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BASIC MILITARY JUSTICE HANDBOOK

NAVAL JUSTICE SCHOOL
NEWPORT, RHODE ISLAND

MARCH 1976

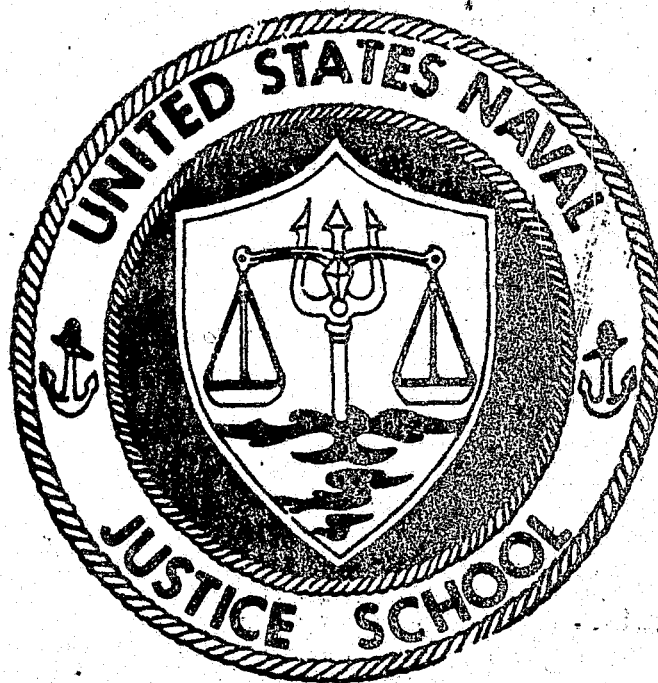
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**BASIC
MILITARY JUSTICE
HANDBOOK NCJRS**

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**NAVAL JUSTICE SCHOOL
NEWPORT, RHODE ISLAND**

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PREFACE

This publication is designed to simply explain the rather complex legal principles and procedures inherent in the military justice system in order to assist the commanding officer, executive officer, legal officer, and discipline officer 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, the publication should not be utilized without supplementary legal research.)

It should be noted that the Basic Military Justice Handbook is divided into five separate sections as follows: - -

<u>Section/Title</u>	<u>Divider Color</u>
Section One - Survey of Evidence for Nonlawyers,	White
Section Two - Basic Military Criminal Procedure,	Green
Section Three - Substantive Law Basic Study Guide,	Yellow
Section Four - Glossary of Words and Phrases, and	Green
Section Five - Common Abbreviations Used in Military Justice	Yellow

BASIC MILITARY JUSTICE HANDBOOK

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SURVEY OF EVIDENCE

FOR

NONLAWYERS

SECTION ONE

CHAPTER 1

INTRODUCTION TO EVIDENCE

SECTION ONE
SURVEY OF EVIDENCE FOR NONLAWYERS

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SECTION ONE

CHAPTER I

INTRODUCTION TO EVIDENCE

GENERAL. Acting much like a filter, the law of evidence operates to separate that evidence or information which is worthy of being placed before the triers of fact from information which has no place before these jurors. Obviously, this is a gross over-simplification, but it conveys the basic idea underlying the law of evidence.

Long ago, it was realized that a legal proceeding was one of the most important events in the lives of those who would 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, 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, but 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.

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 arm of the Federal Government, as would be expected, the basic source -- although not the primary source -- for evidentiary law 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 might try a criminal case, would derive 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. UCMJ, Article 36, 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 1969 (Rev.), (hereafter abbreviated MCM), as periodically revised. The latest revision to the MCM was Executive order 11835, 27 January 1975. Thus, the primary source of the rules of evidence is to be found in Chapter 27, MCM 1969 (Rev.), and it is here that the bulk of military evidentiary rules are set forth. In addition, other chapters of the MCM deal with matters related to the law of evidence.

The MCM, either in Chapter 27 or other chapters, could not interpret each point of the law relating to evidence. This is a continuing process. For that reason the Courts of Military Review and Court of Military Appeals, (hereafter abbreviated CMR and COMA respectively) were established to interpret points of law on particular issues. In effect, then, they have the function of making new laws 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 the CMR or COMA 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.

Yet another source of evidentiary law is found in rules of evidence followed in Federal District courts, or, when not inconsistent with such rules, the law of evidence as it existed at common law (unwritten law of a country based on custom, usage, and judicial decisions). See paragraph 137 of the MCM.

Lastly, 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 Navy Regulations, the Manual of the Judge Advocate General of the Navy, the Bureau of Naval Personnel Manual, and various orders and instructions; the decisions of State Courts; and, finally, scholarly works on evidence.

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

APPLICABILITY OF THE RULES OF EVIDENCE. In a particular trial, the rules of evidence may well determine whether or not the accused is convicted or acquitted. Without the rules of evidence, however, the outcome of trials would be left in doubt and would be inconsistent in their results. The courtroom would be a place of utter chaos. Thus, these rules, while some choose to call them "technicalities", are necessary for fairness both to the government and to the accused.

Para. 137, of the MCM makes its rules of evidence "applicable in cases before courts-martial. . .," but it does not address itself to offenses considered at the imposition of Article 15 nonjudicial punishment. Paragraph 133b(3) requires that the accused be advised of his rights against self-incrimination (Art. 31b) at mast or office hours. Since Article 15 punishment is "non-judicial", there is no requirement at present that the formal rules of evidence should apply. Nevertheless, in imposing nonjudicial punishment the Commanding Officer should assure himself that the information which provides the basis for imposition of nonjudicial punishment is reliable. The formal rules of evidence do apply to general, special, and summary courts-martial. Each stage of the court proceeding is controlled by the rules of evidence.

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

Besides the ultimate issue of guilt or innocence, there are other issues which will arise at trial. For example, one right of the accused is to have access to the files of the government that pertain 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 these files, the government may be prevented from introducing this information at trial.

Thus, without the law of evidence, the criminal trial as we know it would be a very disorderly proceeding. Without it, information received at trial would be unreliable and, many of the rights afforded an accused in a criminal proceeding would be denied.

THE FORMS OF EVIDENCE

Evidence can be divided into three basic categories: 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, he runs the danger of being prosecuted for perjury. There are, however, 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 a form of "oral" evidence from the standpoint of a broad definition of the term. Generally, witnesses will be able to relate what they actually observed, heard, smelled, felt, or experienced, either through oral testimony or by acting out what they know as a result of their sensory perception.

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 writing in evidence. Another example involves unauthorized absences. A servicemember absents himself from his command. In order to prove that he was absent from his command, the government introduces a service record entry from the accused's service record as proof of this fact.

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. While strictly speaking, there are three main forms of evidence, a 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 courts 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.

TYPES OF EVIDENCE. At trial, any form of evidence may be introduced. It is introduced to prove or disprove a fact in issue, but how do they do this? This is where the types of evidence are involved. All evidence will operate to prove or disprove a fact in issue, either directly or circumstantially. Direct evidence and circumstantial evidence may take any of the forms already discussed.

1. Direct Evidence. Evidence is directly 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 that he is the perpetrator of the alleged offense, is direct evidence that he did it.

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 only circumstantial evidence that he was ever 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.

ADMISSIBILITY OF EVIDENCE. Apart from the forms and types of evidence, is the subject of admissibility of evidence, with which, in fact, the remainder of this course will concern itself. When will certain matters be admitted into evidence? When will they not?

Admissibility depends on three factors: authenticity; relevancy (materiality); and competency. For evidence to be admissible, it must meet each qualification or test.

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 this, 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. Lastly, 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 numbers, 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. The certificate establishes that the document is what it purports to be. The judge may judicially recognize the fact that the authenticating certificate was in fact signed by the custodian. Once this is done, 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 (materiality). The term relevancy means that the information must reasonably tend to prove or disprove any matter in issue. The question or test here is, "Does the evidence aid the court in answering the question before it?"

Notice that the term, "materiality" is included after the term "relevancy". Essentially, in criminal law they mean about the same thing, and will be so considered in this text.

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 relevant material and not barred by any exclusionary rule. It is admissible as fit and appropriate proof in a particular case. Several other considerations bear on this determination.

a. Public policy First, the evidence sought to be introduced must not be contrary to public policy. The 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 counter-balancing 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, this concept acts to further certain relationships at the expense of excluding certain evidence, e.g., the husband-wife privilege precludes the calling of one spouse to testify against the other. Similar privileges protect the relationships of attorney-client and clergyman-penitent. There is no such protection afforded in military law to a doctor and his patient.

b. Reliability A second 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 inadmissible. The best evidence rule pertains to business record entries, and the rule states that the highest and best evidence of the business entry is the original. Unless it can be shown that the original is lost, destroyed, in the possession of the accused, or otherwise accounted for, the party desiring to produce and prove the contents of a business record must produce the original. These rules exist with one purpose in mind: evidence which is offered must be reliable.

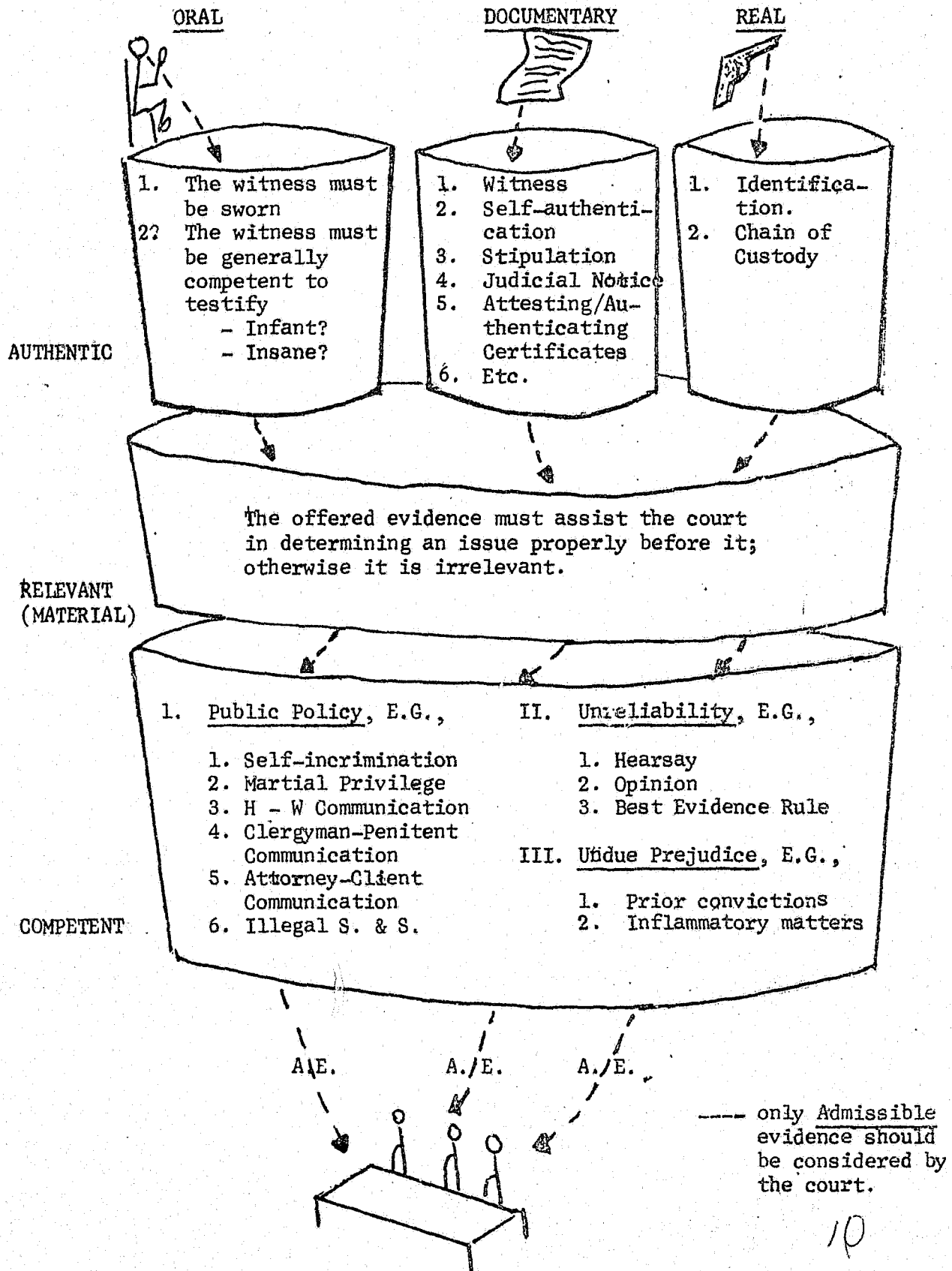
c. Undue prejudice. The third consideration with regard to competence rests in the area of undue prejudice. Here, such matters as prior convictions and inflammatory matters may not be received in evidence - to prove or disprove an issue at trial.

Therefore, competency is in fact a test of whether or not something is admissible, but, more than this, it is a matter of whether or not the evidence can meet three tests: public policy, reliability, and undue prejudice.

ADMISSIBLE EVIDENCE FILTERS

SECT ONE
CHPT I

Formula: $A + R + C = AE$



SECTION ONE

CHAPTER II

**ORIGINAL EVIDENCE, THE HEARSAY
RULE, AND THE EXCEPTION TO
THE HEARSAY RULE:**

A SURVEY

SECTION ONE

CHAPTER II

ORIGINAL EVIDENCE, THE HEARSAY RULE, AND THE

EXCEPTIONS TO THE HEARSAY RULE:

A SURVEY

GENERAL. By referring to the diagram in the previous chapter, it can be seen that hearsay is a factor which affects the competency of evidence. Without anything more, hearsay, standing alone, is unreliable, and courts cannot consider it. However, because much of the information which courts do consider falls within the area of exceptions to the hearsay rule, it will be our task to examine the nature of hearsay; to be able to distinguish between hearsay and original evidence; and to be able to identify and recognize exceptions to the hearsay rule. As a legal officer or a discipline officer, this is important because -- at least at the preliminary stage -- it will be you who advises your commanding officer on the evidence which is available against a particular accused. If the bulk of your evidence is composed of hearsay, and is not within any of the admissible exceptions to the hearsay rule, it might well preclude prosecution of a particular case or require consideration of administrative alternatives which may alleviate the necessity of complying with the hearsay rule.

How many times have discipline, legal, or commanding officers said, "Can't we just go (to trial) on sworn statements?" The answer is no, but the question would never have been asked had they understood the requirements of the hearsay rule.

HEARSAY AND ORIGINAL EVIDENCE

1. Hearsay. Hearsay may be defined as a statement which is offered in evidence to prove the truth of the matters stated therein, but which was not made by the author when a witness before the court at the hearing in which it is so offered. For example, A tells B that he (A) saw C shoot D. B attempts to repeat A's story as a witness in the prosecution of D. Immediately, opposing counsel will rise and object to B's testimony as hearsay. The author of the statement is A, but A is not the witness before the court. B could have misunderstood what A told him. Yet we are asked to accept what B says that A told him as the truth. The fundamental principle underlying the general rule (that hearsay shall not be admitted in evidence in a trial by court-martial) is the fact that in a criminal prosecution the law requires that the testimony of the actual witness -- A in this case -- be taken before the court. It must be taken before the court to ensure that at the time the testimony is given that the witness is sworn, he is available for cross-examination, he can be scrutinized by the court and the parties to the trial, and he is available to confront the accused.

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Remember, however, that a hearsay statement is one which is offered for the truth of the matter stated therein.

2. Original evidence. A statement introduced to show that it was made, and not for its truth, is original evidence. Like hearsay, original evidence can be in the form of a statement or an act which is equivalent to a statement (e.g., a nodding of the head, etc.), but there is one key difference. With original evidence, we are introducing a statement merely to show that it was made, not to prove the truth of that statement. For example, A and B are engaged in an argument. C overhears A say to B, "B, you are a sonofabitch." Here C could testify as to what he heard A tell B. Likewise, B could testify as to what A told him. Here, the parenthood of B is not in question. What we are trying to show is the fact that A made the statement. The fact of his making the statement might go to prove circumstantially that A was very angry at the time he made the statement. Para. 139 of the MCM provides additional explanation and examples.

EXCEPTIONS TO THE HEARSAY RULE. As a general statement, hearsay, because of its unreliable nature, is excluded from consideration by a court-martial. Yet, over the years, courts found that it was impossible to exclude all types of hearsay, since some types of hearsay were more reliable than other types. Therefore, exceptions to the hearsay rule developed. We will consider each of these exceptions briefly. These exceptions are:

- Confessions and Admissions
- Statements of conspirators and co-actors
- Spontaneous exclamations
- Statements of motive, intent, state of mind or body
- Dying declarations
- Business records
- Official records
- Past recollection recorded
- Depositions
- Former testimony

1. Confessions and Admissions. A confession is an out-of-court statement made by an accused which admits each and every element of the offense charged. An admission is an out of court statement made by an accused which may admit part of an element, an element, or more than one element of the offense charged, but which falls short of a complete admission to every element of the offense charged. Confessions and admissions are out of court statements introduced for the truth of the matters contained therein. They are hearsay, but while they are hearsay, they constitute one of the major exceptions to the hearsay rule.

Each year, a large number of convictions are made possible because of the existence of a confession or admission by the accused. Confessions and admissions are trustworthy because of their inculpatory nature, i.e., an accused would not admit to a crime or the elements of a crime unless his statement were true-- or at least this is one explanation which has been forwarded with regard to overcoming the problem of reliability.

Confessions and admissions are commonly known as "inculpatory" statements. Their content implicates the accused as the perpetrator of a crime. "Exculpatory" statements, on the other hand, are statements which would exonerate the accused of the wrongdoing. Normally, exculpatory statements (e.g., a denial of a particular wrong doing) are not admissible as exceptions to the hearsay rule. However, if the prosecution introduces the incriminating part of a confession or admission, the accused is entitled to offer the exculpatory or self-serving part of the confession or admission.

Under certain circumstances, silence may constitute an admission. For example, if a person makes an allegation against an accused under circumstances which required the accused to make a denial of the accuracy of the imputation, his silence will support an inference that he thereby admitted to the truth of the imputation. To illustrate this, suppose A is lying on the floor in a pool of blood and B is standing over A with a pistol in his hand. A's wife, C, enters the room and screams, "B, you have killed my husband." B says nothing but lowers his head and later begins to cry. B acquiesced in C's statement.

2. Statements of conspirators. A statement, including non-verbal conduct amounting to a statement, made by one conspirator during the conspiracy and in furtherance of it is admissible in evidence for the purpose of proving the truth of the matters stated against those of his co-conspirators who were parties to the conspiracy at the time the statement was made or who became parties to the conspiracy thereafter. To be admissible, the statement must have been made in furtherance of the conspiracy. However, often a confession by a co-conspirator is made only after the conspiracy is over. In such a case his confession is admissible only against himself. In such a case this confession is entirely inadmissible in a joint or common trial unless (1) references to the co-accused are deleted or (2) the maker of the statement is subject to cross-examination.

This exception to the hearsay rule applies only to statements made at the time of the conspiracy in furtherance of the conspiracy. C overhears A and B plotting their robbery of the First National Bank. C could relate their statements made as part of the conspiracy at B's trial. Likewise, A could relate B's remarks in pursuance of the conspiracy at B's trial.

3. Spontaneous exclamations. 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 the result of deliberation or design, is admissible as an exception to the hearsay rule to prove the truth of the matters stated. A spontaneous exclamation, to be admissible, requires independent evidence of the exciting, startling, or surprising event. However, it is not necessary that the act charged and the exciting, startling, or surprising event be one and the same.

To cite an example of a spontaneous exclamation, suppose A and B have engaged in a knife fight. B stabs A and leaves the scene. Immediately, C happens upon the scene and sees A lying in a pool of blood gasping "B stabbed me in the arm, call an ambulance." A's statement to C would qualify as a spontaneous exclamation. C could testify as to what A told him. Suppose two days after B stabbed A, A decides to report it to the police. A leisurely makes his way to the police station and says, "B stabbed me." This would not qualify as a spontaneous exclamation.

Usually, a spontaneous exclamation is made on the spur of the moment as part of a transaction or a reaction to an event. The opportunity for the declarant to reflect on what he is saying or to fabricate is minimal. Thus, the law of evidence will allow this type of hearsay in evidence as an exception to the rule because of the apparent reliability of the statement.

4. Statements of motive, intent, state of mind or body. If a statement is made under circumstances not indicative of insincerity and discloses a relevant and then existing motive, intent, or state of mind or body of the person who made the statement, evidence of the statement is admissible for the purpose of proving the motive, intent, or state of mind or body so disclosed.

To qualify under this exception, the statement must directly show the state of mind or body of the declarant. The state of mind or body or motive or intent must exist at the time the statement is made; it must be a "present" state which existed contemporaneously with the statement. This is true even though the act may be accomplished in the future. For example, A is heard to say, "I am going to 'get' B tonight." When A made the statement in the presence of C, C observed A brandishing his "Crowfoot" stainless steel switchblade knife and observed a twisted smile on A's face. This statement would be admissible to show A's intent with regard to the murder of B for which A is on trial.

With regard to the accused, several special rules apply to this exception. First, a statement of the accused which otherwise meets the requirements of this exception, is admissible whether it is favorable or unfavorable to the accused. Evidence of statements of the accused not made under circumstances indicative of insincerity and tending to show a consciousness of innocence on the part of the accused is admissible. This is true whether the statement of the accused was made before, during or after the alleged offense.

Statements of motive, intent, or state of mind or body when made by persons other than the accused are generally admissible as exceptions to the hearsay rule. However, where such statements -- made by the victim, for instance -- are accusatory in nature, they are not admissible. For example, suppose the victim said, "I'm not feeling well; I think A is poisoning my food." The accusation that the victim thought that A was poisoning the victim's food would be inadmissible. And note that such a statement does not qualify as a "spontaneous exclamation," as discussed above.

Suppose the statement which we wish to attribute to A was made by B. B's statement as to his state of mind, for instance, would be inadmissible unless A adopts it. For example, A says, "The CO is a SOB; somebody should throw him overboard." And B, who is present at this statement's uttering says "Yeah, that's for sure." Shortly thereafter the CO is thrown overboard and B is on trial for it. A's statement would be admissible against B because of B's acquiescence therein.

It must be remembered that whenever statements of motive, intent, or state of mind or body are sought to be admitted into evidence as exceptions to the hearsay rule, there must be a showing that they were made under circumstances not indicative of insincerity. In other words, under circumstances which would not indicate that the author fabricated the statements for some particular purpose other than to actually relate the motive, intent, or state of mind or body.

5. Dying Declarations. Statements made by the victim while in extremis and while under a sense of impending death are known as dying declarations, and they are admissible as exceptions to the hearsay rule in trials for homicide or for any offense resulting in the death of the alleged victim.

Suppose, however, that the offense did not result in the death of the victim. For example, A sees B steal his watch. A hurries over to tell CID, but on the way A is run over by an automobile driven by C. In the hospital, A knows that he is dying and makes a statement to that effect. He also states that B was the culprit who stole his watch. This is not a dying declaration because there is no immediate relationship between the death of the victim and the offense charged.

The introduction of a dying declaration must be preceded by an offer of proof that establishes the existence of those conditions that render the declaration admissible. This may include facts relative to the mental and physical condition of the victim, the nature and extent of wounds that make obvious the impossibility of survival, the declarant's own conduct and statements, and the receipt of the last rites of the church of his faith. However, there need not be a belief or apprehension of immediate and instant death. It is the "impression of the impending death" rather than the "rapid succession of death" that makes for admissibility.

Dying declarations must be complete statements. This does not mean that the declarant must state every element of the crime, but it does mean that the statement must be complete as far as it goes. For example, suppose the declarant could only utter the name of a friend and nothing more. From this, we would have no way of knowing if the friend killed the declarant or that the declarant simply wanted to have his friend by his side during his last moments. This is an incomplete statement.

The declarant does not have to personally make the statement or declaration. In some instances the declarant may be unable to speak; he may only be able to make some gesture such as blinking his eyes or nodding his head in response to questions posed by another person. However, in these situations, the actions of the victim will constitute dying declarations and will be admissible as exceptions to the hearsay rule. Remember that hearsay is not limited to verbal statements. Hearsay may be in the form of verbal communications, writing, or gestures -- in fact hearsay encompasses any form of communication.

6. Official Records. 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, is admissible as evidence of the fact or event, if it was made by any person within the scope of his official duties and 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. It may be inferred that a person who had the duty to make the record performed his duty properly, and once the official record, foreign or domestic, is properly authenticated, it may further be inferred that the above requirements are met.

In other words, once it is shown that the record is an official record and it has been properly authenticated, it may be inferred that it was properly made.

Official records may be made in many ways, and the word "writing" used in the definition of an official record refers to every means of recording data upon any medium: magnetic recordings; data cards; microfilm; etc.

It is important that we recognize that many records in the military have the character of official records. For example, service record entries -- UA entries -- may be viewed as official records; in a great number of courts-martial these entries are used to prove the absence of the accused. Likewise, a Shore Patrol Report is also an official record. However, in the case of the Shore Patrol Report it should be pointed out that this record is made with a view principally toward prosecution. Because it is made with a view principally toward prosecution, it may not be used as an exception to the hearsay rule. On the other hand, a UA entry in a service record is not made principally with a view toward prosecution. It serves to reflect a number of things: troop strength, entitlement for creditable service, entitlement for pay and allowances, a basis for determining whether a particular injury was incurred in the line of duty, etc. Thus, this entry which is required by service personnel manuals reflects much more than an offense report made for the purpose of prosecution.

7. Business Records. A business entry includes any writing on 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 and is admissible as evidence of the act, transaction, occurrence, or event, if made in the regular course of any business, provided it was the

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regular course of the business to make the memorandum or record at the time of the act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of the writing or record, including the lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but these circumstances will not affect its admissibility. Also, the term "business" can be any business, profession, occupation, or calling of any kind.

Strictly speaking, the government is one of the biggest businesses we have. Many entries, used on a daily basis by the military, are business entries (service record entries, travel claims, personnel claims, etc.).

With regard to both business entries and official entries, each is made in the normal course of events, and, as such, they are considered to be trustworthy. Even though the person actually making an entry (e.g., a clerk, personnelman, keypunch operator, etc.) may not have personal knowledge of the fact or event recorded, established procedures for recording this information guarantee its accuracy. In other words, the source of the information itself is reliable so long as the entries are made in conformance with the requirements for official or business records. There are times when a document which should be an official record but cannot so qualify is admissible as a business record. For example, assume that the regulations require that service record book entries be signed by the CO with his name typed below the signature. But CDR A, the CO, always just types his name on them. In all other respects the entries are correct, and he always does it this way. These entries would not be admissible as official records because not prepared in accordance with applicable regulations, but they would be admissible as business records.

8. Past Recollection Recorded. In some instances, a person may witness an event and record the facts from his own knowledge. Later, when the same person is called upon to testify at a trial, he will have forgotten some or all of the facts which he originally observed and recorded. From his own memory, the witness will be unable to recall the facts and events he observed no matter how hard he tries. Even looking at the facts and events he recorded at the time of the incident or shortly thereafter will not serve to refresh the witness' complete recollection. This would be particularly true where, for instance, the witness observed something bearing the serial number 24356876245764323456MXK. No matter how hard he tried, he would be unable to recall this identifying number unless he had a photographic memory.

Paragraph 146 of the MCM allows the introduction of this information in the form of memoranda, provided the witness is able to testify that, at the time of his making the memorandum, it represented his knowledge at a time when his recollection was reasonably fresh as to the facts or events recorded. Further, it must be shown that the witness is unable -- even after attempting to refresh his recollection from the memorandum -- to recall the facts or events completely. However, there need not be a total failure of the witness' memory in order to qualify the memorandum for introduction into evidence. Further, the witness need not have made the

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memorandum himself, but, if he did not make the memorandum, it must be shown that the witness found the memorandum to be correct at a time when his recollection was reasonably fresh as to the facts or events recorded.

9. Depositions. A deposition is the testimony of a witness in response to questions submitted by the party desiring the deposition and by the opposite party, which is reduced to writing and taken under oath before a person empowered to administer oaths. Depositions normally are taken to preserve the testimony of witnesses whose availability at the time of the trial appears uncertain. The qualifications of counsel and the rights of the accused to counsel for the taking of a deposition are the same as those prescribed for trial by the type of court-martial before which the deposition is to be used. The accused and his counsel, with whom he has established an attorney and client relationship, shall be present at the taking of any deposition unless the accused consents to the taking of the deposition in the absence of himself, his counsel, or both.

Depositions are an exception to the hearsay rule. The witness is under oath, and both counsel and the accused have a right to be present. However, there is one significant difference between the testimony of a witness at a deposition and the testimony of a witness in court. This difference is the fact that the members of the court and the judge will be unable to observe the witness. This may be very important, particularly in view of the fact that a witness' personal demeanor in court may be closely linked to his worthiness of belief.

When it appears that a witness will be unavailable, many commands will make the easy observation, "Then why not take depositions?" Article 49(d)(1) of the UCMJ provides that a deposition may be taken where it appears that a witness resides beyond the State, Territory, Commonwealth, or District of Columbia in which the court, commission, or board is ordered to sit, or beyond 100 miles from the place of trial or hearing. However, notwithstanding this provision, COMA has stated that to allow Article 49(d)(1) to control the admissibility of depositions might result in their routine admission in many courts-martial in derogation of the principle that depositions are an exception to the normal rule of live testimony. In other words, depositions are an exception to the rule that the witness must be produced. The right of confrontation -- the right to have a witness present in court and to meet him face to face -- is an essential right guaranteed by the Constitution. Depositions are allowed only in cases of extreme necessity. Thus, the easy answer of taking depositions, while a well recognized exception to the hearsay rule, is not as easy as it might seem. This accounts for the fact that depositions are used only sparingly, particularly if the defense has interposed an objection to their use.

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10. Former Testimony. Where a witness has testified at any trial by court-martial or civilian proceeding where the issues were substantially the same, this testimony given at the prior proceeding may, when properly proved and established to be otherwise admissible, be received in evidence at a subsequent court-martial where it appears that the witness is dead, insane, or too ill or infirm to attend the trial; that the witness is not amenable to process or not otherwise available to testify at the trial; or that military necessity prevents the witness from being available at trial. Former testimony is an exception to the hearsay rule. Additional requirements for the introduction of former testimony include an opportunity on the part of the accused to be adequately represented by counsel and to confront and cross-examine the witness. Also, former testimony given at a preliminary judicial hearing, such as an investigation conducted under Article 32, UCMJ, of an allegation against the accused is admissible under the same conditions as testimony given at a former trial of the accused.

Again, former testimony is admissible in only a limited number of situations, and, for that reason, it is not widely used in trial by courts-martial. Nevertheless, it constitutes an exception to the hearsay rule.

There are other exceptions to the hearsay rule, however, the foregoing constitute the major exceptions. From the above, it is apparent that not all hearsay is inadmissible. However, when considering whether or not a case should be referred to trial, one cannot be too careful to take stock of the available evidence to determine if sufficient admissible evidence exists to warrant referral. In this regard, it is important to know what is and what is not admissible.

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SECTION ONE
CHAPTER III
ARTICLE 31
OF THE CODE
AND THE
RIGHT TO COUNSEL

SECTION ONE
CHAPTER III

ARTICLE 31 OF THE UCMJ AND THE RIGHT TO
COUNSEL

ARTICLE 31 OF THE UNIFORM CODE OF MILITARY JUSTICE.

1. Text.

Art. 31. Compulsory self-incrimination prohibited

(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. From the text of Article 31 of the UCMJ, four important points can be gleaned. First, section (a) of Article 31 prohibits any person subject to the UCMJ from compelling any other person to incriminate himself. Secondly, section (b) requires persons subject to the UCMJ to give a specific warning to an accused or suspect before interrogating him. Section (c) proscribes compelling witnesses to produce evidence that is not relevant and which is degrading. Finally, section (d) gives added protection in the form of excluding from consideration by a court-martial any evidence obtained in violation of sections (a), (b), or (c) or as the result of coercion, unlawful influence, or unlawful inducement.

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Under certain circumstances, is the production of a liberty card or pass protected by Article 31(b)? Can a Chief who suspects a service member of having marijuana in his pocket ask him to produce what is in his pocket? Can a service member suspected of using drugs be required to produce blood or other body fluids if these fluids will be used in a court-martial? In each case, the appellate court system in the military has decided that these acts are entitled to the protection of Article 31(b). We shall see why presently.

3. Rationale for Article 31. Article 31 is neither new, nor the product of a conspiracy by military lawyers to impede the efficient operation of a command. "There is some evidence of the privilege (against self incrimination) in early colonial America. . . /T/he privilege in regard to an accused was fairly well established in the New England colonies before 1650 and in Virginia soon after. In any case, it was inserted in the constitutions or bills of rights of several American states before 1789. . ." E. W. Cleary, McCormick's Handbook of the Law of Evidence 247 (2d ed. 1972).

Subsequently, the self-incrimination provision was incorporated in our Fifth Amendment: "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

Thus, Article 31 has been "handed down", so to speak, and for good reason. The object behind our entire criminal system is to do justice, and in this context public policy demands that the government prove the individual guilty, not that the individual prove himself innocent. Given the proper set of conditions, any individual might be compelled to confess to a crime for which he is blameless. However, this would only result in a system in which there was no justice -- a system so arbitrary that it would lack any public support and would depend on force rather than respect for its existence. Such a system would be doomed to failure.

In the military system, Article 31 provides a definite standard and set of rules which govern the admissibility of confessions and admissions.

4. To which interrogators does Article 31 apply? The warning requirements contained in Article 31(b) require a "person subject to this chapter /UCMJ/" to advise an accused or suspect properly prior to conducting an interrogation or requesting any statement from him. The term "person subject to this chapter", has been the subject of some confusion. Basically, all military personnel, when acting for the military, must operate within the framework of the UCMJ. Thus, where a naval officer who operated a music store was told to be on the lookout for stolen accordions, COMA held that the officer (on active duty) had a duty to "warn" naval personnel who came into his music store (seeking to sell what he believed were the stolen accordions) before questioning them.

Whether viewed from the standpoint of the accused or that of his interrogator, it is obvious that Lieutenant Gallagher was under a duty to advise both sailors of their rights under Article 31, prior to questioning them concerning the stolen musical instrument. "He was a person subject to this chapter interrogating an individual whom he 'suspected of an offense'. In fact, it is patent from his testimony... that

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Lieutenant Gallagher conversed with the accused and his companion for the express purpose of obtaining incriminating admissions from them." United States v. Souder, 11 USCMA 59, 61, 28 CMR 283, 285 (1959).

On the other hand, when military personnel are acting in purely private capacities, no warning is required. Therefore, where a service member seeks to obtain his own property stolen by another, by questioning the thief, also a service member, no warning is required. However, the provisions of Article 31(d) are still applicable, even in these circumstances, if coercion, unlawful influence or unlawful inducement are involved.

Since the Naval Investigative Service, although manned by civilian investigators, is, like the Marine Corps' Criminal Investigation Division an extension of the military operating pursuant to military direction and control, both NIS and CID are required to administer Article 31(b) warnings prior to interrogating or questioning a military accused or suspect. When they are agents of the military, other civilian investigators and base security police also fall within the same rule which applies to NIS and CID; they must warn an accused or suspect of his Article 31(b) rights. Additionally, Article 8 of the 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 the FBI's apprehending deserters, COMA has specifically held that no Article 31(b) warning was required prior to apprehending a suspected deserter. The following language from that case is illustrative of the law in this area:

"FBI agents who are apprehending deserters are not required to warn them of their rights under Article 31, UCMJ." U. S. v. Temperley, 22 USCMA 383, 47 CMR 235 (1973). A close look at this case is necessary to see precisely what is authorized. All that COMA allowed to be done was to ask the ultimately accused person questions about his identity without advising him of rights 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 did go on to say, however, that when they have taken the individual into custody or otherwise deprived him of his freedom of action in any significant way then appropriate warnings must be given. The warnings required are discussed in this chapter under the heading "The Right To Counsel."

Thus, the present state of the law with regard to both the Federal Bureau of Investigation and domestic civilian law enforcement officers is that they are not required to give an Article 31(b) warning prior to questioning a military man suspected of a military offense so long as they are not acting directly for the military. It should further be noted that situations arise where a service member may be investigated by both Federal

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authorities and military authorities jointly. However, merely because a parallel set of investigations are being conducted through cooperation by military and Federal authorities does not make one the agent of the other. Thus, no Article 31(b) warning will usually be required by FBI unless they act directly for the military.

With regard to foreign civilian authorities, how does the Article 31 apply, if at all? Case law indicates that in this area, also, unless foreign authorities are acting as agents of the military, no Article 31(b) warning is required.

As a general proposition the military cannot eliminate the requirements of Article 31 by using an agent or an informant to do that which cannot be done directly. Consequently an informer could not be used to actively interrogate a suspect or accused without the giving of warnings. But an informer can be placed in a position to observe or listen and then report what he saw. For example, an informer could be placed in a cell with the accused. If the accused then makes admissions to the informer, without interrogation by the informer, such admissions would not be seen as having been obtained in violation of Article 31. It is only when interrogation begins that Article 31 is activated. Similarly, statements made by the accused to an undercover agent while in a waiting room at a NIS office were admissible into evidence. The record showed that the statements were freely made and he was not questioned but made the statements after the agent engaged him in conversation by pretending to be a criminal engaged in activities similar to that of the accused. U. S. v. Hinkson, 17 USCMA 126, 37 CMR 390 (1967).

5. Who must be warned? Article 31(b) requires that an accused or suspect be advised of his rights prior to questioning or interrogation. To determine if a person is an accused, usually it is a simple matter of determining if charges have been preferred against him. If so, he is an accused. On the other hand, to determine when a service member is or is not a suspect is more difficult. The test applied in this situation is whether or not suspicion has crystallized to such an extent that a general accusation of some recognizable crime can be formed. This test is objective; that is, courts will review the facts available to the interrogator to determine whether or not the interrogator should have suspected the service member, not whether he in fact did. Rather than speculate in a given situation, it is preferable to warn a potential suspect of his Article 31(b) rights before attempting to interrogate him. As COMA has recently said, a "suspect's rights to silence under Article 31(b) does not depend on whether he is guilty; it depends on whether he is a suspect."

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 which he has violated? There is no necessity to advise a suspect of the particular article violated, but it is necessary to accurately advise him of the offense or at least the area of inquiry such that he understands what it is he is being questioned about. 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

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Jones of a specific article of the UCMJ, it would be perfectly acceptable 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 do not incriminate or tend to incriminate him. Rather, the right to remain silent is a complete 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 USCMA 430, 9 CMR 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 contain a caveat to the effect that any statement made by the accused or suspect may be used in evidence against him in a trial by court-martial. In one older case, the interrogator merely advised the accused that anything which the accused said could be used against him. The words, "in a trial by court-martial", were omitted. COMA held that this was not error, reasoning that the advice was really 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, and many convictions have been reversed merely because the interrogator attempted to advise an accused or suspect "off the top of his head". The best practice is to utilize the form designed for this purpose supplied by the Judge Advocate General of the Navy.

9. Timing. As soon as an interrogator has reason to suspect a service member of an offense, the service member must be warned. To question a service member without warning him of his rights, then to subsequently advise him of his rights, will not make his admissions or confession admissible. Likewise, once an accused or suspect has made a confession or admission without being advised of his rights (or after being incorrectly advised of his rights) followed by a subsequent (proper) warning, any confession or admission he makes may well be inadmissible. Why? Initially, the service member suspect has made a statement without being advised of his rights. This is termed an "involuntary" statement. Next, he is advised of his rights, then makes 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 service member did not say to himself, "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 his first statement could not be used against him. Thus, the second statement, although preceded by a warning, in all probability will be inadmissible. In order for it to be admissible, the

trial counsel must make a clear showing that the second statement was not influenced by the first. Hence, it is essential that all interrogation or questioning of a suspect be preceded by appropriate warnings. This will eliminate the problem.

Another problem in this area concerns the suspect who has committed several crimes. The interrogator may know of only one of these crimes, and properly advise the suspect of his rights with regard to the known offense. During the course of the interview with the interrogator, the suspect relates the circumstances surrounding his desertion (the offense which the interrogator has warned the accused). In addition, however, the suspect tells the interrogator that while he was in a desertion status he stole a military vehicle. As soon as the interrogator becomes aware of the additional offense, he must advise the suspect of his rights with regard to the theft of the military vehicle before interrogating him concerning the additional violation.

If the interrogator does not follow this procedure, statements with regard to the desertion will be admissible but statements concerning the theft of the military vehicle which are given in response to interrogation regarding the theft must 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 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 his recollection or notes. If written, the statement of the accused or suspect may be introduced in evidence by the prosecution. Lawyers have represented many clients who at the NIS Office, 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, the clients will usually respond, "No, I did not make a statement; I told the agent what I did, but I refused to sign anything." Provided the suspect or accused fully understood his right to counsel and right to remain silent and was fully advised of his Article 31(b) rights, an oral confession or admission is just as valid for a court's consideration as a writing. If the confession or admission is in writing and signed by the accused, the accused is hard put to deny the statement or attribute 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 will sign it.

Apart from the words of the suspect or accused, other actions also amount to statements. At the outset of this chapter, several questions were posed. "Under certain circumstances, is the production of a liberty card or pass protected by Article 31(b)?" "Can a Chief who suspects a service member of possessing marijuana ask him to produce what is in his pocket? Each of these cases constitute "acts" on the part of a suspect which amount to "admissions." An example will serve to illustrate this:

In United States v. Nowling, 9 USCMA 100, 25 CMR 363 (1958), the

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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. COMA 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. (25 CMR at 364) 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 CMR at 365)

Essentially the same situation occurred in United States v. Corson, 18 USCMA 34, 39 CMR 34 (1968), except there the accused was suspected of possessing marijuana and 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.

Frequently, during the conduct of searches, a suspect may be asked to point to his locker or to identify an item of clothing. If, as indicated, the serviceman 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.

11. Body fluids. In essence, the same rationale which has been applied to equivalent acts has also been applied to the taking of body fluids. Thus, the law is that the taking of blood, urine, and other body fluids requires an Article 31(b) warning to the effect that the suspect is suspected of a specific crime; that he does not have to produce the body fluid requested; and that if he does produce the fluid it can be subjected to tests, the results of which may be used against him in a trial by court-martial. U. S. v. Ruiz, 23 USCMA 181, 48 CMR 797 (1974).

This situation is to be distinguished from those in which a physician orders the taking of body fluids for medical purposes. There, test results may be used in a criminal trial under the theory that the incriminating evidence was discovered incident to a good faith medical examination.

To compel a suspect to display scars or injuries, try on clothing or shoes, place his feet in footprints, or submit to fingerprinting does not require an Article 31(b) warning, and a suspect does not have the option of refusing to do these acts. The reason for this rests in 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.

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12. Applicability to nonjudicial punishment (Article 15) hearings.
Paragraph 133(b) of the Manual for Courts-Martial provides, in part:

When the mast or office hours procedure is followed,
the accused will be accorded a hearing which shall
include the following elemental requirements:

* * * * *

(3) Explanation to the accused of his rights
under Article 31(b) of the Uniform Code of Military
Justice.

Clearly, an Article 31(b) warning is required. Thus, if the accused is going to be interrogated at the Article 15 hearing, he has the rights provided by Article 31 and he may elect to exercise them. Accordingly, he need not give any statement. Additionally, he may desire to give a statement only with counsel present. If this is the posture of the case, the Article 15 hearing officer has only limited options. He may complete the hearing without a statement by the accused, or he may recess the hearing to be continued when counsel is provided the accused.

However, as a general rule, at the Article 15 hearing, lawyer counsel is not required. Article 15 presupposes that the officer imposing non-judicial punishment will afford the service member an opportunity to present matters in his own behalf. What Article 15 contemplates is that evidence will be presented against the "accused" and that the "accused" will be afforded an opportunity to question any witnesses against him and examine any relevant documents; after this has been completed, the "accused" should be afforded an opportunity to present any matters which he desires. This can be done by asking the "accused", "Is there anything you would like to say concerning the charge or the matters presented, "and not by conducting an interrogation of the "accused" at Article 15.

13. Understanding the Article 31(b) warning. At trial, the admissibility of the confession or admission will initially depend on whether the government is able to demonstrate that the accused, before making his confession or admission to interrogators, understood his rights. This can be done by placing the interrogator or other witnesses on the witness stand to testify concerning what the accused was told. They may also testify as to what the accused told them regarding his (the accused's) understanding of his rights. If a written advice and waiver of his rights is available, it too may be introduced in evidence to show what the accused saw, possibly read, and signed. This evidence does no more than to show circumstances from which the court could conclude that the pretrial statement of the accused was in compliance with Article 31 and was otherwise voluntary.

The defense may introduce evidence to the effect that the warnings were not properly given, the accused did not understand or waive them, or other factors indirectly not in compliance with Article 31(b). The defense may make a further showing that the confession was not in fact voluntary as required by Article 31(d).

14. The Article 31(b) warning. Article 31(b) consists of the following elements. The suspect or accused must be advised:

- (a) of the nature of the offense or offenses of which he is accused or suspected;
- (b) that he has a right to remain silent; and
- (c) that any statement made by him may be used against him in a trial by court-martial.

Apart from a suspect or accused's Article 31(b) rights, a service member in a custodial situation must be advised of additional rights. These are known as his Miranda/Tempia rights, or the rights to lawyer counsel. These lawyer counsel rights will be discussed in the latter part of this chapter, but they include:

- (a) the right to consult with a lawyer and to have a lawyer present with the suspect or accused during questioning;
- (b) the right to retain (hire) a civilian lawyer at his own expense; or, if the suspect or accused wishes, the right to have a military lawyer appointed for him at no cost to him,
- (c) the right to terminate an interview or interrogation at any time for any reason. (Of course, the exercise of any of the rights above could operate to terminate the interview.)

The following excerpt from the Manual of the Judge Advocate General of the Navy, Appendix 1-n, contains both the suspect or accused's Article 31(b) rights, his right to counsel, and a statement indicating that the suspect or accused understands these rights and has chosen to waive these rights. It is essential that these rights be read to the suspect or accused, that they be explained to him, and he be given ample opportunity to read them for himself before signing his acknowledgement and waiver (if this is his desire) and before making any statement or answering any questions. *Appendix 1-n should be used whenever possible.

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THE RIGHT TO COUNSEL

1. Miranda-Tempia, the right to counsel. Rather than discuss the factual situations in Miranda v. Arizona, 348 U.S. 436 (1966), and United States v. Tempia, 16 USCMA 629, 37 CMR 249 (1967), it is enough to say that a military suspect or accused in a custodial situation must be advised of his right to counsel which, specifically stated again, is 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; or, if you wish, Navy or Marine Corps authority will appoint a military lawyer to act as your counsel without cost to you."
- b. "You have the right to have such retained civilian lawyer or appointed military lawyer present during this or any other interview."

If the suspect or accused requests counsel, all interrogation and questioning must immediately cease until counsel can be obtained.

2. Custodial interrogation. While "custody" might imply the "jail house" or "brig", the courts have interpreted this term in a far broader sense. A deprivation of one's freedom of action in any significant way constitutes custody for the purpose of the counsel requirement. Suppose Private Fuller is taken before his commanding officer, Colonel Sparks, for questioning. Private Fuller is not under apprehension or arrest; furthermore, no charges have been preferred against him. Colonel Sparks proceeds to question Private Fuller concerning a broken window in the former's office. Colonel Sparks has been informed by L/Corporal Jenks that he saw Private Fuller toss a rock through it. Here, certainly Private Fuller is suspected of damaging military property of the United States. In this situation, with Private Fuller standing before his commanding officer, it should be obvious that Private Fuller has been denied his freedom of action to a significant degree. Hence, Colonel Sparks would be required to advise Private Fuller of his right to lawyer counsel (and, of course, his Article 31(b) rights). If he does not, Private Fuller's statement that he did break the window would be inadmissible in his forthcoming court-martial.

Likewise, where a suspect is summoned to the NIS office for an interview with NIS agents, this constitutes custody.

Suppose that a service member 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 service member was not being questioned about the offense for which he was incarcerated, he is considered to be in custody; hence, advice as to lawyer counsel is required.

One further situation should be addressed before moving on. What of the service member who seeks his commanding officer, executive officer, or legal officer and wants to have a "heart to heart" talk concerning the \$2,000.00 he "ripped off" from the Disbursing Officer's safe?

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

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 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; -----

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

WAIVER OF RIGHTS

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

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

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

A-1-n(1)
Change 4

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(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; -----

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(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. -----

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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 4

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The general rule is that the law does not require that one who "walks into a police station seeking to confess" to be stopped. So long as the CO, XO, or legal officer does not interrogate or question the individual, an Article 31(b) warning and advice as to lawyer counsel rights may not be required. However, complete warnings are strongly recommended. Each case is decided on its own facts and merits. A warning in this situation will serve to remove any question concerning the propriety of the officer's actions and virtually guarantee the admissibility of the pretrial statement of the accused. It is clear that once the individual has done his talking and the listener seeks to interrogate further that Article 31 warnings are required in this situation.

3. The prosecution's burden. The prosecution has the burden of affirmatively establishing that the accused was advised of his rights. In one case, the prosecution, on appeal, argued that it was not necessary to advise the accused of his right to counsel because he had received this information as part of his training when he initially entered the military. The conviction was reversed with a holding that there is no presumption that a suspect or accused understands his rights based on prior training or indoctrination. Additionally, he could not during such training, be advised of the offense of which he is suspected, as required by Article 31.

4. Understanding of the right. While it is true that the form of any warning or advice as to rights is not the essential factor which the courts will consider in determining its sufficiency, deviating from a sufficient statement of rights, such as that found in Appendix 1-n of the Manual of the Judge Advocate General of the Navy, the interrogator runs the risk of giving an incomplete or incorrect warning.

Several examples will serve to illustrate this. 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."

In each case, it was held that the warnings or advice was insufficient to convey to the suspect or accused his right with regard to lawyer 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.

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FACTORS AFFECTING VOLUNTARINESS. These factors discussed below may affect the admissibility of a confession or admission. For instance, it is quite possible to completely advise a person of his rights and secure a confession or admission which is completely involuntary merely because of something which 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: clearly a threat. After being fully advised, a suspect is told that there was practically no evidence against him, but the charges would have to be referred to trial if he did not choose to make a statement: a threat or promise.

When confronted with the situation of being asked by an accused or suspect "What will happen to me if I don't make a statement," the reply should be truthful: "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 have to 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. It should be obvious that physical force will operate to invalidate a confession or admission. Consider, however, 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 properly 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 it is not if A were in fact influenced by the previous beating received at the hands of C notwithstanding the fact that X knew nothing about this. See Article 31(d).

3. Prolonged confinement or interrogation. Duress or coercion may 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. Therefore, no firm solution, only good judgment, should provide the answer in each case.

4. "Fruit of the Poison Tree". The "primary taint" is the initial violation of the accused's right. And the evidence which is the product of the exploitation of this taint is labeled "fruit of the poisonous tree." Characterized by this term is the question of whether the evidence to which an objection is now being made has been obtained by the exploitation

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of a violation of the accused's Article 31 rights or rights under the law of search and seizure, or instead, the evidence has been obtained "by means sufficiently distinguishable to be purged of the primary taint."

Thus, if Private Jones is found in possession of one ounce of marijuana in his pocket and interrogated without being advised of his Article 31(b) rights and confesses to the possession of three tons of marijuana in his parked vehicle located on base, the three tons of marijuana as well as Private Jones' confession will be excluded from evidence. The reason: the three tons of marijuana was discovered as a result of the exploitation of 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, according to his in court testimony, he was told that "they had the goods on him" and showed him the marijuana which was found in his locker. This confession is not admissible because it was the result again of exploitation of unlawfully obtained evidence.

When the reader 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. However, on the basis of his training, a lawyer's professional opinion founded on experience and research will provide the best available answer to difficult questions which arise daily.

SECTION ONE

CHAPTER IV

SEARCH AND SEIZURE

SECTION ONE
CHAPTER IV

SEARCH AND SEIZURE

SOURCES OF THE RULES CONCERNING SEARCH AND SEIZURE

1. CONSTITUTION: The basic protection against unreasonable searches and seizures is to be found in the Fourth Amendment to the United States Constitution:

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.

At the outset, it should be noted that only unreasonable searches and seizures are proscribed. To a large measure, the concept of unreasonableness rests upon whether or not the individual conducting the search exceeded his lawful authority. For example, suppose a police agent was authorized to search for a stolen typewriter in the house of John Jones. The agent goes through the personal letter file of John Jones and discovers an envelope containing heroin. Clearly, the agent has exceeded his lawful authority by "fishing" through Jones' private papers. He was searching in a place in which it was unreasonable to believe the item for which he was searching might be found.

The next important aspect of this constitutional provision centers about the term "probable cause". The essence of probable cause is facts which taken together may provide the foundation or basis for the search.

Finally, embodied in the Fourth Amendment is the concept of particularity. Particularity operates to limit the scope of the area to be searched and the items to be searched for.

Reduced to its simplest terms, a civilian search warrant is a written document. It is based on a sworn statement of facts made under oath by an individual before a magistrate. These facts relate to matters known to the individual which will serve to justify the magistrate's ordering a search. If the magistrate is convinced that a search is justified, he will issue a warrant or authorization for a search. The following sketch provides an example of a civilian search warrant:

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Affidavit for Search Warrant

FULTON SUPERIOR COURT

GEORGIA, FULTON COUNTY

The undersigned being duly sworn deposes and says:

That on 12 January 1976 at approximately 2:00 p.m. deponent witnessed John Curry Williams take into room 114 at the Atlanta Plaza Hotel, 102 Flag Street, Atlanta, Fulton County, Georgia, approximately one pound of a substance believed to be marijuana. Further, that deponent has ascertained from the room clerk at the Atlanta Plaza Hotel that room 114 is currently occupied and let to the said John Curry Williams. Further, that at approximately 2:10 p.m. on said date the deponent purchased one ounce, more or less, of the said substance believed to be marijuana from the said John Curry Williams. That deponent has examined the substance and, based on his experience, he believes it is marijuana.

Deponent makes this affidavit for the purpose of securing the issuance of a Search Warrant for the premises known as room 114, Atlanta Plaza Hotel, 102 Flag Street, Atlanta, Fulton County, Georgia, and the person and the personal possessions of the said John Curry Williams, and any other individual who may be present in said room or occupying the said described premises at the time said Search Warrant is executed.

/s/ Joseph M. Walsch
Detective First Class
Narcotics Division
Atlanta Police Department

Sworn to and subscribed to before me this 12th day of January 1976.

/s/ Jack R. Cobb
Judge, Superior Court
Fulton Judicial Circuit

Search Warrant

FULTON SUPERIOR COURT

GEORGIA, FULTON COUNTY

TO: DETECTIVE JOSEPH M. WALSCH and any other legally constituted officer.

Affidavit having been made before me by DETECTIVE JOSEPH M. WALSCH that he has reason to believe that on the person and personal possessions of John Curry Williams and any other person present upon the premises herein-after described, or occupying the premises known as room 114, Atlanta

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Plaza Hotel, 102 Flag Street, Atlanta, Fulton County, Georgia, and on said premises is located one pound, more or less, of marijuana, which is contraband under the laws of the State of Georgia, and which is subject to search and seizure, and I am satisfied that there is probable cause to believe that the property so described is being concealed on the person and premises above described and that the foregoing grounds for application for issuance of the search warrant exists. You are hereby commanded to search forthwith the person and premises named for the property specified, and making the search in the daytime, and if the property be found there to seize it, leaving a copy of this warrant, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days to this date, as required by law.

This 12th day of January 1976; at 2:45 o'clock P.M.

/s/ Jack R. Cobb
Judge, Superior Court
Fulton Judicial Circuit

In some states, a "return" is required on a warrant. The "return" is a sworn statement to the effect that the search was conducted in a proper manner and that a list of the described items were seized.

2. Manual for Courts-Marital. In the military, while the same facts stated in the affidavit would have to be related to the commanding officer (acting as the magistrate), and the commanding officer's authorization to conduct the search would be required, there is no requirement that the matters presented to the commanding officer be under oath, that they be in writing, or that there be a return, as such, of the items seized. Notwithstanding the absence of the requirements, Appendix 1-1 of the JAG Manual and JAG Manual, Sec. 0148, provide for the military equivalent of a civilian search warrant. Appendix 1-1 has been reproduced in this text for instructional purposes.* Its use by the commanding officer or person designated to authorize searches is optional with the command.

Paragraph 152 of the MCM provides that evidence obtained as a result of an unreasonable search or seizure of the person or property of the accused or suspect by one acting under the authority of any governmental unit within the United States or its territories is inadmissible as evidence in a trial by court-martial. As previously noted, this provision contains the same guarantees found in the Fourth Amendment with the exceptions noted. Not infrequently, the military's appellate judiciary will talk in terms of the Fourth Amendment rather than the MCM's paragraph 152 in its decisions. Nevertheless, it is paragraph 152 which is the military's equivalent of the Fourth Amendment, and every commander, executive officer, legal, and discipline officer should have a working knowledge of this paragraph's content.

*See Figure 4-3a following this page.

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SECT ONE
CHPT IV

REQUEST FOR AUTHORIZATION TO CONDUCT SEARCH AND SEIZURE

Instructions: This form will be completed in accordance with instructions on the reverse.

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

2. I further state that 2.

3. In view of the foregoing, the undersigned requests that permission be granted for a search of³

(the person) (and) (the quarters or billets) (and)
and seizure of³
(the automobile) () (items searched for)

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(Signature, typed name, and organization)

INSTRUCTIONS FOR COMPLETING FORM

REQUEST FOR AUTHORIZATION TO CONDUCT SEARCH AND SEIZURE

1. 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.
2. 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.
3. 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 paragraph 152, MCM, 1969 (Rev.).

RECORD OF AUTHORIZATION FOR SEARCH (See section 0148)

1. At _____ on _____ I was
Time Date
approached by _____
Name
in his capacity as _____ who advised
Duty 1
me that he suspected _____ of
Name
_____ and requested permission to
Offense
search his _____
Object or Place 2
for _____
Items 3

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

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SECT ONE
CHPT IV

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

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RECORD OF AUTHORIZATION FOR SEARCH (continued)

4. 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.

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3. Purpose and effect. The search and seizure provisions incorporated both in the Constitution and the MCM operate to exclude as evidence in courts-martial the fruits or evidence produced as the result of unreasonable searches. Thus, the "exclusionary rule", as it is called, seeks to deter the use of governmental authority in conducting unlawful searches. As J. Shane Creamer, Esq., observed in his book, The Law of Arrest, Search and Seizure:

In the broad view, these constitutional limitations on police powers require law enforcement officers to have prior justification before swooping down on a citizen. In Nazi Germany the Gestapo operated under a system of no limitations or legal restraints and literally could seize any citizen at any time without cause. In our free society, the Constitution absolutely prevents this type of harrowing police tactic. (at p. 1).

Our Constitution does not prohibit searches. It only requires that searches be done lawfully, which means "reasonably" as that term has come to be defined.

4. Definitions. A search, briefly defined, is a quest for incriminating evidence. Black's Law Dictionary defines a search as "an examination of a man's house or other buildings or premises, or of his person, with a view to the discovery of contraband or illicit or stolen property, or some evidence of guilt to be used in the prosecution of a criminal action for some crime or offense with which he is charged." Seizure means "to take possession of forcibly, to grasp, to snatch, or to put into possession." (Black's Law Dictionary). It is possible that a search may be lawful, but the seizure unlawful. For example, a search of a house for drugs pursuant to a proper search authorization may be legal; however, the seizure of personal letters incident to the search may be illegal because they were outside the scope of what could be seized.

Another term frequently used with regard to searches is "contraband". Contraband refers to items, the possession of which is in and of itself illegal. Marijuana is a prime example. Of course, a search does not necessarily have to be for contraband. The instrumentalities of crimes such as burglar tools, weapons, etc., may also legitimately fall within the object of a search. Likewise, the fruits of a crime, money taken from a bank robbery, etc., also qualify as the objects of a search.

Probable cause to conduct a search means those facts or apparent facts which would lead a man of reasonable caution to believe that there is some specific item connected with a violation of law on the premises (or person) to be searched. This is the standard which the person authorizing the search must use in making his determination to permit or to deny authority for a search. There is, however, another type of probable cause. This is the probable cause which is required for an apprehension: a reasonable belief that an offense has been committed and the one to be apprehended committed it. When we discuss the search incident to lawful apprehension, it is this probable cause to apprehend which will determine the legality of the apprehension and, hence, the legality of the search incident thereto.

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5. Civil liability. The United States Supreme Court has held that a Fourth Amendment violation by a Federal agent acting under color of his authority will give rise to a Federal cause of action for damages caused by the violation. While Federal agents have no immunity to protect them from damage suits charging a violation of constitutional rights, a Federal court has held that a defense to such an action would be a good faith and reasonable belief in the validity of the arrest and search and in the necessity for carrying out the arrest and search in the way the arrest was made and the search was conducted. In essence, the law in this area requires that the search be based upon good faith, that it be conducted upon reasonable belief in its validity, and that its form be reasonable under all of the circumstances. Note that the good faith requirement would have to be demonstrated on the basis of what facts led the person authorizing the search to believe that his actions were justified. As of the present, there are no known cases which have extended civil liability to the military officer authorizing the search. However, the precedent exists in the civilian community, and the officer authorizing a search can hardly ignore its existence.

CAPACITY OF PERSON CONDUCTING THE SEARCH

Searches differ by virtue of who conducts them and in what capacity that person is acting. Remember, it is only evidence unlawfully seized in searches instigated or conducted by one acting in a governmental capacity which is inadmissible.

1. Individual capacity. Under certain circumstances, evidence obtained by an individual seeking to recover his own stolen personal property may be admissible in a court-martial notwithstanding the fact that the individual might have unlawfully entered the thief's locker to recover his property. On the other hand, had the government (military) conducted the same search without probable cause, the evidence obtained might not be admissible.

Several examples should serve to illustrate this. In United States v. Volante, 4 USMA 689, 16 CMR 236 (1954), a Marine NCO searched the locker of a fellow worker seeking to find stolen exchange property. The NCO stated that he did not want his pay checked because of the shortages in the exchange. Because the NCO was motivated by personal, rather than official, interest, the evidence was held to be admissible at the trial of the thief.

In another case, out of curiosity, a service member searched the First Lieutenant's desk to satisfy his curiosity that the First Lieutenant did not have a camera which was stolen from one of the other men. The camera was found in the desk and was allowed into evidence on the theory that it was the service member's personal curiosity rather than an "official interest" which motivated his actions.

It is important to note, however, that the absence of a law enforcement duty does not necessarily make a search purely personal. Thus, if the search is conducted or authorized by one who normally has disciplinary power over the accused or is involved in law enforcement, then in most instances it will be considered to be a governmental, rather than private, act.

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2. Foreign governmental capacity. Evidence produced through searches by agents of foreign governments will not be admissible in courts-martial unless the foreign agents meet Fourth Amendment standards in the conduct of the search and seizure. United States v. JORDAN, 23 USCMA 525, 50 CMR 664 (1975). The foregoing is true concerning foreign searches regardless of whether the search is conducted by foreign police acting on their own or in conjunction with American authorities.

3. Civilian police. While there are a range of warrantless searches in civilian law enforcement, just as in the military, generally speaking, searches by civilian authorities within the United States and its possessions and territories must be based on valid warrants issued by civilian magistrates in order to be valid.

TYPES OF SEARCHES DEEMED REASONABLE

1. Search by order of the commanding officer.

a. General. Paragraph 152 of the MCM designates as lawful those searches authorized upon probable cause by the commanding officer (or his designee) having control over the property or the person to be searched in the following instances:

(1) "A search of the property owned, used or occupied by, or in the possession of a person subject to military law or the law of war, the property being situated in a military installation, encampment, or vessel or some other place under military control or situated in occupied foreign country.

(2) "A search of the person of anyone subject to military law or the law of war who is found in any such place, territory, or country.

(3) "A search of the military property of the United States, or of the property of non-appropriated fund activities of an armed force of the United States."

While the excerpt from paragraph 152 states the general guidelines, case law in this area dictates, to a significant degree, what the commanding officer may and may not do.

b. Jurisdiction. Before any search may be ordered, the authorizing officers must have jurisdiction over the place, person, or property to be searched.

(1) Jurisdiction over the property. With regard to Navy, Marine Corps or Coast Guard property, there is usually little question over which property belongs to what commander. A ship, for example, is obviously under the control of its commanding officer, and generally speaking, public areas (where an individual would have no reasonable expectation of privacy) may be searched without probable cause. However, probable cause would be required to search Seaman Jones' personal locker because Seaman Jones has a reasonable expectation of privacy in the locker even though it is part of the ship and government property. What about Seaman Jones' car parked on the pier or in the parking lot? The base commander would probably have control, and, thus, given probable cause, the base commander could order the search. Suppose the USAF has assigned

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a barracks to a Marine command. While these barracks are USAF property, once assigned to the Marines, control over them, and hence, authority to order searches would also rest with the Marine command.

What of property not controlled by the military? As a general rule, within the United States, its territories, and possessions, property under civilian jurisdiction may not be searched by military authorities. A civilian search warrant is required. In certain cases, some property, usually base housing areas, may sometimes be subject to the concurrent jurisdiction of both military and civilian authorities. The critical question in these situations is whether or not by the terms of the grant of property to the Federal government, the military retained the power to conduct searches. If jurisdiction is truly concurrent, the military would have the power to authorize searches based on probable cause. However, in many instances, unless the question has been decided, the services of a military lawyer to research the matter will be required. If in any doubt whatsoever, the commander should consult his Judge Advocate or a legal service office before the necessity for a search arises. This will eliminate problems and, if necessary, allow the Judge Advocate ample time to coordinate the matter with civilian authorities and render a written accord on the subject. Jurisdiction may vary from one tract of land to another.

(2) Jurisdiction over the person (military). Aside from the concept of jurisdiction over the land there are other considerations. One concerns who may be searched by order of the commanding officer. Clearly, two categories of persons are subject to search. Members of the commanding officer's unit and persons subject to military law are subject to search by order of the commanding officer (or his designee) when in places under his jurisdiction.

The question arises, however, how far does the commander's authority to search the person of members of his command extend? In other words, must the CO of a ship limit his searches to his men on board his ship? Does the power extend to his men on board the Naval Station? Does it extend to his men when they are on any other piece of military property or reservation? Does it extend still further into the civilian community? In United States v. Turks, 9 CMR 641, (ACM 6172, 1953) guidance was furnished by the Air Force Board of Review in three of these areas. In Turks a search of a member of a command was conducted upon order of his squadron commanding officer, but the search took place outside the squadron area on an Air Base under military control in Japan. There, it was observed:

/We cannot/ perceive any requirement that an accused must be returned to the squadron area before he could be searched under the authority of /his/ own commanding officer and our attention has not been directed to any rule, regulation, or authority to that effect. To hold otherwise might result that where one airman standing in the squadron area could be lawfully searched by the commanding officer, his barracks mate, standing a few feet away, but off the squadron area, could not be lawfully searched by his own commanding officer. Such result would unduly impair the ability of the commander to perform

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his duties and, accordingly, we hold that the search and seizure in this case was not rendered unlawful by the fact that it was conducted outside the squadron area of the commanding officer who authorized it. (at 646).

This answers three of the four questions. The commanding officer can search his men on board his command, on a military base, and on military property. Additionally, of course, any personnel subject to the UCMJ may be searched on board a particular command by order of the commanding officer exercising control over the command. The question yet remains, what of the military person present in the civilian community?

With regard to persons subject to military law when physically present in the civilian community, a careful examination of Paragraph 152 of the Manual would seem to indicate that their person (not vehicle or house located in the U.S., its territories or possessions) can be searched. This, of course, would be predicated on the fact that probable cause existed based on the presence of evidence on the person connected with a military offense. This opinion is based on the Manual's language regarding "persons" subject to military law. However, in the case of their motor vehicles and houses located in the civilian community within the United States, its territories, or possessions, a civilian warrant would be required.

(3) Jurisdiction over the person (civilian). Commanding officers on bases within the United States, its territories, and possessions do not have jurisdiction to search civilians who are not subject to military law. Before this statement is contested too vigorously, it might be well to add that the term "search" (quest for incriminating evidence) is used. If probable cause does exist to search Mary Smith, a casual visitor on a military installation, a search warrant can be obtained from an appropriate civilian magistrate and a search may be conducted by State or Federal law enforcement officials, depending upon who has jurisdiction. OpJAGN 1951/41, 1 Dig. Ops., MilSec. sec.201.

This does not mean that a civilian entering or leaving a military installation may not be subject to a reasonable inspection as a condition precedent to entry or exit. However, an inspection differs significantly from a search. As will be discussed later, an inspection is not a quest for incrimination evidence. It is a procedure instituted to deter pilferage, to enhance and protect the security of a military installation, and to stem the flow of drugs on bases - to name a few of the reasons. Additionally, military personnel have the same rights as other citizens insofar as their ability to make "citizens arrest." Therefore a look to the state law of the particular place in question is required. But as a general rule, anybody may apprehend another for a felony committed in his presence, and then search him incident to that apprehension.

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(4) Jurisdiction over property controlled by military persons subject to military law. Quarters on military installations may be searched by the commander having control of this property upon probable cause. The same is true for vehicles - regardless of ownership - when operated by persons subject to the UCMJ.

(5) Jurisdiction over private property controlled by civilians. Unlike property under the control of persons subject to military law, civilian personal property (e.g., vehicles, lunch boxes, tool chests, etc.) may not be searched by order of the commanding officer. A warrant, either State or Federal depending upon the circumstances, would be required. Again, it is important to note that inspections at gates are not prohibited.

(6) Military vehicles or military property not intended for personal (as contrasted to official) use. A military vehicle, aircraft, etc., may be searched by the commanding officer or his designee or lawful agent anywhere at any time without the requirement of probable cause. For example, the Base Security Officer suspects PFC Jones of transporting marijuana in the CO's vehicle. He stops the CO's vehicle, and, in the absence of the CO, searches it. The fruits of the search would be admissible against PFC Jones at his trial for possession of marijuana. It should also be noted that this search may be conducted regardless of whether anybody believes any misconduct is in progress.

(7) Searches outside the United States, its territories, or possessions. Here the commanding officer or his designee has authority to authorize searches of persons subject to the UCMJ, their personal property, vehicles, and houses, on or off a military installation. This authority stems from the fact that no civilian magistrate, part of the Federal or any State judiciary, has authority to authorize searches outside the United States, its territories, or possessions. However, the probable cause requirement still exists. Furthermore, certain Status of Forces or North Atlantic Treaty Organization agreements may limit or curtail this authority in favor of the host country. It is essential that commanding officers familiarize themselves with the laws and treaty agreements controlling the situation in a specific country.

Except where specifically authorized by treaty or international agreement, foreign agents do not have the right to search areas considered extensions of the sovereign (i.e., the United States). Examples are ships, aircraft, military installations, etc.

c. Delegation of authority to authorize searches. The commanding officer or officer in charge of a unit, unless he chooses to delegate his authority, is the only officer within his command who may authorize searches. In the Marine Corps, the company commander may act to authorize searches. Therefore, when the term "commanding officer" or "officer in charge" is used, this may be taken to mean the company commander. Not infrequently, however, where several companies have ready access to the battalion commander, the battalion commander may choose to reserve the power to authorize searches to himself. In this situation, the company commander would not exercise his power to authorize searches.

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However, the commanding officer is not always available to authorize searches, and, frequently, it is desirable that other officers within his command be delegated this authority.

There are several ways to do this. It may be verbal, but a written instruction is recommended because it serves to establish orderly procedures in this area and eliminate questions as to the precise delegations.

Next, it is important to note that the commanding officer may delegate this authority to co-exist with his own authority, or he may choose to delegate this authority only in his absence.

If the former (and more common) procedure is followed, then perhaps the CO, XO, and CDO might all possess the authority without regard to the physical presence or availability of one or the other. Under the latter procedure, if the CO is present, he alone has the authority to authorize searches. If the CO is absent or unavailable, then the XO alone has the authority. Likewise, if both the CO and XO are absent or unavailable, the CDO is vested with the authority to authorize searches. Even without any other delegation, by virtue of U.S. Navy Regulations, Article 0903, the senior officer present is in fact in command.

Actually, either procedure may be satisfactory. The main point is to make sure that the officer exercising this authority has a basic grasp of his function in this regard. Those designated to perform the function of authorizing searches should be identified by title or office rather than by name.

Furthermore, the commanding officer should be selective in his designation because a person "directly" involved in law enforcement cannot also function as a magistrate. This is a parallel to the situation in the civilian community. For example, the chief of police could not authorize searches. However, the commanding officer, even though he is responsible for discipline is not disqualified from authorizing searches; also this is true in the case of most of the officers within the command. While they may function as XO, CDO, or OOD, this does not prevent their being designated to authorize searches. COMA has indicated that even a Station Judge Advocate may be designated to authorize searches.

The following is a sample instruction designating specified officers, in addition to the commanding officer, to authorize searches. It also deals with searches and seizures in general. While an instruction of this length and comprehensive scope is not mandatory, at least an instruction designating basic authority to conduct searches is strongly recommended for each command.

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SAMPLE SEARCH AND SEIZURE INSTRUCTION

NAVBALCOM INSTRUCTION 5510.3A

Subj: Searches and Seizures

Ref: (a) Para. 152, Manual for Courts-Martial, United States

1. Purpose. To establish the authority of various officers 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) privately owned property, physically located in an area under his jurisdiction, provided such property is owned, used or occupied by a person subject to military law.

(3) 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;

(4) All other U.S. Government-owned or controlled property under his jurisdiction.

(b) As to property described in category (4) 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 hereof.

(c) Items or other evidence seized as a result of a search of persons or property falling within categories (1), (2) or (3) 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) that the proposed search will disclose fruits of the offense, instrumentalities with which the offense was committed or which may be

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used in effecting an escape, contraband or other evidence of the offense or of the identity of the offender.

(d) Before deciding whether to order any search of persons or property described in categories (1), (2), or (3) 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 categories (1), (2) or (3) above in this command. Additionally, in accordance with specific authority granted in reference (a), the following officers are hereby authorized to act in the place and stead of the Commanding Officer in ordering such searches:

- (1) Executive Officer
- (2) Command Duty Officer
- (3) Other senior officer present in the absence of all of the above officers.

5. Criteria

(a) When so acting, these officers will exercise their judicial discretion in deciding whether or not 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 determining the proper category (set forth in paragraph 4a, above) under which to consider the persons or property of which a search is requested.

Category (1): Is limited to members of the armed forces and civilians accompanying armed forces in a combat zone in time of war.

Category (2): Will normally include such items as automobiles, suitcases, civilian clothing, privately owned parcels, etc., physically located on government property and owned or used by a member of the armed forces.

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Category (3): Includes lockers issued for the stowage of personal effects, government quarters, or other spaces or containers issued to an individual for his private use.

Category (4): Includes 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.

6. Exception. In unusual circumstances, the interests of the safety or security of the command, military necessity, or the necessity for immediate action to prevent the removal or disposal of stolen property may leave insufficient time to contact one of the officers named above in order to obtain prior authorization to conduct a search. Under such circumstances, any officer or petty officer of this command, on the scene in the execution of his military duties, is authorized to conduct a search without prior approval of any officer named above. When so acting, such officer or petty 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) 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 persons or property is to be searched, and what items or information is expected to be found on such persons or property. At the time the search is ordered, or as soon thereafter as practicable, the individual authorizing the search will set forth, including 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 a 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.

(b) 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 or petty officer.

(c) 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.

(d) 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.

(e) Personnel conducting a search properly authorized by this instruction will search only those persons and/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:

(f) 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) fruits or products of any offense against the Uniform Code of Military Justice;
- (2) instrumentalities by means of which any such offense was committed, or which may be used to effect the escape of any offender;
- (3) any other evidence of the commission of any such offense or the identity of the offender;
- (4) contraband, i.e., any property the mere possession of which is prohibited by law or lawful regulation.

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

(g) 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 of the persons conducting the search.

(h) No person conducting a search shall tamper with any items seized in any way, but shall personally deliver such items to the person authorizing the search. 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 of the person authorizing the search and receipt of further instructions.

(i) All persons who authorize searches pursuant to this instruction and subsequently come into possession of seized property shall (1) insure

that it is correctly tagged or marked; (2) physically secure it in a space not open to unauthorized access; (3) verbally report the circumstances to the Commanding Officer or Executive Officer at the earliest practicable time; and (4) submit the reports as specified in paragraph 7 (a) above.

(j) 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. It is noted that 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. The usage of these forms is highly recommended.

(signed) COMMANDING OFFICER

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d. Probable cause. Stated again, the standard to be applied by the commanding officer (or his designee), after hearing the facts presented to him, in deciding whether or not to authorize a search is:

Are these facts and apparent facts, based on my experience, sufficient to convince me, acting as an impartial magistrate, that there is a definite instrumentality of a crime, fruit of a crime, contraband, or other item connected with the violation of law located on specified premises or persons?

Consider the following:

Private Wilson is seen in the company area, apparently "high" on something. No odor of alcohol can be detected. Several amphetamine tablets fall from his pocket as he reaches for a cigarette. Under the standard above, would the Battalion Commander, who has authority to authorize searches, be justified in ordering a search of Private Wilson's locker? Stated differently, does probable cause exist to search Private Wilson's locker?

Assume that S/Sgt. Mitchell has observed these facts and reported them to the Company Commander. The Company Commander relates them to the Battalion Commander. The Battalion Commander, who will authorize or deny permission to conduct the search, may go through the following thought process to arrive at the proper decision:

(i) I know both S/Sgt. Mitchell and the Company Commander, and I have known them well for more than a year. Without question, even though I did not interview S/Sgt Mitchell personally, I am satisfied that the people furnishing me with the information are reliable.

(ii) I have seen the pills which fell out of Private Wilson's pocket, and I have called the medical officer and CID to my office to examine the pills, and both stated that on visual examination they were of the opinion that the substance was an amphetamine. Also, I know that Private Wilson was "high." This corroborates or confirms my belief that these are amphetamines.

(iii) It is a crime to possess amphetamines without a prescription. Thus, these pills are contraband.

(iv) Despite the foregoing, how do I know Private Wilson has any more pills in his locker? Has anyone seen him putting them in his locker or getting them out of his locker? Has anyone made a "buy" from Private Wilson and noticed him going in the area of his locker to get the drugs? I will have to answer "no" to all of those questions. First, I don't know if he has any more pills. Second, even if he does have any more evidence, I don't have probable cause to believe that any contraband would be located in his locker. Therefore, I must deny permission to search his locker.

In Viet Nam, a case similar to the one cited above occurred, but the search was authorized. It was held that the search was not based

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on probable cause as there was nothing to link the premises searched with the individual's possession of drugs.

One thing should be clear: searches must be based on probable cause, and probable cause is more than a mere suspicion, hunch or hope that something will be found.

(1) Subject matter. When a search is authorized by the command, whether the authorization be oral or in writing, the thing or things which are the object of the search must be specified. For instance, if the facts point to a knife or other sharp instrument as being the instrumentality of a crime, the commanding officer or person authorizing the search should specify what is to be sought. Likewise, if marijuana is the object of the search, it too must be specified.

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 admissible in evidence against the accused? The answer is "yes" if the marijuana were discovered incident to the search for the knife. If the command 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. However, in looking for the knife suppose 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 his drugs located 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 for a knife, and probable cause existed to cause the person authorizing the search to believe that the knife was located in the locker. A search of boxes in which the knife could be located would be perfectly legal, but the knife certainly would not be located in an envelope containing a letter. Hence, the subject matter -- or what is being sought in the search -- controls where we may look.

The pistol is another good example. Suppose we are searching for a stolen pistol on the accused's premises and look in a match box and find heroin. Again, we could not expect to find the pistol in the match box; hence, we are on an illegal fishing expedition. Even though lawfully on the premises to search for the pistol, we may not extend our search into areas where it would not be reasonable to expect to find the item sought.

Something else the person conducting the search should keep in mind is the fact that once the item sought is located, the search should cease at that point. Suppose we are looking for a pistol and find it. We must not open the next drawer which contains two kilos of heroin, because our search is complete. Although if searching for heroin and some is found, the search may continue to look for more.

(2) Premises. Apart from specifying the subject matter of the search, the one authorizing the search must also specify the premises to be searched; by premises is meant person, place, or thing.

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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. Again, he cannot guess as to the location of the subject matter.

If one possesses authorization for the search of a vehicle, this will not permit or authorize him to search a dwelling house located near the vehicle.

(3) Source and quality of information. Probable cause must be based on information which is provided to the one authorizing the search. In the sphere in which searches are authorized, frequent use is made of informers. Whenever informers are used, the one authorizing the search must be provided information in two distinct areas:

First, he must be advised of the underlying facts and circumstances from which the informer concluded that the items to be seized are in the place to be searched.

Second, he must be advised of underlying facts and circumstances from which he, the one authorizing the search, may himself conclude

- (a) That the informer is credible himself or
- (b) That the informer's information is reliable

Satisfying the first part of this requirement generally poses no problem. In satisfying the second part of this requirement, numerous things may be considered.

If the informant appears personally before the commanding officer, and the commanding officer has an opportunity to observe him and judge his credibility, this is a factor which will bear upon his reliability.

If the commanding officer knows the informant or is familiar with his reputation for truth and veracity, this too may be considered.

If the informant is one who is charged with law enforcement duties, usually his information, based on his direct observations, is reliable.

The informer may be a "good citizen" with a clean record, which is something to consider regarding his reliability.

An eyewitness to a crime or the victim of a crime is usually seen as reliable.

So too, a co-actor who makes declarations against penal interest (i.e., incriminates himself) may be considered to be trustworthy. The past "track record" of the informer may be considered. An informer who has provided reliable information three times in the recent past may be viewed as reliable this time. However, the one authorizing the search cannot be satisfied with the conclusion, "informer X has been

reliable three times before." Rather he should get as many details as possible - dates, information he provided, and the results of acting on that information - so that he can himself conclude that the informer has been shown to be reliable.

Another important factor to consider is whether or not at least some of the information furnished by the informant may be corroborated by other evidence. The facts that are corroborated should point to criminal activity. It is not sufficient to merely corroborate the fact that the potential accused will be in a certain place at a certain time.

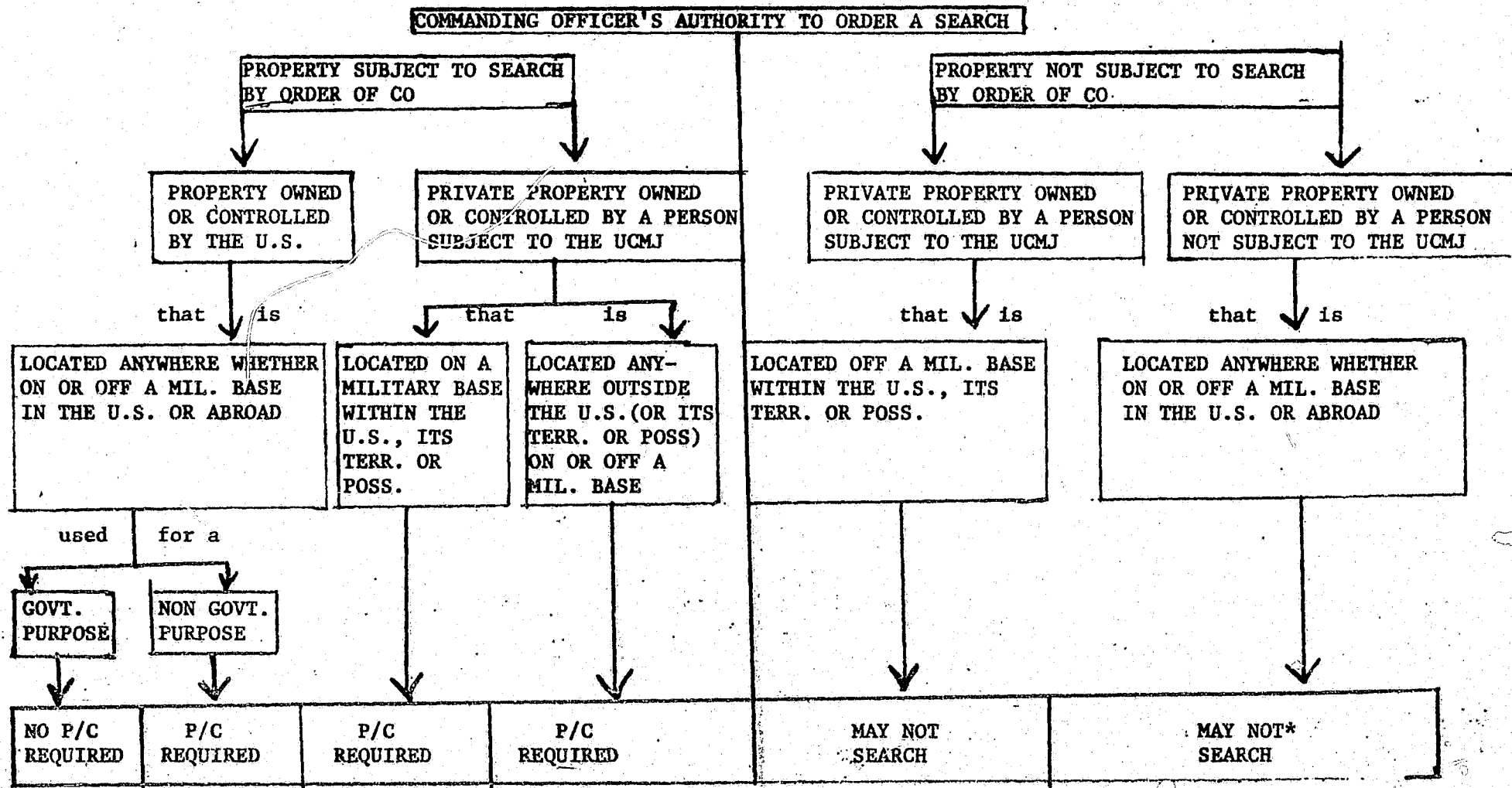
The informer's identity need not be disclosed to the authorizing officer. However, he must still be provided with facts and circumstances as indicated above, to allow him to independently make the required conclusions.

Marijuana detector dogs are seen as another "informer" for purposes here. Consequently, the authorizing officer must be advised of the qualifications, training, and past use of the dog and its handler so that the one authorizing the search may conclude that this "informer" is reliable.

The two requirements discussed above cannot be stressed too much. Whenever an informer, of any kind, is used these requirements must be satisfied or the authorized search will not be valid.

The following chart has been included to summarize when the commanding officer or his designee may authorize a search and when they may not.

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*But may detain a person not subject to UCMJ until a search warrant is obtained from an appropriate civilian magistrate or until civilian police authorities arrive to effect an arrest.

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2. Consent Searches If the owner, or other person in a position to consent, 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). If a free and voluntary consent is obtained, no probable cause is required.

The Manual recognizes this type of search in paragraph 152:

The following searches are among those which are lawful:

A search of one's person with his freely given consent, or of property with the freely given consent of a person entitled in the situation involved to waive the right to immunity from an unreasonable search, such as owner, bailee, tenant, or occupant as the case may be under the circumstances.

For example, where an investigator asked the accused if he "might check his personal belongings" and the accused answered, "Yes. . . it's all right with me" the court found that there was consent. However, the court has also said that "mere acquiescence in the face of authority is not consent." Thus, where the CO 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 always becomes, "Was the consent freely and voluntarily given?"

It is not essential that a suspect be warned of any specific rights before giving his consent to a search. He need not be advised of the right to refuse to consent. The only predicate for the admission of evidence obtained as a result of a search based upon consent is whether the consent was freely and voluntarily given. U. S. v. NOREEN, 23 USCMA 212, 49 CMR 1 (1974). Nevertheless, the giving of this advice may be strong evidence that the individuals assent to the search was voluntary.

Accordingly, the giving of this advice is recommended and a part of the standard form as provided in appendix 1 to the JAGMAN is reproduced on the following page. Further, if during the search, interrogation of the person is desired, then he must be advised of his rights under Article 31 and Tempia, as discussed in chapter III of this text.

As previously noted, the term "control" over property is used rather than ownership. For instance, if Seaman Jones occupies a residence with his girl, Sally Smith, and Seaman Jones pays the rent, Sally, in Seaman Jones' absence, can consent to a search of the premises. Suppose however, that Seaman Jones keeps a large tin box at the residence to which Sally is not allowed access. The box could not be subject to a search by reason of Sally's consent. She can only consent to a search of those places or areas where Seaman Jones has given her "control". Likewise, if Seaman Jones maintained his own private room within the residence, and Sally was not allowed access to the room, Sally could not give permission to a search of this room.

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CONSENT TO SEARCH (See section 0148)

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

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

Signature

WITNESSES

3. Search Incident to a lawful apprehension

Historically, this search of the person and property in the immediate possession/control of the "apprehendee" has been founded on the need to protect the apprehending official from harm from concealed weapons and to preserve evidence from destruction.

A search of an individual's person, of the clothing he is wearing, and of the property into which he could reach to obtain a weapon or destroy evidence is a lawful search if it is conducted incident to a lawful apprehension of that individual.

UCMJ, Art. 7a, defines apprehension as "the taking into custody of a person." This means the imposition of physical restraint which is substantially the same as civilian "arrest." It differs from military "arrest" which is merely the imposition of moral restraint.

To render such a search lawful, the apprehension itself must be lawful. To be lawful the apprehension must be based upon probable cause which exists if the facts and circumstances would justify a prudent man in concluding that an offense has been or is being committed and that the person being apprehended, committed or is in the commission of the offense.

It should be noted that an apprehension may not be used as a sham to accomplish an otherwise illegal search. Furthermore, only the person apprehended and the immediate area where he could reach to obtain a weapon or destroy evidence may be searched. For example, a search of a room other than the one in which the accused was apprehended which yielded marijuana was held to be illegal because it went beyond the area from which the accused could reasonably be expected to obtain a weapon or destroy evidence.

While the search must be "incident to the lawful apprehension" this does not mean that the search should take place before the apprehension. A search incident to apprehension may not be used to justify the apprehension. If probable cause to apprehend did not exist at the time of the apprehension, subsequent events cannot be used to justify the apprehension. It is only after a man has been lawfully apprehended that his person and the clothing he is wearing may be searched.

In 1969 the Supreme Court of the United States decided the case of Chimel v. California, 395 U.S. 752. The Chimel case is generally interpreted as placing great restrictions on the ability of apprehending/arresting officials to routinely search, as incident to a lawful apprehension, beyond the "person" of the person being apprehended. In the Chimel case, the accused was suspected of burglarizing a coin shop. He was arrested in his home, and, incident to the arrest (apprehension), the police

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searched the entire three-bedroom house, including the attic, garage, and workshop. The Supreme Court of California upheld the search/seizure as being incident to the accused's arrest. The Supreme Court of the United States reversed, saying, "When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect escape. Otherwise, the officer's safety might well be endangered and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control'-- construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence. There is no comparable justification, however, for routinely searching rooms other than that in which an arrest occurs-- or, for that matter, for searching through all the desk drawers or other closed or concealed areas of that room itself. Such searches, in the absence of well recognized exceptions, may be made only under the authority of a search warrant." The fact that the accused is apprehended in a vehicle does not justify a search of the entire vehicle. The apprehending officer need not close his eyes to evidence or contraband in plain view. He may seize it. However, absent this sighting in plain view, the entire vehicle cannot be searched without establishing probable cause therefor. And unless there is a good reason why there cannot be delay, an authorization to search must be obtained before the search of the vehicle can begin. In accordance with CHIMEL, however, those parts of the vehicle into which the suspect can reach to obtain weapons or destroy evidence may be searched as incident to the apprehension.

4. "Shakedown" searches. A shakedown search is like any other search ordered by the commanding officer. It requires his permission. Probable cause is necessary. The object of the search must be specified. What distinguishes a shakedown search from a regular command authorized search is the area or premises to be searched.

Because so many men and women are quartered in such fairly small areas on bases and on board ships, it is relatively easy for a person to commit a crime and conceal the fruits or instrumentalities of the crime for the time necessary to prevent the discovery of evidence.

For example, SN Smith sleeps in a compartment with 25 other men. At 2300 he retires and places his money under his pillow, as is his custom. At 0500 the following morning, he arises to find his money gone. No one (or very few people) has departed the compartment since

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2300. At 0510 the commanding officer is notified and orders a search, after talking to SN Smith. The search order encompasses the entire compartment, not just one person's locker.

The Court of Military Appeals and Federal courts have upheld this type of search. While it is not recommended that an entire ship or large part of a base be searched save under the most exceptional circumstances, it should be noted that one search of this nature (a quest for a murder weapon) extended to twenty barracks, three mess halls, and two other structures, all known as the "26th Area." In that case the "trail of blood" led into this area. Thus, the facts justified the commanding officer's decision to order a search of the area.

It must be remembered that the shakedown search is an exception, not the rule. Irresponsible use of this valuable tool could result in its restriction. It should definitely not be considered a means of accomplishing an other wise illegal search of an individual's locker, etc., where no legal method is available.

5. Search by reason of exigent circumstances where probable cause to search exists (Necessity Search). A "necessity search" is a search under circumstances demanding immediate action to prevent removal or disposal of property believed, on reasonable grounds, to be contraband or stolen property. Such a search is permitted out of necessity, but there must be the same type of probable cause that would justify the commanding officer's ordering the search. The commanding officer's permission is not required for this type of search because, as the term necessity implies, immediate action is necessary. Searches of automobiles are frequently justified on this basis since their mobility makes obtaining the commanding officer's permission impracticable.

This is not to say that all searches of automobiles may be conducted on this basis. For instance, if an automobile belonging to a service member who is on duty for several hours is to be searched, and it is parked, the commanding officer's permission would be required.

On the other hand, if a vehicle were stopped by security and what appeared to be a green leafy substance believed to be marijuana was seen sticking out of the trunk, the security policeman would be justified in searching the trunk.

In United States v. Swanson, 3 USCMA 671, 14 CMR 89 (1954), the accused was alleged to have stolen \$76 in a bivouac area. The first sergeant called the men together and informed them of the theft and tried to have the money returned with no further action to be taken. The thief didn't take advantage of the opportunity to return the stolen money. There were no officers present and their return was not expected for an appreciable time. The first sergeant conducted a search. Here it was held that the search was lawful. The thief was put on notice that the crime was discovered, and further delay would have allowed the thief greater opportunity to conceal the money. Thus, the search was the only reasonable course of action. And in U.S. v.

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WHEATON, 48 CMR 649 (ACM 1974) a demand for immediate action dispensed with the need for command authorization prior to the search. There, an NCO who was familiar with the smell of marijuana was conducting a routine barracks inspection and smelled the odor of burning marijuana coming from the accused's room. He knew the room was occupied, knocked and heard movement and an aerosol can being sprayed. All these factors were consistent with a crime in progress and attempts to destroy contraband of a type easily destroyed and allowed the immediate entry of the room.

In all respects, except for the absence of the requirement that the commanding officer's permission be obtained, a "necessity search" is identical to a command authorized search.

6. "Search" by owner of property or person not acting in official capacity. In the foregoing caption, the word "search" has been placed in quotes implying that perhaps this term does not adequately describe what is actually taking place when a person "looks" for what is his. We defined "search" as a quest for incriminating evidence. What the owner actually does when he looks for his property is to conduct a quest to recover his property. Thus, in the legal sense at least, we have something other than a search.

Additionally, even though the individual, acting for his own and not a governmental purpose, may commit a trespass, or other crime, this will not operate to exclude evidence obtained in this manner.

Yet this situation must be distinguished from the one in which the owner of the property is acting under the suggestion or direction of those involved in law enforcement. In the latter situation, the evidence would be excluded on the theory that the government is attempting to have a private party conduct a search which the government may not lawfully conduct.

7. Search pursuant to civilian warrant. Where service members subject to the UCMJ reside off base within the United States, its territories, or possessions, a search warrant must be obtained from civilian authorities and the search conducted by civilian law enforcement agents. The commanding officer, while he has authority to search the person of one subject to the UCMJ or the law of war anywhere, does not have the authority to order a search of his automobile or residence located off the military installation in the U.S., its territories, or possessions. Likewise, a civilian warrant is required to search civilians whether they happen to be on or off a military installation located in the United States or abroad. However, where the circumstances demand it, a civilian on a military installation in the United States, its territories, or possessions may be detained by the military until a search warrant (and civilian police official) can be obtained from an appropriate civilian magistrate or until civilian police authorities arrive to effect an arrest.

As previously noted, unless modified by a Status of Forces Agreement, the commanding officer or his designee, upon probable cause, may authorize a search of private property owned or controlled by a person subject to the UCMJ when such property is located abroad.

ACTIVITIES NOT CONSTITUTING SEARCHES

What has been discussed to this point deals with searches and the evidence derived therefrom. However, other activities undertaken by the commanding officer, for purposes other than gathering incriminating evidence, may yield incriminating evidence. It is these activities which will be discussed below.

1. Inspections at gates and checkpoints.

a. General. Military commanders are often charged with the security of geographically large bases and/or areas of concentrated military and dependent population. COMA has recognized the "gate" and "checkpoint" inspections as a legitimate means of aiding him in his duty to protect the installation by preventing contraband and dangerous instrumentalities from coming aboard, and preventing the removal of the installation a piece at a time.

Inspection of individuals entering or leaving military installations has, for some time, been recognized and practiced by the military. The term "inspection" describes what takes place at the gate of a military installation. The question then arises, how does a search differ from an inspection? A search is made with a view toward discovering contraband or other evidence to be used in the prosecution of a criminal action. It is made in anticipation of prosecution. On the other hand, an inspection is an official examination to determine the fitness or readiness of the person, organization or equipment, and though criminal proceedings may result from matters uncovered thereby, it is not made with a view to any criminal action.

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 A's company's lockers? This 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 valid search because the Colonel has no "underlying facts and circumstances from which to conclude the informer is reliable or his information credible."

Suppose, however, Colonel X, having no information concerning A, is seeking to deter 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 the 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; Colonel X had no way of knowing that A would be coming through the gate. Here, the purpose was not to "get" A but merely to deter the flow of drugs or other contraband. The evidence, by interpretation of present case law, would be admissible under the gate "search" concept.

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b. Control at the gate. "The power of a military /commander/ over a reservation /or his command/ is necessarily extensive and practically exclusive, forbidding entrance and controlling residence as the public interest may demand .../I/t is well settled that a post commander can, in his discretion, exclude all persons other than those belonging to his post from post and reservation grounds." In every case the due process clause of the Fifth Amendment does not require that the individual excluded be afforded a hearing or advised of the reason for exclusion from the military installation. Cafeteria Workers v. McElroy, 367 U.S. 886, 893, 6 L.Ed. 2d 1230, 81 S. Ct. 1743 (1961).

While Cafeteria Workers concerns the right of a commander to exclude civilians from his military installation, this case serves to highlight the authority of the commander in this area. Further, in this area, the case of United States v. Poundstone, 22 USCMA 277, 46 CMR 277 (1973), deserves special attention.

This COMA decision states:

"Both the generalized and particularized types of searches are not to be confused with inspections of military personnel entering or leaving certain areas, or those, for example conducted by a commander in furtherance of the security of his command. These are wholly administrative or preventive in nature and are within the commander's inherent powers." Poundstone at 46 CMR 282.

Chief Judge Darden also said:

"The commanding officer of a military installation... may without probable cause order the search of military personnel or vehicles entering or leaving his base as a necessary part of his authority and responsibility for the security of his command. ***...the commanding officer's traditional authority and responsibility for the security of a military base and its personnel are sufficiently broad to permit him constitutionally to search all those who enter or leave the installation's perimeters." 46 CMR at 282-83.

It therefore appears that a search (or inspection) authorized by the commanding officer of a military installation and conducted at the gate to the installation, may be authorized without probable cause.

c. The checkpoint search on a military installation. A checkpoint search, one which may take place anywhere on a military installation, unlike the gate search, requires probable cause. Checkpoint searches usually have as their purpose the deterrence of specific types of offenses (e.g., introduction of drugs into a particular area, etc.). A "checkpoint search" is part inspection and part search. In the case described below, the use of the dog was of an inspectional nature. Only after the dog provided probable cause did the search commence.

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In a recent case, a commanding officer of a unit on a large military installation viewed with concern the widespread increase of drug, and drug related, crimes in his unit. In an effort to curtail the introduction of drugs into his unit, a roadblock inspection system was established by a unit regulation. Operationally, the procedure consisted of stopping vehicles at the first of two checkpoints manned by military personnel, inspecting driver's license and registration, and advising the occupants of the vehicle to read a sign: "Attention, narcotics check, with narcotics dogs. Drop all drugs here and no questions asked. Last Chance." An "amnesty barrel" was located under the sign. At the second checkpoint, further down the road, a narcotics dog was allowed to "sniff" inside the vehicle. In the event the dog "alerted", a search of the occupants and vehicle was conducted. In this case, at the second check point Rex, a marijuana detector dog, was allowed to put his head inside the vehicle. He alerted, and a search* of the vehicle and occupants was conducted. Several packets of heroin were discovered in the accused's wallet. The Court of Military Appeals in upholding the search made several points clear in this case:

- (1) a search other than at the gateway of a military installation does require probable cause; and, since this was not a consent search, probable cause was required.
- (2) searches under the circumstances of this case are reasonable as a proper part of the military commander's discharge of his military functions.
- (3) circumstances when this type of search would be lawful are:
 - (a) to protect the security of the command; and
 - (b) to effectuate a proper military regulatory program.
- (4) whether or not a condition will justify a command approach of the type used in this case does not depend upon the particular number of violations but rather the evil such a system seeks to prevent and the reasonableness of the means used.
- (5) at least impliedly, a prerequisite to a search of this nature is the requirement that the individual, who may be susceptible to being searched, be forewarned or afforded an opportunity to exempt himself from any criminal liability by disposing of the contraband or fruits of the crime; while this point was not specifically decided, common sense, better practice, and more favorable appellate consideration would seem to dictate the necessity of "a way out" for the potential accused or suspect.
- (6) lastly, the use of the dog (which alerted and provided probable cause) in and of itself was not considered a search; the dog was analogized to "using a flashlight to illuminate dark

*Under the facts, no specific authority to search was requested. General authority was contained in the instruction.

places on a public street in which a burglar might be lurking.
United States v. Unrue, 22 USCMA 466, 470, 47 CMR 556, 560 (1973).

d. Conclusion. Before attempting gate or checkpoint searches, consultation with a Naval Legal Services Office (NLSO), Station or Staff Judge Advocate is strongly recommended. Such searches, while attractive, have definite limitations. Unless conducted in a reasonable manner what might otherwise prove a useful instrumentality may be rendered ineffective. Consequently, a carefully prepared instruction or order incorporating sound legal advice is highly advisable.

2. Administrative Inspections. A commanding officer is responsible not only for the combat readiness of his command, but also for the cleanliness, safety and maintenance of his command's physical plant and for the health, discipline and welfare of his personnel. The uniqueness of military life and the responsibility of the commanding officer for the security, health, safety, welfare, and discipline of his command allows command sanctioned administrative inspections of military personnel and their property. General inspections for such purposes (as distinguished from searches of the person or property of an individual for criminal investigative purposes) are lawful and are not required to be based upon probable cause. Items of contraband or other evidence seized during such administrative activities are admissible against the accused at a subsequent court-martial.

For example, in U.S. v. Grace, 19 USCMA 409, 42 CMR 11 (1970), the Commanding Officer of Security Police Squadron, Utapao Airfield, ordered an inspection of the squadron area and its three barracks "to check living conditions" and "to determine whether unauthorized weapons were present" which might present a danger to the command. Two-man teams of senior noncommissioned officers conducted the inspection of the billeting areas. As the inspection progressed a member of the inspecting team was informed that the accused had marijuana in his wall locker. The inspecting NCO noticed the accused attempting to take something out of his locker and ordered him to return the item to his locker, to standby, and to await his turn to be inspected. When the team approached the accused's locker, he refused to open the locker and challenged their authority. The commanding officer was informed of these facts. After conferring with a legal officer and deciding that he did not have probable cause to order a search, the CO declined to do so, but he did instruct the inspection team to continue their inspection of the accused's locker and area, even over his objection, and to complete the inspection of all other uninspected areas. The inspection of the accused's locker revealed a quantity of marijuana.

In Grace it was held that an inspection, valid at the inception, is not transformed into an illegal proceeding simply because one of the persons subject to the inspection becomes the subject of a criminal investigation. The inspection did not become an illegal search of the accused's effects. However, it is clear that the scope of an inspection in progress cannot be broadened or extended based on such suspicion.

The motivation which prompts the administrative inspection will determine whether or not courts will view such action as an inspection or simply as activity which in fact amounts to a search. Note that a

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search is an examination of an individual's property, or person with a view to the discovery of contraband, stolen property or other evidence of a crime to be used in the prosecution of a criminal action for some offense of which he is suspected or charged prior to the search. On the other hand, quests or activities conducted as routine administrative acts for the purpose of preserving health, safety, or discipline, or insuring the operational effectiveness and security of the command, without a view toward obtaining incriminating evidence against a particular individual, are permissible as administrative inspections.

In U.S. v. Lange, 15 USCMA 486, 35 CMR 458 (1965), the Squadron Commander authorized the squadron administrative officer to conduct periodic "standby" inspections. The administrative officer had never utilized this authorization, but he understood the authorization to enable him to conduct routine inspections at his discretion. Subsequently, a theft of a watch and money was reported to the administrative officer, who ordered an immediate "inspection". He began the "inspection" by inspecting the living quarters of persons who were billeted in quarters adjoining the victim. The accused's living quarters, which adjoined the victim's were "inspected" and the stolen wallet and funds were found there, as well as two other wallets which had been reported stolen previously. Thereafter, the "inspection" was terminated.

It was decided that an inspection cannot be used as a pretext to cover up an otherwise unlawful search. It is clear that what was conducted in this case was in fact a search which was not authorized by one empowered to order a search. (This was really a "shakedown search" conducted by one not empowered to authorize such.)

It is recommended that commands formulate instructions to be followed when conducting administrative inspections. A judge advocate should be contacted and his training utilized in such undertakings. The sample instructions which follow may be an aid to commands in formulating such instructions.

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INSTRUCTION
SAMPLE

Subj: Inspections

Ref: (a) Chap. 7, U.S. Navy Regulations, 1973
(b) Title 10, United States Code, Section 5947
(c) Command Instruction on Contraband
(d) Command Instruction on Search and Seizure

1. PURPOSE: To establish policy and procedures for inspections of military personnel and property under the jurisdiction of the Commanding Officer, U.S.S. _____. The purpose of authorized administrative inspections is to determine the fitness and readiness of the command to perform its mission and to ensure security, health, welfare, and discipline within the command.

2. CANCELLATION: This instruction cancels _____ Inst. _____.

3. BACKGROUND:

a. The commanding officer is charged with the responsibility, as defined in references (a) and (b), to ensure the safety, well-being, and efficiency of the command. This responsibility encompasses the authority to take all necessary and proper measures, under the laws, regulations and customs of the naval service, to promote and safeguard the morale, physical well-being and the general welfare of personnel of the command.

b. As set forth in Article 0708 of reference (a), one vehicle for discharging the responsibility of the commanding officer for his command is periodic administrative inspections of material and personnel of the command.

c. In order to protect the welfare of personnel assigned to the command and ensure the safety of the command, administrative inspections will be conducted in order to detect and confiscate contraband as defined in reference (c). Such periodic inspections will include inspections to deter dangerous drugs within the command.

4. POLICY: Administrative inspections shall be ordered by the commanding officer or executive officer who, for the purposes of ordering inspections defined in paragraph 3 above, is specifically delegated authority to order such administrative inspections by this instruction.

a. When ordered, specific directions shall be given as to the purpose of the inspection and the personnel and/or areas to be inspected by the inspectors.

b. Inspections, when directed, may be either announced or unannounced in advance of the inspection.

c. To ensure the accomplishment of the objectives of inspections, as set forth in this instruction, such inspections shall be held on a regular basis within the command.

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d. The results of an inspection shall be reported to the executive officer or commanding officer. Any deficiencies noted during an inspection shall be made a part of such a report on the results of the inspection.

5. ACTION: When inspections are ordered, inspectors shall be guided by the procedures outlined in this instruction.

Commanding Officer

Distribution:

CONTINUED

1 OF 5

INSTRUCTION

Subj: Contraband, delineation of

Ref: (a) Chap 11, U.S. Navy Regulations, 1973
(b) SecNav Inst. 1700.11 series
(c) Command Inst. on Inspections
(d) Command Inst. on Searches

1. PURPOSE: To list and discuss categories of items which, by law or regulation, are illegal for a member of the naval service to have in his possession on board any ship, craft, aircraft or in any vehicle of the naval service, or within any base or other place under naval jurisdiction.

2. CANCELLATION: This instruction cancels _____ Inst. _____.

3. BACKGROUND: Contraband are objects and things the ownership or possession of which are prohibited by law or regulation and are subject to forfeiture and destruction upon seizure. The categories, objects, and things listed below are not a conclusive listing of all items which are contraband. Nor does this instruction set forth the circumstances when possession of a proscribed item would be lawful, as when a member of the naval service obtained permission to own or possess the item from proper authority. The listing below delineates items which are contraband and, when a member is discovered in possession of such objects or things, there is a presumption that such possession is unlawful.

4. The possession of the following items by members of the naval service is prohibited:

a. Weapons. Article 1130 of reference (a) prohibits the possession on board any ship, craft, or aircraft or naval base of a dangerous weapon, instrument, or explosive device or compound. This prohibition shall extend to firearms; devices which expel a projectile either by air or gas; switch-blade knives; blackjacks; brass knuckles; leaded clubs; a cord leather or wire garrote; or an edged weapon the blade of which is more than five inches in length, when the possession of any of the above is not necessary for the proper performance of duty or authorized by proper authority.

b. Alcoholic Liquors. Article 1150 of reference (a) prohibits the possession of alcoholic liquors for beverage purposes on board any ship, craft, aircraft or naval base, except as may be authorized by the Secretary of the Navy. Reference (b) defines alcoholic beverages as wine, distilled spirits, and malt beverages.

c. Marijuana, Narcotics, and Controlled Substances. Article 1151 of reference (a) prohibits the possession by persons in the naval service of marijuana, narcotic substances or other controlled substances as are defined and listed in the Comprehensive Drug Abuse Prevention and Control Act of 1970, as amended (84 Stat. 1236).

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e. Instrumentalities of a Crime. Objects or things used in the commission of a crime or capable of use only in the commission of crime are contraband. Prohibited items which fall in this category would be gambling devices; pipes used to smoke marijuana; hypodermic syringes used to inject a narcotic or controlled substances; and altered or false armed forces identification cards.

5. ACTION. Contraband discovered during an inspection, as defined in reference (c), or a search, as defined in reference (d), in the possession of a member of the command or located within the command shall be seized. A report of the circumstances of the seizure shall be made to commanding officer or executive officer of the command.

Commanding Officer

Distribution:

3. Administrative Inventories. An inventory of the personal property of an individual, if motivated by a governmental purpose other than a quest for incrimination evidence to be used at trial in the prosecution of the individual for a criminal offense, is lawful and contraband or evidence incidentally found during the course of such a legitimate inventory will be admissible in a subsequent criminal proceeding.

For example, in U.S. v. Mossbauer, 20 USCMA 584, 44 CMR 14 (1971), the accused was apprehended by civilian authorities in town on the preceding evening for possession of marijuana and indecent exposure. At 0530 the following morning the CO 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 CO 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 record minute particles of green vegetable matter found in the left pocket of 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.

In U.S. v. Kazmierczak, 16 USCMA 594, 37 CMR 214 (1967), the court points out obvious and legitimate reasons for regulations authorizing inventory of the property of absentees by saying, "Even the temporary absence of a member of the unit may require an immediate replacement. If the absent member has left his possessions in the unit, these must be removed to make room for those of the replacement. Common sense indicates the absentee's effects cannot be tossed casually into a sack and stored... Common sense also indicates that each article stored for the absentee should be listed to guard against a later claim of damage or loss... We hold, therefore, that the inventory procedure prescribed by the regulation is not per se contrary to the constitutional prohibition against unreasonable search and seizure."

SECTION ONE

CHAPTER V

COMPULSORY PROCESS AND DISCOVERY

SECTION ONE
CHAPTER V

COMPULSORY PROCESS AND DISCOVERY

COMPULSORY PROCESS

1. Introduction. The Sixth Amendment to the United States Constitution provides that: "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, the UCMJ, Arts. 46, 47, and 49, implement this constitutional provision.

a. UCMJ, Art. 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.

b. UCMJ, Art. 47, provides criminal sanctions for witnesses who have been subpoenaed and fail to appear or testify.

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

d. 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 certain documents or evidentiary objects with him. In the military, there is no distinction; the subpoena contained in appendix 17 of the MCM, a copy of which appears on the following page, contains a section where the witness may be ordered to bring with him any documents, evidentiary items, etc.

A subpoena is usually issued only to a civilian witness. The attendance of military witnesses may be obtained by military orders. However, where a service member is due to be discharged during the course of the trial and will not agree to a voluntary extension, a subpoena may be necessary.

Not all proceedings may utilize subpoenas. The subpoena is available to all courts-martial, courts of inquiry, and UCMJ, Art 139, investigations (i.e., redress of injury to property, JAGMAN, Ch. X). Bodies which may not utilize the subpoena are informal JAGMAN investigations, formal JAGMAN investigations (except for UCMJ, Art. 139), administrative discharge board hearings, and UCMJ, Art. 15, hearings conducted in accordance with MCM, 1969 (Rev.), par. 133b, and UCMJ, Art. 32 investigations.

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SUBPOENA FOR CIVILIAN WITNESS	
<p>¹ General, special, or summary court-martial.</p> <p>² Place where process is issued.</p> <p>³ Name of witness.</p> <p>⁴ Show used, unless name and grade of person designated.</p> <p>⁵ Line out, when inappropriate. "before" designated to take your deposition for use).</p> <p>⁶ General, special, or summary court-martial.</p> <p>⁷ Place where court is to convene.</p> <p>⁸ Appropriate authority.</p> <p>⁹ Prosecution or defense, as appropriate.</p> <p>¹⁰ Name, etc., of accused or other subject of investigation.</p> <p>¹¹ Line out, when inappropriate. "and bring with you" When appropriate describe documents or exhibits which the witness is required to produce before the court.</p> <p>¹² To be subscribed by trial counsel, recorder, etc.</p> <p>¹³ When service is by mail the witness will be requested to subscribe this subpoena under oath of exemption on one copy and to return same to the officer who issued the subpoena.</p> <p>¹⁴ This proof of service will be filled out when service is personal, and the same thus completed will be returned to the officer issuing the subpoena.</p>	<p>General ¹ Court-Martial of the United States, U. S. Naval Station,</p> <p>San Diego, California ²</p> <p>The President of the United States, to <u>Claude M. Richardson</u> ³</p> <p>You are hereby summoned and required to appear on the <u>16th</u> day of <u>December</u></p> <p>19 <u> </u> at <u>9</u> o'clock <u>A</u>. M. (before <u> </u></p> <p>⁴ designated to take your deposition for use) ⁵ before</p> <p>⁶ General ¹ court-martial of the United States, at <u>Building 73,</u></p> <p><u>U. S. Naval Station, San Diego, California</u> ⁷</p> <p>appointed by <u>an order of the Commandant, Eleventh Naval District,</u></p> <p><u>San Diego, California</u> ⁸</p> <p>dated <u>11 December</u> 19 <u> </u> to testify as a witness for the <u>defense</u> ⁹</p> <p>in the case of <u>United States v. Richard F. Vailancourt, Seaman,</u></p> <p><u>U. S. Navy</u> ¹⁰ (and bring with you <u> </u></p> <p><u> </u>) ¹¹</p> <p>Failure to appear and testify is punishable by a fine of not more than \$500 or imprisonment for a period not exceeding six months, or both.</p> <p>Bring this subpoena with you and do not depart from the court without proper permission.</p> <p>Subscribed at <u>U. S. Naval Station, San Diego, Calif.</u> this <u>13th</u> day of</p> <p><u>December</u> 19 <u> </u> <u>W. J. Hughes</u> ¹²</p> <p style="text-align: center;">W. J. HUGHES Lieutenant, JAGC, USN Trial Counsel</p> <p>The witness is requested to subscribe on the top of the subpoena the following and to return to the person serving the subpoena the copy thereof so subscribed.</p> <p style="text-align: center;">PLACE <u> </u> DATE <u> </u>, 19 <u> </u></p> <p>I hereby accept service of the above subpoena. ¹³</p> <p style="text-align: right;">SIGNATURE OF WITNESS <u> </u></p> <p>Personally appeared before me, the undersigned authority, ¹⁴</p> <p><u> </u>, who, being first duly sworn according to</p> <p>law, deposes and says that at <u> </u> on <u> </u></p> <p>19 <u> </u>, he personally delivered to <u> </u> in person's</p> <p>duplicate of the within subpoena.</p> <p style="text-align: right;">SIGNATURE AND GRADE <u> </u></p> <p>SUBSCRIBED AND SWORN to before me at <u> </u> this <u> </u> day</p> <p>of <u> </u>, 19 <u> </u> <u> </u></p> <p style="text-align: right;">SIGNATURE, GRADE, AND OFFICIAL STATUS <u> </u></p>

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2. Procedures for obtaining witnesses. MCM, 1969 (Rev.), par. 115, contains the basic procedures for obtaining witnesses which are outlined below. Since the trial counsel is charged with obtaining witnesses for the government whom he considers material and necessary, this discussion will be centered about defense requests for witnesses.

a. Where trial and defense counsel agree a witness is material and necessary, trial counsel is charged with obtaining the witness.

(1) 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 may be forwarded through the regular channels.

In case a military witness is located at a place other than the place (area) 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 costs of travel and per diem of military personnel and civilian employees of the Navy (and Marine Corps). . . will be charged to the operation and maintenance allotment which supports temporary additional duty travel for the convening authority of the court-martial." JAGMAN, Sec. 0137a(1).

(2) 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 court and not that officer by name. 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 to personally 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, Sec. 0137.

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b. Where trial and defense counsel cannot agree on whether a witness is material and necessary, a different procedure applies. In the event a witness has been informally requested by the defense, and the trial counsel has concluded that the witness is not material and necessary, the defense counsel may submit a formal request for the witness.

"A request for the personal appearance of a witness /civilian or military/ will be submitted in writing, together with a statement, signed by the counsel requesting the witness, containing (1) a synopsis of the testimony that it is expected the witness will give, (2) full reasons which necessitate the personal appearance of the witness, and (3) any other matter showing that the expected testimony is necessary to the ends of justice." MCM, 1969 (Rev.), par. 115a.

This request is submitted through the trial counsel to either the convening authority or military judge according to whether the question arises before or after the trial begins.

In forwarding this request for the personal appearance of the witness, the trial counsel will have an opportunity to express his views in the matter. Normal practice requires the trial counsel to reduce his position to writing in a forwarding endorsement and furnish the defense counsel with a copy of the endorsement.

If prior to trial, the convening authority will receive the request. The convening authority must evaluate the request on an individual basis considering the materiality of the testimony and its relevance to the guilt or innocence of the accused, together with the relative responsibilities of the parties concerned, against the equities of the situation. It is well settled that budgetary considerations will not serve as a measure of whether or not the testimony of a particular witness is material and necessary. A witness may also be seen as necessary and material solely on the issue of appropriate punishment.

In considering a request for a witness, it is advisable for the convening authority to utilize the services and advice of a Judge Advocate (not the trial or defense counsel). If the request is denied, a formal written denial for record purposes is preferred. If the request is granted, the procedures contained in paragraph a. above should be followed.

In the event that the convening authority denies the request for the witness, the matter may be litigated before the military judge. If the military judge agrees with the convening authority in denying the request for the witness, the trial will proceed and the matter will be considered on review of the case. On the other hand, if the military judge takes the position that the witness' testimony is material and necessary, the convening authority has a number of options available: he may procure the witness; withdraw the charges and specifications; allow the trial counsel to enter into a reasonable stipulation as to what the witness would testify to were he present (if the defense will agree

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and withdraw its request for the witness); or simply refuse to obtain the witness. In the case of a refusal to obtain the witness the military judge may grant a continuance until the convening authority provides the witness or he may dismiss the charges and specifications concerning which the witness would testify.

The convening authority has the option of either making the witness available or dismissing the charge. United States v. Daniels, 23 USCMA 94, CMR 655 (1974).

3. Important concepts. As previously mentioned, budgetary matters are not a consideration with regard to whether or not a witness should or should not be present to testify. It has been said that "military justice should have no dollar sign attached to it, but military justice, like the Constitution, is 'not at war with common sense.'" United States v. Sears, 20 USCMA 380, 43 CMR 220, 225 (1971). In other words, the facts and not budgetary considerations must decide whether or not a witness should be present.

This is true whether the witness is a witness on the merits of the case (for findings) or a witness in extenuation and mitigation.

The convening authority should never try to influence the military judge in any way. The convening authority's position in refusing to provide a defense witness at government expense should appear in the record in the form of the convening authority's written denial of the defense's request for a witness. In making his independent determination at trial, the military judge may consider this. However, in the Sears case cited above, the judge ruled against the convening authority and held that the witness was required. The convening authority then asked the judge to reconsider his decision. The judge did so and essentially changed his prior ruling. In criticizing the military judge, the Court of Military Appeals stated: "When faced with the knowledge that the convening authority refused to comply with that order of the court to obtain the witness, he the military judge continued with the trial and thereafter reversed his previous finding as to the necessity of the witness to the defense case. In our opinion, his capitulation to the will of the convening authority was an abuse of discretion." Sears, at 43 CMR 220, 224 (1971). The remedy was that the court set aside the findings of guilty and ordered the charge and specification dismissed.

Another question frequently arises. Why can't stipulations or depositions be used in place of a witness? They can if the defense agrees to the deposition or stipulation and agrees to withdraw its request for the witness. The accused has the trial right to confront and cross-examine the witnesses against him. He cannot be forced to forego this right.

With regard to taking depositions from servicemen, the Court of Military Appeals has said, "Since a serviceman, subject to military orders, is always within the jurisdiction of the military court, we do not believe that he is unavailable simply because he is stationed more than one hundred miles from the situs of the trial. Something more is required . . .

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We hold, therefore, that with regard to military witnesses, the right to confrontation as embodied in military due process requires that actual unavailability be established before a deposition of a serviceman is admitted into evidence." United States v. Davis, 19 USCMA 217, 41 CMR 217, 223, 224, (1970).

4. Conclusion. The convening authority and his legal officer would be well advised to consult a Judge Advocate when requests for witnesses are made. Through his advice, unnecessary expense to the command can be avoided. Moreover, where a witness is necessary, an otherwise valid conviction may be reversed for want of one witness.

If witnesses are to be subpoenaed or ordered to attend a trial, planning on the part of the government is essential. Trial counsel cannot expect to mail a subpoena to a witness one day and have him available the next. The convening authority also must remember that a witness from a distant command, while available, may not be immediately available. For this reason, timely action is the key to expeditious disposition of cases.

DISCOVERY

1. Definition and purpose. Discovery is the right to examine (i.e., discover) information possessed by the opposing side before or during trial. Under the UCMJ and the MCM, only the accused has the right to discovery. There are three basic reasons why this is a valuable right.

First, it puts the defense on an equal footing with the prosecution in terms of investigative resources. Next, it enables the defense to prepare a rebuttal to the charges. Lastly, it provides the basis for cross-examination and impeachment of prosecution witnesses at trial. However, the most important aspect of discovery is the fact that it puts the defense on notice as to the strength of the government's case. If the government has done its homework, discovery, or the release of information to the defense, should not be something to be feared. In fact, compelling evidence of guilt may well persuade the defense to enter a plea of guilty and thereby save the government a great deal of time and expense in the trial of a particular case.

The accused's right to discovery under the UCMJ is implemented by various provisions of MCM and rules developed by case law. The scope of discovery in the military is extremely broad compared to civilian practice. Although the materials to which the defense counsel has access are specifically delineated, any errors in denying requests for discovery are measured on appeal by the reasonableness of the defense counsel's requests. Discovery is not intended as a substitute for the defense counsel's preparing his case, but it is an essential part of it.

Any request for discovery should be as specific as possible under the circumstances; it should be timely; it should be directed to the appropriate official; it should be supported by the specific authority authorizing the disclosure of the requested material; and it should be

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continuing, i.e., asking that the prosecution furnish evidence of a specific kind then in its possession and any similar that they obtain subsequent to the original request.

The following is a discussion of the specific authority for and modes of discovery.

2. UCMJ, Article 32, Pretrial Investigation. An investigation to determine whether or not a case should be referred to a general court-martial, disposed of at a lesser type of court, referred to nonjudicial punishment, or the charges dismissed, known as a pretrial investigation, is always convened, except when specifically waived by the accused. Where an accused is held for trial by general court-martial, the pretrial investigation is one of the primary means of discovery. The pretrial investigating officer has the duty to conduct a thorough and impartial investigation of all matters set forth in the charges and specifications. He is to conduct an inquiry into the truth of the matters set forth in the charges, consider the form of the charges and make a recommendation as to the disposition which should be made of the case in the interest of justice and discipline.

Military witnesses may be required to attend this investigation through the use of military orders. Civilian witnesses, on the other hand, may not be required to attend. If the convening authority approves the taking of a deposition (in accordance with Article 49), civilian witnesses may then be subpoenaed for that purpose, and the deposition could then be used by the Article 32 investigating officer.

During the conduct of the pretrial investigation, the accused and his counsel have a right to be present and to cross examine witnesses who appear for the government.

The accused is also entitled to a summary of the testimony taken at the investigation or, if the record is prepared as a verbatim transcript, a copy of the verbatim transcript.

MCM, 1969 (Rev.), par. 34d, also provides: "To the extent required by fairness to the government and the accused, documentary evidence and statements of witnesses who are not available will be shown, or the contents thereof will be made known, to the accused. . .and to his counsel."

3. MCM, 1969 (Rev.), par. 44h, Documents and other information possessed by the prosecution. Paragraph 44h requires the trial counsel to permit the defense to examine from time to time any paper accompanying the charges, including the report of investigation and papers sent with the charges on a rehearing. He must also allow the defense to examine the convening order and any amending orders. Before trial, the defense should be provided with a list of probable witnesses for the prosecution.

Generally considered as accompanying the charges are: the report of the preliminary inquiry officer and any statements taken by him; statements taken by the Naval Investigative Service; recommendations as to dispositions by officers subordinate to the convening authority; the report of the pretrial investigating officer and the transcript of his investigation; the Staff

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Judge Advocate's advice to the convening authority; papers relating to any previous withdrawal or referral of charges; and the accused's service record or service record book.

Exceptions to paragraph 44h are such documents which are classified for reasons of security and those containing the names of confidential informants. Nevertheless, if the defense can establish that the substantial rights of the accused may be prejudiced to such an extent that he will not receive a fair trial, the convening authority may be faced with the choice of withdrawal of charges or disclosure.

When the Naval Investigative Service performs an investigation, this investigation is in two parts: an investigative report (commonly referred to as a "cover sheet") and the statements appended thereto. Without question, the statements taken by the Naval Investigative Service fall within those items of evidence which are discoverable both under MCM, 1969 (Rev.), paras. 44h and 115c. Yet a great deal of controversy has raged over whether or not the investigative report should be made available to the defense counsel. The position of the Naval Investigative Service is clearly stated in large print on the cover sheet: "This document is the property of the Naval Investigative Service. Contents may be disclosed only to persons whose official duties requires access hereto. Contents may not be disclosed to the party(s) concerned without specific authorization from the Naval Investigative Service." On this subject, there is no COMA authority, but the better approach would appear to be to allow the defense to examine the report. This will serve to avoid, in many cases, unnecessary delay caused by litigation at the time of trial.

4. MCM, 1969 (Rev.), para. 115c, Discovery of evidentiary matter in control of military authorities. This paragraph further implements UCMJ, Article 46, by allowing the defense to use and examine documents or other evidentiary materials in the custody and control of military authorities, the trial counsel, the convening authority, the military judge, or the president of a special court-martial without a military judge.

The defense must make a reasonable request for documents or other evidentiary matters. This does not give the defense counsel a license to engage in a "fishing expedition". However, if the defense can demonstrate a reasonable relationship of the document requested to the case, the document should be made available to the defense.

Not discoverable under this provision are trial counsel's research notes or his notes which were obtained as a result of his interviews with prospective witnesses.

5. Interview of witnesses. Under MCM, 1969 (Rev.), par. 48h, the defense counsel must be given an ample opportunity to interview the accused and any other person. The defense must be allowed to interview witnesses privately without the interference or presence of the trial counsel or any other representative of the prosecution.

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6. Depositions as a discovery device. Except when required by law in the proper forum, a witness may not be compelled to testify or divulge information. Depositions, taken prior to trial, are one means of requiring a contrary witness to reveal his knowledge of the matters at issue in a case. Where the witness is a civilian, as has already been mentioned, the subpoena may be used to compel his attendance at the taking of a deposition.

7. Conclusion. Convening authorities and legal officers should not consider a demand for information an unjustified invasion of "executive privilege". The law of discovery is well established in our judicial system. Each case must be handled on an individual basis. In this area, the advice of a Judge Advocate can prove extremely helpful to the command.

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SECTION TWO
CHAPTER I

INFORMAL DISCIPLINARY MEASURES

INTRODUCTION. Those persons having even minimum exposure to the military criminal law system understand that the basic disciplinary actions that may be taken in any case include nonjudicial punishment, summary court-martial, special court-martial, or general court-martial. It is likewise understood that those actions are listed in increasing order of severity so that one prosecuted by general court-martial is exposed to punishments extending to execution. Inherent in any superior-subordinate relationships, and thus inherent in the military society, is the authority of the superior to compel performance of tasks by the subordinate. In given situations, these orders can relate to acts of misconduct or deficient performance by the subordinate as the superior attempts, through informal means, to correct the deficiency. Were this not so, every minor act of misconduct or deficient performance would have to be dealt with in a legal proceeding and any resulting conviction would be a matter of record for the rest of the offender's life. Because individual rights are involved in these informal measures, military courts, laws and regulations have imposed some restraints on military superiors utilizing such measures. This Chapter will discuss briefly some of these restraints and analyze the legal complexities involved.

BASIC SOURCE MATERIAL. The student should read the following basic sources in connection with this Chapter.

1. Manual for Courts-Martial, 1969 (Rev.), Paras. 128c and 129a.
2. Manual of the Judge Advocate General (Navy), Sec. 0101c, and Appendix, Sec. 1-a.

NONPUNITIVE MEASURES

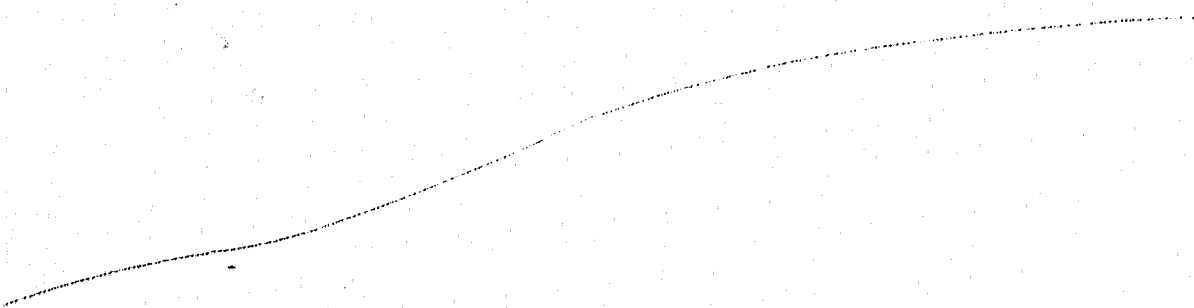
INTRODUCTION. "Nonpunitive measures" is terminology used in the Manual for Courts-Martial 1969 (Rev.) para 128c (henceforth referred to as the MCM) which refers to various leadership techniques, short of formal nonjudicial punishment or court-martial action, designed to encourage the development of acceptable behavioral standards in the members of a command. The objective of these leadership techniques is the enhancement of self-discipline. While it is commonly believed that a commander's discretion is virtually unlimited in this area of his responsibility, the truth of the matter is that the law imposes significant restraint on the commander's use of nonpunitive measures. The nature of this restraint will be examined through a discussion of nonpunitive censure, extra military instruction, denial of privileges, and alternative voluntary restraint.

NONPUNITIVE CENSURE. Nonpunitive censure is nothing more than criticism of a subordinate's behavior or performance of duty by a military superior. This censure is informal and it may be delivered either orally or in writing. Since this form of reproof is commonly used in military organizations, it is normally delivered orally and referred to as "chewing out." Nonpunitive censure is a more formal method of registering disapprobation than some means of communication, but it is not a matter of record and does not become a part of one's official record even if the censure is delivered in writing. The law places little restraint on the commander's use of this leadership technique though sound leadership principles may dictate the commander's use of censure in terms of good judgement.

EXTRA MILITARY INSTRUCTION. "Extra military instruction" is terminology referring to the practice of assigning extra tasks to one exhibiting behavioral or performance deficiencies for the purpose of correcting those deficiencies through the performance of the assigned tasks. For instance a superior might order close order drill to be performed by a subordinate for one hour per day to correct some noted deficiency in the behavior or performance of the subordinate. Normally such tasks are performed in addition to normal duties. This kind of leadership technique is more severe than nonpunitive censure and, because it involves direct action toward the subordinate, the law has placed some significant restraints on the commander's discretion. All extra military instruction involves an order from a superior to a subordinate to do the task assigned. 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. The problem that must be resolved in every extra military instruction

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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 is difficult but the analysis involved is not complex and can be successfully utilized to avoid legal complications. The following analytical process will prove useful.

1. Identify the Deficiency. The initial step in analyzing extra military instruction in terms of its legal ramifications in a given case is to properly identify the deficiency of the subordinate. For example, Seaman Jones is assigned responsibility for securing all doors and windows in his office each night but routinely forgets to secure some of the windows. Although at first blush it would appear that his deficiency is the failure to close windows, a more accurate perception of the deficiency involved may be either lack of knowledge or lack of self discipline depending upon specific reason for the failure. In other words "deficiency" refers to shortcomings of character or personality as opposed to shortcomings of action. The act (failure to close windows) is an objective manifestation of an underlying character deficiency which, in the eyes of military courts, extra military instruction is designed to help overcome. Accordingly an act should always be identified by its underlying character deficiency to avoid the complications to be discussed below. In this connection, terminology relating to character traits which is used on fitness report forms is helpful to use in the determination of the underlying reasons for the deficient act.

2. Rationally Related Task. The task to be assigned must under the law be rationally or logically related to the deficiency noted or courts will view the underlying order as being one imposing punishment. Appellate military courts have relied heavily on this relationship as indicative of the real purpose for the giving of the extra military instruction order. It is this criterion that makes absolutely necessary the proper identification of the deficiency in terms of character rather than action. Few tasks assigned as extra military instruction 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 windows one hundred times 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. If, however, the deficiency noted by the order giver is a lack of self discipline, instead of the act, then a great many tasks become logically related to the deficiency noted and the careless attitude involved is not illogically related to a corrective measure of close order drill. Or if a failure to close windows is the result of lack of knowledge of the duty (ignorance hence 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 of his responsibility.

Where the military superior has analyzed the subordinate's deficiency as relating to some trait of character and assigned a task he determined to be correctionally or instructionally related to the deficiency, the military courts have readily accepted the superior's opinion that the task he assigned was logically related to the deficiency he noted in the subordinate. Where the facts show that the superior assigned a task because the subordinate did some unacceptable act, military courts see the assigned task as retaliatory and, hence, tend to 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 or 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 Jones forgets to close the windows, and the commander retaliates with, "Jones, 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,

"Jones, you've been forgetting to secure your windows lately and I know you're familiar with the rules. This lack of self discipline is not important in peacetime nor are windows that important. But, bad habits learned in peace can be fatal in war. I am assigning you to do some close order drill and perhaps by having to instantly obey commands you will develop the strength of self discipline you need to survive in war."

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 extra military instruction order are greatly enhanced--and the less likely, conversely, the courts will be to misconstrue his purpose.

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4. Judicious Quantity. Assuming all other factors are indicative of a bona fide training purpose, extra military instruction may still be construed by the courts as punishment if the quantity of instruction is injudicious. There is a paucity of meaningful guidance as to what constitutes a judicious amount of instruction or training in this context. The Manual of the Judge Advocate General of the Navy (henceforth referred to as JAGMAN) in section 0101(b) sets out standards for the assignment of extra duties as a punishment imposed under the Uniform Code of Military Justice, Article 15. Since extra duties as punishment and extra military instruction are very similar, JAGMAN, sec. 0101(b), can be used as guidance for extra military instruction. Accordingly, no more than two hours of instruction should be required each day, instruction should not be required on Sundays, and after completing each day's instruction the subordinate should be allowed normal limits of liberty. In this connection extra military instruction, since it is training, can lawfully interfere with normal hours of liberty. One should not confuse this 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. Summary. Extra military instruction, in the eyes of the law, is a leadership tool and not a retributive punishment device. To constantly bear this in mind will help a superior avoid difficulties related to the lawfulness of his order to undergo 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. Of the facts indicating a superior's purpose in giving the extra instruction the "logical relationship" test is most important and the basis of that test is in the character analysis. 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 as courts have had to consider extra military instruction cases, all of the facts related to the circumstances of the extra instruction order, the facts precipitating its promulgation, and the task assigned will be carefully considered.

DENIAL OF PRIVILEGES. Denial of privileges is a more drastic leadership measure than extra military instruction in that it does not necessarily involve or require an instructional purpose. Perhaps oversimply stated, a "right" exists when law or regulation gives an individual authority to compel performance. A "privilege" exists when an individual has no such authority. Thus, thirty days annual leave is a statutory right as is compensation for active military service.

The use of a commissary, post exchange, or base theater is normally considered a privilege. 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. [See JAGMAN, Sec. 0101(c)]. Liberty can lawfully be deprived only because of some bona fide health, welfare, training or military necessity or, when pursuant to law, disciplinary purpose. Thus, denying liberty to prevent chronic, brief, unauthorized absences at the beginning of working hours is an unlawful deprivation of liberty, regardless of any humanitarian purpose of the commander ordering the restriction. 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 save when and how 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.

ALTERNATIVE VOLUNTARY RESTRAINT. Alternative voluntary restraint is a device whereby a military superior promises not to report an offense or to impose disciplinary punishment for it in return for a promise by the subordinate not to take normal liberty and to remain on base or aboard ship. Such a practice is not recognized as a lawful exercise of military authority, and a superior who uses this device runs a risk of prosecution. Alternative voluntary restraint should be avoided since it cannot be enforced in court should the matter arise in a criminal prosecution.

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CHAPTER II
NONJUDICIAL PUNISHMENT

INTRODUCTION. Nonjudicial punishment is a procedure designed to impose summary punishment for minor disciplinary infractions. The legal protection afforded an individual subject to such a proceeding is more complete than is the case with non-punitive measures but less complete than is the case for courts-martial. Because of the minimal legal protection involved the maximum permissible punishment is very limited. Nonjudicial punishment is, thus, a balance between judicial protection and the military need for summary disposition of disciplinary infractions. The fact that legal safeguards are minimal should not serve as a basis for abuse of this procedure. The Uniform Code of Military Justice, Article 15 and Manual for Courts-Martial 1969 (Rev.), paragraphs 128 to 135 constitute the basic law of nonjudicial punishment. The Manual of the Judge Advocate General of the Navy (JAGMAN), Chapter I also contains significant detail for the processing of nonjudicial punishment actions. In addition, ALNAV 41 of May 1973 promulgated new procedural safeguards for accused persons subjected to nonjudicial punishment.

BASIC SOURCE MATERIAL. The student should read the following basic sources in connection with this CHAPTER.

1. Uniform Code of Military Justice, Articles 2, 15 and 138.
2. Manual for Courts-Martial 1969 (Rev.), paras. 8-13, 127c, 128-135 and 158. See also Appendix 12.
3. Manual of the Judge Advocate General (Navy), Sec. 0101 and 0102.
4. ALNAV 41 of May 1973.

SECTION TWO
CHAPTER II
PART ONE
NATURE AND REQUISITES

SCOPE. The Uniform Code of Military Justice, Article 15 and Manual for Courts-Martial, paragraph 128 authorize commanders to impose disciplinary punishment for minor offenses without intervention of court-martial. Implicit in this simple statement are some complex principles.

1. Jurisdiction. In order to punish anyone the punishing entity must have the power to do so. This power is generally referred to as jurisdiction and it has two primary aspects. Jurisdiction over the person refers to the power to punish the offender. As a general rule a commander has authority to punish all military personnel assigned or attached to his command including personnel serving in a temporary additional duty status. Jurisdiction over the offense refers to the power to punish an individual for a specific act of misconduct. Not all acts of perceived misconduct are punishable in the military society but rather only those acts described as offenses in the Uniform Code of Military Justice or recognized as punishable under the General Article (Article 134) thereof. In this connection it matters not where the act occurred since the Uniform Code of Military Justice applies everywhere in the world.

2. Minor Offenses. The terminology "minor offense" is the cause of some concern in the administration of nonjudicial punishment. The Uniform Code of Military Justice, Article 15 and Manual for Courts-Martial 1969 (Rev.), para. 128b indicate that "minor offense" means misconduct normally not more serious than that appropriate to the summary court-martial (the jurisdictional maximum impossible punishment extends to thirty days confinement). These sources also indicate that the nature of the offense and the circumstances surrounding its commission are also factors relating to the determination of the significance of an offense. It does not ordinarily include misconduct which, if trial by General Court-Martial, could be punished by a Dishonorable Discharge or confinement at hard labor for more than one (1) year.

The Navy has taken the position that the final determination as to whether an offense is "minor" is within the sound discretion of the commanding officer. The Marine Corps has adopted the discussion in Hagerty v. U.S. 449 F 2d 352 (1971) as to what constitutes a minor offense. In this case, the U.S. Court of Claims stated that the power to impose punishment under Article 15, UCMJ is limited to minor offenses as determined by an arbitrary evaluation of what constitutes a major or minor offense based upon the seriousness of the charge only and not upon the facts and circumstances of the individual. Marines should consult Marine Corps LEGADMINMAN para. 2006.4f and Promulgation Page for Change 4. (Marine Corps Order P5800.8)

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a. Maximum Penalty. Begin the analysis with a consultation of the Table of Maximum Punishments (MCM, Para. 127c) and determine the maximum possible punishment allowed by the table. Although the Manual for Courts Martial 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 rarely minor.

b. Nature of Offense. The Manual for Courts-Martial also indicates in paragraph 128b that the "nature of the offense" should be considered. This is a significant statement and often misunderstood as referring to the seriousness or gravity of the offense. However, gravity refers to the maximum possible punishment and is the subject of separate discussion in that paragraph. In context, nature of the offense refers to its character not its gravity. In criminal law there are two basic types of misconduct -- disciplinary infractions and crimes. Disciplinary infractions relate the breach 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 circumstance 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 terms "disciplinary punishment" used in the Manual for Courts-Martial are carefully chosen words.

c. Circumstances. The circumstances surrounding the commission of a disciplinary infraction are important to the determination of whether such 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 severe 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 the disposition 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, to dispose of disciplinary

infractions is much greater than his latitude in dealing with crimes. Where the commander determines the offense to be minor, a statement must be made on the NAVPERS 1626/7, REPORT AND DISPOSITION OF OFFENSES (Navy) or on the UNIT PUNISHMENT BOOK (NAVMC 10132-Marine Corps) indicating that the commander, after considering all facts and circumstances has determined that the offense is minor.

3. Other Considerations. Concurrently with making a decision with respect to whether an offense is major or minor, the commanding officer must also consider the following factors in determining the proper disposition of a case; (1) whether the alleged offense is trivial in nature; (2) whether the charge states an offense cognizable under the UCMJ; (3) whether the charge is supported by the available evidence; (4) the character and prior service of the accused; (5) other sound reasons for punishing or not punishing the accused. MCM 1969 (Rev), paras. 32d, 33h.

4. Statute of Limitations. The Uniform Code of Military Justice, Article 43(c) forbids the imposing of punishment for an offense committed more than two years before the date of the contemplated imposition of punishment. 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 from United States jurisdiction do not count in computing the two year limitation.

5. Cases Previously Tried by Civilians. JAGMAN, Secs. 0101b(2) and 0107e preclude 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 unless 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). The authority to proceed must be obtained in writing and a copy of the grant of authority forwarded to the Secretary of the Navy for review. Authority is to be granted only where the case involves substantial discredit to the naval service and the civilian disposition was inadequate to meet Navy disciplinary needs. It is difficult to imagine how these requisites could be met in minor disciplinary cases.

AUTHORITY TO IMPOSE. The office of commanding officer inherently has nonjudicial punishment authority. The power rests in the office of commander not in the person. A commander on leave is temporarily succeeded in command by the officer so designated and, in the eyes of the law, the successor has the authority, not the commander on leave. Thus the Commanding Officer, USS BROWNSON has nonjudicial punishment authority, but Commander Geise, U.S. Navy, has or does not have such authority depending on whether he is exercising command at the time. Likewise, the authority to impose nonjudicial punishment is not delegable except to a principle assistant by a general or flag officer commander. In no other case does a deputy or executive officer have authority to impose punishment under UCMJ, Article 15. An officer-in-charge has limited

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nonjudicial punishment authority if he is a commissioned officer designated as an officer-in-charge by departmental orders, tables of organization, manpower authorizations, orders of a flag or general officer in command, or orders of a senior officer present.

PROPER RESPONDENTS. Commanding officers are authorized to impose nonjudicial punishment upon all military personnel in their commands. The terminology "of his command" means personnel assigned to or attached to the command. The terms include personnel performing temporary additional duty, who in the eyes of the law are members of both the parent and temporary commands. A person can only be punished once for any offense regardless of how many commanders have authority to punish him. An officer-in-charge can only punish enlisted members of his unit. In virtue of interservice agreements, Navy and Marine Corps officers cannot exercise their authority over Army personnel or Air Force officers. Disciplinary matters should be referred to the appropriate service commander who is responsible for the accused. Likewise policy indicates that Coast Guard offenders should be referred to the appropriate Coast Guard commander. Navy and Marine Corps personnel are members of the same service (Naval Service) and there are no restrictions on nonjudicial punishment authority between the Navy and Marine Corps. Both the commanding officer of the ship and the commander of an embarked unit or command have authority to impose nonjudicial punishment upon members of the embarked command. In such cases, policy indicates that the embarked unit commander should not exercise his authority if the commander of the ship wishes to exercise his authority [See JAGMAN, Sec. 0101b(3)]. A ship commander has no authority to limit or restrict the authority of the embarked unit commander nor can any commander limit or restrict the authority of a subordinate empowered by law to impose nonjudicial punishment [JAGMAN Sec. 0101a(5)].

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CHAPTER II
PART TWO
HEARING PROCEDURE

INTRODUCTION. Nonjudicial punishment results from a process involving an investigation into unlawful conduct and a subsequent hearing to determine whether and to what extent the 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 the NAVPERS 1626/7 (REPORT AND DISPOSITION OF OFFENSES) or the NAVMC 10132 (UNIT PUNISHMENT BOOK) is filled out. 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 (appropriate service directives should be consulted for details regarding the completion of these forms.) 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.

PREHEARING ADVICE. Prior to holding the UCMJ, Article 15 hearing the commanding officer must cause the accused to be given the following advice. The commander need not personally give the advice but may assign this responsibility to the Legal Officer, or other appropriate person. The advice must, however, be given.

1. Offense Involved. The accused must be advised of the offense of which he is suspected. It is not necessary to read the allegations in specification language inasmuch as the law requires that he be informed of the substance of the offense. The substance of which he is informed should include the pertinent facts to clearly identify the offense.

2. Contemplated Action. The accused must be informed that the commanding officer is contemplating the imposition of nonjudicial punishment for the offense.

3. Right to Refuse NJP. The accused must be informed of his right to refuse to submit to a nonjudicial punishment hearing unless he is assigned to or embarked on a vessel. In the latter situation an accused does not have the right to refuse nonjudicial punishment. He must also be advised that if he refuses NJP his case might be referred to court-martial.

4. Hearing Rights. The accused must be advised that if he agrees to submit to nonjudicial punishment he will receive a hearing at which he will receive the following rights.

a. Presence. To be personally present before the officer conducting the hearing.

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- b. Offense. To be advised of the offense involved in the hearing
- c. Silence. To have his right to remain silent (UCMJ, Article 31) explained to him.
- d. Confront Evidence. To be present during the presentation of all evidence against him whether testimony or written statement and if statements are used he has a right to be given copies of them.
- e. Inspect Evidence. To inspect all items of physical or documentary evidence considered at the hearing by the commanding officer.
- f. Present Evidence. To present any matter in mitigation (facts pertaining to the accused tending to show he deserves lenient treatment), extenuation (facts relating to the offense tending to show it was not a particularly serious infraction), and defense (facts tending to show the accused did not commit the offense).
- g. Personal Representative. To be accompanied at the hearing by a personal representative to speak on the accused's behalf. The representative does not have to be a lawyer though he may be a lawyer.
- h. Appeal. To appeal the matter in writing to higher authority should punishment be imposed.

HEARING REQUIREMENTS. 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.

1. Hearing Officer. Normally, the officer who actually holds the nonjudicial punishment hearing is the commanding officer of the accused. The Manual for Courts-Martial, paragraph 133(b) 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 standin will receive all evidence, prepare a summarized record of matters considered, and forward the record to the officer having nonjudicial punishment authority. That commander's decision will then be communicated to the accused in writing.

2. Personal Representative. The concept of a personal representative to speak on behalf of the accused at a UCMJ Article 15 hearing is a new one and hence little concrete guidance can be given at this time. The burden of obtaining such a representative is on the accused. As a practical matter, he is free to choose anyone he wants -- lawyer or nonlawyer, officer or enlisted man. This freedom of the accused to choose a representative does not obligate the command to provide lawyer counsel, and current regulation does not create a right to lawyer counsel to the extent 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 UCMJ 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 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 or long.

3. Adversary Proceeding. The presence of a personal representative is not meant to create an adversary 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 atmosphere.

4. Witnesses. When the hearing involves controverted questions of fact pertaining to the alleged offenses, witnesses must be called to testify if they are present on the same ship or base or are otherwise available at no extra 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 extra cost to the government.

5. Public Hearing. When requested by the accused, the hearing must be open to the public to the extent provided by available space unless the commander decides that security dictates otherwise. In the Marine Corps, commanders have been directed to require members of the command to attend these hearings as a part of general military training to dispel false notions about NJP. The advent of the public hearing means that commanders will have to ensure that their hearings are and appear to be fair, impartial, and sober. The public hearing also means that a crowded office space should not be utilized for UCMJ Article 15 hearings if a more suitable space is reasonably available.

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0. Private Hearing. Conversely, the accused has the right, independent of the right to a public hearing to confer privately with the commanding officer concerning any matter which in the opinion of the accused is too personal for public airing. This right is meaningless unless the hearing officer advises the accused of this right prior to the imposition of punishment.

POST HEARING ADVICE. After punishment has been imposed, the accused must be advised of his appellate rights. The advice must be complete and include the following matters.

1. To Whom Made. In the Navy the appeal must be directed to the area coordinator authorized to convene general courts-martial. In the Marine Corps the appeal shall be made to the officer next superior in the chain of command of the officer who imposed punishment. /JAGMAN 0101f(3)7. In the Navy the appeal is forwarded to the area coordinator exercising general court-martial jurisdiction unless a commanding officer exercising general court-martial jurisdiction and senior in the chain of command of the officer imposing the punishment specifically directs other disposition. When the area coordinator is not senior to the officer imposing punishment or where punishment was imposed by an area coordinator, the appeal will be forwarded to the officer exercising general court-martial jurisdiction over the officer imposing punishment /JAGMAN, Sec. 0101f(2)7.

2. When Made. The appeal must be submitted within a reasonable time after the hearing. An appeal filed more than fifteen days after the hearing can be rejected on that basis alone.

3. Form. The appeal must be in writing.

4. Grounds. There are only two grounds for appeal -- that the punishment was unjust (accused was not guilty of the offense, the act he did was no crime, etc.) or that it was disproportionate to the offense committed (accused committed the offense but the punishment was too severe).

5. Lawyer Review. The accused is not required to be advised but should be informed that, if his punishment involves a reduction in grade or exceeds arrest-in-quarters, correctional custody or forfeitures for seven days or extra duties, restriction or detention of pay for fourteen days, the case must be referred to a lawyer prior to the reviewing authority acting on the appeal. The advice of the lawyer need not be attached to the appeal record.

6. Scope of Review. The accused need not but ought to be advised that the reviewing authority is not limited to the matters of record in the appeal package but can make such collateral inquiry as he deems necessary.

7. Review Procedure. The accused also ought to be advised of any peculiar local rules for submission of nonjudicial punishment appeals.

HEARING PROCEDURE. In a general sense the nonjudicial punishment hearing should be conducted in the following sequence (at the end of this PART sample right acknowledgement forms and a hearing guide provide more detailed guidance for conducting the hearing). Before reporting to the commanding officer a subordinate should advise the accused of his hearing rights and have him execute an acknowledgement of this advice. If needed, time should be given to the accused to obtain a personal representative. At the hearing, the commander should fully advise the accused of his rights (to remain silent, present evidence, etc., see hearing guide). All evidence bearing on the offense and known to the commander should be presented and considered making sure the defendant is afforded an opportunity to exercise his rights with respect to the evidence. The defendant should then be allowed to present any matters he wishes. After considering the evidence the decision should be announced. Throughout the hearing someone should be detailed to keep notes of the proceeding summarizing all matters considered for use subsequently in any appeal or congressional inquiry. Following the hearing the accused should be advised of his appellate rights.

NONJUDICIAL PUNISHMENT
ACCUSED'S ACKNOWLEDGMENT OF HEARING RIGHTS

I, _____, Social Security Number _____,
assigned or attached to _____,
have been informed of the following facts and rights:

1. That I am suspected of having committed the following violation(s)
of the Uniform Code of Military Justice:

2. That it is contemplated that my case will be referred to a UCMJ
Art. 15 hearing;

3. That I have the right to refuse an Article 15 hearing if I am not
attached to or embarked in a vessel;

4. That if I accept an Article 15 hearing I will receive a hearing at
which I will be accorded the following rights:

- a. to be present before the officer conducting the hearing;
- b. to be advised of the offense(s) of which I am suspected;
- c. to not be compelled to make any statement regarding the offense(s)
charged and I realize that if I make any statement it may be used
against me at the hearing or at a court-martial.
- d. to be present during the presentation of all information against
me, including testimony of witnesses in person, or by the receipt
of their written statement(s), copies of such statements having
been furnished to me;
- e. to have made available to me for my inspection all items of
information in the nature of physical or documentary evidence
to be considered by the officer conducting the hearing;
- f. to have full opportunity to present any matter in mitigation
(matter in mitigation has for its purpose the lessening of the
punishment which may be imposed. Matters in mitigation may
include particular acts of good conduct or bravery, relate to the
reputation or record of the accused in the service for efficiency,
fidelity, subordination, temperance, courage, or any other trait
which goes to make a good serviceman.); extenuation (matter in
extenuation of an offense serves to explain the circumstances

surrounding the commission of the offense, including the reasons that motivated the accused, but not extending to legal justification or excuse. Example, "I went UA, but did so because my girl friend was pregnant."; or defense (matter in defense would be any evidence tending to show that one is not guilty of the offense(s) charged including evidence that one's character is not of the type one would have if he had committed this offense(s) the offense(s) of which I am suspected);

- g. to be accompanied at the hearing by a personal representative to speak on my behalf, provided by ME, who may but need not be a lawyer (the personal representative can be anyone who is available and willing to represent the accused; there is no official way any person can be compelled to represent an accused and his act in doing so is purely voluntary on his part);
5. That if I submit to an Article 15 hearing and if Nonjudicial Punishment is imposed, I will have the right to appeal to higher authority;
 6. That if I have a right to refuse an Article 15 hearing and do so, the charges against me may be referred to trial by court-martial;
 7. That if not otherwise contemplated, I have the right to request that the Article 15 hearing will be open to the public to the extent permitted by available space, unless in the opinion of the Commanding Officer security interests dictate otherwise, and
 8. that if there is an open hearing, I may still confer privately with the officer who holds the hearing regarding matters which, in my opinion, are of a personal nature.

Signature of Accused & Date

Signature of Witness & Date

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Figure 1-2

THE COMMANDERS GUIDE FOR UCMJ, ART. 15 HEARINGS

COMMANDING OFFICER:

/C.O. should be able to explain in words which are readily understandable to the accused how the alleged facts of the accused's act (or omission) comprised an offense under the UCMJ.⁷

The purpose of this NJP proceeding is to conduct an impartial hearing into your alleged misconduct. You are advised that you are suspected of committing a violation of the Uniform Code of Military Justice, specifically Article(s) _____ on _____ (date) by _____ (describe the specific nature of the offense). You are entitled to the full protection of Uniform Code of Military Justice, Article 31, that is, you have the absolute right to remain silent, to refuse to make any statement regarding this offense, and to refuse to answer any of my questions. However, if you do make a statement that statement may be used as evidence against you in a trial by court-martial or any other proceeding including this hearing. Do you understand these rights?

Yes/No. (If no, explain rights in detail.)

ACCUSED:

COMMANDING OFFICER:

You are further advised that an NJP hearing is not a trial and that a determination of misconduct on your part is not a conviction. Finally, you are advised that although the formal rules of evidence used in trial by courts-martial do not apply at NJP hearings, evidence presented in an informal manner will be presented to determine your alleged misconduct.

At this hearing you also have the following rights:

COMMANDING OFFICER:

- a. to be present during the presentation of all information against you, either by testimony of witnesses in person, or by the receipt of written statements, in the case of statements copies of the statements will be furnished to you;
- b. to have made available to you for inspection all items of information in the nature of physical or documentary evidence to be considered by me;
- c. to have full opportunity to present any matter in mitigation, extenuation or defense;
- d. to be accompanied at this hearing by a personal representative, provided by you, who may, but need not be, a lawyer; you are entitled to have anyone assist you who is willing and able to appear;

This hearing will be public, to the extent permitted by space, (unless security matters are discussed) however, if you would like to confer with me about

anything which you feel is of a personal nature, you may do so. If there are any controverted questions of fact concerning the suspected offense, witnesses if present on the same ship, camp, station, or otherwise available shall be called to testify if this can be done at no cost to the government. If punishment is imposed after this hearing you have the right to appeal to the next higher authority.

COMMANDING OFFICER: Do you understand these rights?

ACCUSED: Yes, sir.

COMMANDING OFFICER: Do you want a personal representative?

ACCUSED: No/Yes, sir.

COMMANDING OFFICER: Further, it is my purpose at this proceeding, if I find that you have committed the offense(s), to impose punishment under Art. 15 unless (if such right exists) you demand trial by court-martial.

COMMANDING OFFICER: (If not attached to a vessel)
You have the absolute right to demand trial by court-martial instead of accepting nonjudicial punishment. Will you accept nonjudicial punishment or do you wish to request trial by court-martial?

ACCUSED: "I'll accept nonjudicial punishment" or "I wish to be tried by court-martial."

COMMANDING OFFICER: Do you realize that you may request trial by court-martial at any time prior to my announcing punishment, if any is to be awarded?

ACCUSED: "I understand."

COMMANDING OFFICER: The evidence that will be considered against you consists of the testimony of _____, and _____

(Command evidence is now presented)

_____ which will now be heard (after each testimony ask accused if he wishes any questions asked) and/or these documents or this physical evidence (ask accused or his personal representative if they had an opportunity to see these papers and articles and if not, show them to the accused).

COMMANDING OFFICER: Is there anything that you wish to offer in your behalf -- either as a defense to the offense charged or as an explanation of the facts surrounding the commission of the offense, or in mitigation of the offense?

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ACCUSED: /If his case does not include the testimony of his immediate commander and work supervisor the CO should ask them to testify about the accused's performance?

COMMANDING OFFICER: Is there anything else you wish me to consider?

COMMANDING OFFICER: I find that you have (not) committed the offense(s) charged.

COMMANDING OFFICER: Accordingly, I impose the following punishment:
/State specifically the punishment awarded; making sure that the punishment does not exceed that authorized by Manual for Courts-Martial, 1969 (Rev), paras. 127 or 131b. See Table One in Part Three.

COMMANDING OFFICER: You are advised that you have the right to appeal this punishment to (Identify proper authority by name and organizational title.)
Such appeal must be filed by you in writing within a reasonable time, normally fifteen days from today. Following this hearing (the Legal Officer, First Sergeant, or other person) will advise you more fully of this right to appeal. Do you understand?

ACCUSED: Yes/no, sir.

COMMANDING OFFICER: This hearing is terminated.

Figure 2-3

NONJUDICIAL PUNISHMENT
ACCUSED'S ACKNOWLEDGEMENT OF APPELLATE RIGHTS

I, _____, SSAN _____, assigned
or attached to _____, have been informed
of the following facts concerning my rights of appeal from nonjudicial
punishment imposed upon me on _____.

- a. That I have the right to appeal the punishment imposed pursuant to UCMJ, Article 15, to the commander next senior to the officer who imposed the punishment.
- b. My appeal must be submitted within a reasonable time, fifteen days normally being considered a reasonable time,
- c. The appeal must be in writing;
- d. I understand that there are only two grounds for appeal:
 - (1) The punishment was unjust (what was done was not an offense, there was substantial and prejudicial violations of my procedural rights, evidence presented does not prove I committed the offense, etc.)
 - (2) The punishment was disproportionate (too severe);
- e. That if the punishment imposed 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, the appeal must be referred to a lawyer for consideration before action may be taken by appellate authority;
- f. I understand that the appellate authority is not limited to matters of record but may make collateral inquiry in connection with the review of my appeal.

Signature of Accused & Date

Signature of Witness & Date

NOTE: This advice should be given to the accused by someone who is familiar with the Legal SOP and format for submitting NJP appeals utilized by the particular organization concerned.

Figure 3-1

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SECTION TWO
CHAPTER II
PART THREE
AUTHORIZED PUNISHMENTS

LIMITATIONS. The maximum imposable punishment in any UCMJ, Article 15 case is limited by:

1. Grade of the Imposing Officer: Officers, grades O-1 to O-3, have limited punishment powers; Officers, grades O-4 to O-6, have more punishment powers; and, flag or general officers have even greater punishment authority.

2. Status of the Defendant: Punishment authority is also limited by the status of the accused - is he an officer or enlisted man and is he aboard or attached to a ship.

3. Punishment Tables. Table #1 at the end of the PART details the variations for the maximum punishment available under UCMJ, Article 1r.

MAXIMUM LIMITS - SPECIFIC

1. Officer Defendants. If punishment is imposed by the following grades of commanders, the limits are as indicated.

a. By Flag/General Officer In Command.

(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.

(5) Detention of Pay: not more than 1/2 of 1 month's pay per month for three months.

b. By Field Grade Officers (O-4 to O-6).

(1) Admonition (reprimand).

(2) Restriction: not more than 30 days.

c. Officer Grades (O-1 to O-3).

(1) Admonition/reprimand.

(2) Restriction: not more than 15 days.

d. By Officer-in-Charge: None.

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SECT TWO
CHPT II

2. Enlisted Defendants.

a. By Commanders in Grades 0-4 and above.

- (1) Admonition/reprimand
- (2) Confinement on Bread and Water/Diminished Rations: imposable only on grades E-3 and below and for not more than 3 days.
- (3) Correctional Custody: not more than 30 days and only on grades E-1 to E-3.
- (4) Forfeiture: not more than 1/2 of 1 month's pay per month for two months.
- (5) Reduction: one grade.
- (6) Extra Duties: not more than 45 days.
- (7) Restriction: not more than 60 days.
- (8) Detention of Pay: not more than 1/2 of 1 month's pay per month for three months.

b. By Other Commander or Officer-in-Charge.

- (1) Admonition or Reprimand.
- (2) Correctional Custody: not more than 7 days and on grades E-1 to E-3 only.
- (3) Confinement on Bread and Water/Diminished Rations: not more than 3 days and only on grades E-1 to E-3.
- (4) Forfeiture: not more than 7 days pay.
- (5) Reduction: to next inferior pay grade if C.O./OIC has the promotional authority to the higher grade.
- (6) Extra Duties: for not more than 14 days.
- (7) Restriction: not more than 14 days.
- (8) Detention of Pay: not more than 14 days pay.

PUNISHMENT TYPES

1. Admonition/Reprimand. Procedures are detailed very clearly in MCM, para. 131c(1) and JAGMAN, Sec. 0102 (See also SECNAVINST 1620.6 series). Adhere closely to these procedures.

2. Arrest in Quarters. Impossible only on officers and cannot be imposed upon enlisted persons. It is a moral restraint as opposed to a physical restraint. It is similar to restriction but has much narrower limits than restriction. 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 commander cannot require the performance of military duty by the accused which involves the exercise of authority over subordinates.

3. Restriction. Also a moral as opposed to physical restraint. Its severity depends upon the breadth of the limits as well as duration of the restriction. If restriction limits are drawn too tightly there is a real danger that they may amount to either pretrial arrest or arrest in quarters which in the former case cannot be imposed as punishment and in the latter case is not an authorized punishment for enlisted persons. 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.

4. Forfeiture. Applies to basic pay but not incentive pay, allowances for subsistence or quarters, etc. Forfeiture means that the defendant forfeits monies due him in compensation for his military service only and not any private funds. The amount of forfeiture should be stated in dollars not in fractions of pay, and indicate the number of months affected; hence, "to forfeit \$50.00 per month for 2 months." Where a reduction is also involved in the punishment, the forfeiture must be premised on the new lower rank. 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. Forfeitures will be stated in dollar amounts only.

5. Detention of Pay. Is a temporary withholding of pay - or a forced savings plan. The monetary limit is 1/2 of one month's pay - the effective period over which the money can be collected is limited to 3 months - and the aggregate can be detained for no longer than one year from the date of its imposition. The detained amount must be returned at the close of the detaining period or at the expiration of enlistment whichever occurs first.

6. Extra Duties. Extra duties are any kind of duties assigned, in addition to routine duties, as punishment. Such duties may include watches but not guard duty. Sundays count as a duty day but extra duty may not be performed on Sunday. JAGMAN, Sec. 0101b(6) indicates that extra duty should not be performed more than 2 hours per day. When imposed upon a petty officer (E-4 and above) the duties cannot be demeaning to his rank. The immediate CO of the defendant will normally designate the amount and character of extra duty regardless of who imposed the punishment.

7. Reduction in Grade. Limited by MCM, para. 131c(7) and JAGMAN 0101b(7) to one grade only. The grade from which reduced must be within the promotional authority of the CO imposing the reduction. If a reduction is to be imposed along with forfeitures, CO should consider the impact of both punishments before imposing them.

8. Correctional Custody. A physical restraint during either duty or nonduty hours or both and may include hard labor or extra duty. Prisoners may perform military duty but not watches and cannot bear arms or exercise authority over subordinates [See MCM, para. 131c(4)]. Specific regulations for conducting correctional custody are found in SECNAVINST 1640.7A series. Time spent in correctional custody is not "lost time" and correctional custody cannot be imposed on grades E-4 and above [see JAGMAN 0101b(4)]. Similarly, correctional custody is not an authorized court-martial punishment.

9. Confinement on Bread/Water or Diminished Rations. Can be utilized only if accused is attached to or embarked on a vessel (even if ship is tied up at the dock). The punishment involves physical confinement and amounts to solitary confinement because contact is allowed only with authorized personnel. 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 further detailed in SECNAVINST 1640.7 series. This punishment cannot be imposed upon E-4 and above and it may not be combined with any other form of restraint.

EXECUTION OF PUNISHMENTS

1. Usual Case. All punishments, if not suspended take effect when imposed. As a practical matter in most cases this means punishment is to take effect when the commander informs the accused of his punishment decision.

2. Deferral of Punishment. JAGMAN, Sec. 0101e authorized deferrment of the execution of punishment in two cases.

a. Commanders and officers-in-charge at sea may defer the execution of confinement on bread and water or correctional custody when the exigencies of service require. In such cases deferral may be for a reasonable time but cannot exceed 15 days.

b. Punishment is also deferred when the accused is already subject to a forfeiture, detention of pay, or a restraint in virtue of previous NJP. The new punishment is not effective until the prior status is ended.

c. Change 5 to JAGMAN section 0101e(2) now allows the staying of Restraint type punishments (Arrest-in-quarters, Correctional Custody, Confinement on Bread and Water or Diminished Rations, Restriction) and Extra Duties pending appeal in the cases of accused NOT attached to or embarked in a vessel."

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

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TABLE ONE

LIMITS OF PUNISHMENTS UNDER ARTICLE 15, UCMJ
(NON-JUDICIAL PUNISHMENT)
(SEE NOTES 1 & 2)

Imposed By	Imposed on	Confinement on B & W or Dim Rats (4)(12)	Correctional Custody (3) (4)	Arrest in Quarters (3)(4)	Forfeiture (5) (6)	Reduction (7)	Extra Duties (3)(4)	Restriction to Limits (3)	Detention of Pay (5) (8)	Admonition (9)	Reprimand (9)
General Officers in Command	Officers	No	No	30 days	1/2 one mo. for 2 mos.	No	No	60 days	1/2 one mo for 3 mos	Yes	Yes
	E-4 to E-9	No	No	No	1/2 one mo. for 2 mos.	1 Grade	45 days (10)	60 days (10)	1/2 one mo for 3 mos	Yes	Yes
	E-1 to E-3	3 days	30 days (10)	No	1/2 one mo. for 2 mos.	1 Grade	45 days (10)	60 days (10)	1/2 one mo for 3 mos	Yes	Yes
	O-4	Officers	No	No	No	No	No	30 days	No	Yes	Yes
to O-6	E-4 to E-9	No	No	No	1/2 one mo. for 2 mos.	1 Grade	45 days (10)	60 days (10)	1/2 one mo for 3 mos	Yes	Yes
	E-1 to E-3	3 days	30 days (10)	No	1/2 one mo. for 2 mos.	1 Grade	45 days (10)	60 days (10)	1/2 one mo for 3 mos	Yes	Yes
	O-3 below and Oinc's (13)	Officers	No	No	No	No	No	15 days	No	Yes	Yes
(13)	E-4 to E-9	No	No	No	7 days	1 Grade	14 days (11)	14 days (11)	14 days	Yes	Yes
	E-1 to E-3	3 days	7 days (11)	No	7 days	1 Grade	14 days (11)	14 days (11)	14 days	Yes	Yes

- (1) NJP may not be imposed if, before imposition of punishment, trial by court-martial is demanded by any member not attached to or embarked on a vessel.
- (2) Officer who imposes punishment, or his successor in command, CO of unit to which accused is transferred, or his successor in command, and officer receiving appeal, may, at any time -
 1. Suspend probationally for up to 6 months from date of suspension or until expiration of enlistment, whichever is earlier -
 - a. Any part or amount of unexecuted punishment
 - b. A reduction in grade or a forfeiture, whether or not executed, except if executed the suspension must be made within 6 months of imposition
 2. Remit or mitigate any part or amount of the unexecuted punishment
 3. Set aside in whole or in part the punishment, whether executed or unexecuted, and restore all rights, privileges, and property affected
 4. Mitigate reduction in grade to forfeiture or detention of pay
 5. Mitigate (provided the mitigated punishment shall not be for a greater period than the punishment mitigated) -
 - a. Arrest in quarters to restriction
 - b. Confinement on bread and water or diminished rations to correctional custody
 - c. Correctional custody or confinement on bread and water or diminished rations to extra duties or restriction, or both
 - d. Extra duties to restriction
- (3) No two or more of these punishments may be combined to run consecutively in the maximum amount imposable for each; must be apportioned.
- (4) Any, except bread and water, may be combined to run concurrently for the maximum of the most severe
- (5) Should be imposed in round dollars. May be combined by apportionment: 14 days of detention equals 1 day forfeiture.
- (6) Forfeiture, and detention of pay may not be combined unless apportioned.
- (7) If grade from which reduced is within promotion authority of CO or any subordinate.
- (8) Detention of pay shall be for a stated period of not more than one year, but not beyond expiration of enlistment.
- (9) May be imposed in addition to or in lieu of all other punishments.
- (10) 14 days of extra duties equals 1 day of custody or 2 of restriction.
- (11) 1 day of custody equals 2 of extra duties or 2 of restriction.
- (12) Only if embarked on or attached to a vessel.
- (13) Oinc's have NJP authority over enlisted personnel only.

Ref: (a) P.L. 87-648, 10 U.S.C. Sec. 815 (Art 15, UCMJ)
(b) Par. 131, MCM, 1969
(c) Sec 0101, JAG Manual

SECTION TWO
CHAPTER II
PART FOUR
COMBINATION/APPORTIONMENT OF PUNISHMENT

GENERAL RULE. MCM, para. 131d states that no two punishments of the same type can be imposed in the maximum permissible for each. There are two methods of combining punishments recognized in military law.

1. Concurrent Punishment: means two or more punishments being executed at the same time (Example: 5 days correctional custody and 5 days of restriction served at the same time).

2. Consecutive Punishment: means two or more punishments being served in series -- one after the other (Example: 5 days correctional custody followed by 10 days of restriction).

DEPRIVATIONS OF LIBERTY

1. Defined. In decreasing order of severity, deprivations of liberty include correctional custody, arrest in quarters, extra duties, and restriction. Confinement on bread and water is also a deprivation of liberty, but it cannot be combined with any other forms of restraint.

a. Concurrent Punishment: Deprivations of liberty cannot be combined to exceed the maximum for the most severe form: correctional custody, arrest in quarters, restriction and extra duty.

Example: An O-4 commander can impose on an E-2 30 days correctional custody, 45 days extra duties, or 60 days restriction. To combine these to run concurrently, the commander can impose 30 days correctional custody, extra duties and restriction. All are served over the same period of time.

Example: An O-2 commander can impose 7 days correctional custody, 14 days extra duties, or 14 days restriction. To combine these punishments to run concurrently, the commander can impose 7 days correctional custody, restriction and extra duty. All are served at the same time over the same period of time.

b. Consecutive Punishment: To combine deprivations of liberty consecutively, they must be apportioned in accordance with the Table of Equivalent Nonjudicial Punishments in MCM, para. 131d. This table and the rules for consecutive apportionment have been reduced to usable form in tables #2 and #3 at the end of this PART.

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DEPRIVATIONS OF PAY

1. Defined. Deprivation of pay includes forfeiture and detention of pay. Forfeiture is the more severe since the accused does not get the money back as is the case with detention.

2. Concurrent Punishment. Monetary punishments cannot be combined unless there is an apportionment made in accordance with the table to MCM, para. 131d. This apportionment formula has been reduced to usable form in tables #3 and #4 at the end of this PART.

3. Consecutive Punishment. Same rules apply as for concurrent punishment.

SAMPLE COMBINATION - DEPRIVATION OF PAY. The following procedure can be utilized to determine the appropriate combination of monetary punishments. This procedure is premised on dollar amounts as opposed to the MCM, para. 131d method of computation which uses days of pay.

PROBLEM. Seaman Jones earns \$300 per month all of which is subject to forfeiture and detention. The commanding officer (O-4) wishes to exact \$100 per month forfeiture and subject the remainder of Jones' pay to detention. How much can be detained?

RULES.

1. Jones may not be deprived of more than $\frac{1}{2}$ of his pay in any one month. Thus the maximum forfeitable in one month is \$150 in this case. Thus the desired \$100 forfeiture is within legal limits.

2. Forfeitures cannot be exacted for more than two months. Thus the total amount of Jones' pay subject to forfeiture is \$300 (150 x 2 months).

3. Detention of pay cannot be exacted for more than three months. Thus \$450 of Jones' pay is subject to detention (\$150 x 3 months).

PROCEDURE

1. Create the chart drawn below.

Punishment	Month #1	Month #2	Month #3
Forfeiture			//////////
Detention			
Total			

2. First decide and enter the amount of pay the commander wishes to forfeit for each month in the appropriate month column. Also enter the total pay per month subject to monetary punishment (in Jones' case \$150) in the appropriate total columns. When combining punishments, both kinds in total cannot exceed \$150 in each month.

Punishment	Month #1	Month #2	Month #3
Forfeiture	100	100	//////////
Detention			
Total	150	150	150

3. Consider and set up the following equation. The total money subject to forfeiture (\$150 x 2 months = \$300) relates to the total money detainable \$150 x 3 months = \$450) as the amount of money remaining which could have been forfeited (\$300 - \$200 = \$100) relates to the unknown amount lawfully detainable (X). Thus the formula:

$$\text{\$300} : \text{\$450} :: \text{\$100} : X$$

4. Multiply \$300 by X and \$450 by \$100 in the next step. Thus the formula:

$$\begin{aligned} \text{\$300} : \text{\$450} &:: \text{\$100} : X \\ \text{\$300}X &= 45000 \end{aligned}$$

5. To determine the total amount of money detainable in Jones' case, divide \$45000 by \$300. Thus the formula:

$$\begin{aligned} \text{\$300} : \text{\$450} &; \text{\$100} : X \\ 300X &= 45000 \\ X &= 45000 \div 300 \\ X &= \text{\$150} \end{aligned}$$

6. The total amount of money that Jones' commander can subject to detention in combination with the decided forfeiture is \$150 as determined in the foregoing mathematical process. This \$150 can be detained in any combination the commander desires so long as the lawful maximum monthly totals are not exceeded. Thus the chart shows that only \$50 can be detained in months #1 and #2 but \$150 can be detained in month #3 (since no forfeiture has affected month #3). The commander then decides how he wants to apportion the \$150 detainable among the three months. Assuming he wishes to detain the maximum the chart should be completed as follows:

Punishment	Month #1	Month #2	Month #3
Forfeiture	\$100	\$100	////////////////
Detention	\$ 50	\$ 50	\$50
Total	\$150	\$150	\$150

TABLE TWO

TABLE I

For combining Correctional Custody,
Extra Duties and Restriction to
Limits to be served consecutively.

ED	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28
CC	CC	CC	CC	CC	CC	CC	CC	CC	CC	CC	CC	CC	CC	CC	CC	CC	CC	CC	CC	CC	CC	CC	CC	CC	CC	CC	CC	CC
R	R	R	R	R	R	R	R	R	R	R	R	R	R	R	R	R	R	R	R	R	R	R	R	R	R	R	R	R
1	58	54	52	50	48	46	44	42	40	38	36	34	32	30	28	26	24	22	20	18	16	14	12	10	8	6	4	2
2	55	53	51	49	47	45	43	41	39	37	35	33	31	29	27	25	23	21	19	17	15	13	11	9	7	5	3	1
3	52	50	48	46	44	42	40	38	36	34	32	30	28	26	24	22	20	18	16	14	12	10	8	6	4	2		
4	50	48	46	44	42	40	38	36	34	32	30	28	26	24	22	20	18	16	14	12	10	8	6	4	2			
5	48	46	44	42	40	38	36	34	32	30	28	26	24	22	20	18	16	14	12	10	8	6	4	2				
6	46	44	42	40	38	36	34	32	30	28	26	24	22	20	18	16	14	12	10	8	6	4	2					
7	44	42	40	38	36	34	32	30	28	26	24	22	20	18	16	14	12	10	8	6	4	2						
8	42	40	38	36	34	32	30	28	26	24	22	20	18	16	14	12	10	8	6	4	2							
9	40	38	36	34	32	30	28	26	24	22	20	18	16	14	12	10	8	6	4	2								
10	38	36	34	32	30	28	26	24	22	20	18	16	14	12	10	8	6	4	2									
11	36	34	32	30	28	26	24	22	20	18	16	14	12	10	8	6	4	2										
12	34	32	30	28	26	24	22	20	18	16	14	12	10	8	6	4	2											
13	32	30	28	26	24	22	20	18	16	14	12	10	8	6	4	2												
14	30	28	26	24	22	20	18	16	14	12	10	8	6	4	2													
15	28	26	24	22	20	18	16	14	12	10	8	6	4	2														
16	26	24	22	20	18	16	14	12	10	8	6	4	2															
17	24	22	20	18	16	14	12	10	8	6	4	2																
18	22	20	18	16	14	12	10	8	6	4	2																	
19	20	18	16	14	12	10	8	6	4	2																		
20	18	16	14	12	10	8	6	4	2																			
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23	12	10	8	6	4	2																						
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TABLE THREE

TABLE A

For combining Correctional Custody with either Extra Duties or Restriction to Limits to be served consecutively.

CC	+	R	or	ED
1	+	58	or	43
2	+	56	or	42
3	+	54	or	40
4	+	52	or	39
5	+	50	or	37
6	+	48	or	36
7	+	46	or	34
8	+	44	or	33
9	+	42	or	31
10	+	40	or	30
11	+	38	or	28
12	+	36	or	27
13	+	34	or	25
14	+	32	or	24
15	+	30	or	22
16	+	28	or	21
17	+	26	or	19
18	+	24	or	18
19	+	22	or	16
20	+	20	or	15
21	+	18	or	13
22	+	16	or	12
23	+	14	or	10
24	+	12	or	9
25	+	10	or	7
26	+	8	or	6
27	+	6	or	4
28	+	4	or	3
29	+	2	or	1

CC - Number of days of
Correctional Custody.

R - Number of days of
Restriction to Limits.

ED - Number of days of
Extra Duty.

Note 1: Extra Duties and Restriction to Limits may be combined to be served concurrently to the maximum of Extra Duties.

TABLE B

For combining Extra Duties and Restriction to Limits to be served consecutively.

ED	+	R
1	+	58
2	+	57
3	+	56
4	+	54
5	+	53
6	+	52
7	+	50
8	+	49
9	+	48
10	+	46
11	+	45
12	+	44
13	+	42
14	+	41
15	+	40
16	+	38
17	+	37
18	+	36
19	+	34
20	+	33
21	+	32
22	+	30
23	+	29
24	+	28
25	+	26
26	+	25
27	+	24
28	+	22
29	+	21
30	+	20
31	+	18
32	+	17
33	+	16
34	+	14
35	+	13
36	+	12
37	+	10
38	+	9
39	+	8
40	+	6
41	+	5
42	+	4
43	+	2
44	+	1

Note # 1

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TABLE THREETABLE C

For combining Forfeiture
of Pay and Detention of
Pay.

FF	+	DP
1	+	43
2	+	42
3	+	40
4	+	39
5	+	37
6	+	36
7	+	34
8	+	33
9	+	31
10	+	30
11	+	28
12	+	27
13	+	25
14	+	24
15	+	22
16	+	21
17	+	19
18	+	18
19	+	16
20	+	15
21	+	13
22	+	12
23	+	10
24	+	9
25	+	7
26	+	6
27	+	4
28	+	3
29	+	1

(Notes # 2 & 3)

FF - Number of days of
Forfeiture of Pay.

DP - Number of days of
Detention of Pay.

Note 2: Forfeiture of Pay and Detention of
Pay must be expressed in dollars
not in days.

Note 3: In no case shall Forfeiture or Deten-
tion of Pay, or a combination thereof,
be imposed in excess of 15 days in any
single month.

TABLE D

For combining Detention
of Pay and Forfeiture of
Pay.

DP	+	FF
1	+	29
2	+	28
3	+	28
4	+	27
5	+	26
6	+	26
7	+	25
8	+	24
9	+	24
10	+	23
11	+	22
12	+	22
13	+	21
14	+	20
15	+	20
16	+	19
17	+	18
18	+	18
19	+	17
20	+	16
21	+	16
22	+	15
23	+	14
24	+	14
25	+	13
26	+	12
27	+	12
28	+	11
29	+	10
30	+	10
31	+	9
32	+	8
33	+	8
34	+	7
35	+	6
36	+	6
37	+	5
38	+	4
39	+	4
40	+	3
41	+	2
42	+	2
43	+	1

(Notes # 2 & 3)

SECTION TWO
CHAPTER II
PART FIVE
CLEMENCY AND APPELLATE CORRECTIVE ACTION

AUTHORITY TO ACT. MOM, paras. 134-135 indicate that after the imposition of nonjudicial punishment the following officials have authority to take clemency action or remedial corrective action. 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.

1. The officer who imposed the punishment. This authority is inherent in the office not the person holding the office as is true of the authority to impose nonjudicial punishment.

2. The successor in command to the office which 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 (See JAGMAN, sec. 0101j).

5. The successor in command of the latter.

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. This power has the effect of voiding the punishment and restoring the rights, privileges, and property lost to the accused in virtue of the punishment imposed. This action should be reserved for compelling circumstances where the commander feels a clear injustice has been perpetrated. 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. Such action can be taken with respect to the whole or a part of the punishment imposed.

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SECT TWO
CHPT II

2. Remission. 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 adjudged punishment, though he may have partially completed it. Rights, privileges and property lost in virtue of executed portions of punishment are not restored nor is the punishment voided as in the case of the "set-aside."

3. Mitigation. This action also relates to the unexecuted portions of punishment as a general rule. 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. (See JAGMAN sec. 0101i).

a. Quality. Without increasing quantity the following qualitative reductions or mitigations may be taken:

(1) Arrest in quarters can be mitigated to restriction, and confinement on bread and water or diminished rations can be mitigated to correctional custody.

(2) Correctional custody or confinement on bread and water or diminished rations can be mitigated to extra duties, restriction, or both.

(3) Extra duties can be mitigated to restriction.

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

c. Reduction-in-Grade. Reduction in grade, even though executed, may be mitigated to either forfeiture or detention of pay (MCM, para. 134). The amount of forfeiture or detention can be no greater than could have been awarded by the mitigating commander had he initially imposed punishment. This mitigation ordinarily should be accomplished within a reasonable time -- 4 months after execution as a general rule (See MCM, para. 134).

4. Suspension of Punishment. This action 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). This action can be taken with respect to unexecuted portions of the punishment or in the case of a reduction in grade 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. The probationary period cannot exceed six months and terminates automatically upon expiration of current enlistment.

c. At the end of the probationary period the suspended portions of the punishment are automatically remitted.

d. Vacation of suspended punishment may be effected by any commander or officer-in-charge who has authority to impose the kind and amount of punishment involved in the particular case.

(1) A formal hearing is unnecessary unless the punishment exceeds the amount stated in Article 15(e), UCMJ. If punishment does exceed that amount the probationer should, unless impracticable, be given a hearing to rebut any adverse or derogatory matter considered.

(2) The Manual for Courts Martial 1969 (Rev) implies that derogatory or adverse information can be used as a basis for vacating a suspended NJP. However, as a general practice an offense against the UCMJ is generally the basis for vacating a suspension.

(3) Typically vacation proceedings are handled at NJP. First, the suspended punishment is vacated and then the Commanding Officer can impose a subsequent NJP if the new act of misconduct is a violation of the UCMJ. At the subsequent NJP the accused must again be provided all his hearing rights, etc.

(4) There is no authority in the Uniform Code of Military Justice for the imposition of conditions of probation, though this is now recognized in court-martial practice. If such conditions are contemplated it is advisable to obtain legal advice before so doing.

APPLICATION BY ACCUSED. MCM, para. 134 indicates that the accused may apply for any of the foregoing actions and the application can be predicated on new matters not presented at initial nonjudicial punishment proceeding.

SECTION TWO
CHAPTER II
PART SIX
APPEAL FROM NONJUDICIAL PUNISHMENT

PROCEDURE. As previously noted in PART TWO of this CHAPTER, the commanding officer is required to ensure that the accused is advised of his right to appeal the punishment imposed. As a general rule Navy appeals are forwarded through appropriate channels to the area coordinator authorized to convene general courts-martial. In the Marine Corps appeals are submitted through appropriate channels to the officer next superior in the chain of command to the officer who imposed the punishment. If the next superior authority is the Commandant of the Marine Corps, only appeals from punishments imposed by general officer commanders will be forwarded to the Commandant. All other appeals are forwarded to the general officer in command geographically nearest to the officer who imposed punishment [JAGMAN, Sec. 0101f(3)]. If the offender is transferred to a new command prior to filing his appeal the appeal should be forwarded directly to the officer who imposed punishment by the immediate commanding officer of the offender at the time the appeal is filed [JAGMAN, Sec. 0101f(7)].

TIME. Appeals must be submitted within a reasonable time [MCM, para. 135 and JAGMAN, Sec. 0101f(1)]. Normally fifteen (15) days is considered to be a reasonable time. If an appeal is not filed within the fifteen day period, the officer imposing punishment must nonetheless forward the appeal to the appropriate reviewing authority. The reviewing authority may lawfully deny any such appeal solely on the basis of its late submission. JAGMAN, Sec. 0101f(1)(b) indicates that if the accused foresees difficulty in submitting his appeal within fifteen days he should request an extension of time from the officer who imposed punishment. This request should be made in writing and the decision on the request should likewise be in writing. The law does not, however, require requests for time extensions to be filed in writing. When submitted to official channels, nonjudicial punishment appeals must be promptly forwarded and decided. The filing of such an appeal does not relieve the offender from the imposed punishment and he may lawfully be required to serve such punishment while the appeal is being processed if attached to or embarked on a vessel. When any such restraint type punishments (Arrest-in-Quarters, Correctional custody, confinement on bread and water or diminished rations, restriction) or extra duties are imposed upon an accused not attached to or embarked on a vessel, if unsuspended, will take effect when imposed provided however, that if an accused indicates an intent to appeal his punishment at the time of imposition of nonjudicial punishment, such punishment will be stayed pending completion of such appeal, unless the accused requests otherwise. If an accused does not indicate an intent to appeal at the time of imposition of NJP but later indicates an intent to appeal in a timely manner, as prescribed by (section 0101f of JAGMAN) further serving of punishment will be stayed pending completion of such appeal unless the accused requests otherwise.

CONTENTS OF APPEAL PACKAGE. At the end of this PART will be found two sample nonjudicial punishment appeal packages. One is a suggested format for Marine Corps use and the other is for use in Navy cases. The paperwork relating to the appeals are inserted in chronological sequence, instead of in proper administrative form, as an aid to following the proper appeal route. Also included with the sample appeals is a schematic drawing of the normal appeal route found in the Navy and Marine Corps.

SECT TWO
CHPT II

1. Appellant's Letter. The letter of appeal from the offender should be addressed to the appropriate reviewing authority via the appropriate commanding officer 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. As noted in PART TWO of this CHAPTER, there are only two grounds for appeal -- the punishment was unjust or the punishment was disproportionate to the offense committed. All specific reasons for appeal should be set forth under one of these two grounds. The grounds for appeal are broad enough to cover all reasons for appeal. Punishment is disproportionate if it is, in the opinion 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. Unjust punishment exists when the evidence is insufficient to prove the accused committed the offense, when the statute of limitations UCMJ, Article 43(c) prohibits lawful punishment, or when any other fact, including a denial of substantial rights, questions the validity of the punishment. These grounds may not be artfully stated in any given appeal letter and the reviewer may have to deduce the appropriate ground implied in the accused's letter. Inartful draftmanship 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 MCM, para. 135, requires the appeal to be promptly forwarded 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 or others, but 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.

2. Via Addressee Endorsements. All via addressees should use a simple forwarding endorsement and should not normally comment on the validity of the appeal. The exception to this rule is the endorsement of the officer who imposed punishment. In some form or other, his endorsement should add to the package the service record of the offender, a summary of the evidence considered at the hearing, a copy of the 1626 form (Navy) or the NAVMC 10132 Unit Punishment Book (Marine Corps),

and copies of the rights acknowledgement forms executed by the accused at or before the hearing (hearing rights and appellate rights). The summary of evidence need not be a burden to prepare if good statements were obtained in the preliminary inquiry and considered at the hearing with any deviations occurring in the hearing testimony (if there is testimony) being noted and filed with the record of the case. The commander who imposed punishment should not, in his endorsement, seek to "defend" himself from the allegations of the appeal but should, where appropriate, explain how he rationalized the evidence. This officer may properly include any facts relevant to the case as an aid to reviewing authorities, but should avoid irrelevant character assassination of the accused. The meat of the imposing commander's endorsement is a thorough summary of the evidence considered at the hearing. Reviewing authorities should insist on a complete summary to ensure a correct decision on the appeal. Finally, any errors made at the hearing should be corrected and the corrective action directed in the forwarding endorsement. Even though such action is taken, the appeal must 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 (where such a review is required by law or regulation), 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. All via addressees should execute simple return endorsements without other comment. 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.

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

REVIEW GUIDELINES. Though not specifically stated in basic references the better view of the law is that review standards are as legally precise as those applying to the court-martial process. Thus the evidence should establish beyond reasonable doubt, in the opinion of the reviewer and the officer who imposed punishment, that the accused committed the offense charged. This means that each element (a fact the law requires to be proved to convict a person of a certain offense) must be proved beyond reasonable doubt. Appropriate paragraphs of the Manual for Courts-Martial detail, in general terms, the elements required to be established to prove a particular crime. More detailed and reliable guidance can be found in Department of the Army Pamphlet 27-9 - Military Judges Guide . The following guidelines will also prove helpful for the review phase.

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. 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, imparts 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 (See MCM, para. 158 for a discussion of lesser included offenses).

3. Lawyer Review. UCMJ, Article 15 requires that if an appeal involves punishment in excess of that which a grade O-3 commander who does not possess promotional authority could impose, the appeal must be referred to a lawyer for consideration and advice. The advice of the lawyer is a matter between the reviewer and the lawyer and does not become a part of the appeal package. Many commands now require all UCMJ, Article 15 appeals to 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. Such inquiries are time-consuming and should be avoided by requiring thorough appeal packages from the officer imposing punishment.

AUTHORIZED APPELLATE ACTION. As explained in PART FIVE of this CHAPTER, the reviewing authority can:

1. Approve the punishment in whole.
2. Mitigate or set aside the punishment to correct errors.
3. Dismiss the case (if this is done the reviewer must direct the restoration of all rights, privileges, and property lost by the accused in virtue of the imposition of the punishment).
4. Mitigate or set aside the punishment for reasons of executive clemency.
5. Order a rehearing on an uncharged but supported offense. In ordering such a rehearing the reviewer must be careful not to express any opinion as to whether he believes the accused actually committed the uncharged offense.



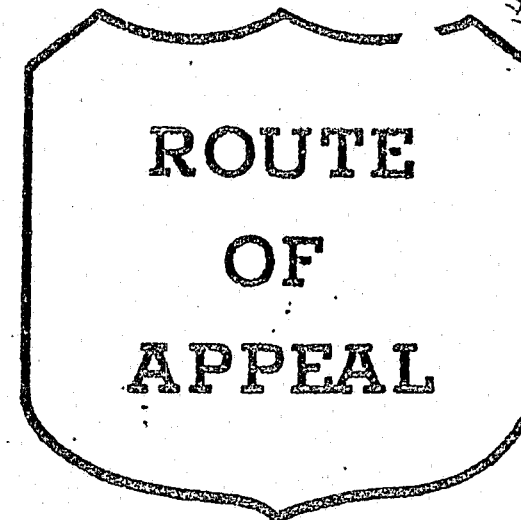
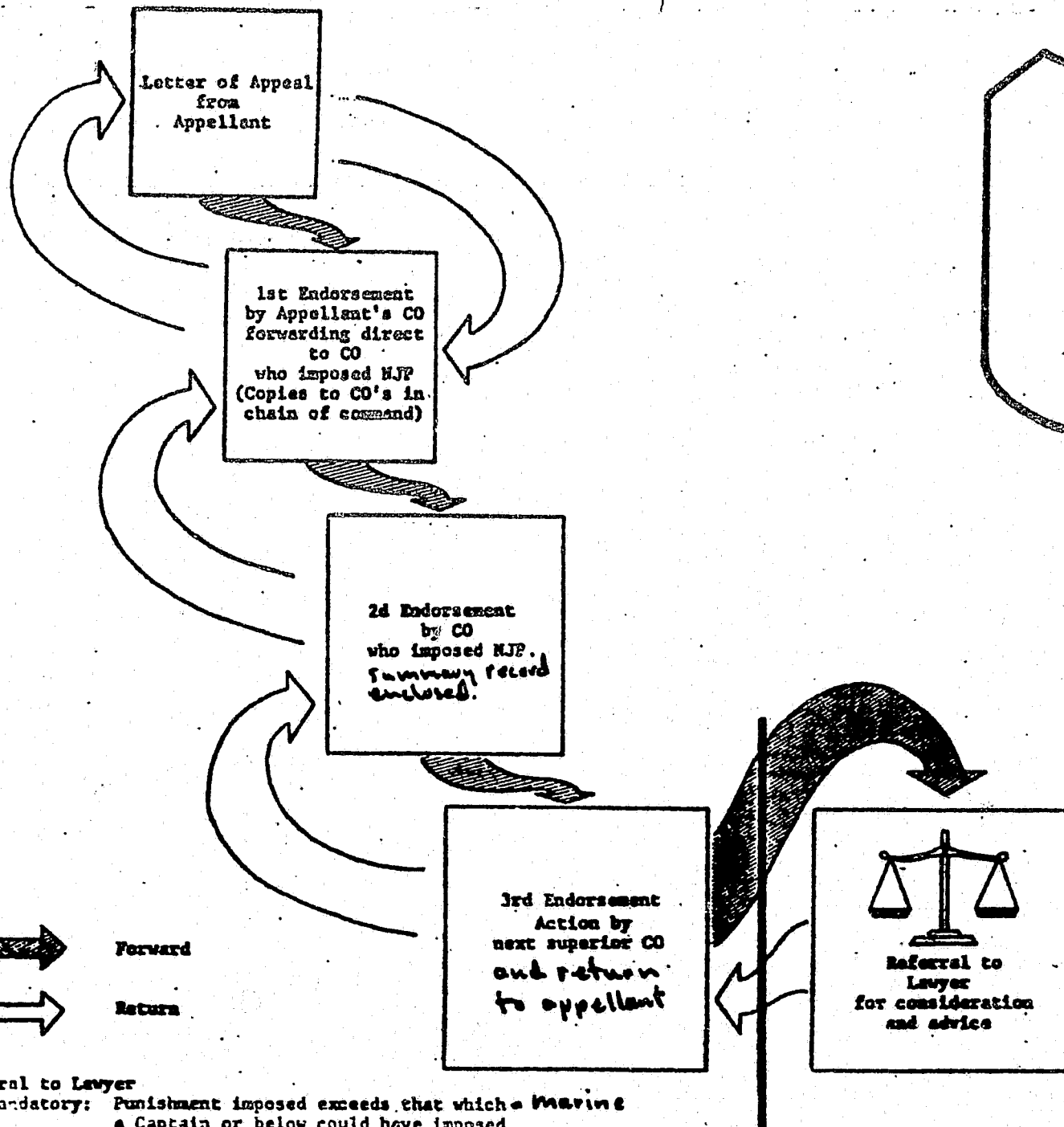
Forward

Return

Referral to Lawyer

Mandatory: Punishment imposed exceeds that which a Marine a Captain or below could have imposed.

Optional: Any other case



from

N J P

- Ref: (a) UCMJ, Art. 15(e)
(b) MCM, 1969 (Rev) para. 135
(c) JAG Manual, sec. 0101f

Figure 7-1

**SAMPLE NONJUDICIAL PUNISHMENT APPEAL
NAVY APPEAL PACKAGE**

XYZ:abc
1 July 197

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

Subj: Nonjudicial punishment, appeal from

Ref: (a) UCMJ, Art. 15(e)
(b) MCM, 1969 (Rev.), para. 135
(c) JAG Manual, Sec. 0101f
(d) Navy Regs, Art. 1109 (1973)
(read to appellant so that he is aware of same.)

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 197
by CDR S. D. DUNN, Commanding Officer, USS BENSON (DD 895) as follows:

a. Offenses

Charge I: Violation of UCMJ, Article 134

Specification: In that RDSN John P. WILLIAMS, USN, did on
board the USS BENSON (DD 895) on or about
16 June 197 unlawfully carry a concealed
weapon, to wit: a switchblade knife.

b. Punishment: Forfeiture of \$50.00 pay.

c. Grounds of Appeal.

(1) Punishment for Charge I is unjust because I, in fact, did
not know knife was on me. The clothes were borrowed.

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SECT TWO
CHPT II

S A M P L E

XYZ:abc
2 July 197

FIRST ENCLOSUREMENT on RDSN John P. WILLIAMS' ltr of 1 July 7

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

Subj: Nonjudicial punishment, appeal from; case of RDSN John P. WILLIAMS,
434-52-9113, U. S. Navy

Encl: (4) NAVPERS 1626/7 with attachments thereto
(5) SR

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

NONJUDICIAL PUNISHMENT
ACCUSED'S ACKNOWLEDGMENT OF HEARING RIGHTS

I, _____, Social Security Number _____,
assigned or attached to _____,
have been informed of the following facts and rights:

1. That I am suspected of having committed the following violation(s)
of the Uniform Code of Military Justice:

2. That it is contemplated that my case will be referred to a UCMJ
Art. 15 hearing;
3. That I have the right to refuse an Article 15 hearing if I am not
attached to or embarked in a vessel;
4. That if I accept an Article 15 hearing I will receive a hearing at
which I will be accorded the following rights:
 - a. to be present before the officer conducting the hearing;
 - b. to be advised of the offense(s) of which I am suspected;
 - c. to not be compelled to make any statement regarding the offense(s)
charged and I realize that if I make any statement it may be used
against me at the hearing or at a court-martial.
 - d. to be present during the presentation of all information against
me, including testimony of witnesses in person, or by the receipt
of their written statement(s), copies of such statements having
been furnished to me;
 - e. to have made available to me for my inspection all items of
information in the nature of physical or documentary evidence
to be considered by the officer conducting the hearing;
 - f. to have full opportunity to present any matter in mitigation
(matter in mitigation has for its purpose the lessening of the
punishment which may be imposed. Matters in mitigation may
include particular acts of good conduct or bravery, relate to the
reputation or record of the accused in the service for efficiency,
fidelity, subordination, temperance, courage, or any other trait
which goes to make a good serviceman.); extenuation (matter in
extenuation of an offense serves to explain the circumstances

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surrounding the commission of the offense, including the reasons that motivated the accused, but not extending to legal justification or excuse. Example, "I went UA, but did so because my girl friend was pregnant."; or defense (matter in defense would be any evidence tending to show that one is not guilty of the offense(s) charged including evidence that one's character is not of the type one would have if he had committed this offense(s))

- g. to be accompanied at the hearing by a personal representative to speak on my behalf, provided by ME, who may but need not be a lawyer (the personal representative can be anyone who is available and willing to represent the accused; there is no official way any person can be compelled to represent an accused and his act in doing so is purely voluntary on his part);
- 5. That if I submit to an Article 15 hearing and if Nonjudicial Punishment is imposed, I will have the right to appeal to higher authority;
- 6. That if I have a right to refuse an Article 15 hearing and do so, the charges against me may be referred to trial by court-martial;
- 7. That if not otherwise contemplated, I have the right to request that the Article 15 hearing will be open to the public to the extent permitted by available space, unless in the opinion of the Commanding Officer security interests dictate otherwise, and
- 8. that if there is an open hearing, I may still confer privately with the officer who holds the hearing regarding matters which, in my opinion, are of a personal nature.

Signature of Accused & Date

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Signature of Witness & Date

NONJUDICIAL PUNISHMENT
ACCUSED'S ACKNOWLEDGEMENT OF APPELLATE RIGHTS

I, _____, SSAN _____, assigned
or attached to _____, have been informed
of the following facts concerning my rights of appeal from nonjudicial
punishment imposed upon me on _____.

- a. That I have the right to appeal the punishment imposed pursuant to UCMJ, Article 15, to the commander next senior to the officer who imposed the punishment.
- b. My appeal must be submitted within a reasonable time, fifteen days normally being considered a reasonable time;
- c. The appeal must be in writing;
- d. I understand that there are only two grounds for appeal:
 - (1) The punishment was unjust (what was done was not an offense, my procedural rights were violated, evidence presented does not prove I was guilty, etc.)
 - (2) The punishment was disproportionate (too severe);
- e. That if the punishment imposed 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, the appeal must be referred to a lawyer for consideration before action may be taken by appellate authority;
- f. I understand that the appellate authority is not limited to matters of record but may make collateral inquiry in connection with the review of my appeal.

Signature of Accused & Date

Signature of Witness & Date

NOTE: This advice should be given to the accused by someone who is familiar with the Legal SOP and format for submitting NJP appeals utilized by the particular organization concerned.

SECT TWO CHPT II
REPORT AND DISPOSITION OF OFFENSE(S)
NAVPERS 1626/7 (Rev. 5-72)

S/N 0106-079-0671

To: Commanding Officer, USS BENSON (DD 895) Date of Report: 16 June 197-

I hereby report the following named man for the offense(s) noted:

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

PLACE OF OFFENSE(S)	DATE OF OFFENSE(S)
Quarterdeck, USS BENSON DD895	16 June 197-

DETAILS OF OFFENSE(S) (Refer by article of UCMJ, if known. If unauthorized absence, give following info: time and date of commencement, whether over land 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 197- 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

(Rate/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 questions or make any statement regarding the offense(s) of which I am accused or suspected. However, I understand any statement made or questions answered by me may be used as evidence against me in event of trial by court-martial (Article 31, UCMJ).

Witness: /s/ H. O. Kay Legal Officer Acknowledged: /s/ John P. Williams
(Signature) (Signature of Accused)

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

(Signature and title of person imposing restraint)

(Signature of Accused)

INFORMATION CONCERNING ACCUSED

CURRENT ENL. DATE	EXPIRATION CURRENT ENL. DATE	TOTAL ACTIVE NAVAL SERVICE	TOTAL SERVICE ON BOARD	EDUCATION	GCT	AGE
24 May 71	23 May 1975	1yr 1mo	10 mos	HS	57	19 yrs.
MARITAL STATUS	NO. DEPENDENTS	CONTRIBUTION TO FAMILY OR OTHER ALLOWANCE (Amount required by law)		PAY PER MONTH (Including sea or foreign duty pay if any)		
Never married	none	none		\$342.60		

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

None

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PRELIMINARY INQUIRY REPORT

From: Commanding Officer
 To: ENS David S. Willis, USNR

Date: 20 June 197

1. Transmitted herewith for preliminary inquiry and report by you, including, if appropriate in the interest of justice, 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/ LT Garry V. Brown

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

RECOMMENDATION AS TO DISPOSITION:

☒ DISPOSE OF CASE AT MAST

☐ REFER TO COURT MARTIAL FOR TRIAL OF ATTACHED CHARGES
 (Complete Charge Sheet (DD Form 538) through Page 2)

☐ NO PUNITIVE ACTION NECESSARY OR DESIRABLE

☐ OTHER

COMMENT (Include data regarding availability of witnesses, summary of expected evidence, conflicts in evidence, if reported. Attach statements of witnesses, documentary evidence such as service record entries in US 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. Hudson, who directed that Williams be put on report. Attached hereto are the statements of Chief Johnson, WO1 Hudson and SN Williams.

/s/ David S. Willis

(Signature of Investigative Officer)

ACTION OF EXECUTIVE OFFICER

☐ DISMISSED

☒ REFERRED TO CAPTAIN'S MAST

SIGNATURE OF EXECUTIVE OFFICER

/s/ R. D. Line, LCDR, USN

RIGHT TO DEMAND TRIAL BY COURT-MARTIAL

(Not applicable to persons attached to or embarked in a vessel)

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

WITNESS

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 \$ 50.00 PAY PER MO. FOR 1 MO(3)

☐ 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(3) DETAINED FOR _____ MO(3)

☐ AWARDED SPCH

☐ AWARDED SCM

DATE OF MAST:

25 June 197

DATE ACCUSED INFORMED OF ABOVE ACTION:

25 June 197

SIGNATURE OF COMMANDING OFFICER

/s/ S. D. Dunn, CDR, USN

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

SIGNATURE OF ACCUSED

David S. Willis

DATE

25 Jun '79

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

SIGNATURE OF WITNESS *H.O. King* 25 Jun '79

FINAL ADMINISTRATIVE ACTION

APPEAL SUBMITTED BY ACCUSED

DATED: 1 July 197

FINAL RESULT OF APPEAL:

FORWARDED FOR DECISION ON

APPROPRIATE ENTRIES MADE IN SERVICE RECORD AND PAY ACCOUNT ADJUSTED WHERE REQUIRED

DATE: 25 June 197

/s/ Leg Off

(Initials)

FILED IN UNIT PUNISHMENT BOOK

DATE: 25 June 197

s Leg Off

(Initials)

18 JUNE 1977

I, HAROLD B. JOHNSON, OMC, USN have been asked by ENS D.S. WILLIS to make the following statement:

On 16 June 1977 I was the TOOD on board the U.S.S. Benson 00897. At approximately 1630 I was on the quarterdeck and ROSEN 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 know that a number of the crew had bought knives while we were in the Med.

I told WILLIAMS to stop and ask him what he had in his pocket. He started to stutter, so I told him to empty his right-hand pocket. He did and 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 have it 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 five inch blade over to the legal officer, LTJG KAY.

WITNESS:
DAVID S. WILLIS
ENS, USNR

HAROLD B. JOHNSON
OMC, USN 154
2-55

18 JUNE 197

I, Robert A. Hudson, WO-1, USN HAVE BEEN ASKED BY
ENS. D.S. WILLIS TO MAKE THE FOLLOWING STATEMENT.

ON 16 JUNE 197, I WAS THE OOD ON BOARD
THE U.S.S. BENSON. MY TOOD 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, THAT HE
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 1953	
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 7	

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

(2) I HAVE THE RIGHT TO REMAIN SILENT;

(3) ANY STATEMENT I DO MAKE MAY BE USED AS EVIDENCE AGAINST ME IN TRIAL BY COURT MARTIAL;

(4) I HAVE THE RIGHT TO CONSULT WITH A LAWYER 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;

(5) I HAVE THE RIGHT TO HAVE SUCH RETAINED CIVILIAN LAWYER 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 MAKE A STATEMENT;

(2) 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) I EXPRESSLY DO NOT DESIRE TO HAVE SUCH A LAWYER PRESENT WITH ME DURING THIS INTERVIEW;

(4) 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 7
SIGNATURE (INTERVIEWER)	TIME	DATE
David S. Willis	1015	19 Jun 7
SIGNATURE (WITNESS)	TIME	DATE

attached hereto and

THE STATEMENT ~~HEREIN~~ 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)

19 JUNE 197

I, John P. Williams, ROSN, USN, after having been advised of my rights by ENS David S. Willis, which I acknowledged on the attached Rights form, make the following statement, fully 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 the knife 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 is a good knife and I did not want to just throw it away.

John P. Williams

witness:

David S. Willis

ENS, USNR

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XYZ:abc
5 July 197

SECOND ENDORSEMENT on RDSN John P. WILLIAMS' ltr of 1 July 7

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

Subj: Nonjudicial punishment, appeal from; case of RDSN John P. WILLIAMS,
434-52-9113, U. S. Navy

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

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SECT TWO
CHPT II

XYZ:abc
6 July 197

THIRD ENDORSEMENT on RDSN John P. WILLIAMS' ltr of 1 July 197

From: Commanding Officer, USS BENSON (DD 895)

To: RDSN John P. WILLIAMS, 434-52-9113, U. S. Navy

Subj: Nonjudicial punishment, appeal from; case of RDSN John P. WILLIAMS,
434-52-9113, U. S. Navy

1. Returned for delivery.

S. D. DUNN

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S A M P L E

SECT TWO
CHPT II

XYZ:abc
8 July 197

FOURTH ENDORSEMENT on RDSN John P. WILLIAMS ltr of 1 July 197

From: RDSN John P. WILLIAMS, 434-52-9113, U.S. Navy
To: Commanding Officer, USS BENSON (DD 895)

Subj: Nonjudicial punishment, appeal from; case of RDSN John P. WILLIAMS,
434-52-9113, U.S. Navy

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

SECT TWO
CHPT II

SAMPLE NONJUDICIAL PUNISHMENT APPEAL
MARINE CORPS APPEAL PACKAGE

SAMPLE

SERVICE COMPANY
HEADQUARTERS BATTALION
MARINE CORPS SUPPLY CENTER
BARSTOW, CALIFORNIA 92311

XYZ:abc
1 May 1971

From: Lance Corporal Abel A. Marine, 123 45 67/0121, U. S. Marine Corps
To: Commanding Officer, Headquarters Battalion, Marine Corps Supply
Center, Barstow, California (next superior in chain of command
to officer who imposed NJP)

Via: (1) Commanding Officer, Service Company, Headquarters Battalion,
Marine Corps Supply Center, Barstow, California (appellant's
immediate CO and officer who imposed NJP)

Subj: Nonjudicial punishment, appeal from

Ref: (a) UCMJ, Art 15(e)
(b) MCM, 1969 (Rev), par 135
(c) JAG Manual, sec 0101f
(d) Navy Regs, Art 1109
(read to appellant so that he is aware of same.)

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 sub-
mitted from nonjudicial punishment imposed upon me on 31 April 1971 by
Captain N. J. PEIGH, Commanding Officer, Service Company, Headquarters
Battalion, Marine Corps Supply Center, Barstow, California, as follows:

a. Offenses

Charge I: Violation of UCMJ, Article 86

Specification: Unauthorized absence from 0600 to 0800
28 April 1971

Charge II: Violation of UCMJ, Article 92

Specification: Dereliction of duty by failure to properly
supervise the barracks cleanup detail on
28 April 1971

b. Punishment: Forfeiture of \$20.00 pay, and restriction for 15 days.

c. Grounds of Appeal

(1) Punishment for Charge II is unjust because I, in fact, was not derelict in the performance of my duty.

(2) The punishment is disproportionate to the remaining offense.

2. (Statement of facts, circumstances, or matters in mitigation in support of the appeal.)

3. Enclosures (1) through (3) are submitted in support of this appeal.

4. I have read and had explained to me subparagraphs 2 and 3 of reference (d).

ABEL A. MARINE

S A M P L E

XYZ:abc
2 May 1971

FIRST ENDORSEMENT on LCpl Abel A. MARINE's ltr of 1May71

From: Commanding Officer, Service Company, Headquarters
Battalion, Marine Corps Supply Center, Barstow,
California 92311

To: Commanding Officer, Headquarters Battalion, Marine
Corps Supply Center, Barstow, California 92311

Subj: Nonjudicial punishment, appeal from; case of Lance
Corporal Abel A. MARINE, 123 45 67/0121, U. S. Marine
Corps

Encl: (4) Summary transcript of impartial hearing
(5) Unit punishment page
(6) SRB, subject Marine (if next superior is geograph-
ically removed, then preferable to enclose appropriate
extracts of SRB)

1. Forwarded for action. Enclosures (4) through (6) 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 next superior authority 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.)

N. J. PEIGH

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SERVICE COMPANY
HEADQUARTERS BATTALION
MARINE CORPS SUPPLY CENTER
BARSTOW, CALIFORNIA 92311
(Unit of officer who imposed NJP)

SUMMARY TRANSCRIPT OF IMPARTIAL HEARING

Held 31 April 1971 1000 before Major N. J. Peigh
(date) (time) Commanding Officer

1. Accused: MARINE, Abel A. LCpl 123 45 67/0121 17 Jul 19
(name) (rank) (ser no/MOS) (PEBD)

was/was not present and was/was not represented by a personal represe
tative.

2. Accused was/was not advised that he was suspected of the
following offense(s):

Charge I: Viol Art 86, UCMJ

Specification: Unauthorized absence from 0600 to 0800
28 April 1971

Charge II: Viol Art 92, UCMJ

Specification: Dereliction of duty by failure to properly
supervise the barracks cleanup detail on
28 April 1971

3. Accused was/was not advised of his rights under UCMJ Article
31(b) and his other rights in the premises. (see attached Forms).

4. The following information against the accused was presented

WITNESSES (statements attached)

CySgt Z. C. Hardbole

Sgt H. E. Bignose

LCpl P. D. Rumpsnoodle

S A M P L E

EXHIBITS AND DOCUMENTS (attached)

Page 12, SRB

5. The accused was/was not given the opportunity to examine the above described information.
6. The accused was/was not given the opportunity to present matters in defense, mitigation, or extenuation, as follows:
(Summarize any oral statements of accused; attach statements or documents presented by accused)
7. The accused was found guilty of Charge I, Specification, Charge II, Specification.
8. The following punishment was imposed:
Forfeiture of \$20.00 pay, and restriction for 15 days.
9. The accused was/was not advised of his right to appeal.

Commanding Officer

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NONJUDICIAL PUNISHMENT
ACCUSED'S ACKNOWLEDGMENT OF HEARING RIGHTS

I, _____, Social Security Number _____,
assigned or attached to _____,
have been informed of the following facts and rights:

1. That I am suspected of having committed the following violation(s) or the Uniform Code of Military Justice:

2. That it is contemplated that my case will be referred to a UCMJ Art. 15 hearing;
3. That I have the right to refuse an Article 15 hearing if I am not attached to or embarked in a vessel;
4. That if I accept an Article 15 hearing I will receive a hearing at which I will be accorded the following rights:
 - a. to be present before the officer conducting the hearing;
 - b. to be advised of the offense(s) of which I am suspected;
 - c. to not be compelled to make any statement regarding the offense(s) charged and I realize that if I make any statement it may be used against me at the hearing or at a court-martial.
 - d. to be present during the presentation of all information against me, including testimony of witnesses in person, or by the receipt of their written statement(s), copies of such statements having been furnished to me;
 - e. to have made available to me for my inspection all items of information in the nature of physical or documentary evidence to be considered by the officer conducting the hearing;
 - f. to have full opportunity to present any matter in mitigation (matter in mitigation has for its purpose the lessening of the punishment which may be imposed. Matters in mitigation may include particular acts of good conduct or bravery, relate to the reputation or record of the accused in the service for efficiency, fidelity, subordination, temperance, courage, or any other trait which goes to make a good serviceman.); extenuation (matter in extenuation of an offense serves to explain the circumstances

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surrounding the commission of the offense, including the reasons that motivated the accused, but not extending to legal justification or excuse. Example, "I went UA, but did so because my girl friend was pregnant."); or defense (matter in defense would be any evidence tending to show that one is not guilty of the offense(s) charged including evidence that one's character is not of the type one would have if he had committed this offense(s) of the offense(s) of which I am suspected);

- g. to be accompanied at the hearing by a personal representative to speak on my behalf, provided by ME, who may but need not be a lawyer (the personal representative can be anyone who is available and willing to represent the accused; there is no official way any person can be compelled to represent an accused and his act in doing so is purely voluntary on his part);
- 5. That if I submit to an Article 15 hearing and if Nonjudicial Punishment is imposed, I will have the right to appeal to higher authority;
- 6. That if I have a right to refuse an Article 15 hearing and do so, the charges against me may be referred to trial by court-martial;
- 7. That if not otherwise contemplated, I have the right to request that the Article 15 hearing will be open to the public to the extent permitted by available space, unless in the opinion of the Commanding Officer security interests dictate otherwise, and
- 8. that if there is an open hearing, I may still confer privately with the officer who holds the hearing regarding matters which, in my opinion, are of a personal nature.

Signature of Accused & Date

Signature of Witness & Date

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NONJUDICIAL PUNISHMENT
ACCUSED'S ACKNOWLEDGEMENT OF APPELATE RIGHTS

I, _____, SSAN _____ assigned
or attached to _____, have been informed
of the following facts concerning my rights of appeal from nonjudicial
punishment imposed upon me on _____.

- a. That I have the right to appeal the punishment imposed pursuant to UCMJ, Article 15, to the commander next senior to the officer who imposed the punishment.
- b. My appeal must be submitted within a reasonable time, fifteen days normally being considered a reasonable time;
- c. The appeal must be in writing;
- d. I understand that there are only two grounds for appeal:
 - (1) The punishment was unjust (what was done was not an offense, my procedural rights were violated, evidence presented does not prove I was guilty, etc.)
 - (2) The punishment was disproportionate (too severe);
- e. That if the punishment imposed 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, the appeal must be referred to a lawyer for consideration before action may be taken by appellate authority;
- f. I understand that the appellate authority is not limited to matters of record but may make collateral inquiry in connection with the review of my appeal.

Signature of Accused & Date

Signature of Witness & Date

NOTE: This advise should be given to the accused by someone who is familiar with the Legal SOP and format for submitting NJP appeals utilized by the particular organization concerned.

29 April 1971

On 28 April 1971 US G4Sgt Z.C. Hardbole, U.S. Marine Corps, was assigned duties as acting First Sergeant of Service Company, Headquarters Battalion, MESC, Barstow, Calif. Lance Corporal Abel A. Marine, assigned as company unit diary clerk, did not report for duty at 0600 when normal work hours commenced on 28 April 1971. I have instructed Marine about the timely commencement of the workday, including the 0600 reporting time, on at least five previous times. Sgt Marine did not report for work at the command until 0800 on 28 April 1973.

Z.C. Hardbole
M4Sgt USMC

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29 April 1973

I, Sergeant H.E. Bigrose, USMC, was on 28 April 1973, assigned duties as police sergeant for Service Company, Headquarters Battalion, MCRD, Parris, Calif., as police sergeant. I assigned Sgt. A. A. Marine, USMC, to the 1600 barracks cleanup detail in the company barracks and instructed him to supervise the performance of the four privates assigned to do the work. At 1615 while the cleanup detail was supposed to be working, I found Sgt. Marine asleep in his bunk in the company office and not in the barracks supervising the detail there.

Sgt. H.E. Bigrose, USMC

29 April 1973

I, Capt. P. D. Bumpamoodle, USMC, was in the Service Company barracks about 1600 on 28 April 1973 when I saw Capt. Marine being in the cleanup detail. He ordered them to clean the barracks and then left the area saying he had more important things to do than "watch a bunch of snuffies".

P. D. Bumpamoodle
Capt USMC

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CONTINUED

2 OF 5

UNIT PUNISHMENT BOOK (5612)

NAVJAG 10132 (REV. 7-65)

9-63 EDITION MAY BE USED

(Use embossed plate equipment where possible)

1. See instructions in Chapter 15, Marine Corps Personnel Manual (MCO P5000 3)
2. Form is prepared for each person referred to Commanding Officer's Office.

<p>1. INDIVIDUAL</p> <p>Abel A. MARINE LANCE CORPORAL 123 45 67 89/0121</p>	<p>2. ORGANIZATION</p> <p>Service Company Headquarters Battalion MCSC, Barstow, California</p>
<p>3. OFFENSE(S) (To include dates and specific circumstances)</p> <p>Violation UCMJ, Art. 86:UA 0600 to 0800 28 April 1971. Violation UCMJ, Art. 92:dereliction of duty in failing to properly supervise barracks cleanup detail on 28 April 1971.</p>	<p>4. DATE & PLACE OF COMMISSION OF OFFENSE</p> <p>(1) 28 April 1971 (2) 28 April 1971</p>
	<p>5. ARTICLE 31, UCMJ UNDERSTOOD (Initials of accused)</p> <p><i>AAm</i></p>
	<p>6. I have been advised of and understand my right to demand trial by court-martial in lieu of non-judicial punishment. I do not demand trial and will accept non-judicial punishment subject to my right of appeal.</p>
	<p>31 April 1971 <i>Abel A. Marine</i></p> <p>(DATE) (SIGNATURE)</p>
<p>7. PUNISHMENT AWARDED & DATE THEREOF</p> <p>31 April 1971: to forfeit twenty dollars (\$20.00) pay and to be restricted to the limits of Serv Co, HqBn, MCSC, Barstow Calif for fifteen (15) days.</p> <p>Upon consideration of the facts and circumstances surrounding these offenses and upon further consideration of the needs of military discipline in this command, I have determined the offenses involved herein to be minor and properly punishable under UCMJ, Art. 15.</p> <p><i>N. J. PEIGH</i> N. J. PEIGH, Commanding Officer</p>	
<p>8. SUSPENSION OF EXECUTION OF PUNISHMENT, IF ANY</p> <p>NONE</p>	
<p>9. PUNISHMENT AWARDED BY (Name, grade, title)</p> <p>N. J. PEIGH, Captain, Commanding Officer</p>	
<p>10. DATE OF NOTICE TO ACCUSED</p> <p>31 April 1971</p>	<p>11. RIGHT OF APPEAL UNDERSTOOD (Initials of accused)</p> <p><i>AAm</i></p>
<p>13. DATE OF APPEAL (If any)</p> <p>1 May 1971</p>	<p>12. INITIALS OF CO WHO TOOK FINAL ACTION INDICATED IN 7, 8, AND 11</p> <p><i>KGP</i></p>
<p>14. DECISION ON APPEAL (If appeal is made) AND DATE THEREOF</p>	
<p>15. DATE OF NOTICE TO ACCUSED OF DECISION ON APPEAL</p>	<p>16. INITIALS OF IMMEDIATE CO OF ACCUSED</p>
<p>17. REMARKS</p> <p>2-76</p>	

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XYZ:abc
5 May 1971

SECOND ENDORSEMENT on LCpl Abel A. MARINE's ltr of 1May71

From: Commanding Officer, Headquarters Battalion, Marine
Corps Supply Center, Barstow, California 92311
To: Lance Corporal Abel A. MARINE, 123 45 67/0121, U. S.
Marine Corps
Via: (1) Commanding Officer, Service Company, Headquarters
Battalion, Marine Corps Supply Center, Barstow,
California 92311

Subj: Nonjudicial punishment, appeal from; case of Lance
Corporal Abel A. MARINE, 123 45 67/0121, U. S. Marine
Corps

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.

I. M. SKIPPER

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S A M P L E

XYZ:abc
6 May 1971

THIRD ENDORSEMENT on LCpl Abel A. MARINE's ltr of 1 May 71

From: Commanding Officer, Service Company, Headquarters Battalion,
Marine Corps Supply Center, Barstow, California 92311
To: Lance Corporal Abel A. MARINE, 123 45 67/0121, U. S. Marine Corps
Subj: Nonjudicial punishment, appeal from; case of Lance Corporal Abel A.
MARINE, 123 45 67/0121, U. S. Marine Corps

1. Returned for delivery.

N. J. PEIGH

SAMPLE

XYZ:abc
8 May 1971

FOURTH ENDORSEMENT on LCpl Abel A. MARINES's ltr of 1 May 1971

From: Lance Corporal Abel A. MARINE, 123 45 67/0121, U.S.
Marine Corps

To: Commanding Officer, Service Company, Headquarters
Battalion, Marine Corps Supply Center, Barstow, California 92311

Subj: Nonjudicial punishment, appeal from] case of Lance Corporal Abel
A. MARINE, 123 45 67/0121, U.S. Marine Corps

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.

ABEL A. MARINE

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SECTION TWO
CHAPTER IV
THE SPECIAL COURT-MARTIAL

INTRODUCTION. The special court-martial is the intermediate level court-martial when compared to the summary and general courts-martial. The three types of court-martial increase in severity from summary to special and then to general court-martial because the maximum permissible increase with each level and because the legal protection of an accused's rights increase with each level of court-martial. The special court-martial, being intermediate, shows some of the capacity for summary punishment inherent in the summary court-martial but, at the same time, shows a good deal of the legal protection inherent in the general court-martial. Basically, the special court-martial is a court consisting of at least three members, counsel, and a judge. It's 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 pay grade E-1. This Chapter will discuss in some detail the special court-martial and the mechanics of its operation.

BASIC SOURCE MATERIAL. Supplementary reading from basic source material is assigned at the end of each Part of this Chapter. These assignments relate to the material discussed in the Part concerned.

SECTION TWO
CHAPTER IV
PART ONE
CREATING OF THE SPECIAL COURT-MARTIAL

AUTHORITY TO CONVENE. Uniform Code of Military Justice (UCMJ), Article 23, indicates that special courts-martial may be created by any person authorized to convene a general court-martial (see UCMJ, Art. 22), the commanding officer of any Naval vessel, shipyard, base, or station, and the commanding officer of any Marine Corps brigade, regiment, barracks, wing, group, station, base or other place of comparable size where Marine Corps personnel are on duty. The Manual of the Judge Advocate General of the Navy (JAGMAN), section 0103(b), lists other commanders authorized to convene special courts-martial. Some of the more important are commanding officers of all battalions and squadrons of Marine or Marine Corps Reserve commands and all commanding officers of Navy activities or units except inactive duty training Naval Reserve units. As is true of nonjudicial punishment authority and summary court-martial convening authority, the authority to create the special court-martial resides in the office specified by law and not in any individual. This authority cannot be delegated so there is no place for "acting" or "by direction" authority on legal documents relating to court-martial creation. All judicial acts relating to court-martial action must be personally accomplished by the person, who at the time of such action, is authorized or required by law to act.

MECHANICS OF CONVENING. Before any case can be brought before a special court-martial such a court-martial must have been created (convened). The special court-martial is created by the written orders of the convening authority which also detail the judge, counsel, members, etc. The format of the special court-martial convening order, unlike that of the summary court-martial will vary. This is due to legal complexities, to be discussed later, which dictate the composition of the court-martial. Suffice at this time to know that a special court-martial may lawfully be composed of a prosecutor, defense counsel, and at least three members headed by a president; a prosecutor, defense counsel, jury of at least three members, and a military judge; or a prosecutor, defense counsel and a military judge alone. In addition, counsel may be lawyers or, in some cases, nonlawyers. Thus, any given convening order can significantly differ from other convening orders. Sample convening orders of various types are included at the end of this Part for guidance. In this connection, the military judge only type of special court-martial is created in virtue of an accused exercising a right to such trial which, in effect, excuses detailed court members. Such a special court-martial is not normally created by a special convening order. The Manual for Courts-Martial (MCM), paragraph 36, and Appendix 4, and JAGMAN, sec 0104, contain guidance for the preparation of the convening order. Basically the order should be under the command letterhead, be dated and serialized, and signed personally by the convening authority. The order should specify the names and roles of the various participants, the qualifications and status as to oath of counsel and judge, and where enlisted persons are properly detailed to the court their units are specified. When drafted and executed the special court-martial is created or, in legal terms, convened and remains until discharged.

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SECT TWO
CHPT IV

AMENDMENT OF CONVENING ORDERS. Changes in personnel detailed to the court by the convening order should be accomplished by written amendment. If for some reason there is insufficient time for drafting amendments an oral change made by the convening authority and confirmed in writing is acceptable. Oral modifications are dangerous and should be avoided if possible. Prior to the assembly of the court, changes in court personnel are presumed to be justified unless evidence shows the contrary to be true. For instance a modification replacing a defense counsel where evidence shows an attorney-client relationship was formed between the accused and the originally detailed counsel would not be deemed a justifiable modification. Replacing a court member because of transfer from the command, the taking of leave, etc. is proper if done before trial. Once the court is assembled, no member may be excused by the convening authority except for good cause. "Good cause" is legal terminology for critical situations such as illness, emergency leave, combat exigencies, etc. In the latter situation the convening authority must submit to the court for inclusion in the record of trial a detailed statement of the reasons necessitating the change in court personnel. The amendment to the convening order is drawn in the same basic format as the basic order but need only reference the basic order and detail any change to be made in court personnel. The modification is serialized the same as the original but additional letters or numbers are used to identify the modification as a separate order. Thus convening order serial 1-73 could be amended by serial 1-73A, 1-73B, or 1A-73, 1B-73, or any other combination of letters and numbers desired. These serializations are important and must be carefully organized. A sample modification to a convening order is included at the end of this Part. The sample amendment modifies the sample basic order 6-73 (at the end of this Part) to add a military judge. Where numerous changes are contemplated or have occurred a new convening order shall be drafted to reflect the changes. A number of modifications to one convening order can cause confusion and possible mistakes at trial. A copy of each convening order and modification should be distributed to court personnel concerned.

CONSTITUTION OF SPECIAL COURTS-MARTIAL. As previously indicated there are several configurations of special courts-martial depending upon varying legal technicalities.

1. Three members. One type of special court-martial consists of a minimum of three members, 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 a punitive discharge cannot be adjudged. UCMJ, Art. 10, allows a "three member" type special court-martial to adjudge a bad conduct discharge where the accused is represented by a UCMJ, Art. 27(b), certified lawyer and a military judge could not be assigned to the case because of physical conditions or extraordinary military exigencies.

Such conditions would logically be very 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 convening authority should not attempt to proceed with such a court on a punitive discharge case for the president, a nonlawyer who is responsible for conducting the trial according to established rules, must referee 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 convening authority should include in the First Indorsement on the Charge Sheet instructions that a Bad Conduct discharge is not an authorized punishment. Such a precaution removes the possibility that the court would erroneously impose a sentence involving a punitive discharge. It must be emphasized that these instructions should be detailed on the Charge Sheet, not the convening order.

2. Military Judge and Members. In this type of special court-martial counsel, at least three members and a military judge are detailed. The members function as a civilian jury to 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 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 UCMJ, Art. 19, to adjudge a punitive discharge provided the accused is represented by a UCMJ, Art. 27(b), certified lawyer. This type of special court-martial has become fairly standard in the naval service as being composed of military judge, at least three members, and certified lawyer counsel for government and accused.

3. Military Judge Only. This form of special court-martial is not created by a convening order but by the exercise of a right by the accused. UCMJ, Art. 16, gives the accused the right to request in writing trial by military judge without members. The accused is entitled before so electing to know the identity of the judge who will sit on his case and, in any event; the prosecutor may argue against the request when presented to the 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 request must be in writing and personally signed by the accused. A sample request is included at the end of this Part and MCM, App. 8e. 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 a UCMJ, Art. 27(b), lawyer.

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 defendant is an enlisted man, noncommissioned warrant officers are eligible to be court members. MCM, para 4 indicates that no member of the court will be junior in grade to the defendant if it can be avoided. Members of an armed force other than that of the accused can be utilized only in the peculiar circumstances detailed in MCM, para 4g.

2. Enlisted Members. UCMJ, Art. 25(c) gives an enlisted defendant an absolute right to be tried by a court consisting of at least one third enlisted members. The defendant desiring enlisted membership must submit a personally signed request before the conclusion of any UCMJ, Art. 39A session (pretrial hearing) or before the assembly of the court at trial. A sample request is included at the end of this Part. 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). The convening order, or modification, which assigns enlisted personnel to the court must also indicate the unit of each member. For example:

MEMBERS

Commander Roy Beane, U.S. Navy
Lieutenant William Bomey, 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 convening authority directs the original court to proceed with trial. Such actions can only be taken when enlisted persons cannot be assigned because of extraordinary circumstances. In such event the convening authority must forward to the trial counsel for attachment to the record of trial a complete and detailed explanation of the extraordinary circumstances and why trial must proceed without enlisted members.

3. Selection of Members. UCMJ, Art. 25(d)2, indicates that convening authorities shall appoint as members personnel who, in his opinion, are best qualified by reason of age, education, training, experience, length of service, and judicial temperament. These factors, of course, vary with individuals and are not necessarily dependent on the grade of the particular person. No person in arrest or confinement is eligible to be a court member and 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 be a court member for that case. There are no definitive procedural guidelines for the selection of particular court members. It is clearly improper for the convening authority to select persons who possess the "rubber stamp" frame of mind just because of that frame of mind. The law will not allow court stacking in any form. Beyond that, almost any

system for fairly selecting court personnel will be lawful. A good method is to have the personnel officer select at random ten or fifteen officers (if available) submit the list to the legal officer for screening the best qualified, and then send the list to the convening authority with the legal officer's recommendations for selection. The convening authority should then select the five or six who, in his judgement, are best qualified.

QUALIFICATIONS OF MILITARY JUDGE. UCMJ, Art. 26(b) 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 (UCMJ, Art. 26c) can also act in special court-martial cases. In any event, the convening order must specify the qualifications of the military judge and also state whether or not the oath has been administered to him as required by UCMJ, Art. 42(a), and JAGMAN, sec. 0111. Regulations permit a one time oath to be administered to the judge obviating the necessity for swearing him at trial.

IMPROPER CONSTITUTION - MEMBERS/JUDGE. 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 lawfully adjudicate. 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. UCMJ, Art. 16, 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 time or the trial cannot lawfully proceed. If at any time there are not sufficient members present (or, if applicable, enlisted members), the trial must be delayed until a quorum is present or the convening authority 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 Judge to BCD Court: A "BCD" special court-martial is terminology referring to a special court-martial which is authorized to adjudge a bad conduct discharge as a sentence. Where the convening authority creates a court and does not detail a military judge and cannot justify not doing so, and the convening authority does not otherwise limit the sentencing authority of the court, the trial may proceed but no bad conduct discharge can lawfully be adjudged. The error in this situation limits the sentencing power of the court but does not deprive the court of authority to try the case.

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3. No Written Request For Judge Alone. The absence of a written request, personally signed by the accused, for trial by judge alone deprives the court of the power to try the case concerned by judge alone. In the absence of such a request members must be present.

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 of any enlisted members from lawfully proceeding -- even if the accused made an oral request for such membership.

5. Non-detailed Member or Judge Participating. Participation in the trial by a member or judge not properly detailed by the convening authority invalidates the proceedings. Only lawfully appointed personnel can participate in court-martial proceedings.

6. Members or Judge Not Sworn. UCMJ, Art. 42(a), requires court members and military judges to be sworn. The form of the oaths and method of administration are detailed in JACMAN, sec. 0111 and MCM, para 114(a) and (b). The failure to properly 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 UCMJ, Art. 26, renders the trial proceedings void. As far as age, experience, judicial temperament, etc. aspects of member qualifications are concerned, the law is not settled on the effect the defect has on trial proceedings. The absence of such factors is also hard to demonstrate. Presence of unrequested enlisted members or enlisted members of the accused's unit will void proceedings. The presence of a civilian member or some other defect respecting the grade of the member will also render proceedings void.

QUALIFICATIONS OF COUNSEL. UCMJ, Arts. 19 and 38, basically detail the accused's right to counsel before court-martial. MCM, para 6, discusses the subject further. UCMJ, Art. 27, details the qualifications for counsel.

1. Prosecutor. The prosecutor in military criminal law is referred to as the "trial counsel". For special court-martial the trial counsel need only be properly detailed by the convening authority and be a commissioned officer. The assignment of an enlisted man 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 by the convening authority in the convening order or modification thereof. Individual counsel is a counsel requested by the accused and can be a civilian or military person.

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a. Detailed Counsel.

(1) BCD. Special Courts-Martial. UCMJ, Art. 19, specifically indicates that a bad conduct discharge cannot be lawfully adjudged in any case unless a lawyer certified in accordance with UCMJ, Art. 27(b), is detailed to the case by the convening authority. If a so certified lawyer is not detailed, the court may proceed but no punitive discharge may be adjudged.

(2) Non-BCD Special Courts-Martial. UCMJ, Art. 27c, details the qualifications for counsel at special court-martial. Where the convening authority has no desire to approve a punitive discharge if adjudged or the maximum permissible sentence does not include a punitive discharge the initially detailed defense counsel need not be a lawyer certified under UCMJ, Art. 27(b). Detailed defense counsel must be a commissioned officer but not, at the outset, a lawyer. UCMJ, Art. 27c, gives the defendant the right to be defended by a certified lawyer at a non-BCD special court-martial. Prior to trial the accused must be afforded the opportunity to request detailed military lawyer counsel and, if requested, such counsel must be provided unless unavailable because of physical conditions or military exigencies -- very rare circumstances and not merely convenience or whim. If the request for a detailed military lawyer is refused the convening authority must forward to the court, for attachment to the record of trial, a comprehensive statement indicating in specific detail the reasons why a certified military lawyer 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 certified lawyer counsel can be furnished. The refusal to detail certified counsel is a decision subject to review by appellate authorities. If initially detailed defense counsel is a nonlawyer then, under the law, no BCD can be adjudged if otherwise permitted for the offense. In such a case if the accused asks for a detailed certified lawyer, and such defense counsel is in fact detailed, then the court, if otherwise permitted by law, may adjudge a BCD in the case. Thus the accused by exercising his right to lawyer counsel can, as a practical matter, find himself subject to greater punishment.

(3) Doctrine of Equivalent Qualification. UCMJ, Art. 27(c), 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, etc. but means equality in terms of UCMJ, Art. 27, qualifications of counsel. Thus if trial counsel is qualified to practice before general courts-martial (certified under UCMJ, Art. 27b) then detailed defense counsel must be so certified also. 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 detailed defense counsel must be one of the foregoing also.

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b. Individual Counsel. Individual Counsel is military legal terminology referring to counsel specifically requested by the accused. Such counsel may be military or civilian persons.

(1) Civilian counsel. At any special court-martial the accused has the right to be represented by civilian counsel provided by him at his own expense. Where such counsel is retained by the accused detailed counsel remains to assist the Individual Counsel unless expressly excused by the defendant. MCM, para 48(a), indicates that nonlawyer civilian Individual Counsel may represent the accused at a non-BCD special court-martial but not at a BCD special court-martial (such nonlawyer counsel may sit at the counsel table and be consulted by the accused however). The defendant is entitled to a reasonable delay before trial for the purpose of obtaining and consulting civilian Individual Counsel.

(2) Individual Military Counsel. At any special court-martial the accused has the right to be represented by a military counsel of his own choice if such counsel is reasonably available. For BCD special courts-martial Individual Military Counsel must be a lawyer but not necessarily certified by the Judge Advocate General under UCMJ, Art. 27b. At a non-BCD special court-martial the Individual Military Counsel can be anyone of any grade. Whether or not a requested counsel is reasonably available is a determination the convening authority must personally make. The request for Individual Military Counsel is submitted to the convening authority through detailed defense counsel, trial counsel, and, as a practical matter, the legal officer. If the requested counsel is a member of the command of the convening authority a determination of availability will be made by the convening authority based on objective facts relating to the requested counsel's assigned duties, immediate workload, projected workload, critical nature of assigned duties, and any other facts relating to availability. The rule of reasonable availability, as a practical matter, is that a requested counsel within the command of the convening authority is available unless compelling reasons dictate otherwise. If the requested Individual Military Counsel is not within the command of the convening authority, the convening authority must nevertheless determine availability. A request must be forwarded to the commanding officer of the requested counsel asking that such person be made available to defend the accused or the reasons for his nonavailability be explained. If the commanding officer of the requested counsel decides not to make that counsel available the convening authority will notify the accused of that fact and the reasons for nonavailability. The accused can then appeal through the convening authority to the commanding officer next senior to the commanding officer of the requested counsel unless such appeal would require submission to Department level authorities. In the latter case the accused has no recourse but to the trial judge. All papers relating to requests for Individual Military Counsel must be attached to the record of trial where such requests have been denied. In non-BCD special courts-martial other counsel requirements require the convening authority to do some mental gymnastics. He must first decide if Individual Military Counsel is reasonably available and, if not, he must then decide whether the circumstances justify denial of a detailed lawyer counsel. In other words a request for Individual Military Counsel should be treated as a request for detailed lawyer counsel if the former is not available.

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c. Recapitulation - Right to Lawyer Counsel: At a special court-martial, the accused has the right to be represented by detailed military counsel certified under UCMJ, Art. 27b, if available, a civilian individual counsel at his own expense, or a military individual lawyer counsel if reasonably available. In any BCD special court-martial the accused must be represented by lawyer counsel. Military lawyers are provided by the convening authority at no expense to the accused.

d. No Defense Counsel. MCM, para 48(a), recognizes the right of the defendant to represent himself at a special court-martial without assistance of counsel.

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 of the UCMJ, Art. 19 proviso that a BCD may not be approved unless a word-for-word (verbatim) record is made of everything which transpired during the proceedings. The convening authority 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 convening authority or one of his subordinates. The reporter must be sworn though a one time oath may be utilized (see JAGMAN, sec. 0111d and MCM, paras 7 and 113).

BASIC SOURCE MATERIAL. In connection with the study of this Part the student should read the following basic resource material.

1. UCMJ, Arts. 6, 17, 19, 23, 25-29, 30, 38 and 42.
2. MCM, paras 3-7, 29-33, 36-37, 39-51, 113 and Appendix 4.
3. JAGMAN, secs 0103b and d, 0104-0106, 0110, 0111, and 0116.

SAMPLE REQUEST FOR ENLISTED COURT MEMBERS

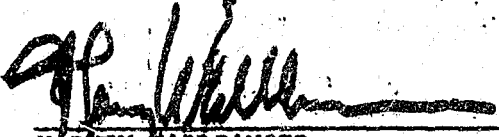
SPECIAL COURT-MARTIAL

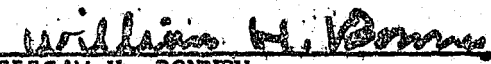
NAVAL JUSTICE SCHOOL
NAVAL BASE
NEWPORT, RHODE ISLAND 02840

United States of America
v.
Seaman William H. BONNEY
444 44 4444 U.S. Navy

Request For Enlisted Membership
on Special Court-Martial
17 November 1973

I, Seaman William H. Bonney, the accused in the above styled cause, 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.


HARVEY WALLBANGER
LT, JAGC, U.S. Naval Reserve
Defense Counsel


WILLIAM H. BONNEY
Seaman, U.S. Navy

NAVAL EDUCATION AND TRAINING CENTER
Newport, Rhode Island 02840

23 February 1978

SPECIAL COURT-MARTIAL CONVENING ORDER 4-78

A special court-martial is hereby convened. It may proceed at Naval Education and Training Center, Newport, Rhode Island, to try such persons as may properly be brought before it. The court will be constituted as follows:

MILITARY JUDGE

Commander U. Have Haddit, JAGC, U.S. Navy, certified in accordance with Article 26(b), UCMJ, and previously sworn in accordance with Article 42(a), UCMJ.

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.

COUNSEL

Lieutenant Larry O. Smith, JAGC, U.S. Navy, TRIAL COUNSEL, certified in accordance with Article 27(b), UCMJ, and previously sworn in accordance with Article 42(a), UCMJ;

Ensign Roger L. Crump, U.S. Naval Reserve, ASSISTANT TRIAL COUNSEL, not a lawyer in the sense of Article 27, UCMJ;

Lieutenant Clarence R. Zimmer, JAGC, U.S. Navy, DEFENSE COUNSEL, certified in accordance with Article 27(b), UCMJ, and previously sworn in accordance with Article 42(a), UCMJ;

Ensign Phillip M. Dawes, U.S. Naval Reserve, ASSISTANT DEFENSE COUNSEL, not a lawyer in the sense of Article 27, UCMJ.

ABLE B. SEEWEE

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

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NAVAL EDUCATION AND TRAINING CENTER
Newport, Rhode Island 02840

24 February 1978

SPECIAL COURT-MARTIAL CONVENING ORDER 5-78

A special court-martial is hereby convened. It may proceed at Naval Education and Training Center, Newport, Rhode Island, to try such persons as may properly be brought before it. The court will be constituted as follows:

MEMBERS

Commander Francis Sanchez, U.S. Navy;
Lieutenant Commander Jim Fizz, U.S. Navy;
Lieutenant Walter Raleigh, U.S. Naval Reserve;
Lieutenant (junior grade) John Glaughn, U.S. Naval Reserve;
Chief Ship's Clerk WA Hard A. Snails, U.S. Navy.

COUNSEL

Lieutenant Perry L. Klink, JAGC, U.S. Naval Reserve, TRIAL COUNSEL, certified in accordance with Article 27(b), UCMJ, and previously sworn in accordance with Article 42(a), UCMJ;

Lieutenant Kurt Von Houghstetter, JAGC, U.S. Naval Reserve, DEFENSE COUNSEL, certified in accordance with Article 27(b), UCMJ, and previously sworn in accordance with Article 42(a), UCMJ.

Ab B. Seeweed
ABLE B. SEEWEEED
Captain, U.S. Navy
Commander, Naval Education and
Training Center
Newport, Rhode Island

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NAVAL EDUCATION AND TRAINING CENTER
Newport, Rhode Island 02840

25 February 1978

SPECIAL COURT-MARTIAL AMENDING ORDER 5A-78

Commander Roy Beane, JAGC, U.S. Navy, certified in accordance with Article 26(b), UCMJ, and previously sworn in accordance with Article 42(a), UCMJ, is hereby detailed as MILITARY JUDGE of the special court-martial convened by my Special Court-Martial Convening Order 5-78, dated 24 February 1978.

Abel B. Seeweed

ABLE, B. SEEWEEED

Captain, U.S. Navy

Commander, Naval Education and
Training Center

Newport, Rhode Island

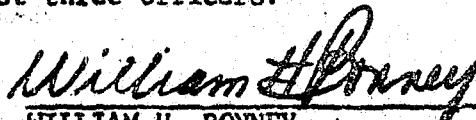
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SAMPLE REQUEST FOR TRIAL BY MILITARY JUDGE ALONE

NAVAL JUSTICE SCHOOL
NAVAL BASE
NEWPORT, RHODE ISLAND 02840

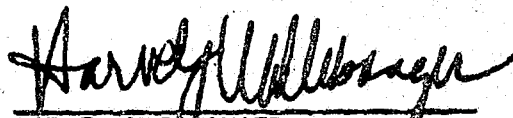
United States of America) Request For Trial Before
v.) Military Judge Alone
Seaman William H. BONNEY) 15 November 1973
444 44 4444, U.S. Navy)

I, Seaman William H. Bonney, the accused in the above styled cause, have been informed that Colonel Roy Beane, U.S. Marine Corps, is the military judge detailed to the special court-martial to which charges and specifications pending against me have been referred for trial. After consulting with defense counsel, I hereby request that the court be composed of the military judge alone. I make this request with full knowledge of my right to be tried by a court-martial composed of at least three officers.


WILLIAM H. BONNEY
Seaman, U.S. Navy

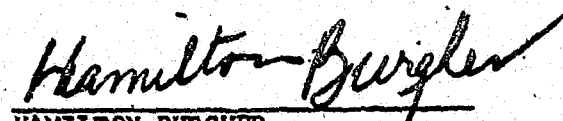
Prior to his signing the foregoing request, I fully advised the accused, William Bonney, of his right to a trial before a court-martial consisting of at least three officers and of his right to have such a court composed of at least one-third enlisted members not of his unit.

15 November 1973


HARVEY WALLBANGER
LT, JAGC, U.S. Naval Reserve
Defense Counsel

The United States does not desire to argue the merits of the foregoing request prior to the court's ruling on same.

15 November 1973


HAMILTON BURGHER
LT, JAGC, U.S. Navy
Trial Counsel

I, the detailed military judge in the above styled cause, grant and approve the request for trial by me alone.

15 November 1973

Roy Buane


ROY BUANE
Col., U.S. Marine Corps
Military Judge

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SECTION TWO
CHAPTER IV
PART TWO
SPECIAL COURT-MARTIAL REFERRAL

INTRODUCTION. The basic process of referring a given case to trial by special court-martial is essentially the same as for referral to summary court-martial (the student should review CHAPTER THREE, PART TWO of this text in connection with the study of this PART). Thus the principles applying 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 the First Indorsement of the Charge Sheet.

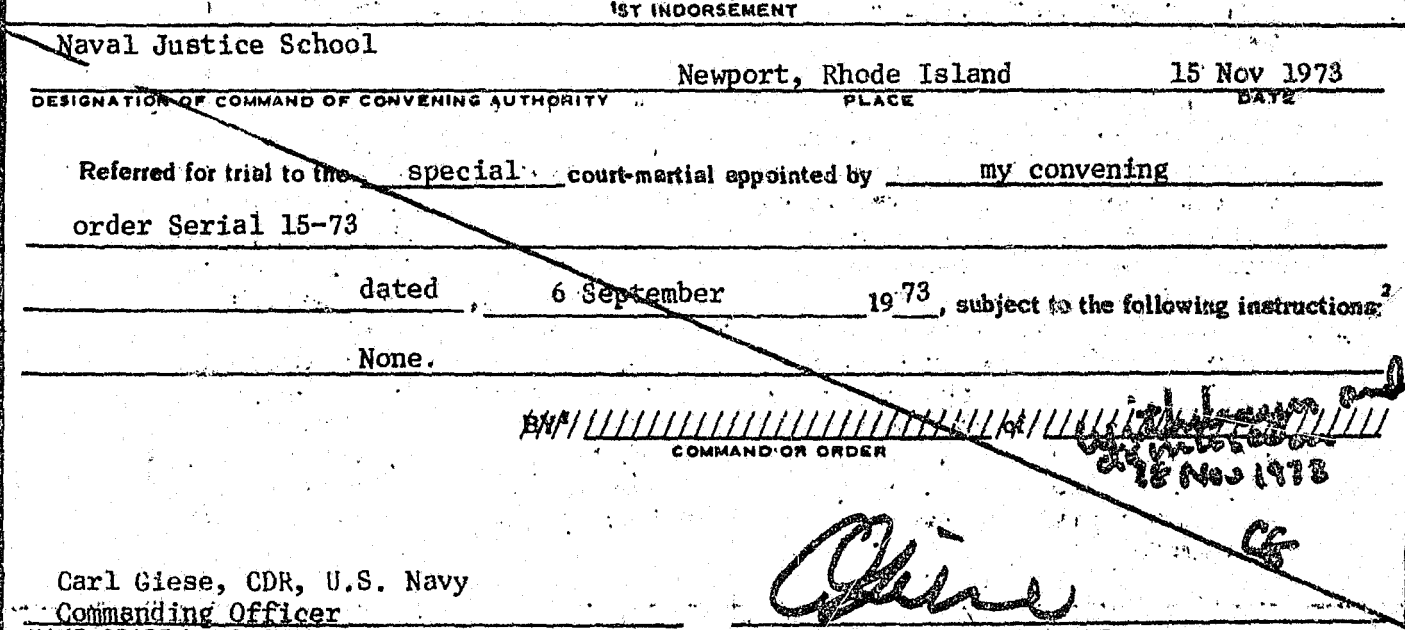

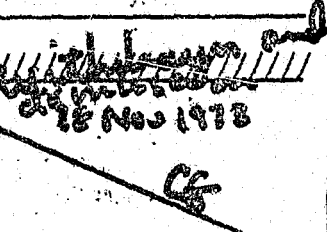
REFERRAL TO TRIAL. If, after reviewing the applicable evidence, the convening authority determines that trial by special court-martial is warranted he must then execute the First Indorsement on the Charge Sheet in the proper manner. In addition to the command data entered on the appropriate lines of the First Indorsement, the convening authority must indicate the type of court-martial to which the case is being referred, the specific special court-martial to which the case is assigned, and the special instructions, if any. The Indorsement should also be personally signed by the convening authority. It might serve well to recall that a clear and concise serial system is absolutely essential to proper referral. The Indorsement must identify the particular court to hear the case, that is it must relate to a specific convening order. Care must always be taken in preparing convening orders and First Indorsements to avoid confusion and legal complications at trial. For example:

1ST INDORSEMENT		
Naval Justice School	Newport, Rhode Island	15 Nov 1973
<small>DESIGNATION OF COMMAND OF CONVENING AUTHORITY</small>	<small>PLACE</small>	<small>DATE</small>
<p>Referred for trial to the <u>special</u> court-martial appointed by <u>my special court-martial convening</u> <u>order Serial 15-73</u></p> <p>dated <u>1 November</u> 19<u>73</u>, subject to the following instructions:²</p> <p><u>None.</u></p>		
<div style="display: flex; justify-content: space-between; align-items: center;"> <div style="text-align: left;"> <p>Carl Glase, CDR, U.S. Navy Commanding Officer</p> <p><small>NAME, GRADE, AND OFFICIAL CAPACITY OF OFFICER SIGNING</small></p> </div> <div style="text-align: center;">  <p><small>SIGNATURE</small></p> </div> </div>		

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WITHDRAWAL OF CHARGES. Withdrawal of charges is a process by which the convening authority takes from a court-martial a case previously referred to it for trial. The convening authority cannot withdraw charges from one court and re-refer them to another without proper reasons or, in legal parlance, good cause. The convening authority may withdraw charges and dismiss them for any reason deemed sufficient to him. Mechanically the withdrawal is accomplished by drawing a diagonal line across the First Indorsement on Page 3 of the Charge Sheet and having the convening authority initial the line-out. It is also advisable to write "withdrawn" across the indorsement and date the action. For example:

1ST INDORSEMENT		
Naval Justice School	Newport, Rhode Island	15 Nov 1973
DESIGNATION OF COMMAND OF CONVENING AUTHORITY	PLACE	DATE
Referred for trial to the <u>special</u> court-martial appointed by <u>my convening</u>		
order Serial 15-73		
dated <u>6 September</u> 19 <u>73</u> , subject to the following instructions:		
<u>None.</u>		
<div style="text-align: center;">  </div>		
<div style="text-align: center;">  </div>		
<div style="text-align: center;">  </div>		
<div style="display: flex; justify-content: space-between;"> <div> Carl Giese, CDR, U.S. Navy <u>Commanding Officer</u> <small>NAME, GRADE, AND OFFICIAL CAPACITY OF OFFICER SIGNING</small> </div> <div> <small>SIGNATURE</small> </div> </div>		

1. Disestablishment of the Court. Perhaps the most frequently occurring withdrawal problem is presented when the convening authority 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 convening authority 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 showed a change was made because the convening authority was displeased with the leniency of the sentence or the number of acquittals, then the withdrawal would be unlawful. 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 switched to the new court. First, the convening authority can withdraw each case from the old court (by lining out the First Indorsement) and re-refer the case to the new court. This is accomplished by executing a new First Indorsement on the Charge Sheet indicating therein the serial number of the new court. The new Indorsement is taped along the top edge over the old lined out Indorsement to allow inspection of both Indorsements. The second method is a less complex solution. A saving clause can be inserted in the convening order of the new court which directs all cases of the old court to 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 the latter case 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 counsel and above the signature of the convening authority. For example:

"all cases in the hands of trial counsel of the special court-martial convened by my convening order serial 4-73 of 1 March 1973, 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."

2. Change of Court - - No Disestablishment. Sometimes a convening authority 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 back logged and in order to relieve the log jam the convening authority may wish to redistribute the pending cases. This action is accomplished by lining out and initialling the old First Indorsement on the Charge Sheet and executing a new Indorsement re-referring the case to a new Court. The new Indorsement is taped on one edge over the old one so as to allow inspection of both Indorsements.

3. 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 in such an event the convening authority 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 otherhand, might exist where the convening authority discovered (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 done 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.

AMMENDMENT OF CHARGES. In some instances amendment (or changes) in specifications will necessitate further administrative action with respect to the Charge Sheet. Minor changes in form or correction of typographical errors will normally require no more administrative action than lining out and initialling the erroneous data and substituting the correct date. This can be accomplished by use of pen and ink interlining or redrafting of the same specification on the original Page 2 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 otherhand, 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 (see MCM, para 33d for a brief discussion of this matter). As a general rule, when re-referral is necessitated by an amendment to a specification, the amended charge can be drafted on the original Page 2 of the Charge Sheet and the old one lined out and initialled. A new Page 3 of the Charge Sheet is then drafted. The new Page 3 is then taped over the old Page 3 so as 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. When a new Charge Sheet is utilized, care must be taken to avoid statute of limitations problems (UCMJ, Art. 43). When a Charge Sheet is properly received by the officer exercising summary court-martial convening authority over an accused so as to preserve the government's right to prosecute that same Charge Sheet must be utilized throughout the trial. A new Charge Sheet would, in cases where the time limitation of UCMJ, Art. 43, had expired, be filed too late to preserve prosecution. Accordingly the other method of amendment must be used to avoid such problems. This particular difficulty is often found in long absence cases. UCMJ, Art. 43, provides a three year period of time after the commission of the offense for desertion charges to be filed with the appropriate convening authority, if the right to prosecute is to be preserved. By the time such charges are normally filed in long absence cases the accused has not returned to military control and the method of his return (which affects maximum punishment) is not yet known. Perhaps long after the three years has expired the accused will return to military control. At that time the Charge Sheet prepared to preserve prosecution must be amended to include the date and method of his return to military control in order to have sufficient allegations to proceed with trial. Since such amendment involves new matter not fairly included in the original charge and since it is being made after the three year limit has expired, the legal officer or convening authority is confronted with a double problem. 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, MCM, para 33d, would indicate that the amendment should be sworn to by an accuser and sent through the referral process. However, the old Page 3 must not be lined out but must remain attached to the original Charge Sheet.

ADDITIONAL CHARGES. If an accused awaiting trial on certain charges commits new offenses or other, and 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 2 of the Charge Sheet beneath the old charges and execute a new Page 3 as the referral.

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process is accomplished in the normal manner. The new Page 3 is taped over the old Page 3 and is not removed, lined out or destroyed. If there are no statute of limitations problems an entirely new Charge Sheet may be prepared.

BASIC SOURCE MATERIAL. In connection with this PART the student should read the following basic source material.

1. UCMJ, Arts. 29 and 43.
2. MCM, paras 24, 29-33, and App. 4.
3. JAGMAN, secs 0105 and 0116.

SECTION TWO
CHAPTER IV
PART THREE
TRIAL PROCEDURE

INTRODUCTION. It is not requisite to his course of instruction that the legal/discipline officer have a complete understanding of the many and complex rules and procedures applicable to the special court-martial trial. It is essential, however, that the legal/discipline officer have a general appreciation for the mechanics of the trial. Though an infinite number of variations may exist in any particular case, the following procedure is generally found in all special courts-martial.

SERVICE OF CHARGES. UCMJ, Art. 35, states that in time of peace no person can be compelled to participate in any special court-martial trial proceeding 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 are used to compute the statutory period (MCM, para 58c). 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 at the bottom of Page 3 of the Charge Sheet. Trial counsel executes this certificate when he presents a copy of the Charge Sheet to the defendant personally. For example:

I have served a copy hereof on each of the above-named accused, this 1 day of November, 1973.

Hamilton Burgher, LT, JAGC, USNR
USS BROWNSON

NAME, GRADE, AND ORGANIZATION OF TRIAL COUNSEL

Hamilton Burgher

SIGNATURE

I When an appropriate commander signs personally, inapplicable words are stricken out. *2* Relative to proper instructions which may be included in the indorsement of reference for trial, see MCM, 33j(1). If none, so state.

Any accused can lawfully object to participation in trial proceedings before the three full 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.

PRETRIAL HEARINGS. Anytime after the service of charges and the three day waiting period a military judge may hold sessions of the 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 deter-

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mined at such a hearing UCMJ, Art. 39(a) and JAGMAN, Sec 01137. At such hearings the judge, trial counsel, defense counsel, accused, and reporter will be present. Several such hearings may be held if desired.

PRELIMINARY MATTERS. At trial, if such matters were not previously taken care of at a pretrial hearing, the first order of business is to make matters of record those documents relating to the convening of the court and referral of the case to the court for trial and to administer the required oaths. Thus the convening order, and any modifications, and the Charge Sheet become matters of record in 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 orders, the reporter, and any Individual Counsel. Qualifications of all personnel are also checked for the record. Following this procedure the judge (or president 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 convening authority.

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. UCMJ, Art. 25(d)2 and MCM, para 62f, 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 and the military judge 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 members from further participation in the trial. Challenges for cause are those challenges predicated on the grounds enunciated in UCMJ, Art. 25(d)2, and MCM, para 62f. The law places no limit on the number of this kind of challenge that can be made in a trial. A peremptory challenge is a challenge that can be made for any reason and does not require a ruling. The government is limited to one peremptory challenge per trial while the defense is limited to one peremptory challenge per accused (UCMJ, Art. 41). The student should become familiar with the grounds for challenge and avoid detailing to courts-martial members who are likely to be disqualified.

MOTIONS. Following the 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 not motions the trial will proceed with the arraignment (see generally, MCM, paras 66-69).

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THE ARRAIGNMENT. MCM, para 65(a), defines arraignment as the procedure involving the reading of the charges to the accused, presenting copies of the charges to the court, 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 (MCM, para 11c). The arraignment is also the cutoff point for the adding of additional charges to the trial. After arraignment no new charges can be added but rather a second trial will be necessary to prosecute them.

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 his pleas. There is a plea to each specification and charge in military practice necessitating two pleas in every case. The recognized pleas in military practice are "Guilty", "Not Guilty", and "Guilty" to any lesser included offense (for a discussion of Lesser Included Offenses see UCMJ, Art. 79 and MCM, para 158). Any other hybrid pleas are irregular and "Not Guilty" pleas will be entered by the judge or court.

1. Not Guilty Pleas. When "Not Guilty" pleas are entered by the court or accused the trial will proceed to the presentation of evidence -- first by the prosecutor and then by the defense.

2. Guilty Pleas. Where "Guilty" pleas are entered or the accused pleads guilty to 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 interrogation must be thorough and involve advice as to the maximum punishment impossible, the pleas amounting to a confession of guilty, waiver of the right against self incrimination concerning the offense to which the pleas relate, and advice of the facts which the government must prove if "Not Guilty" pleas are entered (see MCM, para 70b). In addition the court must explore the facts thoroughly to obtain from the accused an admission of guilt-in-fact to each element of the offense (or offenses) to which the pleas relate.

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 2/3 of the members present at trial must agree on each finding. 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

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votes is one -- the judge's. In contested jury cases, after all evidence and arguments of counsel have been presented the judge (or president if no judge is present) must 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 MCM, para 73).

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 MCM, paras 75 and 76 for a detailed discussion of the sentence phase of the trial).

CLEMENCY. After trial any or all court members and/or the military judge may recommend that the convening authority exercise executive clemency action to reduce the sentence notwithstanding their vote on the sentence at trial.

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 convening authority. 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 on findings, sentence, or other matters requiring a decision by the triers of fact are not recorded. If the convening authority so directs a verbatim record, when otherwise required, need not be prepared. This normally occurs when the convening authority 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 all court proceedings is prepared in all special court-martial cases not involving a punitive discharge sentence and when directed by the convening authority in those cases involving a bad conduct discharge sentence. In any case the convening authority may direct preparation of a verbatim record even though not required by law.

1. Contents-Verbatim Record. MCM, App. 9 details specific guidance for the preparation of special court-martial records of trial when a verbatim record is required. In addition, MCM, paras 82 and 83 and JAGMAN, sec 0120, contain further detail. The student should familiarize himself with these references.

2. Contents-Summarized Record. MCM, App. 10 contains a guide for the preparation of summarized records of trial. In addition MCM, paras 82 and 83 and JAGMAN, sec. 0120 should be consulted.

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3. Authentication of Record. UCMJ, Art. 54 and MCM, para 82(f), 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 will authenticate it. After the record has been authenticated it should, but need not, be given to the defense counsel for his inspection.

4. 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. Where verbatim records are concerned such notes or recordings must be retained until the officer exercising general court-martial jurisdiction over the special court-martial convening authority takes his action in the case (see JAGMAN, sec 0120 a-b).

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PART FOUR
SPECIAL COURT-MARTIAL PUNISHMENT

INTRODUCTION. UCMJ, Arts. 19, 55, and 56 and MCM, Chapter XXV are the primary references concerning the punishment authority of the special court-martial. JAGMAN secs 0118 and 0119, also address punishment power. Each punitive article of the UCMJ contains the statutory maximum permissible punishment for that offense. The other references further limit the punishment authority -- particularly MCM, para 127c.

PROHIBITED PUNISHMENTS. UCMJ, Art. 55, flatly prohibits flogging, branding, marking, tattooing, the use of irons (except for safekeeping of prisoners), and any other cruel and unusual punishment. MCM, paras 125 and 126 add to the list punishments not recognized by service custom (shaving the head, tying up by hands, carrying a loaded knapsack, placing in stocks etc.), loss of good conduct time (a strictly administrative measure), and administrative discharge. In addition correctional custody, while an authorized punishment under UCMJ, Art. 15, is not an authorized punishment for any type of court-martial.

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 (UCMJ, Art. 19). Within those parameters are a number of variations of lesser forms of punishment which may be adjudged.

AUTHORIZED PUNISHMENTS. The Table of Maximum Punishments (MCM, para 127c) contains 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 UCMJ, Art. 56. 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 AWOL (UCMJ, Art. 86), assault (UCMJ, Art. 128), and larceny (UCMJ, Art. 121) is subject to a maximum sentence determined by totalling the maximum punishment for each offense.

1. 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. 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 UCMJ, Art. 27(b) was detailed to the court and, as a general rule, unless a military judge was also detailed to the case. A Bad Conduct Discharge is a separation from the service under conditions other than honorable. The practical effect of this type of separation is less severe than Dishonorable Discharge where the accused automatically becomes ineligible for almost all veterans benefits. The effect of the 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 facts of the case.

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

a. Confinement. Confinement is the physical restraint of the accused in a brig, correctional facility, 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. The special court-martial can adjudge six months confinement at hard labor upon an enlisted man but may not impose such punishment upon an officer or warrant officer. The Table of Maximum Punishments may limit this punishment to an even lesser amount for certain offenses [e.g., failure to go to appointed place of duty (UCMJ, Art. 86) has a maximum confinement punishment of only one month].

b. Hard Labor Without Confinement. This form of punishment is performed in addition to routine duty and may not lawfully be utilized in lieu of regular duties. The amount 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 by 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 is performed the accused should be permitted normal liberty or leave. MCM, para 127c(2) (Table of Equivilent Punishments) 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.

c. Restriction. Restriction is a moral restraint upon the accused to remain within certain specified limits for a specified time. Restriction may be imposed on all persons subject to the UCMJ but not in excess of two months. Restriction is a less severe form of deprivation of liberty than confinement or hard labor and may be combined with any other punishment. The performance of military duties can be required while an accused is on restriction.

3. Confinement on Bread and Water/Diminished Rations. As its name suggests this punishment involves confinement coupled with a diet of bread and water or diminished rations. A diet of bread and water allows the accused as much bread and water as he 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 attached to or embarked on a vessel. Further, both the prisoner and the confinement facility must be inspected by the medical officer and he 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.

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4. Monetary Punishments. The types of monetary punishment authorized by MCM, Para. 126, include forfeiture, detention, and fine.

a. Forfeiture of Pay. This kind of punishment involves the deprivation of a specified amount of the accused's pay for a specific number of months. The maximum amount that is subject to forfeiture 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 imposition of the sentence and not to monies already paid to the accused or to his own personal independent resources.

b. Detention of Pay. This is a lesser included punishment of forfeiture. It differs from forfeiture in that the money is ultimately paid to the accused. A special court-martial may lawfully detain two-thirds of one month's pay per month for three months, and such detention may involve holding the money for a period not to exceed one year from the date it is ordered executed or the expiration of the accused's term of service (whichever is earlier). This punishment is impossible upon any accused at a special court-martial and detention can be combined with any form of punishment. When detention is combined with forfeiture, an apportionment of the two must be made since the same forms of punishment cannot be imposed in the maximum provided for each. The Table of Equivalent Punishment /MCM, Para. 127c(2)/ is designed to facilitate the apportionment problem and its use is discussed hereafter.

c. Fine. A fine is a lump sum judgement against the accused requiring him to pay specified monies to the United States. A fine is not taken from the accused's accruing pay, as is true of forfeiture, but rather becomes due in one payment when the sentence is ordered executed. The sentence to 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. In no way can such a provision operate to exceed the jurisdictional limit of the special court-martial (six months) should the accused fail to pay the fine. It is also doubtful that the maximum confinement permitted by the Table of Maximum Punishments can be exceeded in such cases. MCM, Para. 126h(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 was unjustly enriched by his crime or unless the accused

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is being punished for contempt of court. For example an accused convicted of fraud against the government (UCMJ, Art. 132) by filing and collecting upon a false travel claim has been unjustly enriched to the extent the claim was paid and may properly be fined. A fine cannot exceed the total of the amount of money which the court could have required to be forfeited and it cannot be imposed in combination with forfeiture.

5. Punishment Affecting Grade. There are two punishments affecting grade authorized for special court-martial sentences. These are reduction in grade and loss of numbers.

a. Reduction-in-Grade. This form of punishment has the effect of taking away the pay grade of an accused and placing him in another and 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 man to the lowest pay grade regardless of his grade before sentencing. A reduction can be combined with all other forms of punishment. In the naval service and the Coast Guard the provisions of UCMJ, Art 58(a), regarding automatic reduction to the lowest pay grade in certain cases, do not apply (see JAGMAN, sec 0118a and Coast Guard Supplement, sec 0218).

b. Loss of Numbers. Loss of Numbers is the dropping of an officer a stated number of places on the lined precedence list. Lineal precedence is lost for all purposes except consideration for promotion. This exception prevents the accused from avoiding or delaying passover. 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.

6. Punitive Censure. Punitive censure includes admonition and a reprimand. Censure is the generic term referring to both forms of punishment. Censure is nothing more than a written statement criticizing the conduct of the accused, specifically characterized as admonition or reprimand. Reprimand is considered a more severe disapprobation than admonition. In adjudging a reprimand or admonition the court does not specify the wording of the statement but only its nature. MCM, App. 13 forms 15 - 16 contain guidance for drafting the statements. Either form of punitive censure may be adjudged against anyone subject to the UCMJ in addition to, or in lieu of, other punishments.

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. MCM, para 76a(5), 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 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.

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1. Separate Elements. Offenses are separate if each requires proof of an element not required to be proved for the other.

2. One Offense Included in the Other. If one offense is a Lesser Included Offense of the other the offenses are not separate.

3. 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 are not separate.

4. Single Impulse. Where both offenses were prompted by a single impulse the two offenses are not separate. This test is particularly difficult to apply inasmuch as fast moving circumstances of some offenses make impulse determination difficult.

5. Single Transaction. A single transaction is a combination of a single objective and an insistent 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 purpose is singular (steal property) and the events are integrated. One who wrongfully appropriates the auto. and then later steals the contents commits separate offenses.

6. Different Social Norms. If two or more offenses violate different social norms the offenses are separate. If two or more offenses are multiplicitous 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 multiplicitous.

TABLE OF MAXIMUM PUNISHMENTS. The purpose of the Table of Maximum Punishments (MCM, para 127c) is to prescribe the maximum permissible sentence for all offenses contemplated by the UCMJ and MCM. This Table cannot be used to exceed the jurisdictional limitations of the special court-martial, however. The stated maximums apply to all enlisted persons, but are binding on officers, commissioned warrant officers, warrant officers only insofar as confinement is concerned. The Table applies in peace and war but upon a declaration of war the Table is automatically suspended for certain offenses [see MCM, para 127c(5)]. The punishment opposite any offense listed in the Table is the maximum permissible for that particular offense; any Lesser Included Offense of the offense if a punishment for the lesser offense is not specifically prescribed in the Table; and for any offense closely related to either the listed offense or the lesser offense if that related offense is not specifically covered by the Table. If an offense not listed in the Table is a Lesser Included Offense of a listed offense and is also closely related to another listed offense, the maximum punishment is the lesser of the punishments provided for the listed offenses. If the unlisted offense is not a Lesser Included Offense and is not closely related to a

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listed offense, the maximum punishment is the punishment prescribed in the United States Code or the laws of the District of Columbia whichever is lesser, 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 closely related. A close relationship is contemplated not simply any relationship.

FOOTNOTES TO THE TMP. Footnotes 1 and 2 of the Table of Maximum Punishments deal with the maximum applicable to certain parties to a crime other than the perpetrator. These limitations present no problems in application. Footnote 3 deals with the punishment for attempts and Footnote 4 applies to conspirators. Footnote 5 merits some discussion. It applies to UCMJ, Art. 92 cases (violations of orders) and states that the maximum does not apply in two situations:

1. If in the absence of the order or regulation which was violated or not obeyed, the accused would, on the same facts, be subject to conviction for another specific offense for which a lesser punishment is prescribed in the Table. In such a case the lesser punishment applies.
2. If the violation or failure to obey is a breach of restraint imposed as a result of the order. The purpose of Footnote 5 is to preclude use of UCMJ, Art. 92 punishment limits to get a higher maximum penalty for other specific offenses having lesser punishment limits and which offenses technically involve order violations.

ESCALATOR CLAUSES. There are three instances in which the maximum limits of the Table of Maximum Punishments may be exceeded because of proof of previous offenses. In no event, however, may the so-called escalator clauses operate to exceed jurisdictional limits.

1. If an accused is convicted of an offense or offenses for which the Table of Maximum Punishments does not authorize a Dishonorable Discharge, proof of three or more previous convictions by court-martial during the year immediately 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 Table 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, are excluded. For example:

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Trial (1 June 68)	1 Feb 68	1 Sep 67	1 May 67	1 Apr 67
Convicted of AWOL 1 Apr 68 to 1 May 68 (30 days)	Special Court Conviction	Special Court Conviction	Summary Court Conviction For Larceny Committed on 1 Mar 67	1 year prior to present AWOL commission

In this case all three convictions are useable and the escalator applies. The one year period runs from 1 April '68 (Commission of Instant Offense) to 1 April '67 (one year previous).

Trial (1 Jun 68)	1 Feb 68	1 Sep 67	1 Jul 67	1 Feb 67
AWOL 1 Apr 68 - 1 May 68 Larceny 1 Mar 68	Special Court Conviction	Special Court Conviction AWOL 1 Jul 67 to 1 Aug 67	Special Court Conviction	1 year limit

In the foregoing example the one year time limit for using the escalator would normally run from 1 Mar 68 (commission of earliest instant offense) to 1 March 67. The 1 Sep 67 conviction for 1 month AWOL, however, moves the one year limit back to 1 Feb 67. Thus all convictions can be considered and the escalator applies.

2. If an accused is convicted of an offense or offenses for which the Table does not authorize a punitive discharge, proof of two or more previous convictions within three years next preceding the commission of any of the instant 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 table is less than three months, confinement for three months.

3. If an accused is convicted of two or more separate offenses, for none of which the Table authorizes a punitive discharge, and if the authorized confinement, without substitution, is 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.

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CHAPTER IV
PART FIVE
SPECIAL CONVENING AUTHORITY PROBLEMS

INTRODUCTION. This Chapter has so far been concerned with the mechanics of the referral and trial processes of the special court-martial. The unusual nature of the convening authority, being both quasi-judge and commanding officer, creates several serious problems for the convening authority as he tries to be true to both roles. One must at once recognize that it is extremely difficult for an aggressive commanding officer to discharge his basic responsibility of command and at the same time, remain completely impartial in his attitude toward each wrongdoer. Sometimes the necessity for decisive command action clashes directly with legal technicalities designed to protect individuals from arbitrary or unjust action. In the following portions of this PART 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, the apparent friction between the two roles can be minimized.

PRETRIAL RESTRAINT. Pretrial restraint is terminology relating to the practice of restricting the freedom of movement of an accused, prior to his trial, to insure his presence at that trial. MCM, Chapter V, discusses the various forms of such restraint.

1. Forms of Restraint.

a. Confinement. 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 the 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 (e.g. on base, ship, post, etc.) the command.

b. 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 other than normal housekeeping duties. Authority to order an accused into the status of arrest is governed by the same principles applicable to confinement.

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c. Restriction. Restriction is the moral restraint of an accused within limits which are broader than arrest. Accordingly restriction is the least severe form of pretrial restraint. Any officer authorized to compel arrest can restrict an officer - - this means the commanding officer of an officer accused. MCM, para 20(b), in discussing restriction, indicates that an officer authorized to arrest can also impose restriction on enlisted persons. There is no language in that paragraph authorizing a commanding officer to delegate his authority to restrict an enlisted person; even though such delegation authority exists with respect to confinement and arrest.

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. Though most MCM and UCMJ discussions of pretrial restraint mention only arrest and confinement, the principles are equally applicable to restriction. Before anyone can lawfully be ordered into any pretrial restraint status there must be "probable cause" for its imposition. The person ordering the restraint must have reasonable grounds for believing the accused committed an offense, though such reasonable grounds need not amount to the witnessing of the offense or the knowledge of all of its details. The person ordering restraint must also reasonably believe that restraint is necessary to insure the accused's presence at trial either because of the serious nature of the alleged offense or because the accused is a danger to life, limb, or property, or other facts indicating the accused would not be available for trial. Recent military court decisions have indicated that the serious nature of the offense, in addition to being a criterion for judging the likelihood of the accused to flee or otherwise not appear at trial, may be an independent basis for ordering pretrial restraint. Thus, regardless of the likelihood of the accused fleeing, if a serious offense (presumably those involving a maximum penalty of one year or more of confinement) is involved the accused may be ordered into a pretrial restraint status. 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. Restraint cannot be ordered to prevent one who is about to commit a crime from committing that crime or to keep the person who has committed no crime from pursuing bad habits (e.g. restricting an alcoholic to keep him from going on liberty and getting drunk). In short, there is no concept of preventive detention in military law.

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3. Severity of Restraint. In the foregoing material the decision to restrain and the legal basis for such restraint was discussed. The severity of restraint is also a decision that must be made once the restraining authority determines restraint is necessary. Normally the degree to which the criterion for restraint exists will determine the degree of restraint necessary. Thus, murder is a serious offense from which an accused is very likely to flee and a severe form of pretrial restraint in such a case would seem reasonable. On the other hand, a three months absence offender returned to the command involuntarily may require restraint but perhaps restriction would be sufficient while confinement would be too severe. No hard rule can be laid down for this decision. Good judgement and as much relevant information as possible are requisite to an intelligent decision. UCMJ, Art. 13, does, however, indicate 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. MCM, para 125, indicates that a person held in pretrial confinement will be accorded the facilities, training, and accommodations prescribed by pertinent service directives. In no event however 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. 1640.9, 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. UCMJ, Art. 10, 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. UCMJ, Art. 33, 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 (UCMJ, Art. 32) or if that is not practicable, a detailed written explanation of the reasons for delay will be forwarded within the eight day period. Though these principles are directed specifically to the most severe form of restraint or to general court-martial cases they are, in general, applicable guidelines for all forms of restraint and to the special court-martial. Special court-martial convening authorities must be as sensitive to these principles as higher authority. Thus if an accused of a

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unit is placed in pretrial restraint a special court-martial convening authority would be prudent in requiring charges to be forwarded to him within eight days of such restraint (or a detailed explanation of the delay). The governing principles in this area of law are:

- a. Pretrial restraint should not be utilized for minor offenses - - normally those involving a maximum penalty of four months or less.
- b. Once pretrial restraint is ordered action to try the accused as rapidly as possible must be taken.

4. 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 judgement 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 varied forms of relief available to an accused. Restraint ordered where there was no probable cause subjects the person ordering such restraint to prosecution under UCMJ, Art. 97 (maximum sentence is dishonorable discharge and three years confinement). The accused could also apply to superior authority (UCMJ, Art. 138) or to the Court of Military Appeals for release and/or dismissal of charges. Where the accused is subjected to punishment while in a pretrial restraint status his remedies may be dismissal of charges, release from confinement ordered by higher authority, and/or possibly a prosecution of the responsible party for unlawful detention (UCMJ, Art. 97). Unreasonable delay in processing an accused in a pretrial restraint status may result in dismissal of charges.

DENIAL OF SPEEDY TRIAL. An issue closely related to pretrial restraint is the problem of denial of 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. In cases where an accused has been subject to unreasonable or oppressive delay he is entitled to a dismissal of charges. No single issue in military law has received so much attention as speedy trial and perhaps no other aspect is so likely to cause concern to the commander inasmuch as many factors causing delay are beyond his control. In connection with this subject, the student must be familiar with the provisions of UCMJ, Arts. 10, 30(b), and 33, and MCM, para 215(e). Since the essence of a denial of speedy trial is delay, an analysis of the issue must begin with the period of time for which the government is responsible.

1. Raising the Issue. The issue of denial of speedy trial is normally raised by a motion to dismiss charges made at trial by the accused. In support of this motion the accused need show nothing more than trial has been delayed. The issue may also be presented prior to trial by motion to the convening authority. Once the issue is raised,

the burden to show by a preponderance of evidence that delay was not unreasonable is upon the prosecutor. Basically the prosecutor must show that delay was not unreasonable, that the government proceeded to trial with due diligence, and that the accused was not harmed (or prejudiced) by the delay.

2. Commencement of Accountability. The period of time for which the government must account begins with the imposition of any form of pretrial restraint or the date charges were preferred -- whichever occurs first. The reason for the alternative rule is that the denial of speedy trial can exist even where no pretrial restraint is involved. Where a military accused is held by civilian authorities for surrender to military authorities the civilian confinement will commence the government's accountability. 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 offense. Thus in any case of multiple offenses an accused could suffer a denial of speedy trial only as to some offenses but others would not be affected by the defect. Each offense, therefore, has its own period of accountability.

3. Termination of Accountability. The period of accountability terminates when trial commences. In this connection, if a rehearing is ordered by reviewing authorities the period of accountability will be unaffected. The time between the first trial and the rehearing is adjusted by reducing the confinement portion of the sentence adjudged at the rehearing. Thus the period of time for which the prosecutor must account begins with the commencement date and ends with the beginning of the initial trial.

4. Prejudice Per Se. When an accused has been subjected to pretrial confinement in excess of three months, or to other forms of pretrial restraint for an unreasonable period of time (probably three months), which delay is not substantially explained, the law will presume harm (or prejudice) to the accused and a denial of speedy trial. The absence of an explanation coupled with three months restraint is deemed prejudicial without further proof.

5. Reasonable Delay. In other cases of delay where a substantial explanation is offered by the prosecutor the delay is or is not prejudicial to the accused depending on the facts and circumstances of the particular case. Adequate justification for pretrial delay depends upon the length of pretrial restraint.

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a. Restraint less than three months. In these cases the government must produce a detailed chronology of and explanation for each step in the prosecutorial process. Facts and circumstances relevant to a determination of reasonableness of delay are:

(1) Demands for trial. Has the accused made demands for speedy trial or release and, if so, at what time in the process? Ignored demands for trial are indicative of disregard for the accused's predicament and, hence, unreasonable delay.

(2) Defense delay. Was any portion of the delay directly attributable to the accused? If the accused was an unauthorized absentee at any time, requested a continuance, or otherwise took affirmative action to delay trial the government is not accountable for the delay. Defense delays caused by requests for counsel, presence of defense witnesses, or other rights given the accused by law must be accounted for by the government but the government is allowed a reasonable time to resolve the accused's requests for those rights.

(3) 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 are only reinforcing of 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.

(4) 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 (UCMJ, Art. 10) 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 (UCMJ, Art. 33) 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..

(5) 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.

b. Restraint more than three months. Where the accused is subjected to pretrial confinement in excess of three months, a presumption of a denial of speedy trial exists unless the government demonstrates extraordinary circumstances beyond normal problems of manpower shortage, illness, leave, or mistakes in administrative procedures contributed to the delay. 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. Thus, only the most compelling circumstances will justify delays over three months and the burden of establishing reasonable delay under these circumstances is very difficult to sustain. So far this principle has not been applied to other forms of restraint but it may very well apply.

6. Recapitulation. The strictures relating to speedy trial are such that commanders must be ever mindful of them to avoid untoward dismissal of criminal cases. In practice, speedy trial should be viewed as a limitation on the use of pretrial restraint more than 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 (UCMJ, Articles 10 and 33). Appellate courts will, in such cases, grant relief notwithstanding the pleas of the accused at trial.

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7. Applicable Policy. The Marine Corps, as policy, has recommended to convening authorities that any accused ordered into pretrial confinement (other than those detained in a transient status) be interviewed by a judge advocate within twenty-four hours of such confinement. As a minimum the judge advocate should advise the accused of his right to counsel, his right against self-incrimination, of the charges against him, and of his right to prepare a defense. The judge advocate should advise the accused's commander of the pertinent requests of the accused. If practical, the accused should be interviewed by the judge advocate at the time the confinement decision is made. Within seventy-two hours of confinement the accused should be assigned a military lawyer (unless the accused has chosen a particular counsel in which case that counsel should interview the accused). The policy also recommends strict compliance with UCMJ, Art. 33 and the drafting of complete, detailed, and explanatory chronologies to show not only the steps taken but the reasons for delay. In general court-martial cases it is recommended that the pretrial investigation report (UCMJ, Art. 32) be forwarded to the general court-martial convening authority within eight days -- even though incomplete. Investigation can continue and the completed report forwarded later along with a detailed chronology of the events involved. Only if the foregoing is not practical or there is insufficient evidence to prefer charges should the letter of explanation contemplated by UCMJ, Art. 33, be utilized. The foregoing exemplifies some of the things that can be done to insure timely processing. Convening authorities should always be alert to other methods of controlling the processing time of courts-martial.

8. Denial of Speedy Review. A very closely related right to speedy trial is the right to speedy review once the case is tried. The same general considerations applicable to speedy trial litigation apply to this issue. With the recent decision of Dunlap v. Convening Authority et. al., 23 USCMA 135, 48 CMR 751 (1974), the Court of Military Appeals announced a new rule concerning the timeliness of the review process of courts-martial. Drawing an analogy to pretrial restraint cases and and the ninety (90) day rules, the court stated: "...a presumption of a denial of speedy disposition of the case will arise when the accused is continuously under restraint after trial and the Convening Authority does not promulgate his formal and final action within 90 days of the date of such restraint after completion of the trial. In the language of U.S. v. Burton [21 USCMA 112, 44 CMR 166 (1971)], this presumption will place a heavy burden on the government to show diligence, and in the absence of such a showing the charges should be dismissed." In the words of the Secretary of the Navy, in the absence of really extraordinary circumstances, failure to promulgate the convening authority action within 90 days of trial in cases in which the accused is restrained in any manner will result in dismissal of the charges. With respect to those cases in which no post trial restraint is imposed, the court will not only look to the delay between trial and Convening Authorities action but also whether or not any specific prejudice (harm) accrued to the accused. The best practice would be for the convening authority to take as active an interest in the review process as in the pretrial processing phase of the trial. The convening authority should insure reasonable diligence in record preparation and initial review.

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ACCUSER CONCEPT. In the foregoing paragraphs of this text it has been seen that the office of convening authority involves quasi-judicial responsibility for command decisions relating to pretrial restraint and pretrial processing. The accuser concept is another legal principle relating to command decisions and actions affecting the court-martial process. The basic principle underlying the following discussion is that the law allows a convening authority to act impartially and fairly to ensure justice results from charges preferred by someone other than himself. This principle follows from the establishment in the military commander of quasi-judicial authority which authority must be couched in fairness, impartiality, and justice. When a convening authority discharges these quasi-judicial responsibilities as to charges preferred by himself, impartiality is presumably lost. Accordingly a convening authority must avoid becoming partisan at any stage of a court proceeding or run the risk of losing his authority to convene a court-martial in the affected case. A convening authority becomes an accuser when he signs and swears to charges against the accused, when he directs that someone else sign the charge sheet as a nominal accuser, and when he exhibits an interest more closely related to a case than an official interest. The accuser concept does not concern so much the animus, or state of mind, of the convening authority as it concerns the actions of the convening authority. The analysis of any accuser problem must begin with an appreciation of the basic principle that the convening authority is allowed to act only upon charges preferred by others.

1. Signs Charges. A convening authority becomes an accuser by signing the accuser certificate at the top of Page 3 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 judgement 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 and normally occurs when a subordinate officer succeeds to command after having signed the Charge Sheet as 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 may technically 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 closely working together, the subordinate can determine safely whether there is any reasonable possibility that the convening authority will refer the potential case to trial. If there is a reasonable chance, a Charge Sheet can then be prepared before the case is actually presented to the convening authority. Such a procedure is not unduly cumbersome and will avoid legal complications of a technical nature with the accuser concept. There are several related problems which do not involve a violation of the accuser principle though, at first blush, 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 /UCMJ, Article 34(b), applicable also 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. Fairness and impartiality are not one-way considerations.

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 inordinate, 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. Junior, and presumably less experienced, officers without legal staffs should not defeat justice because of their inexperience or ignorance. 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.

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 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. Statements of the convening authority exhibiting a belief in the accused's guilt may reflect a mental bias having other legal significance, but they alone are not sufficient to disqualify the convening authority because of the accuser concept.

4. Effect of Disqualification. Once the convening authority violates the accuser principle, neither he nor any subordinate or junior commander, nor anyone junior in grade who succeeds him, can lawfully refer the particular case to trial. In such event, the disqualified convening authority must send the case to a superior convening authority in the chain of command or, if not practical, to any superior commander empowered to convene the appropriate type of court-martial. The letter of transmittal should indicate in general terms the reason necessitating the unusual referral procedures.

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 initially be noted that not all command influence is unlawful inasmuch as the convening authority is authorized by law to appoint court members and counsel, to refer cases to trial, and to review 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. Two notions form the basis of the unlawful command influence concept. The first notion is that justice is the fair and impartial evaluation of probative facts by judge and/or jury. The second notion is that nothing but legal and competent evidence presented in court can be allowed to influence the judge and/or jury. There are several ways by which command influence issues are created.

1. UCMJ, Article 37. The only obvious reference to unlawful command influence in the Uniform Code of Military Justice is contained in Article 37. 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 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 to directly influence court results through the application of various administrative techniques available to all commanders and others in virtue of grade or position in the service. Those violating the provisions of UCMJ, Article 37, are subject to court-martial prosecution.

2. Other Direct Influence. Though not specifically addressed by UCMJ, Article 37, there are other forms of unlawful influence embodied in the concept. These types of actions involve the convening authority, his legal officer, or another staff officer writing letters, giving lectures, or otherwise communicating personal or command views to prospective court personnel. Ostensibly these communications are designed to "educate" prospective court personnel about their duties. In reality, these communications are a forum for the convening authority to express dissatisfaction with court sentences, feelings that every one he sends to trial is guilty, or statements that certain punishments should be adjudged in certain kinds of cases. These kinds of communications seek to substitute the views of the convening authority for the independent evaluation of probative facts by the jury, regardless of how cleverly the communications are worded. The fact that such communications are addressed to a large group which coincidentally includes prospective court personnel will not offset the legal import of them.

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In fact 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. 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 best practice is to avoid such communications, if possible.

3. Prosecutor Injected Influence. This type of unlawful influence is not the direct result of an act by the convening authority. It occurs when the prosecutor in an effort to insure a conviction or a severe sentence interjects 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 prosecutor errs when he argues to the court that "...the convening authority considers the accused worthy of a punitive discharge as are all thieves", but if the policy had not existed there would have been no such mistake. 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 prosecutor or through direct policy statements. This influence problem usually arises from "bar talk" or social 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 of these views may be unduly influenced by those views when he sits on the related case as a court member. A court member so influenced is not an impartial juror. This kind of influence, not being directly interjected into the trial process, is not viewed by the law as particularly sinister. Accordingly when the challenge procedure discloses such knowledge by a member the law treats the matter as relating to the qualification of

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the juror to judge the particular case and the juror would be discharged from sitting on the case. If it appears that the convening authority was using "bar talk" to deliberately affect the trial process, then he may be involved with criminal command influence and he would force the prosecutor 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.. UCMJ, Art. 6, was designed to restrict such conversations to commanders and legal officers and to discourage public discussion of these important matters.

PRETRIAL AGREEMENTS. A pretrial agreement is an agreement by the accused to plead Guilty to certain charges in exchange for a promise by the convening authority that the approved sentence in the case will not exceed an agreed degree of severity. JAGMAN, sec 0114, contains detailed guidance for the use of pretrial agreement and a suggested format is included (Appendix I e and f). The offer to enter into such an agreement must originate with the accused and his counsel. The convening authority cannot initiate such an agreement without becoming involved in unlawful command influence. The agreement must be submitted in writing, be personally signed by the accused, and, if the agreement calls for approval of a punitive discharge and defense counsel is not a certified lawyer [UCMJ, Art. 27(b)], a certified lawyer must be made available to advise the accused and witness the offer. The right to an additional counsel may be specifically waived by the accused in the agreement. The offer is then submitted to the convening authority, normally through trial counsel and legal officer. Negotiations are, however, normally worked out informally before a formal proposal is submitted. Whenever an offer is submitted it must be forwarded to the convening authority for his decision and may not be blocked by trial counsel or legal officer. To effect the agreement the convening authority signs the acceptance form and to reject it he signs the rejection form. Once an offer is submitted and rejected counter-proposals by the convening authority are not precluded by law.

1. 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. Unreasonably multiplying offenses from an essentially singular 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 advisable to obtain a lawyer's advice before drafting or approving any pretrial agreement. Such agreements are technically complex and the JAGMAN format will not adequately cover many cases.

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2. Effect of Agreement. An accused may avoid the agreement by not entering Guilty pleas as per the agreement. In such an event the convening authority is not bound to honor his part of the agreement. An accused has the right to withdraw his pleas of Guilty before sentence is pronounced even though a pretrial agreement may have been executed. If that should occur the convening authority is no longer bound by the agreement since the accused deliberately avoided the arrangement. If the court enters pleas of Not Guilty for the accused, because the pleas of Guilty were not provident or because matters inconsistent with guilt arose at some stage of the trial, and a pretrial agreement is involved, the convening authority may be bound by the terms of the agreement unless the accused is shown to have deliberately created the plea problem. The law is, at this writing, unsettled but it would appear that a bona fide rejection of pleas by the judge should not deprive the accused of his bargain inasmuch as he truly believed he was guilty and acted in good faith. A deliberate act by the accused to subvert his pleas is tantamount to a withdrawal of the pleas and the accused should not benefit from his deceit. 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. The military judge should inquire into existence and provisions of the pretrial agreement to be sure the accused acted voluntarily and knowingly in executing the agreement. If trial is by military judge alone he may not examine the sentencing provisions prior to his verdict on the sentence in the case. Normally a genuine 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.

3. Illegal Provisions. A pretrial agreement providing a reduction in the approved sentence each time the accused testified at the trials of several co-accused is unlawful. It is against public policy to create almost irresistible temptations to falsify testimony. A provision providing that the accused waive any motions he may have in exchange for the agreement is unlawful and not binding on the accused, though the whole agreement is not necessarily invalidated. A "gentle-mens" agreement not to raise certain issues is also void for public policy reasons. In drafting pretrial agreements, a lawyer should always be consulted and peculiar or unusual provisions avoided unless approved by a lawyer. Pretrial agreements are in effect, contracts and warrant careful and precise draftmanship to protect the interests of the accused and justice.

SECTION TWO
CHAPTER V

REVIEW

Introduction: The purpose of this Chapter is to discuss a convening authority's responsibility under the Uniform Code of Military Justice (UCMJ), Article 60, to review records of trial. More specifically, this Chapter will deal with the review of special courts-martial convened by one who does not have general court-martial convening authority. A record of trial is prepared at the conclusion of each and every trial by special court-martial. If a Bad Conduct Discharge was awarded to the accused, the record must be verbatim. If no punitive discharge was awarded, a summary of all matters occurring during the trial is all that the record is required to contain. After its preparation, but prior to its being forwarded to the convening authority, the accuracy of the record must be authenticated. This is done by the military judge if one was detailed. If no military judge was detailed, the President of the court must authenticate the record of trial. After the record has been authenticated it is returned to the convening authority's legal officer, who is usually tasked with reviewing the case and making recommendations to the convening authority. The convening authority himself must ultimately take action on the record of trial since his function as the initial reviewer is nondelegable. He (C/A) may however satisfy his obligation by adopting the recommendations made to him by his legal officer.

BASIC SOURCE MATERIAL. Supplementary reading from basic source material is assigned at the end of this Chapter. These assignments relate to the material discussed in the Chapter.

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PART ONE

ELIGIBILITY

Certain persons are prohibited from acting as staff judge advocate or legal officer in a particular case. More specifically, a person may not act as a staff judge advocate or legal officer in any case in which he previously acted as an investigating officer, member, military judge, trial counsel, assistant trial counsel, defense counsel, or assistant defense counsel. These rules prohibit either a pretrial investigating officer or preliminary inquiry officer from later undertaking to act as either the staff judge advocate or legal officer in the same case. Although no specific prohibition exists which would preclude an accuser from acting as the staff judge advocate or legal officer, the better practice would be to exclude an accuser from the list of those who might otherwise act during the review of cases. This practice is recommended since one of the UCMJ's purposes is to insure to every accused that his case will be reviewed fairly and impartially. Appointing an accuser to act during the review of a case would seem to be in conflict with that policy. In the absence of some showing of bias against the accused, a staff judge advocate or legal officer may act during the review of the case even though he previously drafted the charges upon which the accused was tried.

There is no requirement that each command have a "duty legal officer" or "duty review officer" who must review the record of trial in each case. If the person who normally reviews the record of trial and makes recommendations to the convening authority is, for one of the reasons enumerated above, or for any other reason, disqualified from acting in a particular case, the convening authority may either act on his own without benefit of someone else's advice or submit the record to another legal officer for review and get his recommendations on the matter.

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SCOPE OF REVIEW

- A. Proceedings resulting in the accused's being acquitted or having a motion amounting to an acquittal granted.

There are three situations in which the review of a court-martial is a limited one. These are when the accused is acquitted, and when either a motion for a finding of not guilty or a motion to dismiss all charges and specifications on the grounds that the accused lacked mental responsibility (insanity) is granted at trial. In those cases, the convening authority neither approves nor disapproves the result reached by the court-martial. The convening authority's only duty is to ascertain whether or not the court had jurisdiction. A court-martial has jurisdiction if it was properly convened, constituted, had jurisdiction over the person who was tried, and jurisdiction over the offense alleged to have been committed by the accused.

The convening authority's action in such a case would read:

"In the foregoing case of _____ tried by
special court-martial on _____ the court had
jurisdiction over the accused and the offense for which he was
tried and the court was properly convened and constituted."

The section on Error will discuss the convening authority's options when the court-martial lacks jurisdiction.

- B. Proceedings resulting in the accused's being convicted of one or more specifications and sentenced.

The review of a record of trial at which the accused was convicted is more detailed than the review requirements set out in section A, supra. In addition to determining the jurisdiction of the court to adjudicate the matter (convened, constituted, jurisdiction over the person, jurisdiction over the offense) the record must be reviewed to determine:

- (1) Mental responsibility - was the accused mentally responsible for the offenses he was convicted of having committed (was he legally sane at the time of the acts?).
- (2) Mental capacity - did the accused, at the time of trial, understand the nature of the proceedings against him and was he able to intelligently participate in his defense?

With respect to (1) and (2) above, the reviewing officer is entitled to

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presume that the accused had the requisite mental responsibility at the time the offenses were committed and the requisite mental capacity at the time of the trial unless a motion to dismiss for lack of mental responsibility or a motion for a continuance for lack of mental capacity was made at the trial of the accused. Evidence introduced at trial may raise a question as to the accused's mental responsibility or capacity even though no motion to dismiss or to continue the case was made. This situation removes the presumption and requires the reviewer to satisfy himself of the accused's mental responsibility and mental capacity by careful consideration of the evidence in the record.

- (3) Sufficiency of the evidence - Is there competent evidence in the record as a whole to establish each and every element of the offense the accused stands convicted of, beyond a reasonable doubt?

In answering this question, the convening authority has the obligation to weigh the evidence and to judge the credibility of the witnesses just as the military judge or court members did at the time the trial was actually held. If the evidence in the record does not convince the convening authority of the accused's guilt, he must disapprove the finding of guilty. The convening authority may not consider any matter outside of the record of trial itself to cure deficiencies in the proof which raise reasonable doubt of the accused's guilt. However, in addition the convening authority may properly consider matters outside the record of trial in order to either disapprove a finding of guilty or reduce the finding to guilty of a lesser included offense.

- (4) Materially prejudicial errors - were any errors committed during the course of the trial, which require corrective action to be taken?

The various types of error and their effect will be discussed in PART THREE below.

- (5) Legality of the Sentence - Does the sentence awarded to the accused at trial exceed any of the limitations on punishments?

The convening authority must be aware of jurisdictional limits placed on the court, the table of maximum punishments, limitations based on rank, limitations based on the nature of the punishment, and whether the record represents an original trial or a rehearing.

- (6) Appropriateness of the sentence - Is the sentence awarded to the accused appropriate for the offense and the offender?

In arriving at his conclusion, the convening authority may consider matter outside of the record of trial in addition to all of the information contained in the record of trial itself. The convening authority is bound to give the accused a chance to explain or rebut any matter which is adverse to the accused and is being considered by the convening authority to sustain the sentence awarded by the court when: the matter considered is outside the record of trial; and not contained in the service record of the accused. 238

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PART THREE

THE CONVENING AUTHORITY'S ACTION

INTRODUCTION. The Convening Authority's action is a legal document setting forth his orders for action to be taken on the findings and sentence, execution of sentence, confinement, and often sets forth the effective date of certain sentences. These orders of the Convening Authority are based upon the review of the record of trial. The action should be written in unambiguous language to avoid complications for appellate authorities, disbursing, and correctional personnel. Sample forms are set out in Appendix 14, MCM (1969 Rev.) Regardless of labels, the forms contained in Appendix 14 MCM (1969 Rev.) may be used by any Convening Authority taking his initial action on the record of trial.

The Convening Authority, in acting on the findings and sentence, may approve only such findings of guilty, and the sentence or such part or amount of the sentence, as he finds correct in law and fact and as he in his discretion determines should be approved.

ACQUITTALS. An acquittal is a finding of not guilty. When the Convening Authority is taking action on a record of a trial at which the accused was acquitted of all charges, his action is limited. In this circumstance, the Convening Authority's action neither approves nor disapproves the results of the trial. Instead, the action is limited to a comment as to the court's jurisdiction.

CONVICTIONS. A conviction is a finding of guilty. Where the convening authority is taking action on a record of a trial at which the accused was convicted of one or more charges, his actions consists of various parts.

1. Statement of Approval, Modification or Disapproval of Findings and Sentence. This portion of the action is required when ever a convening authority acts in a case which resulted in the accused's being convicted of one or more charges regardless of the punishment adjudged. Two rules apply to the drafting of this portion of the action. The first rule is that approval of any part of the sentence without any mention of the findings, constitutes approval of all findings of guilty. If the convening authority wants to approve all the findings of guilty, his action would read:

"In the foregoing case of _____

The sentence is approved . . ."

or

"In the foregoing case of _____ only so

much of the sentence as provides for . . . is approved."

If the convening authority wishes to disapprove some but not all of the findings of guilty he should so state. For example:

"In the foregoing case of _____

The sentence is approved but the finding of guilty as to

Charge II and its specification are disapproved."

The second rule states that disapproval of the entire sentence without any mention of the findings, constitutes disapproval of all findings of guilty. If the convening authority wants to disapprove all the findings of guilty his action should read:

"In the foregoing case of _____

The sentence is disapproved."

If he wishes to disapprove the sentence but approve some or all of the findings of guilty, his action should set forth the findings of guilty he is approving. For example:

"In the foregoing case of _____

The sentence is disapproved, but the findings of guilty of

Charge I and its specifications are approved."

2. Declaration of Invalidity of Proceedings. The convening authority's action should declare the proceedings invalid whenever a jurisdictional error is discovered on review. In such a case the action would read:

"In the foregoing case of _____,

it appears from the record of trial that (set out error) _____.

In view of the provisions of Article _____ the

proceedings, findings, and sentence are invalid. Another trial

is ordered before another court-martial to be hereafter designated."

This action is also taken with respect to any specification which fails to allege an offense under the UCMJ even if the accused was acquitted of the insufficient specification. In such a case the action would read:

"In the foregoing case of _____ the findings

and proceedings as to Charge I and its specification are invalid

because of its failure to allege an offense under the Uniform

Code of Military Justice."

3. Order of Rehearing or Dismissal of Charge. If the Convening Authority disapproves any finding of guilty his action must indicate either that a rehearing is ordered on the charge(s) and specification(s), or that the charge(s) and specification(s) are dismissed. Whether or not a Convening Authority may order a rehearing is discussed in Part Four below. In such a case the actions would read:

"In the foregoing case of _____, it appears from the record of trial that _____ Under the circumstances For this reason, the sentence is disapproved and a rehearing is ordered before another court-martial to be hereafter designated."

or

"In the foregoing case of _____ the sentence is disapproved and the charges are dismissed."

4. Order of Execution and Suspension of Sentence. An order to execute a sentence is an order directing the sentence to be carried out. If the sentence approved by the Convening Authority is the result of a new trial he may not order any portion of the sentence executed. Additionally, a sentence approved by a convening authority which affects a flag or general officer or includes the death penalty, dismissal, an unsuspended punitive discharge, or unsuspended confinement at hard labor for one year or more may not be ordered executed by him. The convening authority has the authority to order any other sentence executed. If he desires to have the sentence or any portion of it executed, his action should so state. The action in such a case would read:

"In the foregoing case of _____, the sentence is approved and will be duly executed."

or

"In the foregoing case of _____, only so much of the sentence as provides for _____ is approved and will be duly executed."

If the convening authority desires to suspend all or any part of the sentence his action must so state. For example:

"In the foregoing case of _____ the sentence is approved, but the execution thereof is suspended

for _____ months, at which time unless the suspension is sooner vacated, the sentence shall be remitted without further action. The record of trial is forwarded

-or-

"In the foregoing case of _____ the sentence is approved and will be duly executed, but the execution of that portion thereof adjudging _____ is suspended for _____ months, which time unless the suspension is sooner vacated, the suspended portion shall be remitted without further action. The record of trial is forwarded"

5. Order of Deferral of Confinement or Recission of Deferral. A deferral of a sentence to confinement serves to postpone the running of the sentence by putting off its effective date. The convening authority may order the portion of the sentence relating to confinement deferred, upon written application of the accused, so long as the accused remains under the convening authority's jurisdiction and the order to defer is issued before the sentence is ordered executed. In those cases in which the granting of an application for deferral of confinement takes place prior to or concurrently with the convening authority's action, the action must state the date upon which the sentence was (or is) deferred. In such a case the action would read:

"In the foregoing case of _____ the sentence is approved. The service of the sentence to confinement at hard labor for _____ (days) (months) (was deferred on _____) (is deferred effective this date) and will not begin until such time as the sentence is ordered into execution, unless such deferment is sooner rescinded."

If recission takes place prior to or concurrently with the convening authority's action, the date of the deferment and the recission must appear in the action. For example:

"In the foregoing case of _____ the sentence is approved. The service of the sentence to confinement at hard labor for _____ (days) (months) was deferred on _____ and the deferment (was rescinded on _____) (is rescinded effective this date)."

6. Order of Application or Deferral of Forfeitures. If the sentence the convening authority approves does not include confinement or if the convening authority suspends the sentence to confinement, no approved forfeiture may be applied until the sentence is ordered executed. As mentioned above the convening authority may not order any portion of a sentence executed if the sentence is the result of a "new trial" or the sentence as approved by him affects a flag or general officer, includes death, dismissal, an unsuspended punitive discharge (DD or BCD), or unsuspended confinement at hard labor for a year or more. ART. 71 UCMJ. Even though the UCMJ prohibits him from ordering these sentences executed; approved forfeitures apply to pay or allowances becoming due on or after the date the sentence is approved by the convening authority when the approved sentence also includes unsuspended confinement which has not been deferred, unless the Convening Authority specifically defers the application of the forfeitures. In any event, the action should set out the convening authority's desires in any case where he is authorized to apply forfeitures to pay prior to execution of the sentence. The action should read:

"In the foregoing case of _____, the sentence is approved. The forfeitures shall apply to pay (and allowances) becoming due on and after the date of this action."

or

"In the foregoing case of _____ the sentence is approved. The application of the forfeitures is deferred until (The sentence is ordered into execution) (_____.)"

7. Designation of Place of Confinement. In any case where the convening authority orders confinement executed or imposes post-trial confinement pending further appellate review he must designate the place of confinement in his action. The action in this event would read:

"In the foregoing case of _____ the

sentence is approved (and will be duly executed).

_____ is designated the place of confinement."

8. Admonition or Reprimand. Where the convening authority executes a sentence including an admonition or reprimand, he must include the admonition or reprimand in his action. The action in this event would contain the following:

"Pursuant to the sentence of the court, as herein approved,
a letter of (reprimand) (admonition) is this date being served
upon the accused and a copy thereof is hereby incorporated as
an integral part of this action."

9. Statement Regarding Companion Case. In court-martial cases where the separate trial of a companion case is ordered, the convening authority shall so indicate in his action on the record in case. JAGMAN, sec. 0123a. This statement alerts reviewing authorities to look for the companion case(s) and helps them to evaluate the relative appropriateness of sentences. For example:

"This a companion case to that of _____ tried
by special court-martial by this command on _____."

10. Synopsis of Accused's Conduct. In order that the best interests of the service as well as those of the accused may be served, the convening authority, in those cases where the sentence as approved by him extends to a punitive discharge, whether or not suspended, shall include in his initial action a brief synopsis of the accused's conduct record during the current enlistment or current enlistment as extended. This synopsis should include in chronological order: dates, nature of offenses committed, sentences adjudged and approved, and nonjudicial punishment imposed. The synopsis should also include medals and awards, commendations, and any other information of a commendable nature. Although not required, similar action may, if circumstances are deemed appropriate, be taken in other cases. JAGMAN, sec. 0123C. For example:

"A synopsis of the accused's conduct record during his current enlistment (and extension thereof) considered by the convening authority in connection with his action on the sentence in this case is as follows:

12 Jan 19__ - NJP for UA from 1 Jan 19__ to 5 Jan 19__;

awarded 14 days restriction to _____.

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The accused is entitled to wear the following medals and awards: the National Defense Service Medal."

11. Cases Involving Convictions of Larceny or Other Offenses Involving Moral Turpitude. If a punitive discharge has been approved, whether or not suspended, in a case involving conviction of larceny or other offense involving moral turpitude, the convening authority shall include in his action on the record facts which tend to extenuate, mitigate, or aggravate the offense or offenses and which do not appear in the court record or in the papers accompanying the same. If the accused entered a plea of guilty, the Convening authority shall also include a synopsis of the circumstances of the offense amplifying the allegations set forth in the specification regardless of whether such facts are otherwise set forth in the record of trial. In all cases in which the information to be so set forth in the action of the convening authority is not exclusively extenuating or mitigating, the convening authority shall refer a copy of the information to the accused before taking action on the case, and shall afford the accused an opportunity to rebut any part or portion of the information. A comment that such opportunity to rebut was afforded shall be included in the action of the convening authority, and any statement made by the accused in rebuttal shall be appended to such action. JAGMAN, sec 0123f. It should be noted that resort to these matters outside of the record of trial may not be had to support a finding of guilty. MCM, para 85b. Examples of statements contained in the convening authority's action in these situations are:

"A synopsis of the facts tending to extenuate, mitigate, or aggravate the offense(s) 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 my taking action on this case, the foregoing synopsis was referred to the accused for any rebuttal, explanation, or comment he might care to make. (The accused's statement, which is appended to the record of trial, was carefully considered by me before taking my action on this case) (The accused did not desire to make any statement)."

or

"There are no facts which tend to extenuate, mitigate, or aggravate the offenses not otherwise appearing in the record of trial."

or

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"A synopsis of the circumstances of the offenses(s) to which the accused pleaded guilty, in amplification of the statements set forth in the specification, is as follows: (State fully and concisely, and include any matter in extenuation, mitigation, and aggravation). Prior to my taking action on this case, the foregoing synopsis was referred to the accused for any rebuttal, explanation, or comment he might care to make. (The accused's statement, which is appended to the record of trial, was carefully considered by me before taking my action on this case) (The accused did not desire to make any statement)."

12. Statement as to the Accused's Opportunity to Rebut Adverse Matter. The right of an accused to be afforded an opportunity to rebut adverse matter, considered by the convening authority, from outside the record of trial extends beyond cases involving an approved punitive discharge. In fact, convening authority's who are considering adverse matter not contained in the record of trial must afford all accuseds the opportunity to rebut or explain the matter regardless of the sentence that is being approved, unless the accused supplied the information himself or may be charged with knowledge that the information might be used against him, as when it appears in a record of nonjudicial punishment. MCM, para. 85b. In this situation the convening authority's action should state the information considered, the fact that the accused was afforded an opportunity to rebut or explain the matter, and that the accused did or did not make a statement in rebuttal, a copy should be appended to the convening authority's action. For example:

"Prior to taking any action in 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) (The accused did not desire to make any statement)."

13. Statement Forwarding the Record of Trial. In his action, the convening authority should include a statement indicating to whom he is forwarding the record of trial. For example:

"The record of trial is forwarded to Commandant, First Naval District for review in accordance with Article 65(b) (or 65(c)), UCMJ.

14. Signature and Authority. The convening authority's action must be personally signed by the convening authority. Below his signature he must indicate his rank and the fact that he is the Commanding Officer or other fact authorizing him to take the action on the record of trial.

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SECTION TWO
CHAPTER V
PART FOUR

ERROR AND ITS EFFECT

A. DEFINITION. "Error"; in legal parlance, means that the law has not been complied with in some way at some stage of the proceeding. In other words, some one or more persons connected with the case has failed to comply with the rules of procedure, evidence, or have criminal law applicable to the trial of the case. Depending upon its nature, an error committed during the course of a trial by court-martial may require the convening authority to invalidate the findings and/or sentence or take some other action to purge the case of the effect of the error. Errors may be categorized generally as being either "prejudicial" or "nonprejudicial" to the accused. An error is prejudicial if a substantial harm is done to the rights of the accused in which case corrective action must be taken by the convening authority. A nonprejudicial error is said to be "harmless" to the accused in that no substantial harm has resulted to a significant right. In such a case no corrective action is necessary.

Any person who reviews the record of trial has the burden of finding errors contained in the record and then determining whether they are prejudicial or nonprejudicial.

B. PREJUDICIAL ERROR. Prejudicial error occurs in a variety of situations but in each case requires corrective action to remove the effect of the error.

1. Jurisdictional Error. Jurisdiction may be defined simply as the authority of a court-martial to hear and decide a particular case. There are four prerequisites to jurisdiction which must be satisfied in each and every case tried by court-martial:

(a) Proper Convening. Each court-martial must be properly convened by an officer who has been empowered to convene such a court. The reviewer should consult UCMJ, Arts. 22 and 23 as well JAGMAN, sec. 0103 to determine whether or not the person who convened the court had the authority to do so. In addition the reviewer must know that a special or general court-martial convening authority loses the power to convene a court if he is an accuser in the case.

(b) Proper Constitution. Each court-martial must be properly constituted. That is each person who acts in a role during the trial of a case must meet certain minimum qualifications, be otherwise eligible, and be properly detailed to the role. Participation in a role by one who does not possess the minimum qualifications or who is otherwise ineligible may result in the court being improperly constituted.

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(c) Jurisdiction of the Person. Each court-martial must have jurisdiction (the power to try) over the accused. If the court does not have jurisdiction over the accused it cannot legally act in that accused's case. Thus, according to law, a court-martial does not have the power to hear and decide a case having a civilian defendant.

(d) Jurisdiction of the Offense. Each court-martial must have jurisdiction over the offense being tried. For instance a court-martial does not have jurisdiction over an act not made punishable by the UCMJ.

The trial of a case by a court-martial that lacks jurisdiction renders the results of that court-martial null and void. When this situation arises, the convening authority has no choice except to declare the proceedings null and void. If the court-martial acquitted the accused of all charges, the convening authority's action in such a case would read:

"In the foregoing case of _____, it appears from the record of trial that _____. In view of the provisions of Article _____ the proceedings, findings, and sentence are invalid. The charges are dismissed."

If the first court lacked jurisdiction but convicted the accused, the convening authority may re-refer the charges which the accused was convicted of to another trial or he may dismiss them. The action for dismissal is set out above. The convening authority's action when he wants to re-refer the charges to another trial would read:

"In the foregoing case of _____, it appears from the record of trial that _____. In view of the provisions of Article _____, the proceedings, findings, and sentence are invalid. Another trial is ordered before another court-martial to be hereafter designated.

2. Due Process Error. A due process error is committed when an accused is denied a substantial procedural or personal right or privilege given to him by either the Constitution the UCMJ, or other source having the effect of law such as the Manual for Court-Martial.

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Examples of due process errors include the wrongful denial of an accused's right to cross-examine prosecution witnesses; the wrongful denial of right to counsel; denial of the accused's right not to incriminate himself; or not to be twice tried for the same offense (double jeopardy - see UCMJ, Art. 44 and MCM, para 215(b)).

When a due process error is found in the record of trial, the convening authority must disapprove all findings of guilt affected by the error. After disapproving the findings of guilty the convening authority must decide whether to order a rehearing or dismiss the charges. A rehearing may be held as to any offense which the accused was found guilty of having committed at the first trial or an LIO thereof. A convening authority may never order a rehearing on any offense of which the accused was acquitted. A rehearing may only be ordered if there is sufficient evidence, competent or incompetent, in the record to support the findings of guilty. If the evidence contained in the record sufficient to sustain a finding of guilty is made up of both competent and incompetent evidence, an admissible substitute for the incompetent evidence must be available before a rehearing may properly be ordered. The convening authority must disapprove the entire sentence if he is going to order a rehearing. At a rehearing, the court cannot adjudge a greater sentence than that adjudged by the first court as properly reduced by reviewing authorities. In view of the fact that unless otherwise stated, disapproval of the entire sentence constitutes disapproval of all findings of guilty, The convening authority's action, in a case where a rehearing is ordered would read as follows:

"In the foregoing case of _____, it appears from the record that _____.

Under the circumstances of this case, this error is materially prejudicial to the substantial rights of the accused. For this reason, the sentence is disapproved and a rehearing is ordered before another court-martial to be hereafter designated."

As previously mentioned, the convening authority may, in some cases, disapprove the sentence and dismiss the charge(s). This action is required when there is insufficient evidence in the record to support the finding(s) of guilty or a lesser included offense thereof. Such action should also be taken when a motion to dismiss should have been granted at the original trial and the defect cannot be remedied at a rehearing. In addition, the convening authority may desire to take this action even

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though a rehearing could be ordered. If the convening authority takes this action, it would read:

"In the foregoing case of _____,
the sentence is disapproved and the charges are dismissed."

A third alternative becomes available to a convening authority in those cases where the due process error, which always requires automatic disapproval of the findings to which it relates does not affect one or more of the charges and specifications the accused was convicted of having committed. In those cases, the convening authority can disapprove the findings of guilty _____ affected by the error so long as he reassesses the sentence awarded by the court. When the convening authority reassesses, he must make sure that the remainder of the sentence he approves is both legal and appropriate for the findings of guilt that remain untouched. In this regard, it is important to note that the convening authority may reassess a sentence awarded by the court and leave it unchanged. An example of such action is:

"In the foregoing case of _____, the
findings of guilty of Specifications 1 and 2, Charge II,
are disapproved. (The sentence is approved and will be
duly executed.) (Only so much of the sentence as provides
for _____ is approved and will be
duly executed.)"

C. OTHER ERROR. Generally, while jurisdictional and due process errors must always be classified as prejudicial, there are other errors which may occur during the trial of a court-martial which may or may not be prejudicial. If they are prejudicial they are called errors which are materially prejudicial to substantial rights of the accused. If they are not prejudicial they are classified as harmless errors. The important thing to remember about these "other errors" is that they must not automatically be classified as prejudicial. The reviewer must test for prejudice. In conducting this test to determine whether the error is prejudicial or not the reviewer must determine whether the competent evidence in the 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. For example: Accused (A) was tried before a special court-martial and convicted of larceny of \$5.00 from Victim (V). At the trial, witness (W) in response to a question from the trial counsel states that (V) told him (W) that he (V) saw A take the \$5.00. There is no other evidence either direct or circumstantial pointing to the identity of the thief. The defense counsel objected to

(W)'s answer on hearsay grounds. The military judge overruled the objection and let the answer into evidence. The ruling by the judge was error. Since the record contains no other evidence on the element of identity of the thief a court of reasonable and conscientious men could not have reached the same result had the error not occurred. Therefore the error must be classified as prejudicial and corrective action must be taken to cure the error.

On the other hand, assume that in addition to the hearsay statement of (W) as to the identity of the thief, (V) and another person (W2) both testified that they saw A take the \$5.00 from (V)'s locker. In this instance the error committed by the military judge by failing to exclude the hearsay statement of (W), could properly be classified as nonprejudicial or harmless error since the quantity and quality of the competent evidence in the record as to the identity of the thief would have resulted in a court of reasonable and conscientious men reaching the same result.

The test, outlined above, that the reviewer must use in determining whether or not "other error" is prejudicial is really a restatement of the compelling evidence rule. The rule states that when the conviction of an accused rests on both competent and incompetent evidence, the conviction can only be sustained if the competent evidence is of such quality and quantity that a court of reasonable and conscientious men would have reached the same result had the incompetent evidence not been admitted. In other words, the competent evidence is of such quality and quantity as practically to compel in the minds of reasonable and conscientious men a finding of guilty.

It should be noted that the compelling evidence rule may not be used to approve a conviction where a due process error was committed since due process errors are per se prejudicial requiring corrective action in the form of disapproving the findings of guilty to which the due process error relates.

If the application of the test results in the error being classified as prejudicial, the convening authority must disapprove the finding(s) of guilty to which the error relates. The effect on the findings therefore is the same as the effect of due process errors previously discussed. When prejudicial error occurs, the options open to the convening authority with respect to the courses of action available to him are the same as discussed above in the section on due process errors.

Nonprejudicial Error. On the other hand, the testing for error may result in the reviewer's being satisfied that conviction can be approved regardless of the error because of "compelling evidence". In this case the reviewer would classify the error as "harmless error". This classification means that corrective action need not be taken, since the accused was not legally injured by the mistake.

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D. CUMULATIVE ERROR. The cumulative error rule may apply when the record of trial is filled with "harmless errors." The rule states that prejudicial error requiring corrective action results where the record indicates that numerous errors occurred during the course of the trial which, if considered individually, would probably have no measurable effect on the court, but in cumulative effect, constitute prejudicial error requiring corrective action in the form of one of the options discussed in the due process section above.

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SECTION TWO
CHAPTER V
PART FIVE

COURT-MARTIAL ORDERS

INTRODUCTION: A court-martial order publishes the results of trial. One is issued for each Special Court-Martial held regardless of the results of the trial. If the accused at trial by special court-martial receives a bad conduct discharge and that discharge is approved on review, the General Court-Martial Convening Authority who acts as the supervisory authority is responsible for issuing the court-martial order. If the trial of the accused at special court-martial results in no bad conduct discharge being awarded, or if a bad conduct discharge is awarded but not approved by the convening authority, then the responsibility for issuing the court-martial order rests with the convening authority.

FORM AND CONTENT: The form for initial promulgating orders is set out here. It is taken from the Manual for Courts-Martial 1969 (Rev.), Appendix 15.

c. FORMS FOR INITIAL PROMULGATING ORDERS.

The following is a form applicable in promulgating the results of trial and the action of the convening authority in all general and special court-martial cases. Omit the marginal side notes in drafting orders.

General (Special) Court-Martial				(Headquarters) (USS)	Heading
Order No. _____				_____, 19__	
Before a general (special) court-martial which convened at (on board)				Authority	
_____ pursuant to _____ (as amended by					
(Place)		(Description of convening orders)			
_____) was arraigned and tried				Arraignment	
(Description of amending orders, if any)					
[on a (rehearing) (new trial), the former proceedings having been published in—CMO No. _____					
_____ (Hq) (USS)					
_____, 19__]:					
				Accused	
(Grade)	(Name)	(Service No.)	(Armed force)	(Unit)	
Charge I: Violation of the Uniform Code of Military Justice, Article				Charge	
Specification 1: (Set forth specification verbatim from the charge sheet if not amended during trial—or if amended during trial, as so amended—unless it was withdrawn by the convening authority before arraignment. Such withdrawal may be shown as follows:					
Withdrawn by order of the convening authority before arraignment.)					
Specification 2: _____					
Charge II: Violation of the Uniform Code of Military Justice, Article					
Specification: _____					

PLEAS

Pleas

To Specification 1, Charge I: Not guilty.
To Specification 2, Charge I: Guilty.
To Charge I: Guilty.
To the Specification, Charge II: Not guilty.
To Charge II: Not guilty.

or

To all the Specifications and Charges: Not guilty (Guilty).

Note. If a plea is not entered to a specification or charge owing, for example, to the fact that the court sustained a motion to dismiss, the fact will be briefly stated under "Pleas," as shown in the following example. In such a case the specification or charge need not be listed under "Findings."

Charges
dismissed
on motion

To Specification 2, Charge I: Dismissed on motion of defense on ground of former jeopardy.

FINDINGS

Findings

Of Specification 1, Charge I: Guilty.
Of Specification 2, Charge I: Guilty.
Of Charge I: Guilty.

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Of the Specification, Charge II: Not guilty.
Of Charge II: Not guilty.

or

Of all the Specifications and Charges: Guilty.

Note. If a specification or charge is dismissed or withdrawn after a plea has been entered, the fact will be stated under "Findings." If dismissed on motion of the prosecution or withdrawn by the convening authority after evidence on the merits has been received, a notation to this effect should be made setting forth the reasons for such dismissal or withdrawal. Examples:

Of Specification 1, Charge I: Motion for finding of not guilty sustained.
Of Specification 2, Charge I: Dismissed on motion of defense on grounds of *res judicata*.

Of the Specification of the Charge: Withdrawn by order of the convening authority after evidence on the merits had been received because of military necessity occasioned by enemy action.

Accusited

In the event of findings of not guilty of all charges and specifications:

Of all the Specifications and Charges: Not guilty.

The findings were announced on _____, 19____

Sentence

SENTENCE

To be discharged from the service with a bad-conduct discharge, to forfeit \$_____ pay per month for six months, and to be confined at hard labor for _____ (_____ previous convictions considered.)

Date

The sentence was adjudged on _____

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ACTION

Action of
convening
authority

(Copy action of convening authority verbatim, including heading, date, and signature. See appendix 14 for appropriate forms.)

Action of
the officer
exercising general
court-martial
jurisdiction (if
appropriate)

ACTION OF THE OFFICER EXERCISING GENERAL COURT-
MARTIAL JURISDICTION

HEADQUARTERS

In the foregoing case of _____, 19____
(and suspended) by the convening authority is approved. The record of trial
is forwarded to the Judge Advocate General of the _____ for
review by a board of review. Pending completion of appellate review the
accused will be confined in _____

Major General, U.S. _____
Commanding

NOTE. Orders promulgating the proceedings of special court-martial cases,
which include an approved sentence to bad-conduct discharge will be published by the
officer who forwards the record of trial to the Judge Advocate General. If the record
is so forwarded by an officer exercising general court-martial jurisdiction to whom
the record has been forwarded pursuant to Article 65(b), his action will be copied
verbatim immediately after the action of the convening authority.

Authentication

NOTE. The order will be authenticated as prescribed by the Secretary of a
Department.

Joint or
common trials

NOTE. In the case of a joint or common trial separate orders should be issued
for each accused. Joint specifications will be copied verbatim but only the pleas,
findings, sentence, and action pertaining to the accused as to whom the order is
promulgated need be shown.

Each promulgating or court-martial 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 1974 would be "Special Court-Martial
Order no. 10-1974." (While this chapter deals only with the review of
special court-martial cases, it is worthwhile noting that a separate
sequence of serial numbers is used for General Court-Martial convening
orders that are published by a command during the same year.) In the
center of the page the title of the command issuing the order is set
out along with the date of the order. The date of the order is the
date of the action of the authority issuing the order. For example,
we already know that the convening authority is responsible for issuing
the court-martial order in the case of a special court-martial at
which the accused does not receive a bad conduct discharge. If the
date of his action as convening authority is 15 March 197_; the date of
the court-martial order would also be 15 March 197_.

The next section of the court-martial order is called the "authority"
section. It indicates the place where the trial was held and sets out
the command and organization of the convening authority as well as the

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serial number and the date of the convening order. For example:

Before a special court-martial which convened at Naval
Justice School pursuant to Commanding Officer, Naval
Justice School, Special Court-Martial Convening order
3-74 of 1 March 1974.

The "authority" section is followed by the "arraignment" and the "accused" sections 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, these section look like this:

Before a special court-martial which convened at Naval Justice
School pursuant to Commanding Officer, Naval Justice School
Special Court-Martial Convening Order 3-74 of 1 March 1974,
WAS ARRAIGNED AND TRIED: BOATSWAIN'S MATE SEAMAN JOHN P. JONES,
U.S. NAVY, 131-13-1313, NAVAL JUSTICE SCHOOL, NEWPORT, R. I.

The court-martial order next sets out the charge(s) and specification(s) upon which the accused was arraigned. For example:

Charge: Violation of the Uniform Code of Military Justice, Art. 86.

Specification: In that Boatswain's Mate Seaman John P. Jones,
U.S. Navy, Naval Justice School, Newport, R. I.
did, on or about 4 April 1973, without authority
absent himself from his organization, to wit:
Naval Justice School, Newport, R. I., and did
remain so absent until on or about 14 June 1973.

The "plea(s)" section follows the charge(s) and specification(s) section of the court-martial order. The important thing to remember about this section is that the plea(s) of the accused is/are set forth verbatim as spoken by the accused or his counsel at the trial. For example:

PLEAS

To the Charge and Specification thereunder: Not Guilty.

If no plea, was entered to the charge(s) or specification(s) upon which the accused was arraigned, the reason for this happening is stated instead. For example:

To the Charge and Specification thereunder: Dismissed on motion of defense on ground of former jeopardy; or

To the Charge and Specification thereunder: Withdrawn by order of the Convening Authority after arraignment and before the plea.

The "findings" portion of the court-martial order is next. In this section, the findings of the court are set forth as spoken at trial (verbatim). For example:

FINDINGS

Of the specification and the charge: Guilty.

If the accused was acquitted of all charges and specifications, it is necessary to include the date on which the findings were announced by the court. For example:

Of all the specifications and charges: Not Guilty.

The findings were announced on _____, 19__.

If the accused was convicted of one or more specifications, it is necessary to include the "sentence" section in the court-martial order. The sentence is set out verbatim in this section of the order together with a statement as to the number of previous convictions, if any, considered by the court and date the sentence was adjudged. For example:

SENTENCE

To be reduced to pay grade E-1, to be confined at hard labor

for three months and to forfeit \$60.00 per month for three months.

One previous conviction by summary court-martial was considered.

The sentence was adjudged on _____, 19__.

The "action" section is next. It contains the Convening Authority's action verbatim including the heading, date, and signature or evidence of signature. If the court-martial order is issued by the Supervisory Authority, his verbatim action follows the action of the Convening Authority,

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including heading, date, and evidence of signature. Evidence of the signature of either the Convening or Supervisory Authority is indicated by /s/. For example:

ACTION
NAVAL JUSTICE SCHOOL
NEWPORT, RHODE ISLAND 02840

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In the foregoing case of Boatswain's Mate Seaman John P. Jones, U.S. Navy, the sentence is approved. The Naval Correctional Center, Naval Station, Newport, Rhode Island, is designated as the temporary place of confinement. The forfeitures shall apply to pay becoming due on and after the date of this action.

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." Rules require that the name, rank, title, and organization of the officer actually signing the court-martial order be shown. If signed "By direction" such fact must be shown together with the name, rank, title, and organization of the person actually issuing the order. It is also required that at least two lines of textual material appear on the signature page. The signature portion of the "authentication" section may never appear alone.

INCIDENTALS. Special rules apply to the preparation of court-martial orders dealing with cases involving either classified or obscene matter.

In preparation of a court-martial order for a case in which classified material was involved, care should be taken to delete classified material from all copies except for the one retained in the unit files and those copies which must be forwarded with the record of trial for review.

When the order contains obscene matter that is unfit for open publication only the order retained in the unit files, those copies which accompany the record of trial, those which are furnished the Chief Custodian of the personnel records of the armed force concerned, the authorities of the command where the accused is held in custody or to which he is to be transferred, and the commander of the place where the accused is to be confined (if confinement is involved) are to be complete. All other copies prepared, not mentioned in the two (2) preceding paragraphs, should be prepared to eliminate, by use of asterisks, sufficient data to avoid the necessity of classification and such obscene matter as may be unfit for publication.

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SECTION TWO
CHAPTER VI

PRETRIAL ASPECTS OF THE GENERAL COURT-MARTIAL

INTRODUCTION. The general court-martial is the highest level of court-martial in the military criminal law system. Such a court-martial may impose the highest penalties provided by law for any offense. The general court-martial is composed of a minimum of five court members (the jury), a military judge, and lawyer counsel for the government and accused. In some cases the court is composed of a military judge and counsel. The general court-martial is created by the orders 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 (hearing) of the alleged offenses must be made and a report thereof forwarded to the general court-martial convening authority. This pretrial hearing (often referred to as an Article 32 investigation) is normally convened by the summary court-martial convening authority. This CHAPTER will discuss the legal requisites of the pretrial investigation.

BASIC SOURCE MATERIAL.

1. Uniform Code of Military Justice, Articles 18, 22, 32, and 34.
2. Manual for Courts-martial, paragraphs 33, 34, and 35.

SECTION TWO
CHAPTER VI
PART ONE
NATURE OF THE PRETRIAL INVESTIGATION

SCOPE. The formal pretrial investigation (UCMJ, Art. 32) is the military equivalent of the grand jury proceeding in civilian criminal procedure. The purpose of this investigation is to formally inquire into the truth of the allegations contained in the Charge Sheet, to secure information pertinent to the decision on how to dispose of the case, and to aid the accused in discovering the evidence against which 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 cause its dismissal if too frail or if groundless. Such an investigation can be 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 can usually be certain that only the truly serious and meritorious cases are referred to trial by general court-martial.

AUTHORITY TO CONVENE. The UCMJ, Art. 32 Investigation is convened (created) by one authorized by law to convene summary courts-martial or some higher level of court-martial. UCMJ, Art. 24, and JAGMAN, sec. 0103, indicate that commanding officers of Navy vessels, bases, stations, units, or activities and commanding officers of Marine Corps battalions, regiments, air wings, air groups, stations, and similar sized or higher level commands have summary court-martial convening authority and, in virtue of MCM, para 33, the authority to convene the UCMJ, Art. 32 Investigation. As is true of all other forms of convening authority, the power to order the UCMJ, Art. 32 Investigation (hereinafter referred to as the Pretrial Investigation) vests in the office of the commander. Though the law is unsettled it would appear that this kind of convening authority is quasi-judicial and cannot be delegated.

MECHANICS OF CONVENING. The Pretrial Investigation is convened by the written orders of the convening authority which orders also assign the personnel to participate in the proceedings. 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 he then convenes the Pretrial Investigation. This means that the preferral of charges process will have been completed up to, but not including, the First Indorsement on Page 3 of the Charge Sheet. Unlike courts-martial, therefore, 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

Preceding page blank

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 convening 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).

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 higher grade officer or one with legal training. Neither an accuser, nor 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 have previously had a role in inquiring into the offenses involved (such as the 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 of judicial temperament. It is the responsibility of the convening authority to see that such an officer is appointed to Pretrial Investigations.

COUNSEL FOR GOVERNMENT. While the Pretrial Investigation need not be an adversary proceeding, prevailing current practice favors the convening authority's detailing of a lawyer to represent the interests of the United States. The assignment of a counsel for the United States does not lessen the obligation of the investigating officer to thoroughly and impartially investigate the alleged offenses. As a practical matter, however, the presence of lawyers representing the United States and the accused make the Pretrial Investigation an adversary proceeding. Where a lawyer is detailed to represent the United States, he should be detailed in the convening order. Counsel for the United States functions much as a prosecutor does at trial and presents evidence supporting the allegations contained on the Charge Sheet.

DEFENSE COUNSEL. The accused's rights to counsel are as extensive at the Pretrial Investigation as at the general court-martial. Accordingly, the accused is entitled to be represented by a detailed military lawyer, ~~certified in accordance with UCMJ, Art. 27(b), or Individual Military Counsel, who is a military lawyer of the accused's selection, if such counsel is reasonably available, or Individual Civilian Counsel who is a lawyer provided by the accused at his own expense.~~ Where either type of Individual Counsel represents the accused the detailed military lawyer assists requested counsel unless excused by the accused. Detailed defense counsel at a Pretrial Investigation must be a certified /UCMJ, Art. 27(b)/ lawyer and should be appointed by the convening order. Individual Counsel, military or civilian, is normally not detailed on the convening order. An accused is not entitled to both individual military

and civilian counsel in the same case though he may effect that result by requesting Individual Military Counsel, and, after he has been provided, retaining civilian counsel before proceedings begin.

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 (DD Form 457). 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 made in the convening order.

SAMPLE CONVENING 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.

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SAMPLE APPOINTING ORDER
PRETRIAL INVESTIGATION

NAVAL JUSTICE SCHOOL
NAVAL BASE
NEWPORT, RHODE ISLAND 02840

14 December 1973

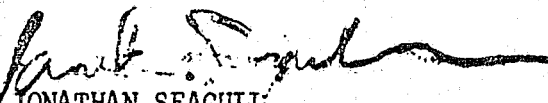
In consonance with authority delegated by Manual for Courts-Martial 1969 (Rev), paragraph 33e, Lieutenant Commander Carl Giese, U.S. Navy, is hereby appointed an investigating officer in the formal pretrial investigation (Uniform Code of Military Justice, Article 32) of the case of United States v. Seaman Guildardo G. Guildersleeve, the allied papers of which are attached. The investigating officer will be guided by the provisions of Uniform Code of Military Justice, Article 32. Manual for Courts-Martial 1969 (Rev), paragraph 34 and pertinent case law relating to the formal pretrial investigation. In addition to the investigating officer hereby appointed, the following personnel are detailed to the investigation for the purpose indicated.

COUNSEL FOR THE GOVERNMENT

Lieutenant Melvin Bailey, JAGC, U.S. Naval Reserve, certified in accordance with Uniform Code of Military Justice, Article 27b.

DEFENSE COUNSEL

Lieutenant Burnie Bridges, JAGC, U.S. Navy, certified in accordance with Uniform Code of Military Justice, Article 27b.


JONATHAN SEAGULL
Captain, U.S. Navy
Commanding Officer

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SECTION TWO
CHAPTER VI
PART TWO

HEARING PROCEDURE

PRE-HEARING PREPARATION. When the investigating officer of a Pretrial Investigation receives his order of appointment he should first study Charge Sheet and allied papers to become thoroughly familiar with the case. The Charge Sheet should be reviewed and any corrections needed should be made so long the changes are minor. If a counsel for the United States has been appointed the investigating officer should contact him to determine what additional information, if any, is available. The investigating officer 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 investigating officer or properly preserved in order to protect the chain of custody or unique identifying features. Once the investigating officer 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 investigating officer to build a case against the accused but to impartially investigate the alleged offense with a view toward discovering the truth.

WITNESSES. Witnesses who have relevant testimony to relate should be scheduled to appear at the formal hearing if they are available. There are several types of witnesses who may cause some problems for the investigating officer whether requested by him or either counsel.

1. Essential Military Witnesses. A witness who is serving on active duty in an armed force and whose testimony is considered important to the fair and proper conduct of the hearing should appear at the hearing and testify. If the witness is subject to the UCMJ, a request should be sent to his commanding officer requesting that the witness be made available to testify. If the witness appears, his testimony can lawfully be considered by the investigating officer when the latter drafts his report. If the commanding officer of the witness will not make the witness available then his sworn written statement can be considered by the investigating officer. In this connection the investigating officer (and hence the convening authority) has the duty to call all available witnesses to testify at the hearing. The convening authority cannot lawfully refuse to request the attendance of a reasonably essential military witness even though he must bear the expenses involved in such an appearance. The determination of availability rests by law with the commanding officer of the witness, not the convening authority. Military witnesses whose testimony are reasonably essential to a fair hearing are "available" if present in the general vicinity of trial unless illness or injury prevents their appearance.

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2. Essential Civilian Witnesses. A civilian witness whose testimony is reasonably essential must be called to testify although there is no legal mechanism currently available to compel such attendance. Accordingly, the investigating officer must make bona fide efforts to get any such witness to voluntarily appear at the hearing. Since there is no subpoena power available, there is no lawful way to compensate a civilian witness for his testimony. If an essential civilian witness does not desire to appear, a sworn written statement of the witness can be considered by the investigating officer at the hearing.

3. Nonessential Witnesses. The investigating officer has a legal duty to call all material witnesses deemed essential to a fair investigation, if such witnesses are available. Whether or not a witness has material, but not essential, evidence to offer is a determination the investigating officer must make utilizing good judgement. If a nonessential witness cannot appear, his sworn written statement may be utilized at the hearing. The accused can waive the presence of any witness, in which case the investigating officer can consider the witness's written statement.

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 United States, if such counsel is detailed. The accused has the right to offer either sworn or unsworn testimony. If undue delay will not result, the signatures of the witnesses who testified at the hearing should be obtained under oath. In this connection, the investigating officer is authorized to administer oaths in connection with the performance of his duties JAGMAN, sec. 250la(2).

STATEMENTS. Unsworn statements may be considered at an Article 32 hearing unless objected to. Upon objection, only sworn statements may be considered. CAVEAT: Since objections to unsworn statements are generally made, be sure to get sworn statements. The unsworn written statement of an available witness whose presence has been waived by the accused, after the accused has been advised of the expected testimony of the witness, may be considered. All statements considered by the investigating officer should be shown to the accused and counsel. The same procedure should be followed with respect to documentary evidence.

RULES OF EVIDENCE. The rules of evidence applicable to trial by court-martial do not strictly apply at the Pretrial Investigation and the investigating officer need not rule on objections raised by counsel except insofar as the procedural requisites of the investigation itself are concerned. Care should be taken to insure that evidence relating to any search and seizure authorizations, UCMJ, Article 31, warnings, or similar legal issues is fully developed at the hearing. 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.

HEARING DATE. Once the pre-hearing preparation has been completed and the foregoing principles considered, the investigating officer 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. A detailed hearing guide for use in Pretrial Investigations follows. The guide also contains instructions for completing the DD Form 457, much of which is compiled as the proceedings take place. At the end of this PART will be found a completed investigation package. Before the hearing commences the pertinent data at the top of Page 1 of DD Form 457 should be entered. It should be noted that the Investigating Officer's report is usually a first endorsement on the convening order. For example.

INVESTIGATING OFFICER'S REPORT <i>(Of charges under the provisions of Article 32, Uniform Code of Military Justice, and paragraph 34, Manual for Courts-Martial, U.S., 1951)</i>			1st ENDORSEMENT
FROM: <i>(Grade, name and organization of investigating officer)</i> Major I. M. Snooper HqCo, H&S Bn, MCB Camp Pendleton, Calif.			DATE OF REPORT 12 August 1973
TO: <i>(Title and organization of officer who directed report to be made)</i> Commanding Officer H&S Bn, MCB Camp Pendleton, Calif.			
GRADE AND NAME OF ACCUSED Private Joe Tanglefoot	SERVICE NUMBER 777669999	ORGANIZATION Serv Co, H&S Bn, MCM Camp Pendleton, California	DATE OF CHARGES 10 Aug 1973

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 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 disposi-
tion of the case of the United States against _____ (grade)
and name of the accused) _____. Copies of the Charge
Sheet and convening 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) _____,
_____ (counsel for the United States), 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 double check the
convening order for its accuracy.

I.O.: Are the legal qualifications of counsel correctly stated
in the convening order?

NOTE. If accused is represented by individual counsel, request that his legal qualifications in terms of UCMJ, Art. 27, be stated. It is not necessary to obtain a recital of legal education and training.

C.U.S.: My legal qualifications are/are not correctly stated in the convening order.

D.C.: My legal qualifications are/are not correctly stated in the convening order.

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 and I am going to investigate these allegations.

I.O.: 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 lawyer counsel. Do you understand what I have just told you?

I.O.: So far as known by me, the witnesses against you are:

I.O.: ~~Before proceeding further I wish to advise you that you~~ have the right to be represented at this hearing by a military lawyer, certified in accordance with UCMJ, Art. 27(b), and detailed to represent you by the convening authority. You have the right in addition to, or in lieu of, detailed military lawyer counsel the right to be represented by a civilian lawyer of your own selection provided by you at your own expense. In addition to, or in lieu of, detailed military lawyer counsel you have the right to be represented by a military lawyer of your own choice if that military lawyer is reasonably available to represent you. Do you understand what I have just told you?

ACC: Yes/No.

I.O.: What is your desire concerning counsel?

NOTE. The accused at this point will almost always be represented by, at least, a detailed lawyer counsel. Should he desire to retain civilian counsel or request Individual Military Lawyer Counsel, the investigating officer will 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 judgement is the rule here. Some accused may use this right as a device to unduly prolong the investigation. If the accused requests Individual Military Counsel the investigating officer will report the matter to the convening authority. If requested counsel is within the command of the convening authority and reasonably available, the convening authority will provide such counsel. If the requested counsel is in another command, the convening authority will take prompt action to determine availability in the same manner as for special courts-martial (see discussion on page 4-10, hereof, concerning Individual Military Counsel).

NOTE. At this point the investigating officer should indicate that the foregoing advice was given by checking the appropriate blocks of paragraphs 1 and 2 of DD Form 457. For example:

(Check appropriate answer)

	YES	NO
1. IN ACCORDANCE WITH THE PROVISIONS OF ARTICLE 32, UNIFORM CODE OF MILITARY JUSTICE, AND PARAGRAPH 34, MANUAL FOR COURTS-MARTIAL, 1951, I HAVE INVESTIGATED THE CHARGES (Exhibit 1) APPENDED HERETO. (If, and as soon as, it is determined the accused elects not to be represented by counsel or by qualified counsel during the investigation, the investigating officer will complete in ink items 1 through 4, except 4f, and will ask the accused to sign item 4e.)	<input checked="" type="checkbox"/>	<input type="checkbox"/>
2. AT THE OUTSET OF THE INVESTIGATION I READ TO THE ACCUSED THE PROVISIONS OF ARTICLE 31, UNIFORM CODE OF MILITARY JUSTICE, AND ALSO ADVISED HIM:	<input checked="" type="checkbox"/>	<input type="checkbox"/>
a. OF THE NATURE OF THE OFFENSE(S) CHARGED AGAINST HIM	<input checked="" type="checkbox"/>	<input type="checkbox"/>
b. OF THE NAME OF THE ACCUSER	<input checked="" type="checkbox"/>	<input type="checkbox"/>
c. OF THE NAMES OF THE WITNESSES AGAINST HIM SO FAR AS KNOWN BY ME.	<input checked="" type="checkbox"/>	<input type="checkbox"/>
d. THAT THE CHARGES WERE ABOUT TO BE INVESTIGATED BY ME	<input checked="" type="checkbox"/>	<input type="checkbox"/>
e. OF HIS RIGHT, UPON HIS REQUEST, TO HAVE COUNSEL REPRESENT HIM AT THE INVESTIGATION, EITHER:	<input checked="" type="checkbox"/>	<input type="checkbox"/>
(1) CIVILIAN COUNSEL, IF PROVIDED BY HIM, OR	<input checked="" type="checkbox"/>	<input type="checkbox"/>
(2) MILITARY COUNSEL OF HIS OWN SELECTION, IF SUCH COUNSEL BE REASONABLY AVAILABLE, OR	<input checked="" type="checkbox"/>	<input type="checkbox"/>
(3) COUNSEL, QUALIFIED UNDER ARTICLE 27(b), APPOINTED BY THE OFFICER EXERCISING GENERAL COURT-MARTIAL JURISDICTION	<input checked="" type="checkbox"/>	<input type="checkbox"/>

The investigating officer should then proceed with his advice to the accused.

I.O.: In addition to the foregoing rights 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 present anything you desire to submit in your own behalf as a defense or in extenuation and mitigation. This right includes the rights to call available witnesses to testify at the hearing and to make a statement yourself which statement may be sworn or unsworn and in any form. Do you understand?

ACC: Yes/No.

NOTE. The investigating officer should now complete paragraph 2 of DD Form 457 capitulating the advice given thus far. For example:

F. OF HIS RIGHT TO CROSS-EXAMINE ALL AVAILABLE WITNESSES AGAINST HIM	<input checked="" type="checkbox"/>
G. OF HIS RIGHT TO PRESENT ANYTHING HE MIGHT DESIRE IN HIS OWN BEHALF, EITHER IN DEFENSE OR MITIGATION	<input checked="" type="checkbox"/>
H. OF HIS RIGHT TO HAVE THE INVESTIGATING OFFICER EXAMINE AVAILABLE WITNESSES REQUESTED BY HIM	<input checked="" type="checkbox"/>
I. HIS RIGHT TO MAKE A STATEMENT IN ANY FORM	<input checked="" type="checkbox"/>
J. HIS RIGHT TO REMAIN SILENT OR TO REFUSE TO MAKE ANY STATEMENT REGARDING ANY OFFENSE OF WHICH HE WAS ACCUSED OR CONCERNING WHICH HE IS BEING INVESTIGATED	<input checked="" type="checkbox"/>
K. THAT ANY STATEMENT MADE BY HIM MIGHT BE USED AS EVIDENCE AGAINST HIM IN A TRIAL BY COURT-MARTIAL	<input checked="" type="checkbox"/>

NOTE. The investigating officer should next record the accused's choice of counsel by completing paragraphs 3 and 4 of DD Form 457. Paragraph 3 records the accused's desires with respect to Individual Military Counsel and also records the appearance and qualifications of Individual civilian counsel. Thus for military counsel, if accused submits a request enter:

3. A. THE ACCUSED REQUESTED MILITARY COUNSEL BY NAME	<input checked="" type="checkbox"/>
B. NAME AND GRADE OF SUCH COUNSEL	
Carl Giese, CDR, U.S. Navy	
C. ORGANIZATION	
USS BROWNSON	
4. MILITARY COUNSEL REQUESTED BY NAME WAS QUALIFIED WITHIN THE MEANING OF ARTICLE 27(9), UNIFORM CODE OF MILITARY JUSTICE	<input checked="" type="checkbox"/>
D. IF ANSWER TO PRECEDING ITEM WAS "NO", ACCUSED WAS INFORMED THAT SUCH UNQUALIFIED COUNSEL MAY NOT REPRESENT HIM AT ANY GENERAL COURT-MARTIAL	N/A
E. MILITARY COUNSEL REQUESTED IN NAME WAS REASONABLY AVAILABLE. (If not available, explain in item 18, having reference to paragraph 30c, Manual For Courts-Martial, 1951, page 46)	<input checked="" type="checkbox"/>

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NOTE. If accused does not request Individual Military Counsel enter:

3. THE ACCUSED REQUESTED MILITARY COUNSEL BY NAME		
A. NAME AND GRADE OF SUCH COUNSEL N/A	ORGANIZATION N/A	
G. MILITARY COUNSEL REQUESTED BY NAME WAS QUALIFIED WITHIN THE MEANING OF ARTICLE 27(b), UNIFORM CODE OF MILITARY JUSTICE		N/A
H. IF ANSWER TO PRECEDING ITEM WAS "NO", ACCUSED WAS INFORMED THAT SUCH UNQUALIFIED COUNSEL MAY NOT REPRESENT HIM AT ANY GENERAL COURT-MARTIAL		N/A
I. MILITARY COUNSEL REQUESTED BY NAME WAS REASONABLY AVAILABLE. (If not available, explain in item 18, having reference to paragraph 300, Manual for Courts-Martial, 1951, page 46)		N/A

NOTE. The appearance of civilian counsel is recorded as shown in the following example.

7. THE ACCUSED STATED HE WOULD BE REPRESENTED BY CIVILIAN COUNSEL		
A. NAME AND ADDRESS OF SUCH COUNSEL Harvey Wallbanger Esquire 1 Broadway Ave., NYC, N.Y.	MEMBER OF THE BAR OF New York	
H. (This item to be used by accused's civilian counsel only)	12 Aug 1978 Camp Pendleton, Calif. Place and date	
I HEREBY ENTER MY APPEARANCE FOR THE ABOVE-NAMED ACCUSED AND REPRESENT THAT I AM A MEMBER OF THE BAR OF New York		
		Harvey Wallbanger (Signature of Counsel)

NOTE. If no civilian lawyer is requested or appears to represent the accused these facts are recorded as follows:

7. THE ACCUSED STATED HE WOULD BE REPRESENTED BY CIVILIAN COUNSEL		
A. NAME AND ADDRESS OF SUCH COUNSEL N/A	MEMBER OF THE BAR OF N/A	
H. (This item to be used by accused's civilian counsel only)	N/A Place and date	
I HEREBY ENTER MY APPEARANCE FOR THE ABOVE-NAMED ACCUSED AND REPRESENT THAT I AM A MEMBER OF THE BAR OF		
		(Signature of Counsel)

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NOTE. The pertinent data concerning detailed counsel is recorded in paragraph 4 of DD Form 457. Normally the request for such counsel will have been made and granted prior to the hearing. Whether that is so or the accused requests a detailed lawyer at the hearing will not affect the manner in which the data is recorded. The appearance of detailed counsel is recorded as follows.

4. a. THE ACCUSED REQUESTED THAT COUNSEL BE APPOINTED BY THE GENERAL COURT-MARTIAL AUTHORITY TO REPRESENT HIM		<input checked="" type="checkbox"/>
b. NAME AND GRADE OF SUCH APPOINTED COUNSEL	ORGANIZATION	
Carl Giese, CDR, USN	USS BROWNSON	
c. APPOINTED COUNSEL (as in b above) WAS QUALIFIED WITHIN THE MEANING OF ARTICLE 27(b), UNIFORM CODE OF MILITARY JUSTICE		<input checked="" type="checkbox"/>
d. IF ANSWER TO PRECEDING ITEM (4c) IS "NO", ACCUSED SPECIFICALLY WAIVED COUNSEL WITH SUCH QUALIFICATIONS		N/ A
e. (To be signed by accused if answer to 3a and 4a, or 3c, or 4c was "NO". If accused fails to sign, investigating officer will explain circumstances in detail in item 18)		
N/A		
Date		
I HAVE BEEN INFORMED OF MY RIGHT TO REPRESENTATION AT THE INVESTIGATION BY COUNSEL QUALIFIED UNDER ARTICLE 27(b), UNIFORM CODE OF MILITARY JUSTICE. I HEREBY WAIVE MY RIGHT TO (SUCH QUALIFIED COUNSEL) (COUNSEL).		
(Signature of Accused)		

NOTE. It is now fairly standard practice to automatically detail a certified military lawyer defense counsel to an accused awaiting a Pretrial Investigation. If, for some reason, a nonlawyer defense counsel is detailed to represent the accused, the accused's waiver of counsel rights must be obtained. This information is recorded in paragraph 4 of DD Form 457. For example, see sample format on the following page. Note that subparagraph f, appears on page 2 of DD Form 457 while the previous subparagraph appears on page 1 thereof.

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4. a. THE ACCUSED REQUESTED THAT COUNSEL BE APPOINTED BY THE GENERAL COURT-MARTIAL AUTHORITY TO REPRESENT HIM		<input checked="" type="checkbox"/>
b. NAME AND GRADE OF SUCH APPOINTED COUNSEL Carl Giese, CDR., USN	ORGANIZATION USS BROWNSON	<input checked="" type="checkbox"/>
c. APPOINTED COUNSEL (as in b above) WAS QUALIFIED WITHIN THE MEANING OF ARTICLE 27(b), UNIFORM CODE OF MILITARY JUSTICE		<input checked="" type="checkbox"/>
d. IF ANSWER TO PRECEDING ITEM (4c) IS "NO", ACCUSED SPECIFICALLY WAIVED COUNSEL WITH SUCH QUALIFICATIONS		<input checked="" type="checkbox"/>
e. (To be signed by accused if answer to 3a and 4a, or 3c, or 4c was "NO". If accused fails to sign, investigating officer will explain circumstances in detail in item 18)		<input checked="" type="checkbox"/>
Date 12 August 1973		
<p>"I HAVE BEEN INFORMED OF MY RIGHT TO REPRESENTATION AT THE INVESTIGATION BY COUNSEL QUALIFIED UNDER ARTICLE 27(b), UNIFORM CODE OF MILITARY JUSTICE. I HEREBY WAIVE MY RIGHT TO (SUCH QUALIFIED COUNSEL) (COUNSEL)."</p> <p style="text-align: right;"><i>Joe T. Lefort</i> (Signature of Accused)</p>		
<p>NOTE: If additional space is required for any item, enter the additional material on a separate sheet. Be sure to identify such material with the proper numerical and, when appropriate, lettered heading (Example, "3c"). Securely attach any additional sheet to the form and add a note in the appropriate item of the form: "See additional sheet." Any matters considered pursuant to paragraph 34, MCM, 1951, which are not identifiable with some other heading in the form should be entered in item 18.</p>		

DD FORM 457 1 JUN 68 PREVIOUS EDITIONS OF THIS FORM ARE OBSOLETE.
FORM 0101-89-3800

(Check appropriate answer continued)		YES	NO
5. COUNSEL FOR THE ACCUSED WAS PRESENT THROUGHOUT THE INVESTIGATION (If the accused waives the right to have counsel present throughout all or a part of the investigation after having requested counsel, state the circumstances and the particular proceedings conducted in the absence of such counsel)		<input checked="" type="checkbox"/>	<input type="checkbox"/>

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.

27p

NOTE. The manner of examining witnesses depends upon whether a counsel for the United States has been detailed. If so, it is customary for him to conduct the initial 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 United States 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 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 statement 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 which was requested by the defense. The investigation should then proceed to the consideration of documentary evidence.

I.O.: I have before me the original page 12 from the service records of the accused and I intend to consider this document in my investigation. It will be appended to my report as Exhibit # _____ and I now show it to accused and counsel.

NOTE. After all documentary evidence has been considered items of real evidence should be marked. Real evidence are 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 finding its relevance.

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If a confession or admission of the accused is to be considered the investigating officer must look into the circumstances to determine compliance with UCMJ, Art. 31 and right to counsel of the accused. This may mean the examination of witnesses or the consideration of the sworn statement of the one taking the confession. A brief discussion and a line of questioning are detailed on pages 3-37 to 3-42.

NOTE. After all evidence has been received, page 2 of DD Form 457 (paragraphs 5-8) should be completed. Paragraph 5 records the witnesses who testified. For example.

5. IN THE PRESENCE OF THE ACCUSED I HAVE INTERROGATED ALL AVAILABLE WITNESSES UNDER OATH OR AFFIRMATION AND HAVE EXAMINED ALL DOCUMENTARY EVIDENCE ON BOTH SIDES.			✓
6. I HAVE REDUCED THE MATERIAL TESTIMONY GIVEN BY EACH SUCH WITNESS UNDER DIRECT AND CROSS-EXAMINATION TO A SWORN OR AFFIRMED WRITTEN STATEMENT EMBODYING THE SUBSTANCE OF THE TESTIMONY TAKEN ON BOTH SIDES.			✓
7. THE SWORN OR AFFIRMED WRITTEN STATEMENTS OF SUCH WITNESSES ARE APPENDED HERETO AS INDICATED:			✓
NAME AND GRADE OF WITNESSES WHO WERE PRESENT	ORGANIZATION OR ADDRESS	EXHIBIT NUMBER	
CDR Carl Giese, U.S. Navy	USS BROWNSON, FPO San Francisco, CA 96602	2	
LT Stule Pidgeon	USS SING SING, FPO San Francisco, CA	3	
Gretta Gattit	41 Va Voom Street, Oceanside, CA	4	

NOTE. Data pertaining to sworn statements of absent witnesses is recorded in paragraph 6 along with the explanation of why requested defense witnesses did not appear (if appropriate). For example, see sample format on the following page.

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6. a. THE SUBSTANCE OF THE EXPECTED TESTIMONY OF EACH OF THE FOLLOWING ABSENT WITNESSES WHOSE PRESENCE WAS NOT REQUESTED BY THE ACCUSED, OR WHO, HAVING BEEN REQUESTED, WERE NOT AVAILABLE, OR FOR WHOM THE REQUEST WAS WITHDRAWN, WAS OBTAINED FROM SUCH WITNESSES IN THE FORM OF A SWORN OR AFFIRMED WRITTEN STATEMENT, OR WAS STIPULATED TO BY THE ACCUSED IN WRITING. SUCH STATEMENTS OR STIPULATIONS ARE APPENDED HERETO AS INDICATED:

NAME AND GRADE OF ABSENT WITNESSES	ORGANIZATION OR ADDRESS	EXHIBIT NUMBER
Ms Va Voom	41 Va Voom Street, Oceanside, California	5
Sgt. Donald Voorhhees, USMC	HqCo H&S Bn, MCB, Camp Pendleton, CA	6

b. A COPY OF EACH SUCH WRITTEN STATEMENT HAS BEEN SHOWN TO THE ACCUSED.

c. IF AN ABSENT WITNESS IS REQUESTED BY THE ACCUSED BUT IS NOT AVAILABLE, ENTER A PROPER EXPLANATION

N/A

NOTE. Documentary evidence is accounted for in paragraph 7 as follows.

a. THE FOLLOWING DOCUMENTS HAVE BEEN EXAMINED, SHOWN TO THE ACCUSED, AND ARE APPENDED AS INDICATED (describe documents)	EXHIBIT NUMBER
Page 12, service records of accused	7
Page 13, service records of accused	8
b. IF ANY DOCUMENTS MADE AVAILABLE TO THE INVESTIGATING OFFICER WERE NOT EXAMINED OR WERE EXAMINED BUT NOT SHOWN TO THE ACCUSED, OR WERE EXAMINED BUT ARE NOT APPENDED, STATE THE REASONS	N/A

NOTE. Real evidence is accounted for in paragraph 8 as follows.

a. THE FOLLOWING DESCRIBED REAL EVIDENCE WAS EXAMINED, SHOWN TO THE ACCUSED, AND IS NOW PRESERVED FOR SAFEKEEPING AS INDICATED: 1 pound cellophane wrapped bag of heroin marked MLH/7-73. Located in Security Locker CID Office Bldg 13171 Camp Pendleton, Calif. Marked Exhibit 9 of this investigation.	✓
b. IF CERTAIN REAL EVIDENCE WHICH WAS EXAMINED WAS NOT SHOWN TO THE ACCUSED, STATE THE REASONS	N/A

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NOTE. 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 desire/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. The investigating officer should then complete paragraph 9 of DD Form 457 as follows. It should be noted that paragraph 9(c-d) relate to the confession (if any) considered as documentary evidence and not to the accused's in-hearing statement, if any.

(Check appropriate answer continued)		YES	NO
a. THE ACCUSED AFTER HAVING BEEN INFORMED OF HIS RIGHT TO MAKE A STATEMENT OR REMAIN SILENT:			
a. STATED THAT HE DID NOT DESIRE TO MAKE A STATEMENT			✓
b. MADE A STATEMENT APPENDED HERETO (Exhibit _____).		✓	
c. THE CIRCUMSTANCES OF THE TAKING OF ANY CONFESSION OR ADMISSION OF ACCUSED WERE INQUIRED INTO BY ME AND SUCH CONFESSION OR ADMISSION APPEARS TO HAVE BEEN OBTAINED IN ACCORDANCE WITH ARTICLE 31, UNIFORM CODE OF MILITARY JUSTICE, AND/OR THE 5TH AMENDMENT. (Where appropriate, attach statement of person taking confession or admission showing circumstances of taking)		✓	
d. THE ACCUSED, AFTER BEING ADVISED THAT HE DID NOT HAVE TO MAKE ANY STATEMENT WITH RESPECT TO IT, WAS SHOWN THE CONFESSION OR ADMISSION AND DID NOT CONTEST IT AS BEING NOT IN COMPLIANCE WITH ARTICLE 31, UNIFORM CODE OF MILITARY JUSTICE. (If the confession or admission was contested, attach accused's explanation of the circumstances.)		✓	

I.O.: The investigation is closed.

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NOTE: After the hearing has been completed, the investigating officer should complete paragraph 10 of DD Form 457 respecting the mental condition of the accused (see MCM, Chapter XXIV for a discussion of mental responsibility or capacity and how to deal with the matter. It is important to note, however, that a mere assertion of insanity by accused or his counsel is not a reasonable basis for referring the accused to a psychiatric board and thereby delaying the investigation. "Reasonable grounds" mean some substantial and 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). If there were grounds for believing the accused insane paragraph 10 should be completed as follows.

10. a. THERE WERE REASONABLE GROUNDS FOR INQUIRING INTO THE MENTAL RESPONSIBILITY OF THE ACCUSED AT THE TIME OF THE ALLEGED OFFENSE (MCM, 120b)	✓
b. THERE WERE REASONABLE GROUNDS FOR INQUIRING INTO THE MENTAL CAPACITY OF THE ACCUSED AT THE TIME OF THE INVESTIGATION (MCM, 120c)	✓
c. IF GROUNDS FOR INQUIRY AS TO THE ACCUSED'S MENTAL CONDITION EXISTS, STATE REASONS THEREFOR AND ACTION TAKEN Preliminary diagnosis by medical officer of schizophrenia. Recommends psychiatric evaluation. Referred to convening authority for action on 12 August 1973. Evaluation completed and report received on 20 August 1973.	
d. A REPORT OF A PSYCHIATRIST (PSYCHIATRIST) IS APPENDED (Exhibit 11)	✓

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SECT TWO
CHPT VI

If there is no basis for psychiatric inquiry paragraph 10 is completed as follows:

10. a. THERE WERE REASONABLE GROUNDS FOR INQUIRING INTO THE MENTAL RESPONSIBILITY OF THE ACCUSED AT THE TIME OF THE ALLEGED OFFENSE (MCN, 120b)		<input checked="" type="checkbox"/>
b. THERE WERE REASONABLE GROUNDS FOR INQUIRING INTO THE MENTAL CAPACITY OF THE ACCUSED AT THE TIME OF THE INVESTIGATION (MCN, 120c)		<input checked="" type="checkbox"/>
c. IF GROUNDS FOR INQUIRY AS TO THE ACCUSED'S MENTAL CONDITION EXISTS, STATE REASONS THEREFOR AND ACTION TAKEN	<div style="background-color: #cccccc; width: 100%; height: 100%;"></div>	
N/A		
d. A REPORT OF A (BOARD OF MEDICAL OFFICERS) (PSYCHIATRIST) IS APPENDED (Exhibit)		<input checked="" type="checkbox"/>

NOTE. Next the investigating officer completes paragraph 11 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. For example.

<p>11. ALL ESSENTIAL WITNESSES WILL BE AVAILABLE IN THE EVENT OF TRIAL. (If any essential witness(es) will not be so available, list name, address, reason for nonavailability, and recommendation, if any, whether a deposition should be taken. List estimated date of separation and/or transfer, if pertinent and available) CDR Carl Giese, U.S. Navy, due for retirement on 1 September 1973. A subpoena should be issued to him if trial is deemed appropriate. All other witnesses will be available.</p>	<div style="background-color: #cccccc; width: 100%; height: 100%;"></div>
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NOTE. Paragraph 12 of DD Form 457 is then completed. It should include a brief summary of any facts relating to the offense indicating they are not particularly serious or other facts deemed pertinent to adequately explain unusual features of the offenses. If there are no such facts so indicate or if explained in some exhibit refer to the exhibit. For example:

<p>12. EXPLANATORY OR EXTENUATING CIRCUMSTANCES ARE SUBMITTED HEREWITH.</p> <p>See accused's statement (Exhibit #10) indicating that he was intoxicated at the time the offenses were committed.</p>	<p>✓</p>
--	----------

NOTE. Next indicate the absence of or the number of previous convictions by court-martial for offenses committed within the six years preceding the commission of any current offense. Disregard the language in paragraph 13 which limits the consideration of previous convictions to three years. Complete paragraph 13 on DD Form 457 as follows.

<p>13. I HAVE INVESTIGATED AND FIND 1 PREVIOUS CONVICTION(S) OF OFFENSES COMMITTED WITHIN THE ^{SIX} YEARS NEXT PRECEDING THE COMMISSION OF AN OFFENSE WITH WHICH THE ACCUSED IS NOW CHARGED (NCM, 1951, par 75b(2)) AND DURING:</p>	<p>✓</p>
<p>(1) A CURRENT ENLISTMENT, VOLUNTARY EXTENSION OF ENLISTMENT, APPOINTMENT, OR OTHER ENGAGEMENT OR OBLIGATION FOR SERVICE OF THE ACCUSED, OR</p>	<p></p>
<p>(2) THE LAST ENLISTMENT, APPOINTMENT, OR OTHER ENGAGEMENT OR OBLIGATION FOR SERVICE OF THE ACCUSED WHICH TERMINATED UNDER OTHER THAN HONORABLE CONDITIONS OR FROM WHICH THE ACCUSED DESERTED AND SUBSEQUENTLY ENLISTED.</p>	<p></p>
<p>AN EXTRACT COPY OF THE ACCUSED'S MILITARY RECORDS OF PREVIOUS CONVICTIONS IS APPENDED (Exhibit 8)</p>	<p></p>

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NOTE. The investigating officer then completes the report form indicating his recommendations to the convening authority. For example.

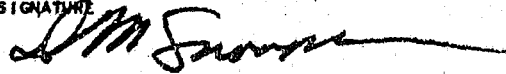
14. IN ARRIVING AT MY CONCLUSIONS I HAVE CONSIDERED NOT ONLY THE NATURE OF THE OFFENSE(S) AND THE EVIDENCE IN THE CASE, BUT I HAVE LIKEWISE CONSIDERED THE AGE OF THE ACCUSED, HIS MILITARY SERVICE, AND THE ESTABLISHED POLICY THAT TRIAL BY GENERAL COURT-MARTIAL WILL BE RESORTED TO ONLY WHEN THE CHARGES CAN BE DISPOSED OF IN NO OTHER MANNER CONSISTENT WITH MILITARY DISCIPLINE.	<input checked="" type="checkbox"/>	
15. THE CHARGES AND SPECIFICATIONS ARE IN PROPER FORM AND THE MATTERS CONTAINED THEREIN ARE TRUE, TO THE BEST OF MY KNOWLEDGE AND BELIEF. (If the answer is "NO", explain and indicate recommended action on additional sheet).	<input checked="" type="checkbox"/>	
16. ANY INCLOSURES RECEIVED BY ME WITH THE CHARGES AND NOT LISTED ABOVE AS AN EXHIBIT ARE SECURELY FASTENED TOGETHER AND APPENDED HERETO AS ONE EXHIBIT (Exhibit 12. If no such inclosures were received, check "NO".)	<input checked="" type="checkbox"/>	
17. (Check appropriate box ONLY if trial is recommended)	<input checked="" type="checkbox"/>	
TRIAL BY <input checked="" type="checkbox"/> GENERAL <input type="checkbox"/> SPECIAL <input type="checkbox"/> SUMMARY COURT-MARTIAL IS RECOMMENDED.		

NOTE. Finally the last paragraphs (18 and 19) of DD 457 are completed. Paragraph 18 is utilized to record any pertinent remarks desired by the investigating officer. For example he may want to suggest changes to the charges or suggest that others be preferred (in which case he should execute a new Charge Sheet). This paragraph is also useful for recording a detailed chronology of the investigation explaining reason for delay. This chronology should be very detailed and include pertinent events as the reasons for their occurrences. Such a chronology may prove invaluable in dealing with speedy trial issues to be litigated at trial. If there are no remarks so indicate. For example.

18. REMARKS (If more space is required, attach additional sheets. Check <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO if additional sheets are attached)
None.

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NOTE. The investigating officer then signs the certificate at the bottom of the last page of DD Form 457. For example.

IV. I HAVE NO PREVIOUS CONNECTION WITH THIS CASE OR ANY CLOSELY RELATED CASE. (If any connection is indicated, attach a full explanation.) I AM NOT AWARE OF ANY REASONS WHICH WOULD DISQUALIFY ME FROM ACTING AS INVESTIGATING OFFICER. (If any reasons appear to exist, attach a statement giving full details.)	
TYPED NAME, GRADE, AND ORGANIZATION OF INVESTIGATING OFFICER I. M. Snooper Hq Co, H&S Bn MOB, Camp Pendleton, California	SIGNATURE 

SECT TWO
CHPT VI

POST HEARING PROCEDURES. After the investigating officer has submitted his report to the convening authority (usually it is delivered to the legal officer) the procedure to be followed depends upon the court-martial convening authority possessed by the officer ordering the Pretrial Investigation. If the commander who ordered the investigation is also a general court-martial convening authority then he may refer the case to trial by general court-martial if he believes the charges are warranted by the evidence and such disposition is appropriate. In such an event, however, the case must first be referred to the Staff Judge Advocate for his review and written legal opinion on the sufficiency of the evidence and advisability of trial. 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 package 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, a notation of 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.

SECTION TWO
CHAPTER VII
SAMPLE PRETRIAL INVESTIGATION REPORT

Note. Enclosed hereafter is a sample Investigation Report. All exhibits are not attached because of the resultant bulk of the sample. Each exhibit is attached in the order it was considered at the hearing.

SECOND ENDORSEMENT on CO, HqBnHqRegt, MCB, CamPen ltr 17adh of 2 Aug 1973
to Maj. I.M. Snooper

From: Commanding Officer, Headquarters Battalion, Headquarters Regiment,
Marine Corps Base, Camp Pendleton, California

To: Commanding General, Marine Corps Base, Camp Pendleton, California

Subj: Formal Pretrial Investigation, case of Private Joe TANGLEFOOT,
1234567, U.S. Marine Corps

Ref: (a) UCMJ, Art. 33
(b) MCM, 1969 Rev, para 331

Encl: (1) Chronology of events, subject case

1. In consonance with references (a) and (b), subject report of Formal Pretrial 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 (UCMJ, Art. 86) vice desertion (UCMJ, Art. 85) 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 will be available for trial.


C. A. SKIPPER
Commanding Officer

Copy to:
CO, HqRegt MCM, CamPen
Accused

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INVESTIGATING OFFICER'S REPORT S A M P L E		FIRST INDORSEMENT	
(Of charges under the provisions of Article 32, Uniform Code of Military Justice, and paragraph 34, Manual for Courts-Martial, U.S., 1951)			
FROM: (Grade, name and organization of investigating officer) Major I. O. Snooper, HqCoHqBnHqRegt, MCB, Camp Pendleton, Calif.		DATE OF REPORT 12 Aug 1973	
TO: (Title and organization of officer who directed report to be made) Commanding Officer, HqBn, MCB, Camp Pendleton, California			
GRADE AND NAME OF ACCUSED Private Joe TANGLEFOOT	SERVICE NUMBER 1234567	ORGANIZATION HqCoHqBnHqRegt, MCB, Camp Pendleton, Calif.	DATE OF CHARGES 1 Aug 1973
(Check appropriate answer)			YES NO
1. IN ACCORDANCE WITH THE PROVISIONS OF ARTICLE 32, UNIFORM CODE OF MILITARY JUSTICE, AND PARAGRAPH 34, MANUAL FOR COURTS-MARTIAL, 1951, I HAVE INVESTIGATED THE CHARGES (Exhibit 1) APPENDED HERETO. (If, and as soon as, it is determined the accused elects not to be represented by counsel or by qualified counsel during the investigation, the investigating officer will complete in ink items 1 through 4, except 4f, and will ask the accused to sign item 4e.)			X
2. AT THE OUTSET OF THE INVESTIGATION I READ TO THE ACCUSED THE PROVISIONS OF ARTICLE 31, UNIFORM CODE OF MILITARY JUSTICE, AND ALSO ADVISED HIM:			X
a. OF THE NATURE OF THE OFFENSE(S) CHARGED AGAINST HIM			X
b. OF THE NAME OF THE ACCUSER			X
c. OF THE NAMES OF THE WITNESSES AGAINST HIM SO FAR AS KNOWN BY ME.			X
d. THAT THE CHARGES WERE ABOUT TO BE INVESTIGATED BY ME			X
e. OF HIS RIGHT, UPON HIS REQUEST, TO HAVE COUNSEL REPRESENT HIM AT THE INVESTIGATION, EITHER--			X
(1) CIVILIAN COUNSEL, IF PROVIDED BY HIM, OR			X
(2) MILITARY COUNSEL OF HIS OWN SELECTION, IF SUCH COUNSEL BE REASONABLY AVAILABLE, OR			X
(3) COUNSEL, QUALIFIED UNDER ARTICLE 27(b), APPOINTED BY THE OFFICER EXERCISING GENERAL COURT-MARTIAL JURISDICTION.			X
f. OF HIS RIGHT TO CROSS-EXAMINE ALL AVAILABLE WITNESSES AGAINST HIM			X
g. OF HIS RIGHT TO PRESENT ANYTHING HE MIGHT DESIRE IN HIS OWN BEHALF, EITHER IN DEFENSE OR MITIGATION			X
h. OF HIS RIGHT TO HAVE THE INVESTIGATING OFFICER EXAMINE AVAILABLE WITNESSES REQUESTED BY HIM			X
i. OF HIS RIGHT TO MAKE A STATEMENT IN ANY FORM			X
j. OF HIS RIGHT TO REMAIN SILENT OR TO REFUSE TO MAKE ANY STATEMENT REGARDING ANY OFFENSE OF WHICH HE WAS ACCUSED OR CONCERNING WHICH HE IS BEING INVESTIGATED			X
k. THAT ANY STATEMENT MADE BY HIM MIGHT BE USED AS EVIDENCE AGAINST HIM IN A TRIAL BY COURT-MARTIAL			X
3. a. THE ACCUSED REQUESTED MILITARY COUNSEL BY NAME			X
b. NAME AND GRADE OF SUCH COUNSEL		ORGANIZATION	
c. MILITARY COUNSEL REQUESTED BY NAME WAS QUALIFIED WITHIN THE MEANING OF ARTICLE 27(4), UNIFORM CODE OF MILITARY JUSTICE			N/A
d. IF ANSWER TO PRECEDING ITEM WAS "NO", ACCUSED WAS INFORMED THAT SUCH UNQUALIFIED COUNSEL MAY NOT REPRESENT HIM AT ANY GENERAL COURT-MARTIAL			N/A
e. MILITARY COUNSEL REQUESTED BY NAME WAS REASONABLY AVAILABLE. (If not available, explain in item 18, having reference to paragraph 34c, Manual for Courts-Martial, 1951, page 46)			N/A
f. THE ACCUSED STATED HE WOULD BE REPRESENTED BY CIVILIAN COUNSEL			X
g. NAME AND ADDRESS OF SUCH COUNSEL		MEMBER OF THE BAR OF	
A. Zealous Advocate		California	
18 Justice Street, Oceanside, Calif.			
h. (This item to be used by accused's civilian counsel only) MCB, Camp Pendleton, Calif., 2 Aug 73			
Place and date			
I HEREBY ENTER MY APPEARANCE FOR THE ABOVE-NAMED ACCUSED AND REPRESENT THAT I AM A MEMBER OF THE BAR OF California			
<i>(Signature of Counsel)</i>			
4. a. THE ACCUSED REQUESTED THAT COUNSEL BE APPOINTED BY THE GENERAL COURT-MARTIAL AUTHORITY TO REPRESENT HIM			X
b. NAME AND GRADE OF SUCH APPOINTED COUNSEL		ORGANIZATION	
Captain Argue N. Plead		HqCoHqBnHqRegt, MCB, Camp Pendleton, Calif.	
c. APPOINTED COUNSEL (as in b above) WAS QUALIFIED WITHIN THE MEANING OF ARTICLE 27(4), UNIFORM CODE OF MILITARY JUSTICE			X
d. IF ANSWER TO PRECEDING ITEM (4c) IS "NO", ACCUSED SPECIFICALLY WAIVED COUNSEL WITH SUCH QUALIFICATIONS			N/A
e. (To be signed by accused if answer to 3a and 4a, or 3c, or 4c was "NO". If accused fails to sign, investigating officer will explain circumstances in detail in item 18)			
N/A			
Date			
I HAVE BEEN INFORMED OF MY RIGHT TO REPRESENTATION AT THE INVESTIGATION BY COUNSEL QUALIFIED UNDER ARTICLE 27(4), UNIFORM CODE OF MILITARY JUSTICE. I HEREBY WAIVE MY RIGHT TO (SUCH QUALIFIED COUNSEL) (COUNSEL).			
Preceding page blank			
<i>(Signature of Accused)</i>			
NOTE: If additional space is required for any item, enter the additional material on a separate sheet. Be sure to identify such material with the proper numerical and, when appropriate, lettered heading (Example, "5c"). Securely attach any additional sheet to the form and add a note in the appropriate item of the form: "See additional sheet." Any matters considered pursuant to paragraph 34, MCM, 1951, which are not identifiable with some other heading in the form should be entered in item 18.			

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SECOND ENDORSEMENT on CO, HqBnHqRegt, MCB, CamPen ltr 17adh of 2 Aug 1973
to Maj. I.M. Snooper

From: Commanding Officer, Headquarters Battalion, Headquarters Regiment,
Marine Corps Base, Camp Pendleton, California

To: Commanding General, Marine Corps Base, Camp Pendleton, California

Subj: Formal Pretrial Investigation, case of Private Joe TANGLEFOOT,
1234567, U.S. Marine Corps

Ref: (a) UCMJ, Art. 33
(b) MCM, 1969 Rev, para 33i

Encl: (1) Chronology of events; subject case

1. In consonance with references (a) and (b), subject report of Formal
Pretrial 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 (UCMJ, Art. 86) vice
desertion (UCMJ, Art. 85) 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 will be available for trial.


C. A. SKIPPER
Commanding Officer

Copy to:
CO, HqRegt MCM, CamPen
Accused

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INVESTIGATING OFFICER'S REPORT S A M P L E		FIRST INDORSEMENT	
(Of charges under the provisions of Article 32, Uniform Code of Military Justice, and paragraph 34, Manual for Courts-Martial, U.S., 1951)			
FROM: (Grade, name and organization of investigating officer) Major I. O. Snooper, HqCoHqBnHqRegt, MCB, Camp Pendleton, Calif.		DATE OF REPORT 12 Aug 1973	
TO: (Title and organization of officer who directed report to be made) Commanding Officer, HqBn, MCB, Camp Pendleton, California			
GRADE AND NAME OF ACCUSED Private Joe TANGLEFOOT	SERVICE NUMBER 1234567	ORGANIZATION HqCoHqBnHqRegt, MCB, Camp Pendleton, Calif.	DATE OF CHARGES 1 Aug 1973
(Check appropriate answer)			YES NO
1. IN ACCORDANCE WITH THE PROVISIONS OF ARTICLE 32, UNIFORM CODE OF MILITARY JUSTICE, AND PARAGRAPH 34, MANUAL FOR COURTS-MARTIAL, 1951, I HAVE INVESTIGATED THE CHARGES (Exhibit 1) APPENDED HERETO. (If, and as soon as, it is determined the accused elects not to be represented by counsel or by qualified counsel during the investigation, the investigating officer will complete in ink items 1 through 4, except 4f, and will ask the accused to sign item 4e.)			X
2. AT THE OUTSET OF THE INVESTIGATION I READ TO THE ACCUSED THE PROVISIONS OF ARTICLE 31, UNIFORM CODE OF MILITARY JUSTICE, AND ALSO ADVISED HIM:			X
a. OF THE NATURE OF THE OFFENSE(S) CHARGED AGAINST HIM			X
b. OF THE NAME OF THE ACCUSER			X
c. OF THE NAMES OF THE WITNESSES AGAINST HIM SO FAR AS KNOWN BY ME.			X
d. THAT THE CHARGES WERE ABOUT TO BE INVESTIGATED BY ME			X
e. OF HIS RIGHT, UPON HIS REQUEST, TO HAVE COUNSEL REPRESENT HIM AT THE INVESTIGATION, EITHER--			X
(1) CIVILIAN COUNSEL, IF PROVIDED BY HIM, OR			X
(2) MILITARY COUNSEL OF HIS OWN SELECTION, IF SUCH COUNSEL BE REASONABLY AVAILABLE, OR			X
(3) COUNSEL, QUALIFIED UNDER ARTICLE 27(b), APPOINTED BY THE OFFICER EXERCISING GENERAL COURT-MARTIAL JURISDICTION.			X
f. OF HIS RIGHT TO CROSS-EXAMINE ALL AVAILABLE WITNESSES AGAINST HIM			X
g. OF HIS RIGHT TO PRESENT ANYTHING HE MIGHT DESIRE IN HIS OWN BEHALF, EITHER IN DEFENSE OR MITIGATION			X
h. OF HIS RIGHT TO HAVE THE INVESTIGATING OFFICER EXAMINE AVAILABLE WITNESSES REQUESTED BY HIM			X
i. OF HIS RIGHT TO MAKE A STATEMENT IN ANY FORM			X
j. OF HIS RIGHT TO REMAIN SILENT OR TO REFUSE TO MAKE ANY STATEMENT REGARDING ANY OFFENSE OF WHICH HE WAS ACCUSED OR CONCERNING WHICH HE IS BEING INVESTIGATED			X
k. THAT ANY STATEMENT MADE BY HIM MIGHT BE USED AS EVIDENCE AGAINST HIM IN A TRIAL BY COURT-MARTIAL			X
3. a. THE ACCUSED REQUESTED MILITARY COUNSEL BY NAME			X
b. NAME AND GRADE OF SUCH COUNSEL		ORGANIZATION	
c. MILITARY COUNSEL REQUESTED BY NAME WAS QUALIFIED WITHIN THE MEANING OF ARTICLE 27(b), UNIFORM CODE OF MILITARY JUSTICE			N/A
d. IF ANSWER TO PRECEDING ITEM WAS "NO", ACCUSED WAS INFORMED THAT SUCH UNQUALIFIED COUNSEL MAY NOT REPRESENT HIM AT ANY GENERAL COURT-MARTIAL			N/A
e. MILITARY COUNSEL REQUESTED BY NAME WAS REASONABLY AVAILABLE. (If not available, explain in item 18, having reference to paragraph 34c, Manual for Courts-Martial, 1951, page 46)			N/A
f. THE ACCUSED STATED HE WOULD BE REPRESENTED BY CIVILIAN COUNSEL			X
g. NAME AND ADDRESS OF SUCH COUNSEL A. Zealous Advocate 18 Justice Street, Oceanside, Calif.		MEMBER OF THE BAR OF California	
h. (This item to be used by accused's civilian counsel only) MCB, Camp Pendleton, Calif., 2 Aug 73 <div style="text-align: right;">Place and date</div>			
I HEREBY ENTER MY APPEARANCE FOR THE ABOVE-NAMED ACCUSED AND REPRESENT THAT I AM A MEMBER OF THE BAR OF California			
 (Signature of Counsel)			
4. a. THE ACCUSED REQUESTED THAT COUNSEL BE APPOINTED BY THE GENERAL COURT-MARTIAL AUTHORITY TO REPRESENT HIM			X
b. NAME AND GRADE OF SUCH APPOINTED COUNSEL Captain Argue N. Plead		ORGANIZATION HqCoHqBnHqRegt, MCB, Camp Pendleton, Calif.	
c. APPOINTED COUNSEL (as in b above) WAS QUALIFIED WITHIN THE MEANING OF ARTICLE 27(b), UNIFORM CODE OF MILITARY JUSTICE			X
d. IF ANSWER TO PRECEDING ITEM (4c) IS "NO", ACCUSED SPECIFICALLY WAIVED COUNSEL WITH SUCH QUALIFICATIONS			N/A
e. (To be signed by accused if answer to 3a and 4a, or 3c, or 4c was "NO". If accused fails to sign, investigating officer will explain circumstances in detail in item 18)			
N/A			
Date			
I HAVE BEEN INFORMED OF MY RIGHT TO REPRESENTATION AT THE INVESTIGATION BY COUNSEL QUALIFIED UNDER ARTICLE 27(b), UNIFORM CODE OF MILITARY JUSTICE. I HEREBY WAIVE MY RIGHT TO (SUCH QUALIFIED COUNSEL) (COUNSEL).			
Preceding page blank (Signature of Accused)			

NOTE: If additional space is required for any item, enter the additional material on a separate sheet. Be sure to identify such material with the proper numerical and, where appropriate, lettered heading (Example, "5c"). Securely attach any additional sheet to the form and add a note in the appropriate item of the form: "See additional sheet." Any matters considered pursuant to paragraph 34, MCM, 1951, which are not identifiable with some other heading in the form should be entered in item 18.

(Check appropriate answer continued)

SAMPLE

YES NO

1. COUNSEL FOR THE ACCUSED WAS PRESENT THROUGHOUT THE INVESTIGATION (If the accused waives the right to have counsel present throughout all or a part of the investigation after having consulted counsel, state the circumstances and the particular proceedings conducted in the absence of such counsel)

Statement of Defense Counsel is appended as Investigation Exhibit 12.

X

2. IN THE PRESENCE OF THE ACCUSED I HAVE INTERVIEWED ALL AVAILABLE WITNESSES UNDER OATH OR AFFIRMATION AND HAVE EXAMINED ALL DOCUMENTARY EVIDENCE ON BOTH SIDES.

X

3. I HAVE REDUCED THE MATERIAL TESTIMONY GIVEN BY EACH SUCH WITNESS UNDER DIRECT AND CROSS EXAMINATION TO A SWORN OR AFFIRMED WRITTEN STATEMENT EMBODYING THE SUBSTANCE OF THE TESTIMONY TAKEN ON BOTH SIDES.

X

4. THE SWORN OR AFFIRMED WRITTEN STATEMENTS OF SUCH WITNESSES ARE APPENDED HERETO AS INDICATED:

NAME AND GRADE OF WITNESSES WHO WERE PRESENT	ORGANIZATION OR ADDRESS	EXHIBIT NUMBER
Cpl Burp R. Blink	HqCoHqBnHqRegt, MCB, CampPen	2
Sgt Ripper D. Rumpsnoodle	SptCoHqBnHqRegt, MCB, CampPen	3
1stLt Cheop O. Hardnose	PMO, MCB, CampPen	4
SSgt Rampant Gumshoe	CIS, PMO, MCB, CampPen	5
Unter de Cuvver	Special Agent, FBI, Los Angeles, Calif.	8

5. a. THE SUBSTANCE OF THE EXPECTED TESTIMONY OF EACH OF THE FOLLOWING ABSENT WITNESSES WHOSE PRESENCE WAS NOT REQUESTED BY THE ACCUSED, OR WHO, HAVING BEEN REQUESTED, WERE NOT AVAILABLE, OR FOR WHOM THE REQUEST WAS WITHDRAWN, WAS OBTAINED FROM SUCH WITNESSES IN THE FORM OF A SWORN OR AFFIRMED WRITTEN STATEMENT, OR WAS STIPULATED TO BY THE ACCUSED IN WRITING. SUCH STATEMENTS OR STIPULATIONS ARE APPENDED HERETO AS INDICATED:

NAME AND GRADE OF ABSENT WITNESSES	ORGANIZATION OR ADDRESS	EXHIBIT NUMBER
None		

b. A COPY OF EACH SUCH WRITTEN STATEMENT HAS BEEN SHOWN TO THE ACCUSED.

N/A

c. IF AN ABSENT WITNESS IS REQUESTED BY THE ACCUSED BUT IS NOT AVAILABLE, ENTER A PROPER EXPLANATION

PFC Ardent Frenn, presently stationed with 3dMarDiv on Okinawa.

7. a. THE FOLLOWING DOCUMENTS HAVE BEEN EXAMINED, SHOWN TO THE ACCUSED, AND ARE APPENDED AS INDICATED (describe documents)

CONFESION OF ACCUSED	EXHIBIT NUMBER
Confession of accused	6
Authenticated copy of page 12, accused's SRB	7

b. IF ANY DOCUMENTS MADE AVAILABLE TO THE INVESTIGATING OFFICER WERE NOT EXAMINED OR WERE EXAMINED BUT NOT SHOWN TO THE ACCUSED, OR WERE EXAMINED BUT ARE NOT APPENDED, STATE THE REASONS

ONI Report, dtd 29 Jul 1974, disclosure forbidden by regs

--

8. a. THE FOLLOWING DESCRIBED REAL EVIDENCE WAS EXAMINED, SHOWN TO THE ACCUSED, AND IS NOW PRESERVED FOR SAFEKEEPING AS INDICATED:

.45 pistol, # 2060731, evidence locker, CIS, PMO, MCB, Camp Pendleton, California.

X

b. IF CERTAIN REAL EVIDENCE WHICH WAS EXAMINED WAS NOT SHOWN TO THE ACCUSED, STATE THE REASONS

None.

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(Check appropriate answer continued)		S A M P L E		YES	NO
9. THE ACCUSED AFTER HAVING BEEN INFORMED OF HIS RIGHT TO MAKE A STATEMENT OR REMAIN SILENT:					
a. STATED THAT HE DID NOT DESIRE TO MAKE A STATEMENT					X
b. MADE A STATEMENT APPENDED HERETO (Exhibit 11)				X	
c. THE CIRCUMSTANCES OF THE TAKING OF ANY CONFESSION OR ADMISSION OF ACCUSED WERE INQUIRED INTO BY ME AND SUCH CONFESSION OR ADMISSION APPEARS TO HAVE BEEN OBTAINED IN ACCORDANCE WITH ARTICLE 31, UNIFORM CODE OF MILITARY JUSTICE, AND/OR THE 5TH AMENDMENT. (Where appropriate, attach statement of person taking confession or admission showing circumstances of taking)				X	
d. THE ACCUSED, AFTER BEING ADVISED THAT HE DID NOT HAVE TO MAKE ANY STATEMENT WITH RESPECT TO IT, WAS SHOWN THE CONFESSION OR ADMISSION AND DID NOT CONTEST IT AS BEING NOT IN COMPLIANCE WITH ARTICLE 31, UNIFORM CODE OF MILITARY JUSTICE. (If the confession or admission was contested, attach accused's explanation of the circumstances.)				X	
10. a. THERE WERE REASONABLE GROUNDS FOR INQUIRING INTO THE MENTAL RESPONSIBILITY OF THE ACCUSED AT THE TIME OF THE ALLEGED OFFENSE (MCM, 120b)					X
b. THERE WERE REASONABLE GROUNDS FOR INQUIRING INTO THE MENTAL CAPACITY OF THE ACCUSED AT THE TIME OF THE INVESTIGATION (MCM, 120c)					X
c. IF GROUNDS FOR INQUIRY AS TO THE ACCUSED'S MENTAL CONDITION EXISTS, STATE REASONS THEREFOR AND ACTION TAKEN					
d. A REPORT OF A (BOARD OF MEDICAL OFFICERS) (PSYCHIATRIST) IS APPENDED (Exhibit)					X
11. ALL ESSENTIAL WITNESSES WILL BE AVAILABLE IN THE EVENT OF TRIAL. (If any essential witness(es) will not be so available, list name, address, reason for nonavailability, and recommendation, if any, whether a deposition should be taken, list estimated date of separation and/or transfer, if pertinent and available)					X
Mr. Heno Erudite, 1572 Apehead Street, Frostbite, Wisconsin, former Sgt, USMC, discharged from USMC 17 Jul 1973, do not recommend deposition since his testimony would be cumulative with testimony of Lt Hardnose.					
12. EXPLANATORY OR EXTENUATING CIRCUMSTANCES ARE SUBMITTED HEREWITH.				X	
The accused was raised by an alcoholic mother in a fatherless household where he was not provided with essentials necessary for good character building. He was physically expelled from the household by his mother's paramour when he was 14 years old while his mother laughed. He held odd jobs until he could enlist in the Marine Corps. The assault on his NCOIC charged in Charge III appears to have been caused by Sgt Rumpsnoodle's close resemblance to the paramour mentioned above.					
13. a. I HAVE INVESTIGATED AND FIND 2 PREVIOUS CONVICTION(S) OF OFFENSES COMMITTED WITHIN THE THREE YEARS NEXT PRECEDING THE COMMISSION OF AN OFFENSE WITH WHICH THE ACCUSED IS NOW CHARGED (MCM, 1957, par 75b(2)) AND DURING:				X	
(1) A CURRENT ENLISTMENT, VOLUNTARY EXTENSION OF ENLISTMENT, APPOINTMENT, OR OTHER ENGAGEMENT OR OBLIGATION FOR SERVICE OF THE ACCUSED, OR				X	
(2) THE LAST ENLISTMENT, APPOINTMENT, OR OTHER ENGAGEMENT OR OBLIGATION FOR SERVICE OF THE ACCUSED WHICH TERMINATED UNDER OTHER THAN HONORABLE CONDITIONS OR FROM WHICH THE ACCUSED DESERTED AND SUBSEQUENTLY ENLISTED.					X
b. AN EXTRACT COPY OF THE ACCUSED'S MILITARY RECORDS OF PREVIOUS CONVICTIONS IS APPENDED (Exhibit 8 9 & 10)				X	
14. IN ARRIVING AT MY CONCLUSIONS I HAVE CONSIDERED NOT ONLY THE NATURE OF THE OFFENSE(S) AND THE EVIDENCE IN THE CASE, BUT I HAVE LIKEWISE CONSIDERED THE AGE OF THE ACCUSED, HIS MILITARY SERVICE, AND THE ESTABLISHED POLICY THAT TRIAL BY GENERAL COURT-MARTIAL WILL BE RESORTED TO ONLY WHEN THE CHARGES CAN BE DISPOSED OF IN NO OTHER MANNER CONSISTENT WITH MILITARY DISCIPLINE.				X	
15. THE CHARGES AND SPECIFICATIONS ARE IN PROPER FORM AND THE MATTERS CONTAINED THEREIN ARE TRUE, TO THE BEST OF MY KNOWLEDGE AND BELIEF. (If the answer is "No", explain and indicate recommended action on additional sheet).					X
16. ANY INCLOSURES RECEIVED BY ME WITH THE CHARGES AND NOT LISTED ABOVE AS AN EXHIBIT ARE SECURELY FASTENED TOGETHER AND APPENDED HERETO AS ONE EXHIBIT (Exhibit . If no such inclosures were received, check "N".)					X
17. (Check appropriate box ONLY if trial is recommended)					
TRIAL BY <input checked="" type="checkbox"/> GENERAL <input type="checkbox"/> SPECIAL <input type="checkbox"/> SUMMARY COURT-MARTIAL IS RECOMMENDED.				X	

S A M P L E

18. REMARKS (If more space is required, attach additional sheets. Check ☐ YES ☒ NO if additional sheets are attached)

- (1) Investigation held 8 August 1973.
- (2) 5.b. Verbatim transcripts of testimony under oath attached as Investigation Exhibits 2 through 5.
- (3) 7.b. ONI Report used only to determine identity of witnesses and expected testimony.
- (4) 15. Charge I: There is not sufficient evidence to support the charge of desertion. The length of the absence was of short duration. The accused possessed his own ID card upon apprehension. Therefore, it is recommended the charge be reduced to unauthorized absence for the period alleged, a violation of Article 86, UCMJ.

Charge II, Specification 1: No evidence to establish a corpus delicti. The only information in the record concerning the offense is in the accused's statement, Investigation Exhibit 6.

All other charges and specifications are in proper form and the matters contained therein are true to the best of my knowledge and belief.

- (5) Defense Counsel objected to consideration of Investigation Exhibit 6 on the ground it was not voluntary. It is considered that Investigation Exhibit 5 clearly shows it was voluntary.
- (6) Defense Counsel objected to consideration of Investigation Exhibit 8 on ground the accused was deprived of his right to cross-examine the witness. Mr. de Cuvver declined to attend the investigation because of a current assignment requiring his presence elsewhere. He submitted Exhibit 8 in lieu of attending the investigation. Obtaining this exhibit caused a delay of 5 days.

19. I HAVE NO PREVIOUS CONNECTION WITH THIS CASE OR ANY CLOSELY RELATED CASE. (If any connection is indicated, attach a full explanation.) I AM NOT AWARE OF ANY REASONS WHICH WOULD DISQUALIFY ME FROM ACTING AS INVESTIGATING OFFICER. (If any reasons appear to exist, attach a statement giving full details.)

TYPED NAME, GRADE, AND ORGANIZATION OF INVESTIGATING OFFICER

I. O. Snooper, Major, USMC
HqCoHqBnHqRegt, MCB, Camp Pendleton, Calif.

SIGNATURE

I. O. Snooper

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SECT TWO
CHPT VII

HEADQUARTERS BATTALION
HEADQUARTERS REGIMENT
MARINE CORPS BASE
CAMP PENDLETON, CALIFORNIA 92055

17/adh
5800
2 August 1973


In consonance with authority delegated by Manual for Courts-Martial 1969 (Rev), paragraph 33e, Major I. M. Snooper, U.S. Marine Corps, is hereby appointed as investigating officer in the formal pretrial investigation (Uniform Code of Military Justice, Article 32) of the case of Private Joe Tanglefoot, U.S. Marine Corps, the allied papers of which are attached. The investigating officer will be guided by the provisions of Uniform Code of Military Justice, Article 32, Manual for Courts-Martial 1969 (rev) para 34, and pertinent case law relating to the formal pretrial investigation. The following personnel are detailed to the investigation for the purposes indicated.

COUNSEL FOR THE GOVERNMENT

Captain Melvin Bailey, U.S. Marine Corps, certified in accordance with Uniform Code of Military Justice, Article 27b.

DEFENSE COUNSEL

Captain Bernie Bridges, U.S. Marine Corps, certified in accordance with Uniform Code of Military Justice, Article 27b.


C. A. SKIPPER
Commanding Officer

SECTION THREE

SUBSTANTIVE LAW BASIC STUDY GUIDE

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SECTION THREE
SUBSTANTIVE LAW BASIC STUDY GUIDE

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SECTION THREE

FOREWORD

This publication is a summary of the more common military criminal offenses described in the Uniform Code of Military Justice. It is written in uncomplicated language and is designed to aid the layman commander, legal officer, and others in developing a basic understanding of the criminal problems he is most likely to encounter. In such context this publication is not designed to replace the Uniform Code of Military Justice or the Manual for Courts-Martial but to be used in conjunction with those sources as a study guide. This publication represents the state of the military criminal law relating to the matters discussed as of the date of printing based upon applicable statutory, regulatory and case law. The law is always subject to change and the person using this publication should be careful to ascertain the current state of the law before taking action on any problem in reliance upon the matters discussed herein.

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SECTION THREE
CHAPTER I
INTRODUCTORY MATTERS

PART ONE
ARTICLE 77
PRINCIPALS

Article 77 is not a punitive article. It merely defines who are principals to crimes. There are three categories of principals: perpetrators, accessories before the fact, and aiders and abettors. Once it is proved that a person is a principal, he is subject to the same punishment as if he were the perpetrator or "chief actor" in the commission of the offense.

Perpetrator -- A perpetrator is one who actually commits the crime, either by his own hand or through an agent. For example, one who places a bomb in the mail is the perpetrator with regard to its ultimate effects even though actual delivery is by the post office, an agent of the perpetrator.

Accessory Before the Fact -- One is an accessory before the fact if he counsels, commands, procures, or causes another to commit an offense and the offense is committed pursuant to such counsel, command, etc. It is not necessary that an accessory before the fact be present at the commission of the offense.

Aider and Abettor -- An aider and abettor is a person who, although not the perpetrator of the crime, is present and participates in its commission by doing some act in order to render aid to, and which does aid, the perpetrator when the crime is committed. To constitute aiding and abetting, there are three requirements. First, the person must be present at the commission of the offense. One is "present" in this sense when he is in such a position as to be able to aid the perpetrator with a view toward successful accomplishment of the crime. For example, the driver of a getaway car, while not actually at the same physical location or engaged in the same acts as the perpetrator, may meet this "presence" requirement. Second, the aider and abettor must participate in the commission of the offense by aiding, inciting, counselling, or encouraging the perpetrator. Mere presence does not constitute participation and a bystander does not become an aider and abettor merely by failing to interrupt the commission of a crime. However, if one has a legal duty to interfere and he does not interfere due to his intent to aid the perpetrator, then he may be an aider and abettor. Third, the aider and abettor must act with intent to aid or encourage the perpetrator.

As a general rule, a principal is criminally liable for all the crimes committed by another principal if those crimes are the natural and probable consequence of a common design. For example, if death

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results during the execution of an unlawful design that ordinarily involves a hazard to life, all principals may be convicted of murder. However, if two persons enter into a common design to commit robbery by snatching purses and one of the two acts as a lookout, sharing only the criminal purpose of the perpetrator to commit robbery and, if the perpetrator, without the knowledge of the lookout, seizes a victim and rapes her after taking her purse, the perpetrator will be guilty of rape and robbery but the aider and abettor will be guilty only of the robbery. The rape was not a natural and probable consequence of the common design.

Withdrawal -- An accessory before the fact and/or an aider and abettor may withdraw from the common purpose and thus escape criminal liability if they do so before the perpetrator commits the offense, they effectively countermand any earlier advice or counsel, and the withdrawal is effectively communicated to the perpetrator in time for the perpetrator to abandon his plan.

Pleading -- All who are deemed principals are charged as if they were the perpetrator of the offense. The elimination of the need to determine the status of the principal for pleading purposes is the reason for Article 77.

In military law, there are two categories of parties to crimes: "principal" and "accessory after the fact." A discussion of the latter category follows.

SECTION THREE

CHAPTER I

PART TWO

ARTICLE 78

ACCESSORY AFTER THE FACT

Article 78 is a punitive article. Therefore, those who meet its proscriptions are subject to prosecution under it.

ELEMENTS: In order to convict an accused of a violation of this article, the evidence must establish beyond a reasonable doubt that:

1. An offense punishable by the Uniform Code of Military Justice was committed by a certain principal at a designated time and place;
2. The accused knew that the principal had committed the offense;
3. The accused thereafter received, comforted, or assisted the principal in some manner; and
4. The accused so acted in order to hinder or prevent the principal's apprehension, trial, or punishment.

DISCUSSION: A failure to report a known offense does not constitute a violation of this article; however, such failure may constitute a violation of applicable Navy Regulations and would, therefore, be punishable as a violation of Article 92.

Conviction of the principal of the offense to which the accused is allegedly an accessory after the fact is not a prerequisite to the trial of the accused. Furthermore, the fact that the principal was tried and acquitted does not preclude trial of the accessory after the fact. The government must prove, however, at the trial of the accessory after the fact that the principal committed an offense punishable under the UCMJ. Evidence of the acquittal or conviction of the principal in the trial of the accessory after the fact is not admissible to show that the principal did or did not commit the offense. Thus, when prosecuting an accessory after the fact, trial counsel must prove beyond a reasonable doubt that two crimes were committed:

- (1) the offense committed by the person who was received, comforted, or assisted, and
- (2) the offense of illegally rendering such aid.

When this article speaks of the accused's knowledge that an offense has been committed, it means only that he actually believed (and such belief was correct) that an offense had been committed. It does not mean that the accused was in possession of such personal information that he could testify as a witness to the offense.

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PLEADING: Follow the form set forth in Appendix 6 to the Manual for Courts-Martial, form number 1 at page A6-4. In alleging this offense, the pleader must not only set forth the acts of the accused in receiving, comforting, and assisting the principal, but also the offense committed by the principal.

SECTION THREE
CHAPTER I
PART THREE

ARTICLE 79
LESSER INCLUDED OFFENSES

If the evidence introduced at the trial of the accused does not prove the offense charged but does prove beyond a reasonable doubt the commission of an offense necessarily included in that charged, the accused may be found guilty of the included offense. An included offense exists when, in addition to the offense charged, the allegations in a specification are sufficient to place an accused on notice that he must defend against it in addition to the offense specifically charged.

There are three principal variations of lesser included offenses:

(1) Where all of the elements of the lesser offense are included and necessary parts of the greater offense. In this situation, the lesser included offense is missing at least one element contained in the greater offense. For example:

- | <u>DESERTION</u> | <u>UNAUTHORIZED ABSENCE</u> |
|--|-----------------------------|
| (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) Where 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:

- | <u>BURGLARY</u> | <u>HOUSEBREAKING</u> |
|--|--|
| (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) Where 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:

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LARCENY

- (a) Wrongfully taking, obtaining, or withholding personal property of another
- (b) Of some value
- (c) With intent to permanently deprive the owner thereof

WRONGFUL APPROPRIATION

- (a) Same
- (b) Same
- (c) With intent to temporarily deprive the owner thereof

Some offenses consist of two or more lesser included offenses. In such a case, if the lesser included offenses are reasonably raised by the evidence, the court may convict the accused of more than one lesser included offense instead of the greater offense that was charged. For example, a charge of robbery by force and violence includes both the offenses of larceny and assault. Consequently, if the proof so establishes, the accused may be found guilty of larceny or wrongful appropriation (itself a lesser included offense of larceny) and/or assault without finding the accused guilty of robbery.

To determine whether a specification contains lesser included offenses, one may look to Appendix 12, Table of Commonly Included Offenses, in the Manual for Courts-Martial and may apply the variations described above. An examination of the case law may also reveal lesser included offenses.

When drafting charges and specifications, one need not allege lesser included offenses. Alleging the greater offense takes care of lesser included offenses as well.

The mechanics of finding an accused guilty of a lesser included offense involve the use of "exceptions and substitutions." For example, if the accused is charged as follows:

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, did, at Marine Corps Base, Camp Pendleton, California, on or about 18 January 1974, steal a wrist watch of a value of about \$125.00, the property of Private James S. Willis, U.S. Marine Corps;

but the evidence proves only that the accused wrongfully appropriated the watch and its value was only \$45.00, then the findings would be announced as follows:

The court finds you, of the specification, guilty, except for the words and figures "steal" and "\$125.00", substituting therefor the words and figures, "wrongfully appropriate" and "\$45.00", of the excepted words and figures, not guilty, of the substituted words and figures, guilty, and of the charge, guilty.

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SECTION THREE

CHAPTER I

PART FOUR

ARTICLE 80

ATTEMPTS

An attempt is defined as an act, done with specific intent to commit an offense under the UCMJ, amounting to more than mere preparation and tending, even though failing to effect its commission.

ELEMENTS: In order to convict an accused of a violation of this article, the evidence must establish beyond a reasonable doubt that:

1. The accused did a certain overt act;
2. The act was done with the specific intent to commit a certain offense under the UCMJ;
3. The act amounted to more than mere preparation; that is, it was a direct movement toward the commission of the intended offense; and
4. The act apparently tended to effect the commission of the intended offense; that is, the act apparently would have resulted in the actual commission of the intended offense except for a circumstance unknown to the accused or an unexpected intervening circumstance which prevented the completion of the intended offense.

DISCUSSION: The act that is required of the accused is an overt or outward act done in furtherance of the intent to commit an offense under the UCMJ. It is not necessary that the accused actually complete the offense. However, one may be convicted of an attempt even though the offense was actually completed.

The accused must have possessed a specific intent to commit an offense under the UCMJ. The specific intent here is the intent to commit the object crime. It is not an "intent to attempt", but rather an intent to commit the object of his criminal purpose. If the accused purposely engages in conduct which would have led to the commission of an offense if the facts were as the accused believed them to be, then an attempt has been committed (if the other requisite elements are also proved) even though the manner the accused selected would have made it impossible for him to complete the offense. For example, an attempt may be established by showing that the accused intended to burn down the brick BOQ, although the accused chose to start the fire with flammable and steel outside on a cold, rainy night and was stopped before he achieved a flame. On the other hand, if what the accused believed to be a crime was actually no crime at all, he cannot be guilty of an offense despite his intent. For example, one who believes that his mixture of aspirin and Coke is a narcotic and consumes the substances with the intent to "get high" has committed no offense.

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The accused has gone beyond mere preparation when he has done more than simply devise or arrange the means necessary for the commission of the offense. He must have gone beyond the preparatory steps and made a direct movement towards the commission of the offense. The exact nature of the activities of the accused is a factual question which must be resolved based on the evidence presented at trial.

Article 80 provides for the substantive offense of attempt and is used to charge all attempts except those which are provided for in the body of another article. The attempts which are covered by other articles are attempted desertion (Article 85), attempted mutiny or sedition (Article 94), attempt by a subordinate to compel surrender (Article 100), attempt to aid the enemy (Article 104), and assault (Article 128). Hence, attempted desertion, mutiny, etc. are charged as violations of Article 85, 94, etc. rather than under Article 80.

PLEADING: For Article 80 violations, follow the form set forth in Appendix 6 to the Manual for Courts-Martial, form number 2 at page A6-4.

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SECTION THREE
CHAPTER I
PART FIVE

ARTICLE 81
CONSPIRACY

GENERAL: A conspiracy is comprised of an agreement between two or more persons to commit an offense under the UCMJ and the performance of an act by at least one of the conspirators to effect the object of the conspiracy.

ELEMENTS: In order to convict an accused of a violation of this Article, the evidence must establish beyond a reasonable doubt that:

1. At a specific time and place, the accused entered into an agreement with a certain named person, or persons, to commit an offense under the UCMJ;
2. While the agreement continued to exist, and while the accused remained a party to the agreement, the accused or a co-conspirator, with the purpose of effecting the object of the conspiracy, performed one or more overt acts as alleged in the specification.

DISCUSSION: The required agreement may be established in any manner. No specific form is required. It is sufficient if the parties arrive at a common understanding to accomplish the goal of the conspiracy. The agreement need not specify the means to be used to accomplish their goals nor the part each actor is to play. But it must be shown that the agreement covered every element of the conspired offense.

Since at least two persons must conspire, acquittal of all but one of the alleged conspirators demands his acquittal as well. Thus, if A and B are alleged conspirators and B is acquitted for whatever reason (even insanity), then A cannot be convicted of conspiracy. Likewise, a charge of conspiracy will not stand where the substantive offense itself requires at least two persons. For example, A and B, the sole participants in adulterous conduct, cannot be convicted of conspiracy to commit adultery. While there must be at least two conspirators, both need not be subject to the UCMJ. Private A may be convicted of conspiracy even though his co-conspirator is Civilian Fred.

The act that is required as an element of conspiracy may be less than that required for attempts. The overt act required in conspiracies must be something independent of the conspiracy agreement itself. However, it need be only some act which tends to effect, or carry out, the object of the agreement. It need not directly tend to accomplish the goal, rather only simple preparation to accomplish the goal is sufficient. For example, if A and B agree to burn down the Justice School and A then buys a blow torch to be used for the task, the conspiracy is complete without more being required. 3.110

One or all of the parties to a conspiracy may, before the performance of an overt act to effect the object of the conspiracy, abandon the design and withdraw from the conspiracy and thereby escape conviction for conspiracy. If a conspirator abandons or withdraws from the conspiracy after the overt act has been performed, he remains guilty of conspiracy and all offenses committed pursuant thereto occurring prior to his withdrawal, but not for offenses committed thereafter.

A conspiracy to commit an offense is a separate offense from the offense which is the object of the conspiracy. Consequently, both conspiracy and the underlying offense which was its object may be charged, tried and punished. Therefore, if A and B agree to rob C at gunpoint and they then carry out their plan, both A and B may be charged with both robbery and conspiracy to commit robbery.

PLEADING: Both conspiracy to commit an offense and the underlying offense should be alleged whenever appropriate. But if the conspiracy itself consists of an agreement to commit several offenses, there is but one conspiracy. The form to follow when alleging a conspiracy is found in form number 3 at page A6-4 of the Manual for Courts-Martial.

SECTION THREE
CHAPTER I
PART SIX

ARTICLE 82
ARTICLE 134
SOLICITATION

A solicitation is any act or conduct which reasonably may be construed as a serious request or advice to commit an offense. Article 82 forbids soliciting another to commit desertion (Article 85), mutiny (Article 94), misbehavior before the enemy (Article 99), and sedition (Article 94). Solicitation to commit offenses other than violations of the above articles may be charged as violations of Article 134.

ELEMENTS: In order to convict an accused of a violation of Article 82, the evidence must prove beyond a reasonable doubt that:

1. At a certain time and place, the accused made certain statements, did certain acts, or conducted himself in a certain manner that constituted a solicitation or advice to a certain person; and
2. Such statements, acts, or conduct constituted a solicitation or advice to commit one of the above-mentioned offenses.

In order to convict an accused of solicitation under Article 134, the evidence must prove beyond a reasonable doubt that:

1. At a certain time and place, the accused made certain statements, did certain acts, or conducted himself in a certain manner that constituted a solicitation or advice to a certain person; and
2. Such statements, acts, or conduct constituted a solicitation or inducement to commit a certain specified offense; and
3. 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.

DISCUSSION: It is not necessary that the person or persons solicited or advised act upon the solicitation or advice. However, with regard to solicitation under Article 82, the maximum permissible punishment for the solicitation is affected by whether or not the one solicited commits or attempts to commit the offense. The person solicited need not be subject to the UCMJ.

PLEADING: Forms 4 and 5, Appendix 6, Manual for Courts-Martial should be followed for pleading violations of Article 82. Form 178 should be followed for pleading solicitation in violation of Article 134. 3/2

SECTION THREE
CHAPTER II
ORDERS OFFENSES

PART ONE
LAWFULNESS OF ORDERS

GENERAL. Before a serviceman may be convicted of disobeying an order, that particular order must be found to be lawful. A general order or regulation, an order requiring the performance of a military duty, and an order from a superior commissioned officer or a superior warrant officer, noncommissioned officer or petty officer in the execution of his office may be inferred to be lawful. The inference of lawfulness renders it unnecessary for the prosecution to introduce evidence to establish the lawfulness of the order. However, once the defendant introduces any evidence questioning the lawfulness of the order, the prosecution must prove beyond a reasonable doubt that the order was lawful. Below will be discussed situations in which the lawfulness of any order may be subject to question.

DISCUSSION.

1. Authority. The person issuing an order must have authority to give the order. Authorization may arise by law, regulations or custom of the service and may depend upon the circumstances under which the order is given. For example, an aircraft commander orders personnel to jettison all personal property. Although the order may be inferred to be lawful, if it was given to enable the plane to go faster so the plane commander would not be late for a date, then the order is unlawful since it is an order which has for its sole objective the attainment of some private end. If the order is given in order to lighten a disabled aircraft so as to enable it to make the base, then the order is lawful since it relates to a bona fide military function and there is no evidence to rebut the inference of lawfulness.

2. Orders Relating to Military Duties. Orders which do not relate to a military duty are unlawful. Military duties include all activities which are reasonably necessary to safeguard or promote the morale, discipline and usefulness of members of a command. An order to an accused who works in the paint shop to paint the Admiral's privately owned automobile does not relate to a military duty because the sole object of the order is the attainment of a private end. Likewise, an order to donate money to charity does not relate to a military duty. Donation is necessarily a matter of exclusively personal decision.

3. Orders Contrary to Law. Orders which are contrary to the Constitution, acts of Congress or lawful orders of superiors, are unlawful. For example, a defendant suspected by his commanding officer of an offense, who was ordered to discuss the matter, may lawfully refuse to do so on the ground that his answers would tend to incriminate him. He could not be convicted for the disobedience of the order because the order contravened the provisions of UCMJ, Article 31 and was therefore unlawful.

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4. Arbitrary Infringement on Private Rights. An order may limit the exercise of a serviceman's rights. If it constitutes an arbitrary or unreasonable interference with private rights or personal affairs, then it is unlawful. The commanding officer, for example, who orders that no member of his command will read Playboy Magazine issues an unlawful order because it is an arbitrary and unreasonable interference with the personal right of a serviceman to select his own reading material. However, suppose an order prohibited the reading of any material while one is acting as Officer of the Day. That order would be lawful since it would be reasonably necessary to promote the usefulness of the OOD to the command. It is not arbitrary or unreasonable to insist that the OOD give full attention to the performance of his duties.

5. Moral Scruples. A serviceman's dictates of conscience, religion, or personal philosophy cannot justify or excuse the disobedience of an order. However, an accused who has requested conscientious objector status must, if possible, be assigned duties least in conflict with his beliefs pending action on his application, if current regulations so direct.

6. Orders Imposing Punishment. Unless issued under Article 15 (NJP) by the commanding officer or pursuant to a sentence of a court-martial, an order which imposes punishment is unlawful. Whether an order is issued for the purpose of punishment, or merely for training, will depend on the facts of each case. For example, an accused who placed two parachutes on the deck in a manner which the petty officer considered improper and, as a result, was ordered to pick up the parachutes, take them from shop to shop, put them down in the proper manner, and announce to all present that this was the proper method of handling parachutes is being "punished" within the meaning of Article 92, when the sole purpose of the order was disciplinary. The order was not issued, designed, or intended to advance the accused's, nor the spectator's, skill in handling parachutes. Consequently, the order is illegal.

7. Order Defined. Before a serviceman can be convicted of disobedience of an order, the order must be a specific mandate to do or not to do a certain thing. An order to obey the law or to perform one's military duty has no specific subject and, consequently, does not constitute an order as contemplated by the UCMJ. The ancient principle that an order must be a definitive mandate, easily understood, easily applied, and easily followed is especially pertinent when trying to hold someone criminally responsible for its violation.

8. Orders in Technical Manuals, etc. Not every regulation is a punitive regulation. The Armed Forces have numerous technical and administrative regulations or manuals designed to standardize and control the organization and administrative operation of the service. These regulations are directed most normally to commanders and provide them necessary guidance. There are usually no punitive sanctions in these regulations and violations of them, while perhaps punishable as dereliction of duty, are not normally prosecutable. Thus, provisions of

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department level personnel manuals, supply manuals, local level standard operating procedures for Military Police, etc., which contain references to behavior of individuals (e.g., each member is allowed to possess only one I.D. card) have been held to be "non-punitive" regulations by appellate courts.

SECTION THREE
CHAPTER II
PART TWO

GENERAL ORDERS AND REGULATIONS

GENERAL. A general order or regulation is one which is promulgated by the authority of a Secretary of a Department and which applies generally to an Armed Force (for example, Navy Regulations) or an order promulgated by a major commander which applies generally to his command or to a large segment of his command (e.g., all officers, E-5s and above, etc.). These orders have the force and effect of laws enacted by Congress. Consequently, a lack of knowledge as to the provisions of a general order or regulation is no defense to a charge of its violation. As with Congressional enactments, everyone is charged with knowing the law.

ELEMENTS. The evidence must establish beyond a reasonable doubt:

1. That a certain lawful general order or regulation was in effect;
2. That the accused had a duty to obey the order; and
3. That he violated or failed to obey the order.

DISCUSSION.

1. Lawfulness. As stated before, a general order or regulation is presumed to be lawful unless contrary to the U. S. Constitution, other federal law, or superior regulation.

2. In Effect. Generally, an order is effective the date of its issuance. However, an order may be later superseded, amended, or cancelled. Therefore, in drafting a specification alleging violation of an order, be sure to allege the particular order or regulation which was in effect at the time of the offense.

3. Authority to Issue. A general order or regulation may only be issued by the President or by the Secretary of Defense, of Transportation, of a military department, or by an officer having general court-martial jurisdiction, a general or flag officer in command, or a commander superior to one of these. Commander, Naval Base, Newport; Commander, Cruiser-Destroyer Force, U. S. Atlantic Fleet; and Commanding General, Marine Corps Base, Camp Lejeune, North Carolina, are examples of major commanders who may issue general orders. The commanding officer of a ship; aircraft; squadron; naval station; Marine battalion or barracks, are examples of a commander without authority to issue general orders. Although the orders of such a commander may be in writing and designated as an instruction or regulation, they do not constitute lawful general orders. A violation of a ship's instruction, for example, would be properly charged

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as a violation of an other lawful order and not as a violation of a lawful general order.

4. Duty to obey. The general order or regulation must be applicable to the accused before he has a duty to obey it. For example, a general order setting forth the duties and responsibilities of the commanding officer of a ship could not be violated by a seaman under his command. The general order simply does not apply to the seaman. An order applicable to all E-5's and below is not applicable to an E-6 defendant.

5. Violation. An order is violated either when the accused does an act prohibited by the order or by the accused failing to do an act required by the order to be done. Sometimes, an order or a regulation prohibits certain acts, but provides exceptions under specified conditions. Generally it is not necessary for the prosecution to establish that the accused did not come within any of the exceptions stated in the order. However, once the accused has offered some evidence that he falls within the exception, then the prosecution must establish beyond a reasonable doubt that he does not.

6. Pleading. The general order or regulation need not be quoted verbatim but should be identified by article, paragraph or section number and date; for example: Article 1296.1, U.S. Navy Regulations, dated 9 August, 1948. The order must be described as a "general order", otherwise the specification fails to allege an offense. The manner in which the accused violated or failed to obey the order must be specifically set forth. When an order prohibits certain acts except under certain specified conditions, generally, it is not necessary to allege that the accused did not come within the terms of the exceptions.

SECTION THREE
CHAPTER II
PART THREE

OTHER LAWFUL ORDERS

GENERAL. An accused who violates an other lawful order issued by a member of the Armed Forces violates UCMJ, Article 92(2). Unlike a lawful general order or regulation, the fact that the accused had knowledge of the order allegedly violated must be pleaded and proved.

ELEMENTS. The evidence must establish beyond a reasonable doubt that:

1. A lawful order was issued by a member of the Armed Forces;
2. The accused knew of the order;
3. It was his duty to obey the order; and
4. He failed to obey the same.

DISCUSSION.

1. Lawfulness. Orders issued by a superior commissioned officer, or by a superior warrant, noncommissioned or petty officer, in the execution of his office may be inferred to be lawful. In certain situations, subordinates are authorized to give orders to superiors, which orders are lawful and which the superior has a duty to obey. For example, an order from an officer of the day, sentry, shore patrolman or commanding officer directed to a service member, whatever his rank, may be lawful. However, rather than inferring that the order is lawful, the prosecution must establish lawfulness by showing the status of the persons giving and receiving the orders and the specific authority of the person giving the order.

2. Knowledge. The prosecution must prove beyond a reasonable doubt that the accused had knowledge of the order. Actual knowledge of the order may be proved by direct or circumstantial evidence. A statement by the accused admitting that he knew of the order would be an example of direct evidence of his knowledge thereof. Testimony that the order was published at quarters, (attended by the accused) or that the order was clearly posted on the bulletin board where the accused passed daily would constitute circumstantial evidence of the accused's knowledge of the order.

3. Duty to Obey. If the order is lawful and issued by a person authorized under the circumstances to issue such an order, and if it is applicable to the accused, then he has a duty to obey the order.

4. Disobedience. The accused's failure to obey the order may be willful or merely as a result of forgetfulness or simple negligence. For example, a seaman aware of a ship's instruction that requires all privately

owned firearms to be stored with the Master-At-Arms, who forgets about the order and keeps his loaded "45" under his pillow, should be charged under Article 92(2) for failure to obey an other lawful order. Orders to be executed at a time later than the giving of the order are disobeyed when the time for performance is passed.

5. Pleading. The order or specific portion thereof which the accused is charged with violating should be set forth verbatim, qualified by the phrase "or words to that effect" in order to provide for slight variances in proof. Furthermore, the specifications must allege that the accused knew of the order and that he had the duty to obey it. Ordinarily, the manner in which the order was violated need not be alleged since the order has previously been quoted verbatim and the statement "that the accused failed to obey the same" is sufficient to apprise him of the wrongful act or omission.

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SECTION THREE
CHAPTER II
PART FOUR

DERELICTION OF DUTY

GENERAL. Dereliction in the performance of duty is the subject of UCMJ Art. 92 (3). The term "dereliction" is so broad that it literally covers the whole field of infractions of duties. This offense must be interpreted to cover only those delinquencies not covered by the other articles of the Code dealing with specific offenses relating to duty. Thus, an accused who not only failed to perform his duty but either did not appear or appeared tardily at his place of duty should be charged with an absence offense under Article 86. Where he fails to obey or disobeys a duty imposed by a lawful order, his offense should generally be charged as an order violation.

ELEMENTS. In order to convict an accused of this offense, the evidence must establish beyond a reasonable doubt that:

1. The accused had a certain prescribed duty;
2. The accused knew of the duty;
3. The accused was derelict in the performance of his duty.

DISCUSSION.

1. Prescribed Duty. A duty may be imposed by regulation, lawful order, or custom of the service. The duty contemplated by Article 92 (3) is any military duty either assigned or incidental to a military assignment.

2. Knowledge. Although the Manual for Courts-Martial does not set forth knowledge of the duty as an element of the offense, it is believed that the prosecution must prove beyond a reasonable doubt that the accused knew of the duty.

3. Derelict. A person is derelict in the performance of his duties when he willfully or negligently fails to perform them or when he performs the duties in a culpably inefficient manner. If the failure is with full knowledge of the duty and an intention not to perform it, the omission is willful. If the omission is the result of the lack of ordinary care, the omission is negligent. Ordinary care means that degree of care which an ordinarily prudent and careful man would exercise in like circumstances in order to perform the duty. The standard to be applied is whether the conduct of the accused was adequate and proper in light of circumstances prevailing at the time of the incident. Culpable inefficiency is inefficiency for which there is no reasonable or just excuse. If an accused had the ability and the opportunity to perform his duties efficiently and instead performed very sloppily, then he is culpably inefficient. However, if the accused's failure in the performance of his duties is caused by ineptitude rather than by willfulness, negligence or culpable inefficiency, then he is not guilty of this offense.

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Ineptitude is a genuine lack of ability to properly perform the duty despite diligent efforts to do so. For example, a recruit earnestly applies himself during rifle training but fails to qualify. Since his failure is due to ineptitude, he is not derelict in the performance of his duties.

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SECTION THREE
CHAPTER II
PART FIVE

WILLFUL DISOBEDIENCE

GENERAL. The offenses set forth under Articles 90(2) and 91(2) involve the intentional defiance of superior authority. Therefore, the accused must specifically intend to violate the order of a superior before he can be convicted of these offenses. In contrast, the disobedience of a lawful general order, an other lawful order, or dereliction in the performance of duties may either be willful or negligent.

ELEMENTS. In order to convict an accused of the offenses the evidence must establish beyond a reasonable doubt that:

1. The accused received a lawful order;
2. The order was issued by a superior commissioned officer, warrant officer, noncommissioned officer or petty officer of the accused;
3. The accused knew that the order was issued by his superior commissioned officer, warrant officer, noncommissioned officer or petty officer; and
4. The accused willfully disobeyed the order.

DISCUSSION.

1. Lawfulness. As stated previously, the order of a superior commissioned officer or of a superior warrant officer, noncommissioned officer or petty officer in the execution of his office may be inferred to be lawful.

2. Receipt of the Order. The order must be directed to the subordinate personally. For example, "Seaman Jones, report to the OOD at once." When the division officer announces at quarters: "All nonrated personnel will wear service dress blues at quarters tomorrow", the order is not directed to a subordinate "personally", although it is a lawful order directed to a class of persons of which Seaman Jones is a member. Suppose at quarters the division officer states: "Jones, Smith, and Brown will report to the executive officer immediately." If Seaman Jones deliberately failed to report, he could be charged with willful disobedience of the order of his superior commissioned officer if all other elements are proved. The order was directed to him personally as well as to others. An order may be passed through an intermediary and still be directed "personally" to the recipient. Note that a deliberate failure to comply with a general order or regulation or with a standing order of a command is not chargeable as a willful disobedience of the order of a superior commissioned officer since such orders are not directed to the subordinate personally.

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3. Form. The form of the order is immaterial so long as it amounts to a positive mandate and is so understood by the subordinate. Expressing an order in a courteous manner rather than in a peremptory form does not change its nature. For example, "Jones, please report to the bridge in five minutes."

4. Routine Duties. The discussion of these offenses in the Manual for Courts-Martial indicates that the non-performance by a subordinate of a mere routine duty should not be charged as a willful disobedience offense. For example, the accused is told by his superior petty officer that his duty will be to clean a particular compartment daily. Four days later he purposely fails to clean the compartment. He should be charged with dereliction in the performance of his duties rather than with willfully disobeying the order of his superior petty officer since there is no immediate and direct confrontation with superior authority. However, if four days later, the superior petty officer enters the compartment and, finding it uncleaned, orders the accused to clean it, and the accused willfully refuses to do so, then the proper charge would be willful disobedience. There has been intentional and immediate defiance of authority, and the designation of the duty as routine would not change the nature of the offense.

5. Superiority. The order must be issued by a superior commissioned officer, warrant officer, noncommissioned officer or petty officer of the accused. This concept of superiority is not used in the traditional sense but as specifically defined in the Manual for Courts-Martial. This concept of superiority will also apply to the later to be discussed offenses of disrespect to superiors and assault upon superiors. A superior is one who is superior to the accused in either rank or in command. One is superior in rank to a defendant if he is senior by at least one pay grade and is a member of the same Armed Force as the defendant. The Navy and Marine Corps are co-equal branches of same Armed Force, the Naval Service. Therefore, a Marine private is junior to a Navy ensign. One is superior in command to an accused if he is superior in the chain of command. One may be a superior in command and hence one's "superior" even though he is a member of another Armed Force. Colonel Courageis, U. S. Army, is embarked as a passenger aboard the USS MCCLOY (DE-1038). The commanding officer, a lieutenant commander, orders the Colonel off the bridge due to impending heavy seas. If the Colonel refuses, he could be charged with willful disobedience of the order of his "superior" commissioned officer. Although the colonel outranks the lieutenant commander by at least one pay grade, the lieutenant commander as commanding officer of the ship has authority over all persons embarked thereon. Thus, the "command" concept takes precedence over the "rank" concept. A Marine major is superior to an Army colonel who works under the major's supervision on a joint staff or command. The superior in command is the superior of a person under his command even though the other person is higher in grade such as in a joint command.

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6. Knowledge. The prosecution must establish beyond a reasonable doubt that the accused actually knew of the order and that he knew it was issued by his superior commissioned officer; warrant officer; non-commissioned officer or petty officer. This element can be proved directly (confession) or by other facts indicating the accused knew of the order and the status of the superior.

7. Disobedience. The failure to obey the order must evidence an "intentional defiance" of authority. A failure to comply with an order through heedlessness, remissiveness, or forgetfulness is not willful disobedience. However, it will be sufficient to constitute the offense of failure to obey an other lawful order. Willful disobedience may be manifested by deliberately omitting to do that which is ordered, by doing the opposite of what is ordered, or by expressly refusing to obey the order. Intentional defiance of authority connotes a flaunting of the authority of the superior to issue the accused orders. Thus there is necessarily a close link between the giving of the order by the superior and the refusal by the accused, such that the conduct of the accused borders on disrespect for the office of the superior. When the superior gives a personal order to the accused seeking to enforce the provisions of a standing order there can be no intentional defiance of authority, regardless of the conduct of the accused. Appellate courts enforce a policy against allowing increased punishment where the gravamen of the offense was a failure to obey an order the violation of which carries a lesser punishment than willful disobedience.

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SECTION THREE
CHAPTER II
PART SIX

DEFENSES

GENERAL. An examination of the facts of a particular case may indicate that an accused has a defense to the order allegedly violated. The actual existence of a defense will depend on whether the facts are actually established as the accused alleges them to be. If the facts are in dispute, then it is up to the finder of fact (the commanding officer at NJP or the members or judge of a court-martial) to determine whether or not a valid defense to the offense charged exists.

DISCUSSION.

1. Illegality. In examining a possible order offense, the initial determination to be made is whether or not the order involved is lawful. If not, then the accused has a defense to its violation.

2. Impossibility. Impossibility of compliance with an order may constitute an affirmative defense in the nature of a legal excuse. The impossibility may be a physical incapacity, the result of an outside interference, or of financial incapacity. Regardless of the cause, if the condition rendering it impossible existed at the time when the order was given, that condition is a legal excuse for noncompliance with any order. For example, Seaman Slick is ordered by his division officer to drive the command car over to the motor pool, but he cannot locate the ignition key. Slick has a defense to any order violation charged (except possibly dereliction of duty). However, if, after the order is given, Seaman Slick through his own carelessness loses the key, then he will not have a defense to a charge of failing to obey another lawful order. The failure to obey another lawful order may be simply the result of negligence. Seaman Slick could not properly be convicted of willful disobedience of an order of his superior commissioned officer because his non-compliance was not willful and was not a defiance of authority.

3. Subsequent Conflicting Orders. Where a subordinate has received an order from a superior which amends or supersedes a previous order received from another superior, his failure to carry out the original order will not constitute an offense. Noncompliance as a result of a subsequent apparently lawful order is an affirmative defense constituting a legal excuse.

SECTION THREE
CHAPTER III

DISRESPECT

PART ONE

DISRESPECT TOWARD A SUPERIOR COMMISSIONED OFFICER

GENERAL. UCMJ, Article 89 punishes any member of the Armed Forces who behaves with disrespect toward his superior commissioned officer. Basically because of its historic roots, this offense has characteristics not shared by the offense of disrespect to a superior noncommissioned officer.

ELEMENTS. In order to convict of this offense, the evidence must establish beyond a reasonable doubt that:

1. There was a superior commissioned officer;
2. Whom the accused knew to be his superior commissioned officer; and
3. To whom disrespect was demonstrated by the accused.

DISCUSSION.

1. Superiority. The principles relating to the concept of superiority as discussed in connection with willful disobedience apply to this offense. Accordingly, a superior commissioned officer for purposes of this offense is a superior in either rank and armed force or command (see discussion in Chapter I). The evidence must also show that the accused knew the victim was his superior commissioned officer. Normally the disrespect itself (which usually is language) will constitute an admission of this element (e.g., "Captain, you're drunk"). It may be necessary to prove this fact circumstantially by showing the officer was well known to the accused, was in uniform at the time, was introduced to the accused just before the crime, was commander of the accused's unit as long as the accused had been assigned, the accused was sober, the place of the disrespect was well lighted, etc. All such facts must be strong enough to prove knowledge beyond a reasonable doubt when viewed as a whole.

2. The Disrespect. Disrespect is synonymous with contempt and amounts to behavior or language which detracts from the respect due the authority and person of the superior. Disrespect may consist of words, acts, omissions, or all of these forms of behavior. It may be directed at the superior's official capacity ("General, you're a stupid strategist.") or his individual capacity ("You're a good strategist, General, but you're a ridiculous donkey at poker.") Whether or not a given behavior is disrespectful depends on the circumstances. Thus, a superior can act so badly that he is undeserving of respect and any disrespect is not punishable under that circumstance. However, truth is no defense to disrespect. The intent of the actor and the understanding of the victim of disrespect are important factors but not decisive. Irrespective of the intent and

understanding that given conduct is not disrespectful, if other military personnel see or hear the behavior, the actor may be punished because of the apparent disruption of military discipline (i.e., the poor example of discipline set for the witnesses). Social engagements allow greater freedom than performance of duty would otherwise permit, but the greater freedom does not amount to a license for disrespect.

3. Presence of Victim. Disrespectful behavior need not occur within sight or hearing of the superior officer. His presence is immaterial. However, disrespect uttered in a private conversation may not be an offense. The term "private conversation" refers to the situation where the accused, while not conducting official business, speaks the disrespect to another person under circumstances where he reasonably believes no others will hear. The best practice would appear to be the weighing of all of the facts to determine if, under the circumstances, the conversation was private. It may then be significant that multiple witnesses of disrespect in an otherwise private conversation are military personnel.

4. Duty Status of Victim. The superior officer need not be in the execution of his office before the accused is held accountable for disrespect to him. Duty status is thus immaterial.

SECTION THREE
CHAPTER III
PART TWO

DISRESPECT TOWARD A SUPERIOR NONCOMMISSIONED OFFICER

GENERAL. The elements of this offense are not the same as those for disrespect to a superior commissioned officer.

ELEMENTS/DISCUSSION.

1. Superiority. The principles relating to the concept of superiority, as discussed in connection with willful disobedience and disrespect toward a superior commissioned officer, apply to this offense. Accordingly, a superior noncommissioned officer for purposes of this offense is a superior either in rank or command, and the accused must know that the victim is his superior. See discussions on pages 2-1 and 3-1.

2. Presence of Superior. In UCMJ, Article 91(3) cases the disrespect must occur within the sight or hearing of the victim. That the disrespectful conduct was heard or seen by the superior noncommissioned officer is then a separate element of this offense. It is not an element, of course, in officer cases under UCMJ, Art. 89.

3. Duty Status of Victim. Disrespect to a superior non-commissioned officer is punishable only when the victim is in the execution of his office. This fact is also an element for this offense and not an element for officer cases under UCMJ, Art. 89. "Execution of Office" means that the victim must be on duty or performing some military function. Most situations are obvious, but some require analysis. A noncommissioned officer who is drinking at the bar after working hours cannot be the victim of disrespect. If, however, he acts to quell a disturbance in which servicemen are involved (as authorized by UCMJ, Art. 7) and at that time suffers disrespect, that disrespect is punishable so long as all other elements of the offense are proved.

SECTION THREE
CHAPTER IV

ABSENCE OFFENSES
PART ONE
FAILURE TO GO

GENERAL. This part of the chapter deals with the offense of failure to go to one's appointed place of duty -- a temporary absence proscribed by UCMJ Art. 86(1). This offense relates to the situation where lawful authority has directed a member of the Armed Forces to be somewhere at a certain time and that member through his own fault does not so report. The member's failure need not be deliberate but he must be at least negligent in failing to report to constitute this offense.

ELEMENTS. In order to convict a serviceman of failure to go, the evidence must prove beyond a reasonable doubt that:

1. Lawful authority appointed a certain time and place for a certain duty to be performed by the accused;
2. The accused knew of this order and the duty imposed by it; and
3. The accused failed to go to that duty at the time prescribed without proper authority.

DISCUSSION.

1. Lawful Authority. While the question of legality of orders is a complex one which has been discussed previously in Chapter I, an order will usually be lawful if the issuer had authority to give the order (i.e., he was a senior officer or petty officer); the order reasonably relates to a military function (as opposed to a personal favor or whim of the giver), and the order is not prohibited by law or other higher authority. The law recognizes that most orders of a military superior which relate to the performance of a military duty are lawful orders. Accordingly, proof that such an order was given by a superior permits a court-martial to infer that the order was lawful without further proof. This permissive inference can, however, be negated by evidence indicating the order was not lawful. The order contemplated by this offense may be written or oral, form being immaterial.

2. Certain time and place. The time and place specified in the order must be very specific. Very little leeway is allowed by law as to either time or place. For instance, an order "to clean up the barber-shop after your other duties are done" is too vague as to time, but an order to "report to Building #17 at 1830" is precise. The place of duty contemplated by this offense is a specific place, as opposed to a general location. Thus, an order "to report to the Naval Education and Training Center, Newport, Rhode Island at 1900" contemplates a general location and is not specific enough for this offense. The order to "report to the Captain's office at 0800" contemplates a specific "place" as opposed to a

general "location" and is legally precise. The issuer of orders must, therefore, know how to give orders which are precise, easily understood, and capable of being easily followed.

3. Knowledge. In order to support a conviction for this offense, the evidence must show that the accused "actually" knew of the order and the duty. One must be careful of the language in the Manual for Courts-Martial, 1969 (Rev.), par. 165, which indicates that "reasonable cause to know" of the duty and order is sufficient. Decisions of the Court of Military Appeals indicate that proof of "actual" knowledge is required to convict. Actual knowledge may be provided directly (e.g., the accused admitted actual knowledge of the order) or circumstantially. Circumstantial proof amounts to demonstrating indirectly beyond reasonable doubt that the accused knew of the order. For example, testimony, proof that the accused was facing the issuer at the time, and proof that the accused was only three feet away from the issuer and apparently attentive, when viewed as a whole, allow the conclusion that the accused actually knew of the order even though there is no direct evidence (accused confession) proving actual knowledge.

4. Without Authority. This is an essential aspect of all absence offenses for if an accused had "authority" to be absent, his absence is not a crime. Proof that no one with proper authority approved or directed a deviation from the order negates innocent absence.

5. Failure To Go. The criminal act of failing to go does not require a deliberate intentional defiance of the order. It is sufficient if the accused is merely negligent in his failure; therefore, this offense is commonly called a "general intent" offense. One who is ordered to report to Building #17 at 1800 and who forgets to go commits this offense as does one who deliberately decides not to go to Building #17 at 1800. Normally, proof that the accused did not report on time at the prescribed place is sufficient to convict him unless the accused can produce some evidence indicating that he was not at fault. Normally, proof of failure to go requires the testimony of a witness or witnesses that the accused did not report as ordered. The offense is complete the moment the time of performance has passed and the accused has not reported. Accordingly, reporting late is not a defense. Negligence is a term which means, in practical terms, fault. One who does an act, or omits to do an act, without taking due care of a reasonable prudent man for the consequences of the act or omission is negligent.

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CHAPTER IV
PART TWO

GOING FROM APPOINTED PLACE OF DUTY

GENERAL. This offense, as described in UCMJ, Article 86(2), is the converse of failure to go [UCMJ, Article 86(1)] and contemplates the punishment of one who leaves his appointed place of duty without authority.

ELEMENTS. In order to convict a serviceman of this offense, the evidence must prove beyond a reasonable doubt that:

1. Lawful authority appointed a certain time and place for a certain duty to be performed by the accused;
2. The accused knew of the order and duty;
3. The accused reported for such duty; and
4. The accused went from his appointed place of duty
5. Without authority.

DISCUSSION. The first two elements, as well as the last element of this offense, involve the same principles governing failure to go (discussed in Part One of this Chapter). Accordingly, only those elements differing in principle are here discussed.

1. **Accused Reported.** It is obvious that one cannot "leave" a place of duty if he has not reported to that place of duty. Accordingly, there must be evidence which indicates that the accused who was ordered to "report to Building #17 for a watch tour from 1800-2200" actually reported there for duty. It is immaterial that the accused was late in reporting for this offense prescribes "leaving", not failing to go. Normally, witnesses will be available to testify that the accused reported; official log entries may reflect that fact or the accused may admit in a statement that he reported to such a place. The "place of duty" contemplated by this offense is the specific place (as opposed to general location) discussed in Part One - Failure To Go.

2. **Accused Went From.** This element simply means that, after reporting for his duty, the accused left that place without proper authority. The facts and conditions of the order must be reviewed to determine whether a requirement existed for the accused to remain at the place for a longer period than he did. For example, one who is ordered to a place to stand a four hour watch has a duty to remain four hours. If he leaves sooner without authority, he has violated UCMJ, Article 86(2). On the other hand, if he was ordered to mail a letter at the Post Office and, after going there only to find it closed, the accused returned to the starting point, he has not committed this offense since he had no duty to remain at the Post Office. The issuer of the order must be careful to give explicit orders to avoid complications. The fact that one returned to his duty after leaving without authority is no defense to this offense since it is a completed crime at the precise moment the accused leaves

his duty. In some cases the physical limits of the place of duty are important in determining whether the accused has "left" his place of duty. Normally, if, under the circumstances of the particular situation, the accused is too far removed from the appointed place to be reasonably able to perform the assigned duty he has "left" that place. No black and white rules are meaningful in resolving this issue.

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CHAPTER IV
PART THREE

AGGRAVATED FORMS OF UCMJ, ARTICLE 86(1) and (2)

GENERAL. The Table of Maximum Punishment /MCM 1969 (Rev.) par. 127(c)7 provides a greater maximum permissible punishment for violations of UCMJ, Article 86(1) and (2) where the evidence shows certain aggravating features. An absence from guard, watch, or other duty section with intent to abandon it or an absence with intent to avoid field maneuvers or exercises, if pleaded and proved, allow the increased punishment to be considered and imposed.

ABSENCE WITH INTENT TO ABANDON. "Intent to abandon" refers to a deliberate choice by the accused to completely divest himself of all further responsibility for his particular duty. The accused not only "fails to report" or "goes from" the duty, he deliberately intends not to perform the duty. This aggravating feature requires proof that the accused entertained this "specific intent." The elements can thus be detailed as proof that:

1. The accused was a member of a guard, watch, or duty section at the time and place indicated;
2. At the time and place indicated, he absented himself from the guard, watch, or duty section;
3. Without proper authority; and
4. The accused intended to abandon his guard, watch, or duty section.

Proof of this offense will normally consist of the written orders (or testimony of one issuing oral order) assigning the accused the duty and testimony, or official log entries, indicating the absence, and direct evidence (statement of the accused) or circumstantial proof of the accused's intent. The first element necessarily includes the notion that the accused knew of his assignment to the watch, guard or duty section.

INTENT TO AVOID FIELD EXERCISES. This offense also involves a specific and deliberate intent on the part of the accused. The evidence must show that:

1. The accused absented himself from his unit;
2. Without authority;
3. The accused knew that his absence would occur during a period (or a part of a period) of maneuvers or field exercises in which he was required to participate; and
4. The accused intended by his absence to avoid all or part of such exercises or maneuvers.

SECTION THREE
CHAPTER IV
PART FOUR

ABSENCE FROM UNIT, ORGANIZATION, OR PLACE OF DUTY

GENERAL. This form of unauthorized absence is the subject of UCMJ, Article 86(3) and represents the protracted absence most commonly associated with the unauthorized absence concept. In the first three parts of this chapter, emphasis was primarily directed to "instantaneous" absences where the length of absence was essentially immaterial. In this part, emphasis is placed upon that form of absence in which the sole aggravating feature is the length of the absence.

ELEMENTS. In order to convict an accused of this offense, the evidence must show beyond a reasonable doubt that:

1. At the time and place concerned, the accused absented himself from his unit, organization, or place of duty;
2. Without authority; and
3. The absence was of the duration indicated.

DISCUSSION.

1. Absence from Unit, etc. As used in this offense, "unit" refers to a ship, company, or platoon-sized group while "organization" refers to a regiment, battalion, base, station, division, or larger groups. "Place of duty" differs from the place of duty referred to under UCMJ, Article 86(1) and (2) in that a general location (as opposed to a specific place) is contemplated. Thus, an absence from the NETC, Newport, R. I. can be absence from one's "place of duty" for purposes of UCMJ, Article 86(3). Care must be taken so as not to confuse this general place of duty with the other forms of absence relating to the "specific place of duty" concept. Though care should always be taken to ensure that the correct unit, organization, or place of duty which the accused abandoned is known, erroneous allegations or proof will not usually result in appellate relief unless the accused is misled or otherwise inadequately apprised of that against which he must defend. This is so because the gist of the offense is absence and not a violation of someone's person or property or order. Thus, pleading absence from Headquarters Battalion and proving at trial an absence from Service Company, Headquarters Battalion is normally an immaterial mistake. Likewise, alleging absence from the Headquarters Battalion and proving absence from the Marine Corps. Transfers of personnel cause some difficulties in determining which unit, etc. the accused abandoned. One who is on temporary duty or temporary additional duty belongs to his parent command and the temporary command. The authority for being absent from the parent command is conditioned on the accused's being at the temporary command, and the temporary command has the authority to control personnel assigned to it. Thus, one who is permanently assigned to the NETC, Newport, R.I. and is TAD to the USS BROWNSON, and who absents himself from the ship without

authority is absent from both the ship and the NETC. Such a person should be charged with UA from the ship, since he most likely understands his offense that way, but it is permissible to charge his absence as being from NETC. One is detached from his parent command pursuant to Permanent Change of Station Orders and belongs to the gaining command (the command to which he is to report) at the moment his detachment is effected. He thus is absent from the new command if he goes UA after detachment and must be so charged. In any event, care should be taken to ensure the proper command is known, pleaded, and supported by evidence to minimize trial problems.

2. Commencement of Absence. UA normally commences the moment the accused leaves his unit without authority; the moment he does not return to his unit, as authority prescribed, from leave or liberty; the moment he fails to report to his new or temporary command at the time prescribed in his orders; or when the accused is only "casually present" in the area of his unit's location, does not report for work assignments, and avoids those in authority. The casual presence type of absence is the most difficult to deal with since its inception necessarily depends upon a series of facts and circumstances. In all UA cases, an inception date must be proved. In most casual presence type UA cases, there should be an Article 86(1) or (2) violation which can be used to establish the inception. For example, the following case:

Seaman Slick decides one day that he needs a vacation from his life guard job at the base swimming pool. Thereafter for two months Slick does not report for work. However, he regularly picks up his pay check at the Station Finance Office, visits his buddies in the barracks, frequents the Post Exchange and Commissary, and even visits the pool sometimes. He avoids all petty officers and others in authority and reports to no one.

It is obvious that though Seaman Slick is physically "present" at his unit his presence is not "bona fide." It should also be noted that investigation would reveal a specific time when Slick failed to report to his appointed place of duty [UCMJ, Art. 86(1)] which could be used to establish the inception date for this "casual presence" UA. For the normal UA case, the inception can be proved by properly authenticated service record entries prepared in strict accord with current regulations and which are based on reliable sources of information. In this connection, it is important that commanders ensure that an absence is verified and not based upon rumor or guess work. An inception date may also be established by testimony of one who has personal knowledge of the absence.

3. Without Authority. This is an essential element of UA and must always be pleaded and proved. It means that no one having such authority authorized or approved an absence. Service record entries may be used to establish this element, but care should be taken to verify the lack of authority for the accused's departure. Normally his immediate supervisor or commanding officer should be consulted prior to making the record entries since the authority to grant leave can sometimes appear in unexpected hands. Testimony by those competent to testify that no absence was authorized can be used to establish the lack of authority for the accused's absence.

4. Intent. Absence need not be deliberate to complete this crime and, though an absence may be due to an intentional act, it quite often is the result of the accused's carelessness. The critical feature relating to the state of mind required is that the accused must in some way be at fault. UA (UCMJ, Article 86(3)) therefore is commonly referred to as a "general intent" offense.

5. Termination of UA. As a general proposition, UA terminates when the accused is "bona fide" returned to military control. Thus, proof of an inception date and a termination date establishes the duration of the absence and determines the maximum permissible sentence. There are many ways in which the UA may be factually terminated and each merits some discussion.


- a. Surrender. An accused often reports to the nearest military installation and discloses his UA status. UA terminates at that moment as a general rule. The termination occurs, again, as a general rule, regardless of the proximity of the place of surrender to the accused's unit.
- b. Apprehension by Military Authority. UA terminates when the accused is apprehended by military authorities who know of his status and have a reasonable opportunity to control him. When an UA accused is apprehended by military authorities for another offense, who by reasonable diligence could know of the UA status, and those authorities exercise temporary jurisdiction over the accused, the UA is terminated. Temporary jurisdiction means to control for a substantial time, prosecute for the other offense, or taking other positive action against the accused.
- c. Civilian Arrest for UA. Military regulations provide that when certain conditions exist with respect to an UA so that it is reasonably apparent the accused does not intend to ever return to his unit, a form (DD 553 - Declaration of Desertion) is issued to various law enforcement agencies in the civilian community. If an accused is arrested pursuant to the request made on that form, UA terminates at the moment of arrest because the civilian officers are acting as "agents" for the military authorities. If civil

authorities arrest an UA accused because they know he is UA; but no request has been made by military authorities for the arrest, the UA terminates when civil authorities notify military authority that the accused is being held for the military. The rule is different in this situation because no agency relationship exists between the civilians and the military authorities.

- d. **Civilian Arrest on Civilian Charges.** Once an UA status exists, civilian arrest predicated upon civilian charges does not change that status regardless of whether the civilian charges are dropped or trial results in acquittal or conviction. Thus UA in such cases does not terminate until civilian authorities notify military authorities that the accused is being held for the military to pick up. That is so even if the accused has served a sentence. Regardless of its length, the whole period is UA. Where the accused is on authorized leave but, because of civilian arrest and disposition of civilian charges, he over-stays his authorized leave time, the determination of whether the time in excess of authorized leave is UA depends upon fault. If the accused was "at fault", the time in excess of authorized leave is UA. Thus, if the accused is tried and convicted by civilian authorities, the time in excess of authorized leave to the date he is held for turnover to military authorities is UA even though a civilian sentence may have been served. If trial results in acquittal, the time in excess of leave is not UA since the accused was not "at fault". If civilian charges are dropped without trial, whether or not the time in excess of authorized leave is UA will depend upon whether the accused was "at fault". A determination that the accused in fact committed the civilian offense may have to be made, and it may have to be proved in court in order to establish a period of UA. Perhaps the best solution to this complex problem is to treat the situation as an acquittal.
- e. **Military Turnover.** When military authorities turn a serviceman over to civilian authorities for disposition of civilian charges, period of absence is an authorized leave of absence and not UA.
- f. **Casual Presence.** UA accused who returns to military control must do so on a "bona fide" basis. If he is only casually present, he is UA and there is no termination. The principles previously discussed in relation to the inception of the casual presence type of UA apply also to the termination of such an absence.
- g. **Summary.** Once UA status exists nothing but a "bona fide" return to military control will terminate it. When an overstay of authorized leave is involved, the UA status depends upon the fault of the accused. The table on the next page capsulizes the rules in this connection and should prove helpful in resolving these kinds of problems

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RELATIONSHIP BETWEEN UA STATUS
AND CIVILIAN ARREST ON CIVILIAN CRIMINAL CHARGES

SITUATION	UA	NOT UA	REMARKS
UA & ACQUITTAL	X		FOR ENTIRE PERIOD
UA & NO TRIAL	X		FOR ENTIRE PERIOD
UA & CONVICTION	X		FOR ENTIRE PERIOD
LEAVE & ACQUITTAL		X	
LEAVE & NO TRIAL	X		IF  DEF. IS AT "FAULT"
LEAVE & CONVICTION	X		ALL TIME OVER LEAVE IS UA
MILITARY TURNOVER		X	AN "AUTHORIZED" ABSENCE

GENERAL RULE: ONCE UA - ALWAYS UA

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SECTION THREE
CHAPTER IV
PART FIVE

DEFENSES COMMON TO UA OFFENSES

GENERAL. The possible defenses to UA are many and varied. No attempt will be made to deal with all of them. What follows is a discussion of the more common defenses and thus the ones most likely to arise.

IMPOSSIBILITY. The defense of impossibility exists when an accused is involuntarily prevented, for reasons beyond his control and not due to his own fault, from being where he is supposed to be at the time required. If the accused has a choice of courses of action and chooses the course which results in his absence, he is at fault and there is no defense. The wrong choice was his fault. If a foreseeable act occurs causing an absence but, through the exercise of reasonable care, the accused could have avoided the absence, then the occurrence of the foreseeable act occasioned by the lack of reasonable care is the accused's fault. For example, an automobile breakdown is a foreseeable result of driving a car. If the accused was negligent in not maintaining the car properly and the breakdown causes an absence, then the accused was at fault and his return on time was not impossible--he is UA. In all UA cases, there must be a thorough investigation of the circumstances to foreclose this defense. In all cases of actual impossibility, the absentee must return to his unit as soon as possible. There are several categories of legal impossibility:

1. Acts of God. Sudden, unexpected, and non-foreseeable floods, snow, rain, or other violent natural occurrences can be valid excuses for UA if such occurrence actually cause the UA. An accused who actually had a chance to report to his unit on time before such an occurrence cannot use such an occurrence as an excuse since his UA status was not caused by the act of God. The occurrence only aggravated the absence by causing further delay in returning.

2. Acts of a third party. The unforeseeable acts of third parties where the accused is not at fault can be a defense to UA if such acts actually cause the UA.

3. Physical Inability. If an accused does not possess the physical capacity to be at his unit at the proper time, then his UA is excused as the result of impossibility. For example, if the accused receives orders at 1200 to report to San Diego, California from Newport, Rhode Island by 1215 the same day, failure to so report is excusable (unless he is Superman). This form of impossibility is pure cause and effect--the accused was UA because he did not have the physical capacity to be present on time.

4. Physical Disability. This defense arises when, through no fault of his own, an accused suffers an injury or disease. This defense differs from physical inability in that the latter is a purely cause and effect

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rule while physical disability is based on a rule of reasonableness. Thus, if an accused is reasonably unable to return to his unit due to a disease or an injury, the absence is excused. For example, a leg broken through no fault of the accused may excuse an absence, while an absence which the accused claims was caused by a running nose would not. The former may, in some cases, reasonably interfere with a timely return, while the running nose probably could never reasonably interfere with timely reporting. Common sense and reason must be applied in these situations to correctly resolve the issue.

MISTAKE/IGNORANCE. An accused's claim that he did not know UA was a crime is no defense. Sometimes a situation arises where the accused honestly believes he had authority to be absent or to be somewhere other than where his absence occurred. If the accused's belief is honest and it is reasonable, he may have a defense to UA. For example, if a Seaman Recruit "authorized" a Yeoman Chief with ten years prior naval service to take 120 days leave and, at his trial for UA, the Chief claims he thought he had authority to be absent, his belief, while perhaps honest, would not be reasonable since a Chief of ten years' experience should know that a Seaman Recruit does not have authority to grant leave. In those UA cases where a deliberate intention is involved (e.g., UA with intent to avoid field exercises), an honest belief (e.g., that he was not to participate in the exercises) is a mistake which amounts to a defense. Therefore, it is important to ascertain the mental element in each UA type in order to apply the correct rule. Whether a mistake amounts to a defense is normally a fact question for the jury after hearing all the evidence.

SECTION THREE
CHAPTER IV
PART SIX

PLEADING UA OFFENSES

PLACE OF DUTY. Be meticulous in determining the correct unit, organization, or place of duty. Remember that "place of duty" as used in Article 86 (1) and (2) is different than "place of duty" as used in Article 86(3).

WITHOUT AUTHORITY. Always be sure these words appear in the pleadings.

TIME. Exact hours of departure and return are not necessary in a pleading unless they are critical to a determination of whether the absence exceeds three or thirty days so as to increase the maximum permissible punishment. Absent allegations in the pleadings, the hour of departure and return on different dates are assumed to be the same. A pleading cannot be amended at trial to reflect an earlier inception date or a later termination date. The pretrial investigation should conclusively establish the correct dates.

AGGRAVATION. Matters reasonably aggravating UA may be pleaded and proved. In the case of UA to avoid field exercises or with intent to abandon guard, watch, or duty section, the aggravating factors must be pleaded because a higher maximum punishment is authorized.

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SECTION THREE
CHAPTER IV
PART SEVEN

MISSING MOVEMENT

GENERAL. Missing movement, an offense proscribed by UCMJ, Article 87, is basically an aggravated form of UA. The aggravating feature of this hybrid UA offense is the negligent or intentional missing of the movement of a ship, aircraft, or unit with which one is assigned to move as a consequent of the UA.

ELEMENTS. In order to convict an accused of missing movement, the evidence must establish beyond a reasonable doubt that:

1. The accused was required to move with a ship, aircraft or unit;
2. The accused knew of the movement;
3. The accused missed the movement without authority;
4. Through neglect or design.

DISCUSSION.

1. Movement. The requirement to move must stem from a military duty inasmuch as this offense is not a "no show" penalty for commercial transportation used while in a no-duty status. A "movement" is a significant transfer of a ship, aircraft, or unit, normally involving a substantial period of time. Normally, for this offense, the movement must be more than a change of berthing space or an administrative move of short distance and duration. Whether a given incident is of enough "significance" to be a movement depends upon circumstances such as duration, distance, mission, existence of a combat environment, short-handedness of crew (would not move unless movement was significant), or budgetary restrictions (would not move on tight budget unless movement significant).

2. Ship, Aircraft, or Unit. UCMJ, Article 87, contemplates troop movements as opposed to the usual individual permanent change of station or temporary duty movement of individuals. Individual moves in a military setting are not contemplated by this offense. Thus, a fighter pilot who does not fly his individual aircraft with a squadron "movement" violates this Article, while he does not violate this Article if he misses a training flight scheduled for his aircraft only. If an accused is "assigned" to a craft as a crew member or passenger by military order and a "movement" occurs, the accused's missing of the movement will constitute a violation of this Article. The term "unit" includes the permanent type of military component such as company, platoon, squadron, wing, etc., which retains integrity after a movement is complete. "Unit" also includes groups of people organized solely for purposes of travel from one place to another which are not to retain unit integrity upon

arrival. For example, the gathering of two hundred Marines into Replacement Company #1040, commanded by a Marine Captain, for transportation to Okinawa creates a "unit" even though in Okinawa each member will go to a different organization. A number of Navy personnel per chance on the same civilian aircraft under Permanent Change of Station orders to the same organization, but traveling as individuals, are not in a "unit" inasmuch as there is no organizational structure.

3. Knowledge of Movement. The evidence must show that the accused knew of the prospective movement. Direct evidence of knowledge might consist of a statement by the accused made to another revealing such knowledge. Proof of facts, which circumstantially prove beyond a reasonable doubt the accused had the requisite knowledge that the movement schedule was posted on the bulletin board for two weeks prior to A's UA, that the accused had a duty to read the board twice daily, that the schedule was repeated at each morning formation, and proof that the accused was present at each formation, would be sufficient to prove knowledge. Each case will, of course, be different and each must be thoroughly investigated to determine facts which relate to knowledge. A service record entry, prepared in accordance with pertinent directives, stating that a certain officer told the accused of the scheduled movement is admissible as an official record so long as the entry reflects only the facts relayed to the accused and not the conclusion that the accused knew of the movement. Such evidence is sufficient to prove knowledge unless the accused denies knowledge, at which time the prosecution must use independent proof of knowledge to convict. Reliance on the service entry instead of thorough investigation of the facts is therefore unwise. The accused need not know the exact day of movement--the middle of next week, month, etc. is exact enough. The accused's knowledge must also come from "official" sources--not scuttlebutt.

4. Missing Movement. In order to convict one of this offense, the movement must occur. The moment the movement occurs and the accused is UA, the offense is complete. This element is loaded with uncertainty, however, inasmuch as the ship may get two miles out of port, break down, and be forced to return. Thus, it may not always be easy to determine whether the "movement" occurred since the "actual" sailing factors will have to be analyzed to determine whether a "significant" movement occurred as opposed to the analysis of the "planned" sailing factors. Normally, proof that the accused was UA when the movement occurred will prove missing movement. Properly authenticated and prepared service record entries reflecting unauthorized absence will be available and should be utilized to prove the UA. The testimony of witnesses that the accused was not aboard when the movement occurred is also proof of missing movement. In all cases, the missing must be without authority.

5. Mental Element. There are two types of missing movement offenses depending on the mental element involved.

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- a. **Design.** Missing movement through design means that the accused deliberately and intentionally missed the movement as opposed to missing movement through carelessness or accident. This is the most serious missing movement offense in terms of punishment and is the most difficult to prove. Direct proof of intent (statement to another) is not often available; thus care must be taken to discover facts which logically bear upon the issue of intent. Statements of the accused that he would never make the movement uttered before his UA, evidence of dislike for the new duty station, failure to get required inoculations for an overseas duty station, dissatisfaction with life at sea or air travel, etc., may all bear upon the issue to show a specific intent to miss movement.
- b. **Neglect.** This form of missing movement is often a lesser included offense of missing movement by design. Neglect means the failure to take such reasonable measures as are appropriate to assure making the movement or the doing of an act without considering its effect on making the movement. Neglect translates into carelessness as opposed to deliberateness. Normally, proof of UA at the moment of movement proves this form of the offense. Where the evidence shows the accused knew only an approximate movement date (e.g., the middle of next week) then, before proof of UA will be deemed sufficient to convict the accused, the evidence must also show that he could reasonably foresee his UA would result in missing movement. For example, a sailor is told his ship is to sail "the middle of next week." Desiring to do the "honorable thing" for his pregnant girl friend, the sailor goes UA to marry her. He figures he will marry Wednesday and return to the ship Friday to prepare for sailing. Upon his return Friday, he discovers the ship left Thursday night instead of the scheduled "middle of next week." In this case, the sailor did not reasonably foresee the consequences of his UA. In fact, he carefully planned his activities to avoid missing movement and thus lacks mens rea ("guilty mind") for missing movement. Accordingly, there is no reasonable possibility that the UA caused the missing movement. Absent such a causal connection, proof of UA alone will not support a conviction for missing movement through neglect. If, on the other hand, the sailor went UA on Monday and did not come back for six months, the length of absence would provide a causal connection with missing movement so as to allow proof of UA to prove this offense.

DEFENSES. The most common defense likely to arise in missing movement cases is mistake of fact. For example, the sailor believes the ship is to sail on the 10th when, in reality, it is the 8th. All such mistakes

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must as a minimum be "honest." That is, the accused must honestly believe that the 10th is the correct sailing date. The mistake must be honest because the defense of mistake of fact is predicated upon a lack of mens rea. Only a dishonest "mistake" is the product of mens rea. Whether such a mistake will be a defense depends upon the type of missing movement involved. Thus, if design is the mental element involved, an "honest" mistake is a defense to that form of missing movement. If the mental element is neglect, the mistake must not only be honest but it must also be reasonable. Thus, if the sailor's belief that the ship sails on the 10th is predicated upon the bar room gossip of his contemporaries, which indicated the sailing date was moved from the 8th to the 10th, that mistake, though perhaps honest, is not reasonable. The sailor is negligent in that he made no effort to check the gossip through official sources.

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SECTION THREE
CHAPTER IV
PART EIGHT

DESERTION

GENERAL. Though UCMJ, Article 85, proscribes three types of desertion, all forms of the offense are but seriously aggravated UA offenses. Indeed the maximum permissible punishment for these offenses indicate that desertion is the most serious of all UA offenses.

DESERTION WITH INTENT NEVER TO RETURN. The first form of desertion occurs when an accused absents himself from his unit intending to never return to that unit. It is the most common form of desertion, but is seldom prosecuted as such in relation to its incidence due to the difficulty of proof.

1. Elements.

a. UA. The principles for this element are the same as for the offense of unauthorized absence (UCMJ, Art. 86).

b. Intent. The accused must specifically intend at the inception of the absence, or at some time during the absence, to never return to the unit. One can desert a unit without deserting the Armed Forces or the ~~Naval Service~~. Care must be taken to determine the correct unit from which the accused deserted, inasmuch as his intent must relate only to his assigned unit, organization, or Armed Force and to no other. He cannot desert a unit to which he is not assigned. The requisite intent need not exist at all times throughout the absence, but it must exist at some time during the absence or at its inception. Once UA and requisite intent exist the offense is complete. A change of heart or mind is no defense. Intent is rarely proved by statement of the accused, but is most often proved by showing circumstances indicating the accused's state of mind. The following facts may be indicative of an intent to remain away permanently: destruction of uniforms, expressed hatred for the unit, destruction of ID cards, protracted absence, involuntary return to military control, hiding far away from all military bases, hiding far away from the assigned unit, use of an alias, obtaining a permanent type job, leaving the country, or making any statement indicating an intent to never return. All factors bearing on intent must be sufficient to prove beyond a reasonable doubt the requisite intent. At a minimum, a long absence with an involuntary return to military control is required to prove a desertion charge. Usually the best place to begin an investigation into this kind of offense is with the arresting civilian (or military) policeman or the place of surrender. Leads will normally be developed from those sources.

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2. Termination by Apprehension. This is a phrase which means involuntary return to military control. If pleaded and proved, this fact raises the maximum permissible punishment from two to three years. As used in this context, "apprehension" has a broader meaning than as used in the restraint provisions of UCMJ, Article 7. In order to constitute an involuntary return to military control, the evidence must show that the accused was taken into custody as an absentee, or that he was arrested by civil authorities who discover his status from someone other than a person acting on the accused's behalf or from the accused, who desires to avoid civilian charges. Thus an UA sailor who, in an effort to escape civilian manslaughter charges, reveals his status to the civilian authorities, is involuntarily returned to military control when released to the Navy. The test for determining the voluntariness of an accused's return is--did the accused freely and voluntarily cause his return to military control. Termination by apprehension (involuntary return) is not an element of desertion but is an aggravating circumstance.

INTENT TO SHIRK IMPORTANT SERVICE. This offense, together with intent to avoid hazardous duty, is the second form of desertion. It deals with an UA in which the accused entertains a deliberate intent to avoid important service, or avoid hazardous duty.

1. Elements. (important service)

- a. The accused "quit" his unit;
- b. The accused went UA (quit) in order to shirk certain service;
- c. The accused knew he was required for the service; and
- d. The service was important.

2. Discussion.

a. Important Service. Contemplates "significant", as opposed to routine, duties and connotes something of substantially greater importance or consequence than ordinary everyday performance. Whether a given service is "important" depends on the facts. Thus basic recruit training, combat duty, and duty aboard an Arctic icebreaker with a task force supplying a scientific expedition have been held to constitute important service. Routine foreign service, on the other hand, has been held not to be "important service." It is not clear whether the accused must have knowledge that the service he avoids is important service or whether the intentional shirking of a known duty which is objectively important completes this offense.

b. Knowledge of Service. It is clear that the evidence must show the accused knew of the duty he was required to perform before he can be held accountable for deliberately shirking it. The gravamen of this offense is the deliberate avoidance of important service and thus it is a "specific intent" offense.

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INTENT TO AVOID HAZARDOUS DUTY. This offense is an unauthorized absence aggravated by a specific intent to avoid hazardous duty. As opposed to important service, the gravamen of this offense is cowardice. The elements are similar to important service desertion.

1. Elements (Hazardous Duty)

- a. The accused "quit" his unit;
- b. With intent to avoid a certain duty;
- c. That the duty was hazardous under the circumstances;
- d. The accused knew with reasonable certainty that the duty was hazardous; and
- e. The accused knew he was required for the duty.

2. Discussion.

a. Hazardous Duty. Need not be hostile combat action, but must be reasonably dangerous to life or limb. Suppression of a domestic mob of renegades or the scaling of sheer cliffs on a training exercise may constitute hazardous duty.

b. Knowledge. For this offense, the accused must have known of the particular duty involved and have been reasonably certain of its hazardous character. In this respect the offense differs from important service desertion. Knowledge of the existence of the hazardous duty can sometimes be inferred from the actual circumstances surrounding an unauthorized absence. For example, proof that the accused was in a squad attacking a hill in Viet Nam and was seen running toward the rear while throwing away his rifle and helmet could be sufficient to infer knowledge of a hazardous duty and convict the accused of unauthorized absence with intent to avoid hazardous duty.

BY JOINING THE SAME OR ANOTHER ARMED FORCE. This is the third form of desertion and proscribes the situation where an accused, without being regularly separated from one of the armed forces, enlists or accepts an appointment in the same or another armed force (including foreign) without fully disclosing the fact that he has not been regularly separated. The key factors here are, first, that the accused was not, in fact, regularly separated and that he knew as much. It seems clear that if the accused had an honest and reasonable belief that he had been regularly separated before he joined another armed force, this offense cannot be committed.

LESSER INCLUDED OFFENSES. The only lesser included offense of desertion is UA. The different forms of desertion are separate and distinct offenses and are not LIO's of each other.

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DEFENSES. Constructive condonation of desertion is not a common defense to desertion since most cases are defended on the facts. This defense is important, however, because action at the unit level may unwittingly absolve a deserter of punishment for his crime. The elements of this defense are:

1. A general court-martial convening authority with knowledge of the accused's alleged desertion (normally a flag officer in command);
2. Unconditionally restores the accused to duty;
3. Without trial.

If the foregoing appears from the evidence, trial of the desertion charge is legally barred. Appellate courts are liberal in granting accused relief where a commander, who is not technically authorized to act in a situation, does so, and the accused relies on his action. Care must be taken at all levels to ensure that desertion suspects are not "unconditionally" restored to duty. Such action may bind the general court-martial authority. When releasing a suspect from pre-trial confinement, one must be sure that the release is not an unconditional restoration to duty. Be sure that the suspect realizes he is free on his own recognizance waiting trial. Most of the law in this area is very old and its certainty questionable.

SECTION THREE

CHAPTER V

THE GENERAL ARTICLE

UCMJ, Article 134, the so-called General Article, is not at all a modern legal invention. Its predecessors date from the 14th Century when similar military legal provisions were first known. The Article punishes all disorders and neglects to the prejudice of good order and discipline in the Armed Forces, all conduct of a nature to bring discredit on the Armed Forces, and crimes and offenses not capital of which servicemen may be guilty. This Chapter will explore these standards with a view toward defining them and aiding the understanding of some of the more common offenses recognized in the Article which may be discussed elsewhere in this publication.

SECTION THREE
CHAPTER V
PART ONE

DEFINING THE STANDARDS

CLAUSE I - DISORDERS AND NEGLECTS.

1. Scope. Clause I proscribes disorders and neglects prejudicial to good order and discipline in the Armed Forces not specifically covered by another article of the Code.

2. Prejudicial Conduct. Acts or omissions which reasonably, directly and palpably prejudice or tend to prejudice good order and discipline are prejudicial to good order and discipline. As a practical matter, "prejudice" means to have a disruptive influence upon. Accordingly, before an act or omission can violate the Clause I standard, it must have a substantial relationship to military activity. Impersonation of an officer, careless discharge of a firearm in the barracks, making false passes, and drug offenses are commonly prosecuted under Clause I.

CLAUSE II - SERVICE DISCREDITING CONDUCT.

1. Scope. Clause II of UCMJ, Article 134, is directed at all forms of misconduct which discredit the Armed Forces in the eyes of the public and which is not elsewhere proscribed by the Code.

2. Discredit. The term "discredit" means to injure the reputation of the Armed Forces. Service discrediting conduct can be conduct which violates local (civilian) law or any other conduct which is directly and substantially service discrediting. An actual discredit need not be shown for it is sufficient if there is demonstrated a direct or palpable tendency to injure the reputation of the Armed Forces. As a practical matter, there must be some possibility, though not necessarily reasonable possibility, of civilian exposure to the act or omission before punishment may lawfully be imposed under Clause II. It is also quite possible for an act or omission to be service discrediting but not prejudicial to good order and discipline -- and vice versa. The facts must, therefore, be analyzed in the light of the standards contained in Clauses I and II in order to choose the applicable theory. "Service discrediting" and "conduct prejudicial" are elements that must be proved but are not pleaded. As a practical matter, the standards of Clauses I and II are run together and seldom is the distinction critical. The distinction is likely to be most critical in the minor offense area where the standards are not obviously violated.

CLAUSE III - CRIMES AND OFFENSES NOT CAPITAL.

1. Scope. Clause III of UCMJ, Article 134, proscribes acts or omissions, not punishable under any other specific article of the Code, which are denounced as crimes by federal statute and triable in the federal courts.

2. Crimes of Unlimited Application. These are crimes punishable in a federal court regardless of where the crime is committed in the jurisdiction. For example, counterfeiting, fraud against the federal government, and bank robbery.

3. Crimes of Limited Application. There are certain federal statutes which have expressed limits of application (e.g., seduction of a female on an American vessel by a seaman, officer, or master) and general statutes having limits in application. The Federal Assimilative Crimes Act (18 U.S. Code 13) is one of the latter. An act which takes place on a federal reservation over which the surrounding state has no jurisdiction, and which act is not proscribed by a specific federal law, may, by operation of the Federal Assimilative Crimes Act, be prosecuted as a violation of federal law, if the act is a crime proscribed by the law of the surrounding state. The mechanics of this statute are complex and should be resolved by seeking a lawyer's advice.

LIMITATIONS ON USING ARTICLE 134.

1. Doctrine of Pre-emption. Congress, in enacting certain articles of the UCMJ, included all variations of related behavior. Those specific articles pre-empt any other article's application including Article 134. Thus Article 121 pre-empts theft crimes and no offense of "wrongful taking" will be recognized under Article 134. Articles 85, 86, and 87 cover all variations of absence. Article 98 pre-empts cowardice in the face of the enemy crimes. Article 134 may not be utilized to invent new variations of pre-empted offenses.

2. Novel Specifications. Novel offenses are not favored by the Court of Military Appeals and are rare in practice. If an offense is not historically recognized, COMA will not validate it unless a "genuine military disciplinary interest" is manifest; there is a strong prejudice to good order and discipline; or there is a high degree of moral disfavor involved. Offenses based on simple negligence are not likely to be upheld.

3. Capital Crimes. Crimes providing for capital punishment are not chargeable under any clause of Article 134.

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SECTION THREE
CHAPTER V
PART TWO

DRUG OFFENSES

GENERAL: Drug abuse is conduct which is proscribed by a variety of laws and thus many alternatives are available for the disposition of such abuse. There are advantages and disadvantages to all of the alternatives so one must be familiar with the different methods of handling drug offenses. The various laws regulating drugs break drugs down into several categories. Narcotics include the opiates (sedatives, such as Opium, Heroin, Methadone, and Codeine) and Cocaine (a stimulant). Narcotics are habit forming and their use usually results in severe neurosis and psychosis. Dangerous drugs are habit-forming, non-narcotic substances such as Barbiturates (sedatives) and Amphetamines (stimulants). Normally, large doses of these dangerous drugs are required to produce psychoses or neuroses. Hallucinogens or psychedelics are not habit forming or narcotic though they are classified as dangerous drugs. The hallucinogens are psychologically addicting and produce gross mental instability and perception. The nature of the reaction to the drug depends almost entirely upon the user's perception of external stimuli. LSD, Mescaline, and Psilocybin are examples of these drugs. Hydrocarbons (such as paint thinner, antifreeze, glue, and other volatile substances) constitute another group of controlled substances. Though non-narcotic and non-addicting, they produce serious kidney and nervous system damage. Marijuana is classified separately but is an hallucinogen.

DISPOSITION ALTERNATIVES.

1. UCMJ, Article 134 (Clause I and II). The sale, use, possession and transfer of illicit drugs have been historically recognized as violating these clauses of Article 134. However, only the habit-forming narcotic drugs and marijuana have been so recognized. Specifically, the wrongful possession, sale, transfer, use, and introduction into ship or station are prohibited.

2. UCMJ, Article 134 (Clause III). This alternative deals with the prosecution of an accused for violating federal drug control laws. The Federal Comprehensive Drug Abuse Prevention and Control Act of 1970 (84 Stat. 1236) and its Title II called the Controlled Substances Act (21 USC § 801) constitute the federal law regulating dangerous drugs. "Use" of such drugs is not prohibited by the statute, but all forms of distribution are forbidden. The Federal Assimilative Crimes Act (18 USC § 13) can be used as an alternative for prosecuting 'use' cases as well as other conduct not specifically interdicted by federal law. A lawyer should be consulted before proceeding on this theory.

3. UCMJ Article 92. Article 1151, U. S. Navy Regulations is a general regulation prohibiting the introduction, possession, use, sale, or other transfer of marijuana, narcotic, or any controlled substance specified by federal law. Accordingly, any such conduct violates this general order and may be prosecuted under Article 92(1).

PROSECUTION WITH UCMJ, ARTICLE 134 ...GENERAL.

Prosecution of drug offenses under Clauses I and II of Article 134 is, like all other such offenses, limited by historical use. Thus, only habit-forming narcotic drugs and marijuana are recognized as prohibited substances. The prohibited acts relating to these substances are use, possession, sale, transfer, and introduction onto ship or station. Historical use not only limits the offenses recognized by Article 134 but it limits some of the terminology as well. Such is true of drug offenses. The term "sale" in most criminal statutes is very broad and covers almost anyone regardless of how remote he might be from the purchase or how unusual, commercially speaking, the form of the sale might be. For purposes of drug offenses under Article 134 "sale" is limited strictly to its commercial sense so that only the principals to a transaction, and not ones acting in their behalf, can be guilty. A whole host of technical commercial law concepts are possible of application, depending on the specific facts of a case. For this reason it is best to consult a lawyer before using Article 134 in drug cases. One can "sell" without having "possession" so "sale" and "possession" are separate offenses and not lesser included offenses of each other. Likewise "transfer" can occur without a "sale" and so "sale" and "transfer" are separate offenses, not LIOs of each other. "Transfer" means any disposition resulting in a change of possession though transfer of title or ownership is no requisite. The term "use" means smoking, swallowing, injecting, or inhaling. One cannot "use" without "possession" so these two offenses are not separate and "possession" is an LIO of "use". "Possession" means control but not necessarily "exclusive" control.

PROSECUTION WITH UCMJ, ARTICLE 134- - ELEMENTS.

In order to convict the accused for drug abuse under the General Article, Clauses I and II, the evidence must prove beyond reasonable doubt that:

1. The accused wrongfully possessed, used, sold, transferred, or introduced to ship or station, for the purpose of use, transfer, or sale;
2. Marijuana, or a habit-forming narcotic drug; and
3. The accused's conduct was either service discrediting or prejudicial to good order and discipline.

ELEMENTS . . . DISCUSSION

1. Wrongfulness. Not all acts of use, etc. are ipso facto "wrongful." Guilty pleas have been held to be improvident without the military judge inquiring further into an accused's statements that "I only had it to get rid of it" or "I only had it to return it", evincing a lack of mens rea. The law allows a court-martial to infer "wrongfulness" unless the contrary appears in the evidence. Like all other inferences, it is unreliable and not a substitute for complete development of the facts to prove wrongfulness. Care should be taken in all cases to develop evidence that tends to rebut all possible explanations for innocent possession, use, etc.. If used, possessed, etc. pursuant to orders, performance of duty, or prescription, such conduct is not "wrongful."

2. Knowledge. There are three types of knowledge, any one or all of which may become pertinent in drug cases. Ignorance of law (accused doesn't know use, possession, etc. is unlawful) is no defense and need not concern the legal officer. Ignorance of the presence of any drug (accused doesn't know he has any drug) is a defense if the accused's belief is honest. The law allows a court-martial to infer knowledge, unless the evidence shows a contrary indication, from the fact of possession, use, etc.. The inference can be reinforced by independent evidence showing the drug reputation of the place of accused's apprehension, the accused's admission of use, possession, etc. at other, but not too remote, times, or other facts relating to knowledge.

3. Substance is a Prohibited Drug. Proof that the substance used, possessed, etc. was a drug proscribed by UCMJ, Article 134, takes various forms. Testimony of the laboratory technician who analyzed the substance and the laboratory report containing the results of the analysis are the common forms of proof. Testimony by a user of the same substance as the accused on several previous occasions, who is familiar with the appearance, effects, etc. of the substance, and which consists of an opinion as to the identity of the substance is admissible evidence to prove the composition of the substance used by the accused if the opinion is based on the physical and mental reaction of the accused who used it. A contemporaneous declaration as to the nature of the substance by a person using it and who may be presumed to know its nature is admissible to prove the identity of the substance.

4. Prejudicial and Service Discrediting Conduct. This element need not be pleaded but must be proved. In view of the previous discussion of the nature of this element, no further discussion is necessary. Normally, if a court-martial has jurisdiction to try a drug case and the other elements are proved, there is sufficient evidence to prove this element and no positive proof is necessary.

PROSECUTION WITH CONTROLLED SUBSTANCES ACT. The controlled Substance Act (21 USC § 801 et seq) is the federal statute which may, in appropriate cases be used for drug prosecution. A "controlled substance" is a drug or substance which is included in schedules I-V found in section 102(b) of the Act. The schedules are to be updated and revised by the Attorney General

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as provided in sections 201 and 202 of the Act. The criminal acts prohibited by the Act are "simple possession" (section 404), possession with intent to manufacture, distribute or dispense, and manufacture or distribution of a controlled substance (section 401). The terms used are very broad but do not extend to use of the substances. Use is not an offense under the Act. "Sale" is within the meaning of "distribute" and "dispense", but it is necessary only to prove a transfer since whether or not the transaction amounted to a "sale" in a commercial sense [as is required for UCMJ, Article 92(1) and Article 134 (I-II)] is immaterial. In order to use the statute or determine the maximum punishment, one must consult the statute and have access to the Attorney General's schedules since many critical decisions turn on which schedule a given substance is listed at any given time. Under federal law, it is not necessary that the prosecutor negate any exception or exemption benefiting the accused. Perhaps this is a backhand way of recognizing the inference of wrongfulness based on proof of possession, possession with intent, etc.. The use of the Controlled Substances Act should not be attempted without guidance from a lawyer.

PLEADING DRUG OFFENSES (Choice of theory). Drug use cases must be prosecuted as violations of UCMJ, Article 92(1) or Article 134, Clauses I-II.

The Federal Assimilative Crimes Act may be used if an applicable State statute exists, but there is no meaningful advantage in that choice. For sale, possession, transfer, etc. cases, the Controlled Substances Act should only be used if a lawyer is available to assist in the proper analysis of the facts of the case and the determination of applicability. UCMJ, Article 92(1) can be used to cover all of these acts for all forms of drugs which are on the Attorney General's Schedules. UCMJ, Article 134, Clauses I-II cover only the habit forming narcotic drugs and marijuana and should be used to prosecute such cases since a more severe penalty is applicable as compared to Article 92(1).

1. Possession, Sale and Transfer.

a. Habit-forming Narcotic Drugs and Marijuana

- (1) Art. 134, Clauses I-II: MCM, 1965 (Rev.) App. 6C, sample specification #144
- (2) Art. 134, Clause III: all three acts are prohibited by Controlled Substances Act (21 USC 844) if they occur in federal jurisdiction. See a lawyer before proceeding under this theory. It is the easiest to prove.
- (3) Art. 92(1): Acts violate U.S. Navy Regulations, 1973, Article 1151. The principles discussed previously with respect to proceeding under Clauses I-II of Article 134 apply to Article 92(1).

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b. Other Controlled Substances

(1) Art. 92(1): U.S. Navy Regulations, Art. 1151 applies.

(2) Art. 134, Clause III: 21 USC 801 applies.

2. Use.

a. Habit-forming Narcotic Drugs and Marijuana

(1) Art. 134, Clauses I-II: MCM 1969 (Rev.), App. 6C, sample specification #145

(2) Art. 134, Clause III: 21 USC 801 does not apply. The Federal Assimilative Crimes Act (18 USC 13) may be used if an applicable State statute exists. Consult a lawyer before proceeding.

(3) Art. 92(1): U.S. Navy Regulations, Art. 1151 applies.

b. Other Controlled Substances

(1) Art. 134, Clause III: the Controlled Substances Act (21 USC 801) does not apply. Federal Assimilative Crimes Act (18 USC 13) may be used if an applicable State statute exists. Consult a lawyer before proceeding.

(2) Art. 92(1): U.S. Navy Regulations, Art. 1151 applies.

3. Wrongful Introduction to Ship, Station, etc.

a. Art. 134, Clause I-II: see sample specification #145 MCM.

b. Art. 92(1): U.S. Navy Regulations, Art. 1151 applies.

4. Possession of Controlled Substance with Intent to Distribute

Art. 134, Clause III, the Controlled Substances Act (21 USC 841) applies. Consult a lawyer before proceeding on this offense.

5. Possession of Controlled Substance on Vessels and Carriers Entering or Leaving U. S. Ports. Art. 134, Clause III: (21 USC 955) applies.

Consult a lawyer before proceeding on this offense. This conduct may also be prohibited by U.S. Navy Regulations Art. 1151 (UCMJ, Art. 92) if the possession involves a military vessel, carrier, or station "introduction." To the extent an "introduction" to post, ship, station, etc. exists, Art. 134 Clauses I-II may also be used.

6. Possession, Use, etc. As a Continuing Criminal Enterprise. Art. 134, Clause III: (21 USC 848) applies. Consult a lawyer before proceeding on this theory. "Continuing Criminal Enterprise" is carefully defined in the statute.

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As provided in sections 201 and 202 of the Act. The criminal acts prohibited by the Act are "simple possession" (section 404), possession with intent to manufacture, distribute or dispense, and manufacture or distribution of a controlled substance (section 401). The terms used are very broad but do not extend to use of the substances. Use is not an offense under the Act. "Sale" is within the meaning of "distribute" and "dispense", but it is necessary only to prove a transfer since whether or not the transaction amounted to a "sale" in a commercial sense [as is required for UCMJ, Article 92(1) and Article 134 (I-II)] is immaterial. In order to use the statute or determine the maximum punishment, one must consult the statute and have access to the Attorney General's schedules since many critical decisions turn on which schedule a given substance is listed at any given time. Under federal law, it is not necessary that the prosecutor negate any exception or exemption benefiting the accused. Perhaps this is a backhand way of recognizing the inference of wrongfulness based on proof of possession, possession with intent, etc.. The use of the Controlled Substances Act should not be attempted without guidance from a lawyer.

PLEADING DRUG OFFENSES (Choice of theory). Drug use cases must be prosecuted as violations of UCMJ, Article 92(1) or Article 134, Clauses I-II.

The Federal Assimilative Crimes Act may be used if an applicable State statute exists, but there is no meaningful advantage in that choice. For sale, possession, transfer, etc. cases, the Controlled Substances Act should only be used if a lawyer is available to assist in the proper analysis of the facts of the case and the determination of applicability. UCMJ, Article 92(1) can be used to cover all of these acts for all forms of drugs which are on the Attorney General's Schedules. UCMJ, Article 134, Clauses I-II cover only the habit forming narcotic drugs and marijuana and should be used to prosecute such cases since a more severe penalty is applicable as compared to Article 92(1).

1. Possession, Sale and Transfer.

a. Habit-forming Narcotic Drugs and Marijuana

- (1) Art. 134, Clauses I-II: MCM, 1965 (Rev.) App. 6C, sample specification #144
- (2) Art. 134, Clause III: all three acts are prohibited by Controlled Substances Act (21 USC 844) if they occur in federal jurisdiction. See a lawyer before proceeding under this theory. It is the easiest to prove.
- (3) Art. 92(1): Acts violate U.S. Navy Regulations, 1973, Article 1151. The principles discussed previously with respect to proceeding under Clauses I-II of Article 134 apply to Article 92(1).

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b. Other Controlled Substances

(1) Art. 92(1): U.S. Navy Regulations, Art. 1151 applies.

(2) Art. 134, Clause III: 21 USC 801 applies.

2. Use.

a. Habit-forming Narcotic Drugs and Marijuana

(1) Art. 134, Clauses I-II: MCM 1969 (Rev.), App. 6C, sample specification #145

(2) Art. 134, Clause III: 21 USC 801 does not apply. The Federal Assimilative Crimes Act (18 USC 13) may be used if an applicable State statute exists. Consult a lawyer before proceeding.

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3. Wrongful Introduction to Ship, Station, etc.

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b. Art. 92(1): U.S. Navy Regulations, Art. 1151 applies.

4. Possession of Controlled Substance with Intent to Distribute

Art. 134, Clause III, the Controlled Substances Act (21 USC 841) applies. Consult a lawyer before proceeding on this offense.

5. Possession of Controlled Substance on Vessels and Carriers Entering or Leaving U. S. Ports. Art. 134, Clause III: (21 USC 955) applies.

Consult a lawyer before proceeding on this offense. This conduct may also be prohibited by U.S. Navy Regulations Art. 1151 (UCMJ, Art. 92) if the possession involves a military vessel, carrier, or station "introduction." To the extent an "introduction" to post, ship, station, etc. exists, Art. 134 Clauses I-II may also be used.

6. Possession, Use, etc. As a Continuing Criminal Enterprise. Art. 134, Clause III: (21 USC 848) applies. Consult a lawyer before proceeding on this theory. "Continuing Criminal Enterprise" is carefully defined in the statute.

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SECTION THREE
CHAPTER VI

ASSAULTS AND BATTERIES

PART ONE
SIMPLE ASSAULT

GENERAL. An assault (UCMJ, Article 128) is committed when an accused offers or attempts to do bodily harm to another person. Assault is distinguished from battery in that the latter offense consists of the actual infliction of the bodily harm offered or attempted. Assault is accurately described then as an attempted battery. The assault is complete regardless of the consummation of the offer or attempt.

ELEMENTS. In order to convict an accused of this offense, the evidence must establish beyond reasonable doubt that:

1. The accused without justification or excuse,
2. Offered or attempted,
3. With unlawful force or violence,
4. To do bodily harm to another person.

DISCUSSION.

1. The Attempt Type Assault. Simply stated, an attempt type assault is an attempted battery. It consists of the accused's doing an act beyond mere preparation and an intent that the act result in bodily harm to the victim. Thus, when Bunyun swings a railroad tie at Blatz intending to strike Blatz, there is an attempt type assault. If Bunyun only picks up the railroad tie so as to be able to strike Blatz with it there is no assault since the act is only preparatory. The victim need not perceive that he is about to be struck. There must, however, be an apparent ability to strike the victim. If Shifty fires his pistol (maximum range 60 yards) intending to wound Slick who is standing nine miles away, there is no assault since there is no apparent ability to strike Slick. This type of assault is a specific intent offense.

2. The Offer Type Assault. An offer type assault is an unlawful demonstration of violence by an intentional or culpably negligent act or omission which creates in the mind of another a reasonable apprehension that unlawful force will imminently be applied to his person. There need be no specific intent to harm the victim. An intentional act or omission is an act or omission deliberately done. A culpably negligent act or omission is the result of more heedlessness than simple negligence, oversight, or carelessness but involves a "culpable" disregard for the foreseeable consequences of the act or omission to others. A "culpable" state of mind evinces recklessness and gross disregard for the safety of others. Practicing fast draw in a crowded room without first unloading the pistol is an example of gross negligence as is swinging a baseball bat in the middle of a crowd without first checking to see if everyone was out of the way. The more dangerous the act or omission is, or the instrument used is,

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the greater the degree of care required of the actor will be and the more likely the possibility of culpable negligence. More care is required in handling dynamite than a butter knife. The offer type assault also requires a state of mind for the victim. The victim must reasonably apprehend imminent bodily harm. A reasonable apprehension exists if the facts and circumstances known and seen by the victim would lead a reasonable man to believe that unlawful force will at once be applied to his person. The victim need not be "afraid" however. The victim must believe on reasonable grounds that the defendant actually has the present ability to do the harm though the defendant need not actually have that ability. Thus an intentional or culpably negligent act or omission which puts the victim in reasonable fear of harm being applied to his person and perception by the victim of an apparent present ability on the part of the defendant to apply the force to the victim is an offer type assault.

3. Conditional Offers of Violence. An offer to inflict bodily harm upon another if the other does not comply with a demand which the defendant has no right to make of the other is an assault if all other elements of the offense are shown. Shifty points a rifle at Slick, a trespasser, and says "Get out of my house or I'll shoot you". Shifty has committed no assault since he is privileged to order a trespasser out of his house. If the offer to shoot was conditioned on Slick giving Shifty all of the money in his wallet there would be an assault since Shifty has no right to demand Slick's money. If the circumstances of the conditional offer of violence negate intent to do anything there is no assault. Thus: "If you weren't a female imposter, Pimp, I'd give you a real cleavage with this axe." is not an assault even if the defendant was holding an axe. If Pimp is a female imposter then the words negate an intent to harm and there is no reasonable basis for the victim to apprehend harm to his person.

4. Threats. Words or threats without an accompanying act cannot constitute an assault. Since, by definition, an assault is an attempted battery, some overt act, intentional or culpably negligent, is required. A threat of future violence is no assault since there is no intent to presently harm the victim and the victim can't reasonably apprehend "imminent" harm.

5. Pleading. The specification need not indicate whether the assault was the offer or attempt type. It should merely allege that the accused did assault the victim. The specific act constituting the assault must be alleged. For example, "A" did assault "B" by unlawfully striking at him with his fist.

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PART TWO

BATTERY

GENERAL. UCMJ, Article 128 defines a battery as an unlawful application of force or violence to the person of another without justification or excuse. The force can be applied directly by use of hands, feet, teeth, etc., or indirectly by throwing stones, shooting a gun, or pushing one person into another. The touching of clothing, spit landing on one's coat, or urine falling on one's shoes, may be unlawful applications of force. The body of the victim need not be directly touched. When a battery has been committed it is not necessary to indulge in the distinction between an offer and attempt type assault. All that is necessary is to determine whether the battery resulted from an intentional or a culpably negligent act. Proof of battery will support a conviction for assault since by definition an assault is an attempted battery.

ELEMENTS. The evidence must establish beyond reasonable doubt that the accused:

1. Without justification or excuse; and
2. With unlawful force or violence;
3. Did bodily harm to another person.

DISCUSSION.

1. State of mind. A battery is committed if the bodily harm is inflicted either intentionally or through culpable negligence. It is not necessary that the accused intend to inflict any particular type of bodily harm nor that his intent be directed toward any particular person. For example, if Shifty throws a wrench at Slick but hits Sledge by mistake he has committed a battery on Sledge. Suppose Shifty is shooting at targets so that inhabited dwellings are in the line of fire. As a result a person is struck and injured. Through his "culpably negligent" act in target practice Shifty has committed a battery. It was foreseeable that a person might be struck by one of the bullets and the failure to take safety measures evidence a gross, reckless, deliberate and wanton disregard for the safety of others. Simple negligence is not sufficient for the offense of battery.

2. Pleading. The specific act constituting the battery must be alleged, including the specific part of the victim touched. For example, "In that Seaman Jones . . . did unlawfully strike Seaman Smith in the face with his fists." the word "unlawfully" must be alleged before "strike". Merely alleging that the accused did "strike" another is not sufficient, as that word alone does not import criminality. The striking or touching of another is a battery only if it is unlawful.

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PART THREE
AGGRAVATED ASSAULT

GENERAL. An offer or an attempt to strike another committed with a dangerous weapon or a means or force likely to produce grievous bodily harm is described as an aggravated assault in UCMJ, Article 128(b). The aggravating circumstance is the use of the dangerous weapon or other means or force likely to produce grievous bodily harm in the commission of what would otherwise be a simple assault.

It is not necessary for proof of this offense that the victim actually suffered any bodily harm (a battery). However, if a battery does result from use of a dangerous weapon or other means or force likely to produce grievous bodily harm, an offer or attempt type assault does not have to exist. All that is necessary, as in the case of a simple battery, is that the accused acted deliberately, or in a culpably negligent manner which resulted in bodily harm to another.

ELEMENTS. The essential elements of the offense which must be established beyond a reasonable doubt in order to obtain a conviction are that the accused:

1. Without justification or excuse;
2. Attempted, or offered with unlawful force or violence to do, or did bodily harm to another;
3. With a dangerous weapon or other means or force likely to produce grievous bodily harm.

DISCUSSION.

1. Force. This aggravated form of assault includes not only those assaults accomplished by means normally considered to be a "dangerous weapon" but also those accomplished by any means which, according to the manner of use, is potentially dangerous. If the instrumentality used is a weapon, it must be a dangerous weapon in fact. Thus, an unloaded rifle, used as a firearm would not be a dangerous weapon but if used as a bludgeon it might be a means or force likely to produce grievous bodily harm. The belief of the victim and the accused as to the dangerous character of a weapon is not material. For example, an unloaded rifle believed by victim and accused to be loaded is pointed at the victim. Despite the belief of each the rifle is not a dangerous weapon. However, there may be, a simple assault since there was an attempt or offer to do bodily harm. When the natural and probable consequence of a particular use of any means of force would be death or grievous bodily harm, it may be said that the means or force is "likely" to produce that result. A bottle, rock, boiling water, drug, beer opener or a fist or foot for example, could be used in a manner likely to produce death or grievous bodily harm. Whether the instrumentality was so used is a question of fact for the court to determine in light of the facts of the particular case. Thus, the nature of the means or force, manner of use, parts of the body to which directed, and, where applicable, the nature and extent of injury are important factors to be considered.

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2. Grievous Bodily Harm. This means serious bodily injury, such as fractured or dislocated bones, deep cuts, torn members of the body and serious damage to internal organs. It does not include minor injuries such as black eye or bloody nose.

3. Pleading. If the instrumentality used is commonly thought of as a "dangerous weapon", and it was used in the normal manner, use that allegation. For example, "Smith did assault Jones by striking him with a dangerous weapon, to wit: a knife . Otherwise, use the allegation "means of force likely to produce grievous bodily harm." For example, "Smith did assault Jones by striking at him with a means of force likely to produce grievous bodily harm, to wit: a baseball bat."

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PART FOUR

INTENTIONAL INFLICTION OF GRIEVOUS BODILY HARM

GENERAL. This form of aggravated assault in violation of Article 128(b) is committed where grievous bodily harm has in fact been inflicted upon another person. In other words, it consists of an aggravated battery in that the bodily harm is grievous and purposefully inflicted.

ELEMENTS. The essential elements of the offense are that the accused:

1. Without justification or excuse,
2. With unlawful force and violence inflicted grievous bodily harm upon another, and
3. That such grievous bodily harm was intentionally inflicted.

DISCUSSION:

1. Intent. This is a specific intent offense and no form of negligence for the mental element will suffice. To obtain a conviction the evidence must establish beyond a reasonable doubt that the accused's act causing the grievous bodily harm was done with the specific intent of accomplishing that result. The intent can be proved by direct (for example, an admission) or circumstantial evidence. When grievous bodily harm has been inflicted by means of intentionally using force in a manner likely to achieve that result, it may be inferred grievous bodily harm was intended. In order to warrant the inference it must appear that such harm was a natural and probable consequence of the intentional action. For example, A strikes B on the jaw, breaking it. It may not be inferred that A specifically intended to inflict grievous bodily harm since a broken jaw is not a likely result of an ordinary fist fight. Such an injury is foreseeable but not probable. But suppose C and D held B while A delivered a series of blows to B's head with a tire iron and breaks B's jaw. The specific intent to inflict grievous bodily harm may be inferred under those circumstances. Repeatedly striking another under these circumstances is clearly likely and probable to result in grievous bodily harm.

2. Lesser Included Offenses. Possible lesser included offenses include assault with a dangerous weapon or means of force likely to produce grievous bodily harm, assault consummated by a battery and simple assault.

3. Pleading. The allegation should describe specifically the nature of the grievous bodily harm and the manner in which it was inflicted. For example, "In that Seaman A did commit an assault upon B by striking him on the head with a club and did thereby intentionally inflict grievous bodily harm upon him, to wit: a fractured skull."

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PART FIVE

INCREASED PUNISHMENT

GENERAL. An increased maximum punishment is authorized under Article 128, UCMJ, where the victim is a commissioned officer, warrant officer, noncommissioned officer or petty officer. The status of the victim must be pleaded and proved to authorize the greater maximum punishment.

ELEMENTS. The prosecution must not only establish beyond a reasonable doubt that the accused assaulted the victim as alleged, but also that:

1. The victim of the assault was a commissioned officer, warrant officer, noncommissioned officer or petty officer, and
2. The accused had actual knowledge that the victim was a commissioned officer, warrant officer, noncommissioned officer or petty officer.

DISCUSSION.

1. Officer Victim. It is not necessary that the victim be superior in rank or command to the accused or that he be in the execution of his office at the time of the assault. For example, Colonel Courageous, U.S. Army, strikes Ensign Easy, U.S. Navy, in the face with his fists. If the prosecution can establish that the Colonel knew that Easy was a commissioned officer, a greater maximum punishment is authorized for the offense. If not, then the Colonel can still be found guilty of a simple battery. This offense is a lesser included offense of Article 90 (Assault upon a superior warrant officer, noncommissioned officer or petty officer in the execution of his office) to be discussed in Part Six.

2. Other Victims. A greater maximum punishment is also authorized if the prosecution can establish that the accused knew that the person assaulted was a sentinel or lookout in the execution of his duty or was a person who then had, and was in the execution of, air police, military police, shore patrol or civil law enforcement duties. An assault consummated by a battery upon a child under sixteen years of age authorizes a greater maximum punishment. The prosecution need not establish that the accused knew the victim was under the age of sixteen. This offense is similar to the offense of statutory rape, and lack of knowledge of the victim's age is no defense.

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PART SIX

ASSAULTS UPON SUPERIORS

GENERAL. Article 90(1) makes punishable the striking, the drawing or lifting up of any weapon or offering of any violence against a superior commissioned officer in the execution of his office. Article 91(1) makes punishable the striking or assaulting of a superior warrant officer, noncommissioned officer or petty officer in the execution of his office. In effect, these offenses are simply assaults aggravated by the status of the victim (commissioned officer, warrant officer, noncommissioned officer, and petty officer) and the relationship between the accused and the victim (the victim is the superior of the accused).

ELEMENTS. The essential elements of these offenses are that:

1. The victim was the superior of the accused at the time,
2. The accused knew the victim was his superior,
3. The accused assaulted or struck his victim,
4. The victim was in the execution of his office at the time.

DISCUSSION.

1. Superior. The meanings of the terms superior commissioned officer and superior warrant officer, noncommissioned officer or petty officer are the same as previously discussed in connection with the offenses of disobedience of superiors and disrespect to superiors. See Chapter I.

2. Knowledge. As in the offenses of disrespect to and disobedience of a superior commissioned officer, warrant officer, noncommissioned officer and petty officer, the accused must have had actual knowledge, at the time of the offense, that the victim was his superior. Such knowledge must be pleaded and proved since it is an essential element of the offenses.

3. The Act. Although the texts of Articles 90(1) and 91(1) differ from that of Article 128 (Assaults) it is an assault or a battery that must be committed against the superior.

4. Execution of Office. This offense can be committed only if the superior was in the execution of his office at the time of the assault or battery. A superior "is in the execution of his office" when engaged in any act or service required or authorized to be done by him by statute, regulation, the order of a superior or military usage. Generally, if the superior has a duty to maintain discipline over another at the time, acts done for this purpose would be in the execution of the office. For example, an Ensign walking down Thames Street sees two sailors about to get into a fight. He identifies himself and steps between them to break it up. One of them punches the Ensign in the nose. The sailor should be charged with

assault upon a superior commissioned officer ~~is~~ the execution of his office since the Ensign was in the execution of his office at the time.

5. Lesser Included Offenses. If it cannot be proved that the victim was "in the execution of his office" or that he was a "superior" commissioned officer, warrant officer, noncommissioned officer or petty officer of the accused at the time of the incident, then the accused may still be found guilty of assault or battery upon a commissioned officer, warrant officer, noncommissioned officer, or petty officer in violation of Article 128. If knowledge by the accused that the victim is a commissioned officer, warrant officer, noncommissioned officer, or petty officer is not proved, then he may still be found guilty of simple assault or battery in violation of Article 128.

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CHAPTER VI
PART SEVEN

COMMON DEFENSES TO ASSAULTS

GENERAL. The affirmative defenses to assault apply generally to all Article 128 offenses and assaults on superiors in violation of Articles 90(1) and 91(1). The affirmative defenses are based on the concept of legal justification, excuse, and consent. What follows is a brief and very general discussion of the nature of some of the more common defenses.

LEGAL JUSTIFICATION. An act of force or violence committed in the proper performance of a legal duty is justified. For example; shooting an enemy in battle; physical contact during a lawful apprehension; or the acts of a guard in subduing a prisoner. However, legal justification is a defense only to that degree of force necessary to carry out the legal duty. If any force in excess of that required is used, then the excessive force may constitute a battery inasmuch as the person performing the duty becomes an aggressor.

LEGAL EXCUSE. Acts of force are legally excused if done through accident, in lawful self-defense, under coercion or duress, or by consent of the victim.

1. Self-Defense. One who is free from fault is privileged to use reasonable force to defend himself against immediate bodily harm threatened by the unlawful act of another. One who intentionally provokes an altercation or who willingly engages in mutual combat is not free from fault and forfeits the right of self-defense, unless there has been an effective withdrawal. The force to which one may resort in self-defense is that which he believes, on reasonable grounds, to be necessary under the circumstances to prevent impending injury. The theory of self-defense is protection, and if excessive force is used against an assailant, the defender becomes the aggressor. However, this principle does not restrict one to utilizing the precise force threatened by the assailant, i.e., the degree of force permitted to the defender need not be identical with the means employed by the assailant. The phrase that "a person may meet force with a like degree of force" is an inaccurate statement of the principle of self-defense since it is not complete but refers to degree of force in reasonable balance under the circumstances. For example, Seaman 'A', the ship's karate expert, approaches his shipmate 'B', and says, "B, I'm going to beat the devil out of you." 'A' starts to strike 'B' with his fist; 'B' pulls out a penknife and stabs 'A'. 'B' may have the defense of self-defense to a charge of aggravated assault. He is not necessarily limited to using his fists to defend himself. Generally, he may use a reasonable amount of force to protect himself in view of the surrounding circumstances. The question, therefore, of whether 'B' acted properly in self-defense is one for the trier of fact (the commanding officer at NJP or the members or judge of a court-martial).

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2. Summary. The rules regarding self defense can be summarized as follows:

a. If the evidence shows that the defender deliberately intended to inflict grievous bodily harm or death upon the attacker, then to establish self-defense the evidence would also have to show that a reasonable and prudent man under the same circumstances would believe that an attack upon him was imminent and that death or grievous bodily harm would result from the attack (an honest and reasonable belief of great danger). This is an objective standard so emotional instability, intoxication, etc. of the defender are immaterial (though detached reflection under pressure is not required). The evidence must also show that the defender honestly believed that the force he used was necessary to protect himself from death or grievous bodily harm. This part of the standard is subjective and emotional instability of defender, intoxication, relative sizes of combatants, age, experience, etc. are all relevant. This aspect of the standard looks through the eyes of the defender to know what he knew, see what he saw, and feel what he felt under the circumstances.

b. Where the evidence shows that the defender did not fear death or grievous bodily harm, the standard for judging the validity of self defense changes. If the defender honestly and reasonably believes that an attacker will imminently inflict bodily harm upon him (objective standard) and he honestly believes that the force he used was necessary to repel the attacker (subjective standard), and the force used was less than that force which reasonably would be expected to produce death or grievous bodily harm (an objective standard), then a valid self-defense ~~claim~~ exists.

c. A defender may stand his ground against an attacker and need not retreat. Retreat is a factor to be considered along with all other facts in determining whether the defender lawfully used dangerous force to repel an attack.

3. Duress. This defense is available to any crime less serious than murder, and is founded on a lack of voluntariness necessary for an act to be characterized as criminal. For example, the duress or coercion must be of such a degree as to cause a reasonable, well-grounded apprehension on the part of the accused that if he did not perform the act, he, or a member of his immediate family, would be immediately killed or be made to suffer serious bodily harm.

4. Consent. The lawful consent by the victim of an alleged battery is a good defense if the consent is freely and knowingly given. However, no one can lawfully consent to an act involving a breach of the peace. For example, Sally ran out of the house chased by Rollo who, upon catching her on the street, administered to her a severe beating. At Rollo's trial, she testified she consented to the beating, stating that she enjoyed the physical abuse. Her testimony does not establish a defense, since one cannot consent to a breach of the peace.

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PART EIGHT

BREACH OF THE PEACE

GENERAL. UCMJ, Article 116 makes punishable any serviceman who causes or participates in any breach of the peace. Breach of the peace is similar in many respects to riot, the latter being more serious. A breach of the peace is an unlawful disturbance of the peace by overt violent or turbulent conduct. The acts involved are disruptive of public calm and quiet or the peace and good order to which the community is entitled.

ELEMENTS. In order to convict an accused of this offense the evidence must establish beyond reasonable doubt that:

1. The accused caused or participated in a certain act of a violent or turbulent nature and
2. The peace of the community was thereby unlawfully disturbed.

DISCUSSION.

1. Violent or turbulent. The term "violent" refers to such conduct as breaking bottles, discharging firearms, or mutual affrays in public places. Violent acts are therefore physical acts of disturbance. The term "turbulent" refers to the inducing or inciting to violence or unrest and is usually associated with vile or abusive words toward another or to others in a public place.

2. Community. This term includes a military organization, post, camp, ship, or station and may also include a confinement facility.

3. Unlawfully. The term "unlawfully" means without justification or excuse. Thus one, who in self-defense of an assault fights the attacker so as to disturb the peace, is excused from criminal punishability. Two combatants mutually engaging in a fight which disturbs the peace have no such defense.

DISORDERLY CONDUCT. This Article 134 offense is discussed at this point because it closely resembles breach of the peace and is almost always a lesser included offense. The elements of this offense are:

1. The Accused Was Disorderly. Disorderly conduct is conduct which affects the peace and quiet of persons who witness it and who may be disturbed or provoked to resentment by it. Thus not only are loud noises covered but conduct such as window peeking are contemplated as well.

2. The conduct was service discrediting or prejudicial to good order and discipline.

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PART NINE

RIOT

GENERAL. The offense of riot is proscribed by UCMJ, Article 116 and closely resembles breach of the peace. The basic difference between the two crimes is that riot contemplates a concert of action by three or more persons and a more serious level of public disturbance.

ELEMENTS. In order to convict an accused of this offense the evidence must show beyond reasonable doubt that:

1. The accused was a member of an assemblage of three or more persons;
2. The accused and at least two others assembled in furtherance of a common purpose to execute an enterprise by concerted action against all opposition;
3. The assemblage or some of its members committed a tumultuous disturbance of the peace; and
4. The disturbance caused or was calculated to cause public alarm or terror.

DISCUSSION. No fewer than three persons can commit a riot. If less than three are involved only a breach of the peace of disorderly conduct is possible. "Common purpose" means an intention, object, plan, or project shared by the assemblage. The purpose need not have been made prior to the assembly but can exist when the assemblage actually begins to execute the common purpose after the assemblage was formed. "Public alarm or terror" is a phrase of somewhat vague meaning. The disturbance apparently must be of such magnitude that the community in general would have cause to be concerned for the safety of its persons and property.

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CHAPTER VI
PART TEN

PROVOKING WORDS AND GESTURES

GENERAL. UCMJ, Article 117 proscribes the use of provoking or reproachful words or gestures toward another subject to the Code. The term "provoking" means to incite, irritate, or enrage another. "Reproachful" means a censuring, blaming, discrediting, or disgracing of one's life or character. The purpose of the statute is not to regulate the content of speech per se but rather to deter breaches of peace that experience teaches will likely result from the use of such words or gestures.

ELEMENTS. In order to convict an accused of this offense the evidence must prove beyond reasonable doubt that:

1. The accused wrongfully used words or gestures toward another subject to the Code and
2. The words or gestures were provoking or reproachful.

DISCUSSION.

1. Toward. The term "toward" means in the presence of and directed to a certain person. Words must be heard by the victim but it is possible that a gesture is punishable even though the victim didn't see it if the gesture was made in his "presence".

2. Words or Gestures. The words or gestures must be such as tend to induce unlawful breaches of the peace. It is not necessary that the victim actually be so influenced. If any witness who perceived the words or gestures would tend to be induced to breach the peace it is sufficient. Reprimands, censures, and reproofs used to further the training, efficiency, or discipline of the military organization are not punishable.

3. Intent/Knowledge. This offense is a general intent offense and does not require that the accused specifically intend to be reproachful or provoking. It is not clear whether the accused must know that the victim is subject to the Code inasmuch as there is appellate authority on both sides of the question. The best view seems to be that such knowledge is not required for this offense.

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CHAPTER VI

PART ELEVEN
COMMUNICATING A THREAT

GENERAL. Communicating a threat is misconduct covered by Article 134 and it often is indiscernable in any meaningful sense from provoking speech. A "threat" is an avowed present determination or intent to injure the person, property, or reputation of another presently or in the future.

ELEMENTS. The elements of this offense are as follows:

1. The accused used certain language;
2. The language constituted a threat;
3. The communication was made known to the person threatened or a third person;
4. The communication was wrongful and without justification or excuse; and
5. The conduct was service discrediting or prejudicial to good order and discipline.

DISCUSSION.

1. Threat. A conditional threat is an offense unless the condition negates the determination to injure. For example, "If you let me out of jail I'll bust your head." is a threat conditioned on release from jail which is not reasonably likely to occur. The condition negates the intent to injure. A conditional threat is an offense unless the one issuing the threat has the right to enforce the condition. For example, "Get out of my house or I'll bust your head." is a conditional threat which condition the issuer of the threat has a right to impose. He thus does not commit this offense. A statement made in jest is not a threat but the opinion of the victim is not a controlling factor in determining whether a threat was in fact made in jest.

2. Communication. It is not necessary that the person to whom the threat relates actually knows of the threat. It is sufficient if the threat is communicated to someone.

3. Intent. It is not necessary to prove that the accused actually had the specific intent to carry out the threat. This offense is a general intent offense which is complete when the threat is uttered or communicated.

SECTION THREE
CHAPTER VII
BREACHES OF RESTRAINT
PART ONE
RESISTING APPREHENSION

GENERAL. "Apprehension" as used in UCMJ, Article 95 is defined as the taking of a person into custody. It therefore, is the military equivalent of the civilian term "arrest". Whether or not the process of a apprehension has begun in a given case is a question of fact.

ELEMENTS. In order to convict an accused of this offense the evidence must prove beyond a reasonable doubt that:

1. Someone attempted to take the accused into custody.
2. The person attempting the apprehension was authorized to apprehend the accused, and
3. The accused resisted.

DISCUSSION.

1. Apprehension. An attempt to apprehend is an overt effort involving clear notice to the defendant that he is being placed in custody. Legally accurate terminology is not necessary so long as the intent of the apprehender is clear.

2. Authority. If under a reasonable belief that a crime has been committed by the accused an officer, warrant officer, noncommissioned officer or petty officer, and Military Policeman, personnel assigned criminal investigation duties and guards in the execution of their duties are authorized to apprehend the accused. As a policy matter officer and warrant officers can be apprehended by enlisted military policeman or one having other such duties if pursuant to a specific order of a commissioned officer, or to prevent disgrace to the service, or to prevent a serious crime, or to prevent the escape of one who has committed a serious crime. An unauthorized apprehension is a violation of UCMJ, Article 97.

3. Resistance. The resistance offered must be physical. Words alone do not constitute resistance.

4. Knowledge. Knowledge by the accused that he is being taken into custody is implied in the first element of this offense (clear notice requirement). There is some doubt as to whether the evidence must show that the accused knew the apprehender had authority to act. This kind of knowledge involves (1) knowledge of the apprehender's status which gives rise to the power, (2) knowledge of the law authorizing apprehension and (3) knowledge of the existence of reasonable cause to apprehend. Though by no means certain it is doubtful that this type of knowledge need be proved. If the thrust of Article 95 is to prevent violence from occurring during apprehension and to discourage resistance to each apprehension, then knowledge, other than a realization of the intent to apprehend (notice), would seem unnecessary. 373

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PART TWO

ESCAPE FROM CUSTODY

GENERAL. Custody is the restraint of free movement imposed by apprehension. Once the accused submits to apprehension he is in the status of "custody" and he no longer has freedom of movement. The status of custody remains until changed.

ELEMENTS. In order to convict the accused of this UCMJ Article 95 offense the evidence must prove beyond a reasonable doubt that:

1. The accused was duly taken into custody, and
2. The accused freed himself from the status of custody before being freed by proper authority.

DISCUSSION.

1. Duly Taken Into Custody. This phraseology means that the status of custody resulted from lawful apprehension.

2. Freed Himself From Custody. The escape occurs when the accused frees himself before properly authorized. Normally the Provost Marshal, Commanding Officer, or apprehending party has authority to free the accused but a guard (chaser) assigned by the apprehending person to watch the accused does not. Any casting off of custodial restraints is sufficient so long as pursuit is, at least temporarily, shaken off. The biggest difficulty in analyzing escape cases is deciding where escape begins and attempted escape ends. The problem turns very closely on the facts, so all facts must be thoroughly developed.

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ESCAPE FROM CONFINEMENT

GENERAL. Confinement, as contemplated by UCMJ, Article 95, is the physical restraint of the person. It is also a status which results from an order into and an imposition of the status upon the defendant. The restraint may be fence, bars, walls, or guards. A guard must have the duty to prevent escape and the physical means, if only his presence, capable of and available to oppose escape.

ELEMENTS. In order to convict the accused to escape from confinement the evidence must establish beyond reasonable doubt that:

1. The accused was lawfully placed in confinement and
2. The accused freed himself before being released by proper authority.

DISCUSSION.

1. Lawful Confinement. An enlisted man may be properly confined by order of any commissioned officer (written or oral) and the order of any commissioned officer or petty officer who is authorized to confine by the commanding officer. Officers, civilians, and warrant officers can be confined only by order of the commanding officer and no delegation of this authority is allowed. Pre-trial confinement may be imposed only upon a reasonable belief that it is necessary to insure the accused's presence at trial or to protect society because of the seriousness of the crime or the dangerous character of the accused.

2. Freed Self. This element involves the casting off of the restraint, and, at least momentarily, shaking off pursuit.

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CHAPTER VII

PART FOUR

BREAKING ARREST

GENERAL. "Arrest" (UCMJ, Art. 95) is the moral, as opposed to physical, restraint of a person not imposed as punishment but as pretrial restraint. It is the status imposed by an order directing the person to remain within specified and narrow limits. The order imposes a duty upon the person to remain within those limits but no physical restraint is necessary. A person so restrained cannot be required to perform military duties and he cannot command, bear arms, stand guard duty, etc.. The status terminates when the original order is countermanded or when the person is given an order by a superior inconsistent with the status.

ELEMENTS. In order to convict the accused of this offense the evidence must establish beyond reasonable doubt that:

1. The accused was lawfully placed in arrest, and
2. That the accused went beyond the limits of arrest without proper authority.

DISCUSSION. The elements of this offense are relatively uncomplicated. Care must be taken, though, not to confuse "going beyond limits" with a failure to sign a log book while in the status. If a person in arrest is required to sign a log book at various times during the period of restraint his failure to do so is not breaking arrest. In order to constitute this offense the person restrained must physically leave the geographical limits of the arrest. For example, one who is ordered into arrest and to remain within Building #117 breaks arrest when he leaves that building and goes to the base theater. Arrest is lawfully imposed upon enlisted men by order of any commissioned officer or by order of anyone authorized by the commanding officer. An officer, warrant officer, or civilian can be ordered into arrest only by his commanding officer.

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PART FIVE

BREACH OF ARREST -IN - QUARTERS

GENERAL. Breach of arrest-in-quarters (UCMJ, Art. 95) is a punishment imposed only upon an officer pursuant to UCMJ, Art. 15. It cannot lawfully exist under any other circumstances. In other respects it is similar to Breaking Arrest.

ELEMENTS. In order to convict the accused of this offense the evidence must prove beyond reasonable doubt that:

1. The accused was lawfully placed in a status of arrest-in-quarters, and
2. The accused went beyond the limits of arrest without proper authority.

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CHAPTER VII

PART SIX

BREAKING RESTRICTION

GENERAL. Breaking Restriction is an offense recognized under UCMJ, Article 134. Restriction is a status similar to arrest but while in such a status the accused can perform military duties. Normally, the limits of restraint are more lenient for the restriction status than for arrest. Restriction is imposed as pretrial restraint or punishment resulting from court-martial or non-judicial punishment. Restriction can also lawfully be imposed administratively to enforce medical quarantine or to accomplish other necessary objectives. One may not be "restricted", however, solely to prevent him from committing a crime it is believed he might otherwise commit. An officer empowered to order arrest is authorized to order restriction.

ELEMENTS. In order to convict the accused of this offense, the evidence must establish beyond reasonable doubt that:

1. The accused was lawfully restricted to certain limits by proper authority,
2. The accused knew of the status and its limits,
3. The accused went beyond the physical limits of his restriction without proper authority, and
4. The conduct was prejudicial to good order and discipline or was service discrediting.

DISCUSSION. No person may lawfully be restricted without reasonable cause. When imposed as punishment, no problem is encountered. In the pretrial restraint setting, the same considerations required to determine the necessity for confinement are required to be utilized in evaluating the necessity for restriction -- only the degree of restraint is different. Restrictions are usually imposed by a written order which requires the accused to sign a log at periodic intervals of from one to several hours each day. The failure to sign the log does not constitute breaking restriction though such failure may be an order violation under UCMJ, Article 92. As is true of arrest, evidence must show that the accused physically went beyond the geographical boundaries of his restriction limits in order to constitute this offense.

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SECTION THREE
CHAPTER VIII

DRUNKENNESS AND MISBEHAVIOR OF SENTINELS

PART ONE

DRUNK ON DUTY

GENERAL. UCMJ, Article 112, makes punishable any serviceman, other than a sentinel or lookout, who is found drunk on duty. Sentinels and lookouts are covered by UCMJ, Article 113 and are not subject to prosecution under Article 112.

ELEMENTS. In order to convict the accused under Article 112, the evidence must prove beyond reasonable doubt that:

1. The accused was on duty; and
2. He was found drunk on that duty.

DISCUSSION. The term "duty" includes all duty /except sentinel or lookout/, whether routine or detail, or in garrison, at a station, or in the field. "Duty" includes standby duties, such as for flight crews, guard duty, etc., but does not include liberty. As a general rule, duty includes every duty which an officer or enlisted man may legally be required to perform. A commanding officer of a ship is constantly on duty while aboard the ship. When exercising command, the commanding officer of a post, station, or other command or detachment in the field is constantly on duty. In order to commit this offense, the "duty" must first be assumed. An affirmative act to undertake the responsibility is required. Relieving someone formally or informally, or doing other acts evincing the assumption of responsibility, is an "assumption" of duty. The duty status is terminated by relief (formal or informal), dismissal, expiration of time, or abandonment of the duty. The fact of drunkenness may be proved by testimony of a witness that the accused staggered, had red eyeballs, talked with slurred speech, did not recognize friends, smelled of alcohol, etc. The opinion of a witness who has seen drunkenness several times previously can also be utilized, if such opinion is based on observed facts, staggering, smell of breath, etc. Testimony of an expert, such as a physician, who observed the accused's condition and the testimony of a laboratory analyst concerning the results of any medical tests can be used at trial. The drunkenness involved, however, must be voluntary. Voluntary drunkenness may be inferred from the existence of the condition unless there is evidence to suggest drunkenness was involuntary. The substance causing the condition need not be consumed on duty, but the condition must exist while the accused is on duty.

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CHAPTER VIII

PART TWO

INCAPACITATION FOR DUTY

GENERAL. While the offense of drunk on duty (UCMJ, Art. 112) addresses itself to misconduct while one has assumed duty, incapacitation for duty through prior indulgence in liquor (UCMJ, Art. 134) is historically recognized misconduct relating to one's inability to assume assigned duties because of drunkenness.

ELEMENTS. In order to convict an accused of this offense the evidence must establish beyond reasonable doubt that:

1. The accused had certain duties assigned to him;
2. The accused knew of such duties;
3. The accused was incapacitated for the proper performance of those duties;
4. Such incapacitation was the result of prior indulgence in intoxicating liquor; and
5. The conduct was service discrediting or prejudicial to good order and discipline.

DISCUSSION.

1. Incapacitation. The term "incapacitation" as used for this offense means to render unfit or unable to perform properly. Incapacitation is therefore a broad term describing a condition which may be far less than staggering drunk. Normally, if the accused is drunk at the time his duty is to commence, he is unfit to perform (incapacitated) even though he may physically be able to accomplish the assigned tasks. The accused may be incapacitated even though at the time his duty is to be assumed he is sober if because of prior indulgence he is sick, has a heavy hangover, etc..

2. Drunkenness. This term has the same meaning for this offense as it did for drunk on duty. One must watch the interplay of drunk on duty and incapacitation. For example, if the accused requests relief from impending, but not assumed duties because of indulgence in liquor he violates Art. 134 (incapacitation) and not Art. 112 (drunk on duty). Likewise, if the person posting the accused refuses to post him because of such a condition the defendant violates Art. 134 (incapacitation) and not Art. 112 (drunk on duty). In order to violate Art. 112 the accused must have assumed his duty.

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DRUNK ON STATION, SHIP, OR IN CAMP

GENERAL. This offense is also covered by UCMJ, Art. 134 and is normally a lesser included offense of drunk on duty. It is a common offense though seldom used in relation to its incidence.

ELEMENTS. In order to convict the defendant of this offense the evidence must establish beyond reasonable doubt that:

1. The accused was on station, ship, in command, in quarters, or in camp;
2. The accused was drunk and;
3. The conduct was service discrediting or prejudicial to good order and discipline.

DISCUSSION. The gravamen of this offense is being drunk while voluntarily on station, ship, in command, in quarters, or in camp. If one who is drunk is brought aboard involuntarily he does not commit this offense. Drunkenness has the same meaning for this offense as for the other drunkenness offenses.

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PART FOUR
DRUNK OR RECKLESS DRIVING

GENERAL. UCMJ, Article 111 makes punishable any serviceman who operates any vehicle while drunk or in a reckless or wanton manner. If physical injury results from such conduct, and such injury is pleaded and proved, the maximum permissible punishment is increased.

ELEMENTS. In order to convict the accused of this offense, the evidence must prove beyond reasonable doubt that:

1. The accused was operating a vehicle;
2. The accused was drunk or the accused was operating the vehicle in a reckless or wanton manner.

DISCUSSION.

1. Operating a Vehicle. The term "vehicle" includes all forms of wheeled land transportation whether or not motorized or passenger carrying. The term "operating" includes guiding the vehicle while in motion, setting the motive power in action, or the manipulation of its controls so as to cause the vehicle to move.

2. Drunk, Reckless, Wanton. The term "reckless" means a culpable disregard of the foreseeable consequences to others. It is more than simple negligence and is of such a heedless nature that the occupants or others are in actual or imminent danger. The term "wanton" includes the notion of recklessness but is an even greater heedlessness which borders on deliberateness. "Wantonness" involves an utter disregard of the probable consequences of operating the vehicle in the manner exhibited. Drunk driving alone is not necessarily reckless or wanton driving. Drunkenness is, however, evidence which, along with other evidence, may prove recklessness or wantonness. Thus a drunk driver who drives his car down the highway twenty miles per hour over the posted limit, weaving from one side of the road to the other, and forcing cars off the road, is a reckless driver. A drunk driver who drives down a narrow, crooked street at ninety miles per hour, driving all over the road and sidewalks, running all stop lights, and running through vegetable stands, cars, and people is operating his car in a "wanton" manner.

3. Personal Injury. If pleaded and proved, a personal injury directly and immediately caused by the operation of the vehicle raises the maximum permissible punishment for either of the three offenses described in Article 111. It is believed that the injured person must be someone other than the driver, though this is not certain.

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CHAPTER VIII

PART FIVE

MISBEHAVIOR OF A SENTINEL

GENERAL. UCMJ, Article 113 punishes misconduct by sentinels or lookouts involving drunkenness on post, sleeping on post, and leaving post before a proper relief. Though other offenses limit in general these forms of misconduct, the position of the sentinel or lookout is deemed sensitive enough to warrant a separate offense. A sentinel or lookout is an observer who has a primary mission to maintain constant vigilance or alertness and a secondary mission to give warning. Thus, prison guards, combat listening posts, fire watches, and the like, while on duty, are sentinels or lookouts. The nature of these duties are indicative of the reasons why their misbehavior is deemed more serious than the same misconduct by one not having such duties.

ELEMENTS. In order to convict the accused of this offense, the evidence must establish beyond reasonable doubt that:

1. The accused was posted as a sentinel or lookout, and
2. The accused was found drunk or sleeping on post or he left his post before being regularly relieved.

DISCUSSION.

1. Post. A "post" is the area where the sentinel is required to be for the proper performance of his duties. It is not an imaginary straight line but includes such surrounding area as orders or circumstances make necessary for the proper performance of the assigned duties. One is "on post" if given an order to go on post as a sentinel and he does so, or by being formally or informally "posted." The posting need not be done in the regular manner prescribed by applicable orders. It is sufficient if one takes his post in accordance with applicable instruction whether, or not formally given.

2. Sleep. "Sleep" is defined as a condition of insentience sufficient to impair the full exercise of the mental and physical facilities. It is a condition beyond a mere dulling of perception. Proof is almost always circumstantial, e.g., the accused did not respond to questions, was in a reclining position, did not respond to shaking, and was heard to snore. Sleeping on post is commonly called a "general intent" offense; thus, negligence of the defendant is a sufficient state of mind to support conviction. Physical inability to remain awake caused by accident (not the accused's fault), disease, or by the performance of a rigorous and protracted schedule of duties without a reasonable opportunity for sleep is a defense.

3. Drunk. The meaning of this term has been previously discussed. Sentinels cannot be convicted under UCMJ, Article 112 (drunk on duty) but only under Article 113.

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4. Leaving Post Before Relief. The term "leave" as used for this offense means that his ability to perform the duty for which he was posted is impaired. Exact distance depends upon the circumstances. For example, a distance of fifty feet for a combat listening post or a few inches for a radar observer may constitute "leaving" post. "Regular relief", as used in the second element, means: on sight relief by one authorized to relieve the accused; the expiration of the period of watch with orders permitting the accused to leave the post; on relief by superior competent authority.

LOITERING ON POST. This is a lesser offense of UCMJ, Article 113, and is covered by Article 134. Its elements are the same as those of Article 113 except the act is sitting or loitering. "Sitting" has its normal meaning. "Loitering" means sauntering, idling around, lingering, etc., evincing a general failure to give complete attention to duty.

SECTION THREE
CHAPTER IX

CRIMES AGAINST PROPERTY

PART ONE
LARCENY

ELEMENTS. In order to convict an accused of larceny (UCMJ, Article 121), the evidence must prove beyond reasonable doubt that:

1. The accused wrongfully took, obtained, or withheld property;
2. The property belonged to or was in the possession of one having a greater right to it than the accused;
3. The property had some value; and
4. The accused intended to permanently deprive or defraud another of the use and benefit of the property, or to appropriate it to his own use or the use of any person other than the true owner.

DISCUSSION - Wrongful taking, obtaining, or withholding.

1. Wrongfulness. The taking, obtaining, etc. must be wrongful. Wrongfulness normally exists when the property is taken, etc. without the lawful consent of the owner. Property obtained or taken pursuant to law or lawful regulation is not "wrongfully" taken even though the owner may not consent (e.g., police seize lawfully evidence of a crime). A negligent taking, etc. is not "wrongful" for purposes of larceny.

2. Taking. The term "taking" for purposes of UCMJ, Article 121, requires an asportation and trespass, i.e., the thief must exercise control of the property and he must remove the property so as to defeat the owner's control of the property. Thus, a thief who moves a radio from the middle of the store shelf to the end of the shelf preparatory to sliding it off has exercised dominion (control) over the radio, but there is not yet a larceny since there has been no asportation (removal). If the thief then slides the radio off the shelf and starts for the door, only to find the radio chained to the shelf, he has exercised dominion (control) but there has been no asportation since the property has not been removed so as to defeat the owner's control (it is chained to the shelf). If the thief takes the radio, cuts the chain, and walks out of the store, he has exercised dominion and there is asportation so as to amount to a wrongful taking. Thus the statement in MCM 1969 (Rev.), para. 200(a), that "any movement or exercise of dominion by any means is sufficient" is not an accurate statement. Normally property missing under unexplained circumstances can be inferred to have been "taken."

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3. Obtaining. Wrongful obtaining is larceny by false pretenses. This type of larceny requires that possession of the property be transferred voluntarily by the owner to the thief in reliance upon false pretense made by the thief. To complete a wrongful obtaining, there must always be a materially false representation by the thief and a reliance on it by the owner. The false pretense can be an act, word ("For \$50.00 I can get you a new Cadillac."), symbol (Switch PX price tags and take item to cashier), token or silence (offer to get Cadillac for \$50.00, later victim gives \$25.00 tip for thief's efforts, thief does not disclose false pretense). To be a false pretense, the representation must be false when it is made. It must, therefore, relate to a presently existing fact (give wrong name and address on loan application) or a past fact ("I have never been refused credit"). An existing state of mind of the thief is a presently existing fact. Thus, if he represents to a loan agent that he will repay a loan when his inheritance check comes in next week, knowing all the while he does not so intend, the thief has uttered a false pretense to get the loan. An opinion is not a fact and cannot be the subject of a false pretense ("Give me a lower interest rate. I have inside dope that rates are going to drop next week.") The accused must know his representation was false or have no belief in its truth. The relevant criminal states of mind are thus (1) knowing the statement is false, (2) believing the statement false, and (3) not knowing whether statement is true or false. If the accused believes a statement to be true or if it is true, then he has an innocent state of mind for purposes of false pretense larceny. If the thief makes a false statement believing it to be true (innocent state of mind) but discovers its falsity before property is received by him, and he fails to disclose the truth, then silence, upon transfer of the property, is a reaffirmation of the original false statement and amounts to a false pretense (by silence). Lastly, the false pretense must be an effective, inducing cause of the owner's transfer of the property. It need not be the only inducing cause. The false pretense need not cause an actual pecuniary loss to the owner but only cause him to part with his property. A false statement that the purchaser intends the PX goods for his own use is a false pretense even though the purchaser pays the PX the full price for the item. False representations made after delivery of property are by definition not false pretenses for purposes of this crime.

4. Withholding. In the "taking" and "obtaining" type larcenies, the thief always gets possession of property unlawfully, either by physical act or false pretense. For purposes of the wrongful withholding type larceny, the thief always gets the property lawfully...he rents, borrows, leases, stores, etc.. The criminal act is the failure to return the property acquired lawfully. A failure to return it when the owner demands, a failure to account when an accounting is due, and the devoting of the property to a use not authorized by the owner are the methods by which the withholdings are accomplished. Thus this form of larceny includes the civilian offense of embezzlement and, indeed, many of the reported cases involve fund custodians who have embezzled from their accounts. A jury is permitted to infer larceny when an accounting has been demanded and the accused has refused. The inference is only permissive and should not be relied on in the investigation phase. Where the case involves a diversion of property to an unauthorized use, the diversion completes the crime and no demand is required or relevant.

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DISCUSSION. Other Elements.

1. Property. The term "property", as used in UCMJ, Article 121, means any personal property or money of any kind. The term does not include real estate or attachments to real estate. The property must have a corporeal existence -- some sensible measurement characteristic. Thus, one cannot steal a naked right (right to quiet enjoyment of rental, right to free speech, right to vote, etc.). Problems arise in connection with thefts of telephone service, gas service, electricity, etc.. There is considerable doubt that these could be subject to larceny but may be prosecutable under UCMJ, Article 134.

2. Owners. There are two kinds of owners recognized in military criminal law as applying to larceny. The "General Owner" is the true owner. He has title and the greatest possessory right of all to the property. The "Special Owner" is one with a possessory right less than that of the general owner (a renter, bailee, borrower, etc.). A prior thief of the same item is a Special Owner as against a second thief but not as to any other Special Owner or the General Owner. The owner must have a superior right to the property at the time of theft as against the thief. A General Owner, therefore, does not "steal" from a thief when he recaptures his property, and the loser in a gambling game can take back his losses without committing larceny (gambling is against public policy and a winner has no right to the proceeds). In pleading ownership, the last special owner should be used since the thief understands the crime in that light and only one interest must be proved. If the General Owner is used, two interests must be proved -- that of the General Owner and that of the Special Owner. The term "person" as used in this offense is very broad and includes people, corporations, associations, etc. that need not be legal entities.

3. Property Value. If stolen property has no value, there can be no larceny of it for purposes of UCMJ, Article 121. The maximum permissible punishment increases with the value of the property stolen. An allegation that the property had "some value" limits punishment to the minimum permissible in MCM 1969 (Rev.), para. 126(c). The thief's opinion on value is irrelevant since an objective determination of this issue must be made. Value is the legitimate market value of the property at the time and place of theft. Normally, someone knowledgeable of the market must testify on the issue. If value cannot be determined this way, or if because of the nature of the item and the place of theft cannot be determined, the fair market value in the United States at the time of theft or the replacement cost, whichever is lesser, is the value of the property. U. S. Government property is usually valued by reference to price lists contained

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publications since the government price is almost always lower than the fair market value. If fair market value is lower then it determines value. The victim of a larceny who shopped for the property is competent to testify as to the price he paid for the item, but his testimony is not conclusive. In most cases, market value can readily be determined by consulting with local merchants selling the item, and it should always be used in larceny cases. The condition or depreciation of the stolen item must always be considered in determining value.

4. Intent. A specific intent to deprive the owner permanently of the use or benefit of the stolen property is larceny. Wrongful appropriation, which normally is a lesser included offense of larceny, involves a specific intent to temporarily deprive the owner of the use and benefit of the property. Evidence of a "permanent" intent may consist of a confession or admission, the destruction of the property, unconditional sale of the property, hiding the property, abandoning the property, willful consumption of stolen food (can't be returned), and similar facts. Evidence of a "temporary" intent may consist of a confession or admission, leaving the property near the owner's quarters, returning the property after a time, pawning the property and retaining the ticket, etc.. A good investigation should address itself to this issue and be meticulously conducted so as to develop all factors possible. Too often this element is overlooked in the pretrial stage and the oversight proves an insurmountable barrier at trial. There must always be evidence of at least one type of intent or there is no larceny. Motive quite often is indicative of intent.

PERMISSIVE INFERENCE. Proof of a conscious, exclusive, and unexplained possession of recently stolen property permits a jury to infer that the possessor stole the property.

1. Conscious Possession. The evidence must show that the accused is aware that he has the property (he holds it in hand, locked in his footlocker, etc.). It is not necessary to prove the accused knew the property was stolen before the inference may be utilized.

2. Exclusive Possession. The evidence must show that the accused exercised control over the property to the exclusion of anyone else's interest.

3. Recently Stolen Property. This is a relative concept. A good test for determining if the property is "recently" stolen is as follows: is the time span between theft and discovery not so long under the circumstances as to create a reasonable possibility that the thief disposed of the goods and an innocent man got possession. Thus the character of the property (motors or money), its saleability, size, weight, and other factors bearing on ease of disposal or concealment are important. Normally the nature of the property will resolve this issue and special investigative techniques won't be necessary. This inference is important though because often it is the only connection between the theft and thief.

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LOST, MISLAID, AND ABANDONED PROPERTY. These factors are important in larceny cases because often the nature of found property determines which kind of theft is involved, if any at all.

1. Lost Property. Property involuntarily parted with and which the owner knows not of the whereabouts is "lost property". This concept does not involve intentional concealment and lost memory but involves an inadvertent loss. If the property is found with clues as to who the owner might be and the finder intends to return the property he is in lawful possession of the property when he takes it. Clues to ownership may be identifying marks, nature of the property (e.g., a police helmet), or the location of the property (e.g., found in Tom Jones' room). The finder steals such property if he does not intend to return it to the owner (a wrongful taking). Evidence of the finder's intent is best determined by analyzing his conduct with respect to the property (did he hide it, make a reasonable effort to return it, sell it, etc.). Where "lost property" is found with no clues as to ownership the finder has lawful possession regardless of his intent to return the property. If at a later time clues to ownership are discovered, the finder is under an obligation to take reasonable steps to return the property. If he does not do so he may be guilty of a "wrongful withholding" type larceny.

2. Mislaid Property. Property intentionally placed for temporary purposes but inadvertently left there by the owner is "mislaid property". There is almost always a clue to ownership of "mislaid property" since the owner is likely to return to the spot to claim his property. Thus, if one finds a suitcase in an unlocked railway terminal locker it's probably "mislaid property" (owner forgot it). If found on a sidewalk near the station it's probably "lost property" (owner dropped it). If the finder takes "mislaid property" intending to return it he has lawful possession.

3. Abandoned Property. Property to which the owner has relinquished all title, right, and possession is "abandoned property". The location, condition, and type of property together with the existence or non-existence of ownership clues will normally determine if the property is "abandoned property".

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CHAPTER IX

PART TWO

COMMON DEFENSES TO LARCENY

INTOXICATION. Voluntary intoxication, if of so great a degree as to negate the required specific intent, is a defense to larceny and wrongful appropriation. The defense amounts to a claim that the accused did not know his taking, etc. was "wrongful." Normally, the degree of intoxication can be determined by evidence indicating the degree to which the accused recognized familiar persons, spoke intelligibly, realized the consequences of other acts (such as throwing bottles at or pushing others, etc.). Often the littlest and most unobtrusive facts can be critical.

HONEST MISTAKE. The accused often claims that he honestly believed the property he took was his. If the jury believes him honest in his mistake, the accused has a defense to larceny and wrongful appropriation. His belief need not be "reasonable", only "honest." If one takes property he honestly believes is his, he lacks the requisite mens rea for larceny. All factors bearing upon one's honesty and worthiness of belief are important and should be weighed by the jury.

IMPOSSIBILITY. If one takes property which he believes is someone else's property but which in reality is his own property, he is not guilty of larceny, but he may be guilty of attempted larceny. Should this situation arise, a lawyer should be consulted before disposing of such a case.

NEGLIGENT LOSS. One who carelessly handles another's property does not "steal" the property if it is discovered missing. The gravamen of larceny is the intentional dispossession of the owner and not the negligent handling of property.

LACK OF MENS REA. This defense is very complex and the factors pertaining to it must be carefully examined. Basically, the accused claims that his state of mind was innocent at the time of his actions so that his taking, obtaining, or withholding was not "wrongful." The defense arises in several forms.

1. Friendly Borrower. This situation arises where sailors 'A' and 'B' are good friends who have a history of borrowing from one another in an honest manner. One day 'A' borrows from 'B' without 'B's knowledge. At trial he claims he just "borrowed" the money as always knowing that 'B' wouldn't mind. Appellate courts have held that, if believed, the accused lacks the requisite mens rea for either larceny or wrongful appropriation since his taking was not wrongful. Courts have not been liberal in applying this doctrine but, in order to protect the case, the pretrial investigation should reveal such pertinent factors as the closeness of the relationship between victim and accused, whether the accused came forward to repay before he knew the theft report was filed, motive for theft, denials of the taking made by the accused, the existence of a history of borrowing between victim and accused, and other factors bearing on the accused's honesty.

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2. Friendly Lesson Teacher. This situation arises where 'A' and 'B' are close work associates but one is careless in securing valuables. The other takes the valuables to "teach his friend a lesson" on security. This situation, if the accused is believed, also exhibits a lack of mens rea and is a defense to both larceny and wrongful appropriation. The factors bearing upon the validity of the defense are of the same kind as relate to the "Friendly Borrower."

3. Practical Joke. An accused may claim that he took the property of another to play an "April Fool's Joke" upon the owner. Though this situation seems to be a logical extension of the "Friendly Borrower" and "Lesson Teacher" cases, the appellate courts have held that such a taking is wrongful. The theory is that the law protects an owner from being vexed by another in the control of his property. The joke goes to the motive of the accused but does not negate mens rea.

4. Summary. The lack of mens rea concept is not at this time an expanding doctrine, and courts are not likely to give credence to such a claim. Most of the cases in which these situations arise contain ample evidence in the circumstances of the taking to rebut the defense. For example, many takings occur while the "friend" is sleeping, money is taken from a wallet in the friend's trousers, and the "borrower" seldom comes forward until after investigation has commenced and he is aware of its existence. However, pretrial inquiry must always be mindful of these suspicious circumstances, and an investigation should not be completed until all facts are known.

PLEADING MULTIPLE LARCENIES. There exists an almost insoluble legal problem in military criminal law in deciding whether a series of thefts is one crime or several crimes. The problem is that if the pleader aggregates the values of the stolen properties, the maximum permissible penalty is raised accordingly. If, on the other hand, a substantially single transaction is unreasonably multiplied in charges if broken down into each of the several thefts, a rule of thumb is that, if an aggregate is alleged, the evidence must show the crimes are not separate and, if separate specifications are used, the evidence must show the crimes were not a single transaction. The rule is not meaningful to the pleader. It is probably better practice to see if the evidence reasonably established separate takings, etc.. If so, plead several specifications. If the evidence reasonably established one taking, etc., plead the aggregate and hope for the best.

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PART THREE

RECEIVING STOLEN PROPERTY

GENERAL. Receiving stolen property is an offense cognizable under UCMJ, Art. 134. It is closely related to the withholding type larceny and care must be taken to differentiate the two offenses.

ELEMENTS. The evidence must prove that:

1. The accused unlawfully received, bought or concealed certain personal property.
2. Which property was stolen from an owner,
3. The accused knew the property was stolen at the time he received the property,
4. The property had value, and
5. 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.

DISCUSSION.

1. Unlawfully Received. The accused must be shown to have received the goods without the consent of the owner and without justification or excuse to establish "unlawfulness". One who buys stolen goods to return them to the owner does not receive "unlawfully". Any control is sufficient to constitute "receipt" of the goods. The property is "received" if delivered to the accused's warehouse, his agent, or put in mail even though the accused does not touch the goods. The term "property" means personal property only, not real estate. An accused who steals goods from a thief does not receive stolen goods for he is a thief and guilty of larceny.

2. Property Must Be Stolen. Wrongfully appropriated property is probably "stolen" property though there is much doubt about it. The property must be stolen by someone other than the accused since a perpetrator cannot receive property from himself. The aider/abettor and the accessory before the fact can be receivers of stolen property since their initial involvement in the theft need not involve possession of the stolen goods. The conviction of the thief cannot be used as evidence of the fact that goods are stolen at the trial of the receiver of stolen property. The evidence must show factually the theft and the receiving of the goods.

3. Knowledge. The accused must be shown to have known the goods were stolen at the time he received them. Thieves are not likely to confess their crimes to receivers so the law construes "knowledge" broadly. Proof that the accused actually knew the goods were stolen, believed they were stolen, or had definite suspicion the goods were stolen and refused

To investigate further for fear of discovering the goods were stolen is sufficient to prove knowledge for this offense. The general rule is whether a reasonable man, knowing what the accused knew and seeing what he saw, would think the goods were stolen. Negligence in not realizing the goods were stolen does not amount to knowing the goods were stolen. A greater culpability must be involved.

4. Value of Property. Same principles for determination of value for larceny cases apply to this offense. (See Part One).

5. Prejudicial Conduct. This concept is discussed in another Chapter of this material. For purposes of this offense, if all other elements have been established, then this element will have been proved. No independent evidence is required.

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SECTION THREE
CHAPTER IX

PART FOUR

ROBBERY

GENERAL. Robbery (UCMJ, Art. 122) is an offense which is a compound of two offenses previously discussed, to wit: larceny and assault. It is important to understand the concept of robbery in order to avoid handling such a case as a simple larceny and assault. The thief willing to steal through the use of force is a dangerous man in any society and his crime should be disposed of as the serious offense that it is.

ELEMENTS. In order to convict an accused of robbery the evidence must prove beyond reasonable doubt that:

1. The accused wrongfully took personal property of some value from the victim,
2. The taking was from the person or in the presence of the victim,
3. The taking was against the will of the victim,
4. The taking was by means of force and violence or fear of immediate or future injury to the victim's person or property or to the person or property of a relative, member of the family, or anyone in the victim's company, and
5. The taking was with intent to permanently deprive the owner of the use and benefit of the property.

DISCUSSION. The first and last elements of this offense comprise a taking type larceny. The principles pertaining to the offense of larceny previously discussed in this Chapter apply to this aspect of robbery.

1. From the Person or Presence. The property must be taken from the person of the victim or in his presence, but it is not necessary that the victim be within any given distance of his property. For example, forcing the victim to reveal the location of the property while in the living room of his house and then taking the property which is located in the kitchen is a taking from the "person or presence" of the victim. The term "presence", practically speaking, means "immediate control". Thus a taking of property in the immediate control of the victim, if by force, is Robbery.

2. Force and Violence. The taking must involve force and violence toward the victim or putting him in fear. Force or violence must be actual force or violence and it is immaterial whether the victim was placed in fear by the application of such force and violence. The force and violence used need only be sufficient to overcome the actual resistance of the victim, put the victim in a position that does not afford him an op-

portunity to resist, or to overcome the resistance of any security attachment which connects the property to the person of the victim. The demonstration of a personal injury, a blow, or force sufficient to overcome any resistance the victim was capable of offering is not requisite to this offense. In fact the victim need not offer resistance at all. The force or violence to the person must precede or accompany the taking of the property. This basically means that the force need not be simultaneous with the taking but it must be concurrent or closely related to the taking. Force and violence as used in this offense is sufficiently broad in meaning to encompass all forms of simple and aggravated battery.

3. Putting in Fear. If force and violence are not used in a taking there can still be a Robbery if the victim is put in fear of a present or future injury to himself, his family, or to a companion present at the taking. The term "fear" does not mean "afraid". Fear means a reasonably well-founded apprehension of the present or future injury. This means that, while there need be no actual force or violence used, there must be "demonstrations" of force or menacing acts which reasonably raise an apprehension of harm. The type of harm feared may be death or bodily injury to the person or property of the victim, or to the person or property of a relative, family member, or anyone in his company at the time of the taking. The threat to the victim must be serious enough to warrant the giving up of his property.

SECTION THREE
CHAPTER IX

PART FIVE

BAD CHECKS

GENERAL. Bad check law is contained in UCMJ, Arts. 123a and 134 but this Part will deal mainly with UCMJ, Art. 123a. Bad check offenses are very common in the military society and enforcement of these laws difficult. Recent decisions of the U. S. Supreme Court which require a substantial military connection to support military jurisdiction over an offense have made the Armed Forces a haven for rubber check writers. Civilian authorities will not prosecute rubber check writers unless a large sum of money is involved because the expense of prosecution is great and the likely punishment not substantial. Military authorities, as a practical proposition, cannot prosecute a rubber check writer unless the criminal act occurs on a military installation or unless military status was an inducing influence for the criminal act. UCMJ, Art. 123a deals with two basic types of check transactions-- the procurement of something with intent to defraud and the payment of a past due obligation with intent to deceive.

ELEMENTS - INTENT TO DEFRAUD. To constitute the offense the evidence must show that:

1. The accused made, drew, uttered, or delivered a check, draft, or order for the payment of money,
2. At the time of the making, drawing, uttering or delivering the accused knew that he, the maker, or drawer thereof, did not or would not have sufficient funds in or credit with the bank for payment of the check or order in full on presentment,
3. The making, drawing, uttering, or delivery was unlawful with intent to defraud.

DISCUSSION.

1. Make, draw, utter, deliver. The words "make" and onymous and constitute the acts of writing and signing the check. The accused is a maker/drawer only after he signs the check. The term "deliver" means to transfer the check to another. "Utter" is broader than "deliver" and includes an offer to transfer the check with a representation that the check will be paid on presentment. One person can be a maker, utterer, and deliverer. The institution of which the check is drawn need not exist. The term "check" includes a post-dated check.

2. Knowledge. The evidence must show that the accused actually knew when he wrote the check that he had insufficient funds or credit with the bank at the time the check was written or he would not have sufficient funds or credit to pay the check in full on presentment. The term "insufficient funds" includes the "no-account" situation and the "overdrawn account" situation (the account balance of the maker at the time of presentment of the check is less than the face value of the instrument). The term "credit" means an arrangement or understanding, express or implied, between the bank and the accused to pay the check. It is apparent the proving this element in the normal case is difficult. The law therefore permits a jury to infer knowledge of insufficient

funds of credit, if after refusal of payment by the bank, the maker does not redeem the check within five days of notice, to said maker, of the refusal of payment. This inference may not be used against an utterer or deliverer, only a maker or drawer. The term "presentment" refers to the time payment is demanded by the arrival of the check at the bank. Notice to the maker of refusal of payment can be oral or written and can be given by anyone.

3. Procurement. The check must be made for the procurement of an article or thing of value. The article need not actually be obtained since the making of the check for that purpose is sufficient. A service is not an article or thing of value. For example, writing a bad check to pay for an automobile involves a procurement of an article of value. Writing a bad check to pay for maid service is not the procurement of an article of value.

4. Defraud. The accused's intent in procuring the article of value must be to defraud. An intent to defraud means an intent to obtain something of value through a misrepresentation and to apply the article to the accused own use or to the use of another either temporarily or permanently. Proof that a check was written for the purpose of obtaining an article of value will almost always prove the requisite intent.

ELEMENTS - INTENT TO DECEIVE. The elements for this form of Art. 123a are the same as for the intent to defraud offense--only the last two elements differ and are discussed here.

1. Past Due Obligation. The purpose of the making, uttering, etc. is to pay for a past due obligation or "any other purpose". A "past due obligation" is an obligation to pay money which has matured prior to the making etc.. The phrase "for any other purpose" includes all purposes other than the payment of a past due obligation or the procurement of any article of value. A service may be included in the term "any purpose"

2. Intent to Deceive. An intent to deceive means intent to cheat, trick, mislead, or to mislead into believing as true that which is false. It is a state of mind evincing an intent to gain advantage for oneself, or to bring about a disadvantage for another, through misrepresentation. Thus a bad check written to pay a debt, figuring that by the time it bounces and is redeposited the defendant will have funds to pay it, evinces an intent to deceive. A gambling debt is unenforceable and a bad check written to pay such a past due obligation is no offense, unless a forgery is involved whereby a third party is harmed. A jury is permitted by law to infer that every check carries a representation that it will be paid on presentment.

PROOF OF INTENT TO DECEIVE OR DEFRAUD. Proof that, after a refusal of payment by the bank, the maker or drawer did not redeem the check within five days notice (written or oral) to said maker, of the refusal of payment by the bank permits the jury to infer an intent to defraud or deceive. Proof that a check was drawn on a nonexistent bank or drawn on a closed account is circumstantial evidence of intent.

SPECIAL EVIDENCE RULES. Because of the nature of the banking business and modern computerized techniques original documents pertaining to

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transactions need not be obtained. Certified copies or extracts of records of a public banking business, written "translations" of banking entries which originally exist as machine or electronic records, and testimony or certificate from a banking official that no business record exists which pertains to the given transaction are admissible items of evidence, if properly authenticated. Banking entries are authenticated by testimony of an official in charge of the entry (or his assistant or a certificate from such person) that the writing concerned is the original record or a copy thereof; the entry was made in the regular course of banks's business the regular course of the bank's business includes making the entry, and that the ~~person~~ making the statement is the correct official. Such testimony or certificate must be made under oath.

BUSINESS ENTRIES. If a check is presented for payment through regular banking channels and returned to the person submitting the check for payment with a notation in the form of a stamp, ticket, or other writing on or accompanying the check, and which notation is made by the drawee or presenting bank, indicating that payment was refused for insufficient funds or other reasons, then proof of the foregoing facts allows the jury to infer that the notation is an authentic business entry and is admissible as evidence that payment was refused for the reasons stated. Accordingly, every effort should be made to locate the rubber check and all notations thereon and the person who accepted the check and forwarded it for payment.

CAVEAT. The two forms of bad check offenses contained in UCMJ, Art. 123a are separate and distinct and they are not lesser included offenses of each other. It is not a violation of this Article to make a bad check for the procurement of an article of value with intent to deceive. It is likewise not a violation of this article to make a bad check for the payment of a past due obligation with intent to defraud. Care must be taken in drafting pleadings of this offense to keep the criminal acts and the states of mind in their proper relationships.

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SECTION THREE
CHAPTER IX

PART SIX

DISHONORABLE FAILURE TO MAINTAIN FUNDS

GENERAL. Dishonorable failure to maintain funds for the payment of funds (UCMJ, Art 134) is the only other purely bad check offense in the Code. No intent to deceive or defraud is required for this offense so this crime is usually a lesser included offense of Art. 123a cases/

ELEMENTS: The evidence must prove beyond a reasonable doubt that:

1. The accused made and uttered a check,
2. For the purchase of - - - - ; purpose of - - - - ; or in payment of a debt,
3. The accused thereafter dishonorably failed to place or maintain sufficient funds in or credit with the bank for payment of the check in full or presentment, and
- 4.. Under the circumstances, the accused's conduct was prejudicial to to good and discipline in the Armed Forces or was of a nature to bring discredit upon the Armed Forces.

DISCUSSION. The terms contained in this element have the same meaning as they do for UCMJ, Art. 123a. The term "dishonorable" means a state of mind characterized by fraud, deceit, false representation, willful evasion, demonstrable bad faith, or other distinctly culpable circumstances evincing a grossly indifferent attitude toward the account and obligation. Simple carelessness, negligence, or forgetfulness is not a sufficiently evil state of mind for this offense. For example, an accused who utters a check and later through oversight forgets to note it in his checkbook so as to cause a shortage in his account when he utters a second check does not commit this offense so long as his oversight does not amount to gross negligence.

SECTION THREE
CHAPTER IX

PART SEVEN

SALE, DAMAGE, LOSS, OF MILITARY PROPERTY

GENERAL. UCMJ, Art. 108 prohibits anyone subject to the Code, who lacks proper authority, from selling or otherwise disposing of; or willfully or through neglect damaging; destroying or losing; or willfully or through neglect suffering to be lost, damaged, destroyed, sold, or wrongfully disposed of, any military property of the United States. This offense deals with how property is treated as opposed to how the accused got it.

ELEMENTS. In order to convict the accused of any form of this offense the evidence must show that:

1. The accused sold, disposed of, etc., certain property by - -
2. The act was done without proper authority,
3. The property was military property of the United States, and
4. The property had a certain value or some value.

DISCUSSION. To simplify the discussion of the elements of this offense, it is necessary to divide the crimes into their separate parts.

1. Wrongful Sale or Other Disposition. These terms cover a broad range of activity and include abandonment, surrender, or any other form of loss of control of the property. "Sale" is used in its ordinary commercial sense. This particular form of Art. 108 misconduct is predicated on simple negligence and a deliberate or specific intent is unnecessary. The offense is completed when the accused, without authority, negligently or deliberately sells or otherwise disposes of military property of the U.S. having some value. "Military Property" is all property owned, held, or used by one of the military departments of the U.S. The exact kind of property (paper clip or rifle) is immaterial.

2. Willfully or By Neglect, Damaging, Destroying, or Losing or Suffering to Be Lost, Damaged, Destroyed, Sold or Wrongfully Disposed Of. As used in this aspect of Art. 108, the term "willfully" means a deliberate intentional act, while "negligent" means the failure to exercise the due care of a reasonably prudent man under the circumstances. "Lost Property" means the accused unintentionally parted with control of the property and now can't find it. "Damage" means to make less valuable. "Suffering" is a term synonymous with "allowing." Before one can be guilty of "suffering" property to be lost he must have had a duty to protect the property, having failed to perform that duty, and his failure must have caused the loss, damage, destruction, etc.

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3. Inference. If any item destroyed, damaged, or lost was an item of individual issue (rifle, field jacket, student materials, etc.) and the accused cannot explain the loss the court may infer negligence. Thus proof of the nature of the item and its loss, or damage, or destruction without explanation will support a conviction for this offense.

SECTION THREE
CHAPTER IX
PART EIGHT

WASTING, SPOILING, DAMAGING, DESTROYING NONMILITARY PROPERTY

GENERAL. UCMJ, Article 109 addresses itself to the willful, reckless, or wrongful dealing with any property belonging to anyone other than a military department of the federal government.

ELEMENTS. The elements of this offense are that:

1. The accused, without authority (wasted or spoiled) or (destroyed or damaged) by - - -,
2. Nonmilitary property owned by - - -,
- 3a. That the wasting or spoiling (real property) was done willfully or recklessly, or
- 3b. The destruction or damage (personal property) was done willfully and wrongfully, and
4. The property had a certain value.

DISCUSSION.

1. Wasting or Spoiling. These terms refer to real property and are similar to "destruction and damaging" which relates to personal property. To constitute this offense, the wasting/spoiling must be either deliberate or the result of a gross disregard for the consequences of the accused's act with respect to the property (recklessness).

2. Destroy or Damage. These terms relate to personal property. Only willful and wrongful destruction or damage of nonmilitary property is punishable; simple negligence is not sufficient.

3. Loss or Sale. These acts are not contemplated by this Article.

RECAPITULATION - PROPERTY OFFENSES. UCMJ, Articles 108 and 109 punish the following misconduct relating to the following kinds of property:

1. Military real and personal property: willful or negligent damage, destruction, loss, sale or other disposition, and the willful or negligent suffering of loss, sale, destruction, damage, or disposal.
2. Nonmilitary real property: willful or reckless wasting or spoiling.
3. Nonmilitary personal property: willful and wrongful destruction or damage.

SECTION THREE
CHAPTER X

FALSE STATEMENTS

PART ONE

FALSE OFFICIAL STATEMENT

GENERAL. UCMJ, Article 107, makes punishable anyone who with intent to deceive signs any false record, return, regulation, order or other official document knowing it to be false or who makes any other false official statement.

ELEMENTS. In order to convict the accused of this offense, the evidence must prove beyond reasonable doubt that:

1. The accused made a statement or signed a document, record, regulation, etc.;
2. The statement or document was official;
3. The statement or document was false;
4. The accused knew the statement to be false; and
5. The accused had the intent to deceive.

DISCUSSION.

1. Statement or Document. These terms have their ordinary meaning. An "official" statement or document directly or indirectly effects a governmental function and must be made to a person who in receiving it is discharging his official duties. The person who requests the statement or submission of the document must have authority to require the statement. As a practical matter, any matter within the cognizance of any department or agency of the federal government is "official." UCMJ, Article 31, has limited the application of "officiality." A suspect in a criminal matter does not make an "official" statement unless he has an independent duty to make a true statement. For example, if an enlisted club manager was suspected of stealing funds and also had an independent administrative duty to account for the funds, though he has the right to remain silent at any criminal interrogation, if he speaks at all, he must be truthful or run the risk of making a false official statement (due to his duty to account).

2. Knowledge. An official statement, which the accused knew was false or which the accused believed was not true, constitutes the requisite guilty knowledge for this offense.

3. Intent to Deceive. The term "deceive" means to mislead, trick, cheat, or to cause one to believe as true that which is false. It is not necessary that the victim actually be deceived. The law allows a court-martial to infer the existence of an intent to deceive from proof of knowledge of the falsity of the statement.

SECTION THREE
CHAPTER X

PART TWO

FALSE SWEARING

GENERAL. False swearing is an historically recognized offense covered by UCMJ, Art. 134. The making, under lawful oath, not in a judicial proceeding or course of justice, of a false oral or written statement not believing it to be true constitutes the offense. Since the crime does not occur in a judicial proceeding it is deemed less serious than perjury.

ELEMENTS. To prove this offense the evidence must show:

1. The accused took a lawful oath,
2. That he made a false statement,
3. That he didn't believe the statement true, and
4. The conduct was service discrediting or prejudicial to good order and discipline.

DISCUSSION.

1. Lawful Oath. UCMJ, Art. 136 details those who are authorized to administer oaths when necessary in the performance of their duties. The term "necessary" is very broad. The oath given must be recognized as an oath by the accused when it is given and may be given by Trial Counsel, Legal Officer, Defense Counsel and many others.

2. False Statement. The principle previously discussed relating to falsity and knowledge apply to this offense.

SECTION FOUR

GLOSSARY OF WORDS AND PHRASES

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SECTION FOUR

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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 its 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. HOC

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 USC 1651(a), 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 supervisory 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.

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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 judgment in a proceeding other than that in which the judgment was rendered and outside the normal chain of appellate review.

COMMAND - (1) the authority which a commander in the military service lawfully exercises over his subordinates by virtue of rank or assignment; (2) a unit or units, an organization, or an area under the authority of one individual; (3) an order given by one person to another who, because of the relationship of the parties, is under an obligation or sense of duty to obey the order, 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.

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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.

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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 - a degree of carelessness greater than simple negligence; a negligent act or omission accompanied by a culpable disregard for the foreseeable, though not, necessarily, the natural and probable, consequences to others of such act or omission.

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 - wilfully 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 judgement 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.

GROSS NEGLIGENCE - the intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another; such a gross want of care and regard for the rights of others as to justify the presumption of willfulness and wantonness; a degree of negligence which is substantially higher in magnitude than simple negligence but falling short of intentional wrong.

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.

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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.

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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 distinguish right from wrong and to adhere to the right.

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 - the omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a reasonable and prudent man 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 personal safety or property of other persons.

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

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SECTION FIVE

Basic Military
Justice Handbook
Rev. 3/76
MC 10-76

COMMON ABBREVIATIONS USED IN MILITARY JUSTICE

AAF	Accessory after the fact
ABA CPR	American Bar Association Code of Professional Responsibility
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
BUPERS	Bureau of Naval Personnel
BUPERSMAN	Bureau of Naval Personnel Manual
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
CHNAVPER	Chief of Naval Personnel
CID	Criminal Investigations Division
CMA	United States Court of Military Appeals

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CMC	Commandant of the Marine Corps
CMO	Court-Martial Order
CMR	Court of Military Review; Court-Martial Reports
CNO	Chief of Naval Operations
CO	Commanding Officer
COMA	United States Court of Military Appeals
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
DP	Detention of Pay
ED	Extra Duty
EMI	Extra Military Instruction
E & M	Extenuation and Mitigation
FACA	Federal Assimilative Crimes Act
FORF; FF	Forfeiture
FRCrnP	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	Investigating Officer
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 Offense
LO	Legal Officer
LOD	Line of Duty
MCM	Manual for Courts-Martial, United States, 1969 (Rev.)
MFNG	Motion for a finding of not guilty
MJ	Military Judge
MP	Military Police
N/A	Not Applicable
NCO	Noncommissioned Officer
NG	Not guilty
NIS	Naval Investigative Service
NJP	Nonjudicial Punishment
NLSO	Naval Legal Service Office
NAVY REGS	U.S. Naval Regulations, 1973
OEGCMJ	Officer exercising General 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
PCS	Permanent Change of Station
PIO	Preliminary Inquiry Officer

PO	Petty Officer
PTA	Pretrial Agreement
PTI	Pretrial Investigation
PTIO	Pretrial Investigating Officer
RED	Reduction
REST.; R	Restriction
SA	Supervisory Authority
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
TENP	Table of Equivalent Nonjudicial Punishments
TEP	Table of Equivalent Punishments
TMP	Table of Maximum Punishments
UA	Unauthorized Absence
UCMJ	Uniform Code Military Justice
UD	Undesirable Discharge

UPB	Unit Punishment Book
USC	United States Code
USCA	United States Code Annotated
USCA	United States Court of Military Appeals
VA	Veterans Administration
W.A.	Wrongful Appropriation
WO	Warrant Officer
XO	Executive Officer

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END