heroin, LSD, marijuana, methamphetamine, opium, phencyclidine, secobarbital, and Schedule I, II, and III controlled substances: Dishonorable discharge; forfeiture of all pay and allowances; and confinement at hard labor not to exceed 15 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 at hard labor not to exceed 10 years.

e. When any of the above offenses is committed while the accused is on duty as a sentinel or lookout; on board a vessel or aircraft used by or under control of the armed forces; in or at a missile launch facility used by or under the control of the armed forces; in a hostile fire pay zone; or in time of war, the maximum period of confinement and forfeiture of pay and allowances authorized for such offense shall be increased by 5 years.

5. Elements

a. That the accused wrongfully 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.

6. Pleading

a. General considerations. See Part IV, par. 37f, MCM, 1984. If possible, the quantity of drugs should be alleged. If the quantity is not known, such terms as "some," "traces of," or "an unknown quantity of" may be utilized. If the offense involves distribution, the specification should identify the person who received or purchased the drugs. The identity of the receiver/purchaser is particularly useful in cases involving more than one distribution, because it will make it easier for the factfinder to relate a witness's testimony to a specific alleged distribution. Identifying the purchaser/receiver as a military person also assists in establishing jurisdiction over the offense when the offense occurs off base. The amount of money paid for the drugs need not be pleaded. The accused's acts must be alleged to be "wrongful." The schedule to which a controlled substance belongs should be alleged, if possible, because of the above-mentioned punishment distinctions. However, if the drug is one of the nine actually named in article 112a, the schedule does not have to be charged. If the aggravating circumstances of sentinel/lookout, in time of war, etc., are applicable, then so allege the circumstances.

b. Sample pleadings

Charge: Violation of the Uniform Code of Military Justice, Article 112a

(1) Possession

Specification 1: In that Seaman Pushin D. Snow, U.S. Navy, USS Angeldust, on active duty, did, on board USS Angeldust, at sea, on or about 15 December 1984, wrongfully possess 50 grams, more or less, of marijuana, a Schedule I controlled substance.

(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 1984, wrongfully use 5 grams, more or less, of marijuana, a Schedule I controlled substance.

(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 1984, wrongfully distribute 50 grams, more or less, of marijuana, a Schedule I controlled substance, to Seaman Ida Snort, U. S. Navy.

(4) Manufacture

Specification 4: In that Seaman Pushin D. Snow, U.S. Navy, USS Angeldust, on active duty, did, on board USS Angeldust, at sea, on or about 15 December 1984, wrongfully manufacture 50 grams, more or less, of marijuana, a Schedule I controlled substance.

(5) Introduction

Specification 5: In that Seaman Pushin D. Snow, U.S. Navy, USS Angeldust, on active duty, did, on or about 15 December 1984, on board USS Angeldust, at sea, wrongfully introduce 50 grams, more or less, of marijuana, a Schedule I controlled substance, 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 1984, on board USS Angeldust, at sea, wrongfully introduce 450 grams, more or less, of marijuana, a Schedule I controlled substance, onto a vessel used by the armed forces, to wit, USS Angeldust, with intent to distribute the said controlled substance.

C. Drug paraphernalia. Article 112a does not address drug paraphernalia, and resort must therefore be made to any applicable orders or regulations (or to article 134). For the Navy and Marine Corps, a service-wide drug paraphernalia regulation was promulgated in SECNAVINST 5300.28, dated 12 June 1982.

1. Text. Paragraph 7b of SECNAVINST 5300.28 states:

> Except for authorized medicinal purposes, the use for the purpose of injecting, ingesting, inhaling, or otherwise introducing into the human body marijuana, narcotic substances or other controlled substances, or the possession with the intent to so use, or the sale or other transfer with the intent that it be so used, of drug abuse paraphernalia by persons in the naval service is prohibited.

Paragraph 4f of the instruction defines drug abuse paraphernalia as:

> All equipment, products and materials of any kind that are used, intended for use, or designed for use in injecting, inhaling or otherwise introducing into the human body marijuana, narcotic substances, or other controlled substances in violation of law.

2. Analysis. Although the instruction uses somewhat broad language to define drug abuse paraphernalia, it is clear that nothing can be considered paraphernalia unless it is used, possessed, sold, or transferred with the intent that it be used as a medium through which illegal drugs are to be introduced into the body. Hence, the intent of an accused determines whether any given form of property is drug abuse paraphernalia. Factors tending to prove the intent of the accused might include statements concerning the use of the objects by a person in possession of drugs; proximity of the paraphernalia, in time and space, to the unlawful use of drugs; instructions provided with an object concerning its use; descriptive materials with the object explaining its use; and the existence or scope of legitimate uses for the object. Consequently, an item as innocuous as a government issue ball point pen may be paraphernalia if an accused uses it to smoke marijuana. On the other hand, possession of an item commonly associated with drug abuse, such as a water pipe, may not be banned if it is possessed for an innocent purpose. The regulation also contains an exception for "authorized medicinal purposes." Hence, if an accused possesses a syringe with the purpose of injecting a controlled substance into his body, he is not guilty of an offense, if his possession was incident to an authorized medicinal purpose. Violations of this SECNAV instruction are meant to be enforced by "disciplinary or punitive action as may be ... appropriate..." under article 92 (violation of a lawful general order).

D. Failure to report drug offenses

1. Bases for prosecution

a. U.S. Navy Regulations. Article 1139, U.S. Navy Regulations, 1973, states:

> Persons in the Department of the Navy shall report to proper authority offenses committed by persons in the Department of the Navy which 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 violation of a lawful general order. (Note that whether or not the accused was aware of the existence of article 1139 would be irrelevant in any such prosecution. Part IV, par. 16c(1)(d), MCM, 1984.)

b. Dereliction of duty. A person who willfully or negligently fails to perform a known duty imposed by regulation, lawful order, or custom of the service may be guilty of dereliction of duty in violation of Article 92(3), UCMJ. Although there would appear no reason in the Navy or Marine Corps to change dereliction of duty instead of violation of Article 1139, U.S. Navy Regulations, 1973, such as approach may be useful in those services without applicable punitive regulations.

E. Article 134. Drug violations which are not addressed by article 112a nor by applicable regulations might potentially be prosecuted under clause 3 of article 134, "crimes or offenses not capital." A clause 3 prosecution could be accomplished under two theories. First, another Federal criminal statute could be the basis for prosecution. Second, state criminal statutes might be assimilated into Federal law through the use of the Federal Assimilative Crimes Act (provided the offense occurs in an area subject to exclusive or concurrent Federal jurisdiction).

F. Common defenses in drug cases. Two defenses commonly arise in drug cases: Lack of knowledge and entrapment.

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.

When the evidence raises the issue of lack of knowledge that the accused possessed the substance, or a lack of knowledge of the substance's true identity, the burden will be on the prosecution to prove beyond a reasonable doubt that the accused's possession was knowing and conscious.

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. Medical purpose. Another defense that may be raised on drug use is the "authorized medicinal purposes" exception. Article 1151, U.S. Navy Regulations, 1973, 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

A. Overview. The UCMJ prohibits four major types of drunkenness offenses:

1. Drunk on ship, on station, in camp, or in quarters (article 134);

2. drunk on duty (article 112);

3. incapacitation for duty (article 134); and

4. drunken or reckless driving (article 111).

B. "Drunk" defined. Part IV, par. 35c(3), MCM, 1984, defines "drunkenness" as "any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental or physical faculties." Drunkenness is therefore measured in terms of the impairment of physical abilities, such as vision, speech, balance, coordination, and reaction time. Drunkenness is also determined by the impairment of the accused's judgment. Drunkenness may be caused by alcoholic beverages, or by drugs. There is no specific point at which a person becomes drunk. There is, for example, no specific blood-alcohol level which, by itself, will result in the accused being declared drunk as a matter of law. (In many states, by contrast, the law provides that when a certain blood-alcohol level is reached, the accused may legally be presumed to be drunk.) The accused's intoxication must be voluntary. Therefore, if ruffians pin the accused to the floor and force the accused to drink, the accused's resulting intoxication will not be voluntary.

C. Proof of drunkenness. Intoxication can be proven in several ways. The results of scientific tests, such as blood-alcohol or breathalyzer tests, are the most reliable proof of intoxication when they are properly performed. Such tests may not always be sufficient by themselves, however. Tests of physical coordination, such as walking a straight line or balancing on one leg, are frequently administered when the accused is apprehended. These tests do 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 XXVII of this text for a discussion of disorderly conduct.

4. Pleading

a. General considerations. See Part IV, par. 73f, MCM, 1984. If the accused was drunk and disorderly, the specification should allege "drunk and disorderly" rather than just "drunk."

b. Sample pleading

Charge: Violation of the Uniform Code of Military Justice, Article 134.

Specification: In that Chief Boatswain's Mate John E. Walker, U.S. Navy, USS Beerkeg, on active duty, was, on board USS Beerkeg, located at New London, Connecticut, on or about 14 December 1984, 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. Merely being hung-over is not sufficient for this offense.

3. Pleading

a. General considerations. See Part IV, par. 36f, MCM, 1984. The specification should allege the accused's duty.

b. Sample pleading

Charge: Violation of the Uniform Code of Military Justice, Article 112.

Specification: In that Yeoman Third Class Susan S. Barandgrill, U.S. Navy, USS Rumrun, on active duty, was, on board USS Rumrun, located at Perth Amboy, New Jersey, on or about 1 December 1984, 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; and

b. the accused was incapacitated for the proper performance of those duties; and

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. Therefore, if the

accused has already assumed duty and is then found on duty hung-over, he/she is not guilty of both articles 112 and 134. He/she may be guilty of dereliction in violation of article 92.

3. Pleading

a. General considerations. See Part IV, par. 76f, MCM, 1984. The accused's duty should be alleged.

b. Sample pleading

Charge: Violation of the Uniform Code of Military Justice, Article 134.

Specification: In that Chief Yeoman Gus L. Turpentine, U.S. Navy, Service School Command, Naval Training Center, San Diego, California, on active duty, was, at Service School Command, Naval Training Center, San Diego, California, on or about 10 December 1984, as a result of wrongful previous indulgence in intoxicating liquor or drugs, incapacitated for the proper performance of his duties as an instructor at Yeoman "A" School.

G. Drunken or reckless driving (article 111)

1. Elements of the offense. The prosecution must prove beyond reasonable doubt that:

a. At the time and place alleged, the accused operated a vehicle; and

b. the accused was either:

(1) drunk; or

(2) operating the vehicle in a reckless or wanton manner.

(Note: If injury resulted, add as an element)

c. that the accused thereby caused the vehicle to injure a person.

2. Discussion

a. Vehicle. "Vehicle" includes any mechanical conveyance for land transportation, whether or not motor-driven or passenger-carrying. One operates a vehicle when one guides the vehicle while in motion, sets the vehicle in motion, or manipulates the vehicle's controls so as to cause the vehicle to move. Water or air transportation is not included.

b. Drunk or reckless. The accused must either be drunk while driving or driving in a reckless manner. "Drunk" has the same meaning as discussed in paragraph 2 of this chapter. "Reckless" involves a culpable disregard of the foreseeable consequences of one's actions. It is a

significantly greater degree of carelessness than simple negligence. "Wanton" involves an even greater degree of negligence than recklessness. Wantonness involves an utter disregard of the probable consequences of one's actions. A person who acts wantonly behaves as if he or she doesn't care about what happens as a result of his or her actions.

Drunken driving is not always reckless driving. Drunkenness is a factor which, along with all the other evidence, may prove recklessness or wantonness. Thus, a drunk driver who nonetheless obeys the speed limit and is careful of the safety of others is not guilty of reckless driving, only drunken driving. A drunk driver who drives at 20 m.p.h. 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 m.p.h., driving up over the sidewalk, running all stop lights, and hitting parked cars is acting wantonly. There is no suct 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, 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. The fact that the injury was to the driver himself/herself, is sufficient to aggravate the offense.

4. Pleading

a. General considerations. See Part IV, par. 35f, MCM, 1984. If the accused's driving results in personal injury, that fact must be alleged, but the nature of the injury need not be pleaded.

b. Sample pleadings

Charge: Violation of the Uniform Code of Military Justice, Article 111.

(1) Drunken driving

Specification 1: In that Seaman Recruit Desmond C. Crazydriver, U.S. Navy, USS Crunch, on active duty, did, at Naval Air Station, Jacksonville, Florida, on or about 5 August 1984, 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 Base, Philadelphia, Pennsylvania, on or about 3 September 1984, on Broad Street between Porter Avenue and the Delaware River, operate a vehicle, to wit: a passenger car, in a reckless manner by driving on the sidewalk at a speed in excess of 50 miles per hour.

(3) Drunken driving resulting in personal injury

Specification 3: In that Seaman Recruit Desmond C. Crazydriver, U.S. Navy, USS Crunch, on active duty, did, at Naval Air Station, Fly, Ohio, on or about 6 October 1984, 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

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 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, par. 38c(4), MCM, 1984, describes a sentinel or lookout as one whose duties include the requirement to "maintain constant alertness, be vigilant, and remain awake, in order to observe for the possible approach of an enemy, or to guard persons, property, or a place, and to sound the alert, if necessary." The terms include one who is detailed to use any equipment designed to locate friend, foe, or possible danger, or at a designated

place to maintain internal discipline, or to guard stores, or to guard prisoners while in confinement or at work. Whether the accused was a sentinel or lookout, within the meaning of articles 113 and 134, is a factual issue to be decided at trial. The most important factor will be whether the accused's duties required constant vigilance. Therefore, the instruction or orders that describe the accused's duties will be very important evidence, especially if those orders mandate an extraordinary degree of alertness.

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, pars. 37f and 104f, MCM, 1984. The format for specifications under article 113 and article 134 are substantially similar. Under article 113, if the drunkenness on, sleeping on, or leaving the post occurred in an area designated as authorizing combat pay, this is an aggravating fact which significantly increases the authorized maximum punishment. Since the article 113 sentinel offenses are

capital offenses in time of declared war, the phrase "during time of declared war" should be added after the date of the offense when appropriate.

2. Sample pleadings

a. Sleeping on post. (For drunk on post, substitute "drunk" for "sleeping.")

Charge: Violation of the Uniform Code of Military Justice, Article 113.

Specification: In that Private First Class Ima Z. Rack, U.S. Marine Corps, Marine Barracks, Charleston, South Carolina, on active duty, on or about 18 July 1985, at Naval Base, Charleston, South Carolina, being on post as a sentinel at Gate No. 1, was found sleeping upon her post.

b. Leaving post before proper relief

Charge: Violation of the Uniform Code of Military Justice, Article 113.

Specification: In that Private First Class Harry N. Van Ish, U.S. Marine Corps, Marine Barracks, Charleston, South Carolina, on active duty, on or about 20 August 1984, at Naval Base, Charleston, South Carolina, being posted as a sentinel at Gate No. 1, did leave his post before he was regularly relieved.

c. Loitering on post. (For sitting down, substitute "wrongfully sit down" for "loiter.")

Charge: Violation of the Uniform Code of Military Justice, Article 134.

Specification: In that Seaman Apprentice Ida Gold Brick, U.S. Navy, Naval Education and Training Center, Newport, Rhode Island, on active duty, while posted as a sentinel, did, at Naval Education and Training Center, Newport, Rhode Island, on or about 16 June 1985, loiter on her post.

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 reasonable doubt that:

a. At the time and place alleged, a certain person attempted to apprehend the accused; and

b. the person attempting to apprehend the accused was a person lawfully authorized to apprehend the accused; and

c. the accused actively resisted the apprehension by committing certain acts.

2. Discussion

a. Apprehension. Article 7(a), UCMJ, defines apprehension as the act of taking a person into custody. Apprehension equates to a civilian arrest. In the military justice system, the terms "apprehension" and "arrest" must not be confused. They are not synonymous.

b. The attempt to apprehend. Someone must have made an overt effort to apprehend the accused. This attempt must include clear notice to the accused that he or she was being placed in custody. While words such as "You are under apprehension" are the clearest notification to the accused, the accused may be notified by other words importing the same meaning. Notification may also occur through acts, or a combination of words and acts, which clearly communicate to the accused the fact that he or she is being apprehended.

c. Authority to apprehend. Article 7 of the Code and R.C.M. 302(b), MCM, 1984, authorize the following persons to conduct military apprehensions:

(1) Commissioned officers;

(2) warrant officers;

(3) noncommissioned officers and petty officers; and

(4) other persons in the execution of law enforcement duties.

R.C.M. 302(b) also states a policy that an enlisted member should apprehend a warrant or commissioned officer only when ordered to do so by another commissioned officer, or when necessary to prevent disgrace to the service, the commission of a serious crime, or the escape of an officer who has committed a serious offense.

d. Resistance. Words, by themselves, are insufficient to constitute resisting apprehension. Some degree of physical resistance is also required, such as flight or assaulting the apprehending officer. The resistance must occur before the accused has submitted to the apprehending officer's control. If the accused submits to the apprehension and then attempts to resist, the offense committed is not resisting apprehension. Instead, the accused may be guilty of escape from custody or attempted escape from custody.

e. Knowledge. The "clear notification" requirement for the attempt to apprehend implies that the accused must have knowledge that an apprehension is being attempted. There is apparently no requirement that the accused actually know that the person attempting the apprehension is lawfully empowered to apprehend. Part IV, par. 19c(1)(d), MCM, 1984, however, provides: "It is a defense that the accused held a reasonable belief that the person attempting to apprehend him did not have authority to do so." Therefore, a reasonable belief that the apprehending person was acting without authority to apprehend is a complete defense. It must be noted that Part IV, par. 19c(1)(d) specifically states that the accused's belief that there existed no grounds for apprehension is no defense.

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, par. 19f(1), MCM, 1984. The specific acts which constituted the resistance should be pleaded. The identity of the person attempting the apprehension should be pleaded.

b. Sample pleading

Charge: Violation of the Uniform Code of Military Justice, Article 95.

Specification: In that Fireman Neville B. Kaught, U.S. Navy, USS Elusive, on active duty, did, on board USS Elusive, located at Mayport, Florida, on or about 19 May 1985, resist being lawfully 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; and

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 need only involve moral, rather than physical restraint of freedom of movement. As noted above, it may 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 is not guilty of escape from confinement or custody, but may be found guilty of attempted escape.

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, par. 19f(3) and (4), MCM, 1984. The sample pleading below alleges escape from confinement. An escape from custody pleading would follow the same format, but would substitute "custody of [person's name] a person authorized to apprehend the accused" for "confinement in [place]."

b. Sample pleading

Charge: Violation of the Uniform Code of Military Justice, Article 95.

Specification: In that Private Duck N. Runn, U.S. Marine Corps, Headquarters and Service Squadron, Marine Corps Air Station, Cherry Point, North Carolina, on

active duty, having been placed in lawful confinement in the Marine Corps Air Station Brig, Cherry Point, North Carolina, by a person authorized to place the accused in confinement, did, at Marine Corps Air Station, Cherry Point, North Carolina, on or about 17 May 1985, escape from said 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; and

b. the accused knew of the limits of the arrest or restriction; and

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, par. 19f(2) and 102f, MCM, 1984. The formats for pleading each offense are similar. Note that the accused's knowledge of the limits of the restriction or arrest are not expressly pleaded.

b. Sample pleadings

(1) Breaking arrest

Charge: Violation of the Uniform Code of Military Justice, Article 95.

Specification: In that Ensign Busta Out, U.S. Navy, USS Camden, on active duty, having been placed in arrest in the Unaccompanied Officer Personnel Housing, Naval Base, Philadelphia, Pennsylvania, by a person authorized to order the accused into arrest, did, at Naval Base, Philadelphia, Pennsylvania, on or about 24 October 1984, break said arrest.

(2) Breaking restriction

Charge: Violation of the Uniform Code of Military Justice, Article 134.

Specification: In that Radioman Third Class Atwater Kent, U.S. Navy, USS Ashtabula, on active duty, having been restricted to the limits of the USS Ashtabula, by a person authorized to do so, did, on board USS Ashtabula, located at Norfolk, Virginia, on or about 22 September 1984, break said restriction.

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; and

b. the statement or document was an official statement or document; and

c. the statement or document was false; and

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. The statement may be oral or written, but it must be an official statement. An official statement is any one made in the line of military duties. The coverage is meant to be extremely broad. A suspect who is being interrogated normally has no duty to make a statement. Article 31, UCMJ, protects the suspect's right to remain silent. Therefore, any statement made by a suspect during an interrogation

is not an official statement. On the other hand, if the suspect has an independent duty to make a statement or report, any statement such an accused makes may be an official statement. For example, an enlisted club manager has an independent duty to account for club funds. Therefore, if the manager is suspected of stealing the funds, and makes a false report about the funds after being advised on his article 31 rights, the report is nonetheless an official statement. The manager's duty to account is separate from the right to remain silent under article 31. If the manager voluntarily waives the right to remain silent, he/she must speak truthfully or be subject to prosecution under article 107.

b. Accused's knowledge. The accused must have actually known, at the time the official statement was made, that the statement was false. This element is established if the accused had no belief that the statement was true.

c. Intent. The accused must make the false statement with an intent to deceive. This denotes an intent to mislead, trick, cheat, or induce someone to believe as true something that is false. No one actually need be deceived, nor any material benefit be obtained. If the accused knew that the official statement was false, the law will permit the court to infer that the accused intended to deceive. This is a permissive inference, which may be rejected if there is evidence to the contrary.

3. Pleading

a. General considerations. See Part IV, par. 31f, MCM, 1984. Note that the false statement must be summarized or quoted verbatim. If the statement was entirely untrue, an allegation that it was wholly false will suffice. If the statement was only partially untrue, the specification must explain the way in which it was partially false.

b. Sample pleading

Charge: Violation of the Uniform Code of Military Justice, Article 107.

Specification: In that Chief Yeoman Wylie Slighe, U.S. Navy, USS Dubious, on active duty, did, on board USS Dubious, located at San Diego, California, on or about 15 May 1985, 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, par. 48c, MCM, 1984, for an extensive discussion of forgery.

D. Perjury (article 131). Perjury occurs when a witness gives sworn testimony in a judicial proceeding, and the witness knows at the time that the testimony is false. The perjured testimony must concern a material fact or issue in the trial. Judicial proceedings include courts-martial and article 32 pretrial investigations. False sworn statements in other hearings, proceedings, or situations are prosecuted as false swearing in violation of article 134. Closely related to perjury is the article 134 offense of subornation of perjury, which occurs when the accused induces a witness in a judicial proceeding to give sworn testimony that the accused knows is untrue. See Part IV, par. 57c, MCM, 1984, for an extensive discussion of perjury.

E. Frauds against the United States (article 132). Article 132 prohibits seven offenses which constitute, or relate to, frauds against the United States 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, par. 58c, MCM, 1984, for an extensive discussion of the various types of frauds against the United States.

F. False swearing (article 134)

1. Elements of the offense. The prosecution must prove beyond a reasonable doubt that:

a. At the time and place alleged, the accused took an oath or made an affirmation; and

b. the oath or affirmation was lawfully administered to the accused by a person having authority to do so; and

c. upon the oath or affirmation, the accused made a statement; and

d. the statement was false; and

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 2502 of the Manual of the Judge Advocate General list the persons authorized to administer oaths and affirmations in the Department of the Navy. The oath or affirmation must actually be administered. Asking the accused questions such as "Is all of this true?" does not constitute the administration of an oath or affirmation.

b. False statement. The accused's statement under oath or affirmation must be false in fact. Moreover, the accused must not have believed that the statement was true when it was made. False swearing covers both official and unofficial statements. Thus, a suspect who knowingly makes a false statement during an interrogation is not guilty of making a false official statement. But, if the statement is made under oath, the suspect may be found guilty of false swearing. Article 31, UCMJ, merely protects the suspect's right to remain silent. Once the suspect takes an oath or makes an affirmation, the suspect is under a legal duty to tell the truth.

3. Pleading

a. General considerations. See Part IV, par. 79f, MCM, 1984. The statement must be summarized or quoted verbatim.

b. Sample pleading

Charge: Violation of the Uniform Code of Military Justice, Article 134.

Specification: In that Airman Apprentice Lyon Thrue Histeeth, U.S. Navy, Naval Air Station, Lakehurst, New Jersey, on active duty, on or about 1 July 1985, 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

A. Overview. Previous chapters of this section have discussed the common defenses to the crimes described in each chapter. This chapter will briefly outline the various defenses recognized in military criminal law which typically confront the legal officer in the drafting of charges. This chapter will also discuss the defense of insanity, which is not presented elsewhere in this text.

Defenses may be grouped into two categories: Defenses in bar of trial and defenses on the merits. Defenses on the merits can be subdivided into general defenses and affirmative defenses. Insanity can be both a defense in bar of trial and a defense on the merits.

B. Defenses in bar of trial. Defenses in bar of trial are matters which do not directly relate to the accused's guilt or innocence. They present legal grounds for preventing the trial from proceeding. Defenses in bar of trial are decided by the military judge alone. A successful defense in bar of trial will usually result in a dismissal of the charges without any determination of the accused's guilt or innocence of those charges.

1. Lack of jurisdiction. See R.C.M. 201-203, MCM, 1984, and section two (Procedure) of this text for a discussion of jurisdictional matters.

2. Statute of limitations. See R.C.M. 907(b)(2)(B), discussion, MCM, 1984. Article 43 of the Code provides that most offenses must have sworn charges formally receipted for within two years after the date of the offense. Some offenses, such as desertion in peacetime, and those prohibited by articles 119 through 132, have a three-year 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. Articles 43(d) and 43(e) describe situations and circumstances under which the running of the statute of limitations is suspended or tolled.

3. Former jeopardy. See R.C.M. 907(b)(2)(C), MCM, 1984. Article 44(a) of the Code provides that no person may be tried, without his or her consent, a second time for the same offense. Former jeopardy does not apply to a rehearing which has been ordered to correct errors in a previous trial of the same charges, nor does former jeopardy preclude a trial by court-martial when the previous trial was by a state court or foreign court. But see JAGMAN 0116d (new) (prior approval of the Judge Advocate General required in order to court-martial one convicted by civilian court for same offense). Neither does former jeopardy apply when the former adjudication of the offense was at office hours or captain's mast.

4. Former punishment. See R.C.M. 907(b)(2)(D)(iv), MCM, 1984. When punishment has been imposed under article 15 for a minor offense, that offense cannot be tried at a subsequent court-martial. Former punishment also applies to article 13 punishments for minor disciplinary infractions by a person in pretrial restraint. If the offense is not minor, usually carrying a punishment in excess of one year in confinement, former punishment is not a bar to a subsequent court-martial.

5. Denial of speedy trial. See R.C.M. 707, MCM, 1984, and section two (Procedure) of this text.

6. Constructive condonation of desertion. See chapter XXII ("Absence Offenses") of this section, and R.C.M. 907(b)(2)(D)(iii), MCM, 1984.

7. Grant or promise of immunity. See R.C.M. 704 and R.C.M. 907(b)(2)(D)(ii), MCM, 1984. If the accused has been previously promised or granted immunity from prosecution in return for his or her testimony at another proceeding, the accused may not be prosecuted for any offenses covered by the grant or promise of immunity. See JAGMAN, § 0130 (new), 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 paragraph 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 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 paragraph D of this chapter, also functions as a general defense when, because of mental disease or defect, or because of intoxication, the accused was unable to form a required specific intent.

b. Alibi. Under the alibi defense, the defense contends that the accused couldn't 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 wasn't elsewhere, but in fact committed the crime.

c. Illegality of orders. See chapter XX ("Orders Offenses and Dereliction of Duty") of this text.

d. Good character. Under the Military Rules of Evidence, general good character evidence is not admissible to show that a person acted in conformity therewith. This general rule is a significant change from prior military practice and has several exceptions. One exception is that evidence of a pertinent trait of character of the accused offered by the accused may be admissible. Good military character is admissible in a drug prosecution to show the accused wasn't involved. Evidence of the character trait of honesty is admissible in a larceny trial. Evidence of good military character would be admissible, for example, in a prosecution for disobedience of orders to show that the accused was less likely to have committed the offense. 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 reasonable doubt that the asserted affirmative defense does not apply. The following are the common affirmative defenses, most of which have been discussed elsewhere in this text.

a. Legal justification. See R.C.M. 916(c), MCM, 1984. Legal justification is the lawful performance of a lawful duty which results in the accused committing acts that otherwise would constitute a crime. The accused must be performing a lawful duty, which may be imposed by statute, regulation, orders, or custom of the service. Furthermore, the accused must be performing the duty in a lawful manner, although not necessarily in exact compliance with precise procedural regulations.

b. Obedience to apparently lawful orders. See R.C.M. 916(d), MCM, 1984. If the accused commits acts that would otherwise constitute a crime because he or she was ordered by competent authority to perform those acts, the accused will not be guilty of a crime if the orders were apparently lawful. An order is not apparently lawful if a person of ordinary sense and understanding would know or believe it to be illegal.

c. Accident or misadventure. See chapter XXV ("Assaults") of this text, and R.C.M. 916(f), MCM, 1984.

d. Self-defense or defense of another. See chapter XXV ("Assaults") of this text, and R.C.M. 916(e), MCM, 1984.

e. Duress. See chapter XXV ("Assaults") of this text, and R.C.M. 916(h), MCM, 1984.

f. Entrapment. See chapter XXVIII ("Drug Offenses") of this text, and R.C.M. 916(g), MCM, 1984.

g. Physical or financial inability. See chapters XX ("Orders Offenses") and XXII ("Absence Offenses") of this text, and R.C.M. 916(i), MCM, 1984.

h. Lawful consent. See chapter XXV ("Assaults") of this text. A person cannot usually give lawful consent to an act likely to result in grievous bodily harm or death.

i. Special privilege. See chapter XXV ("Assaults") of this text.

j. Mistake of fact. See chapter XXII ("Absence Offenses") and XXVIII ("Drug Offenses") of this text, and R.C.M. 916(j), MCM, 1984. When the accused's mistake of fact negates a required specific intent, mistake of fact is a general defense.

k. Insanity. The accused's lack of mental responsibility at the time of the offense is a complete defense. Insanity is discussed in paragraph D of this chapter and in R.C.M. 916(k), MCM, 1984.

D. Insanity

1. General concepts. Insanity is a legal concept, not a medical or psychological one. Insanity involves three distinct phenomena:

a. Lack of mental responsibility at the time of the offense;

b. lack of mental capacity to stand trial; and

c. diminished, or partial, mental responsibility to possess knowledge or form a specific intent.

These three 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 mental disease or defect, he or she lacked substantial capacity either:

(1) To appreciate the criminality of his or her conduct; or

(2) to conform his or her conduct to the requirements of law.

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 result in diminished mental capacity when, because of the intoxication, the accused is unable to possess certain required knowledge or to form a required specific intent that is an element of the offense.

c. "Substantial capacity" (capacity). The mental disease or defect need not be so profound that the accused is totally unable to appreciate the criminality of the conduct or to conform to the law. Stated another way, the accused lacks mental responsibility for the acts when the mental disease or defect substantially impairs the accused in the requisite manner.

d. "Appreciate the criminality of his or her conduct" (cognition). The accused's mental condition must render the accused substantially unable to understand that his or her acts are the type that society considers criminal. Stated another way, the accused must not understand that the acts are wrongful to the extent that penal sanctions will be imposed for them. This concept must not be confused with ignorance of the law, which is usually not an excuse. It focuses instead on the accused's lack of understanding of the nature and quality of the act, rather than on any belief the accused may have had about the existence of a law prohibiting it. This is a cognitive standard.

e. "Conform his or her conduct to the requirements of law" (volition). Even though the accused understands and appreciates the fact that the act is criminal, the accused's mental condition substantially impairs the accused's will and volition to the extent that the accused is substantially unable to prevent himself or herself from committing the crime. This is a volitional standard.

f. Working of the rule. In sum, therefore, in order for the insanity defense to be available to an accused, he/she must demonstrate a lack of capacity and a lack of cognition or volition. In other words, if an accused has capacity, the insanity defense is unavailable.

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. Diminished (partial) mental responsibility. If the accused's mental condition, while not amounting to a lack of mental responsibility, nonetheless renders the accused unable to possess a required knowledge or to entertain a required specific intent or premeditation, the accused's diminished, or partial, mental responsibility will constitute a defense. Diminished mental responsibility may be the result of a "mental disease or defect" discussed previously, or it may be caused by voluntary intoxication by drugs or liquor.

5. Deciding insanity issues. The accused's insanity may be raised either before trial or during trial. It may even be raised after trial, but only under limited conditions.

a. Inquiry. R.C.M. 706, MCM, 1984, outlines procedures for inquiry into the accused's sanity. The issue of insanity may be raised by the accused's commanding officer, the defense counsel, the trial counsel, or the article 32 pretrial investigating officer. If the accused's commanding officer has reason to believe that the accused is insane, or was insane at the time of the offense, the commanding officer will refer the accused to a sanity board. It is wise to refer the accused to the sanity board whenever the issue is raised, in order to avoid later delays in disciplinary proceedings. The sanity board consists of one or more physicians. At least one member of the board should be a psychiatrist. Although sanity boards without a psychiatrist are permissible when a psychiatrist is not reasonably available, they are definitely unwise, as the finding of such a board would be subject to strong attack at trial. The sanity board will evaluate, examine, and observe the accused. The sanity board is required to report findings about whether the accused was free enough from mental disease or defect to:

(1) Appreciate the criminality of his or her conduct;

(2) conform his or her conduct to the requirements of law;

(3) understand the nature of the proceedings; and

(4) 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 possible 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.

c. Litigation at trial. R.C.M. 916(k), MCM, 1984, provides a detailed, extensive discussion of litigation of insanity at trial. Before the accused may raise an insanity defense at trial, he or she must submit to a sanity board evaluation, if one has not been previously conducted. The military judge may enter any orders necessary to protect the accused's Article 31 or other substantive rights. The burden is always on the prosecution to prove beyond reasonable doubt that the accused is sane. The law presumes all persons to be sane, both at the time of the offense and at the time of trial. This presumption, however, may be totally rebutted by evidence to the contrary.

CHAPTER XXXIV

FRATERNIZATION AND SEXUAL HARASSMENT

A. Fraternization

1. Fraternization in general. Fraternization is very much a viable offense under the UCMJ, and there is an increasing number of fraternization cases being published by the courts of review and the Court of Military Appeals. Though each service appears to be handling the offense differently, cases have been successfully prosecuted under articles 92 (when there is a lawful order in effect which precludes the conduct), 133 and 134. Historically, the prohibition against fraternization applied only to undue familiarity between officers and enlisted persons and was based on social or class distinctions. Presently, it is the negative effect wrongful fraternization has on discipline and morale that has allowed the proscription to withstand all manner of legal attacks. The courts have held that wrongful fraternization compromises the chain of command, undermines a leader's integrity and, at the very least, creates the appearance of partiality and favoritism. Fraternization is now a listed offense at paragraph 83 in the MCM, 1984, but there are currently no reported cases under the new paragraph. The maximum punishment is two years' confinement and a dismissal.

2. Definition. Because fraternization has traditionally been a breach of custom, it is more describable than definable. Frequently it is not the acts alone which are wrongful per se, but rather the circumstances under which they are performed. In United States v. Free, 14 C.M.R. 466, 470 (N.B.R. 1953), the Navy Board first enunciated the difficulty in defining fraternization:

> Because of the many situations which might arise, it would be a practical impossibility to lay down a measuring rod of particularities to determine in advance what acts are prejudicial to good order and discipline and what are not. As we have said, the surrounding circumstances have more to do with making the act prejudicial than the act itself in many cases. Suffice it to say, then, that each case must be determined on its own merits. Where it is shown that the acts and circumstances are such as to lead a reasonably prudent person, experienced in the problems of military leadership, to conclude that the good order and discipline of the armed forces has been prejudiced by the compromising of an enlisted person's respect for the integrity and gentlemanly obligations of an officer, there has been an offense under Article 134.

Therefore, it is not every interaction between officers and enlisted that is wrongful. Example: An officer merely having a drink with an enlisted man is not fraternization without reference to other circumstances.

Part IV, para. 83c, MCM, 1984, makes no specific attempt to define fraternization. It expressly adopts the "acts and circumstances" language of United States v. Free, and describes the offensive acts as those which are in "violation of the custom of the armed forces against fraternization." Fraternization has also been described as "...untoward association that demeans the officer, detracts from the respect and regard for authority in the military relationship between officers and enlisted and seriously compromises the officer's standing as such." United States v. VanSteenwyck, 21 M.J. 795 (N.M.C.M.R. 1986) contains an excellent historical analysis of the concept of fraternization. In discussing whether an officer's sharing of marijuana with enlisted personnel and having sexual relations with female members of his staff constituted wrongful fraternization, the Navy court says in footnote 12: "Fraternization...in civilian usage means associating in a brotherly manner; being on friendly terms. The military usage of the term is very similar...fraternization refers to a military superior-subordinate relationship in which mutual respect of grade is ignored."

3. Elements. Part IV, para. 83b, MCM, 1984, lists five elements under fraternization. Though there have been no cases yet reported under this listed offense, the paragraph appears to be largely a codification of existing case law.

a. The accused was a commissioned or warrant officer.

-- Enlisted personnel cannot be prosecuted under this paragraph, though there are other theories for prosecuting the enlisted personnel involved. Warrant officers (WO-1) are included as accused despite the fact that elsewhere in the UCMJ they are treated as enlisted. Part IV, para. 15a, MCM, 1984.

b. The accused fraternized on terms of military equality with one or more enlisted members in a certain manner.

(1) This element affirms the concept that not every meeting between officers and enlisted is wrongful. The association becomes wrongful when the officer involved discards his or her rank as a determinative factor in the relationship. By becoming "too friendly," the officer fails to maintain a modicum of reserve that indicates to all that the officer retains his authority at all times. However, this article does not require that a command or supervisory relationship exist between the officer and enlisted person before there can be an offense.

(2) The conduct prohibited need not be sexual in nature, although it often is. Any conduct that compromises an officer's ability to lead, because of undue familiarity, can be the basis for a charge. Even simple acts of association, such as eating or drinking together, can be alleged as the overt conduct required by this element, if under the circumstances the acts are inappropriate.

(3) The accused then knew the person(s) to be (an) enlisted member(s).

-- It would appear to be a general defense that the accused honestly did not know the person's enlisted status. The government must show actual knowledge beyond a reasonable doubt.

d. Such fraternization violated the custom of the accused's service that officers shall not fraternize with enlisted members on terms of military equality.

(1) The existence of a custom proscribing the alleged conduct provides the notice of criminal sanction required by due process. Recent N.M.C.M.R. cases have uniformly held that any reasonable officer of even minimal intelligence is on notice that officers cannot associate with enlisted personnel on terms of military equality in the naval service. Custom as to the amount of permissible association varies between the services.

(2) However, the prosecution must prove the existence of a service custom which makes the alleged conduct wrongful. "Custom" is defined at Part IV, para. 60c(2)(b), MCM, 1984. In its legal sense, "custom" means more than a method of procedure or a mode of conduct or behavior which is merely of frequent or usual occurrence. 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. 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. The government may rely 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. In the Navy, there is little written policy available, but custom may be proven through testimony. In one case, an officer with 31 years of service testified as to the custom against officer-enlisted sexual relations. General guidance is contained in Useful Information For Newly Commissioned Officers, NAVEDTRA 10802-AG.

e. Under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

The potential harm must be direct and palpable, though it need not actually occur.

4. Constitutionality. All manner of constitutional challenges have been leveled against the concept of fraternization. Since the United States Supreme Court decided Parker v. Levy in 1974, all such attacks have largely failed. 417 U.S. 733. In Parker, the high court recognized the military's special need for discipline, against which certain personal liberties may pale. Freedom of association, equal protection, right of privacy and void for vagueness arguments have all failed.

5. Alternative theories of prosecution. For cases of over-familiarity between ranks which do not fit the elements described in Part IV, para. 83, MCM, 1984, there may be other means of prosecution.

a. The conduct may violate a lawful order or regulation and be punishable under Article 92, UCMJ. Notice that officer-officer and enlisted-enlisted overfamiliarity may have the same detrimental effect on morale and discipline in certain circumstances as officer-enlisted fraternization. As such, the participants may be subject to a lawful verbal order to cease and desist. Failure to terminate the relationship may constitute willful disobedience under Articles 90 or 91, UCMJ.

b. The underlying conduct might itself constitute a separate crime such as adultery, sodomy, drug abuse or even dereliction.

c. The conduct may be such that it would constitute conduct unbecoming an officer and gentleman in violation of Article 133, UCMJ. However, a higher level of misconduct must be shown under this article. For example, it was held that an officer partying with enlisted and passing out in bed next to an enlisted man does not reach that level of dishonor to be considered "conduct unbecoming."

6. Pleading. The sample specification for the listed fraternization offense appears at Part IV, para. 83F, MCM, 1984.

B. Sexual harassment

1. Sexual harassment in general. Sexual harassment, when charged under article 93, is not an offense that requires a sexual assault; more often, the conduct proscribed involves comments or gestures of a sexual nature. It is a form of abuse of subordinates, and was first recognized as an offense by the MCM, 1984. There is, as yet, no published appellate case law in this area.

2. Text of Article 93, UCMJ, cruelty and maltreatment

-- Any person subject to this chapter who is guilty of cruelty toward, or oppression or maltreatment of, any person subject to his orders shall be punished as a court-martial may direct.

3. Discussion and definitions

a. "Any person subject to his orders" means not only those military personnel under the direct or immediate command of the accused, but extends to all persons including civilian employees, who by reason of some duty or employment are required to obey the lawful orders of the accused. The accused need not be in the direct chain of command over the victim. Korean nationals performing contract work, supervised by an Army lieutenant, were held to be "subject to the orders" of the lieutenant. This element, that the victim was subject to orders of the accused, creates an obvious loophole in the prosecution of sexual harassment cases under this article. It does not cover harassment between personnel of the same rank unless position or duties create a senior-subordinate relationship. Assault, improper punishment, and sexual harassment may all constitute the cruelty, maltreatment or oppression for article 93 purposes. Sexual harassment includes influencing, offering to influence, or threatening the career, pay or job or another person in exchange for sexual favors and deliberate or repeated offensive comments or gestures of a sexual nature. (Emphasis added.) Part IV, para. 17c(2), MCM, 1984. The emphasized language in the discussion portion of paragraph 17 of MCM, 1984, is the only language in the Manual that expressly deals with sexual harassment. The elements, punishment and sample specification for article 93, cruelty and maltreatment, remain identical to those first published in the 1951 Manual for Courts-Martial, United States.

b. "Deliberate or repeated offensive comments." This language suggests that the offense may be committed willfully or through culpable

negligence. The "or repeated" terminology, standing alone, may seem to imply strict liability if it is found to be cruel or oppressive on an objective standard. Part IV, para. 17c(2), MCM, 1984. However, the same language appears in SECNAVINST 5300.26 (25 August 1980) and MCO 5300.10 (4 February 1981), as well as the policy statements of other services on sexual harassment. Within these documents, the phrase "or repeated" is explained as referring to those comments or gestures of a sexual nature which are initially made innocently but become wrongful by repetition, particularly after the victim has complained.

4. Difficulties with article 93

a. Specification. The sample specification at paragraph 17f clearly contemplates the historical forms of cruelty toward subordinates, such as a drill instructor abusing a recruit. Hence, the sample specification must be extensively tailored. The specification should reflect sexual harassment as the specific type of abuse; whether it was deliberate or repeated; and should include an exact description of the acts of misconduct.

b. Necessity of complaint. There is no requirement under article 93 that the victim complain though, certainly, if an innocent comment is made and the victim complains about the remark or gesture, such notice to the accused may go a long way in proving culpable negligence if the situation is repeated. Both SECNAVINST 5300.26 and MCO 5300.10 say the victim should complain and make the situation know to his or her superior. The commander is required to investigate under these orders.

c. Maximum punishment. The maximum punishment listed in paragraph 17e is a dishonorable discharge and one year confinement. This could create "ultimate offense" problems if the same misconduct is prosecuted under article 92 as an orders offense. Part IV, par. 16e, Note, MCM, 1984. See section 0404I.

5. Defenses. It would appear that an honest and reasonable belief (mistake) that the questioned behavior is appropriate is a defense. It is not a defense that the comments or gestures were enjoyed, appreciated, or that the victim, by appearance or dress, somehow invited the comments except as it may affect the determination of cruelty or oppression.

6. Related orders. SECNAVINST 5600.26 of 20 August 1980 and MCO 5300.10 of 4 February 1981, contain virtually identical prohibitions against sexual harassment. They were generated in response to Office of Personnel Management, and the Secretary of Defense requests that each of the service secretaries generate policy statements emphasizing harassment is the same as that in the Manual, because of their origin as policy statements, it is unlikely that they will be found to be punitive orders for article 92 prosecutions. Both regulations require commanders to train personnel about sexual harassment and require victims of such misconduct to use their chain of command.

a. SECNAVINST 5370.24 of 24 October 1984, Standard of Conduct and Government Ethics, is a punitive order. Paragraph 6c, captioned "Using naval position," prohibits naval personnel from misusing their official position for personal gain. This paragraph could be the basis for a sexual harassment prosecution. It applies to officers, enlisted, and civilians without reference to chain of command.

b. Section 703 of Title VII of the United State Code (Civil Rights Act) has been the basis of Federal prosecutions for sexual harassment. Federal courts treat sexual harassment as a form of sex discrimination. The Department of the Navy has been successfully sued under the Title VII for sex discrimination.

c. There are numerous other military orders and directives that deal with sexual harassment, including: OPNAV 12720.3, NAVAIR 5350.1, NAVSEA 5350.1, OPNAV 5350.5, NCPC 12410.1, and CMC White Letter Number 18080 of 2 December 1980.

7. Alternatives to article 93 for sexual harassment. Prosecution of comments and acts alleged to be sexual harassment is an area as yet untested by the appellate courts. However, there are many other articles and theories under which the same misconduct could be prosecuted.

a. Comments may amount to disrespect under articles 89 or 91, provoking speech under article 117, communicating a threat under article 134, extortion under article 127, bribery under article 134, or indecent language under article 134.

b. Where contact or acts are involved, articles such as 128 assaults, 134 indecent acts, 120 rapes, 125 sodomy, or 134 adultery may also be alternatives, depending upon the circumstances surrounding the alleged harassment.

c. Finally, dereliction of duty under article 92 and conduct unbecoming an officer under article 133 may also be charged when sexual harassment is alleged.

SECTION FOUR

GLOSSARY OF WORDS AND PHRASES

SECTION FOUR

GLOSSARY OF WORDS AND PHRASES

The following words and phrases are those most frequently encountered in Military Justice which have special connotations in Military Law. This list is by no means complete and is designed solely as a ready reference for the meaning of certain words and phrases. Where it has been necessary to explain a word or phrase in the language of or in relation to a rule of law, no attempt has been made to set forth a definitive or comprehensive statement of such rule of law.

ABANDONED PROPERTY - property to which the owner has relinquished all right, title, claim and possession with intention of not reclaiming it or resuming ownership, possession or enjoyment.

ABET - to encourage, incite, or set another on to commit a crime.

ACCESSORY AFTER THE FACT - one who, knowing that an offense punishable by the UCMJ has been committed, receives, comforts, or assists the offender in order to hinder or prevent his apprehension, trial or punishment.

ACCESSORY BEFORE THE FACT - one who counsels, commands, procures, or causes another to commit an offense, whether present or absent at the commission of the offense.

ACCUSED - one who is charged with an offense under the UCMJ.

ACCUSER - any person who signs and swears to charges; any person who directs that charges nominally be signed and sworn to by another; and any person who has an interest other than an official interest in the prosecution of the accused.

ACTIVE DUTY - the status of being in the active Federal service of any of the Armed Forces under a competent appointment or enlistment or pursuant to a competent muster, order, call or induction.

ACTUAL KNOWLEDGE - a state wherein a person in fact knows of the existence of an order, regulation, fact, etc. in question.

ADDITIONAL CHARGES - new and separate charges preferred after others have been preferred against the same accused.

ADMISSION - a statement made by an accused which may admit part of an element, an element, or more than one element of an offense charged, but which falls short of a complete confession to every element of an offense charged.

AFFIDAVIT - a statement or declaration reduced to writing and confirmed by the party making it by an oath taken before a person who had authority to administer the oath.

AFFIRMATION - a solemn and formal external pledge, binding upon one's conscience, that the truth will be stated.

AIDER AND ABETTOR - one who shares the criminal intent or purpose of the perpetrator, and seeks to help him carry out his scheme, and, hence, is liable as a principal.

ALIBI - a defense that the accused could not have committed the offense alleged because he was somewhere else when the crime was committed.

ALLEGE - to assert or state in a pleading; to plead in a specification.

ALLEGATION - the assertion, declaration, or statement of a party to an action, made in a pleading setting out what he expects to prove.

ALL WRITS ACT - a Federal statute, 28 U.S.C. 1651(a) (1982), which empowers all courts established by Act of Congress, including the Court of Military Appeals, to issue such extraordinary writs as are necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

APPEAL - a complaint to a superior court of an injustice done or error committed by an inferior court whose judgment or decision the court above is called upon to correct or reverse.

APPELLATE REVIEW - the examination of the records of cases tried by courts-martial by proper reviewing authorities, including, in appropriate cases, the convening authority, the Court of Military Review, the Court of Military Appeals, 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 of bad conduct and is 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 force to the person of another by a material agency used directly or indirectly.

BEYOND A REASONABLE DOUBT - the degree of persuasion based upon proof such as to exclude not every hypothesis or possibility of innocence, but any fair and rational hypothesis except that of guilt; not an absolute or mathematical certainty but a moral certainty.

BODILY HARM - any physical injury to or offensive touching of the person of another, however slight.

BONA FIDE - in good faith.

BREACH OF THE PEACE - an unlawful disturbance of the public tranquility by an outward demonstration of a violent or turbulent nature.

BREAKING ARREST - going beyond the limits of arrest before being released by proper authority.

BURGLARY - the breaking and entering in the nighttime of the dwelling house of another with intent to commit murder, manslaughter, rape, carnal knowledge, larceny, wrongful appropriation, robbery, forgery, maiming, sodomy, arson, extortion, or assault.

BUSINESS ENTRY - any writing or record, whether in the form of any entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, made in the regular course of any business, profession, occupation, or calling of any kind.

CAPTAIN'S MAST - the term applied, through tradition and usage in the Navy and Coast Guard, to nonjudicial punishment proceedings.

CAPITAL OFFENSE - an offense for which the maximum punishment includes the death penalty.

CARNAL KNOWLEDGE - an act of sexual intercourse with a female not the accused's wife and who has not attained the age of 16 years.

CHALLENGE - a formal objection to a member of a court or the military judge continuing as such in subsequent proceedings; either for cause, based on a fact or circumstance which has the effect of disqualifying the person challenged from further participation in the proceedings, or peremptorily, without grounds or basis.

CHARGE - a formal statement of the article of the UCMJ which the accused is alleged to have violated.

CHARGE AND SPECIFICATION - a formal description in writing of the offense which the accused is alleged to have committed; each specification, together with the charge under which it is placed, constitutes a separate accusation.

CHIEF WARRANT OFFICER - a warrant officer of the Armed Forces who holds a commission or warrant in warrant officer grades W-2 through W-4.

CIRCUMSTANTIAL EVIDENCE - evidence which tends directly to prove or disprove not a fact in issue, but a fact or circumstance from which, either alone or in connection with other facts, a court may, according to the common experience of mankind, reasonably infer the existence or nonexistence of another fact which is in issue; sometimes called indirect evidence.

CLEMENCY - discretionary action by proper authority to reduce the severity of a punishment.

COLLATERAL ATTACK - an attempt to impeach or challenge the integrity of a court judgement 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, including demanding of another to do an act towards commission of a crime.

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 in a situation where the initial enlistment was void but the enlistee unconditionally continues in the military and accepts military benefits.

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, lists the personnel of the court, such as members, counsel and military judge, 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.

COUNSELLING - directly or indirectly advising, recommending, or encouraging 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 deprive another person of something of value by cheating, deceiving, misleading, tricking, or causing that person to believe as true something which is false.

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.

DETENTION OF PAY - the temporary withholding of pay resulting from a court-martial sentence or nonjudicial punishment.

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 and 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.

GREVIOUS BODILY HARM - a serious bodily injury; does not include minor injuries, such as a black eye or a bloody nose, but does include fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs and other serious bodily injuries.

HABEAS CORPUS - "You have the body"; an order from a court of competent jurisdiction which requires the custodian of a prisoner to appear before the court to show cause why the prisoner is confined or detained.

HARMLESS ERROR - an error of law which does not materially prejudice the substantial rights of the accused.

HAZARD A VESSEL - to put a vessel in danger of damage or loss.

HEARSAY - an assertive statement, or conduct, which is offered in evidence to prove the truth of the assertion, but which was not made by the declarant while a witness before the court in the hearing in which it is offered.

IN CONCERT WITH - together with, in accordance with a design or plan, whether or not such design or plan was preconceived.

INCAPACITATION - the physical state of being unfit or unable to perform properly.

INCULPATORY - anything that implicates a person in a wrongdoing.

INDECENT - an offense to common propriety; offending against modesty or delicacy; grossly vulgar, or obscene.

INFERENCE - a fact deduced from another fact or facts shown by the state of the evidence.

INSANITY - see, MENTAL CAPACITY and MENTAL RESPONSIBILITY, infra.

INSPECTION - an official examination of persons or property to determine the fitness or readiness of a person, organization, or equipment, not made with a view to any criminal action.

INTENTIONALLY - deliberately and on purpose; through design, or according to plan, and not merely through carelessness or by accident.

IPSO FACTO - by the very fact itself.

JOINT OFFENSE - an offense committed by two or more persons acting together in pursuance of a common intent.

JOINT TRIAL - the trial of two or more persons charged with committing a joint offense.

JURISDICTION - the power of a court to hear and decide a case and to award an appropriate punishment.

KNOWINGLY - with knowledge; consciously, intelligently.

LASCIVIOUS - tending to excite lust; obscene; relating to sexual impurity; tending to deprave the morals with respect to sexual relations.

LESSER INCLUDED OFFENSE - an offense necessarily included in the offense charged; an offense containing some but not all of the elements of the offense charged, so that if one or more of the elements of the offense charged is not proved, the evidence may still support a finding of guilty of the included offense.

LEWD - lustful or lecherous; incontinence carried on in a wanton manner.

LOST PROPERTY - property which the owner has involuntarily parted with by accident, neglect, or forgetfulness and does not know where to find or recover it.

MATTER IN AGGRAVATION - any circumstances attending the commission of a crime which increases the enormity of the crime.

MATTER IN EXTENUATION - any circumstances serving to explain the commission of the offense, including the reasons that actuated the accused, but not extending to a legal justification.

MATTER IN MITIGATION - any circumstance having for its purpose the lessening of the punishment to be awarded by the court and the furnishing of grounds for a recommendation of clemency.

MENTAL CAPACITY - the ability of the accused at the time of trial to understand the nature of the proceedings against him and to conduct or cooperate intelligently in his defense.

MENTAL RESPONSIBILITY - the ability of the accused at the time of commission of an offense to appreciate the criminality of his or her conduct, or to conform his or her conduct to the requirements of the law.

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.

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 the superior right to possession of property in the light of all conflicting interests therein.

PAST RECOLLECTION RECORDED - memoranda prepared by a witness, or read by him and found to be correct, reciting facts or events which represent his past knowledge possessed at a time when his recollection was reasonably fresh as to the facts or events recorded.

PER CURIAM - "by the court"; a phrase used in the report of the opinion of a court to distinguish an opinion of the whole court from an opinion written by any one judge.

PER SE - taken alone; in and of itself; inherently.

PERPETRATOR - one who actually commits the crime, either by his own hand, by an animate or inanimate agency, or by an innocent agent.

PLEADING - the written formal indictment by which an accused is charged with an offense; in Military Law, the charges and specifications.

POSSESSION - actual physical control and custody over an item of property.

PREFERRAL OF CHARGES - the formal accusation against an accused by an accuser signing and swearing to the charges and specifications.

PREJUDICIAL ERROR - an error of law which materially affects the substantial rights of the accused and requiring corrective action.

PRESUMPTION - a fact which the law requires the court to deduce from another fact or facts shown by the state of the evidence unless that fact is overcome by other evidence before the court.

PRETRIAL INVESTIGATION - an investigation pursuant to Article 32, UCMJ, that is required before convening a GCM, unless waived by the accused.

PRIMA FACIE CASE - introduction of substantial evidence which, together with all proper inferences to be drawn therefrom and all applicable presumptions, reasonably tends to establish every essential element of an offense charged or included in any specification.

PRINCIPAL - (1) one who aids, abets, counsels, commands, or procures another to commit an offense which is subsequently perpetrated in consequence of such counsel, command or procuring, whether he is present or absent at the commission of the offense; (2) the perpetrator.

PROBABLE CAUSE - (1) for apprehension, a reasonable grounds for believing that an offense has been committed and that the person apprehended committed it; (2) for pretrial restraint, reasonable grounds for believing that an offense was committed by the person being restrained; and (3) for search, a reasonable grounds for believing that items connected with criminal activity are located in the place or on the person to be searched.

PROVOKING - tending to incite, irritate, or enrage another.

PROXIMATE CAUSE - that which, in a natural and continuous sequence, unbroken by an efficient intervening cause, produces a result, and without which the result would not have occurred.

PROXIMATE RESULT - a reasonably foreseeable result ordinarily following from the lack of care complained of, unbroken by any independent cause.

PUNITIVE ARTICLES - Articles 78 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 cancelling 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 IN LIEU OF ARREST - moral restraint, less severe than arrest, imposed 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.

RESTRICTION TO LIMITS - moral restraint imposed as punishment.

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.

SLEEP - a period of rest for the body and mind during which volition and consciousness are in partial or complete abeyance and the bodily functions partially suspended; a condition of unconsciousness sufficient sensibly to impair the full exercise of the mental and physical faculties.

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 an intentional 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, pay grades W-1 through W-4.

WILLFUL - deliberate, voluntary and intentional, as distinguished from acts committed through inadvertance, accident, or ordinary negligence.

WRONGFUL - contrary to law, regulation, lawful order or custom.

SECTION FIVE

COMMON ABBREVIATIONS USED IN MILITARY JUSTICE

SECTION FIVE

COMMON ABBREVIATIONS USED IN MILITARY JUSTICE

AAF	Accessory after the fact
ABA CPR	American Bar Association Code of Professional Responsibility
ABA Model Rules	American Bar Association Model Rules of Professional Conduct
ABF	Accessory before the fact
ACC	Accused
ADC	Assistant Defense Counsel
ALMAR	General message from the Commandant of the Marine Corps to all Marine Corps activities
ALNAV	General message from the Secretary of the Navy to all naval activities
ART.	Article, Uniform Code of Military Justice
ATC	Assistant Trial Counsel
BCD	Bad-Conduct Discharge
BOR	Board of Review
CA	Convening Authority
CBW	Confinement on Bread and Water
CC	Correctional Custody
CDO	Command Duty Officer
CG	Commanding General; Coast Guard
CH	Charge
CHL	Confinement at Hard Labor
CHNAVPERS	Chief of Naval Personnel
CID	Criminal Investigations Division
C.M.A.	United States Court of Military Appeals

CMC	Commandant of the Marine Corps
CMO	Court-Martial Order
C.M.R.	Court of Military Review; Court-Martial Reports
CNO	Chief of Naval Operations
CO	Commanding Officer
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
G	Guilty
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
Mil.R.Evid.	Military Rules of Evidence
NAVY REGS	U.S. Naval Regulations, 1973
N/A	Not Applicable
NMPC	Naval Military Personnel Command
NCO	Noncommissioned Officer
NG	Not guilty
NIPLOC	Nonpunitive Letter of Censure
NIS	Naval Investigative Service
NJP	Nonjudicial Punishment
NLSO	Naval Legal Service Office

NPM	Nonpunitive Measures
OEGCMJ	Officer exercising General Court-Martial Jurisdiction
OESPCMJ	Officer exercising Special Court-Martial Jurisdiction
OINC; OIC	Officer in Charge
OJAG	Officer of the Judge Advocate General
OOD	Officer of the Deck/Day
OPNAV	Office of the Chief of Naval Operations
OTH	Discharge under other than Honorable Conditions
PCS	Permanent Change of Station
PIO	Preliminary Inquiry Officer
PO	Petty Officer
PTA	Pretrial Agreement
PTI	Pretrial Investigation
PTIO	Pretrial Investigating Officer
R.C.M.	Rules for Court-Martial
RED	Reduction
REST	Restriction
SCM	Summary Court-Martial
SECNAV	Secretary of the Navy
SJA	Staff Judge Advocate
S/L	Statute of Limitations
SLO	Staff Legal Officer
SOFA	Status of Forces Agreement
SNCO	Staff Noncommissioned Officer
SP	Shore Patrol
SPCM	Special Court-Martial
SPEC.	Specification
SRB	Service Record Book

TAD	Temporary Additional Duty
TC	Trial Counsel
UA	Unauthorized Absence
UCMJ	Uniform Code of Military Justice
UPB	Unit Punishment Book
USC	United States Code
USCA	United States Code Annotated
U.S.C.M.A.	United States Court of Military Appeals
VA	Veterans Administration
WO	Warrant Officer
XO	Executive Officer

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