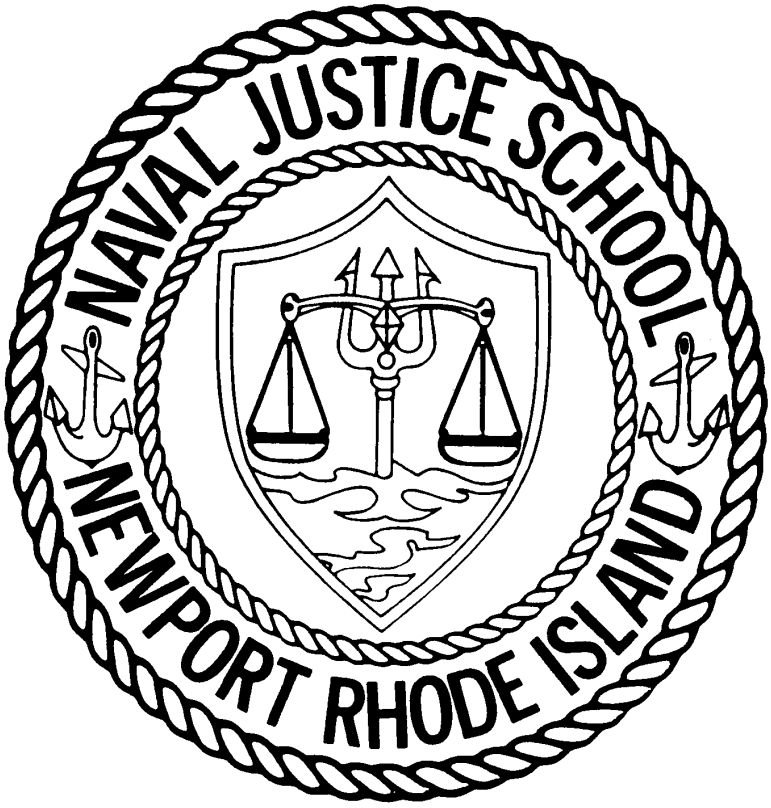
HANDBOOK FOR

MILITARY JUSTICE

AND CIVIL LAW



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CHAPTER 1

CHAPTER 1

EV 1. INTRODUCTION TO EVIDENCE

EV 1.1. *General.*

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

EV 1.2. *Sources of the law of evidence.*

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

In 1951, pursuant to Article I, Section 8, Congress enacted the Uniform Code of Military Justice [hereinafter UCMJ], which contains a number of articles dealing with evidentiary matters. Article 36, UCMJ, vests the President of the United States with power to prescribe rules of evidence for the military. These Military Rules of Evidence [hereinafter Mil.R.Evid.] are found in Part III of the Manual for Courts-Martial (2005 Edition)[hereinafter MCM]. Although the bulk of evidentiary rules are set forth in this section of the MCM, other chapters of the MCM deal with matters related to the law of evidence as well.

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

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

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

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

EV 1.3. *Applicability of the rules of evidence.*

Rule 101 of the Mil.R.Evid. makes the rules of evidence applicable to general, special, and summary courts-martial. The Mil.R.Evid., except for the rules concerning privileges, are not applicable at Article 32 pretrial investigations, administrative separation boards or nonjudicial punishment proceedings. Part V, para. 4c, MCM, however, requires that the accused's rights against self-incrimination (Article 31b) be explained at Article 15, also known as NJP or office hours.

EV 1.4. *Effects of Non-Compliance with the rules of evidence.*

Evidence sought to be introduced at Court-Martial must not be obtained contrary to public policy. An “exclusionary rule” is a recognition by the courts that in certain instances there is a public policy that requires the exclusion of certain evidence at Court-Martial because of a counterbalancing need to encourage or prevent certain activity or types of conduct. The exclusionary rule in action will be discussed at length in subsequent chapters of this text as it

relates to evidence obtained in violation of the law of self incrimination (Chapter III) and laws pertinent to search and seizure (Chapter IV). Additionally, public policy sometimes acts to protect certain relationships at the expense of excluding certain evidence (e.g., the husband-wife privilege precludes under certain circumstances the calling of one spouse to testify against the other). Similar privileges protect the relationships of attorney-client, clergyman-penitent and in a more limited fashion, that of the psychotherapist and patient. Conversely, there is no such protection afforded in military law to a doctor and his or her patient.

CHAPTER 2

CHAPTER 2

EV 2. THE LAW OF PRIVILEGES

EV 2.1. *Introduction to the law of privileges*.

The law concerning privileges, found in Section V of the Military Rules of Evidence, represents the President's determination that it is in the best interests of the public to prohibit the use of specific evidence arising from a particular relationship in order to encourage such relationships and to preserve them once formed. For instance, it is considered to be in the public's best interest that the institution of marriage be preserved. Therefore, as will be explained in this chapter, evidentiary rules exist that prohibit, under certain circumstances, compelling one spouse to testify against the other or the disclosing by one spouse of confidential communications made between the spouses during their marriage.

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

EV 2.2. *Husband-wife privilege - Mil.R.Evid. 504*

As previously stated, the husband-wife privilege is based on the policy that society's need to protect the marital relationship is greater than the benefit society would reap by using the testimony of one spouse against the other, or using statements made in confidence by one spouse to the other while married. Mil.R.Evid. 504 sets forth two distinct privileges. One relates to the ***capacity of one spouse to testify*** against the other (spousal incapacity). The other privilege relates to ***confidential communications*** between the spouses while married.

EV 2.2.1. *Spousal incapacity*.

Under this privilege, a person has the right either to elect to testify or refuse to testify against his or her spouse, if, *at the time the testimony is to be introduced*, the parties are lawfully married. A lawful marriage will also include a common-law marriage if established in a state which recognizes common-law marriages. If, at the time of testifying, the parties are divorced, or if their marriage has been legally annulled, the privilege will not be available.

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

EV 2.2.2. *Confidential communication*.

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

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

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

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

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

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

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

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

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

EV 2.3. ***Lawyer-client privilege - Mil.R.Evid. 502***

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

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

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

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

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

A "lawyer" is a person authorized, *or reasonably believed by the client to be authorized*, to practice law. Both military judge advocates and civilian lawyers fall within this privilege. The privilege also may be applicable, however, in situations where the client *reasonably believes* that he / she is consulting in private with a person authorized to practice law even if the person consulted is not so authorized. It is therefore important that non-lawyers, particularly command legal officers, not intentionally or inadvertently hold themselves out as persons authorized to practice law. Otherwise, the consultation / counseling session, etc., may be deemed to be privileged.

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

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

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

EV 2.4. ***Clergy-penitent privilege - Mil.R.Evid. 503***

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

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

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

EV 2.5. ***Informant privilege - Mil.R.Evid. 507***

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

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

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

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

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

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

EV 2.6. ***Doctor-patient privilege - Mil.R.Evid. 501(d)***

The Military Rules of Evidence do not recognize any doctor-patient privilege. Statements made by a military member to either a civilian or military physician are not privileged and, assuming such statements are otherwise admissible, the statements may be disclosed and admitted into evidence at a court-martial. Information obtained while interviewing a member exposed to the acquired immune deficiency syndrome (AIDS) virus for treatment or epidemiological purposes, however, may not be used to support any adverse personnel action. These adverse personnel actions include court-martial, NJP, involuntary separation if for other than medical reasons, administrative or punitive reduction in grade, denial of promotion, unfavorable entries in personnel records, and a bar to re-enlistment. *See* SECNAVINST 5300.30C (14 March 1990).

EV 2.7. ***Psychotherapist-Patient Privilege – Mil.R.Evd. 513***

Mil.R.Evd. 513 established this privilege in the military. A patient has the privilege to prevent the disclosure of any confidential communications made between the patient and a psychotherapist, or an assistant to the psychotherapist, if the communication was made to facilitate diagnosis or treatment of the patient's mental health condition. Patient records that pertain to any such communications between a patient and a psychotherapist are included in the privilege.

Psychotherapist is defined as a psychiatrist, clinical psychologist, or any clinical social worker licensed to provide mental health services in any state, territory or possession of the United States. The privilege may be claimed by the patient, or by the psychotherapist on behalf of the patient. The rule has eight (8) exceptions to the privilege, some seemingly very broad. There is no privilege when:

1. The patient is dead

2. The communication is evidence of spouse abuse, child abuse or neglect, or in a proceeding when one spouse is charged with a crime against the other spouse

3. Federal law, state law, or service regulation imposes a duty to report information contained in a communication.

4. The psychotherapist believes that a patient's mental condition makes the patient a danger to any person, including the patient.

5. The communication clearly contemplated the commission of a future crime or fraud, or the psychotherapist's services are sought to assist anyone in planning or committing what the patient knew or reasonably should have known to be a crime or fraud.

6. It is necessary to ensure the safety and security of military personnel, military dependents, military property, classified information or the accomplishment of a military mission.

7. When an accused offers statements or other evidence concerning his mental condition in defense, extenuation or mitigation.

8. The admission or disclosure of the communication is constitutionally required.

It is ***highly recommended*** that when a legal officer identifies communications that are privileged under this rule, he or she seek the assistance of a judge advocate before applying any of the exceptions to force the disclosure of the communication in question.

EV 2.8. ***Classified information - Mil.R.Evid 505***.

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

EV 2.9. ***Voluntary disclosure for drug abuse rehabilitation***.

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

administrative separation proceedings, or for vacating previously suspended punitive action. Participation in the self-referral program does not preclude disciplinary action or adverse administrative action based upon "independent" evidence. Personnel in the program are subject to valid unit sweep and random urinalysis inspections. The provision of the self-referral program are contained in OPNAVINST 5350.7, encl. (10).

CHAPTER 3

CHAPTER 3

EV 3. THE LAW OF SELF-INCRIMINATION

EV 3.1. *Article 31 of the Uniform Code of Military Justice*

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

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

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

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

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

EV 3.2. *General discussion*.

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

EV 3.3. *Who must give Article 31 warnings?*

Article 31(b) requires a "person subject to this chapter" (UCMJ) to warn an accused or suspect prior to requesting a statement or conducting an interrogation. The term "person subject to this chapter" has been the subject of some confusion. If this provision were applied literally, all persons in the military would be required to give warnings regardless of their position in the command structure or their involvement in a case. However, this was not the intent of the law. Basically, all military personnel, ***when acting for the military***, must operate within the framework of the UCMJ. Thus, when military personnel act as investigators or interrogators, or within the chain of command in a disciplinary capacity, they must warn a suspect under Article 31(b) prior to asking the suspect any questions.

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

The Court of Military Appeals clarified this area in *United States v. Duga*, 10 M.J. 206 (C.M.A. 1981). In *Duga*, the court held that the Article 31(b) warnings are required in the following situations:

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

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

Unless ***both*** of the *Duga* requirements are met, Article 31(b) warnings will not be required for any statement made to be admissible. Thus, where an undercover informant obtains incriminating statements from a narcotics dealer, the

statements will normally be admissible in the absence of warnings. Though the informant is acting in an official capacity, anything said by the suspect regarding the drug transaction is a casual conversation rather than perceived as a response to official interrogation.

Normally, anyone acting in a law enforcement or disciplinary capacity will be considered acting in an official capacity for purposes of Article 31(b) warnings. Additionally, any questioning done by a military supervisor in the suspect's chain of command will create a strong presumption that the questioning was done for disciplinary purposes.

EV 3.3.1. ***Civilians required to give Article 31 warnings.***

Civilians acting as agents of the military must comply with Article 31b. This includes agents of the Naval Criminal Investigative Service and the Marine Corps' Criminal Investigation Division. This rule applies with equal force to civilians acting as base or station police when acting as agents of the military. Likewise, other civilian investigators, such as Federal and state investigators, must warn an accused or suspect of his Article 31(b) rights when acting as agents of the military.

Civilian law enforcement officers are not required to give an Article 31(b) warning prior to questioning a military person suspected of a military offense, so long as they are acting independently of military authorities. *M.R.E. 305(h).* In such cases, the civilians are not acting in furtherance of a military investigation unless the civilian investigation has merged with a military investigation. Situations may arise where a service member is investigated by both Federal and military authorities jointly. However, the fact that parallel investigations are being conducted through cooperation by military and Federal or state authorities does not make the civilians agents of the military. Thus, no Article 31(b) warnings are required of civilian authorities unless they act directly for the military or the two investigations are merged into one. Similarly, no Article 31b warnings are required of foreign authorities who interrogate military suspects unless the foreign authorities are acting as agents of the military or the interrogation is instigated or participated in by military personnel or their agents.

EV 3.4. ***When are warnings required?***

Article 31(b) requires that an accused or ***suspect*** be advised of his or her rights prior to questioning or ***interrogation***.

EV 3.4.1. ***Who is a suspect?***

The threshold for determining if someone is a suspect is very low. The test applied is whether suspicion is to such an extent that a general accusation of some recognizable crime can be made against this individual. The test is an objective reasonable person standard; i.e. would a reasonable individual have suspected the individual of committing the crime? Courts will review the facts available to the interrogator to determine whether the interrogator should have suspected the service member. Rather than speculate in a given situation, it is far preferable to warn all potential suspects before attempting any questioning.

EV 3.4.2. ***What constitutes interrogation?***

An interrogation takes place when any questioning, conversation, acts, or lack thereof, are intended to, **or reasonably likely to**, elicit an incriminating response from the service member. Mil.R.Evid. 305(b)(2).

EV 3.5. ***What warnings are required? (Article 31(b) UCMJ)***

EV 3.5.1. ***Fair notice as to the nature of the offense.***

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

EV 3.5.2. ***Warning of the right to remain silent.***

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

EV 3.5.3. ***Warning regarding the consequences of speaking.***

The exact language of Article 31(b) requires that the warning advise an accused or suspect that any statement made may be used as evidence against him in a trial by court-martial.

EV 3.5.4. ***Right to terminate the interrogation.***

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

EV 3.6. ***Spontaneous confession.***

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

EV 3.7. ***"Statement" defined.***

It is important to understand the term “statement” in the context of Article 31(b) warnings means more than just the spoken word. A statement can be oral or written. Many individuals, after being taken to an NCIS office and after waiving their right to remain silent and their right to counsel, have given a full confession. When later asked if they made a "statement" to NCIS, they will often respond, "No, I did not make a statement; I told the agent what I did, but I refused to sign anything." Provided the accused was fully advised of his rights, understood and voluntarily waived those rights, an oral confession or admission is as valid for a court's consideration as a writing. Naturally, where the confession or admission is in writing and signed by the accused, the accused will have great difficulty denying the statement or attributing it to a fabrication by the interrogator. Thus, where possible, pretrial statements from an accused or suspect should be reduced to writing, whether or not the accused or suspect agrees to sign it.

In addition to oral statements, some actions of an accused or suspect may be considered the equivalent of a statement and are thus protected by Article 31. During a search, for example, a suspect may be asked to identify an item of clothing in which contraband has been located. Because the service member is a suspect, these acts on his part may amount to admissions. Therefore, care must be taken to see that the suspect is warned of his Article 31(b) rights or the identification of the clothing is obtained from some other source. Similarly, if an investigator believes a service member has marijuana in her possession, and says to her, “ I know you have drugs in your pocket, so why don’t you just hand them over,” if the member complies, her actions are a statement of admission. To be admissible, she would need to be properly warned before being asked to turn over the drugs.

In most cases, however, to have an individual simply identify himself is not an "interrogation," and production of the identification is not a "statement" within the meaning of Article 31(b). Consequently, no warnings are required. Superiors and those in positions of authority may lawfully demand a service member to produce identification at any time without first warning the service member under Article 31(b). Merely identifying one's self upon request is generally considered to be a neutral act. An exception to this general rule arises when the service member is suspected of carrying false identification. In such cases, the act of producing identification is an act that directly

relates to the offense of which the service member is suspected. The act, therefore, is "testimonial" and not neutral in nature; thus, proper warnings are required.

EV 3.8. ***Body fluids***.

The Military Rules of Evidence treat the taking of all body fluids as nontestimonial and neutral acts and thus not protected by Article 31. Although the extraction of body fluids no longer falls within the purview of Article 31, the laws concerning search and seizure and inspection remain applicable, and compliance with Mil.R.Evid. 312 is a prerequisite for the admissibility in court of involuntarily obtained body fluid samples. *See* chapter IV, *infra*. Furthermore, even though urinalysis results are not subject to the requirements of Article 31(b), they sometimes may not be admissible in courts-martial because of administrative policy restraints imposed by departmental or service regulations.

EV 3.9. ***Other nontestimonial acts***.

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

EV 3.10. ***Consent to search***.

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

EV 3.11. ***Applicability to nonjudicial punishment (Article 15) hearings***.

The *Manual for Courts-Martial* provides that the mast or office hours hearing shall include an explanation to the accused of his or her rights under Article 31(b). Thus, an Article 31(b) warning is required, and these rights may be exercised; that is, the accused is permitted to remain silent at the hearing. Article 15 hearings are usually custodial situations. As discussed below, when a suspect is in custody, the law requires that certain counsel warnings be given in addition to the Article 31(b) warnings to ensure the admissibility of statements at a subsequent court-martial. Therefore, since counsel rights will not usually be given at an NJP hearing, statements made by the accused during NJP might not be admissible against him at a subsequent court-martial. For example, if, during his NJP hearing for wrongful possession of marijuana, Seaman Jones confesses to selling drugs, the confession will not be admissible against him at his subsequent court-martial for wrongful sale of drugs if he was not given counsel warnings at NJP. Statements given at NJP by the accused, however, are admissible against the accused at the NJP itself, regardless of whether the accused was given counsel warnings.

While no statement need be given by the accused, Article 15 presupposes that the officer imposing nonjudicial punishment will afford the service member an opportunity to present matters in his own behalf. It is recommended that compliance with Article 31(b) rights at NJP be documented on a form such as the one found in JAGMAN, app. A-1-m.

EV 3.12. ***The right to counsel***

EV 3.12.1. ***Counsel warnings***.

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

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

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

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

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

EV 3.12.2. ***"Custody."***

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

Suppose that a 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 will be considered to be in custody. Thus, advice as to counsel is required.

EV 3.12.3. ***Practical distinction from Article 31.***

Applying the definition of custody to the military setting makes it difficult to imagine a situation where Article 31(b) warnings would be required but counsel warnings would not. As a practical matter, no distinction is drawn. When a situation requires the giving of "31(b) rights," it is highly recommended that all self-incrimination rights, both Article 31(b) and counsel warnings, be given to ensure the admissibility of any statements obtained. Furthermore, all rights advisements should be documented using a form such as JAGMAN appendix A-1-m. The form will help ensure that appropriate rights warnings are given and that a record of the rights given and the acknowledgement and waiver of the same will be available if a dispute later arises. It is essential that these rights be read to the suspect or accused, that they be explained, and that the individual be given ample opportunity to read them before signing an acknowledgement and waiver (if this is desired) and before making any statement or answering any questions.

When a command is concerned about what procedure to follow, or whether or not a confession or admission can be allowed into evidence, a lawyer should be consulted.

EV 3.12.4. ***Request for counsel.***

A suspect must "unequivocally" request counsel. Ambiguous requests will not suffice. However, it is recommended that when faced with an ambiguous request, the wise interrogator will further explore the accused's desires for counsel.

EV 3.13. ***Cleansing warnings.***

When an interrogator obtains a confession or admission without proper warnings, subsequent compliance with Article 31 will not automatically make later statements admissible. This is best illustrated with the following example: Assume the accused or suspect initially makes a confession or admission without proper warnings. This statement, due to the lack of warnings, would be inadmissible at a later court-martial. Next, assume the accused or suspect is subsequently properly advised and then makes a second statement identical similar to the first

inadmissible statement. Before the second statement can be admitted, the government must make a clear showing to the court that the second statement was both voluntary and independent of the first inadmissible statement. There must be some indication that the second statement was not made only because the person felt the government already knew about the first confession and, therefore, he had nothing to lose by confessing again.

The Court of Appeals for the Armed Forces has sanctioned a procedure to be followed when a statement has been improperly obtained from an accused or suspect. In this situation, re-warn the accused giving all warnings mandated. ***Additionally***, include a "cleansing warning" to this effect: "You are advised that the statement you made on _____ cannot and will not be used against you in a subsequent trial by court-martial." Although not a per se requirement for admission, this cleansing warning will assist the government in meeting their burden of a clear showing that the second statement was not tainted by the first.

Another problem in this area concerns the suspect who has committed several crimes. The interrogator may know of only one of these crimes, and properly advises the suspect regarding the known offense. During the course of the interrogation, the suspect relates the circumstances surrounding desertion, the offense about which the interrogator has warned the accused. During questioning, however, the suspect tells the interrogator that, while in a desertion status, he or she stole a military vehicle. As soon as the interrogator becomes aware of the additional offense, the interrogator must advise the suspect of his or her rights with regard to the theft of the military vehicle before interrogating the suspect concerning this additional crime. If the interrogator does not follow this procedure, statements concerning the theft of the military vehicle made by the accused that are given in response to interrogation regarding the theft probably will be excluded, even though the statements regarding the desertion may be admissible.

EV 3.14. *Factors affecting voluntariness*.

It is possible to completely advise a person of his or her Article 31(b) and counsel rights, yet secure a confession or admission that is involuntary because of something that was said or done. The factors below may affect the voluntariness, and hence the admissibility of a confession or admission

EV 3.14.1. *Threats or promises*.

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

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

EV 3.14.2. *Physical force*.

Obviously, physical force will invalidate a confession or admission. Consider this situation. ***A*** steals ***B***'s radio. ***C***, a friend of ***B***'s, learns of ***B***'s missing radio and suspects ***A***. ***C*** beats and kicks ***A*** until ***A*** admits the theft and the location of the radio. ***C*** then notifies the investigator, ***X***, of the theft. Even though ***C***, a private actor, was not required to give any warnings, the statement will not be admissible because ***A*** involuntary admitted stealing the radio after being repeatedly beaten by ***C***.

EV 3.14.3. *Prolonged confinement or interrogation*.

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

EV 3.15. *Consequences of violating the rights against self-incrimination*

EV 3.15.1. *Exclusionary rule*.

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

EV 3.15.2. *Fruit of the poisonous tree*.

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

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

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

EV 3.15.3. *Standing to raise 5th Amendment / Article 31 issues at trial*.

The general rule is that 5th Amendment / Article 31 rights are personal ones and that only the accused at trial may raise a self-incrimination or confession issue. Mil.R.Evid. 304(a). Thus, even if a co-accused makes an unwarned statement that the prosecution intends to use against the accused, the accused lacks standing to raise the issue of the accomplice's lack of warnings.

EV 3.16. *Grants of immunity*

EV 3.16.1. *Who may issue grants of immunity*

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

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

EV 3.16.2. *Types of immunity*

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

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

EV 3.16.3. *Forms.*

See JAGMAN, app. A-1-i(1)-(3). Commands seeking a grant of immunity for a witness should consult with their staff judge advocate.

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

SUSPECT'S RIGHTS AND ACKNOWLEDGEMENT / STATEMENT

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

RIGHTS

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

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

(2) I have the right to remain silent;

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

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

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

WAIVER OF RIGHTS

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

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

(2) I expressly desire to make a statement;

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

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

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

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

A-1-m(2)

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

SIGNATURE (ACCUSED / SUSPECT)

CHAPTER 4

CHAPTER 4

EV 4. SEARCH AND SEIZURE / DRUG ABUSE DETECTION

EV 4.1. *Part A SEARCH AND SEIZURE*

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

Searches and seizures conducted in accordance with the requirements of the United States Constitution will generally yield admissible evidence. On the other hand, evidence obtained in violation of constitutional rules will not be admissible in any later criminal prosecution. With this in mind, the most productive approach for the reader is to develop a thorough knowledge of what actions are legally permissible (producing admissible evidence for trial by court-martial) and what are not. This will enable the command to determine, before acting in a situation, whether prosecution at court-martial will be possible. The legality of the search or seizure depends on what was done by the command both prior to and at the time of the search or seizure.

This chapter discusses command actions that constitute reasonable searches, and other command actions that, although permissible and productive of admissible evidence, are not actually searches or seizures.

EV 4.1.1. *Sources of the law of search and seizure.*

EV 4.1.2. *United States Constitution, Amendment IV*.

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

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

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

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

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

The " exclusionary rule" of the Fourth Amendment is a judicially created rule based upon the language of the Fourth Amendment. The United States Supreme Court considered this rule necessary to prevent unreasonable searches and seizures by government officials: in effect, the exclusionary rule was created to ***enforce*** the Fourth Amendment. The sole basis for the law of search and seizure has been stated to be the protection of the individual's privacy from governmental intrusion..

EV 4.1.3. ***Manual for Courts-Martial, part III***.

Unlike the area of confessions and admissions covered in Article 31, Uniform Code of Military Justice (UCMJ), there is no basis in the UCMJ for the military law of search and seizure. By a 1980 amendment to the *Manual for Courts-Martial* [hereinafter MCM], the Military Rules of Evidence [hereinafter Mil.R.Evid.] were enacted. The Military Rules of Evidence provide extensive guidance in the area of search and seizure in rules 311 -317, and anyone charged with the responsibility for authorizing and conducting lawful searches and seizures should be familiar with those rules.

EV 4.2. ***The language of the law of search and seizure***.

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

EV 4.2.1. ***Search***.

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

(1) A quest for evidence;

(2) conducted by a government agent; and

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

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

EV 4.2.2. ***Seizure***.

A seizure is the taking of possession of a person or some item of evidence in conjunction with the investigation of criminal activity. The act of seizure is separate and distinct from the search; the two terms vary significantly in legal effect. On some occasions, a search of an area may be lawful, but not a seizure of certain items thought to be evidence. Examples of this distinction will be seen later in this chapter. Mil.R.Evid. 316 deals specifically with seizures and creates some basic rules for application of the concept.

EV 4.2.3. ***Probable cause to search***.

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

(1) A crime has been committed; and

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

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

(1) Written statements, including e-mail;

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

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

EV 4.2.4. ***Probable cause to apprehend***.

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

(1) A crime was committed; and

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

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

EV 4.2.5. ***Civil liability***.

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

EV 4.2.6. ***Capacity of the searcher***.

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

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

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

(3) **Civilian police**. Any action to search or seize by what the Mil.R.Evid. 311(c)(2) calls "other officials" must be in compliance with the U.S. Constitution and the rules applied in the trial of

criminal cases in the U.S. District Courts. "Other officials" include agents of the District of Columbia, or of any state, commonwealth, or possession of the United States.

EV 4.2.7. ***Objects of a search or seizure.***

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

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

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

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

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

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

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

(a) Generally, government agents may search for and seize such property for any or no reason, unless the person assigned the property has a reasonable expectation of privacy therin. Mil.R.Evid. 316(d)(3).

(b) Barracks rooms, footlockers and wall lockers are presumed to carry with them an expectation of privacy; thus, they can be searched only where the Military Rules of Evidence permit.

EV 4.3. ***Categorization of searches.***

In discussing the law of search and seizure, we can divide all search and seizure activity into two broad areas: those that require prior authorization and those that do not. Within the latter category of searches, there are two types: searches requiring probable cause (Mil.R.Evid. 315) and searches not requiring probable cause (Mil.R.Evid. 314).

EV 4.3.1. ***Probable cause searches based upon prior authorization.***

EV 4.3.1.1. ***Civilian search warrants.***

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

EV 4.3.1.2. ***Military search authorization.***

This type of "prior authorization" search is akin to that described in the text of the Fourth Amendment, but is the express product of Mil.R.Evid. 315. This rule clearly intends that the power to authorize a search is based upon the billet, rather than being founded in rank or officer status. Thus, in those situations where senior noncommissioned or petty officers occupy positions as officers in charge or positions analogous to command, they are generally competent to authorize searches absent contrary direction from the service secretary concerned. In the typical case, the commander or other "competent military authority," such as an officer in charge, decides whether probable cause exists when issuing a search authorization.

EV 4.3.1.3. ***Jurisdiction to authorize searches.***

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

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

(a) **Civilians**. The search of civilians is now permitted under Mil.R.Evid. 315(c) when they are present aboard military installations. This gives the military commander an alternative in such situations where the only possibility, prior to the Mil.R.Evid., was to detain that person for a reasonable time while a warrant was sought from the appropriate Federal or state magistrate.

(b) **Military.** Mil.R.Evid. 315 indicates two categories of military persons who are subject to search by the authorization of competent military authority: members of that commanding officer's unit and others who are subject to military law when in places under that commander's jurisdiction (e.g., aboard a ship or in a command area)..

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

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

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

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

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

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

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

EV 4.3.1.4. ***Delegation of power to authorize searches***

(1) Commanders may not delegate the power to authorize searches and seizures. However, if full command responsibility devolves upon a subordinate, that person may authorize searches and seizures since the subordinate in such cases is acting as the commanding officer. General command responsibility does not automatically devolve to the CDO, SDO, OOD, or even the executive officer simply because the commanding officer is absent. Only when full command responsibilities devolve to a subordinate member of the command may that person lawfully authorize a search. Readers should follow the guidance set forth by their respective Commander's / CG's.

(2) Mil.R.Evid. 315(d)(2) provides that military judges or magistrates may authorize searches and seizures if authorized. No procedures presently exist in the Navy or Marine Corps to delegate the power to authorize searches or seizures to military judges or military magistrates. Unless such a procedure is authorized by the Secretary of the Navy, no such delegation should be attempted.

EV 4.3.1.5. ***The requirement of neutrality and detachment.***

The commander authorizing the search must act in a neutral and detached manner when making the decision. The fact that a commander may be the convening authority that is empowered to dispose of any misconduct discovered as a result of a search and seizure she authorized does not cause that commander to not be neutral or detached. Case law only requires the commander to refrain from entering the evidence-gathering process. Mil.R.Evid. 315(d) further adds:

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

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

EV 4.3.1.6. ***The requirement of probable cause***

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

(a) A crime has been committed; and

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

Before an authorizing official may conclude that probable cause to search exists, he or she must have a reasonable belief that the information giving rise to the intent to search is reliable and has a factual basis. Mil.R.Evid. 315 allows probable cause to be based either wholly or in part on hearsay information.

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

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

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

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

(b) If an individual making a probable cause determination is relying upon the in-person report of an ***informant***, he must determine both that the informant is believable and that the property observed is likely to be what the observer believes it to be. The determining individual may consider the demeanor of the informant, as well as the factors noted under paragraph (c) below, to help determine whether the informant is believable. An individual known to have a "clean record" and no bias against the suspect is likely to be credible. Information from an anonymous informant, by itself, is never sufficient to establish probable cause.

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

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

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

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

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

The factors listed above are not the only ways to determine an informant's believability. The commander may consider any factor tending to show believability, such as the informant's military record, his duty assignments, and whether the informant has given the information under oath. While current military law does not require that statements used to establish probable cause be made under oath, an oath is ***highly recommended***, as it enhances believability of the information presented.

EV 4.3.1.7. *The use of a writing in the search authorization*.

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

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

Finally, probable cause must be determined by the person who is asked to authorize the search without regard to the prior conclusions of others concerning the question to be answered. No conclusion of the authorizing official should

ever be based on a conclusion of some other person or persons. The determination that probable cause exists can be arrived at only by the officer charged with that responsibility.

EV 4.3.1.8. ***Execution of the search authorization.***

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

EV 4.4.

EV 4.4.1. ***Probable cause searches without prior authorization.***

EV 4.4.1.1. ***Exigency search.***

This type of search is permitted by Mil.R.Evid. 315(g) under circumstances demanding some immediate action to prevent removal or disposal of property believed, on reasonable grounds, to be evidence of crime. Although the exigencies may permit a search to be made without the requirement of a search authorization, there still must be sufficient reliable information to support probable cause. Prior authorization is not required under Mil.R.Evid. 315(g) for a search based upon probable cause under the following circumstances:

(1) **Insufficient time**. No authorization need be obtained where there is probable cause to search, and there is a reasonable belief that the time required to obtain an authorization would result in the removal, destruction, or concealment of the property or evidence sought. For example, this exception may, depending on the facts present, be a basis for entry into barracks or apartments in situations where drugs are being used. If in doubt, the best course of action is to attempt to "freeze the scene", post guards and obtain a search authorization.

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

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

EV 4.4.2. ***Searches not requiring probable cause or authorization.***

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

EV 4.4.2.1. ***Searches upon entry to or exit from U.S. installations, aircraft, and vessel abroad.***

Commanders of military installations, aircraft, or vessels located abroad may authorize personnel to conduct searches of persons or property upon entry to or exit from the installation, aircraft, or vessel. The justification for the search is the need to ensure the security, military fitness, or good order and discipline of the command. Mil.R.Evd 314(c).

EV 4.4.2.2. *Consent searches*.

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

Except under the Navy and Marine Corps urinalysis program, there is no absolute requirement that an individual from whom consent is sought be told of the right to refuse such consent, nor is there any requirement to warn under Article 31b, even when the individual is a suspect before requesting consent. OPNAVINST 5350.7(series) and MCO 1000.10 (The Marine Corps Substance Abuse Program) currently require the command to inform a member of his right to refuse a consent urinalysis. OPNAVINST 5350.7(series) additionally requires the member be told why the command is seeking a consent urinalysis.

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

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

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

EV 4.4.2.3. *Stop and frisk*.

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

EV 4.4.2.4. *Search incident to a lawful apprehension*.

A search of an individual's person, of the clothing he is wearing, and of places into which he could reach to obtain a weapon or destroy evidence is a lawful search if conducted incident to a lawful apprehension of that individual and pursuant to Mil.R.Evid. 314(g). Apprehension is the taking into custody of a person. This means the imposition of physical restraint and is substantially the same as civilian "arrest." It differs from military arrest which is merely the imposition of moral restraint.

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

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

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

When a law enforcement officer lawfully apprehends the occupants of an automobile, the officer may conduct a search of the entire passenger compartment (including a locked glove compartment and any container found therein, whether opened or closed) as part of a valid search incident to apprehension.

EV 4.4.2.5. ***Emergency searches to save life or for related purposes***.

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

EV 4.5. ***"Plain view" seizure***.

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

EV 4.6. ***The use of drug-detector dogs***.

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

Close attention must be given to establishing the reliability of the informers in this situation (i.e., the dog and dog handler). The drug-detector dog is simply an informant, albeit with a bigger, more sensitive nose and a somewhat more scruffy appearance. As in the usual informant situation, there must be a showing of both factual basis (i.e., the dog's alert and surrounding circumstances) and the dog's reliability. This may be done by the commanding officer to reviewing the record of the particular dog's previous performance in actual cases (i.e., the dog's success rate). This information is included in the dog's "probable cause folder" and will be carried by the handler any time the dog is working in the field. For more information on the use of military working dogs as drug detectors and establishing their reliability as such, see OPNAVINST 5585.2 (*Military Working Dog Manual*) of 25 August 1997.

EV 4.7. ***Body views and intrusions***.

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

EV 4.7.1. ***Visual examinations of the body***.

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

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

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

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

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

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

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

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

EV 4.7.2. ***Intrusion into body cavities***.

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

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

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

EV 4.7.3. ***Extraction of body fluids***.

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

a. Pursuant to a lawful search authorization; or

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

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

EV 4.7.4. ***Intrusions for valid medical purposes***.

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

EV 4.8. *Inspections and inventories*.

EV 4.8.1. *General considerations*.

Although not within any category of searchs (prior authorization / without prior authorization), administrative inspections and inventories conducted by government agents may yield evidence admissible in trials by court-martial. **Mil.R.Evid. 313** codifies the law of military inspections and inventories. If carried out lawfully, inspections and inventories are not designed to be "quests for evidence" and are thus not searches in the strictest sense. Since that element of the formula is missing, it follows that items of evidence found during these inspections are admissible in court-martial proceedings. If either of these administrative activities is primarily a quest for evidence directed at certain individuals or groups, the inspection is actually a search and evidence seized will normaly not be admissible.

EV 4.8.2. *Inspections*.

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

Mil.R.Evid. 313(b) makes it clear that "an examination made for the primary purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings is not an inspection within the meaning of this rule." But, an otherwise valid inspection is not rendered invalid solely because the inspector has as his or her secondary purpose that of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings.

An inspection may be made of the whole or any part of a unit, organization, installation, vessel, aircraft, or vehicle. Inspections are quantitative examinations insofar as they do not single out specific individuals or very small groups of individuals. There is, however, no legal requirement that the entirety of a unit or organization be inspected. An inspection should be totally exhaustive (i.e., every individual of the chosen component is inspected) or it should be done on a random basis, by inspecting individuals according to some rule of chance (i.e., rolling dice). Such procedures will be an effective means to avoid challenges based on grounds that the inspection was a subterfuge for a search.

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

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

Suppose, however, that Colonel ***X***, having no information concerning ***A***, is seeking to remove contraband from his command, prevent removal of government property, and reduce drug trafficking. He establishes inspections at the gate. Those entering and leaving through the gate have their persons and vehicles inspected on a random basis. Colonel ***X*** is not trying to singe out ***A*** or any other particular individual. ***A*** carries marijuana through the gate and is inspected. The inspection is a reasonable one; the trunk of the vehicle, under its seats, and ***A***'s pockets are checked.

Marijuana is discovered in ***A***'s trunk. The marijuana was discovered incident to the inspection. ***A*** was not singled out, and was inspected in the same manner as everyone else. The evidence would be admissible.

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

EV 4.8.3. *Inventories*.

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

EV 4.9. *Consequences of obtaining evidence from unlawful searches and seizures*.

EV 4.9.1. *Exclusionary rule*.

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

EV 4.9.2. *Fruit of the poisonous tree*.

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

EV 4.9.3. *Standing*.

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

Example: NCIS suspects that YN3 Silvio and YN3 Bolling are selling drugs from YN3 Bolling's married enlisted quarters. An NCIS agent breaks into YN3 Bolling's house without a search authorization. Inside the house, the NCIS agent seizes several ounces of white powder, a scale, plastic baggies, and $500.00 cash. This evidence is inadmissible against YN3 Bolling because his reasonable expectation of privacy in his house gives him "standing" to object to the illegal search. The evidence is therefore inadmissible at YN3 Bolling's court-martial. YN3 Silvio, on the other hand, does not have a reasonable expectation of privacy in YN3 Bolling's house, thus he has no "standing" to object to the illegal search. The evidence is therefore admissible against YN3 Silvio.

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

EV 4.9.4. *Inevitable discovery*.

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

EV 4.9.5. *Good faith exception*.

Mil.R.Evid. 311(b)(3) provides that the exclusionary rule will not be applied if the person authorizing the search was competent to do so and had a substantial basis for deciding probable cause existed, and if those seeking his authorization and those executing it acted in good faith.

EV 4.1. *Part B DRUG ABUSE DETECTION*

This section deals with the Navy and Marine Corps urinalysis program and its limitations.

EV 4.2. *General guidance*.

The urinalysis programs of the Navy, Marine Corps, and Coast Guard were established primarily to provide a means for the detection of drug abuse and to serve as a deterrent against drug abuse. Some of the important directives concerning the program are: DoD Directive. 1010.1 of 9 Dec. 1994; OPNAVINST 5350.4C of 29 June 1999, MCO 1000.10 of 13 Dec 1996, and COMDTINST 5355.1B of 21 Dec 89. Additional guidance is found in the Military Rules of Evidence. These rules and directives contain detailed guidelines for the collection, analysis, and use of urine samples.

EV 4.3. *Types of tests*.

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

EV 4.3.1. *Search and seizure*.

EV 4.3.1.1. *Tests conducted with member's consent*.

Members suspected of having unlawfully used drugs may be requested to consent to urinalysis testing. For consent to be valid, it must be freely and voluntarily given. In this regard, OPNAVINST 5350.4C provides that, prior to requesting consent, commands should advise the member that he or she is suspected of drug use and may decline to provide a sample. MCO 1000.10 has a similar requirement. A recommended urinalysis consent form is provided as appendix II to this chapter. This additional advice is not required in the Coast Guard.

EV 4.3.1.2. *Probable cause and authorization*.

Urinalysis testing may be ordered, in accordance with Mil.R.Evid. 312(d) and 315, whenever there is probable cause to believe that a member has wrongfully used drugs and that a test will produce evidence of such use. For example, during a routine locker inspection in the enlisted barracks, you find an open baggie of what appears to be marijuana under some clothes in Petty Officer Jones' wall locker. Along with the marijuana you find a roach clip and some rolling papers. You notify the commanding officer of your find and he sends for Jones. A few minutes later, Petty Officer Jones staggers into the CO's office—eyes red and speech slurred. He is immediately apprehended and searched. A marijuana cigarette is found in his shirt pocket. Under these facts, a commander would have little trouble finding probable cause to order that a urine sample be given.

EV 4.3.1.3. ***Probable cause and exigency***.

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

EV 4.3.2. ***Inspections under Mil.R.Evid. 313***.

Commanders may order urinalysis inspections just as they may order any other inspection to determine and ensure the security, military fitness, and good order and discipline of the command. Urinalysis inspections may not be ordered for the primary purpose of obtaining evidence for trial by court-martial or for other disciplinary purposes. Commands may use a number of methods of selecting service members or groups of members for urinalysis inspection including, but not limited to:

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

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

c. Urinalysis testing of an entire unit.

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

EV 4.3.3. ***Service-directed testing***.

Service-directed testing is actually nothing more than inspections of units expressly designated by the Chief of Naval Operations. These include: rehabilitation facility staff; security personnel; fleet "A" School candidates; officers and enlisted in the accession pipeline; and those executing PCS orders to an overseas duty station. *See* OPNAVINST 5350.4C, encl. (2).

EV 4.3.4. ***Valid medical purpose***.

Blood tests or urinalyses may also be performed to assist in the rendering of medical treatment (e.g., emergency care, periodic physical examinations, and such other medical examinations as are necessary for diagnostic or treatment purposes). Do not confuse this with a fitness-for-duty examination ordered by a service member's command. ***Note***: Paragraph 3.b of enclosure (2) to OPNAVINST 5350.4C requires urinalysis results to be from a Navy Drug Screening Lab or other DoD certified lab before taking any administrative or disciplinary action on such results. Results from non-DoD certified labs may not be used for any disciplinary or administrative purposes.

EV 4.3.5. Fitness-for-duty testing.

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

EV 4.3.5.1. ***Command-directed testing***.

A command-directed test shall be ordered by a member's commander, commanding officer, officer in charge, or other authorized individual whenever a member's behavior, conduct, or involvement in an accident or other incident

gives rise to a reasonable suspicion of drug abuse and a urinalysis has not been conducted on a probable cause or consensual basis. Command-directed tests are often ordered when suspicious or bizarre behavior does not amount to probable cause.

EV 4.3.5.2. ***Aftercare and surveillance testing***.

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

EV 4.3.5.3. ***Evaluation testing***.

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

EV 4.3.5.4. ***Safety investigation testing***.

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

EV 4.4. ***Uses of urinalysis results***.

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

The results of a command-directed / fitness-for-duty urinalysis may **NOT** be used against the member for any disciplinary purposes, nor on the issue of characterization of service in separation proceedings. In addition, positive results obtained from a command-directed / fitness-for-duty urinalysis may not be used as a basis for vacation of the suspension of execution of punishment imposed under Article 15, UCMJ, or as a result of court-martial. Such result may, however, serve as the basis for referral of a member to a DOD treatment and rehabilitation program and as a basis for administrative separation.

What administrative or disciplinary action can be taken against service members identified as drug abusers through service-directed urinalysis testing varies, depending upon which CNO-designated unit was tested. The only constant is that all service-directed testing may be considered as the basis for administrative separation. For further guidance on the uses of service-directed urinalysis results, see OPNAVINST 5350.4, encl. (2), Appendix A, reproduced as appendix III of this chapter.

EV 4.5. ***The collection process***.

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

EV 4.6. ***Drug testing***.

EV 4.6.1. ***Navy drug screening laboratories***.

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

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

EV 4.7. ***FINDING THE EXISTENCE OF PROBABLE CAUSE TO ORDER A SEARCH***

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

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

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

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

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

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

   b. Is the person or place described with particularity?

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

5. Who is the source of this information?

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

   b. If the source is the person you are questioning, proceed to question 6 immediately.

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

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

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

If you are satisfied as to the reliability of the information and that of the person from whom you receive it, and you then entertain a reasonable belief that the items are where they are said to be, then you may authorize the search and seizure. It should be done using a written form. (See JAGMAN appendix A-1-n, or appendix VI to this chapter).

EV 4.8. ***SEARCH AUTHORIZATIONS: INFORMANT ADDENDUM***

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

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

a. Questions to determine the informant's reliability:

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

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

(3) Has the provided information always proven correct in the past?

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

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

(6) Has any prior information resulted in conviction?

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

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

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

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

EV 4.9. *SEARCHES: DESCRIBE WHAT TO LOOK FOR AND WHERE TO LOOK*

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

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

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

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

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

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

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

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

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

c. **Evidence of crimes**

(1) **Fruits of a crime**

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

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

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

(3) **Evidence which may aid in a particular crime solution**:

Example: "Papers, documents, and effects which show dominion and control of said area, including, but not limited to, canceled mail,
stenciled clothing, wallets, receipts."Appendix I-c(1)

EV 4.10. ***URINALYSIS CONSENT FORM***

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

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

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

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

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

_____
Signature

Date

_____
Witness' Signature

_____
Date

EV 4.11. ***USE OF DRUG URINALYSIS RESULTSOF DRUG URINALYSIS RESULTS***

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

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

EV 4.12. *URINALYSIS*

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

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

The unit coordinator should:

1. Ask for the member's ID card.

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

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

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

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

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

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

8. Seal bottle with tamper resistant tape.

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

10. Have member initial label.

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

Have member sign ledger.

Have observer sign ledger.

14. Have coordinator sign ledger.

15. Place bottle in original cardboard container.

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

Appendix IV(1)

The observer should:

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

2. Ensure male members use urinal only. If there are two urinals, side-by-side, only one member should provide a sample at any one time. If there are more than two urinals, no more than two members should give samples at one time and each should use one of the two end urinals. If member is female, keep the stall door open. Observers should *never* observe more than one service member at a time.

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

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

5. Initial the ledger.

6. Sign the ledger.

Problems arise in the following situations:

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

2. When the observer fails to initial the ledger.

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

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

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

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

7. When an atmosphere of confusion surrounds the collection.

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

Be aware that urinalysis cases take approximately three months on average from collection to trial. If the observer was only TAD to the testing command at the time of collection, the observer may have to return to his / her parent command before trial. Also, if either the observer or unit coordinator is planning to transfer or deploy within three months of the urinalysis, he / she may be unavailable for trial. In all these cases, personnel may have to return to testify at convening authority expense.
Appendix IV(2)

EV 4.13. *DRUG SCREENING LABSDRUG SCREENING LABS*

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

AREAS OF RESPONSIBILITYAREAS OF RESPONSIBILITY

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

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

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

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

EV 4.14. ***RECORD OF AUTHORIZATION FOR SEARCH (See JAGMAN 0170)***

RECORD OF AUTHORIZATION FOR SEARCH

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

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

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

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

Grade Signature Title

A-1-n(1)

INSTRUCTIONS

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

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

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

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

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

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

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

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

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.

EV 4.15. ***CONSENT TO SEARCH (See JAGMAN 0170)***

CONSENT TO SEARCH

I, _____, have been advised that inquiry is being made in connection with . I have been advised of my right not to consent to a search of [my person] [the premises mentioned below]. I hereby authorize _____ and _____, who [has] [have been] identified to me as
Position(s)
search of my [person] [residence] [automobile] [wall locker] [_____] [_____] located at .

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

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

Signature

WITNESSES

A-1-o

CHAPTER 5

CHAPTER 5

EV 5. DISCOVERY AND REQUESTS FOR WITNESSES

EV 5.1. *Introduction to discovery*.

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

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

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

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

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

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

EV 5.2. *Methods of discovery*

EV 5.2.1. *Right to interview witnesses*.

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

EV 5.2.2. *Pretrial investigation, Article 32, UCMJ*

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

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

EV 5.2.3. *Documents and other information possessed by the prosecution*.

R.C.M. 701 implements the "equal access" doctrine embodied in Article 46, UCMJ, and provides for discovery in six areas:

EV 5.2.3.1. ***Papers accompanying the charges and the convening order***.

As soon as practicable after charges have been served on the accused, the trial counsel is required to provide copies of (or allow the defense to inspect) any paper which accompanied the charges when referred, the convening order and any amending order, and any sworn or signed statement relating to an offense charged in the case which is in the possession of the trial counsel.

EV 5.2.3.2. ***Documents, tangible objects, and reports***.

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

EV 5.2.3.3. ***Witnesses***.

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

EV 5.2.3.4. ***Prior conviction of accused offered on the merits***.

Before arraignment, the trial counsel shall notify the defense of any records of prior civilian or court-martial convictions that the government may attempt to introduce at trial.

EV 5.2.3.5. ***Information to be offered at sentencing***.

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

EV 5.2.3.6. ***Exculpatory evidence***.

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

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

EV 5.2.4. ***Disclosure by the defense***

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

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

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

EV 5.2.5. ***Prior statements***.

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

EV 5.3. ***Requests for witnesses.***

EV 5.3.1. ***The process for determining who will be called as witnesses***.

Under R.C.M. 703, the trial counsel must take timely and appropriate action to provide for the attendance of the witnesses who have personal knowledge of the facts at issue in the case for both the prosecution and defense.

EV 5.3.1.1. ***Prosecution witnesses***.

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

EV 5.3.1.2. ***Defense witnesses***.

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

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

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

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

(2) In determining whether the personal appearance of a defense witness requested on the merits is necessary, the convening authority and / or the military judge will refer to the factors set forth in R.C.M. 703 for guidance.

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

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

(b) a synopsis of the expected testimony; and

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

(4) R.C.M. 1001(e) states the requirements for the personal appearance of a witness in the presentencing proceeding.

EV 5.3.1.3. Action taken to produce required witness

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

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

(b) In the event that a military witness is located at a place other than the location of the trial, and travel at government expense is required, "the appropriate superior will be requested to issue the necessary orders." Practically speaking, the convening authority will contact the command to which the witness is attached and will furnish the accounting data for the witness.

(c) Civilian witnesses are obtained by the issuance of a subpoena. The subpoena is prepared by the trial counsel.

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

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

CHAPTER 6

CHAPTER 6

PR 6. MILITARY JUSTICE INVESTIGATIONS

PR 6.1. *INTRODUCTION*

This chapter sets forth a recommended procedure for receiving and investigating complaints of misconduct. This chapter also discusses the commanding officer's responsibility to investigate complaints of misconduct and the limitations imposed upon his discretion in disposing of such complaints.

PR 6.2. *PRELIMINARY INVESTIGATORY ACTION*

PR 6.2.1. *The initiation of a complaint*

The initiation of a complaint is nothing more than bringing to the attention of proper authority the known, suspected, or probable commission of an offense punishable under the UCMJ.

PR 6.2.1.1. *Who may initiate a complaint.*

Any person -- military or civilian, adult or child, officer or enlisted -- can initiate a complaint.

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

PR 6.2.1.2. *How a complaint is initiated.*

A complaint may be initiated in many different ways. For example, a complaint may be based upon the receipt of a Report and Disposition of Offense(s) Form (NAVPERS Form 1626/7), most frequently referred to as a "report chit." The 1626/7 form is by far the most common method of submitting a complaint in the Navy. The Coast Guard uses a similar form, Report of Offense and Disposition (CG Form 4910). The Marine Corps equivalent is the Unit Punishment Book (UPB) (NAVMC 10132). The UPB, however, is seldom used to submit an initial complaint in the Marine Corps; a locally prepared form, typically referred to as a "report chit," is used for this purpose. In both services, a complaint may also be initiated based upon, *inter alia*: the report of a victim, the victim's parents or friends; a witness' statement; a Shore Patrol or Military Police report; the receipt of a report of investigation conducted by the Naval Criminal Investigative Service (NCIS), Coast Guard Investigative Service (CGIS), Marine Corps Criminal Investigation Division (CID), or similar agency; or upon receipt of signed and sworn charges (i.e., preferred charges on a DD Form 458).

PR 6.2.1.3. *Duty to report offenses.*

Article 1137, *U.S. Navy Regulations (1990)*, requires personnel of the naval service to report to proper authority offenses committed by persons in the naval service which come under their observation. Coast Guard personnel are similarly guided by Article 9-1-1 of U. S. Coast Guard Regulations.

PR 6.2.1.4. *To whom made*

a. A suspected offense may be reported to any person in military authority over the accused. This may be the Commanding Officer (CO), but usually it is to a designated subordinate such as the Officer Of the Day (OOD), Command Duty Officer (CDO), Executive Officer (XO), the discipline officer, or the legal officer.

b. The great majority of reports will be initiated by persons in military authority over the accused. These reports are usually in writing (e.g., a report chit) and, regardless of who originally received the report of complaint, it should be forwarded to the discipline officer, the legal officer, command master chief, first sergeant/sergeant major, etc., as appropriate for command knowledge and action.

PR 6.2.2. *Action upon receipt of complaint.*

R.C.M. 401(b) requires that, upon receipt of charges or information about a suspected offense, proper authority -- ordinarily the immediate commanding officer of the accused -- shall take prompt action to determine what disposition

should be made in the interests of justice and discipline. The immediate commander will then either personally inquire into the charges or order a preliminary inquiry into the charges or the suspected offenses sufficient to enable him to make an intelligent disposition of them.

PR 6.2.3. ***Investigation by NCIS CGIS, and CID .***

PR 6.2.3.1. ***Generally.***

NCIS is the primary investigative and counterintelligence agency for the Department of the Navy. CGIS is the primary investigative service for Coast Guard commanders. CID is the investigative arm of the Marine Corps Provost Martial With respect to military justice, CGIS operates in a fashion parallel to that of NCIS described herein; however, CGIS mission and procedure do differ from NCIS mission and procedures.

PR 6.2.3.2. ***Mandatory referral to NCIS.***

Per SECNAVINST 5520.3B of 4 January 1993, the following types of incidents must be referred to NCIS for investigation:

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

b. Incidents of actual, potential, or suspected sabotage, espionage, subversive activities, or defection;

c. Incidents of loss, compromise, leakage, unauthorized disclosure, or unauthorized attempts to obtain classified information;

d. Any incident involving ordnance;

e. Incidents of perverted sexual behavior (but not those involving consensual homosexual conduct);

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

g. Incidents involving narcotics, dangerous drugs, or controlled substances (It is typically NCIS policy to decline investigation in cases involving "user amounts" of marijuana, amphetamines, and barbiturates.);

Note: Such instances must still be reported to NCIS, but NCIS has the discretion to decline the investigation; in which case, the incident should be investigated within the command. If the base/installation has a CID unit, consideration should be given to requesting their assistance.

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

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

j. Incidents of fire or explosion of questionable origin affecting property under Navy or Marine Corps control;

k. All incidents of theft of government property; and

l. Incidents involving national security.

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

PR 6.2.3.3. ***NCIS may decline investigation.***

NCIS may decline to investigate any case which in its judgment would be fruitless or unproductive.

PR 6.2.3.4. ***Command action held in abeyance.***

Upon referral to NCIS, commanding officers receiving information indicating that naval personnel have committed a major offense on a naval installation, including those described in SECNAVINST 5520.3B, should, in such cases, refrain from taking action with a view to trial by court-martial and refer the matter to the senior resident agent of the cognizant NCIS office or his nearest representative for their investigation in accordance with SECNAVINST 5520.3B.

PR 6.2.3.5. ***Referral by NCIS to other investigative agencies.***

If a case is referred by NCIS to another Federal investigative agency, any resulting prosecution, subject to the exceptions set forth below, will be handled by the cognizant U.S. Attorney.

a. If both a major Federal offense and a military offense have been committed, naval authorities may investigate all military offenses and such civilian offenses as may be practicable and may hold the accused for prosecution. Such actions must be reported to Judge Advocate General of the Navy (OJAG) and the cognizant officer exercising general court-martial jurisdiction (OEGCMJ).

b. If, following referral of a case by NCIS to a civilian Federal investigative agency for investigation, the U.S. Attorney declines prosecution, NCIS may resume investigation, and the command may prosecute.

c. If, while Federal authorities are investigating the matter, existing conditions require immediate prosecution by naval authorities, the OEGCMJ may seek approval for trial by court-martial from the U.S. Attorney or refer the issue to OJAG if agreement cannot be reached at the local level.

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

PR 6.2.4. ***Administrative fact-finding bodies***

1. Certain types of incidents or offenses may be of such a nature as to require exhaustive scrutiny (e.g., ship groundings; shortages in accounts of ship's stores or navy exchanges, etc.; extensive fire or explosion; capsizing of a small boat; and other complex or serious incidents). In such cases, an administrative fact-finding body should be convened. The regulations covering fact-finding bodies are contained in the *JAGMAN* and in the *Administrative Investigations Manual for the Coast Guard (AIM)*. These bodies have thus become known as "*JAG Manual* Investigations" in the naval services, and "Admin Investigations" in the Coast Guard.

2. The primary function of an administrative fact-finding body is to search out, develop, assemble, analyze, and record all available information about the matter under investigation. Under appropriate circumstances, they may constitute the ideal method of investigating an alleged or suspected offense. However, an administrative fact-finding body is not to be utilized in lieu of a preliminary inquiry if the only basis for a fact-finding body is to determine if disciplinary action should be taken.

3. *JAG Manual* and Admin Investigations are discussed extensively in the Naval Justice School Civil Law Study Guide.

PR 6.2.5. ***The preliminary inquiry***

1. The usual procedure, if the offense is relatively minor and is not under investigation by NCIS, CGIS, or CID or an administrative fact-finding body, is for the command to appoint an individual of the command to conduct a preliminary inquiry into the complaint. The following recommended procedures will facilitate the inquiry and the flow of the information garnered there from to the CO. Not all of the procedures outlined below are absolute requirements, and modifications should be made to suit the particular requirements of the individual command.

a. Upon the receipt of a report of an offense, the discipline officer/legal officer should draft charge(s) and specification(s) against the accused, using the information set forth in the report of offense(or shore patrol report or base police report), and using Part IV, MCM, 2005, for guidance. These charges should then be set forth on a 1626/7 for the Navy, a UPB for the Marine Corps, or a CG-4910 for the Coast Guard. Examples of an 1626/7, UPB, and CG-4910 have been attached as *Appendix A* to this chapter.

b. Using the accused's service record, the relevant forms should be completed to include the data called for on the front page.

c. The Marine Corps UPB does not serve the dual function of an investigative format and report chit. The initial information required on the UPB may be filled in. *See* Appendix 2-3. Instructions for the completion of the UPB are contained within Chapter 2, MCO P5800.16A (LEGADMINMAN). Alternatively, a locally prepared preliminary inquiry report form may be used and later appended to the UPB.

d. The "DETAILS OF OFFENSE(S)" block. Type the charges and specifications as drafted by the discipline officer in the "DETAILS OF OFFENSE(S)" block. If there is not enough space on the form for the charges and specifications, type them on a separate sheet and staple them to the form. If known, be sure to include the name and duty stations or residences of all witnesses. This information should be located in the initial report of offense.

e. The person submitting the initial report will sign the form in ink in the "PERSON SUBMITTING REPORT" block.

f. The accused should then be called in for a personal interview with the discipline officer for the limited purpose of informing the accused of his rights under Article 31b, UCMJ. When the discipline officer is satisfied that the accused understands the nature and effect of the article 31b warning, he should have the accused sign the "ACKNOWLEDGED" blank in the article 31b warning block on the 1626/7 and sign the "WITNESS" blank himself. For the Marine Corps, this would be Item 6 of the UPB. If the accused refuses to sign the 1626/7, the discipline officer should simply note that fact on the form and initial the entry. For Coast Guard personnel, the CG-4910 does not address rights acknowledgement. This is done using a rights acknowledgement letter. Also unlike the Navy form, the CG-4910 includes a provision for the assignment of a mast representative to an accused. Further, Coast Guard commands generally do not have discipline or legal officers. These functions are usually the responsibility of the executive officer.

Caution: The discipline/legal officer should not attempt to interrogate the accused at this stage. Questioning the accused with a view to obtaining a statement concerning the offenses of which he is suspected is better left to the preliminary inquiry officer (PIO), if one is appointed, who will be in a better position to give necessary warnings and ask appropriate questions after he has explored the evidence in the case.

g. The CO should appoint a commissioned officer or senior enlisted person to serve as the PIO.

2. If the discipline/legal officer does not perform the functions of a PIO, he should forward the file to an officer of the command appointed to conduct a preliminary inquiry into the alleged offenses.

a. The preliminary inquiry usually is conducted in an informal manner. The function of the person appointed to conduct the inquiry is to collect and examine all evidence that is essential to determine the guilt or innocence of the accused, as well as evidence in mitigation or extenuation. As noted in the discussion to R.C.M. 303, it is not the function of the PIO merely to prepare a case against the accused.

b. After being given all of the information concerning the alleged offenses in the possession of the discipline/legal officer, the PIO should:

(1) obtain signed and sworn statements, if possible, from all material witnesses setting forth everything that they know about the case;

Note: All witnesses interviewed or contacted should be listed in the appropriate blanks on the reverse side of the 1626/7 or CG-4910. Witnesses usually do not need to be advised of their Article 31(b) rights, unless the PIO also suspects that the witness has committed an offense and the PIO intends question them concerning the suspected offense(s) at the time of questioning.

(2) obtain any real or documentary evidence that sheds light on the case;

(3) verify and complete the personal data concerning the accused in the "INFORMATION CONCERNING ACCUSED" block on the 1626/7 or CG-4910; and

(4) personally interview the division officer/chain of command of the accused in order that he can fill out the "REMARKS OF THE DIVISION OFFICER" completely and accurately. If the PIO is the division officer, he should so indicate.

c. After examining all other available evidence, the PIO should interview the accused with a view to obtaining a statement concerning the offenses. At the outset of the interview, the PIO must see that the accused is properly advised of his rights under Article 31b, UCMJ.

Note: It is strongly recommended that the PIO use an Acknowledgment and Waiver of Rights Form to record the accused's notification and waiver of his Aricle 31b Rights. A sample form is contained in *Appendix B* to this chapter.

d. A summary of all relevant information obtained by the PIO should be set forth in the "COMMENT" block of the 1626/7 or CG-4910 along with the signature of the PIO. The statements and documents collected during the investigation of the PIO should be attached to the 1626/7or CG-4910.

e. The PIO should draft all charges he has probable cause to believe the accused committed. This action is accomplished by filling out Block 10 on page 1 of the charge sheet (DD Form 458). The PIO should not sign and swear to the charges in Block 11 of the charge sheet at this time. To do so would constitute "preferral" of charges and may start the speedy trial clock. The speedy trial clock will be discussed in chapter XIII. Suffice it to say that once charges have been preferred, the government has no more than 120 days to bring the accused to trial at court-martial.

Note: The PIO need not execute a charge sheet in every case, but should in those cases which he believes are of sufficient gravity to warrant at least a SCM. If he has doubts, the discipline/legal officer should be consulted.

f. The PIO should make recommendations to the CO as to disposition of the case by filling in "RECOMMENDATION AS TO DISPOSITION" block of the 1626/7 or CG-4910.

PR 6.2.6. ***Final pre-mast screening***

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

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

3. The XO reviews the report and may, if desired, call the accused before him, advises him of his rights under Article 31b and, if the accused is not attached to or embarked in a vessel, of his right to refuse NJP pursuant to Article 15(a), UCMJ.

4. The XO may hold a formal screening of the reported offenses in order to accomplish the above review and to ascertain that the accused has been advised of his rights. This pre-mast screening is commonly used at naval commands, and is commonly known as Executive Officer's Inquiry (XOI). If the formal screening is used, the XO should not attempt to conduct a preliminary hearing to develop evidence but should only review the information against the accused and determine that he has been properly advised. Depending upon the working relationship between

the CO and the XO and any delegated authority granted by the CO, the XO may dismiss minor violations without referral them to the CO for NJP.

5. If the preliminary investigation reveals an offense which warrants trial by court-martial, it is not necessary for the accused to be first taken to NJP. The CO can refer sworn charges directly to a court-martial for trial by simply completing and signing Block 14 on the charge sheet (DD Form 458).

PR 6.2.7. ***Pre-mast restriction***

1. Form NAVPERS 1626/7 suggests that the CO has at his discretion the ability to impose pre-mast restriction.Prior to the 1984 revisions to the Manual for Courts-Martial (MCM), pre-mast restriction was authorized. However, the 1984 changes did away with pre-mast restriction. Today it is, in fact, illegal to impose such restraint.

2. The Coast Guard Military Justice Manual (MJM) at 1.B.2 advises that a member may be placed in "pre-disposition restraint" only if the CO is considering referring the charges against the member for trial by special or general court-martial. Once a CO determines that he will dispose of the charges a some forum other than by trial by special or general court-martial, the accused must be released from pre-disposition restraint.

PR 6.3. ***APPENDIX A - REPORT AND DISPOSITION OF OFFENSE(S)***
NAVPERS 1626/7 (REV. 8-81) S/N 0106-LF-016-2636

To: Commanding Officer, _____ Date of Report: _____
1. I hereby report the following named person for the offense(s) noted:

NAME OF ACCUSED	SERIAL NO. **N/A**	SSN	RATE/GRADE	BR. & CLASS	DIV/DEPT

PLACE OF OFFENSE(S) **(BE SPECIFIC)**	DATE OF OFFENSE(S) **(BE SPECIFIC)**

DETAILS OF OFFENSE(S) (*Refer by article of UCMJ, if known. If unauthorized absence, give following info: time and date of commencement, whether over leave or liberty, time and date of apprehension or surrender and arrival on board, loss of ID card and/or liberty card, etc.):* **ENUMERATE OFFENSES SEPARATELY! LISTING BY CHARGE AND SPECIFICATION. IF NECESSARY FOR CLARITY, USE SAMPLE SPECS (PART IV, MCM) FOR CORRECTNESS. USE AS MUCH INFORMATION AS NECESSARY TO ACCURATELY INFORM THE ACCUSED OF THE CHARGES AGAINST HIM. EXAMPLE: VIOLATION OF ARTICLE 134, UCMJ: IN THAT BM3 JOHN JONES, USN, ON ACTIVE DUTY, DID, ONBOARD USS FOX, ON OR ABOUT 16 JULY 19CY, UNLAWFULLY CARRY A CONCEALED WEAPON, TO WIT: A KNIFE WITH A FIVE-INCH BLADE. (USE ADDITIONAL PAGE(S) IF NECESSARY.)**

NAME OF WITNESS	RATE/GRADE	DIV/DEPT	NAME OF WITNESS	RATE/GRADE	DIV/DEPT
List All Known Witnesses					

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

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

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

PRE-MAST RESTRAINT

☐ PRE TRIAL CONFINEMENT

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

☐ NO RESTRICTIONS

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

INFORMATION CONCERNING ACCUSED

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

	DATE		BOARD			
-----INFORMATION FROM SERVICE RECORD-----						
MARITAL STATUS	NO. DEPENDENTS	CONTRIBUTION TO FAMILY OR QTRS ALLOWANCE (Amount required by law) **N/A**	PAY PER MONTH (Including sea or foreign duty pay, if any)			
RECORD OF PREVIOUS OFFENSE(S) (Date, type, action taken, etc. Nonjudicial punishment incidents are to be included.) **LIST ALL PRIOR COURTS-MARTIAL AND CAPTAIN'S MASTS. INCLUDE: DATE OF COURT OR MAST; TYPE OF COURT (SPCM, NJP); NATURE OF OFFENSE (ARTICLES OF UCMJ VIOLATED AND DESCRIPTION OF OFFENSE, I.E., DISRESPECT TO SUPERIOR PETTY OFFICER); SENTENCE IMPOSED.**						

PRELIMINARY INQUIRY REPORT

From: Commanding Officer Date: _____

To: **NAME OF PRELIMINARY INQUIRY OFFICER**

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

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

REMARKS OF DIVISION OFFICER MAY BE SUMMARIZED BY PRELIMINARY INQUIRY OFFICER, OR SECTION MAY BE COMPLETED PERSONALLY BY ACCUSED'S DIVISION OFFICER.

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

NAMES OF PERSONS PRELIMINARY INQUIRY OFFICER DETERMINES TO BE MATERIAL WITNESSES. (INCLUDE THOSE REQUESTED BY ACCUSED.)

RECOMMENDATION AS TO DISPOSITION:

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

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

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

BE AS SPECIFIC AS POSSIBLE, DISCUSS ANY DISCREPANCIES IN ANTICIPATED TESTIMONY OR OTHER EVIDENCE. SWORN STATEMENTS SHOULD BE ATTACHED, IF OBTAINED. ANTICIPATED ABSENCE OF ANY MATERIAL WITNESSES SHOULD BE NOTICED.

(Signature of Investigation Officer)

ACTION OF EXECUTIVE OFFICER

☐ DISMISSED ☐ REFERRED TO CAPTAIN'S MAST	SIGNATURE OF EXECUTIVE OFFICER

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

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

WITNESS	SIGNATURE OF ACCUSED

-----INAPPLICABLE IF ACCUSED ATTACHED OR EMBARKED ON A VESSEL.-----

ACTION OF COMMANDING OFFICER

☐ DISMISSED
☐ DISMISSED WITH WARNING (Not considered NJP)
☐ ADMONITION: ORAL/IN WRITING
☐ REPRIMAND: ORAL/IN WRITING
☐ REST. TO _____ FOR ____ DAYS
☐ CONF. ON _____ 1, 2, OR 3 DAYS
☐ CORRECTIONAL CUSTODY FOR DAYS
☐ REDUCTION TO NEXT INFERIOR PAY GRADE

☐ REST. TO _____ FOR ____ DAYS WITH SUSP. FROM DUTY ☐ FORFEITURE: TO FORFEIT $____ PAY PER MO. FOR MO(S) ☐ DETENTION: TO HAVE $___ PAY PER MO. FOR (1, 2, 3) MO(S) DETAINED FOR _ MO(S)	☐ REDUCTION TO PAY GRADE OF ☐ EXTRA DUTIES FOR __ DAYS ☐ PUNISHMENT SUSPENDED FOR ☐ ART. 32 INVESTIGATION ☐ RECOMMENDED FOR TRIAL BY GCM ☐ AWARDED SPCM ☐ AWARDED SCM

DATE OF MAST:	DATE ACCUSED INFORMED OF ABOVE ACTION **USUALLY SAME DATE AS MAST**	SIGNATURE OF COMMANDING OFFICER

It has been explained to me and I understand that if I feel this imposition of nonjudicial punishment to be unjust or disproportionate to the offenses charged against me, I have the right to immediately appeal my conviction to the next higher authority within 15 days. **NOTE: APPEAL TIME IS NOW ONLY 5 DAYS NOT 15 DAYS. IF THIS SECTION IS USED, THE "15" MUST BE CHANGED TO "5".**

SIGNATURE OF ACCUSED DATE:	I have explained the above rights of appeal to the accused. SIGNATURE OF WITNESS DATE

FINAL ADMINISTRATIVE ACTION

APPEAL SUBMITTED BY ACCUSED DATED: FORWARDED FOR DECISION ON	FINAL RESULT OF APPEAL **DENIED**
APPROPRIATE ENTRIES MADE IN SERVICE RECORD AND PAY ACCOUNT ADJUSTED WHERE REQUIRED DATE: _____ (Initials)	FILED IN UNIT PUNISHMENT BOOK: DATE: _____ (Initials)

NAVPERS 1626/7 (REV. 8-81 (BACK))

UNIT PUNISHMENT BOOK (5812)
NAVMC 10132 (REV. 1-00) (Previous editions will not be used.) (EF)
SN: 0109-LF-982-7300

Copy to: OMPF
Unit Files
SRB/OQR
Member

Staple Additional pages here.

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

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2. I have been advised of and understand my rights under Article 31, UCMJ. I also have been advised of and understand my right to demand trial by court martial in lieu of non-judicial punishment. I (do) (do not) demand trial and (will) (will not) accept non-judicial punishment subject to my right of appeal. I further certify that I (have) (have not) been given the opportunity to consult with a military lawyer, provided at no expense to me, prior to my decision to accept non-judicial punishment.

(Date)_____ (Signature of accused)

3. The accused has been afforded these rights under Article 31, UCMJ, and the right to demand trial by court-martial in lieu of non-judicial punishment.

(Date)_____ (Signature of immediate CO of accused)

4. BOOKER STATEMENT: I have been given the opportunity to consult with a lawyer, provided by the government at no cost to me, in regard to a pending NJP for violation(s) of Article(s)_____ of the UCMJ. I understand that I have the right to refuse NJP; I (do) (do not) choose to exercise that right. I further understand that acceptance of NJP does not preclude my command from taking other administrative action against me.

(DATE) _____ _____ (SIGNATURE) _____

5. UNAUTHORIZED ABSENCE (in excess of 24 hours) AND MARKS OF DESERTION

6. FINAL DISPOSITION TAKEN AND

7. SUSPENSION OF EXECUTION OF PUNISHMENT, IF ANY.

8. FINAL DISPOSITION TAKE BY (Name, grade, title)

9. Upon consideration of the facts and circumstances surrounding (this offense) (these offenses) and upon further consideration of the needs of military discipline in this command, I have determined the offense(s) involved herein to be minor and properly punishable under Article 15, UCMJ, such punishment to be that indicated in 8 and 9. (Signature of CO who took final disposition in 3) _____		10. DATE OF NOTICE TO ACCUSED OF FINAL DISPOSITION TAKEN.
11. The accused has been advised of the right of appeal. _____ _____ (Date) (Signature of CO who took final action in 11)	12. Having been advised of and understanding my right of appeal, at this time I (intend) (do not intend) to file an appeal. _____ (Date) (Signature of accused)	13. DATE OF APPEAL, IF ANY.
14. DECISION ON APPEAL (IF APPEAL IS MADE), DATE THEREOF, AND SIGNATURE OF CO WHO MADE DECISION _____ _____ (Date) (Signature of CO making decision on appeal)		15. DATE OF NOTICE TO ACCUSED OF DECISION ON APPEAL.

16. REMARKS	17. Final Administrative action, as appropriate, has been completed.	
18. UNIT		
19. INDIVIDUAL (Last name, first name, middle initial)	20. GRADE	21. SSN

U.S. DEPARTMENT OF HOMELAND SECURITY U.S. COAST GUARD CG-4910 (Rev. 2-05)	REPORT OF OFFENSE AND DISPOSITION

TO	DATE OF REPORT

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

NAME OF ACCUSED	RATE/GRADE	DIV./DEPT.

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

DETAILS OF OFFENSE(S) *(Recite article UCMJ, if known. Not necessary to use form specification in Part IV, MCM. Generally describe actions of accused which are believed to constitute offense(s) under the UCMJ.)*

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

RATE/GRADE/TITLE OF PERSON SUBMITTING REPORT	SIGNATURE OF PERSON SUBMITTING REPORT

INITIAL ACTION OF EXECUTIVE OFFICER

(When allegations apparently involve minor offenses normally handled by NJP or SCM, the accused should be advised of the allegation(s) and offered the opportunity to select a representative. If a statement is to be requested, advise accused of rights from Form CG-5168A or "Encl. (5)", MJM (COMDTINST M5810.1 Series) . Thereafter the matter should be referred, with the next section of information provided, to a preliminary inquiry officer for investigation.)

I have been informed of the Offense(s) which I am suspected of having committed, that the command is considering the imposition of nonjudicial punishment and has assigned a preliminary inquiry officer, and

☐ I DESIRE THAT _____ BE APPOINTED AS MY REPRESENTATIVE IN THIS CASE.

☐ I DO NOT DESIRE THE APPOINTMENT OF A REPRESENTATIVE.

_____
(Signature of accused)

_____ IS APPOINTED THE ACCUSED'S REPRESENTATIVE.

_____ IS DESIGNATED THE PRELIMINARY INQUIRY OFFICER.

_____
(Signature of Executive Officer)

INFORMATION CONCERNING ACCUSED

CURRENT ENL. DATE	EXP. CURRENT ENL. DATE	TOTAL ACTIVE SERVICE	TOTAL SERVICE ON BOARD	EDUCATION	GCT	AGE	MARITAL STATUS	NO. OF DEPENDENTS	PAY PER MO. *(including sea or foreign duty pay)*

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

PREVIOUS EDITION IS OBSOLETE

Reset

Page 2 of CG-4910 (Rev. 2-05)

PRELIMINARY INQUIRY OFFICER'S REPORT

COMMENT. (Address witness availability and conflicts of evidence. Summarize available evidence to support each element of the offense alleged, including location of real and documentary evidence. Attach statements, or summaries of statements of witnesses. Summarize reasons for ultimate recommendation.)

RECOMMENDATION AS TO DISPOSITION:

- ☐ DISPOSE OF CASE AT MAST
- ☐ REFER TO COURT MARTIAL FOR TRIAL OF ATTACHED CHARGES *(Complete Charge Sheet DD Form 458, page 1.)*
- ☐ NO PUNITIVE ACTION NECESSARY OR DESIRABLE
- ☐ OTHER *(Specify)* _____

SIGNATURE OF PRELIMINARY INQUIRY OFFICER

ACTION OF EXECUTIVE OFFICER

- ☐ DISMISSED
- ☐ RECOMMEND CAPTAIN'S MAST
  - ☐ INFORMED ACCUSED OF RIGHTS TO REFUSE NJP AND CONFER WITH COUNSEL *(If accused not attached to or embarked in a vessel.)*
  - ☐ ACKNOWLEDGEMENT OF RIGHTS/ACCEPTANCE OF NJP FORM ATTACHED
- ☐ RECOMMEND TRIAL BY _____ COURT-MARTIAL

_____
(Signature of Executive Officer)

ACTION OF COMMANDING OFFICER

- ☐ DISMISSED
- ☐ DISMISSED WITH WARNING *(Not considered NJP)*
- ☐ ADMONITION: ORAL/IN WRITING
- ☐ REPRIMAND: ORAL/IN WRITING
- ☐ REST TO _____ FOR _____ DAYS
- ☐ FORFEITURE: TO FORFEIT $ _____ PAY PER MO. FOR _____ MO(S).
- ☐ CORRECTIONAL CUSTODY FOR _____ DAYS
- ☐ REDUCTION TO PAY GRADE _____
- ☐ EXTRA DUTIES _____ DAYS
- ☐ PUNISHMENT SUSPENDED FOR _____ MOS.
- ☐ ART. 32 INVESTIGATION
- ☐ REFER TO SPCM
- ☐ REFER TO SCM

DATE OF MAST	DATE ACCUSED INFORMED OF ABOVE ACTION AND NJP APPEAL RIGHTS	SIGNATURE OF COMMANDING OFFICER

FINAL ADMINISTRATIVE ACTION

APPEAL SUBMITTED BY ACCUSED DATE: _____ FORWARDED FOR DECISION ON _____	FINAL RESULT OF APPEAL:
APPROPRIATE ENTRIES MADE IN SERVICE RECORD *(Date & Initials)*	FILED IN UNIT PUNISHMENT BOOK *(Date & Initials)*

Reset

PR 6.4. ***APPENDIX B – SUSPECT'S RIGHTS ACKNOWLEDGMENT/WAIVER***

DEPARTMENT OF THE NAVY

MILITARY SUSPECT'S ACKNOWLEDGEMENT AND WAIVER OF RIGHTS

Place: _____

_____

I, _____

have been advised by _____

that I am suspected of _____

_____

I have also been advised that:

(1) I have the right to remain silent and make no statement at all;
(2) Any statement I do make can be used against me in a trial by court-martial or other judicial or administrative proceeding;
(3) I have the right to consult with a lawyer prior to any questioning. This lawyer may be a civilian lawyer retained by me at no cost to the United States, a military lawyer appointed to act as my counsel at no cost to me, or both;
(4) I have the right to have my retained civilian lawyer and/or appointed military lawyer present during this interview; and
(5) I may terminate this interview at any time, for any reason.

I understand my rights as related to me and as set forth above. With that understanding, I have decided that I do not desire to remain silent, consult with a retained or appointed lawyer, or have a lawyer present at this time. I make this decision freely and voluntarily. No threats or promises have been made to me.

Signature: _____

Date & Time. _____

Witnessed: _____

_____

Date & Time: _____

At this time, I, _____ desire to make the following voluntary statement. This statement is made with an understanding of my rights as set forth above. It is made with no threats or promises having been extended to me.

OPNAV 5527/3 (12-82) SN 0107-LF-055-2715

601748 DPSDBO QUANTICO VA

PR 6.5. ***APPENDIX C - INSTRUCTIONS FOR PRELIMINARY INQUIRY OFFICERS (PIOs)***

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

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

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

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

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

e. originals or copies of documentary evidence;

f. if the accused waives his Article 31b rights, a copy of the signed Acknowldgment of Rights and Waiver and a signed sworn statement by the accused—or a summary of interrogation of the accused, signed and sworn to by the accused—or both; and

g. any additional comments by the investigator as desired.

2. ***Objectives***

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

b. The PIOs secondary objective is to collect information about the accused which will aid the CO in making a proper disposition of the case. Items of interest to the CO include, but aren't limited to: the accused's currently assigned duties, performance evaluation, attitude and ability to get along with others, and any particular personal difficulties or hardships which the accused is willing to discuss. Information of this sort is best reflected in the statements of the accused's supervisors, peers, and of the accused himself.

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

a. The PIO should not begin by interrogating the accused because, if guilty, the accused is the person with the greatest motive to lie. The PIO should interview the accused last, so that the PIO is fully prepared to question the accused and is armed with all relevant facts and circumstances of the alleged offenses.. Even if the accused confesses his guilt, the PIO should nevertheless collect independent evidence corroborating the confession.

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

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

effectively in written form.

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

5. ***Collect the real evidence.*** Real evidence is a physical object (such as the knife in an assault case or the stolen camera in a theft case, etc). Before seeking out the real evidence, if any exists, the PIO must be familiar with the 300 Series of the Military Rules of Evidence (M.R.E.), which are contained in Part II of the MCM, concerning searches and seizures. If the item is too big to bring to an NJP hearing or into a courtroom, a photograph of the item should be taken. If real evidence is already in the custody of a law enforcement agency, it should be left there unless otherwise directed. The PIO should, however, inspect it personally.

6. ***Rights advisement***

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

b. Appendix B to this Chapter contains a Rights Acknowledgement and Waiver form which may be used to ensure the PIO correctly advises suspects of their rights before asking any questions. Filling in that page must be the first order of business when meeting with the suspect. Only one witness is necessary, and that witness may be the PIO. Additionally, while questioning other witnesses, if the PIO believes that the witness may have also committed misconduct and the PIO intends to question the witness about that potential misconduct, the PIO should also utilize the Rights Acknowledgement and Waiver form to properly advise the witness of his rights with regard to self-incrimination.

7. ***Interrogate the accused.*** The accused may be questioned ***only*** after knowingly and intelligently waiving all constitutional and statutory rights. Such waiver, if made, should be recorded on a copy of the suspect's Acknowledgement of Rights and Waiver Form. If the accused asks questions regarding the waiver of these rights, the PIO must decline to answer or give any advice on that question. The decision must be left to the accused. Other than advising the accused of the rights as stated in paragraph 6b above, the PIO should never give any other form of legal advice to the accused. If the accused wants legal advice or a more detailed explanation of his rights he should be referred to the nearest Naval Legal Serice Office or Military Defense Counsel Office.

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

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

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

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

PR 6.6. ***APPENDIX D - SAMPLE INVESTIGATOR'S REPORT***

INVESTIGATOR'S REPORT IN THE CASE OF _____

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

2. Witnesses interviewed (not the accused).

NAME	PHONE	Signed statement	Summary of interview

4. Documentary evidence:

Description	Original or copy	Attached or location

INVESTIGATOR'S REPORT IN THE CASE OF _____

5. Real evidence:

Description	Name of Custodian	Custodian'sPhone number

6.	Permit the accused to inspect report chit.	Yes__ No
7.	Accused initialed second page of charges.	N/A__ Yes__ No
8.	Accused signed acknowledgement line on NAVPERS 1626/7.	Yes__ No
9.	Investigator signed witness line on NAVPERS 1626/7.	Yes__ No
10.	Accused waived rights.	Yes__ No
11.	Accused made statement (only when #10 is Yes), and	
	Accused's signed statement attached _____	
	Summary of interrogation attached _____	

PR 6.7. ***APPENDIX E - WITNESS' STATEMENT***

Name _____Grade / Rate _____Social Security No.

Command _____Division _____
TAD from / to _____ until _____

Whereabouts for next 30 days _____ Phone _____

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

_____

_____

_____

_____

_____

_____

(use additional pages if necessary)

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

_____ _____ 20__ _____
(Witness' Signature) (Date) (Time)

Sworn to before me this date.

_____ _____ 20__ _____
(Investigator's Signature) (Date) (Time)

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

PR 6.8. ***APPENDIX F - REQUEST FOR LEGAL HOLD***

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

Subj: REQUEST FOR LEGAL HOLD ICO _____

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

Name	Rank	SSN	Unit	RTD

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

3. The request for legal services in the subject case (was) (will be) forwarded to the Office of the Staff Judge Advocate (on) (not later than) _____, 20__.

SIGNATURE

NOTE: This letter should not be read as a means of holding witnesses and/or the accused past their EAOS/EAS for court-martial purposes. It is simply a means to ensure that they are identified as vital participants in the process.

CHAPTER 7

CHAPTER 7

PR 7. INFORMAL DISCIPLINARY ACTIONS: NONPUNITIVE MEASURES

PR 7.1. *INTRODUCTION*

While many violations of the UCMJ could be handled formally, that is by imposition of nonjudicial punishment or referral to court-martial, doing so is not always in the best interest of the service. Often, use of nonpunitive measures can be as effective in dealing with, correcting, or preventing minor disciplinary problems. Consequently, the military justice system recognizes and provides for informal disciplinary measures.

The term "nonpunitive measures" is used to refer to various leadership techniques which can be used to develop acceptable behavioral standards in members of a command. Nonpunitive measures generally fall into one of three areas: nonpunitive censure, extra military instruction (EMI), or administrative withholding of privileges. COs and officers-in–charge (OIC) are authorized and expected to use nonpunitive measures to further the efficiency of their commands. However, they are forbidden from using them to "punish." As their name suggests, these measure are **non**punitive, i.e., **not punishment**.

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

PR 7.2. *AUTHORITY FOR NONPUNITIVE MEASURES*

The use of nonpunitive measures is encouraged and, to a degree, defined in R.C.M. 306(c)(2), which states:

> ***Administrative action.*** A commander may take or initiate administrative action, in addition to or instead of other action taken under this rule [e.g., NJP, court-martial], subject to regulations of the Secretary concerned. Administrative actions include corrective measures such as counseling, admonition, reprimand, exhortation, disapproval, criticism, censure, reproach, rebuke, extra military instruction, or the administrative withholding of privileges, or any combination of the above.

Other nonpunitive administrative actions available to a commander include, but are not limited to, performance ratings, reassignment, career-field reclassification, and administrative reduction for inefficiency.

PR 7.3. *NONPUNITIVE CENSURE*

Nonpunitive censure is the criticism of a subordinate's conduct or performance of duty by a military superior. The censure may be either oral or in writing. When oral, it often is referred to as a "chewing out"; when reduced to writing, the letter is styled a "nonpunitive letter of caution" (hereinafter NPLOC).

A sample of a NPLOC is set forth in Appendix A-1-a of the JAGMAN and Appendix B to this chapter. It should be noted that such letters are private in nature and copies may not be forwarded to the Chief of Naval Personnel (CHNAVPERS) or to Headquarters Marine Corps (HQMC). Additionally, NPLOCs may not be quoted in or appended to fitness reports or evaluations, included as enclosures to *JAG Manual* or other investigative reports, or otherwise included in the official departmental records of the recipient. The deficient performance of duty or other underlying facts which led to the issuance of the NPLOC can be mentioned, however, in the recipient's fitness report or enlisted evaluation. In this regard, the requirements of the JAGMAN are met by avoiding any reference to the fact that a NPLOC was issued. There is only one exception to the rule that NPLOCs are not forwarded to CHNAVPERS or HQMC: Secretarial Letters of Censure issued by the Secretary of the Navy are submitted for inclusion in the recipient's service records. Secretarial Letters of Censure are actually punitive in nature, and, although no appeal is authorized, a rebuttal may be submitted.

A NPLOC should not be confused with a letter of instruction (LOI) which is referenced in 1611-022 of the MILPERSMAN (Detachments for Cause). The MILPERSMAN requires command documentation such as a LOI before an officer can be detached for cause due to unsatisfactory performance. A sample LOI is contained in

Appendix C to this chapter.

PR 7.4. *EXTRA MILITARY INSTRUCTION*

The term "extra military instruction" (EMI) is used to describe the practice of assigning extra tasks to a servicemember who is exhibiting behavioral or performance deficiencies for the purpose of correcting those deficiencies through the performance of the assigned tasks. Normally such tasks are performed in addition to normal duties. Because this kind of leadership technique is more severe than a NPLOC, the law has placed some significant restraints on the commander's discretion in this area.

All EMI involves an order from a superior to a subordinate to do the task assigned. However, it has long been a principle in military law that orders imposing punishment are unlawful and need not be obeyed unless imposed as a part of nonjudicial punishment or a court-martial sentence. Thus, the question that must be asked to determine whether the EMI is valid is whether a legitimate training purpose is involved or whether the purpose of the EMI is punishment. The resolution of this question requires some thought, but the analysis involved is not complex and should be used to avoid legal complications. The commander should: (1) identify the deficiency; and, (2) assign a logically/rationally related task (EMI) in a judicious quantity. To determine if the EMI is logically/rationally related to the deficiency, the commander must simply ask himself, “Does the EMI assigned logically address the deficiency in conduct or performance?” If the answer is yes, it can be presumed that the EMI is valid.

PR 7.4.1. *Identification of deficiency.*

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

PR 7.4.2. *Rationally related task.*

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

For example, what extra task could be assigned to correct one who inadvertently leaves windows unsecured? Perhaps an assignment to close all the windows in the command area each night for two weeks -- or is that task indicative of a punishment motive? How about close order drill? Close order drill logically has nothing to do with windows. More appropriately if a failure to close windows is the result of lack of knowledge of one's duty (ignorance being the deficiency), it would be logical to require the subordinate to study the pertinent security orders for an hour or two each night until he learns his responsibility. Perhaps the delivery of a short lecture by the individual would demonstrate his new-found knowledge of this responsibility.

Where the military superior has analyzed the subordinate's deficiency as relating to some trait of character and assigned a task he determined to be 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 noted in the subordinate. Where the facts show that the superior assigned a task because the subordinate did some unacceptable act, military courts see the assigned task as retaliatory and, hence, view the task as punishment.

PR 7.4.3. *Language used.*

Whenever courts try to determine the purpose of an order, they essentially become involved in trying to determine the state of mind of the issuer of the order. 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, the task assigned was given for valid training purposes. Equally important as this "logic" test is the

language used when the order is given. Seaman Roberts forgets to close the windows, and the commander retaliates with:

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

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

Roberts, you've been forgetting to secure your windows lately and I know you're familiar with the security considerations involved. Lack of self-discipline is inexcusable, even in peacetime. Your failure to close the windows are indicative of your lack of self-discipline. Bad habits learned in peacetime can be fatal in war. I am assigning you to close the windows in the command area for seven days. This added responsibility will help you to develop the self-discipline you need to survive in a combat situation.

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

PR 7.4.4. *Judicious quantity.*

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

PR 7.4.5. *Authority to impose.*

The authority to assign EMI to be performed during working hours is not limited to any particular rank or rate but is an inherent part of the authority vested in officers, petty officers, and noncommissioned officers. The authority to assign EMI to be performed after working hours is held by the CO or OIC but may be delegated to other officers, petty officers, and noncommissioned officers within the unit.

For the Navy, OPNAVINST 3120.32C discusses EMI in detail and clearly states that the delegation of authority to assign EMI outside normal working hours is to be encouraged. Ordinarily, such authority should not be delegated below the chief petty officer (E-7) level. However, in exceptional cases, as where a qualified petty officer is filling a chief petty officer billet in an organizational unit which contains no chief petty officer, authority may be delegated to a mature petty officer. There is no Marine Corps or Coast Guard order which is equivalent to the Navy's OPNAVINST 3120.32C; however, the use of nonpunitive measures by officers and noncommissioned officers is discussed in paragraph 1300 of the MCO P5800.16A CH 5 (*Marine Corps Manual)*.

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

EMI must have a valid training purpose and be reasonably related to the deficiency to be corrected. EMI may extend to a review of proper procedures for performance of assigned tasks or the performance of additional work designed to improve the skills of the individual. The ramifications of failing to adhere to this standard is emphasized by the following cases.

PR 7.5. *DENIAL OF PRIVILEGES*

A. A third nonpunitive measure which may be employed to correct minor deficiencies is the denial of privileges. A "privilege" is defined as a benefit provided for the convenience or enjoyment of an individual. Denial of privileges is a more severe leadership measure than either censure or EMI. This is because an instructional purpose is not required to deny privileges. Examples of privileges that may be withheld can be found in section 0104 of the JAGMAN. Privileges include special liberty, 72-hour liberty, exchange of duty, special command programs, access to base or ship movies, access to enlisted or officers' clubs, hobby shops, and parking privileges. It may also encompass such things as withholding of special pay and commissary and exchange privileges, provided such withholding complies with applicable rules and regulations and is otherwise in accordance with the law.

B. Final authority to withhold a privilege, however, ultimately rests with the authority empowered to grant that privilege. Therefore, the authority of officers and petty officers to withhold privileges is, in many cases, limited to recommendations via the chain of command to the appropriate authority. Officers and petty officers are authorized and expected to initiate such actions when considered appropriate to remedy minor infractions and necessary to further the efficiency of the command. Authority to withhold privileges of personnel in a liberty status is vested in the CO or OIC. Such authority may, however, be delegated to the appropriate echelon of command, but in no event may the withholding of privileges — either by the CO, OIC, or some lower echelon — be tantamount to a deprivation of liberty itself.

C. The Court of Military Appeals (C.M.A.) has indicated that the UCMJ does not authorize deprivation of an individual's liberty except as punishment by court-martial or NJP without a clear necessity for such restraint, either as pretrial restraint or in the interest of health, welfare, discipline, or training.

PR 7.6. *USE OF ALTERNATIVE VOLUNTARY RESTRAINTS OR SELF-DENIAL OF PRIVILEGES*

A. The offer to an individual, as an alternative to formal punishment or reporting of misconduct, to withhold action, if he will voluntarily restrict himself or accede to an order that is beyond the authority of the superior to give (also known as "putting him in house arrest confinement to quarters (HACQ)") is unenforceable and not sanctioned as a nonpunitive measure.

B. Finally, it should be noted that there is a common practice of withdrawing and withholding the green military identification card from an individual as a nonpunitive measure, or even as part of NJP restriction, in order to enforce the presence of the individual for the required period of time. Frequently (especially in the case of afloat commands) an individual must show his identification card to leave the limits of the command and, without it that individual may not leave. Previous versions of the MILPERSMAN required that a Navy servicemember carry their military ID card with them at all times, arguably rendering the practice of retaining ID cards to enforce restriction illegal (or at best unsanctioned). The current MILPERSMAN section regarding ID cards, 1000-080, contains no requirement that members retain their ID cards at all times. However, BUPERSINST 1750.10A, Paragraph 1004 of MCO P5512.11 and Ch 13E of COMDTINST M1000.6A, the Coast Guard Personnel Manual, all suggest that ID card issuing authorities advise members to carry the card at all times, and requires the card be surrendered for identification or investigation or while in disciplinary confinement. In short, a fair reading of the applicable instructions does not preclude a CO from retaining a military ID card to enforce a lawfully-imposed restricted status (via NJP, courts-martial, or pretrial restraint, for example). However, the practice of confiscating and retaining an ID card by any member, including the CO, for the purpose of imposing *ad hoc* restriction is not permitted under any circumstances.

PR 7.7. *LIBERTY RISK*

PR 7.7.1. *Basis*.

There are two recognized purposes behind a liberty risk program: (1) the essential protection of the foreign relations of the United States, and (2) international legal hold restriction. The commander has substantial discretion in deciding to place a member on liberty risk; however, the decision should generally be limited to cases involving a serious breach of the peace or flagrant discredit to the service. Contrary to the beliefs and desires of many COs, the program only applies overseas, either in a foreign country or in foreign territorial waters. Remember that the deprivation of normal liberty, except as specifically authorized under the UCMJ, is illegal. The Coast Guard PCO/PXO Legal Desk Book authorizes a USCG CO the same authority.

PR 7.7.2. ***Due Process***.

Before placing a servicemember on liberty risk, the commander must afford adequate administrative due process safeguards. After reviewing each case individually, the commander should advise the member in writing of his assignment to the program, the basis for the action, and that the servicemember will be given an opportunity to respond. The commander should consider whether less restrictive means (e.g., liberty hours) will be effective in a given case before curtailing all liberty. The command should use incremental categories whenever possible. The CO must periodically review each assignment to assess whether continued curtailment of liberty is justified.

PR 7.7.3. ***Procedures***.

The program is administrative restraint, not punitive; thus, a servicemember's liberty may be curtailed regardless of whether he is facing charges. Conversely, members punished at NJP or a court-martial should not automatically be placed on liberty risk unless their offense and/or predilections otherwise justify that assignment. No service record entries are made. Additionally, members placed on liberty risk cannot not be required to muster or work with members undergoing punitive restriction. If not done appropriately, assignment to liberty risk may constitute a prior punishment or pretrial restraint, thereby inadvertently starting the speedy trial clock. Other legitimate bases for limitations on liberty outside the military justice system include: extra military instruction (EMI), bona fide training, operational necessity, medical reasons, safety/security of personnel, and command integrity. Liberty may also be denied if a member's appearance is contentious, inflammatory, lewd, or unlawful.

PR 7.8. ***APPENDIX A - SAMPLE EMI ASSIGNMENT ORDER***

(Date)
From: (Rate and full name of person imposing EMI)
To: (Rate and full name of person being assigned EMI)

Subj: ASSIGNMENT OF EXTRA MILITARY INSTRUCTION (EMI)

Ref: (a) JAGMAN, § 0103 [or local instruction]

1. Your performance indicates the following deficiencies: [you failed to make required log entries to record certain events and failed to make proper tours of your watch area.]

2. These performance deficiencies stem from: [your inattention to duty in preparing for your assigned watch.]

3. Per the reference, the following extra military instruction is assigned to assist you in overcoming these deficiencies: [you will study the pertinent orders for watchstanders and develop a checklist for use by personnel standing this watch.]

4. This EMI shall be performed between 1630 and 1800 from Monday 1 June 20CY through Friday 5 June 20CY. On Monday, 8 June 20CY, you will present a 30-minute class on this subject to your division.

_____
(Signature)

_____
(Date)

1. I hereby acknowledge notification of the above EMI. I have read and understand reference (a) and am aware that failure to perform said EMI in the manner set out therein is a violation under Article 92, UCMJ, which is punishable by either nonjudicial punishment or at court-martial.

_____
(Signature)

Copy to:
Members' training record (original)
Command Master Chief
Legal Officer
Division Officer

PR 7.9. ***APPENDIX B - SAMPLE NONPUNITIVE LETTER OF CAUTION***

From: Commanding Officer, USS JOHN QUINCY ADAMS (CV 11)
To: CTOCS Michael Stipe, USN, 123-45-6789

Subj: NONPUNITIVE LETTER OF CAUTION

Ref: (a) Report of JAGMAN Investigation of 7 Sep CY
(b) JAGMAN, § 0105
(c) R.C.M. 306(c)(2), Manual for Courts-Martial (2005 ed.)

1. Reference (a) is the record of investigation convened to inquire into the transmission of a certain message on board USS JOHN QUINCY ADAMS while you were SSES Assistant Division Officer.

2. The investigation disclosed that, as Assistant Division Officer, on 19 July CY, you participated in the writing and printing of a bogus message to perpetrate a joke against a chief petty officer stationed onboard USS JOHN QUINCY ADAMS. After printing and delivering a hard copy of the bogus message to the chief petty officer in question, you failed to ensure that the bogus message was completely deleted from the message database, resulting in the bogus message being transmitted to the Bureau of Naval Personnel. To compound the error, when you realized that the bogus message had been sent you did not notify your superiors but instead took steps to prevent their ever discovering your misconduct.

3. Your performance and judgment during this incident was substandard. As Assistant Division Officer, it was inappropriate for you to participate in the drafting of a bogus message on USS JOHN QUINCY ADAMS communications equipment. More critical, however, was your failure to notify your superiors about the incident. You are hereby administratively admonished for your actions on 19 July CY.

4. This letter, being nonpunitive in nature, is addressed to you as a corrective measure. It does not become a part of your official record. However, you are advised that, as Assistant SSES Division Officer, you are in a position of special trust. In the future, I expect you to exercise greater care in the performance of your duties in order to measure up to the high standards of USS JOHN QUINCY ADAMS. I trust the instructional benefit you receive from this experience will heighten your awareness of the extent of your responsibilities and help you become a more proficient Senior Chief Petty Officer.

E. D. BRICKELL

PR 7.10. ***APPENDIX C - SAMPLE LETTER OF INSTRUCTION***

From: Commanding Officer, USS NEVERSAIL (CV 11)
To: LCDR Mike Rowmanage, USN, 4321/1300, Aviation Fuels Officer, USS NEVERSAIL (CV 11)

Subj: LETTER OF INSTRUCTION

Ref: (a) MILPERSMAN 1160-010, 020

1. This Letter of Instruction is issued per the reference to discuss specific measures required to improve the unsatisfactory performance of the Aviation Fuels Division on board NEVERSAIL.

2. Since your assumption of duties as aviation fuels officer on board NEVERSAIL, you have allowed unauthorized procedures to exist in the Aviation Fuels Division that resulted in the structural damage to JP-5 storage tank 8-39-02J during underway replenishment on 18 July CY. You failed to familiarize yourself with appropriate aviation fuels directives and thus you were unable to verify the proceedings in your division. You also failed to ensure all directives were maintained up-to-date. Generally, you relied totally upon your assistant aviation fuels officer for the day-to-day operation of your division.

3. To function effectively as the aviation fuels officer, you must become more involved in the day-to-day aspects of your division. You cannot manage from your office, accepting the counsel of your assistants without developing an adequate personal knowledge of specific procedures. You must personally set your division's goals and personally verify they are being met.

a. You must review every aviation fuels directive applicable to USS NEVERSAIL. You will ensure that you are familiar with directed procedures. As a matter of routine, you will personally verify that your division does not deviate from directed procedures unless authorized by higher authority.

b. You will submit quota requests for yourself and CWO2 J. S. Ragmann to attend an aviation fuels officer course upon completion of this deployment.

4. This letter is designed to aid you in correcting deficiencies in your performance as a division officer. The entire chain of command is available to assist you in any way possible. We want and need your success.

D. R. PEPPER

CHAPTER 8

CHAPTER 8

PR 8. NONJUDICIAL PUNISHMENT

PR 8.1. *INTRODUCTION.*

The terms "nonjudicial punishment" and "NJP" are used interchangeably to refer to certain limited punishments which can be awarded for minor disciplinary offenses by a CO or OIC to members of his command. In the Navy and Coast Guard, nonjudicial punishment proceedings are referred to as "captain's mast" or simply "mast." In the Marine Corps, the process is called "office hours," and in the Army and Air Force, it is referred to as "Article 15 proceedings." The legal protection afforded an individual subject to NJP proceedings is more complete than is the case for nonpunitive measures, but, by design, is less extensive than for courts-martial.

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

1. Request mast is a hearing before the CO, at the request of service personnel, for the purpose of making requests, reports and statements, and airing grievances.

2. Meritorious mast is held for the purpose of publicly and officially commending a member of the command for noteworthy performance of duty.

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

B. "Mast" and "office hours" are procedures whereby the CO or OIC may:

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

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

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

C. "Mast" and "office hours" are not:

1. a criminal trial or court-martial, as the term "nonjudicial" implies;

2. a criminal conviction; and

3. an acquittal if a determination is made not to impose punishment.

PR 8.2. *NATURE AND REQUISITES OF NONJUDICIAL PUNISHMENT*

PR 8.2.1. *The power to impose nonjudicial punishment*

PR 8.2.1.1. *Generally.*

Authority under Art. 15, UCMJ, may be exercised by a CO, an OIC, or by certain officers to whom the power has been delegated in accordance with regulations of the appropriate Secretary.

a. **A commanding officer**

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

(2) The power to impose NJP is inherent in the office and not in the individual. Thus, the power may be exercised by a person acting as CO, such as when the CO is on leave and the XO succeeds to command.

b. **An officer in charge**

OICs exist in the naval service and the Coast Guard. In the Navy and Marine Corps, an OIC is a commissioned officer who is designated as “officer in charge” of a unit by departmental orders, tables of organization, manpower authorizations, orders of a flag or general officer in command or orders of the Senior Officer Present.

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

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

(2) Additionally, where members of the naval service are assigned to a multi-service command, the commander of such multi-service command may designate one or more naval units and for each unit shall designate a commissioned officer of the naval service as commanding officer for NJP purposes over the unit. A copy of such designation must be furnished to the Chief of Naval Personnel, the CMC, or the Commandant of the Coast Guard (G-CLS) as appropriate, and to the Judge Advocate General.

PR 8.2.1.2. ***Limitations on power to impose NJP***

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

PR 8.2.1.3. ***Referral of NJP to higher authority***

a. If a CO determines that his authority under Article 15 is insufficient to make a proper disposition of the case, he may refer the case to a superior commander for appropriate disposition.

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

PR 8.2.2. ***Persons on whom NJP may be imposed***

PR 8.2.2.1. ***Member of the Command.***

A CO may impose NJP on all military personnel of his command. An OIC may impose NJP only upon enlisted members assigned to the unit of which he is in charge. At the time the punishment is imposed, the accused must be a member of the command of the CO (or of the unit of the OIC) who imposes the NJP.

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

b. In addition, a party to a *JAG Manual* investigation remains "of the command or unit" to which he was attached at the time of his designation as a party for the sole purpose of imposing a letter of admonition or reprimand as NJP.

PR 8.2.2.2. ***Personnel of another armed force***

a. Under present regulations, joint commanders have jurisdiction over personnel of Army, Air Force, and Naval Services for nonjudicial punishment purposes; however, there is little guidance with regard to exercising such authority. Until such guidance is received is it recommended that such personnel be punished by their parent service unit for discipline. If this is impractical and the need to discipline is urgent, NJP may be imposed but a report to the Department of the Army or Department of the Air Force is required.

b. MJM 1.A.4(e) and (f) provide guidance with regard to NJP for non-CG personnel assigned to Coast Guard units and CG personnel assigned to other branches of the armed forces. CG CO's may impose NJP on non-CG personnel assigned to them subject to the individual's parent service regulations. Non-CG CO's may impose NJP on CG personnel assigned to them reporting the action to Commandant (G-LMJ) or they may transfer the CG member to a CG unit for investigation and punishment.

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

PR 8.2.2.3. ***Imposition of NJP on embarked personnel***

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

b. Similar policy provisions apply to the withholding of the exercise of the authority to convene SPCM's or SCM's by the CO of the embarked unit.

PR 8.2.2.4. ***Imposition of NJP on reservists***

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

b. A member of a Reserve component who is subject to the UCMJ at the time he commits an offense in violation of the UCMJ is not relieved from amenability to NJP or court-martial proceedings solely because of the termination of his period of active duty for training or inactive duty training before the allegation is resolved at NJP or court-martial.

(1) Hence, the CO seeking to impose NJP over Reserve personnel has the following options:

(a) impose NJP during the active duty or inactive duty training when the misconduct occurred;

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

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

(d) if the accused waives his right to be present at the NJP hearing, the CO or OIC may impose NJP after the period of active duty or inactive duty training of the accused has ended.

(2) Confinement is not an authorized punishment without the approval of the Secretary of the Navy for those Reserve members who have been involuntarily recalled for purposes of imposition of discipline.

(3) For those Reserve personnel who receive restriction or extra duty as a result of NJP imposed during a normal period of active duty training or inactive duty training, the restraint may not extend beyond the normal termination of the training period.

(4) For those Reserve personnel who receive a restraint form of punishment from an NJP or court-martial for which they have been involuntarily recalled to active duty, such punishment cannot be served at any time other than a subsequent active duty training session unless the Secretary of the Navy so approves.

PR 8.2.3. ***Right of the accused to demand trial by court-martial***

a. Article 15a, UCMJ, and Part V, para. 3, MCM (2005 ed.), provides another limitation on the exercise of NJP. Except in the case of a person attached to or embarked in a vessel, an accused may demand trial by court-martial in lieu of NJP.

b. This right to refuse NJP exists up until the time NJP is imposed (i.e., up until the CO announces the punishment). This right is not waived by the fact that the accused has previously signed a "report chit" indicating that he would accept NJP.

c. The category of persons who may not refuse NJP includes those persons assigned or attached to the vessel; on board for passage; or assigned or attached to an embarked staff, unit, detachment, squadron, team, air group, or other regularly organized body.

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

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

PR 8.2.4. ***Offenses punishable under Article 15***

Article 15 gives a CO the power to punish individuals for minor offenses. The term "minor offense" has been the cause of some concern in the administration of NJP. Article 15, UCMJ, and Part V, para. 1e, MCM (2005 ed.), indicates that the term "minor offense" means misconduct whose maximum sentence if tried by a general court-martial would not include a dishonaorable discharge or confinement for longer than 1 year. Additionally, the nature of the offense and the circumstances surrounding its commission are also factors which should be considered in determining whether an offense is minor in nature. The Navy and Marine Corps, however, have taken the position that the final determination as to whether an offense is "minor" is within the sound discretion of the commanding officer. Imposition of NJP does not, in all cases, preclude a subsequent court-martial for the same offense.

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

b. **Circumstances.** The circumstances surrounding the commission of a disciplinary infraction are important to the determination of whether such an infraction is minor. For example, willful disobedience of an order to take ammunition to a unit engaged in combat can have fatal consequences for those

engaged in the fight and, hence, is a serious matter. Willful disobedience of an order to report to the barbershop may have much less of an impact on discipline. The offense must provide for both extremes, and it does because of a high maximum punishment limit. When dealing with disciplinary infractions, the commander must be free to consider the impact of circumstance since he is considered the best judge of it; whereas, in disposing of crimes, society at large has an interest coextensive with that of the commander, and criminal defendants are given more extensive safeguards. Hence, the commander's discretion in disposing of disciplinary infractions is much greater than his latitude in dealing with crimes. Where the commander determines the offense to be minor, a statement is recommended on the NAVPERS 1626/7 (Navy) and CG-4910 (Coast Guard) and is required on the UPB NAVMC 10132 (Marine Corps), indicating that the commander, after considering all facts and circumstances, has determined that the offense is minor.

PR 8.2.4.1. *The statute of limitations is applicable to NJP.*

Article 43(b)(2), UCMJ, prohibits the imposition of NJP more than two years after the commission of the offense. This is true even where block 13 of the charge sheet has been completed showing receipt of sworn charges by the officer exercising summary court-martial jurisdiction. This action normally tolls the running of the statute of limitations for purposes of trial by court-martial. For NJP purposes completion of block 13 does not toll the statue of limitations.

PR 8.2.4.2. *Cases previously tried in civil courts.*

Section 0124 of the JAGMAN and MJM 1.A.7.c., permit the use of NJP to punish an accused for an offense for which he has been tried by a domestic or foreign civilian court, or whose case has been diverted out of the regular criminal process for a probationary period, or whose case has been adjudicated by juvenile court authorities. However, before doing so, permission must be obtained from the officer exercising general court-martial jurisdiction. Typically this is the general or flag officer in command over the command desiring to impose NJP (USN/USMC) or the Commandant (G-L) (USCG).

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

Clearly, cases in which a finding of guilt or innocence has been reached in a trial by court-martial cannot be then taken to NJP. However, the last point at which cases may be withdrawn from court-martial before findings with a view toward NJP is presently unclear.

PR 8.2.4.3. *Off-base offenses*

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

As a matter of policy, in areas not under military control, the responsibility for maintaining motor vehicle traffic law and order rests with civil authority. The enforcement of traffic laws, including DUI/DWI offenses, falls within the purview of the civil authorities. Off-duty, off-installation driving offenses, however, are indicative of inability and lack of safety consciousness. Such driving performance does not prevent the use of nonpunitive measures (i.e., deprivation of on-installation driving privileges).

PR 8.2.5. *Hearing procedure*

PR 8.2.5.1. *Introduction.*

The imposition of NJP results from an investigation into unlawful conduct and a subsequent hearing to determine whether and to what extent an accused should be punished. Generally, when a complaint is filed with the CO of an accused, that commander is obligated to cause an inquiry to be made to determine the truth of the matter. When this inquiry is complete, a NAVPERS Form 1626/7, UPB Form NAVMC 10132, or CG Form 4910 is filled out. The Navy NAVPERS 1626/7 functions as an investigation report as well as a record of the processing of the NJP case. The Marine Corps NAVMC 10132 is a document used to record NJP only. The appropriate report and allied papers are then forwarded to the commander. The ensuing discussion will detail the legal requirements and guidance for conducting an NJP hearing.

PR 8.2.5.2. ***Prehearing advice.***

If, after the preliminary inquiry, the CO determines that disposition by NJP is appropriate, the CO must cause the accused to be given certain advice. The CO need not give the advice personally, but may assign this responsibility to the legal officer or another appropriate person. The accused must be informed of the following:

a. **Contemplated action.** The accused must be informed that the CO is considering the imposition of NJP.

b. **Suspected offense.** The suspected misconduct must be described to the accused and such description should include the specific article of the UCMJ which the accused is alleged to have violated.

c. **Government evidence.** The accused should be advised of the information upon which the allegations are based or told that he may, upon request, examine all available statements and evidence.

d. **Right to refuse NJP.** Unless the accused is attached to or embarked upon a vessel (in which case he has no right to refuse NJP), he should be told of his right to demand trial by court-martial in lieu of NJP; of the maximum punishment which could be imposed at NJP; of the fact that, should he demand trial by court-martial, the charges could be referred for trial by summary, special, or general court-martial; of the fact that he could not be tried at summary court-martial over his objection; and that, at a special or general court-martial, he would have the right to be represented by counsel.

e. **Right to confer with independent counsel.** Unless the accused is attached to or embarked upon a vessel, he should be told of his right to confer with counsel prior to making his decision of whether or not to accept NJP. A failure to properly advise an accused of his right to confer with counsel, or a failure to provide counsel, will not render the imposition of NJP invalid or constitute a ground for appeal. However, if the command imposing the NJP desires that the record of the NJP be admissible for courts-martial purposes, the record of the NJP must be prepared in accordance with applicable service regulations and reflect that:

(1) the accused was advised of his right to confer with counsel;

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

(3) the accused knowingly, intelligently, and voluntarily waived his right to refuse NJP.

Recordation of the above so-called "*Booker* rights" advice and waivers should be made on page 13 (Navy) or page 12 (Marine Corps) of the accused's service record. Section 0109 of the JAGMAN*l* explains precisely how a command may prepare service record entries which will be admissible at any subsequent trial by court-martial. If an accused waives any or all of the above rights, but refuses to execute such a waiver in writing, the fact that he was properly advised of his rights, waived his rights, but declined to execute a written waiver should be so recorded. In the Coast Guard the member signs the rights disclosure form which is attached to the 4910. No service record entries are required.

Because of Federal court litigation involving an attack on the Navy for issuing a discharge under other than honorable conditions based, at least in part, on prior NJP's, the CMC has directed, in ALMAR 097-87, that the *Booker* advice and service record book entry reflecting compliance with *Booker* contain the following language:

[Date.] I certify that I have been given the opportunity to consult with a lawyer, provided by the government at no cost to me, in regard to a pending (NJP/SCM) for violation of Article(s) (Art. No.(s)) of the UCMJ. I understand that I have the right to refuse that (NJP/SCM): I (do) (do not) choose to exercise that right. I further understand that acceptance of (NJP/SCM) does not preclude my command from taking other adverse administrative action against me. I (will) (will not) be represented by a civilian / military lawyer. Signature of accused.

f. **Hearing rights.** If the accused does not demand trial by court-martial within a reasonable time after having been advised of his rights, or if the right to demand court-martial is not applicable, the

accused shall be entitled to appear personally before the commanding officer for the NJP hearing. At such hearing, the accused is entitled to:

(1) be informed of his rights under Art. 31, UCMJ;

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

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

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

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

(6) have witnesses present, including those adverse to the accused, upon request, if their statements will be relevant, and if they are reasonably available: and

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

PR 8.2.5.3. ***Forms.***

The forms set forth in Appendices A-1-b, A-1-c, and A-1-d of the JAGMAN, and Enclosures (3) and (4) of the MJM are designed to comply with the above requirements. Appendix A-1-b is to be used when the accused is attached to or embarked in a vessel. Appendix A-1-c or Enclosure (3) is to be used when the accused is not attached to or embarked in a vessel, and the command does not desire to afford the accused the right to consult with a lawyer to assist the accused in deciding whether to accept or refuse NJP. Appendix A-1-d or Enclosure (4) is to be used when an accused is not attached to or embarked in a vessel, and the command does afford the accused the right to consult with a lawyer to decide whether to accept or reject NJP. Use and retention of the proper forms are essential to ensure that the record of the NJP will be admissible at a subsequent court-martial.

PR 8.2.5.4. ***Hearing requirement.***

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

a. **Personal appearance waived.** If the accused waives his right to personally appear before the CO, he may choose to submit written matters for consideration by the CO prior to the imposition of NJP. Should the accused make such an election, he should be informed of his right to remain silent and that any matters so submitted may be used against him in a trial by court-martial. Notwithstanding the accused's expressed desire to waive his right to personally appear at the NJP hearing, he may be ordered to attend the hearing if the officer imposing NJP desires his presence. If the accused waives his personal appearance and NJP is imposed, the officer imposing NJP must ensure that the accused is informed of the punishment as soon as possible.

b. **Hearing officer.** Normally, the officer who actually holds the NJP hearing is the CO of the accused. The CO or OIC may only delegate his authority to hold the hearing to another officer under extraordinary circumstances. These circumstances are not detailed, but they must be unusual and significant rather than matters of convenience to the commander. This delegation of authority should be in writing and the reasons for it detailed. It must be emphasized that this delegation does not include the authority to impose punishment. At such a hearing, the officer delegated to hold the hearing will receive all evidence, prepare a summarized record of matters considered, and forward the record to the officer having NJP authority. The commander's decision will then be communicated to the accused personally or in writing as soon as practicable.

c. The record of a formal *JAG Manual* investigation or other fact-finding body (e.g., an Article 32 investigation) in which the accused was accorded the rights of a party with respect to an act or omission for which NJP is contemplated may be substituted for the hearing.

(1) It is possible to impose NJP on the basis of a record of a *JAG Manual* investigation at which the accused was afforded the rights of a party because the rights of a party include all rights to which the accused would have been entitled at the NJP hearing plus additional procedural safeguards, such as assistance of counsel.

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

d. **Burden of proof.** The CO or OIC must decide that the accused committed the charged misconduct by a preponderance of the evidence.

e. **Personal representative.** The concept of a personal representative to speak on behalf of the accused at NJP has caused some confusion. For Navy and Marine Corps members, the burden of obtaining such a representative is on the accused. For Coast Guard personnel, except when the member is represented by counsel, a representative shall be appointed to assist the member in preparing for and at the mast proceedings, unless the member specifically waives the assistance of a representative. As a practical matter, he is free to choose anyone he wants -- a lawyer or a nonlawyer, an officer or an enlisted person. This freedom of the accused to choose a representative does not obligate the command to provide military counsel, and current regulations do not create a right to military counsel to the extent that such a right exists at court-martial. The accused may be represented by any military counsel who is willing and able to appear at the hearing. While a military counsel's workload may preclude the military counsel from appearing, a blanket rule that no military counsel will be available to appear at NJP would appear to contravene the spirit if not the letter of the law. It is likewise doubtful that one can lawfully be ordered to represent the accused. It is fair to say that the accused can have anyone who is able and willing to appear on his behalf without cost to the government. While a command does not have to provide a personal representative, it should help the accused obtain the representative he wants. In this connection, if the accused desires a personal representative, he must be allowed a reasonable time to obtain someone. Good judgment should be utilized here, for such a period should be neither inordinately short nor long.

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

g. **Witnesses.** When the hearing involves controverted questions of fact pertaining to the alleged offenses, witnesses shall be called to testify if they are reasonably available (i.e., on the same ship or base or are otherwise available at no expense to the government). Thus, in a larceny case, if the accused denies he took the money, the witnesses who can testify that he did take the money must be called to testify in person if they are available at no cost to the government.

Additionally, because the Military Rules of Evidence do not apply at NJP proceedings, the testimony of a witness who cannot be produced physically to testify may be presented via telephone, sworn statement or affidavit, note, letter, email, etc.

h. **Public hearing.** The accused is entitled to have the hearing open to the public unless the CO determines that the proceedings should be closed for good cause. The CO is not required to make any special arrangements to facilitate the public's access to the proceedings.

i. **Command observers.** The attendance of representative members of the command during all NJP proceedings is encouraged to dispel erroneous perceptions concerning the fairness and integrity of the proceedings.

j. **Publication of NJP.** COs are authorized to publish the results of NJP. Within one month following the imposition of NJP, the name of the accused, his rate, offense(s), and their disposition may be published in the plan of the day, posted upon command bulletin boards, and announced at daily formations (Marine Corps) or morning quarters (Navy). If the plan of the day is disseminated to nonmilitary personnel, or the bulletin board is accessible to nonmilitary personnel, the published results may not include the name of the accused.

PR 8.2.5.5. ***Possible actions by the CO at NJP (listed on NAVPERS 1626/7 and Enclosure (2), MJM)***

a. **Dismissal with or without warning**

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

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

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

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

d. **Imposition of NJP.** Although not required, in the Marine Corps, racial and/or ethnic identifiers (e.g., Male/Female, White/Black/Hispanic/Other) of the accused should be reflected in unit punishment books and records of NJP proceedings.

PR 8.3. *AUTHORIZED PUNISHMENTS AT NJP*

PR 8.3.1. *Limitations.*

The maximum imposable punishment in any NJP is limited by several factors.

PR 8.3.1.1. *The grade of the imposing officer.*

COs in grades O-4 to O-6 have greater punishment powers than officers in grades O-1 to O-3; flag officers, general officers, and officers exercising general court-martial jurisdiction have greater punishment authority than COs in grades O-4 to O-6.

PR 8.3.1.2. *The status of the imposing officer.*

Regardless of the rank of an OIC, his punishment power is limited to that of a CO in grade O-1 to O-3; the punishment powers of a CO are commensurate with his permanent grade.

PR 8.3.1.3. *The status of the accused.*

Punishment authority is also limited by the status of the accused. Is he an officer or an enlisted person? If enlisted, what is his rate?

PR 8.3.1.4. *The nature of the command.*

Is it an ashore command or is he attached to or embarked in a vessel? The maximum punishment limitations discussed below apply to each NJP action and not to each offense.

Note: All known offenses of which the accused is suspected should ordinarily be considered at a single NJP proceeding.

PR 8.3.2. ***Maximum limits – Specifics.***

PR 8.3.2.1. ***Officer accused.***

If punishment is imposed by officers in the following grades, the limits are as indicated below.

a. By officer exercising general court-martial jurisdiction or a flag/general officer in command, or designated principal assistant:

(1) punitive admonition or reprimand;

(2) up to 30 days arrest in quarters;.

(3) up to 60 days restriction: and

(4) not more than ½ of one month's pay per month for two months;

b. By officers O-4 to O-6:

(1) admonition or reprimand; and

(2) up to 30 days restriction.

c. By officers O-1 to O-3:

(1) admonition or reprimand; and

(2) up to 15 days restriction.

d. OICs are not authorized to impose NJP on an officer accused.

PR 8.3.2.2. ***Enlisted accused.***

a. By COs in grades O-4 and above:

(1) admonition or reprimand;

(2) up to 3 days confinement on bread and water/diminished rations (USN and USMC only);

(3) up to 30 days of correctional custody;

(4) up to ½ of one month's pay per month for two months;

(5) reduction of one pay grade;

(6) up to 45 days of extra duties; and

(7) up to 60 days restriction.

b. By COs in grades O-3 and below or any commissioned OIC:

(1) admonition or reprimand;

(2) up to 3 days confinement on bread and water/diminished rations (USN and USMC only);

(3) up to 7 days correctional custody:

(4) up to 7 day's forfeiture of pay;

(5) reduction of one pay grade;

(6) up to 14 days extra duties; and

(7) up to 14 days restriction.

PR 8.3.3. ***Nature of the punishments***

PR 8.3.3.1. ***Admonition and reprimand.***

Punitive censure for officers must be in writing, although it may be either oral or written for enlisted personnel. It should be noted that reprimand is considered more severe than admonition.

PR 8.3.3.2. ***Arrest in quarters.***

This punishment is imposable only on officers. It is a moral restraint, as opposed to a physical restraint. It is similar to restriction, but has much narrower limits. The limits of arrest are set by the officer imposing the punishment and may extend beyond quarters. The term "quarters" includes military and private residences. The officer may be required to perform his regular duties as long as they do not involve the exercise of authority over subordinates.

PR 8.3.3.3. ***Restriction.***

Restriction also is a form of moral restraint. Its severity depends upon the breadth of the limits as well as the duration of the restriction. If restriction limits are drawn too tightly, there is a real danger that they may amount to either confinement or arrest in quarters, which, in the former case, cannot be imposed as NJP and, in the latter case, is not an authorized punishment for enlisted persons. As a practical matter, restriction ashore means that an accused will be restricted to the limits of the command, except, of course, at larger shore stations where the use of recreational facilities might be further restricted. Restriction and arrest in quarters are normally imposed by a written order detailing the limits thereof and usually require the accused to muster at certain specified times during the restraint.

PR 8.3.3.4. ***Forfeiture***.

A forfeiture applies to basic pay and to sea or foreign duty pay, but not to incentive pay, allowances for subsistence or quarters, etc. "Forfeiture" means that the accused forfeits monies due him in compensation for his military service only. It does not include any private funds. This distinguishes forfeiture from a "fine," which may only be awarded by a court-martial. The amount of forfeiture of pay must be stated in whole dollar amounts, not in fractions, and indicate the number of months affected (e.g., "to forfeit $50.00 pay per month for two months"). Where a reduction is also involved in the punishment, the forfeiture must be premised on the new lower rank, <u>even if the reduction is suspended</u>.

PR 8.3.3.5. ***Extra duties.***

Various types of duties may be assigned, in addition to routine duties, as punishment. However, extra duties which constitute a known safety or health hazard, which constitute cruel and unusual punishment, or which are not sanctioned by the customs of the service involved are prohibited. Additionally, when imposed upon a petty or noncommissioned officer (E-4 and above), the duties cannot be demeaning to his rank or position. The immediate CO of the accused will normally designate the amount and character of extra duty, regardless of who imposed the punishment, and that such duties normally should not extend beyond two (2) hours per day. Guard duty may not be assigned as extra duties and, except in cases of reservists performing inactive training or active duty for training for periods of less than seven days Additionally, a member cannot be required to perform extra duty on Sunday -- although Sunday counts as if such duty was performed.

PR 8.3.3.6. ***Reduction in grade.***

Reduction in pay grade is limited to one grade only by Part V, para. 5c(7), MCM (2005 ed.), section 0111e of the JAGMAN, and MJM 1.E.2.g. The grade from which reduced must be within the promotional authority of the CO or OIC imposing the reduction. Accordingly, OIC's may impose reduction in grade to enlisted personnel in the paygrades of E-2 through E-6 (E-5 in the Marine Corps).

PR 8.3.3.7. ***Correctional custody.***

Correctional custody is a form of physical restraint during either duty or non-duty hours, or both, and may include hard labor or extra duty. Awardees may perform military duty, but not watches, and cannot bear arms or exercise authority over subordinates. To assist commanders in imposing correctional custody, correctional custody units (CCU's) have been established at major shore installations. The local operating procedures for the nearest CCU should be checked before correctional custody is imposed.

PR 8.3.3.8. ***Confinement on bread and water or diminished rations.***

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

PR 8.3.4. ***Execution of punishments***

PR 8.3.4.1. ***General rule.***

As a general rule, all punishments, if not suspended, take effect when imposed. This means that the punishment in most cases will take effect when the officer imposing NJP informs the accused of his punishment imposed. Thus, if the officer imposing NJP wishes to impose a prospective punishment, one to take effect at a future time, he should simply delay the imposition of NJP altogether. There are, however, several specific rules which authorize the deferral or stay of a punishment already imposed.

a. An officer imposing NJP may defer correctional custody, confinement on bread and water, or confinement on diminished rations for a period of up to 15 days when:

(1) adequate facilities are not available;

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

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

b. **Deferral of restraint punishments pending an appeal from NJP**.

A servicemember who has appealed from NJP may be required to undergo any punishment imposed while the appeal is pending, except that, if action is not taken on the appeal within a reasonable time, normally within 5 working days after the appeal was submitted, and if the member so requests, any unexecuted punishment involving restraint or extra duties must be stayed until action on the appeal is taken.

c. **Interruption of restraint punishments by subsequent NJP's**.

The execution of any nonjudicial (or court-martial) punishment involving restraint will normally be interrupted by a subsequent NJP involving restraint. Thereafter, the unexecuted portion of the prior restraint punishment will be executed. The officer imposing the subsequent punishment, however, may order that the prior punishment be completed prior to the service of the subsequent punishment. This rule does not apply to forfeiture of pay, which

must be completed before any subsequent forfeiture begins to run.

d. **Interruption of punishments by unauthorized absence**.

Service of all unexecuted portions of punishment imposed at NJP's will be interrupted during any period that the servicemember is UA.

PR 8.3.4.2. ***Responsibility for execution***.

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

ARTICLE 15 PUNISHMENT LIMITATIONS
Navy and Marine Corps

Imposed By	Imposed On	Bread & Water or DIMRATS (1)	Correctional Custody (2)	Arrest in Quarters (3)	Forfeitures (4 & 5)	Reduction (4 & 6)	Extra Duties (7)	Restriction (7)	Reprimand or Admonition (4)
Flags/Generals in Command	Officers	No	No	30 Days	1/2 of 1 Mo. for 2 Mos.	No	No	60 Days	Yes
	E-4 to E-9	No	No	No	1/2 of 1 Mo. for 2 Mos.	1 Grade	45 Days	60 Days	Yes
	E-1 to E-3	3 Days	30 Days	No	1/2 of 1 Mo. for 2 Mos.	1 Grade	45 Days	60 Days	Yes
O-4 to O-6	Officers	No	No	No	No	No	No	30 Days	Yes
	E-4 to E-9	No	No	No	1/2 of 1 Mo. for 2 Mos.	1 Grade	45 Days	60 Days	Yes
	E-1 to E-3	3 Days	30 Days	No	1/2 of 1 Mo. for 2 Mos.	1 Grade	45 Days	60 Days	Yes
O-3 / Below & OICs (8)	Officers	No	No	No	No	No	No	15 Days (9)	Yes
	E-4 to E-9	No	No	No	7 Days	1 Grade	14 Days	14 Days	Yes
	E-1 to E-3	3 Days	7 Days	No	7 Days	1 Grade	14 Days	14 Days	Yes

Navy and Marine Corps Art. 15 Punishment Limitations Chart Information

(1) May be awarded only if attached to or embarked in a vessel and may not be combined with other restraint punishment or extra duties.
(2) May not be combined with restriction or extra duties.
(3) May not be combined with restriction.
(4) May be imposed in addition to or in lieu of all other punishments.
(5) Shall be expressed in whole dollar amounts only.
(6) Navy Chief Petty OOfficers (E-7 to E-9) may not be reduced at NJP; Marine Corps Staff Noncommissioned Officers (E-6 to E-9) may not be reduced at NJP (Check directives relating to promotion).
(7) Restriction and extra duties may be combined to run concurrently, but the combination may not exceed the maximum possible for extra duties.
(8) OICs regardless of rank have NJP authority over enlisted personnel only. Marine Corps Company Commanders may only reduce personnel within their promotion authority. Any OIC may only reduce members who are within their promotion authority.
(9) Restriction imposed upon commissioned and warrant officers may not exceed 15 days when imposed by a CO below the grade of O-4 (JAGMAN 0111a).

ARTICLE 15 PUNISHMENT LIMITATIONS
Coast Guard

Imposed By	Imposed On	Bread & Water or DIMRATS	Correctional Custody (1)	Arrest in Quarters (2)	Forfeitures (3 & 4)	Reduction (3 & 5)	Extra Duties (6 & 7)	Restriction	Admonition (3)
Flag Officers in Command	Officers	No	No	30 Days	1/2 of 1 Mo. for 2 Mos.	No	No	60 Days	Yes
	E-4 to E-9	No	No	No	1/2 of 1 Mo. for 2 Mos.	1 Grade	45 Days	60 Days	Yes
	E-1 to E-3	No	30 Days	No	1/2 of 1 Mo. for 2 Mos.	1 Grade	45 Days	60 Days	Yes
O-4 to O-6	Officers	No	No	No	No	No	No	30 Days	Yes
	E-4 to E-9	No	No	No	1/2 of 1 Mo. for 2 Mos.	1 Grade	45 Days	60 Days	Yes
	E-1 to E-3	No	30 Days	No	1/2 of 1 Mo. for 2 Mos.	1 Grade	45 Days	60 Days	Yes
O-3 / Below	Officers	No	No	No	No	No	No	15 Days (8)	Yes
	E-4 to E-9	No	No	No	7 Days	1 Grade	14 Days	14 Days	Yes
	E-1 to E-3	No	7 Days	No	7 Days	1 Grade	14 Days	14 Days	Yes
2 OINCs (9)	Officers	No	No	No	No	No	No	No	No
	E-4 to E-9	No	No	No	3 Days	No	14 Days	14 Days	No
	E-1 to E-3	No	No	No	3 Days	No	14 Days	14 Days	No

** *Note: See footnote information listed on next page*

Coast Guard Art. 15 Punishment Limitations Chart Information

This information goes with the chart on the preceding page

(1) May not be combined with restriction or extra duties.

(2) May not be combined with restriction.

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

(4) Shall be expressed in whole dollar amounts only.

(5) USCG CPOs (E-7 to E-9) may not be reduced at NJP.

(6) Restriction and extra duties may be combined to run concurrently, but the combination may not exceed the maximum possible for extra duties.

(7) May be imposed only upon personnel E-6 and below.

(8) Restriction imposed upon commissioned and warrant officers may not exceed 15 days when imposed by a CO below the grade of O-4 (Art. 1.E.1.b MJM).

(9) OICs regardless of rank have NJP authority over enlisted personnel only.

PR 8.4. *COMBINATIONS OF PUNISHMENTS*

PR 8.4.1. *General rules.*

Provides that All authorized NJP's may be imposed in a single case subject to the following limitations:

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

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

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

4. restriction and extra duties may be combined to run concurrently, but the combination may not exceed the maximum imposable for extra duties.

PR 8.4.2. *Examples*.

1. If an O-4 CO wishes to impose the maximum amount of punishment at NJP upon an E-3, the maximum that could be imposed would be:

a. a punitive letter of reprimand or admonition (or an oral reprimand or admonition);

b. reduction to E-2;

c. forfeiture of one-half pay per month for two months (based upon the reduced rate, i.e. E-2 in this case); and

d. forty-five days restriction and extra duties to be served concurrently.

2. If an O-3 CO (or any OIC, regardless of grade) wishes to impose the maximum amount of punishment at NJP upon an E-3, the maximum that could be imposed would be:

a. a punitive letter of reprimand or admonition (or an oral reprimand or admonition);

b. reduction to E-2, if E-3 is within the promotion authority of the OIC; (Marine Corps CO's must have special court-martial convening authority to reduce);

c. forfeiture of 7 days' pay (based upon the reduced rate, i.e. E-2 in this case); and

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

PR 8.5. *CLEMENCY AND CORRECTIVE ACTION ON REVIEW*

PR 8.5.1. *Definitions*.

PR 8.5.1.1. *Clemency.*

Clemency action is a reduction in the severity of punishment. Whether clemency is granted is solely within the discretion of the officer authorized to take such action for whatever reason deemed sufficient to him.

PR 8.5.1.2. *Remedial Corrective Action.*

Remedial corrective action is a reduction in the severity of punishment or other action taken by proper authority to correct some defect in the NJP proceeding and to offset the adverse impact of the error on the accused's rights.

PR 8.5.2. ***Authority to act.***

After the imposition of NJP, the following officials have authority to take clemency action or remedial corrective action:

1. the officer who initially imposed the NJP;

2. the authority who initially imposed the NJP (the office rather than the officer);

3. the successor in command over the person punished;

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

5. the CO or OIC of a unit, activity, or command to which the accused is properly transferred after the imposition of punishment by the first commander; and

6. the successor in command of the latter.

PR 8.5.3. ***Forms of action.***

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

PR 8.5.3.1. ***Setting aside punishment.***

This power has the effect of voiding the punishment (or any part or amount thereof) and restoring the rights, privileges, and property lost to the accused by virtue of the punishment imposed. This action should be reserved for compelling circumstances where the commander feels a clear injustice has occurred. This means, normally, that the commander believes the punishment of the accused was clearly a mistake. If the punishment has been executed, executive action to set it aside should be taken within a reasonable time -- normally within four months of its execution. The commanding officer who wishes to reinstate an individual reduced in rate at NJP is not bound by the provisions of MILPERSMAN 1430-020 limiting advancement to a rate formerly held only after a minimum of 12 months' observation of performance. Such action can be taken with respect to the whole or a part of the punishment imposed. All entries pertaining to the punishment set aside are removed from the service record of the accused.

PR 8.5.3.2. ***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 punishment, though he may have partially completed it. Rights, privileges, and property lost by virtue of executed portions of punishment are not restored, nor is the punishment voided as in the case when it is set aside. The expiration of the current enlistment or term of service of the servicemember automatically remits any unexecuted punishment imposed at NJP.

PR 8.5.3.3. ***Mitigation.***

Generally, this action also relates to the unexecuted portions of punishment. Mitigation of punishment is a reduction in the quantity or quality of the punishment imposed. However, the punishment imposed may never be increased so as to be more severe.

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

(1) arrest in quarters to restriction;

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

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

(4) extra duties to restriction.

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

Example: In mitigating NJP, neither the quantity nor the quality of the punishment may be increased. For example, it would be impermissible to mitigate 3 days' confinement on bread and water to 4 days' restriction because this would increase the quantity of the punishment. It would also be impermissible to mitigate 60 days' restriction to one day of confinement on bread and water because this would increase the quality of the punishment. However, 45 days extra duties may be mitigated to 45 days restriction.

c. **Reduction in grade.** Reduction in grade, even though executed, may be mitigated to forfeiture of pay. The amount of forfeiture can be no greater than that which could have been imposed by the mitigating commander had he initially imposed punishment. This mitigation must be done within four months after the date of execution.

PR 8.5.3.4. ***Suspension of punishment.***

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

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

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

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

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

(2) Examples of lawful conditions include: duty to obey local civilian laws; refraining from associating with particular individuals (i.e., known drug users); not entering particular establishments or trouble spots; requirement to agree to searches of person, vehicles, or lockers; to successfully graduate from a particular rehabilitation course (i.e., alcohol rehab, anger management, defensive driving, etc.); to make specified restitution to a victim; to conduct specified GMT on a topic related to the offense; or any variety of conditions designed to rehabilitate or curtail risk-oriented conduct.

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

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

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

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

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

(4) The order vacating a suspension must be issued within ten working days of the commencement of the vacation proceedings and the decision to vacate the suspended punishment cannot be appealed. .

e. The probationary period cannot exceed six months from the date of suspension and terminates automatically upon expiration of current enlistment. The running of the period of suspension will be interrupted, however, by the unauthorized absence of the accused or the commencement of any proceeding to vacate the suspended punishment. The running of the period of probation resumes again when the unauthorized absence ends or when the suspension proceedings are terminated without vacation of the suspended punishment.

PR 8.6. *APPEAL FROM NONJUDICIAL PUNISHMENT*

PR 8.6.1. *Procedure.*

If NJP is imposed, the officer imposing the NJP is required to ensure that the accused is advised of his right to appeal. A person punished under Article 15 may appeal the imposition of such punishment through proper channels to the appropriate appeal authority. If, however, the offender is transferred to a new command prior to filing his appeal, the immediate CO of the offender at the time the appeal is filed should forward the appeal directly to the officer who imposed punishment.

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

a. A GCM authority superior to the officer imposing punishment may, however, set up an alternative route for appeals.

b. When the area coordinator is not superior in rank or command to the officer imposing punishment, or when the area coordinator is the officer imposing punishment, the appeal will be forwarded to the GCM authority next superior in the chain of command to the officer who imposed the punishment.

c. An immediate or delegated area coordinator who has authority to convene GCM's may take action in lieu of an area coordinator if he is superior in rank or command to the officer who imposed the punishment.

d. For mobile units, the area coordinator for the above purposes is the area coordinator most accessible to the unit at the time of forwarding the appeal.

2. When the officer who imposed the punishment is in the chain of command of the Commandant of the Marine Corps, the appeal will be made to the officer next superior in the operational chain of command to the officer who imposed the punishment (e.g., an appeal from company level NJP should be submitted to the battalion commander). When such review is impractical due to operational commitments, as determined by the officer who imposed the punishment, appeal from NJP shall be made to the Marine officer authorized to convene general courts-martial geographically nearest and senior to the officer who imposed the punishment.

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

4. A flag or general officer in command may, with the express prior approval of the Chief of Naval Personnel or the Commandant of the Marine Corps, delegate authority to act on appeals to a principal assistant.

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

6. In the Coast Guard, appeals are submitted via the chain of command of the officer who imposed the punishment to the next superior commissioned officer in the CO's chain of command who has a military lawyer regularly assigned.

PR 8.6.2. ***Time***.

Appeals must normally be submitted in writing within five working days of the imposition of NJP, or the right to appeal shall be waived in the absence of good cause shown. The appeal period begins to run from the date of the imposition of NJP, even if any part of the punishment imposed is suspended. In computing the 5-day period, allowance must be made for the time required to transmit the notice of imposition of NJP and the appeal itself through the mails. In the case of an appeal submitted more than five days after the imposition of NJP (less any mailing delays), the officer acting on the appeal shall determine whether "good cause" was shown for the delay in the appeal.

PR 8.6.2.1. ***Extension of time.***

If it appears to the accused that good cause may exist which would make it impracticable or extremely difficult to prepare and submit the appeal within the five working day period, the accused should immediately advise the officer who imposed the punishment of the perceived problems and request an appropriate extension of time. The officer imposing NJP shall determine whether good cause was shown and shall advise the accused whether an extension of time will be permitted.

PR 8.6.2.2. ***Request for stay of restraint punishments or extra duties***.

A servicemember who has appealed may be required to undergo any restraint punishment or extra duties imposed while the appeal is pending, except that, if action is not taken on the appeal by the appeal authority within five days after the written appeal has been submitted, and if the accused has so requested, any unexecuted punishment involving restraint or extra duties shall be stayed until action on the appeal is taken. It is helpful if the accused includes in his written appeal any request for stay of restraint punishment or extra duties; however, a written request for a stay is not specifically required, nor is it required to be submitted with the original appeal request.

PR 8.6.3. ***Contents of an appeal package.***

Sample NJP appeal packages are included at the end of this chapter as Appendices (A) -- USN and (B) – USMC.

PR 8.6.3.1. ***Appellant's letter (grounds for appeal).***

The letter of appeal from the accused should be addressed to the appropriate appeal authority via the officer who imposed the punishment and other appropriate commanders in the chain of command. The letter should set forth the salient features of the NJP (date, offense, who imposed it, and punishment imposed) and detail the specific grounds for relief. There are only two grounds for appeal: the punishment was unjust or the punishment was disproportionate to the offense committed.

a. **Unjust punishment.** Unjust punishment exists when the evidence is insufficient to prove the accused committed the offense; the statute of limitations prohibits lawful punishment; or when any other fact, including a denial of substantial rights, calls into question the validity of the punishment.

b. **Disproportionate punishment.** Punishment is disproportionate if it is, in the judgment of the reviewer, too severe for the offense committed. An offender who believes his punishment is too severe thus appeals on the ground of disproportionate punishment, whether or not his letter artfully states the ground in precise terminology. Note, however, that a punishment may be legal but excessive or unfair considering circumstances such as: the nature of the offense; the absence of aggravating circumstances; the prior record of the offender; and any other circumstances in extenuation and mitigation. The grounds for appeal need not be stated artfully in the accused's appeal letter, and the reviewer may have to deduce the appropriate ground implied in the letter. Inartful draftsmanship or improper addressees or other administrative irregularities are not grounds for refusing to forward the appeal to the reviewing authority. If any commander in the chain of addressees notes administrative mistakes, they should be corrected, if material, in that commander's endorsement which forwards the appeal. So, if an accused does not address his letter to all appropriate commanders in the chain of command, the commander who notes the mistake should merely readdress and forward the appeal. He should not send the appeal back to the accused for redrafting since the appeal should be forwarded promptly to the reviewing authority. The appellant's letter begins the review process and is a quasi-legal document. It should be temperate and state the facts and opinions the accused believes entitles him to relief. The appellant should avoid unfounded allegations concerning the character or personality of the officer imposing punishment. The appellant, however, should state the reasons for his appeal as clearly as possible. Supporting documentation in the form of statements of other persons, personnel records, etc., may be submitted if the appellant desires. In no case is the failure to do these things lawful reason for refusing to process the appeal. Finally, should the appellant desire that his restraint punishments or extra duties be stayed pending the appeal, he may specifically request this in the letter.

PR 8.6.3.2. ***Contents of the forwarding endorsement.***

All via addressees should use a simple forwarding endorsement and should not comment on the validity of the appeal. The exception to this rule is the endorsement of the officer who imposed the punishment.

a. The officer who imposed NJP should comment on any assertions of fact contained in the letter of appeal which he considers to be inaccurate or erroneous.

b. The officer who imposed NJP should recite any facts concerning the offenses which are not otherwise included in the appeal papers. If such factual information was brought out at the NJP, the endorsement should so state and include any comment in regard thereto made by the appellant at the NJP. Additionally, any other adverse factual information set forth in the endorsement, unless it recites matters already set forth in official service record entries, should be referred to appellant for comment, if practicable, and he should be given an opportunity to submit a statement in regard thereto or state that he does not wish to make any statement.

c. A copy of the completed mast report form (NAVPERS 1626/7 or CG-4910) or office hours report form (NAVMC 10132) should be included as an enclosure.

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

e. Finally, copies of the appellant's record of performance as set forth on service record page 9 (Navy) or page Record of Service and NAVM C 118(3) (Marine Corps) should be included as enclosures.

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

PR 8.6.3.3. ***Endorsement of the reviewing authority.***

There are no particular legal requirements concerning the content of the reviewer's endorsement except to inform the appellant of his decision. A legally sound endorsement will include the reviewer's specific decision on each ground of appeal, the basic reasons for his decision, a statement that a lawyer has reviewed the appeal, and instructions for the disposition of the appeal package after the offender receives it. The endorsement should be addressed to the appellant 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.

PR 8.6.3.4. ***Via addressees' return endorsement.***

If any via addressee has been directed by the reviewer to take corrective action, the accomplishment of that action should be noted in that commander's endorsement. The last via addressee should be the appellant's immediate commander. This endorsement should reiterate the steps the reviewer directed the appellant 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.

PR 8.6.4. ***Review guidelines.***

As a preliminary matter, it should be noted that NJP is not a criminal trial, but rather an administrative proceeding, primarily corrective in nature, designed to deal with minor disciplinary infractions without the stigma of a court-martial conviction. As a result, the standard of proof applicable at NJP is "preponderance of the evidence" vice "beyond reasonable doubt."

PR 8.6.4.1. ***Procedural errors.***

Errors of procedure do not invalidate punishment unless the error denies a substantial right or does 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 NJP, and he had such a right, then the error amounts to a denial of a substantial right.

PR 8.6.4.2. ***Evidentiary errors.***

Strict rules of evidence do not apply at NJP hearings. Evidentiary errors not amounting to insufficient evidence, will not normally invalidate punishment. Note that, although the rules of evidence do not apply at NJP, Article 31, UCMJ, should be complied with at the hearing.

PR 8.6.4.3. ***Lawyer review.***

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

PR 8.6.4.4. ***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.

PR 8.6.4.5. ***Delegation of authority to action appeals.***

An officer exercising general court-martial jurisdiction or an officer of general or flag rank in command may delegate his power to review and act upon NJP appeals to a "principal assistant" as defined in section 0106d of the *JAG Manual* and Article 1.A.3.d of the MJM. The officer who has delegated his NJP powers may not act upon an appeal from punishment imposed by the principal assistant. In some cases, it may be inappropriate for the principal assistant to act on certain appeals (as where an identity of persons or staff may exist with the command which imposed the punishment), and such fact should be noted by the command in the forwarding endorsement.

PR 8.6.5. ***Authorized appellate action.***

In acting on an appeal, or even in cases in which no appeal has been filed, the superior authority may exercise the same power with respect to the punishment imposed as the officer who imposed the punishment. Thus, the reviewing authority may:

1. approve the punishment in whole;

2. mitigate, remit, or set aside the punishment to correct errors;

3. mitigate, remit, or suspend (in whole or in part) the punishment for reasons of clemency;

4. dismiss the case; or

5. authorize a rehearing where there are substantial procedural errors not amounting to a finding of insufficient evidence to impose NJP. At the rehearing, however, the punishment imposed may be no more severe than that imposed during the original proceedings, unless other offenses which occurred subsequent to the date of the original proceeding are added to the original offenses. If the accused, while not attached to or embarked in a vessel, waived his right to demand trial by court-martial at the original proceedings, he may not assert this right as to those same offenses at the rehearing but may assert the right as to any new offenses at the rehearing.

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

PR 8.7. *IMPOSITION OF NJP AS A BAR TO FURTHER PROCEEDINGS*

PR 8.7.1. ***Generally.***

Proceedings related to NJP are not a criminal trial and, as a result, the defense of former/double jeopardy is not available to one whose case has been disposed of at NJP. The MCM (2005 ed.), however, does provide a bar to further proceedings in certain instances.

PR 8.7.2. ***Imposition of NJP as a bar to further NJP***

1. Once a person has been punished under Article 15, punishment may not again be imposed upon the individual for the same offense at NJP. This same provision precludes a superior in the chain of command from increasing punishment imposed at NJP by an inferior in the chain of command.

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

2. A superior in the chain of command may require that certain types of cases be forwarded to him prior to the immediate CO imposing NJP.

PR 8.7.3. ***Imposition of NJP as a bar to subsequent court-martial***

1. R.C.M. 907(b)(2)(D)(iv), MCM (2005 ed.), prohibits an accused from being tried at court-martial for a minor offense for which he has already received NJP. Part V, para. 1e, MCM (2005 ed.), defines "minor" offenses, in part, as "offense(s) for which the maximum sentence imposable would not include a dishonorable discharge or confinement for longer than one year if tried by general court-martial." The rule further provides, however, that the officer imposing NJP has the discretion to consider as "minor" even certain offenses carrying punishments in excess of that provided in the rule.

2. Although it is clear that Congress did not intend for the imposition of NJP to preclude the subsequent court-martial of an individual who has been accused of committing a serious offense, it is also clear that a servicemember cannot be punished for the same offense twice. Therefore, when an accused is convicted at a court-martial for the same offense for which NJP was received, credit must be given for any and all punishments incurred.

PR 8.8. *TRIAL BY COURT-MARTIAL AS A BAR TO NJP*

PR 8.8.1. *Generally.*

The Court of Military Appeals has considered the propriety of the imposition of NJP for offenses which have already been litigated (at least to some degree) before a court-martial. A reading of these cases would appear to indicate that the question of whether the offense may lawfully be taken to NJP following a court-martial will depend upon whether trial on the merits had begun on the offenses at court-martial prior to the imposition of NJP.

PR 8.9. ***APPENDIX A - SAMPLE NAVY APPEAL PACKAGE OF NONJUDICIAL PUNISHMENT***

5800
27 Jun 20CY

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

Subj: APPEAL FROM NONJUDICIAL PUNISHMENT

Ref: (a) Art. 15(e), UCMJ
(b) Part V, para. 7, MCM (2005 ed.)
(c) JAGMAN, § 0116

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

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

a. Offenses

Charge: Violation of Article 134, UCMJ

Specification: In that RMSN John P. Williams, USN, on active duty, did, on board USS BENSON (DD-895), on or about 16 June CY, unlawfully carry a concealed weapon, to wit: a switchblade knife.

b. Punishment: Forfeiture of $100.00 pay per month for 2 months

c. Grounds of Appeal

Punishment for the Charge is unjust because I, in fact, did not know there was a knife in my pants pocket. The clothes were borrowed.

/s/ *John P. Williams*
JOHN P. WILLIAMS

5800

Ser /

29 Jun 20 CY

FIRST ENDORSEMENT on RMSN John P. Williams, USN, 434-52-9113 ltr 5800
of 27 Jun CY

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

Subj: APPEAL FROM PUNISHMENT ICO RMSN JOHN P. WILLIAMS, USN,
434-52-9113

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

1. Forwarded, recommending denial. Enclosure (4) is attached in amplification of the appeal.

2. On 25 June CY RMSN Williams appeared before me at Captain's mast. He was suspected of a violation of Article 134, UCMJ, unlawfully carrying a concealed weapon on board USS BENSON (DD 895). I found that he had committed the misconduct alleged and awarded a forfeiture of $100.00 pay per month for 2 months. RMSN Williams now appeals his punishment on the basis that it was unjust.

3. The nonjudicial punishment in this case is far from unjust. The evidence adduced at Captain's mast included the following verbal statements in addition to the written statements included in enclosure (4):

a. RMC(SW) William Sharkey, RMSN Williams' divisional chief petty officer, testified that he had heard rumors of RMSN Williams carrying a large "Buck" brand folding knife on his person on board the ship because he wanted to intimidate a shipmate who had started dating RMSN Williams' ex-girlfriend. Chief Sharkey paid particular attention to RMSN Williams, and on 16 June CY he saw RMSN Williams attempt to hide something behind a piece of equipment in a communications space on board the ship. Chief Sharkey waited for RMSN Williams to depart the space and found a "Buck" brand folding knife with a 4-inch blade on it. He seized the knife and turned it in to MAC(SW) Thomas Holding, the ship's chief master-at-arms.

b. Chief Holding called RMSN Williams to his office and executed a suspect's rights advisement/waiver form. RMSN Williams waived his rights and agreed to answer Chief Holding's questions. In his oral statement to Chief Holding RMSN Williams admitted to carrying the knife concealed in his coveralls in an attempt to intimidate ET3 Charles White, how had been dating RMSN Williams former girlfriend, a civilian. RMSN Williams declined to execute a written statement.

c. Lieutenant(j.g.) Stephen Armando, RMSN Williams' division officer, testified that he inspected the coveralls RMSN Williams was wearing on the day in question and they were, in fact, the property of RMSA David Macke. RMSA Macke told LTJG Armando that he (Macke) had lent them to RMSN Williams on 16 June CY.

Subj: APPEAL FROM PUNISHMENT ICO RMSN JOHN P. WILLIAMS, USN,
434-52-9113

3. The clear preponderance of the evidence in this case led me to the conclusion that RMSN Williams knowingly possessed a concealed weapon on board USS BENSON. While it is true that the coveralls he was wearing on the day in question did not belong to RMSN Williams, his own statements at the time of the investigation of the incident clearly indicate that he was the owner of the knife and wrongfully in possession of said knife in a concealed fashion on board my ship. His punishment was just, and should not be disturbed on appeal.

/s/ *S. D. Dunn*
S. D. DUNN

REPORT AND DISPOSITION OF OFFENSE(S)
NAVPERS 1626/7 (REV. 8-81) S/N 0106-LF-016-2636

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

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

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

PLACE OF OFFENSE(S)	DATE OF OFFENSE(S)
Compartment O1-115-4-Q (Radio Central)	16 June CY

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

Violation of Art. 134, UCMJ. In that RMSN John P. Williams, USN, on active duty, did, on board USS BENSON (DD 895), on or about 16 June CY, unlawfully carry a concealed weapon, to wit: a switchblade knife.

NAME OF WITNESS	RATE/GRADE	DIV/DEPT	NAME OF WITNESS	RATE/GRADE	DIV/DEPT
William Sharkey	CPO	CS			
Thomas A. Holding	CPO	X			

RMC(SW), USN /s/ *William A. Sharkey*
(Rate/Grade/Title of person submitting report) (Signature of person submitting report)

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

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

PRE-MASTRAINT

☐ **PRE TRIAL CONFINEMENT**

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

■ **NO RESTRICTIONS**

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

INFORMATION CONCERNING ACCUSED

CURRENT ENL. DATE	EXPIRATION CURRENT ENL. DATE	TOTAL ACTIVE NAVAL SERVICE	TOTAL SERVICE ON BOARD	EDUCATION	GCT	AGE
24 May CY	23 May CY+2	2yr 1mo	10 mos	HS	57	19

MARITAL STATUS	NO. DEPENDENTS	CONTRIBUTION TO FAMILY OR QTRS ALLOWANCE (Amount required by law)	PAY PER MONTH (Including sea or foreign duty pay, if any)
Single	none	none	$965.00

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

None

PRELIMINARY INQUIRY REPORT

From: Commanding Officer Date: 20 June CY
To: ENS David S. Willis, USNR
1. Transmitted herewith for preliminary inquiry and report by you, including, if appropriate in the interest of justice and discipline, the preferring of such charges as appear to you to be sustained by expected evidence.

REMARKS OF DIVISION OFFICER (Performance of duty, etc.)
SN Williams is a good worker who is learning his rate thru on-the-job training. He needs occasional supervision, but works willingly when assigned a job to do. I consider him petty officer material. This is the first time he's been in trouble. /s/ *LT G.V. Jones*

NAME OF WITNESS	RATE/GRADE	DIV/DEPT	NAME OF WITNESS	RATE/GRADE	DIV/DEPT
William Sharkey	CPO	OPS			
Thomas Holding	CPO	X			

RECOMMENDATION AS TO DISPOSITION:

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

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

COMMENT (*Include data regarding availability of witnesses, summary of expected evidence, conflicts in evidence, if expected. Attach statements of witnesses, documentary evidence such as a service record entries is UA cases, items of real evidence, etc.)*
SN Williams was observed hiding something behind a piece of equipment in radio central. Chief Sharkey discovered that it was a Buck knife with a 4-inch blade. MAC(SW) Holding questioned RMSN Williams, who admitted to owning the knife and carrying it in his coveralls on board in an attempt to intimate ET3 White, who was dating RMSN Williams former girlfriend.
/s/ D. S. Willis, ENS, USNR
(Signature of Investigation Officer)

ACTION OF EXECUTIVE OFFICER

☐ DISMISSED ■ REFERRED TO CAPTAIN'S MAST	SIGNATURE OF EXECUTIVE OFFICER /s/ *R. D. Line, LCDR, USN*

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

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

WITNESS NA	SIGNATURE OF ACCUSED NA

ACTION OF COMMANDING OFFICER

☐ DISMISSED	☐ CONF. ON _____ 1, 2, OR 3 DAYS
☐ DISMISSED WITH WARNING (Not considered NJP)	☐ CORRECTIONAL CUSTODY FOR __ DAYS
☐ ADMONITION: ORAL/IN WRITING	☐ REDUCTION TO NEXT INFERIOR PAY GRADE
☐ REPRIMAND: ORAL/IN WRITING	☐ REDUCTION TO PAY GRADE OF
☐ REST. TO _____ FOR ____ DAYS	☐ EXTRA DUTIES FOR __ DAYS
☐ REST. TO _____ FOR ____ DAYS WITH SUSP. FROM DUTY	☐ PUNISHMENT SUSPENDED FOR
■ FORFEITURE: TO FORFEIT $100.00 PAY PER MO. FOR 2 MO(S)	☐ ART. 32 INVESTIGATION
☐ DETENTION: TO HAVE $___ PAY PER	☐ RECOMMENDED FOR TRIAL BY GCM
	☐ AWARDED SPCM ☐ AWARDED SCM

DATE OF MAST: 25 June 20CY	DATE ACCUSED INFORMED OF ABOVE ACTION 25 June 20CY	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 disprortionate to the offenses charged against me, I have the right to immediately appeal my conviction to the next higher authority within~~XXXXXX~~ . 5 days.

SIGNATURE OF ACCUSED DATE: /s/ *J. P. Williams* 25 Jun 19CY	I have explained the above rights of appeal to the accused. SIGNATURE OF WITNESS /S/ *H.O. Kay* DATE 25 Jun 20CY

FINAL ADMINISTRATIVE ACTION

APPEAL SUBMITTED BY ACCUSED DATED: 27 Jun 20CY FORWARDED FOR DECISION ON 28 Jun 20CY	FINAL RESULT OF APPEAL DENIED
APPROPRIATE ENTRIES MADE IN SERVICE RECORD AND PAY ACCOUNT ADJUSTED WHERE REQUIRED /s/ Leg Off DATE: 25 Jun 20CY (Initials)	FILED IN UNIT PUNISHMENT BOOK: DATE: 25 Jun 20CY /s/ Leg Off (Initials)

NAVPERS 1626/7 (REV. 8-81 (BACK))

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

Notification and election of rights concerning the contemplated imposition of nonjudicial punishment in the case of RMSN John P. Williams, USN, SSN 434-52-9113, assigned or attached to USS BENSON (DD 895) .

NOTIFICATION

1. In accordance with the requirements of paragraph 4 of Part V, MCM (2005 ed.) you are hereby notified that the commanding officer is considering imposing nonjudicial punishment on you because of the following alleged offenses:

Art. 134: Unlawfully carrying switchblade on board, 16 Jun CY

(Note: Here describe the offenses, including the UCMJ article(s) allegedly violated.)

2. The allegations against you are based on the following information: Statements of RMC(SW) Sharkey and MAC(SW) Holding.

(Note: Here provide a brief summary of that information.)

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

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

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

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

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

(3) To be accompanied by a spokesperson provided or arranged for by you. A spokesperson is not entitled to travel or similar expenses, and the proceedings will not be delayed to permit the presence of a spokesperson. The spokesperson may speak on your behalf, but may not question witnesses except as the commanding officer may permit as a matter of discretion. The spokesperson need not be a lawyer;

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

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

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

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

ELECTION OF RIGHTS

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

a. Personal appearance. (Check one)

JPW __X__ I request a personal appearance before the commanding officer.

____ I waive a personal appearance. (Check one)

____ I do not desire to submit any written matters for consideration.

____ Written matters are attached.

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

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

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

RMSN Quigley_____

_____

_____

_____

_____

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

/s/ *H. O. Kay*	/s/ *J. P. Williams*
(Signature of witness)	(Signature of accused)
H. O. KAY, ENS, USNR	J. P. Williams, RMSN, USN
(Name of witness)	(Name of accused)

SUSPECT'S RIGHTS ACKNOWLEDGEMENT / STATEMENT

FULL NAME (ACCUSED/SUSPECT)	SSN	RATE/RANK	SERVICE (BRANCH)
John P. Williams	434-52-9113	RMSN	USN
ACTIVITY/UNIT			DATE OF BIRTH
USS BENSON (DD 895)			22 May CY-19
NAME (INTERVIEWER)	SSN	RATE/RANK	SERVICE (BRANCH)
D. S. Willis	000-00-0000	ENS	USNR
ORGANIZATION		BILLET	
USS BENSON (DD 895)		PIO	
LOCATION OF INTERVIEW		TIME	DATE
USS BENSON (DD 895)		1000	19 Jun 20CY

RIGHTS

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

(1) I am suspected of having committed the following offense(s); Unlawfully carrying a concealed weapon, to wit: a switch blade knife *JPW*

(2) I have the right to remain silent; *JPW*

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

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

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

WAIVER OF RIGHTS

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

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

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

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

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

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

SIGNATURE (ACCUSED / SUSPECT	TIME	DATE
/s/ *John P. Williams*	1015	19 Jun CY
SIGNATURE (INTERVIEWER)	TIME	DATE
/s/ *David S. Willis*	1015	19 Jun CY
SIGNATURE (WITNESS)	TIME	DATE

This statement signed by me, is made freely and voluntarily by me, and without any promises or threats having been made to me or pressure or coercion of any kind having been used against me.

/s/ *John P. Williams*
SIGNATURE (ACCUSED/SUSPECT)

18 June 20CY

I, William A. Sharkey, RMC(SW), USN, have been asked by ENS D. S. Willis to make the following statement:

On 16 July 20cy, I was in Radio Central on board USS BENSON (DD 897). At approximately 1030, I noticed RMSN Williams start fumbling in the pocket of his coveralls and mumbling about needing money to buy a soda. He dug deep into the right front pocket of his coveralls and quickly turned his back to me. He dropped to his knees and quickly shoved something underneath a piece of crypto gear. He then asked me if I wanted a soda and left the space. I was curious, and looked underneath and behind the piece of crypto gear RMSN Williams had been kneeling in front of. It was under there where I found a folding "Buck" knife with a long blade. I saw nothing else under the piece of crypto gear that would explain the way RMSN Williams was acting. I took the knife immediately to Chief Holding at the MAA Shack.

William A. Sharkey

RMC(SW) USN

WITNESS: //S// David S. Willis
ENS, USNR

[HAND-WRITTEN]

19 June 20cy

I, John P. Williams, RMSN, USN, having been advised of my rights by Ensign David S. Willis, which I have acknowledged on the attached rights form, make the following statement freely and voluntarily, understanding my rights to remain silent and to consult a lawyer.

I did not own the coveralls I was wearing on 16 June CY. I borrowed them from RMSA Macke. I did not know there was a knife in the pocket.

//s// John P. Williams

WITNESS: */s/ David S. Willis*
DAVID S. WILLIS
ENS, USNR

[HAND-WRITTEN]

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

I, RMSN John P. Williams, SSN 434-52-9113,
(Name and grade of accused)

assigned or attached to USS BENSON (DD 895), have been informed of the following facts concerning my rights of appeal as a result of (captain's mast) (office hours) held on 25 June CY:

a. I have the right to appeal to (specify to whom the appeal should be addressed).

b. My appeal must be submitted within a reasonable time. Five working days after the punishment is imposed is normally considered a reasonable time, in the absence of unusual circumstances. Any appeal submitted thereafter may be rejected as not timely. If there are unusual circumstances which I believe will make it extremely difficult or not practical to submit an appeal within the 5 working day period, I should immediately advise the officer imposing punishment of such circumstances, and request an appropriate extension of time in which to file my appeal.

c. The appeal must be in writing.

d. There are only two grounds for appeal; that is:

(1) The punishment was unjust, or

(2) The punishment was disproportionate to the offense(s) for which it was imposed.

e. If the punishment imposed included reduction from the pay grade of E-4 or above, or was in excess of: arrest in quarters for 7 days, correctional custody for 7 days, forfeiture of 7 days' pay, extra duties for 14 days, restriction for 14 days, or detention of 14 days' pay, then the appeal must be referred to a military lawyer for consideration and advice before action is taken on my appeal.

/s/ *John P. Williams*	/s/ *I. M. Witness*
(Signature of Accused and Date)	(Signature of Witness and Date)
25 June 20cy	25 June 20cy

5800
Ser /
1 Jul CY

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

Subj: APPEAL FROM PUNISHMENT ICO RMSN JOHN P. WILLIAMS

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

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

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

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

/s/ *M. J. Hughes*
M. J. HUGHES

5800
Ser /
6 Jul CY

FIRST ENDORSEMENT on Commander, Cruiser-Destroyer Group ONE ltr 5800
Ser / of 1 Jul CY

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

Subj: APPEAL FROM PUNISHMENT ICO RMSN JOHN P. WILLIAMS

1. Returned for delivery.

/s/ *S. D. Dunn*
S. D. DUNN

5800
Ser /
6 Jul CY

SECOND ENDORSEMENT on Commander, Cruiser-Destroyer Group ONE ltr 5800
Ser / of 1 Jul CY

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

Subj: APPEAL FROM NONJUDICIAL PUNISHMENT

1. I acknowledge receipt, and have noted the contents, of the first endorsement on my appeal from nonjudicial punishment.

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

/s/ *John P. Williams*
JOHN P. WILLIAMS

PR 8.10 ***APPENDIX B – SAMPLE MARINE CORPS APPEAL PACKAGE OF NONJUDICIAL PUNISHMENT***

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

5812
21 July 20cy

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

Subj: APPEAL OF NONJUDICIAL PUNISHMENT

Ref: (a) MCM (2005 ed.)

1. In accordance with reference (a), I am appealing the punishment awarded me at company office hours on 18 July 20cy.

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

/s/ *John Q. Adams*
JOHN Q. ADAMS

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

5812
23 Jul 20cy

FIRST ENDORSEMENT on Private John Q. Adams 456 64 5080/0311 USMC ltr 5812
of 21 July 20cy

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

Subj: APPEAL OF NONJUDICIAL PUNISHMENT

Ref: (a) JAGMAN
(b) LEGADMINMAN

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

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

a. Summary of recitation of facts

(1) Private Adams appeared at Company Office Hours on 18 July 20cy for the following offense:

Article 86, UA 1300, 5 July 20cy to 2344, 15 July 20cy, from Schools Company, Schools Battalion, Marine Corps Base, Camp Pendleton, California 92055.

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

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

Subj: APPEAL OF NONJUDICIAL PUNISHMENT

(4) Private Adams was asked what he pled to the offense; he pleaded guilty and was found guilty.

(5) Private Adams was awarded reduction to Private, restriction to the limits of Schools Company, Schools Battalion, for seven days, without suspension from duty, and forfeiture of $25.00 per month for one month.

b. Summary assertion of facts made by Private Adams:

The findings of guilty are appealed because he feels the punishment is too harsh.

c. Basic record data

(1) Summary of military offenses:

None.

(2) Performance, Proficiency, and Conduct marks are 4.3 and 4.5, respectively.

2. In summary, Private Adams was found guilty of the offense against the Uniform Code of Military Justice. Subject-named Marine was aware of regulations pertaining to unauthorized absence and the steps he should have taken to obtain leave. Private Adams' age, length of service, SRB, and matters presented in extenuation and mitigation were also considered in arriving at an appropriate punishment. A brief summarization of the office hours is contained on the attached sheet of enclosure (1).

/s/ *Andrew Jackson*
ANDREW JACKSON
Major USMC

Copy to:
Private Adams

NOTE: When a Marine makes an appeal, the original UPB is forwarded as an enclosure with the commanding officer's endorsement. A duplicate is retained by the commanding officer pending final disposition. The duplicate copy may be used as the Marine's copy upon completion of the appeal.

UNIT PUNISHMENT BOOK (5812)
NAVMC 10132 (REV. 1-00) (Previous editions will not be used.) (EF)
SN: 0109-LF-982-7300

Copy to: OMPF
Unit Files
SRB/OQR
Member

Staple Additional pages here.

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

. Art. 86, UA 1300, 5 July CY, 15 Jul CY, fr Scols Co, ScolsBn, MCB, CamPen

2. I have been advised of and understand my rights under Article 31. UCMJ. I also have been advised of and understand my right to demand trial by court martial in lieu of non-judicial punishment. I (do) (do not) demand trial and (will) (will not) accept non-judicial punishment subject to my right of appeal. I further certify that I (have) (have not) been given the opportunity to consult with a military lawyer, provided at no expense to me, prior to my decision to accept non-judicial punishment.

(Date) 18 Jul CY (Signature of accused) /s/ John Q. Adams

3. The accused has been afforded these rights under Article 31, UCMJ, and the right to demand trial by court-martial in lieu of non-judicial punishment.

(Date) 18 Jul CY (Signature of immediate CO of accused) /s/ Andy Jackson

4. BOOKER STATEMENT: I have been given the opportunity to consult with a lawyer, provided by the government at no cost to me, in regard to a pending NJP for violation(s) of Article(s) 86 of the UCMJ. I understand that I have the right to refuse NJP; I do not choose to exercise that right. I further understand that acceptance of NJP does not preclude my command from taking other administrative action against me.

(DATE) 18 Jul CY (SIGNATURE) /s/ John Q. Adams

5. UNAUTHORIZED ABSENCE (in excess of 24 hours) AND MARKS OF DESERTION

6. FINAL DISPOSITION TAKEN AND Reduction to Pvt (E-1), restriction to the limits of ScolsCo, ScolsBn, for 7 days, without suspension from duty, and forfeiture of $250.00 per month for 1 month 18 july CY

7. SUSPENSION OF EXECUTION OF PUNISHMENT, IF ANY. None

8. FINAL DISPOSITION TAKE BY (Name, grade, title) Andrew JACKSON, Major, USMC, Commanding Officer

9. Upon consideration of the facts and circumstances surrounding (this offense) (these offenses) and upon further consideration of the needs of military discipline in this command, I have determined the offense(s) involved herein to be minor and properly punishable under Article 15, UCMJ, such punishment to be that indicated in 8 and 9.

(Signature of CO who took final disposition in 3) /s/ Adrew Jackson

10. DATE OF NOTICE TO ACCUSED OF FINAL DISPOSITION TAKEN.
18 July CY

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

18 July CY (Date) /s/ Andrew Jackson (Signature of CO who took final action in 11)

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

18 July CY (Date) /s/ John Q. Adams (Signature of accused)

13. DATE OF APPEAL, IF ANY.

21 July CY

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

21 Juy CY (Date) /s/ Martin Van Buren (Signature of CO making decision on appeal)

15. DATE OF NOTICE TO ACCUSED OF DECISION ON APPEAL. 24 July CY

16. REMARKS

18 Jul - Intent to appeal indicated. Permission of Rest. for 7 days stayed

17. Final Administrative action, as appropriate, has been completed.

TBP

18. UNIT ScolsCo, ScolsBn, Camp Pen CA

19. INDIVIDUAL (Last name, first name, middle initial) Potshed, Thomas B.

20. GRADE CWO-5

21. SSN 123-45-6789

18 July 20cy

PVT John Q. Adams 456-64-5080 USMC

Summary of evidence presented.

The accused admitted to the offense contained in item 5. Accordingly, the accused was found guilty of the single offense.

Extenuating or mitigating factor considered.

PVT Adams stated, relating to the JA, that he had received a phone call from his brother stating that his dog was seriously ill and not expected to live. PVT Adams stated that he knows it was wrong to leave without permission and that he was sorry for his actions.

Based on recommendation of his First Sergeant, Platoon Sergeant, and his past record, the punishment appearing in block 8 was imposed.

[HAND-WRITTEN]

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

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

NOTIFICATION

1. In accordance with the requirements of paragraph 4 of Part V, MCM (2005 ed.), you are hereby notified that the commanding officer is considering imposing nonjudicial punishment on you because of the following alleged offenses:

(Note: Here describe the offenses, including the UCMJ article(s) allegedly violated.)

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

(Note: Here provide a brief summary of that information.)

3. You have the right to refuse imposition of nonjudicial punishment. If you refuse nonjudicial punishment, charges could be referred to trial by court-martial by summary, special, or general court-martial. If charges are referred to trial by summary court-martial, you may not be tried by summary court-martial over your objection. If charges are referred to a special or general court-martial you will have the right to be represented by counsel. The maximum punishment that could be imposed if you accept nonjudicial punishment is:

_____

4. If you decide to accept nonjudicial punishment, you may request a personal appearance before the commanding officer or you may waive this right.

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

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

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

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

(3) To be accompanied by a spokesperson provided or arranged for by you. A spokesperson is not entitled to travel or similar expenses, and the proceedings will not be delayed to permit the presence of a spokesperson. The spokesperson may speak on your behalf, but may not question witnesses except as the commanding officer may permit as a matter of discretion. The spokesperson need not be a lawyer;

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

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

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

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

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

ELECTION OF RIGHTS

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

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

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

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

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

_____ _____
(Signature of witness) (Signature of accused)

_____
(Date)

(Note: If the accused wishes to talk to a lawyer, the remainder of this form shall not be completed until the accused has been given a reasonable opportunity to do so.)

___ I talked to _____, a lawyer on _____.

_____ _____
(Signature of witness) (Signature of accused)

_____
(Date)

b. Right to refuse nonjudicial punishment. (Check one)

_____ I refuse nonjudicial punishment.

_____ I accept nonjudicial punishment. I am advised that acceptance of nonjudicial punishment does not preclude further administrative action against me. This may include being processed for an administrative discharge which could result in an other than honorable discharge.

(Note: If the accused does not accept nonjudicial punishment, the matter should be submitted to the commanding officer for disposition.)

c. Personal appearance. (Check one)

____ I request a personal appearance before the commanding officer.

____ I waive a personal appearance. (Check one)

____ I do not desire to submit any written matters for consideration.

____ Written matters are attached.

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

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

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

_____

_____

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

_____ _____
(Signature of witness) (Signature of accused)

_____ _____
(Name of witness) (Name of accused)

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

I, **Pvt John Q. Adams**, SSN **456 64 5080**,
(Name and grade of accused)

assigned or attached to **ScolsCo, ScolsBn, MCB CamPen**, have been informed of the following facts concerning my rights of appeal as a result of (captain's mast) (office hours) held on **18 Jul 20cy** :

a. I have the right to appeal to (specify to whom the appeal should be addressed).

b. My appeal must be submitted within a reasonable time. Five days after the punishment is imposed is normally considered a reasonable time, in the absence of unusual circumstances. Any appeal submitted thereafter may be rejected as not timely. If there are unusual circumstances which I believe will make it extremely difficult or not practical to submit an appeal within the 5 day period, I should immediately advise the officer imposing punishment of such circumstances, and request an appropriate extension of time in which to file my appeal.

c. The appeal must be in writing.

d. There are only two grounds for appeal; that is:

(1) The punishment was unjust, or

(2) The punishment was disproportionate to the offense(s) for which it was imposed.

e. If the punishment imposed included reduction from the pay grade of E-4 or above, or was in excess of: arrest in quarters for 7 days, correctional custody for 7 days, forfeiture of 7 days' pay, extra duties for 14 days, restriction for 14 days, or detention of 14 days' pay, then the appeal must be referred to a military lawyer for consideration and advice before action is taken on my appeal.

/s/ ***JOHN Q. ADAMS***	/s/ ***I. M. WITNESS***
(Signature of Accused and Date)	(Signature of Witness and Date)
18 Jul cy	**18 Jul cy**

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

5812

Ser /

23 Jul 20cy

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

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

Ref: (a) MCM (2005 ed.)

Encl: (1) NJP Appeal Package

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

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

/s/ ***Martin Van Buren***
MARTIN VAN BUREN

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

5812

24 Jul 20cy

MEMORANDUM ENDORSEMENT

From: Staff Judge Advocate
To: Commanding Officer, Schools Battalion, Marine Corps Base, Camp Pendleton, CA 92055

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

1. The basic correspondence has been reviewed by a judge advocate. The proceedings are considered to be correct in law and fact, and the punishment awarded is not considered to be unjust or disproportionate to the offense committed.

2. Rejection of the appeal is recommended.

/s/ *William H. Harrison*
WILLIAM H. HARRISON

NOTE: Once the battalion commander has received a reply from a judge advocate, his letter requesting review and advice and the reply are <u>not</u> provided to the Marine. This correspondence is retained by the battalion.

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

5812

Ser /

24 Jul 20cy

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

Subj: APPEAL OF NONJUDICIAL PUNISHMENT

1. Returned.

2. Your case has been reviewed by a judge advocate. The proceedings in this case are considered to be correct in law and fact, and the punishment is not considered to be unjust or disproportionate to the offense committed. However, as an act of clemency, only so much of the punishment as provides for reduction to private, restriction to the limits of Schools Company, Schools Battalion, for five days, without suspension from duty, and forfeiture of $25.00 per month for one month will take effect. That portion of the punishment providing for forfeiture of $25.00 per month for one month and restriction to the limits of Schools Company, Schools Battalion, for five days, without suspension from duty, is suspended for six months and, unless sooner vacated, will be remitted at that time.

/s/ *Martin Van Buren*
MARTIN VAN BUREN

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

5812
Ser /
25 Jul 20cy

FIRST ENDORSEMENT on Commanding Officer, Schools Battalion ltr 5812 Ser / of 24 Jul 20cy

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

Subj: APPEAL OF NONJUDICIAL PUNISHMENT

1. Returned.

2. Action has been taken on your appeal, and your attention is invited to the Commanding Officer, Schools Battalion ltr 5812 of 24 Jul 20cy.

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

/s/ *Andrew Jackson*
ANDREW JACKSON

Copy to:
Private Adams

NOTE: Once the commanding officer has received the decision, any necessary administrative action should be taken. The Marine is provided with a copy of the entire appeal package, excluding the battalion commander's letter to the SJA and the memorandum endorsement from the SJA.

PR 8.11. ***APPENDIX C – SAMPLE COAST GUARD APPEAL PACKAGE OF NONJUDICIAL PUNISHMENT***

PR 8.12. ***PROPER HANDLING AND DOCUMENTATION OF NAVY UNAUTHORIZED ABSENCES***

PR 8.12.1. ***Policy.***

The policies and procedures regarding UAs and desertion of enlisted members are found in MILPERSMAN, Arts. 1050-110, 1600-010 through 1600-100. Consult these sections for further amplification of the checklist given below.

PR 8.12.2. ***Procedures.***

The procedures for completing the service record entries can be found in the MILPERSMAN sections above and PAYPERSMAN sections 10381, 90419, and 90435.

PR 8.12.3. ***Checklist***

1. When a member is reported UA, immediately prepare a page 13 to document inception of UA.

2. When a member has been UA over 24 hours, ensure that the NAVPERS 601-6R is prepared. This will stop the servicemember's pay.

3. If member is absent less than 24 hours, prepare a page 13 to document the termination of absence.

4. If the member is gone 10 days, prepare a letter to the next of kin (NOK) notifying them of the member's absence; his / her personal effects should be collected, inventoried, and placed in safekeeping; prepare NAVCOMPT 3060.

5. Upon return of a member gone less than 30 days, complete the NAVPERS 601-6R and decide what type, if any, disciplinary action will be taken.

6. If the member is gone 30 days, he / she is declared a deserter. This may be done earlier if there is an indication the member has no intention to return. The following documents should be prepared and actions taken:

   a. Deserter message;

   b. DD Form 553 (Absentee Wanted by the Armed Forces);

   c. charge sheet DD Form 458 (charge violation of Article 85, UCMJ; prefer and receive charges only; do not refer);

   d. any evidence of desertion should be gathered (such as witness statements, pending incident complaint reports, restriction orders, any relevant message traffic, and any documentation of other pending disciplinary action); and

   e. obtain health, dental, and pay records.

7. Retain a deserter's record on board for 120 days. On the 121st day forward all records via registered mail to:

Officer-in-Charge
Navy Absentee Collection and Information Center
2834 Greenbay Road
North Chicago, IL 60064-3094

Mark outside the envelope “DESERTER – DO NOT OPEN IN MAIL ROOM.”

8. Send personal effects to:

Officer-in-Charge
Cheatham Annex
Fleet and Industrial Supply Center Norfolk
108 Sanda Avenue
Williamsburg, VA 23187-8792

9. A deserter file should be retained by the command. It should include the following:

a. certified copy of the charge sheet;

b. certified copy of the restriction order;

c. right side of the service record (SRB);

d. copy of page 601-6R;

e. performance evaluations;

f. last leave and earning statement (LES);

g. copy of DD 553;

h. copy of deserter message; and

i. any other relevant messages.

10. Upon return of a member from UA, prepare page 13 documenting return.

11. Upon return of a member from UA over 24 hours, but less than 10 days, complete page 601-6R—sending fourth copy to disbursing. This starts member's pay.

12. Upon return of a member from UA over 10 days, but less than 30 days, complete page 601-6R; prepare letter to NOK notifying them of member's return.

13. Upon return of a member from UA over 30 days, complete page 601-6R; prepare letter to NOK notifying them of member's return; and prepare return deserter message if not done by an intermediate command.

PR 8.13. *PROPER HANDLING AND DOCUMENTATION OF MARINE CORPS UNAUTHORIZED ABSENCES*

PR 8.13.1. *References*

1. MCO P5800.16A, *Marine Corps Manual for Legal Administration* (LEGADMINMAN), Chapter 5

2. MCO P1080.35 (PRIM)

3. MCO P4050.38, *Marine Corps Personal Effects and Baggage Manual*

4. MCO P1070.12, *Marine Corps Individual Records and Administration Manual* (IRAM)

5. MCO P5512.11, Uniformed Service Identification and Privilege Card, DD Form 1173

6. MCO P11000.17, *Real Property Facilities Manual*, Vol. X

PR 8.13.2. *Checklist*

1. UA entry (in excess of 24 hours) run on unit diary.

2. Page 12 SRB "to UA" entry made (IRAM 4015).

3. Inventory of government and personal property of absentee accomplished within 24 hours.

4. After 48th hour of absence, the CO telephoned NOK (if not in CONUS, only if dependents reside locally).

5. Prior to 10th day of UA, letter mailed to NOK and copy filed on document side of SRB (fig. 5-1, LEGADMINMAN).

6. Prepare charge sheet ***through*** block IV prior to 31st day of absence for violation of article 85 and all other known charges:

a. charges sworn to, block III;

b. receipted for in block IV; and

c. original placed on document side of SRB.

7. Unit diary entry run declaring deserter status and dropping from roles to desertion on 31st day.

8. SRB pages 3, 12, and 23 completed per IRAM:

a. Chronological record (page 3);

b. offenses and punishments (page 12) administratively declaring deserter status and dropping from rolls; and

c. markings page (page 23).

9. DD 553 prepared and distributed (per para. 5002 of LEGADMINMAN):

a. Date published matches that of page 12 entry date (normally 31st day of UA);

b. if insufficient information, priority message sent to MMRB-10;

c. if incomplete information, permission requested from MHL-30; and

d. original sent to CMC (MHL-30) (Report Symbol MC-5800-01) within seven days of administrative declaration of desertion on page 12.

10. DD 553 distributed properly (para. 5002.2e(4) LEGADMINMAN):

a. copy on document side of SRB;

b. copy to next of kin and all known associates;

c. copy to each chief of police and county sheriff in area of civilian addressees of DD 553; and

d. copy to units assigned admin responsibility and appropriate area police (*see* MCO 5800.10).

11. If deserter has dependents, see para. 5004 of LEGADMINMAN:

a. retrieved dependent ID cards;

b. if not surrendered, notify local medical facilities and military activities;

c. a terminate DD 1172 submitted to DEERS; and

d. dependents directed to vacate quarters.

12. Return of deserter within 91 days:

a. "From UA" entry made in diary;

b. page 12 entry recording date, hour, and circumstances of return to military control (*see* 4015 of IRAM);

c. page 12 SRB entry made removing mark of desertion (not removed if apprehended and / or convicted by civil authorities except as per LEGADMINMAN); and

d. if mark of desertion removed, notify disbursing office in writing of removal per LEGADMINMAN.

13. If no return by 91st day of absence:

a. Audit of SRB, pages 3, 12, and 23 completed and entries correct; and

b. charge sheet on document side correctly receipts for charge prior to page 12 date accused dropped from rolls (if not, redo).

PR 8.14. ***COAST GUARD UNAUTHORIZED ABSENCE***

See Chapter 8C CG Personnel Manual (PERSMAN), COMDTINST M1000.6A

PR 8.15 ***APPENDIX D - SAMPLE 10-DAY UA NOTIFICATION LETTER FOR NEXT OF KIN***

DEPARTMENT OF THE NAVY
USS NEVERSAIL (AS 00)
FPO AE 09501

1610
00
Date

Mr. & Mrs. Ronald Jones
235 Long Street
Los Angeles, CA 91001-9999

Dear Mr. and Mrs. Jones:

I regret the necessity of informing you that your son, Yeoman Third Class Fred Paul Jones, who enlisted in the Navy on June 24, 20CY-2, and was attached to USS NEVERSAIL (AS 00), has been on unauthorized absence since June 25, 20CY. Should you know of his whereabouts, please urge him to surrender to the nearest naval or other military activity immediately since the gravity of the offense increases with each day of absence. At this time, all pay and allowances, including allotments, have been suspended pending return to Navy jurisdiction. Should he remain absent for 30 days, we will be required to declare him a deserter and information will be provided to the Federal Bureau of Investigation (FBI), National Crime Information Center Wanted Persons File, which is available to all Federal, state, and local law enforcement agencies. A Navy Reserve Chaplain living near you is available for counsel in resolving this serious problem. Communication with a chaplain in this situation is considered confidential. If you desire to confer with a Navy Chaplain regarding this unauthorized absence, you may contact, Staff Chaplain, Naval Reserve Readiness Command, 123 Main Street, Los Angeles, CA 91001, phone (213) 555-6655.

Sincerely,

A. B. SEAWEED
Captain, U.S. Navy
Commanding Officer

Copy to:
REDCOM Los Angeles

PR 8.16 ***APPENDIX E - SAMPLE LETTER NOTIFYING NEXT OF KIN OF RETURN FROM UA***

DEPARTMENT OF THE NAVY
USS NEVERSAIL (AS 00)
FPO AE 09501

1610
00
Date

Mr. & Mrs. Ronald Jones
235 Long Street
Los Angeles, CA 14790-9999

Dear Mr. and Mrs. Jones:

Please be advised that your son, Yeoman Third Class Fred Paul Jones, was returned to USS NEVERSAIL (AS 00), on December 24, 20CY. You may write to your son at the above address.

Sincerely,

A. B. SEAWEED
Captain, U.S. Navy
Commanding Officer

Copy to:
REDCOM Los Angeles

[UPON RETURN OF ABSENTEE TO PARENT COMMAND, PREPARE A LETTER NOTIFYING NOK OF MEMBER'S RETURN - NO SPECIFIC LANGUAGE IS DICTATED BY MILPERSMAN. LANGUAGE OF LETTER IS LEFT TO DISCRETION OF PARENT COMMAND. WE RECOMMEND THAT THIS LETTER NOT BE SENT UNTIL THE ABSENTEE IS PHYSICALLY BACK ON BOARD THE COMMAND. *SEE* MILPERSMAN 1600-050]

PR 8.17. ***APPENDIX F - SAMPLE ACKNOWLEDGMENT OF NJP NOTIFICATION***

1621
17
Date

From: First Lieutenant John J. Jones 123 45 6789/1369 USMC
To: Commanding General, 1st Marine Aircraft Wing

Subj: NOTIFICATION OF OFFICE HOURS HEARING

Ref: (a) CG, 1stMAW ltr 1621 17 of _____

1. I acknowledge receipt of the reference which gave me notification of the intent to conduct office hours and I understand my rights in that regard.

2. I have received a copy of the information to support the allegations.

3. I have had an opportunity to consult with counsel. I (did / did not) consult with counsel.

4. I (will / will not) accept office hours and (do / do not) demand trial by court-martial. At office hours, I (will / will not) plead guilty to the offenses alleged against me.

5. I (do / do not) request a personal appearance. Written matters (are / are not) attached.

6. I request that the following witnesses, if reasonably available, be present to testify at the hearing:

SIGNATURE

PR 8.18. ***APPENDIX G - SAMPLE RECORD OF OFFICER NJP***

LETTERHEAD

1621
17
Date

Subj: RECORD OF HEARING UNDER ARTICLE 15, UCMJ ICO, FIRST LIEUTENANT JOHN J. JONES 123 45 6789/1369 USMC

Ref: (a) Article 15, UCMJ
(b) Part V, MCM (2005 ed.)
(c) MCO P5800.16A (LEGADMINMAN)

Encl: (1) CG, 1stMAW ltr 1621 17 of [date]
(2) [SNO's] ltr 1621 17 of [date]
(3) Maj Smith's Report of article 32 investigation of [date] w/ encls

1. First Lieutenant Jones received nonjudicial punishment (NJP) from MajGen Smith, Commanding General of the 1st Marine Aircraft Wing, on [date] for conduct unbecoming an officer. He was awarded a punitive letter of reprimand and forfeiture of $500.00 pay per month for two months.

2. The NJP hearing was conducted in substantial compliance with references (a) and (b). As reflected in enclosures (1) and (2), First Lieutenant Jones was notified of his rights prior to the hearing and elected to accept NJP.

3. This report is prepared by the staff judge advocate, who was present throughout the proceedings, per paragraph 4003 of reference (c).

4. During the hearing, First Lieutenant Jones acknowledged his rights and restated his election to accept NJP. He pled guilty to the charge. Details of the allegations are contained in the article 32 investigation report, attached as enclosure (3).

5. Prior to imposing punishment, the Commanding General deliberated and specifically stated that he considered enclosure (3), including the numerous statements of good character, the Officer Qualification Record, and the oral statements of the witness, First Lieutenant Jones, and the command representative. After the punishment was announced, the Commanding General advised First Lieutenant Jones of his right to appeal to the Commanding General, III Marine Expeditionary Force.

Subj: RECORD OF HEARING UNDER ARTICLE 15, UCMJ ICO, FIRST LIEUTENANT JOHN J. JONES 123 45 6789/1369 USMC

6. At the hearing, First Lieutenant Jones and a character witness, Major Johnson, made statements substantially as follows:

a. First Lieutenant Jones: Sir, every day, for the last four months, I have regretted this incident. I believe that alcohol affected my judgment that night. It was totally out of character for me. It will never happen again. My statement at the article 32 hearing was to the best of my recollection. I am responsible for my actions and I am willing to face the consequences. I would love to be able to stay a Marine.

b. Major Johnson, Executive Officer, [unit]. I am First Lieutenant Jones' executive officer, but I have known him since August of 20CY-3 when we were both students in the aviation supply school at Athens, Georgia. He did well at school and was well-respected. I believe he just exercised bad judgment on the night in question. It was an isolated incident. While I was at The Basic School, I filled several billets and observed many lieutenants. In my opinion, First Lieutenant Jones rates at the top of the batch. I would not hesitate to have him continue to serve with me.

7. The command representative, Colonel Brown, USMC, CO, [unit], made a statement substantially as follows: After reviewing all the facts in this incident, I do not have confidence in First Lieutenant Jones' judgment or integrity. While the overall incident may have been isolated, he made several separate judgment errors that evening. First Lieutenant Jones does not have the integrity required of Marine Corps officers.

Record Authenticated by:

C. L. VARREC
Lieutenant Colonel, USMC
Staff Judge Advocate

PR 8.19. ***APPENDIX H - SAMPLE OFFICER NJP REPORT***

LETTERHEAD

1621
17
Date

FOR OFFICIAL USE ONLY

From: Commanding General, 1st Marine Aircraft Wing
To: Commandant of the Marine Corps (JAM)
Via: (1) Commanding General, III Marine Expeditionary Force
(2) Commanding General, Fleet Marine Force Pacific

Subj: REPORT OF NONJUDICIAL PUNISHMENT ICO FIRST LIEUTENANT JOHN J. JONES 123 45 6789/1369 USMC

Ref: (a) MCO P5800.16A (LEGADMINMAN)
(b) FMFPacO 5810.1L
(c) Art. 15, UCMJ
(d) Part V, MCM (2005 ed.)
(e) Ch. 1, Part B, *JAG Manual*
(f) Article 1122, *U.S. Navy Regulations, (1990)*

Encl: (1) Record of hearing under Article 15, UCMJ
(2) Punitive letter of reprimand
(3) First Lieutenant Jones' ltr 1621 17 of [date]
(4) First Lieutenant Jones' statement regarding adverse matter

1. This report is forwarded for inclusion on First Lieutenant Jones' official records per paragraph 4003 of reference (a) via intermediate commanders, as directed by paragraph 3d(2) of reference (b).

2. On [insert date], in accordance with references (c), (d), and (e), nonjudicial punishment (NJP) was imposed on First Lieutenant Jones for conduct unbecoming an officer. As a result, he was awarded a punitive letter of reprimand and a forfeiture of $500.00 pay per month for two months.

3. Details of the hearing and the circumstances of the offenses are set forth in enclosure (1). A copy of the punitive letter of reprimand is attached as enclosure (2).

4. As reflected in enclosure (3), First Lieutenant Jones did not appeal the punishment. Accordingly, the NJP is now final and will be reflected in the fitness report that includes the date it was imposed, [insert date].

5. I recommend that First Lieutenant Jones be retained on active duty until the expiration of his obligated active service.

6. By copy hereof, First Lieutenant Jones is notified of his right, per reference (f), to submit his comments, within 15 days of receipt, concerning this report of NJP and the letter of reprimand which will be included as adverse matter in his official records. His comments, if any, will be attached as enclosure (4).

Copy to:
CO, MAG-32
CO, MALS-32
First Lieutenant Jones

SAMPLE FIRST ENDORSEMENT

LETTERHEAD

FIRST ENDORSEMENT on CG, 1stMAW ltr 1621 17 of [date]

From: Commanding Officer, Marine Wing Aircraft Squadron 1
To: First Lieutenant John J. Jones 123 45 6789/1369 USMC

Subj: PUNITIVE LETTER OF REPRIMAND

1. Delivered.

SIGNATURE
By direction

PR 8.20. ***APPENDIX I - SAMPLE PUNITIVE LETTER OF REPRIMAND***

LETTERHEAD

1621
17
Date

From: Commanding General, 1st Marine Aircraft Wing
To: First Lieutenant John J. Jones 123 45 6789/1369 USMC
Via: Commanding Officer, Marine Wing Headquarters Squadron 1

Subj: PUNITIVE LETTER OF REPRIMAND

Ref: (a) UCMJ, Art 15
(b) Part V, MCM (2005 ed.)
(c) JAGMAN, § 0114
(d) Record of office hours proceeding

1. On [date], you received nonjudicial punishment (NJP) per references (a), (b), and (c). Prior to the hearing, you were advised of your right to demand trial by court-martial and you elected not to do so. Reference (d) is a summary of the hearing.

2. During July 20CY, you were involved in two separate alcohol-related incidents that resulted in this letter. You were drunk and disorderly on both occasions. On 15 July 20CY, you hosted a party in your BOQ room in Plaza Housing, Okinawa, Japan. At about 0300, a female military policeman asked you to turn down your stereo. In response, you called her a "bitch," told her to "go to hell," threatened her with your fists, and threatened another corporal. At about 0300, 16 July 20CY, you were found asleep in your car near a gangster residence in Okinawa City, Okinawa, Japan. Upon being awakened by Japanese police and asked to leave the area, you got out of your car and became violent, scuffling with the police and Air Force Security Police who were called to the scene, resulting in your being handcuffed and led away.

3. Your misconduct as an officer in dealing with enlisted military police and with Japanese law enforcement personnel brought discredit upon the officer corps. Your conduct reflects adversely on the leadership, judgment, and discipline required of you as an officer of Marines. Accordingly, pursuant to references (a), (b), and (c), you are reprimanded.

4. You are hereby advised of your right to appeal this action within five days of receiving this letter to the next superior authority, the Commanding General, III Marine Expeditionary Force, via the Commanding General, 1st Marine Aircraft Wing, per references (a), (b), and (c).

5. If you do not desire to appeal this action, you are directed to so inform me in writing within five days after receipt of this letter.

6. If you do desire to appeal this action, you are advised that an appeal must be made within a reasonable time and that, in the absence of unusual circumstances, an appeal made more than five days after receipt of this letter may be considered as not having been made within a reasonable time. If, in your opinion, unusual circumstances exist which make it impractical or extremely difficult for you to prepare and submit your appeal within the five days, you shall immediately advise me of such circumstances and request an appropriate extension of time to submit your appeal. Failure to receive a reply to such request will not, however, constitute a grant of such extension of time to submit your appeal. In all communications concerning an appeal of this letter, you are directed to state the date of your receipt of this letter.

7. Unless withdrawn or set aside by higher authority, a copy of this letter will be placed in your official record at Headquarters, U.S. Marine Corps. You may forward within 15 days after receipt of final denial of your appeal or after the date of notification of your decision not to appeal, whichever may be applicable, a statement concerning this letter for inclusion in your record. If you do not desire to submit a statement, you shall so state, in writing, within 5 days. You are advised that the statement submitted shall be couched in temperate language and shall be confined to the pertinent facts. Opinions shall not be expressed nor the motives of others impugned. Your statement

may not contain countercharges.

8. Your reporting senior must note this letter in the next fitness report submitted after this letter becomes final, either by decision of higher authority upon appeal or by your decision not to appeal.

9. A copy of reference (d) has been provided to you for your use in deciding whether to appeal the issuance of this letter.

G. LEVY

PR 8.21. ***APPENDIX J - SAMPLE ADVERSE MATTER STATEMENT***

From: First Lieutenant John J. Jones 123 45 6789/1369 USMC
To: Commanding General, 1st Marine Aircraft Wing

Subj: STATEMENT REGARDING ADVERSE MATTER IN OFFICIAL RECORDS

Ref: (a) CG, 1stMAW ltr 1621 17 of [date]
(b) Art. 1122, *U.S. Navy Regulations (1990)*

1. I received a copy of reference (a) on [date].

2. I understand my right per reference (b) to make a statement concerning the report of nonjudicial punishment, with enclosures, including the punitive letter of reprimand.

3. I choose to make (no statement) (the following statement).

PR 8.22. ***APPENDIX K - SAMPLE OFFICER NJP APPEAL***

From: First Lieutenant John J. Jones 123 45 6789/1369 USMC
To: Commanding General, III Marine Expeditionary Force
Via: Commanding General, 1st Marine Aircraft Wing

Subj: APPEAL OF NONJUDICIAL PUNISHMENT

Ref: (a) CG, 1stMAW ltr of reprimand 1620 17 of [date]
(b) Record of hearing
(c) Article 15, UCMJ
(d) Part V, MCM (2005 ed.)

1. I acknowledge receipt of references (a) and (b) on [date].

2. I further acknowledge that I understand my rights under references (c) and (d) to appeal the imposition of nonjudicial punishment, including the punitive letter of reprimand, to the Commanding General, III Marine Expeditionary Force.

3. I desire to appeal on the ground that the punishment was (unjust, disproportionate to the offenses committed) as follows:

PR 8.23. ***APPENDIX I - MAST / OFFICE HOURS CHECKLIST FOR STAFF JUDGE ADVOCATES***

A. Maintain log book tracking each report chit (i.e., report initiated, sent to division for investigation and completion of rights form—have someone in division initial receipt in log book), return to legal (dismissed, EMI, or XO screening), sent to XO (dismissed, XOI, to CO), return to legal (*Booker* if shore command), mast / office hours (dismissed, NJP).

B. Coordinate with division and with MAA to ensure witnesses and division representative will be present.

C. Have CO record NJP and sign.

D. Post mast / office hours:

1. Post-mast yeoman standing by with appellate rights form;

2. know in advance who may need page 13 warning / counseling; and

3. service record entries should be made without delay.

E. Maintain Unit Punishment Book (UPB)

1. Original report chit with NJP signed by CO;

2. record of mast / office hours proceeding;

3. all documents considered by CO;

4. original—signed and dated—rights warning statements;

5. copies of service record entries; and

6. copies of appeals, endorsements, and responses (originals in NJP appeal correspondence file).

CHAPTER 9

CHAPTER 9

PR 9. CONSTITUTION OF COURTS-MARTIAL AND THE RIGHT TO COUNSEL

PR 9.1. *INTRODUCTION*

A. The jurisdiction of a court-martial -- its power to try and determine a case -- and, hence, the validity of its judgment is conditioned upon the following requisites: That the court be convened by an officer empowered to convene it; that the court be composed in accordance with the law with respect to the number and qualifications of its personnel (military judge and members); that each charge before the court be referred to it by competent authority; that the accused be a person subject to court-martial jurisdiction; and that the offense be subject to court-martial jurisdiction. This chapter will consider the second jurisdictional aspect of courts-martial -- the proper composition of a court-martial.

B. This chapter also will consider the various types of defense counsel in military practice. In a nutshell, the detailed defense counsel is the defense counsel initially assigned to a case by the counsel's commanding officer, officer in charge, or other competent authority. Individual counsel is a counsel requested by an accused and can be either a civilian or a military lawyer. The role of counsel and his relationship to the case will be discussed in detail herein.

C. *Manual for Courts-Martial (2005 ed.),* (MCM) provisions regarding selection of court members and detail of the military judge may be divided into two classes: (1) Qualifications to sit as a member or military judge on certain types of courts; and (2) disqualifications or ineligibility to sit in a particular case or series of related cases. This distinction is made because, while qualifications requirements are generally jurisdictional and nonwaivable, the same cannot be said for ineligibility. This chapter will deal specifically with the general qualification requirements to sit on certain types of courts.

D. R.C.M. 201(b) states, " for a court-martial to have jurisdiction . . . [it] must be composed in accordance with these rules with respect to number and qualifications of its personnel." In this regard, the Supreme Court has held that "[a] court-martial is the creature of statute, and, as a body or tribunal, it must be convened and constituted in entire conformity with the provisions of the statute, or else it is without jurisdiction." The broad language used by the Supreme Court and in the MCM does not mean, however, that every error in the composition of a court-martial is jurisdictional.

Courts have been reluctant to find these deviations regarding the qualifications of personnel to be jurisdictional, even in cases where personnel clearly were ineligible. They have utilized instead the doctrine of prejudicial error, relying on special applications of such concepts as presumed prejudice and inadequate waiver. This chapter will attempt to shed some light on those aspects of court-martial composition which are jurisdictional.

E. Briefly stated, if a court lacks jurisdiction, its proceedings are null and void. If the convening authority desires another trial, he must take appropriate action to remedy the jurisdictional defect and rerefer the charges. If the error is determined to have been merely prejudicial, a determination must then be made as to its effect on the findings and/or sentence. Corrective action can take the form of a partial disapproval of the findings and/or sentence, a dismissal of charges, a rehearing of findings and/or sentence, or a reassessment of the sentence.

F. Article 16, UCMJ, defines the three types of courts-martial as follows:

1. A general court-martial (GCM) consists of:

a. A military judge and at least five members; or

b. except in capital cases, a military judge alone, if, before the court is assembled, the accused, knowing the identity of the military judge and after consultation with defense counsel, requests orally or in writing a court composed only of a military judge, and the military judge approves the request.

2. A special court-martial (SPCM) consists of:

a. At least three members; or

b. a military judge and at least three members; or

c. a military judge alone, if, before the court is assembled, the accused, knowing the identity of the military judge and after consultation with defense counsel, requests orally or in writing a court composed only of a military judge, and the military judge approves the request.

3. A summary court-martial (SCM) consists of one commissioned officer.

PR 9.2. *QUALIFICATIONS OF MILITARY JUDGE*

PR 9.2.1. *SPCM*.

Article 26(b), UCMJ, provides that the military judge of an SPCM must be:

1. A commissioned officer of the armed forces;

2. a member of the bar of a Federal court or of the highest court of a state; and

3. certified as qualified to be a military judge by the Judge Advocate General of the armed force of which such military judge is a member.

In addition to the above requirements, a military judge. May be from an armed force other than that in which the court-martial is convened when permitted by JAG.

PR 9.2.2. *GCM*.

The military judge of a GCM must have the same qualifications as those prescribed for an SPCM military judge. In addition, he must be designated and assigned by the Judge Advocate General (JAG) for duty as a GCM military judge. GCM judges are assigned to the Navy-Marine Corps Trial Judiciary and are directly responsible only to the JAG. This ensures that the CA will not either prepare or review the fitness report of a GCM military judge. GCM judges may perform other duties unrelated to their primary duty as military judges only with approval of the JAG.

PR 9.2.3. *Effect of lack of qualifications.*

If a military judge is not qualified in accordance with Article 26, UCMJ, the proceedings of a court-martial are void (i.e., qualifications requirements are jurisdictional).

PR 9.2.4. *Navy-Marine Corps Trial Judiciary.*

All GCM and SPCM judges are assigned to the Chief Judge, Navy-Marine Corps Trial Judiciary, for supervision and coordination. This is a separate naval activity assigned to the Judge Advocate General for command and primary support. The Navy-Marine Corps Trial Judiciary is organized into judicial circuits, each of which is administered by a GCM judge who is designated the circuit military judge. This circuit judge is directly responsible for the supervision of all judges and for the docketing of all cases within his circuit. He is expected to utilize full-time members of the Navy-Marine Corps Trial Judiciary assigned to his or her command to the maximum extent possible. The primary duty of all full-time military judges is to sit on courts-martial, although special courts-martial judges may also be assigned collateral legal duties, such as summary court-martial or Article 32, UCMJ, pretrial investigating officer, to the extent that such duties are not incompatible with their primary duties as a military judge.

PR 9.2.5. *Coast Guard Trial Judiciary.*

The Coast Guard has one GCM judge, the Chief Trial Judge (G-L-3) who reports to the Chief Counsel. SPCM judges are selected from law specialists on advice duty who serve in this capacity, as a collateral duty. Oversight of the SPCM judges resides in the Chief Trial Judge.

PR 9.3. *QUALIFICATIONS OF MEMBERS*

PR 9.3.1. *General policy.*

The Sixth Amendment right to a trial by jury, including the requirement that a jury be drawn from a representative cross-section of the community, does not apply to selection of members to a court-martial. In selecting the members of a court-martial, a CA has a large measure of discretion. Article 25, UCMJ, provides two general policies to aid him in exercising this discretion.

1. When it can be avoided, no member of an armed force may be tried by a court-martial any member of which is junior to him in rank or grade.

2. A CA shall detail members who are, in his opinion, best qualified for the duty by reason of "age, education, training, experience, length of service, and judicial temperament." A CA also "is free to require representativeness in his court-martial panels and to insist that no important segment of the military community -- such as blacks, Hispanics, or women -- be excluded from service on court-martial panels."

These policy requirements are not mandatory. So long as a member is otherwise qualified, he may sit on a court-martial regardless of rank or grade.

The MCM provides further policy guidelines with respect to the selection of members. Whenever practicable, an SCM officer or the senior member of an SPCM or GCM should be an officer in paygrade O-3 or above. Members of commands other than that of the CA may be detailed with the informal concurrence of their commanding officer. It is good practice for commands to use this device on a reciprocal basis in order to avoid intimations of command influence or prejudicial knowledge by the members of the case or the accused.

Note, however, that members of an armed force other than that of the accused should be detailed in accordance with the provisions of R.C.M. 503(a)(3), discussion (i.e., at least a majority of the members should be of the same armed force as the accused unless exigent circumstances make it impractical to do so). Note, further, that an SCM officer must be of the same armed force as the accused unless otherwise prescribed by the Secretary of the Navy.

PR 9.3.2. *Statutory qualification requirements.*

Article 25, UCMJ, provides that the following persons on active duty are qualified as court members.

1. Any commissioned officer is qualified for all courts-martial for the trial of any person. Art. 25(a), UCMJ.

2. Any warrant officer is qualified:

   a. Only for SPCM's and GCM's; and

   b. for the trial of any person except a commissioned officer.

3. Any enlisted member is qualified:

   a. Only for SPCM's and GCM's; and

   b. only for the trial of an enlisted person; and

   c. only if requested by the accused before the conclusion of a pretrial Article 39(a), UCMJ, session or assembly of the court, whichever occurs first; and,

   d. only if he is not a member of the same "unit" as the accused. For a definition of the term "unit," see Art. 25(c)(2), UCMJ. Note that, if there is no objection to members being detailed from the same unit, this issue may be waived.

A request for enlisted personnel is made via the trial counsel to the convening authority. The request may be in writing, personally signed by the accused or made orally on the record. In *United States v. Brandt*, the court held

that a court-martial was without jurisdiction where the request for enlisted members was signed by defense counsel rather than the accused. The right to request enlisted members expires at the conclusion of a pretrial Article 39(a), UCMJ, session or assembly of the court. An accused will be advised of this right by the military judge at trial prior to its expiration.

PR 9.4. ***JURISDICTIONAL ASPECT OF IMPROPER CONSTITUTION WITH RESPECT TO MILITARY JUDGE AND MEMBERS***

The jurisdictional effect of errors regarding participation and qualification of members and the military judge appear to be identical.

PR 9.4.1. ***Lack of quorum.***

A lack of the required number of members and a military judge at a GCM constitutes a jurisdictional defect. A quorum for a GCM is five members in addition to a military judge, or military judge sitting alone under appropriate conditions. A quorum for an SPCM is three members (with or without military judge) or military judge sitting alone under appropriate conditions, if one has been detailed. A quorum for an SCM is one member.

A failure to detail a military judge to a special court-martial will not result in a jurisdictional defect, but will prevent the court from adjudging a bad-conduct discharge (BCD) unless a military judge could not be detailed to the trial because of physical conditions or military exigencies.

Questions as to the providence of the accused's request for trial by military judge alone, or to the military judge's ruling on such a request, would not appear to be jurisdictional. Although the approval of a judge alone request is within the discretion of the military judge, in cases of a denial, the judge must state his reasons on the record.

There is no jurisdictional maximum number of members of a GCM or SPCM. Nor does the absence of detailed members not a part of a quorum, even if unauthorized, amount to jurisdictional error. There may be prejudicial error, however, if, as in the case of *United States v. Colon*, the number of members absent (4 out of 10 absent) results in a panel no longer representing the intentions of the convening authority. Additionally, the dangers inherent in detailing a large number of members are illuminated in *United States v. McLaughlin*.

PR 9.4.2. ***Member not detailed.***

Participation in a court-martial by a member who is not detailed to the court will render the proceedings void for lack of jurisdiction.

PR 9.4.3. ***Member or military judge not sworn.***

Failure to swear any member or the military judge will result in a jurisdictional defect.

PR 9.4.4. ***Member or military judge not qualified or otherwise ineligible.***

Articles 25 and 26, UCMJ, set forth criteria for eligibility of court members and the military judge. Additional criteria are imposed by R.C.M. 502(a) and (c). The language of the UCMJ appears to be mandatory, and the MCM provides that a statutorily ineligible member shall be excused. Despite this, the law is not well-settled as to which of the various requirements for eligibility are jurisdictional.

The C.M.A. has held that the mere presence of the name of a "disqualified" member on the convening order is not a jurisdictional defect. In *United States v. Miller*, one of the three detailed members of the court had acted as the convening authority in the case by approving a pretrial agreement. The C.M.A. noted that this member would have been subject to a challenge for cause, and that the challenge would have reduced the court below a quorum in a trial with members, but found no error where, as here, the accused had elected to be tried by the military judge alone.

PR 9.5. *ABSENCE, EXCUSE OR CHANGE OF MEMBERS OR A MILITARY JUDGE*

PR 9.5.1. *Military judge*

PR 9.5.1.1. *Absence.*

In any case where a military judge has been detailed, no proceedings may be held in his/her absence; he/she must be present at all times, except during closed sessions of the court.

PR 9.5.1.2. *Detailing a military judge.*

An authority competent to detail the military judge (the circuit military judge or his designate) may, but is not required to, detail a military judge in cases in which neither the offenses charged nor the accused's previous record authorize the imposition of a BCD, or in which the convening authority has directed that a BCD shall not be an authorized punishment.

PR 9.5.1.3. *Change of military judge.*

Before the court-martial is assembled in a case to which he has been detailed, the military judge may be changed by an authority competent to detail the military judge, without cause shown on the record.

After the court-martial is assembled, the military judge may be changed by an authority competent to detail the military judge only when, as a result of disqualification under R.C.M. 902 or for good cause shown, the previously detailed military judge is unable to proceed. There is, however, no necessity for the same judge who ruled on pretrial motions to preside over the trial on the merits. Good cause includes physical disability, military exigency, and other extraordinary circumstances which render the military judge unable to proceed with the court-martial within a reasonable time. "Good cause" does not include temporary inconveniences which are incident to normal conditions of military life. When the military judge is changed, the new military judge is detailed in accordance with R.C.M. 503(b) (i.e., in writing or orally on the record of trial, indicating by whom the military judge was detailed). The reason for the change should be reflected in the record of trial. Note that failure to object to the replacement of the military judge may constitute waiver of any defect.

A new military judge must continue the trial as if no evidence had been introduced, unless a verbatim record of the evidence previously introduced or a stipulation thereof has been read and shown to him in the presence of counsel and the accused.

It is recommended that, if the military judge is replaced after a request has been submitted for trial by military judge alone, the record reflect the reason for the change. R.C.M. 805(d)(2) also requires that an accused must execute a new request for trial by military judge alone before trial may proceed after a new military judge is detailed.

PR 9.5.2. *Members of the court*

PR 9.5.2.1. *Excusal of members before assembly.*

Before assembly, the convening authority may excuse a member of the court from attendance at a particular trial or series of trials, either by amendment to the convening order or, if members are excused without replacement, orally. The reasons for such excuse need not appear in the record of trial. In addition, the convening authority may delegate authority to excuse individual members to the staff judge advocate or to a principal assistant. Before assembly, the delegate may excuse no more than one-third of the total number of members without cause shown.

Unless trial is by military judge alone, no court-martial proceeding may take place in the absence of any detailed member except article 39(a) sessions, voir dire of individual members, or when a member has been properly excused.

Note: The "rotating court" is an impermissible technique. The convening authority may not properly detail a large number of members to a court-martial with a view towards scheduling only some of the members thereof to sit on different cases. A convening authority can properly accomplish the same objective, however, by convening separate courts.

PR 9.5.2.2. *Changing members before assembly.*

Before assembly, a convening authority may, in his discretion and without showing cause, detail new members to a court in place of, or in addition to, the members already detailed. This is done by an amendment to the convening order.

PR 9.5.2.3. *Absence of member after assembly.*

After assembly, no member of an SPCM or GCM may be absent or excused during trial except for physical disability or as a result of a challenge or by order of the convening authority or military judge for good cause. Good cause contemplates a critical situation, such as military exigency or physical disability, as distinguished from the normal conditions of military life. The circumstances requiring absence or excuse must be shown in the record of trial. If a member of the court is absent after assembly, the trial may not proceed if the court is reduced below a quorum or if the absence is not authorized by Article 29(a), UCMJ, and R.C.M. 805(b).

PR 9.5.2.4. *New members after assembly.*

After the court has been assembled, the convening authority may not add new members to the court unless, as a result of excusals, the court has been reduced below a quorum, or the number of enlisted members, when the accused has requested them, is reduced below one-third of the total membership.

After the presentation of evidence on the merits has begun, when a new member is detailed, trial may not proceed unless the testimony and evidence previously admitted on the merits, if recorded verbatim, is read to the new member, or, if not recorded verbatim, and without a stipulation as to the testimony and evidence, the trial proceeds as if no evidence had been presented.

PR 9.6. *COUNSEL AT A GENERAL COURT-MARTIAL*

PR 9.6.1. *Introduction.*

The accused's Sixth Amendment right to counsel is implemented in military trials by Articles 27 and 38, UCMJ. Article 27(b), UCMJ, sets forth the qualifications for counsel who must be detailed to represent the respective parties at a general court-martial. Such counsel are referred to as "27(b) counsel." As a practical matter, a 27(b) counsel is a judge advocate of the Navy, Marine Corps, Army, or Air Force, or law specialist of the Coast Guard; who is a member of the bar of a Federal court or the highest court of a state; and is certified as competent to perform such duties by the JAG of the armed force of which he is a member.

Certification by the JAG is an administrative, rather than judicial, decision, and the JAG is not bound by prescribed standards. At present, Navy and Marine Corps judge advocates and law specialist of the Coast Guard normally are certified upon successful completion of the lawyer course at Naval Justice School.

PR 9.6.2. *Government counsel.*

27(b) counsel must be detailed to act as trial counsel (TC) at a general court-martial. There is no requirement that TC be of the same armed force as the accused. An assistant trial counsel (ATC) may be detailed, as appropriate. Such counsel need not be certified in accordance with article 27(b).

Trial counsel or an assistant trial counsel may be excused or changed at any time without showing cause by an authority competent to detail trial counsel.

PR 9.6.3. *Counsel for the accused.*

Article 38(b)(2), UCMJ, provides that an accused has the right to be represented at a general court-martial by a civilian counsel if provided by him. Article 38(b), UCMJ, further provides that an accused also may be represented by a military counsel under Article 27, UCMJ, or by a military counsel of his own selection if that counsel is "reasonably available." The phrase "reasonably available" is a term of art having a precise legal meaning which is discussed at subsection 0706 C.3, *infra*.

PR 9.6.3.1. ***Detailed military counsel.***

For each general court-martial, an authority competent to detail defense counsel must detail a defense counsel certified in accordance with Article 27(b), UCMJ, and he may detail such assistant defense counsel as he deems appropriate. A detailed defense counsel becomes associate counsel when the accused has individual military or civilian counsel and detailed counsel is not excused. If an associate or assistant defense counsel is to perform duties as a defense counsel, however, he must either be certified in accordance with Article 27(b), UCMJ, or be acting "under the supervision" of the detailed defense counsel. The meaning of the phrase "under the supervision" was analyzed in *United States v. Kraskouskas*, wherein the C.M.A. held it prejudicial for noncertified associate defense counsel to assume control of a case.

PR 9.6.3.2. ***Civilian counsel.***

Article 38(b)(2), UCMJ, provides that the accused has the right to be represented by civilian counsel if provided by the accused at his own expense. The right to be represented by a civilian counsel exists in addition to the right to be represented by a detailed Article 27(b), UCMJ, counsel. In the event that the accused is represented by a civilian counsel, detailed counsel shall act as associate counsel unless the accused indicates in court that he does not desire the services of the detailed defense counsel and the military judge excuses him.

a. **Qualifications of civilian counsel.** The UCMJ imposes no particular qualifications upon civilian "counsel," but it is well-settled that the practice of law before general courts-martial is restricted to members in good standing of some recognized bar.

It is unsettled whether a lawyer, properly licensed only by a foreign government, is qualified to represent a service-member before a court-martial. R.C.M. 502(d)(3)(B), requires that the military judge be satisfied that the foreign counsel has appropriate training and familiarity with the general principles of criminal law which apply in a court-martial before he permits that counsel to appear for the accused. In cases involving classified material, an accused's right to civilian counsel cannot be conditioned upon counsel's obtaining a security clearance. A non-lawyer may not practice before a GCM, even at the accused's insistence, but may sit at the defense table and consult with the accused, subject to the discretion of the military judge.

b. An accused must be given a reasonable opportunity to secure civilian counsel.

PR 9.6.3.3. ***Individual military counsel (IMC).***

The *JAG Manual*, in section 0131, addresses the accused's right to request IMC in detail. Section 3.H.3 of the MJM details IMC procedures in Coast Guard courts. The following includes *JAG Manual*, section 0131 in its entirety.

a. General. Article 38(b)(3)(B), UCMJ, provides that an accused has the right to be represented before a general or special courtmartial or at an investigation under article 32, UCMJ, by military counsel of his own selection if that counsel is reasonably available. Article 38(b)(7), UCMJ, provides that the Secretary concerned shall, by regulation, define "reasonably available" for purposes of paragraph (3)(B) and establish procedures for determining whether the military counsel requested by an accused under that paragraph is "reasonably available." Pursuant to the provisions of article 38(b)(3) and (7), UCMJ, and in accordance with R.C.M. 506, MCM (2002 ed.), the term "reasonably available" is hereafter defined, and the procedures for determining whether a military counsel requested by an accused is "reasonably available" are established. Counsel serving in the Army, Air Force, or Coast Guard, are "reasonably available" to represent a Navy or Marine Corps accused if not otherwise unavailable within the meaning of R.C.M. 506, MCM (2002 ed.), or under regulations of the Secretary concerned for the Department in which such counsel are members. Since an accused has the right to civilian counsel in addition to detailed counsel or individual military counsel, retention of, or representation by, civilian counsel does not extinguish the right to representation by individual military counsel. It is the policy of the Secretary of the Navy that the right to individual military counsel shall be administered so as not to interfere with orderly and efficient trials by court-martial.

b. Definitions

(1) "Proceeding." As used in this section, "proceeding" means a trial-level proceeding by general or special court-martial or an investigation under article 32, UCMJ.

(2) "Commander." For counsel assigned to a Naval Legal Service Office or Detachment, the commander of the requested counsel is defined as the commanding officer of the cognizant Naval Legal Service Office; for counsel assigned to the Naval Civil Law Support Activity, the Commanding Officer, Naval Civil Law Support Activity; for counsel assigned to the Navy-Marine Corps Appellate Review Activity, the Officer in Charge, Navy-Marine Corps Appellate Review Activity; for all other counsel assigned to the Office of the Judge Advocate General, the Assistant Judge Advocate General for Military Justice (Code 02). For all other counsel, the commander is defined as the commanding officer or head of the organization, activity, or agency with which requested military counsel will be serving at the time of the proceeding. The commander is not disqualified from acting as the commander under this rule solely because the commander is also the convening authority.

(3) " Attorney-client relationship." For purposes of this section, an attorney-client relationship exists between the accused and requested counsel when counsel and the accused have had a privileged conversation relating to a charge pending before the proceeding, and counsel has engaged in active pretrial preparation and strategy with regard to that charge. A counsel will be deemed to have engaged in active pretrial preparation and strategy if that counsel has taken action on the case which materially limits the range of options available to the accused at the proceeding.

(a) Actions by counsel deemed to constitute active pretrial preparation and strategy which materially limit the range of options available to the accused include, but are not limited to: advising the accused to waive or assert a legal right, other than simply asserting the right to remain silent, where the accused has followed such advice by waiving or asserting that right; representing the accused at a pretrial investigation under article 32, UCMJ, dealing with the same subject matter as any charge pending before the proceeding; submitting evidence for testing or analysis; advising the accused to submit to a polygraph examination where the accused has followed such advice by so submitting; offering a pretrial agreement on behalf of the accused; submitting a request for an administrative discharge in lieu of trial on behalf of the accused; or interviewing witnesses relative to any charge pending before the proceeding.

(b) Actions that, in and of themselves, will not be deemed to constitute "active pretrial preparation and strategy" include, but are not limited to: discussing the legal and factual issues in the case with the accused; discussing the legal and factual issues in the case with another person under the protection of the attorney-client privilege, such as another defense counsel; performing legal research dealing with the subject matter of the case; representing the accused in the review of pre-trial confinement under R.C.M. 305, MCM (2002 ed.); representing the accused in appellate review proceedings under article 70, UCMJ; or providing counseling to the accused concerning article 15, UCMJ. These actions should be appraised under a totality of the circumstances test to determine if they constitute "active pretrial preparation and strategy."

(4) "Reasonably available." All counsel serving on active duty in the Navy or Marine Corps, certified in accordance with article 27(b), UCMJ, and not excluded by subsections b(4)(a) through (d), below, may be determined to be "reasonably available" by the commander of requested counsel. In making this determination, the commander will assess the impact upon the command should the requested counsel be made available. In so doing, the commander may consider, among others, the following factors: the anticipated duties and workload of requested counsel, including authorized leave; the estimated duration of requested counsel's absence from the command, including time for travel, preparation, and participation in the proceeding; any unique or special qualifications relevant to the proceeding possessed by requested counsel; the ability of other counsel to assume the duties of requested counsel; the nature and complexity of the charges or the legal issues involved in the proceeding; the experience level and any special or unique qualifications of the detailed defense counsel; and the information or comments of the accused and the convening authority. Counsel described in subsections b((4)(a) through (d), below, are not "reasonably available:"

(a) Counsel who are flag or general officers;

(b) Counsel who are performing duties as trial counsel; trial or appellate military judge; appellate defense or government counsel; court commissioner; principal legal advisor to a command, organization or agency having general court-martial convening authority, or the principal assistant to such legal advisor; instructor or student at a college, university, service school, or academy; or assigned as a commanding officer, executive officer or officer in charge;

(c) Counsel who are assigned to any of the following commands, activities, organizations, or agencies: Executive Office of the President; Office of the Secretary of Defense; Office of the Secretary of the Navy; Office of the Joint Chiefs of Staff; Office of the Chief of Naval Operations; Headquarters, U.S. Marine Corps; National Security Agency; Defense Intelligence Agency; Office of the Judge Advocate General; Navy-Marine Corps Appellate Review Activity; Naval Civil Law Support Activity; Office of Legislative Affairs; Office of the Defense Department or Navy Department Inspectors General; or any agency or department outside the Department of Defense; and

(d) Counsel neither assigned to a command or activity located within the Navy-Marine Corps Trial Judiciary Circuit where the proceeding is to be held, nor within 100 miles of where the proceeding is to be held (determined in accordance with the official Tables of Distances). This limitation does not apply in capital cases.

c. Submission and forwarding of requests.

(1) Submission. A request for individual military counsel shall be made in writing by the accused, or by detailed defense counsel on the accused's behalf, and shall be submitted to the convening authority via the trial counsel. It shall state the location and duties of requested counsel, if known, and shall clearly state whether the accused claims to have an attorney-client relationship with requested counsel regarding one or more charges pending before the proceeding, and the factual basis underlying that assertion. It shall also state any special qualifications of requested counsel that are relevant to the case.

(2) Action by the convening authority.

(a) If requested counsel is not on active duty in the armed forces, the convening authority shall promptly deny the request and so inform the accused, in writing, citing this provision.

d. Action by the commander of requested counsel.

(1) Determining whether an attorney-client relationship exists. Applying the criteria enumerated in subsection b(3), above, the commander shall determine whether requested counsel has an attorney-client relationship with the accused regarding any charge pending before the proceeding. This determination shall be made whether or not the accused claims such a relationship in the request.

(2) When there is an attorney-client relationship. If the commander determines that there is an attorney-client relationship regarding any charge pending before the proceeding, then the requested counsel should ordinarily be made available to act as individual military counsel without regard to whether he or she would otherwise be deemed "reasonably available" as defined in subsection b(4), above, unless there is "good cause" to sever that relationship, and provided that requested counsel is certified in accordance with article 27(b), UCMJ. "Good cause" to sever an attorney-client relationship includes, but is not limited to, requested counsel's release from active duty or terminal leave. If requested counsel is not certified in accordance with article 27(b), UCMJ, the commander shall promptly deny the request and so inform the accused, in writing, citing this provision. If there is "good cause" to sever an attorney-client relationship, the commander shall apply the criteria and procedures in subsection d(3), below. “Good cause” does not include routine PCS transfer of detailed counsel. *United States v. Allred* (50 M.J. 795 (N.M.Ct.Crim.App. 1999).

(3) When there is no attorney-client relationship. If the commander determines that there is no attorney-client relationship regarding any charge pending before the proceeding, the following procedures apply:

(a) If the commander determines that requested counsel is not "reasonably available" as defined in subsection b(4), above, the commander shall promptly deny the request and so inform the accused, in writing, citing this provision.

(b) If the commander determines that requested counsel is "reasonably available," the requested counsel shall be made available to represent the accused at the proceeding, and the commander shall promptly inform the convening authority and the accused of this determination.

e. Administrative review. The decision whether requested counsel will be made available to act as individual military counsel is an administrative determination within the sole discretion of the commander, except as specifically provided below. If the commander declines to make requested counsel available, the accused may appeal that decision via the commander to the commander's immediate superior in command, but appeals may not be made which require action at the departmental or higher level. The basis for appeal will normally be abuse of discretion, but if the accused claims that the commander making the determination did not have authority to do so, or did so on the basis of inaccurate or incomplete information, the reviewing authority shall consider those allegations and, if warranted, direct corrective action. The appeal shall be promptly reviewed, and the commander of requested counsel, the convening authority and the accused shall be promptly informed of the decision.

f. Approval of associate defense counsel. If individual military counsel has been made available to defend an accused at a proceeding, the detailed defense counsel normally shall be excused from further participation in the case unless the authority who detailed the defense counsel, in his or her sole discretion, approves a request from the accused that detailed defense counsel act as associate defense counsel. The seriousness of the charges, the retention of civilian defense counsel, the complexity of legal or factual issues, and the detailing of additional trial counsel are among the factors that may be considered in the exercise of this discretion. This decision is not subject to administrative review.

PR 9.6.3.4. ***Denial of IMC request***

a. In the event that a request for an IMC is denied, and an administrative appeal to superior authority is also denied, the detailed defense counsel can request that the military judge allow an offer of proof to reveal that the denying authorities have abused their discretion. In no case, however, can the military judge dismiss the charge or abate the proceedings because the IMC request has been denied.

b. N.C.M.R. has held that, once an accused requests and receives individual military counsel in accordance with Article 38(b), UCMJ, he has no right to request IMC a second time. "[N]either the convening authority nor any other cognizant official is obligated to consider or otherwise process in accordance with [paragraph 48b, MCM, 1969 (Rev.), the precursor of R.C.M. 506(b)], any application for the detail of a person requested as individual military counsel by an accused previously granted military counsel of his own selection." N.C.M.R., in *Kilby*, also noted that neither the Constitution nor Article 38(b), UCMJ, gives to an accused the right "to have appointed an attorney of a specific race, color, sex, age, ethnic background, political affiliation or any other characteristic having no material bearing upon professional competence."

c. **Appeal from a denial of individual military counsel.**

R.C.M. 506(b)(2) provides:

(2) *Procedure*. Subject to this subsection, the Secretary concerned shall prescribe procedures for determining whether a requested person is "reasonably available" to act as individual military counsel. Requests for an individual military counsel shall be made by the accused or the detailed defense counsel through the trial counsel to the convening authority. If the requested person is among those not reasonably available under subsection (b)(1) of this rule or under regulations of the Secretary concerned, the convening authority shall deny the request and notify the accused, unless the accused asserts that there is an existing attorney-client relationship regarding a charge in question or that the person requested will not, at the time of the trial or investigation for which requested, be among those so listed as not reasonably available. If the accused's request makes such a claim, or if the person is not among those so listed as not reasonably available, the convening authority shall forward the request to the commander or head of the organization, activity, or agency to which the requested person is assigned. That authority shall make an administrative determination whether the requested person is reasonably available in accordance with the procedure prescribed by the Secretary concerned. This determination is a matter within the sole discretion of that authority. An adverse determination may be reviewed upon request of the accused through that authority to the next higher commander or level of supervision, but no administrative review may be made which requires action at the departmental or higher level.

When this provision is applied to the present administrative organization of the JAG Corps, it appears that an appeal by right (and a concomitant right to an interim continuance) will arise in the case of most denials of Navy IMC. The Office of the Judge Advocate General is considered to be at the departmental level and, hence, no appeal by right may lie to the Judge Advocate General per se; however, the Deputy Judge Advocate General is assigned additional

duty as Commander, Naval Legal Service Command. As such, he is in the chain of command of CNO. Since the CNO is considered to be an "echelon 1" level command (i.e., departmental level), an appeal by right will lie to Commander, Naval Legal Service Command, who is then an "echelon 2" commander. This appeal by right does not violate the prohibition of R.C.M. 506(b)(2). With regard to requests for Marine IMC, appeals may be taken in a majority of denials thereof. In such cases, the appeal is forwarded to the immediate superior of the officer who has made the determination of unavailability. However, no appeal may of right be taken if the immediate superior in question is the Commandant of the Marine Corps since that office is considered to be at departmental level.

d. **Judicial review of denial for IMC.** R.C.M. 906(b)(2) provides as a basis for a motion for appropriate relief:

(2) Record of denial of individual military counsel or of denial of request to retain detailed counsel when a request for individual military counsel was granted. If a request for military counsel was denied, which denial was upheld on appeal (if available) or if a request to retain detailed counsel was denied when the accused is represented by individual military counsel, and if the accused so requests, the military judge shall ensure that a record of the matter is included in the record of trial, and may make findings. The trial counsel may request a continuance to inform the convening authority of those findings. The military judge may not dismiss the charges or otherwise effectively prevent further proceedings based on this issue. However, the military judge may grant reasonable continuances until the requested military counsel can be made available if the unavailability results from temporary conditions or if the decision of unavailability is in the process of review in administrative channels.

e. **Waiver of a denial of IMC.** Failure to raise the issue at trial may result in a waiver of any defects in processing the request or of an abuse of discretion in denying it.

f. **Legal qualifications of IMC.** Individual military counsel must be certified in accordance with Article 27(b), UCMJ; JAGMAN, § 0131; MJM, 3.H.2.

PR 9.6.3.5. *Counsel on appeal.*

Article 70, UCMJ, provides that the JAG shall detail Article 27(b), UCMJ, counsel to act as appellate defense counsel when such counsel is requested by the accused; when the government is represented by counsel; or when the JAG has certified a case to the Court of Military Appeals. The accused does not have the right to be represented by his military trial defense counsel on appeal, even though that attorney is both willing and available.

PR 9.7. *COUNSEL AT A SPECIAL COURT-MARTIAL*

The rights to counsel at special courts-martial are, in many respects, the same as at general courts-martial. This section will outline the differences, rather than repeating matters covered in the previous section.

PR 9.7.1. *Qualifications of government counsel.*

Trial counsel (and ATC, if any) at an SPCM need not be certified in accordance with Article 27(b), UCMJ. Any commissioned officer not disqualified by previous participation in the same case may be detailed to act as TC or ATC. TC or ATC may be excused or changed at any time without showing cause by the authority who detailed him. Failure to properly detail trial counsel is not jurisdictional error.

PR 9.7.2. *Counsel for the accused*

PR 9.7.2.1. *Qualifications of detailed counsel.*

Under R.C.M. 502(d), detailed defense counsel at an SPCM must be Article 27(b) qualified. In this regard, however, the MCM adopts a stricter rule than that required by the UCMJ. As noted below, the UCMJ does not require that the accused at an SPCM be represented by article 27(b) counsel in every case. Though a discussion of the less strict rule under the UCMJ would now appear to be largely academic, in view of R.C.M. 502(d), it is included here to illustrate the jurisdictional aspects of the rule.

a. **SPCM with BCD, confinement more than 6 months, or forfeiture of pay for more than six months.** A CA must initially detail Article 27(b), UCMJ, counsel to act as detailed defense counsel

in every case before a SPCM authorized to adjudge a BCD, confinement for more than six months, or forfeiture of pay for more than six months. If Article 27(b), UCMJ, counsel is not detailed to a SPCM, a BCD, confinement for more than six months, or forfeiture of pay for more than six months may not be adjudged, even though the military judge and verbatim record requirements are fulfilled.

b. **All other SPCM's**

Generally. Defense counsel initially detailed to a court-martial must be certified under Article 27(b), UCMJ. If 27(b) counsel cannot be obtained because of physical conditions or military exigency, the convening authority must, prior to assembly, make a written statement setting forth in detail:

(a) Why Article 27(b), UCMJ, counsel cannot be obtained; and

(b) why the trial must be held at that time and place rather than postponing or moving it so Article 27(b), UCMJ, counsel can be obtained.

c. **The doctrine of equivalent qualifications.** The UCMJ provides that, in any SPCM, the qualifications of detailed defense counsel must be at least equivalent to those of trial counsel.

(1) If trial counsel (or any ATC) is certified as Article 27(b), UCMJ, counsel, then detailed defense counsel must be Article 27(b), UCMJ, counsel. The doctrine does not require that counsel be of equal rank or legal experience. Any issue in this area is determined on the basis of prejudice to the accused.

(2) **When applicable.** The doctrine of equivalent qualifications only applies in cases where an SPCM is not authorized to adjudge a BCD. Its application is required in two instances where trial counsel is certified under Article 27(b), UCMJ.

(a) Where the accused does not request representation by Article 27(b), UCMJ, counsel after being afforded the opportunity, the effect of the doctrine is that Article 27(b), UCMJ, counsel must be detailed even though the accused may excuse him at trial.

(b) Where military exigencies prevent affording the accused the opportunity of Article 27(b), UCMJ, representation, the practical effect of the doctrine is to preclude the convening authority from claiming the military exigencies exception where he details his only Article 27(b), UCMJ, counsel as trial counsel.

(3) **Effect of individual counsel.** Assume the CA convenes an SPCM not authorized to adjudge a BCD and details nonlawyer counsel to both sides. The accused declines Article 27(b), UCMJ, counsel, but obtains the services of a civilian counsel. At many commands, the CA would then detail an Article 27(b), UCMJ, counsel as trial counsel. If he does this, the doctrine of equivalent qualifications requires that he also detail Article 27(b), UCMJ, counsel as defense counsel (i.e., the doctrine applies to detailed counsel, whether or not the accused is otherwise represented by a lawyer). The accused may, of course, choose to excuse detailed counsel at trial.

d. **Assistant defense counsel.** In general, the qualifications requirements for ADC at an SPCM are the same as at a GCM. Where the conduct of the defense devolves upon the ADC because of the absence of the DC, he must have the same qualifications as are required for the DC.

PR 9.7.2.2. ***Individual counsel.***

The law relating to individual counsel at an SPCM is the same as at a GCM with the exception of some qualifications requirements.

a. **Civilian counsel**

(1) BCD SPCM -- same as GCM; only a person qualified as a lawyer may act as counsel at an SPCM at which a BCD may be adjudged.

(2) All other SPCM's -- there are no qualifications required (i.e., the accused may be represented by a layman if he wishes).

b. **Individual military counsel**

(1) **Qualifications.** IMC must be certified in accordance with Article 27b, UCMJ.

(2) **Reasonable availability and procedure for obtaining IMC.** The test and procedure for obtaining IMC are the same as at a GCM. Note that in a non-BCD SPCM, where nonlawyer counsel are detailed, if the accused requests a specific Article 27(b), UCMJ, counsel, two decisions are required:

(a) Is the requested counsel reasonably available?

(b) Are military exigencies such that no Article 27(b), UCMJ, counsel can be obtained?

Where the accused is not represented by Article 27(b), UCMJ, counsel, a request for a specific lawyer, if denied, should be treated as a request for any lawyer.

PR 9.8. *DISQUALIFICATION OF COUNSEL*

PR 9.8.1. *Generally.*

Even though counsel may be certified under Article 27(b), UCMJ, or otherwise qualified as a lawyer, and thus generally qualified to act as detailed trial counsel or defense counsel or as individual counsel, he may be disqualified from a particular case or series of cases. Article 27(a), UCMJ, and R.C.M. 502(d)(4), list the following grounds for disqualification:

1. If a person acted previously as military judge or court member in the same case, he is disqualified from acting as trial counsel or assistant trial counsel. Unless expressly requested by the accused, he may not act as defense counsel or assistant defense counsel.

2. If a person acted as accuser, he is disqualified from acting as defense counsel or assistant defense counsel unless he is "expressly requested." Despite the prohibitory language of R.C.M. 502(d)(4), it appears that in the absence of bias, hostility, or prejudice, he may act as trial counsel.

3. If a person acted as investigating officer, he is disqualified from acting as trial counsel or assistant trial counsel and, unless requested, from acting as defense counsel or assistant defense counsel. An investigating officer includes anyone who has investigated the offense or a closely related offense under the provisions of Article 32, UCMJ, or who has otherwise conducted a personal investigation into the general matter involving the offense. The term does not include a person who, in the course of his duties as counsel, conducts an investigation in preparation for trial. This exception applies even where counsel uncovers new evidence or interviews new witnesses. The reason for the disqualification is that the impartial role of an investigator is inconsistent with the adversary role of trial counsel. Thus, the prejudice in this area, if any, usually lies in the inadequacy of the pretrial proceedings and then only if the investigating officer knows he will be trial counsel.

4. If a person acted for one side, he may not later act for the other side in the same case. In the absence of evidence to the contrary, a person who, between the time of referral and the beginning of trial, has been detailed as counsel for a court to which a case has been referred shall be deemed to have acted in that case for the prosecution or defense, as the case may be. Acting for the accused at a pretrial investigation or other proceedings involving the same general matter disqualifies a person from acting thereafter as trial counsel or assistant trial counsel.

a. Where it appears that TC or ATC has acted for the defense in the same or related matter and, after consideration of all the circumstances, the possibility of prejudice exists, the prosecutor will be disqualified.

b. Where defense counsel has previously acted for the prosecution in the same case, there will be an automatic finding of prejudice unless the accused has given "informed consent" to being represented by that counsel. Conversely, the accused waives the disqualification issue if, "after full disclosure and inquiry by the military judge," the accused chooses to be represented by counsel who previously acted for the prosecution, provided his selected counsel meets the recognized standards of professional competence. Approval of the accused's requests, however, is within the discretion of the military judge.

c. A distinction is drawn between someone who has acted "for" the defense or prosecution and someone who has participated in the case "in a neutral, impartial or advisory capacity." In *United States v. Smith*, trial counsel was not disqualified to prosecute on basis of the fact that defense counsel consulted with her, while she was a member of the trial defense service, about the tactical advisability of having the accused submit to a polygraph examination. Here, there was no showing that (1) an attorney-client relationship had ever been formed; (2) the prosecution had gained an unfair advantage; (3) any information or witnesses not otherwise discoverable were obtained; or (4) any evidence was obtained as a result of the conversations between the attorneys. Otherwise, reversal may have been required.

d. Prior representation of a government witness often will disqualify a person to act as defense counsel on the theory that he might hesitate to impeach his former client.

e. Where an officer has rendered legal assistance to a person prior to the preferral of charges against him involving the same general matter, he is barred from acting for the government.

PR 9.8.2. ***Summary***

ACTED PREVIOUSLY	MAY ACT AS TC OR ATC?	MAY ACT AS DC OR ADC?	MAY ACT AS IC OR IMC?
As MJ	no	only on request	yes
As member	no	only on request	yes
As IO	no	only on request	yes
For other side	no	only on request	only on request
As accuser	possibly	only on request	yes

PR 9.8.3. ***Waiver of disqualifications.***

As previously indicated, all disqualifications of defense counsel are waivable by the accused except where the TC has acted for the defense. Prudence would seem to require the military judge to advise the accused fully regarding any waiver in this area and to insure that the record reflects his understanding of the matter involved.

The doctrines of waiver and harmless error are probably applicable on appeal, unless invoking them would work a miscarriage of justice.

PR 9.9. *JURISDICTIONAL EFFECT OF IMPROPER CONSTITUTION WITH RESPECT TO COUNSEL*

PR 9.9.1. *Trial counsel*

PR 9.9.1.1. *Failure to swear.*

The requirements of Article 42, UCMJ, relative to swearing of trial counsel do not appear to be jurisdictional.

PR 9.9.1.2. *Qualifications at a GCM.*

The requirements of Articles 27(b)(1) and (2), UCMJ, would appear to be jurisdictional (i.e., trial counsel at a GCM must be a lawyer certified by JAG.

PR 9.9.1.3. ***Qualifications at a SPCM.***

The requirement contained in R.C.M. 502(d)(2) that trial counsel be a commissioned officer is not jurisdictional. Requirements regarding assistant trial counsel are not jurisdictional at either a GCM or SPCM.

PR 9.9.1.4. ***Eligibility.***

The requirements of Article 27(a), UCMJ, relating to the eligibility of an individual to act as trial counsel in a particular case are not jurisdictional.

PR 9.9.2. ***Defense counsel***

PR 9.9.2.1. ***Failure to swear.***

Failure to swear defense counsel is not jurisdictional.

PR 9.9.2.2. ***Qualifications.***

The requirements of Article 27(b) and (c), UCMJ, and R.C.M. 502(d), relating to qualifications of defense counsel at a GCM or SPCM, appear to be jurisdictional. Although the C.M.A. has indicated its agreement with this position [*see United States v. Durham, supra*], the law is not well-settled as to the jurisdictional effect of errors in the following areas.

a. Lack of equivalent qualifications -- held to be jurisdictional in *United States v. Cushing*, 22 C.M.R. 673 (N.B.R. 1956) (even though accused was represented by a civilian lawyer).

b. Unqualified assistant defense counsel -- held not jurisdictional in *United States v. Hutchison*, 1 C.M.A. 291, 3 C.M.R. 25 (1952).

c. Assistant defense counsel acting as defense counsel -- held not jurisdictional in *United States v. Nichelson*, 18 C.M.A 69, 39 C.M.R. 69 (1968).

d. Unqualified civilian defense counsel -- held not jurisdictional, at least where the accused was actively represented by his fully qualified detailed military counsel.

e. Question relating to adequacy of counsel or denial of requested individual counsel -- held not jurisdictional in *United States v. Vanderpool*, 4 C.M.A. 561, 16 C.M.R. 135 (1954).

PR 9.9.2.3. ***Eligibility.***

The requirements of Article 27(a), UCMJ, and R.C.M. 502(d)(4), relating to the eligibility of an individual to act as defense counsel in a particular case are not jurisdictional and may be waived by an accused. If the defense counsel has previously acted for the prosecution in the same case, however, the accused may not waive the counsel's ineligibility to act. Whether this disqualification is jurisdictional, however, is questionable.

PR 9.10. ***EXCUSE, ABSENCE, OR REPLACEMENT OF DETAILED DEFENSE COUNSEL***

For any one of a number of reasons, a detailing authority may wish to change detailed defense counsel. Likewise, detailed defense counsel may be absent from the trial. Because of the great potential for abuse in this situation, the accused's informed consent is usually required. In certain limited circumstances, however, there is an exception to the general rule.

PR 9.10.1. ***After formation of attorney-client relationship.***

Defense counsel will normally be detailed by an order from competent authority assigning him to represent an accused whose case will be or has been referred to a court-martial for trial.

PR 9.10.1.1. ***Methods of excusing or replacing counsel.***

There are a number of ways in which detailed defense counsel may be excused or replaced.

a. **Method no. 1: Oral excuse.** The detailing authority verbally excuses defense counsel, and this fact is announced orally on the record.

b. **Method no. 2: Amendment to the detailing order.** The authority which initially detailed the defense counsel drafts an amendment to the initial detailing order, detailing a different defense counsel and relieving the defense counsel initially detailed.

c. **Method no. 3: Withdrawal and re-referral.** The referring command's legal office drafts a new convening order, withdrawing the case from the first court and re-referring it to the second court. The authority which initially detailed the defense counsel must then re-detail or replace him.

PR 9.10.1.2. ***Propriety of excusing counsel -- the general rule.***

After formation of the attorney-client relationship, the general rule is that the consent of the accused in open court is required before such counsel may be excused. Any waiver of, or consent to, the absence or replacement of counsel initially detailed must be preceded by proper advice by the military judge in open court that the accused has the right to the presence and services of all detailed members of the defense. It should be noted, however, that, though traditionally a failure to comply with the dictates of *United States v. Donohew*, *supra*, regarding advice to an accused concerning counsel rights has resulted in an automatic finding of prejudice mandating reversal, the Navy-Marine Corps Court of Military Review, in *United States v. Jerasi*, held that, even if advice given an accused violated the *Donohew* mandate, so long as the advice complied with Article 38(b), UCMJ, this was not grounds for reversal, absent a showing of specific prejudice. The C.M.A. granted a petition for review in *Jerasi* on whether it is error for a military judge to advise an accused that he automatically lost the services of detailed counsel if he requested IMC. Prior to its decision in *Jerasi*, however, the C.M.A., in *United States v. Johnson*, held that, where the military judge failed to advise the accused that his detailed defense counsel would not necessarily be excluded if he requested individual military counsel, the N.M.C.M.R. could require some showing by the accused as a precondition for relief that he had been deprived of his statutory right to request counsel or, in its discretion, order a rehearing to make such a determination. In deciding *Jerasi*, the court applied *Johnson* and, while condemning the N.M.C.M.R. decision below, affirmed. The rationale was that the appellant still had made no showing that, if properly advised of his counsel rights, he would have acted differently in the exercise of those rights. Hence, the test is not for prejudice, but whether the accused can show denial of a statutory right.

PR 9.10.1.3. ***Consent of the accused may not be required.***

The consent of the accused is not necessary in every instance where a detailed defense counsel is excused, however. Rather, the C.M.A. has looked to the facts of each case to determine whether the convening authority, who detailed defense counsel in accordance with procedures in effect prior to those contained in the MCM, abused his discretion in relieving defense counsel. These cases retain their instructive utility. The test applied by the C.M.A. has undergone an evolution from a test of prejudice to the accused to an evaluation of whether the action of the convening authority in relieving the defense counsel was an unwarranted interference in the attorney-client relationship.

a. In *United States v. Tavolilla*, assistant defense counsel were excused prior to trial by the convening authority, the accused having knowingly consented to the excusal. The C.M.A. found a valid waiver but, en route, addressed the question of whether the convening authority had authority to excuse members of the defense. "Circumstances may make it necessary for the convening authority to replace one defense counsel with another, or to relieve one of several counsel appointed for the accused. However, the convening authority's right to change or relieve counsel under appropriate circumstances does not empower him to control counsel in the exercise of his responsibilities. . . . [h]e cannot authorize defense counsel to represent the accused only to a specific point in the proceedings."

b. In *United States v. Murray*, detailed defense counsel was replaced, over accused's objection, because of a routine change of duty station. The court said that the convening authority could have (1) moved the trial to a time before defense counsel's departure on PCS orders; (2) moved back the defense counsel's detachment date; or (3) accepted defense counsel's offer to remain in the area after detachment. The convening authority did none of these.

c. In *United States v. Baca*, over the accused's objection, detailed defense counsel was relieved by the military judge for testifying as defense witness on motion over accused's competency to stand trial stemming from his alleged amnesia. The C.M.A. held that detailed defense counsel's testimony was not good cause for severing existing attorney-client relationship without accused's consent, where only detailed defense counsel was in position to offer testimony on difficulty accused had with remembering counsel's advice; accused waived his attorney-client privilege for purposes of trial counsel's cross-examination of detailed defense counsel; detailed defense counsel withdrew as counsel for the limited purpose of litigating the motion while assistant defense counsel litigated the motion; the proceeding in which detailed defense counsel acted as a witness was distinct from the remainder of the trial and out of the member's presence; and, in light of detailed defense counsel's extensive involvement with the case over several months, his removal would have worked a substantial hardship on the accused.

d. Other examples of good cause might be: withdrawal of detailed defense counsel because of a conflict of interest; and disqualification of defense counsel for once having acted for the prosecution in the same case. In determining the propriety of excusing or replacing detailed defense counsel, the formation of an attorney-client relationship and counsel's degree of preparation are important factors to be considered.

e. Another instance of good cause would seem to occur when the accused goes UA after forming an attorney-client relationship, but before his trial. If the original defense counsel is no longer available when the accused is returned to military control, the convening authority would be justified in detailing a new defense counsel.

f. It should be noted that referral of a case for trial is not a prerequisite to the formation of an attorney-client relationship. When a given attorney has provided substantial counseling to the accused concerning the charges, such a relationship exists, and it may not be severed by the government without a showing of good cause. A single, brief consultation, however, falls short of establishing a viable attorney-client relationship. The amount or degree of consultation necessary to cement the relationship is unclear from these decisions; whether an attorney-client relationship exists, absent referral for trial, will depend on the facts of each case.

g. The C.M.A. found no error in the conduct of a brief Article 39(a), UCMJ, session in the absence of detailed defense counsel for the sole purpose of determining the accused's wishes in view of the unanticipated and emergency absence of his counsel.

h. The C.M.A. has held that, while an existing attorney-client relationship can only be severed for good cause, when court-martial charges are withdrawn, defense counsel for that court-martial need not be detailed to defend the accused at a later trial, even though the same charges are involved, where there has been a considerable time lapse and governing authorities and the place of trial are different.

PR 9.10.1.4. ***Continued participation of detailed defense counsel after detailing of IMC.***

If the accused's request for IMC is granted, detailed defense counsel is normally excused. The Article 27, UCMJ, authority who detailed the defense counsel, as a matter of sole discretion, may approve a request from the accused that detailed defense counsel shall act as associate counsel.

PR 9.10.1.5. ***The problem of multiple counsel.***

A detailing authority should not detail multiple counsel to a particular court as an administrative convenience, leaving the assignment of specific cases later referred to that court to the chief DC or the SJA. Since the accused has a right to the services of all detailed counsel (except in the good cause situation), the C.M.A. has held that the record must disclose the express consent of the accused to the absence of any detailed defense counsel. This rule is applied literally, even though the accused may not want the services of the absent counsel, and even though the absent counsel is totally without knowledge of the accused's case. The C.M.A. has put additional teeth into the rule by requiring, as a prerequisite to any waiver, that the military judge expressly inform the accused of his right to the services of all detailed defense counsel.

PR 9.10.1.6. *Detailing Recommendations.*

The practice of detailing multiple counsel as an administrative convenience is not recommended because it invites error in the *Donohew* area and also opens the door to dilatory tactics by an accused who simply demands the presence of all counsel, even though he has never seen more than one of them. The practice also may be subject to attack on the grounds that it is an improper delegation of the authority to detail counsel.

PR 9.10.2. *Before formation of an attorney-client relationship.*

Prior to the formation of an attorney-client relationship, an authority competent to detail defense counsel may change detailed defense counsel without showing cause.

PR 9.11. *THE ACCUSED'S RIGHT TO PROCEED PRO SE*

A. R.C.M. 506(d) provides that the accused may decline the services of counsel and represent himself. The C.M.A. has upheld a complete waiver of counsel where the accused discharged both individual counsel and detailed defense counsel at trial after a thorough explanation of his right to counsel. This complete waiver is in accord with the Supreme Court holding in *Faretta v. California*.

B. An accused does not have an unfettered right to proceed pro se. The MCM provides that a waiver of counsel by the accused shall be accepted by the military judge only if he finds that the accused is competent to understand the disadvantages of self-representation and that the waiver is voluntary and understanding. In applying R.C.M. 506(d), the Navy-Marine Corps Court of Military Review expanded the inquiry to be undertaken by the military judge. The appellate courts now require that, before granting a request to proceed pro se, the military judge must first ascertain that the accused is not only competent to understand the disadvantages of self-representation, but also that the accused in fact understands such disadvantages.

C. The military judge may require that a defense counsel remain present even if the accused waives counsel and conducts the defense personally. The right of the accused to conduct the defense personally may be revoked if the accused is disruptive or fails to follow the basic rules of decorum and procedure. The court must make every reasonable effort to ensure that the accused is represented as he desires, but the accused may not be permitted to obstruct the proceedings. In *Howell, supra*, the court appeared to use this principle as an alternative ground for approving a waiver of counsel. In *United States v. Bell*, the issue was squarely presented, albeit at the appellate level. In *Bell*, the accused discharged his detailed counsel after disagreements concerning issues to be raised before the Board of Review (now the Court of Appeals for the Armed Forces). The court held that, under the circumstances, the accused should be given another military counsel and ordered another hearing before the Board. From *Bell* and *Howell*, it is clear that the military judge is not powerless although there is little more than the rule of reasonableness to guide his actions. It would appear that the military judge could properly force the accused to elect between proceeding pro se or accepting the services of a reasonably available defense counsel. If he has specifically rejected the assistance of all reasonably available counsel, whether they are present or not, then he should be allowed to proceed pro se.

PR 9.12. *ADEQUACY OF COUNSEL AND RELATED PROBLEMS*

PR 9.12.1. *Duty of the defense counsel.*

"Defense counsel is an advocate for the accused, not an *amicus* to the court." These words of Chief Judge Quinn characterize the duty of defense counsel in preparing and trying a case. Defense counsel's adversarial responsibilities are different from those of trial counsel in that he is solely an advocate with no duty to seek justice so long as he acts within the law and the ethical and moral standards established by his profession. The defense counsel serves the legal system by representing the accused zealously.

PR 9.12.2. *Effective Assistance of Counsel.*

By virtue of Art. 27, UCMJ, as well as the sixth amendment of the Constitution, a military accused is guaranteed the effective assistance of counsel. In *United States v. Scott*, the C.M.A. adopted the standard of review for claims of ineffective assistance of counsel set out by the U.S. Supreme Court in *Strickland v. Washington*. In order to prevail, an accused must establish (1) that counsel's performance was deficient, and (2) that counsel's deficient performance prejudiced the defense. Since defense counsel is presumed to be competent, the accused must identify specific

errors made by defense counsel which were unreasonable under prevailing norms. The reasonableness of counsel's performance must be evaluated from counsel's perspective at the time of the alleged mistake and in view of all the circumstances. Finally, there must be a reasonable probability that, but for this deficiency, there would have been a reasonable doubt respecting guilt.

PR 9.12.2.1. ***Unprofessional conduct:***

See United States v. Lewis, 16 C.M.A. 145, 36 C.M.R. 301 (1966) (TC: "two-bit piece of cat meat;" DC: "damn liar").

PR 9.12.2.2. ***Vegetation:***

See United States v. Bono, 26 M.J. 240 (C.M.A. 1988) (failure to object to uncharged misconduct in accused's confession, and presenting psychological report tending to show accused not amenable to rehabilitation, held to be ineffective assistance of counsel); *United States v. Cruz*, 25 M.J. 326 (C.M.A. 1987) (failure to raise issue of unlawful pretrial punishment held to be perilously close to ineffective assistance of counsel, absent some properly disclosed sentencing considerations); *United States v. Parker*, 6 C.M.A. 75, 19 C.M.R. 201 (1955) (no voir dire, no challenges, no substantial objections, no testimony, no offered instructions, and no objections to instructions in a capital case).

PR 9.12.2.3. ***Turning on client:***

See United States v. Winchester, 12 C.M.A. 74, 30 C.M.R. 74 (1961) (DC in court: "I have reason to believe this witness [the accused] has perjured himself and I will not be a part and parcel of it."); *United States v. Hampton*, 16 C.M.A. 304, 36 C.M.R. 460 (1966) (DC closing argument: "The prosecution has successfully proven that the accused is guilty of the offense charged."); *United States v. Blunk*, 17 C.M.A. 158, 37 C.M.R. 422 (1967) (DC informed court that accused's desire to present nothing on sentence was contrary to counsel's advice). *United States v. McDonald*, 21 C.M.A. 84, 44 C.M.R. 138 (1971) (DC, in closing argument before sentencing of accused convicted of assault with intent to kill by throwing a fragmentation grenade into a hut where four sergeants were asleep, stated that he could not present character evidence concerning the accused's value as a Marine because he had to be "honest with himself" and had "quite a few misgivings." It took the military court 17 minutes to reach and announce a maximum sentence of 80 years' confinement at hard labor).

PR 9.12.2.4. ***Conflicting interests:***

When an ineffectiveness claim is based on an actual conflict of interest, prejudice may be presumed; however, the accused must first establish that his lawyer "actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance." In *United States v. Davis*, the C.M.A. noted a possible conflict of interest: the accused's assistant defense counsel had represented the government's principal witness at the formal pretrial investigation of the case. These two cases point out that an attorney who has represented an adverse witness may be reluctant to vigorously cross-examine his former client. Also, the attorney may be in possession of privileged information bearing on his former client's credibility, thereby hampering his ability to cross-examine if his former client will not waive the privilege. Another example of conflicting interests is found in *United States v. Jolley*. In *Jolley*, the defense counsel was assigned to represent the accused as well as his two alleged co-actors; the attorney's conflict of interest became manifest when he asked some of his clients to testify against the others. This case illustrates that, by far, the safest course is to appoint a different lawyer for each accused.

Where the possibility of a conflict of interest exists, the military judge must bring it to the attention of the accused and explain to the accused the potential dangers involved. After a proper explanation by the military judge, the accused may retain his counsel despite the possible conflict. Absent an inquiry by the military judge, there is a rebuttable presumption that an actual conflict of interest exists between two co-accused represented by the same lawyer. This presumption can be overcome on appeal if the government can establish beyond a reasonable doubt either that no conflict of interest existed or that, although a conflict existed, the parties nevertheless knowingly and voluntarily chose to be represented by the same lawyer. In *United States v. Devitt*, the C.M.A. held that an actual conflict of interest did not exist for a husband and wife represented by the same lawyer where the lawyer's ". . .strategy produced for each accused the best results reasonably attainable in light of the available evidence."

PR 9.12.2.5. ***Switching sides after trial:***

In *United States v. Williams*, based upon clemency reports, the Judge Advocate General of the Air Force (AF JAG) suspended the accused's BCD subsequent to A.F.C.M.R.'s review and sent one copy of the action to the SJA's office for delivery to the accused. Instead of delivering the action to the accused, the assistant SJA, who had been the accused's DC at trial, returned it with a request to modify it due to accused's intervening misconduct. AF JAG then sent a new action to the command. It did not suspend the BCD. Held: DC's post-trial action was illegal, as was AF JAG's second action on the sentence.

PR 9.12.2.6. ***Failure to present extenuation / mitigation documents:***

In *United States v. Sifuentes*, the Court of Military Review held that failure of the trial defense counsel to request delay in trial until laudatory documents concerning the accused's prior service could be obtained did not deny the accused effective assistance of counsel and was a reasonable exercise of sound judgment. The court found that a delay might have resulted in losing the benefit of other mitigating evidence and that the documents in question would not have manifestly and materially affected the outcome of the trial on sentence.

PR 9.12.2.7. ***Inadequate individual civilian counsel:***

In *United States v. Walker*, the C.M.A. said: "We assume that the accused is entitled to the assistance of an attorney of reasonable competence, whether that attorney is one of his own selection or appointed for him." In this case, the court found no prejudice resulting from civilian counsel's defense, or lack thereof, by emphasizing the work done by detailed defense counsel.

PR 9.12.2.8. ***Assistance of individual military counsel:***

The refusal of IMC to represent an accused after being made available, establishing an attorney-client relationship, and making a court appearance did not prejudice the rights of the accused because the right to IMC is not absolute.

PR 9.12.2.9. ***Adequacy of post-trial representation:***

In *United States v. Palenius*, the C.M.A. held that the accused received ineffective post-trial representation. In *Palenius*, the accused had waived appellate representation before the Army Court of Military Review on the advice of his trial defense counsel. This advice was based on the relatively inexperienced defense counsel's belief that appellate defense counsel could do the accused no good and would only delay final disposition of the case.

PR 9.12.3. ***Special duties of the detailed defense counsel.***

1. Whether the accused has individual military or civilian counsel, detailed defense counsel has certain obligations to fulfill immediately upon being assigned to a case. He must advise the accused that he has been detailed to defend him and explain the accused's right to counsel of his own choice under Article 38(b), UCMJ. If the accused desires individual counsel, detailed defense counsel must so inform the convening authority and assist the accused in obtaining his services. Detailed counsel is not relieved by a request for individual counsel but rather, unless the accused requests otherwise, must undertake the immediate preparation of the defense.

2. The law appears somewhat unsettled as to the limits of activity required of the detailed counsel when acting as associate counsel. When civilian counsel is retained, detailed counsel should make certain that both he and the accused are familiar with those rights peculiar to military practice.

PR 9.12.4. ***Advice to the accused***

1. Proper advice to the accused at the initial interview and thereafter is essential to the formation of an effective attorney-client bond. First, the accused will realize that he, not counsel, must make the important decisions. Second, proper advice is a time saver in that it will enable the accused to focus on relevant facts when consulting with counsel.

2. Initially, defense counsel should explain his general duties and obligation of loyalty. Because of the traditional distinctions between officers and enlisted personnel in the Navy and Marine Corps, particular stress, in the case of an enlisted accused, must be laid upon the confidential relationship between attorney

and client and the lawyer's duty as an advocate. As discussed in the preceding section, counsel must explain the accused's right to counsel and ascertain his desires in that respect.

3. Defense counsel should then explain the elements of the charged offenses, possible affirmative defenses, and maximum punishments. He should then explain the following:

a. The meaning and effect of a plea of not guilty and the government's burden of proof;

b. the right to confront and cross-examine all witnesses and to view any other evidence against him;

c. the meaning and effect of a plea of guilty, including the right to withdraw it, and the possibility of a pretrial agreement;

d. the right to introduce evidence regardless of plea and the right to compulsory process;

e. the right to testify on all or some charges and the right to remain silent;

f. in the event of conviction, the right to present evidence in extenuation and mitigation and the right to present an unsworn statement;

g. the right to assert any proper defense or objection;

h. the right to request enlisted membership on the court, if the accused is enlisted, and the right to request trial by the military judge alone; and

i. the right to challenge for cause and to exercise one peremptory challenge.

4. Defense counsel should familiarize himself with the basic facts of the case before the initial interview, but he should not change or alter his advice in any way because of his first impressions. After a complete investigation, counsel is bound to give his candid opinion as to the merits of the case and his views regarding any decisions to be made by the accused.

PR 9.12.5. ***Classic problem: The "BCD striker."***

Defense counsel is sometimes confronted by a client who is bent on obtaining a separation from the service even if it is with a punitive discharge. Normally, defense counsel, in protecting the interests of the accused, may not urge a court to separate the accused without a showing that such an argument constituted a plea for leniency and was in the accused's best interest.

1. In *United States v. Weatherford*, the C.M.A. looked to the special circumstances of the case to decide that the defense counsel had not erred in urging a court to separate the accused. The court looked to the circumstances of the accused's military record; his age; his civilian work history; the desire of the accused; and, finally, the degree of impediment a BCD would have on the accused after he was separated from the service.

2. Since *Weatherford*, the C.M.A. has continued to look for the special circumstances in each case where the defense counsel urged the court to separate the accused in lieu of confinement or other punishments.

3. When counsel believes that a course of action is not advisable because it is not in the best interest of the accused, the problem arises as to how this conflict is to be resolved consonant with the professional responsibility of the counsel and his responsibility to his client. In *United States v. Blunk*, the accused insisted, contrary to the advice of his counsel, that his counsel not present any evidence in extenuation and mitigation. At a trial before members without military judge, the defense counsel referred to a written statement of the accused which indicated that he was advised of his rights, but had requested counsel not to present any evidence in the presentencing hearing. The C.M.A. found that the presentation of such matter before the members of the court was error, but harmless under the circumstances. The court suggested that, in order for the defense counsel to protect

himself against later unjustified attack by the accused on the grounds of inadequacy of counsel, he secure a statement in writing from his client as to his desire to seek a BCD and retain it in his possession.

4. **Recommendation:** Defense counsel should never argue in favor of a punitive discharge unless, and until, the accused first expresses his desire for such punishment in open court.

PR 9.13. *DUTIES OF TRIAL COUNSEL*

PR 9.13.1. *Primary Duty.*

The primary duty of the trial counsel is to prosecute the case on behalf of the United States. His actions, however, must at all times reflect a desire to have the whole truth revealed.

From the time he is first detailed, the trial counsel must take action necessary to protect the interest of the government in an error-free record, such as insuring full compliance with Article 32, UCMJ.

Trial counsel must carry out his duty to see that justice is done in the context of an adversary proceeding and must not usurp the functions of the court or the convening authority. Trial procedure in the Anglo-American system assumes that opposing counsel will bring out all the evidence favoring their respective sides, with the result that the court has before it all relevant facts on which to base its judgment. This assumption is valid only if trial counsel prosecutes with all the vigor and zeal it implies, but within the legal, ethical, and moral constraints of the profession.

Trial counsel must not use means that are other than fair and honorable, nor should he try to prove facts that he knows to be untrue. If, in preparing for trial, he concludes that the available evidence does not prove an offense charged, his duty is to recommend that the appropriate specification be withdrawn, which is the convening authority's decision. The convening authority having directed prosecution, the trial counsel is bound to present whatever evidence may be available and to do so with all the force and skill of advocacy at his command. To prosecute perfunctorily is to nullify the decision that the UCMJ entrusts to the convening authority, and to arrogate to oneself the power of judgment that the UCMJ entrusts to the court.

PR 9.13.2. *Preparation for trial*

1. In preparing the government's case for trial, the trial counsel must first analyze the elements of the offenses charged and marshal the available evidence on each of them. He must anticipate affirmative defenses and motions in bar of trial and prepare to contest these issues. Minimal preparation of these three aspects of the government's case includes close study of all papers accompanying the convening order and charge sheet with emphasis upon the pretrial investigation, if there was one.

2. In many cases, the trial counsel will discover the existence of additional witnesses or evidence previously unknown to government investigators. In view of this contingency, it is imperative that preparation of the case begin immediately upon receipt of the file, regardless of the anticipated time for preparation and date of trial. If trial counsel discovers that there is insufficient evidence on a particular charge, he should confer with the command's legal officer or staff judge advocate with a view towards dropping the charge.

3. In preparing his case, the trial counsel must interview all government and defense witnesses at least once. Some witnesses require extensive pretrial preparation in order to insure that their testimony is intelligible. It is advisable to prepare a witness for anticipated cross-examination by taking an opposite tack in an interview. In preparing and presenting the testimony of witnesses, the trial counsel must consider himself as an advocate for the government's cause but should be extremely careful lest he induce any changes in a witness' story, consciously or unconsciously. He should also anticipate any need for a grant of immunity.

4. Trial counsel must insure the admissibility of all evidence he plans to use at trial and prepare legal authorities and argument to show the authenticity, relevance, and competency of each bit of evidence.

5. Finally, trial counsel should prepare himself to represent the government with respect to any pretrial requests to the convening authority that may arise.

PR 9.13.3. ***Contacts with the defense.***

Trial counsel's dealings with the defense should always be through whatever counsel the accused may have. Although it is proper to inquire as to anticipated pleas, motions, or objections, any attempt to induce a guilty plea is improper. Trial counsel is under no duty to assist the defense except as required by law. The defense should be permitted to examine the convening order, charge sheet, and all papers accompanying the charges, including the report of investigation and statements of witnesses unless otherwise directed by the convening authority. As a matter of courtesy, it is customary for trial counsel to provide copies of such documents for use by the defense. In order to avoid the necessity of a continuance, the defense should be informed of all probable government witnesses.

The trial counsel should, regardless of the zealousness of the defense, maintain an attitude of professional courtesy and avoid unseemly wrangling. When it will save time and expense to the government, trial counsel should not hesitate to stipulate to uncontested matters.

PR 9.13.4. ***Administrative duties***

PR 9.13.4.1. ***Immediate duties.***

R.C.M. 502(d)(5) imposes several duties upon the trial counsel immediately upon his detail and receipt of the case file.

He should examine the charge sheet, convening order, and allied papers for errors. If he discovers a minor error (e.g., misspelling) he should correct it and initial the change. Errors of a substantial nature should be reported to the legal officer or staff judge advocate of the convening authority.

The convening order should be examined to ensure that it is personally signed by the convening authority. Trial counsel should ensure that the referral block of the charge sheet was personally signed by the convening authority. If it is not, he should ascertain whether the officer signing had proper authority to do so.

Trial counsel should also ensure that the referral block properly reflects the court to which the case is referred by comparing the information thereon with the information on the convening order.

Trial counsel must serve a copy of the charge sheet on the accused personally, not on the defense counsel. The statement of service on page two of the charge sheet should then be signed. At this time, trial counsel should advise the accused of the name of the detailed defense counsel and notify defense counsel that charges have been served.

PR 9.13.4.2. ***Witnesses.***

It is the duty of trial counsel to insure the presence at trial of material witnesses for the government and the defense. He has the power to compel the attendance of witnesses, but only the convening authority may refuse a defense request to require attendance of a witness. Such a request may be renewed at trial. Civilian witnesses usually are willing to attend a trial voluntarily when it is clearly understood that their fees and mileage will be paid. Consequently, unless there is reason to believe that the witness will not attend without personal service of a subpoena, all that is necessary is that a subpoena, in duplicate, be mailed to him with a request that he sign the acceptance of service and return the signed copy to the trial counsel using the enclosed postage-paid envelope.

To secure the attendance of military witnesses, trial counsel should advise the commanding officer of the witness that his presence is needed.

PR 9.13.4.3. ***Trial date.***

The order in which cases are brought to trial is discretionary with the trial counsel. His proposal of a trial date should reflect consideration of speedy trial problems as well as the time needed for preparation. Defense counsel should be informed of the proposed date of trial in writing in all cases. The military judge will determine the trial date.

PR 9.13.4.4. ***Cases with military judge.***

In any case tried before a court with a military judge, additional duties are imposed upon the trial counsel unless local directives provide otherwise. Trial counsel must commit the government to trial on a particular date by means

of a written notice to the defense counsel. If the defense wishes a delay, it must so request in writing. When the date has been agreed upon, the military judge will be informed and he will set a date as close as possible to that agreed upon. In addition, trial counsel must submit a Pretrial Information Report, NAVJAG Form 5813/4, indicating matters which may be considered at an Article 39a, UCMJ, session, such as motions, anticipated pleas, etc. This report may be jointly prepared by trial and defense counsel, or separate reports may be submitted. He must also cause to be prepared items 1-8 on Court-Martial Case Report, NAVJAG Form 5813/2, for the military judge.

PR 9.13.4.5. ***Final steps.***

The trial counsel has the duty of notifying court members and other personnel of the time and place of trial. He is responsible for obtaining the services of a court reporter (and interpreter, if needed). He should ascertain the military judge's desire as to the uniform to be worn and inform all personnel accordingly.

The trial counsel must notify any officer whose duty it is to see that the accused attends trial (e.g., the corrections officer or the individual's unit). Although the accused and defense counsel are responsible for insuring that the accused is properly attired, for protection of the record, trial counsel should insure that the accused is in proper uniform with all ribbons and insignia to which he is entitled, and that the record reflect that this is the case.

CHAPTER 10

CHAPTER 10

PR 10. CONVENING COURTS-MARTIAL

PR 10.1. *INTRODUCTION*

This chapter concerns the authority and procedure for the proper creation of courts-martial. This process is denominated in the Uniform Code of Military Justice (UCMJ) and the *Manual for Courts-Martial (2005 ed.)* (MCM) as "convening" courts-martial, and the officer authorized to convene courts-martial is the "convening authority" (CA). Also discussed in this chapter are the mechanics of convening a court-martial and the effect of defects in the convening process.

PR 10.2. *AUTHORITY TO CONVENE*

The categories of military commanders who are authorized to convene the three types of courts-martial are set forth in the UCMJ. In addition to the categories of officers designated in the UCMJ, the service secretaries may specifically designate military commanders to convene courts-martial of a specific type.

PR 10.2.1. *Summary courts-martial (SCM).*

In the Navy and Marine Corps, those officers empowered to convene a general court-martial (GCM) and/or a special court-martial (SPCM) may also convene an SCM. In addition, officers in charge so empowered by the Secretary of the Navy (SECNAV) may convene SCM's. In the Coast Guard, summary courts martial may be convened by any person who may convene a general or special court-martial.

PR 10.2.2. *Special courts-martial (SPCM).*

The commanding officers authorized to convene special courts-martial are set forth in Article 23(a) (1)-(6), UCMJ. In addition to these commanding officers, Article 23(a)(7), UCMJ, empowers SECNAV to designate other commanding officers or officers in charge to convene SPCM's.

a. In construing the provisions of Article 23(a)(7), UCMJ, the Court of Military Appeals (C.M.A.) has held that it is necessary for the Secretary to specifically designate a commanding officer or officer in charge to convene courts-martial.

(1) In *United States v. Ortiz*, the C.M.A. held that a flag or general officer's designation of a command as separate and detached did not confer upon the commanding officer of such a unit authority to convene SPCM's, even though the Secretary had provided that every command so designated by that grade officer could convene SPCM's. The C.M.A. indicated that such a regulation was an unauthorized delegation of the authority that only the Secretary possessed under Article 23(a)(7), UCMJ.

(2) In *United States v. Cunningham*, the C.M.A. struck down the provisions of a Navy regulation which provided that a flag or general officer could make an officer of his staff a commanding officer over staff enlisted personnel, thereby conferring on that officer, as a commanding officer, the power to convene courts-martial. Here again, the C.M.A. found an unlawful delegation of the personal authority of the Secretary under Article 23(a)(7), UCMJ, although the Secretary had, by regulation, stated that once so designated such commanding officers could convene courts-martial without first obtaining the Secretary's designation of special court-martial authority.

(3) In *United States v. Surtasky*, the C.M.A. upheld the personal authorization granted by SECNAV to the commanding officer, Naval Station, Norfolk, to place all enlisted personnel of the Navy assigned to duty at the Naval Station under the command of the Head, Military Personnel Department of the Naval Station, who was specifically designated as their commanding officer for disciplinary purposes by the Secretary.

b. Commanding officers and officers in charge who have been specifically authorized to convene SPCM's by SECNAV are set forth in JAGMAN, § 0120b. This list is not all inclusive, however. Coast Guard SPCM CA'S are listed at MJM 3.A.2.

c. The procedures to be followed by a command to request designation by SECNAV to convene courts-martial are set forth in JAGMAN, § 0121.

PR 10.2.3. ***General courts-martial (GCM).***

The categories of persons who have authority to convene GCM's are set forth in Article 22, UCMJ. SECNAV also may designate other specific officers who may convene GCM's and some of these officers are specified in JAGMAN, § 0120a. Coast Guard GCMCA's are listed at MJM 3.A.1.

PR 10.2.4. ***Non-delegability of the authority to convene.***

The power to convene courts-martial exists in the office of the commander designated as convening authority and may not be delegated. Where a commander is temporarily absent from the area of his command and another officer properly succeeds to command, the latter may act as convening authority.

1. Certain ministerial duties may be delegated, such as the selection of court-martial panels by the staff judge advocate (SJA) to be submitted to the convening authority for his personal decision.

2. JAGMAN, § 0133 requires that the convening order be personally signed by the convening authority and show his name, grade, and title, including organization or unit.

PR 10.2.5. ***Loss or withdrawal of authority to convene.***

Although a person may have statutory authority to convene courts-martial, he may be precluded from convening courts in specific instances, either because the authority is withheld by superior authority or lost by operation of law.

1. A superior may withhold a subordinate's authority to convene courts-martial. A specific example of the operation of this authority is set forth in the JAGMAN, section 0122b, which restricts the exercise of court-martial jurisdiction by a commanding officer of a unit attached to a ship of the Navy. Even after referral, but before trial, a superior may exercise control by withdrawing the case and referring it to a higher level court.

2. SECNAV has also directed the withholding of court-martial jurisdiction in certain types of cases. However, with respect to JAGMAN, § 0124, the court decided a special court-martial convening authority can prosecute an accused for a crime which he was previously convicted in state court without JAG approval in accordance with JAGMAN, § 0124. The court held that JAGMAN, § 0124, is merely "policy" that imposes no legal or binding restrictions on the convening authority, nor was it intended to confer additional rights to the accused.

3. Authority may be lost where the command is disestablished or redesignated.

4. A commanding officer who is a member of the Navy Medical Corps is not precluded from convening courts-martial to try members of his medical command by Article 24 of the 1949 Geneva Convention or by Article 1063 of *U.S. Navy Regulations, 1990*. In convening such courts-martial, the commanding officer is performing duties related to the administration of his medical unit.

5. Chapter 3.B. of the MJM restricts the exercise of court-martial jurisdiction when: (1) the convening authority is the accuser, (2) the use being considered has either been adjudicated or is pending adjudication in domestic of foreign criminal courts, (3) the case involves classified information, (4) cases where concurrent federal jurisdiction may lead to civilian action, and (5) capital cases.

PR 10.3. ***MECHANICS OF CONVENING COURTS-MARTIAL***

PR 10.3.1. ***Introduction.***

There are two distinct steps required to have a trial by court-martial. First, a court must be established. Second, a case of an accused must be referred to the established court. This section will treat the actual mechanics of convening a court-martial.

PR 10.3.2. ***The convening order: establishing a court-martial***

1. A convening order is a written order issued by a convening authority which creates a court-martial. The sole purpose of the convening order is to establish a court.

2. A court must exist before a case may be referred to it. A court-martial, once established, does not exist necessarily to hear one case but, rather, continues in existence until it is dissolved.

3. Chapter 3.G. of the MJM prescribes required notification procedures for Coast Guard court-martial referrals.

PR 10.3.3. ***Form of a convening order***

1. A court-martial convening order should be in the form set out in Appendix 6 to the MCM, Enclosure 11 of the MJM, and section 0133 of the JAGMAN. A sample SPCM convening order appears at the end of this chapter as Appendix A.

2. It should be on command letterhead.

3. It should have a date and a court-martial convening order number.

PR 10.3.4. ***Content of a convening order***

1. In all cases, the authority to convene a court-martial must be shown on the convening order. Generally, the use of command letterhead is a sufficient recital of authority to convene a court-martial. In cases where the convening authority has been granted authority to convene courts-martial by the Secretary of the Navy, however, this specific authority should be cited in the convening order.

2. The type of court to be convened must be specified (i.e., whether it is an SCM, SPCM, or GCM).

3. The name of the military judge is not included in the convening order.

4. The names of the members must be listed.

a. The convening authority cannot create a court-martial consisting of a military judge alone.

b. The convening order must designate the statutorily required number of members; however, the order should designate no more members than those expected to be present for the trial of cases referred to the court.

(1) Members are listed in order of seniority.

(2) A convening authority may appoint members from another command or armed force, when made available by their commander, to his court. The member's armed force is shown after the member's name.

(3) If enlisted personnel are detailed, the unit of each enlisted member is not shown on the convening order; but, keep in mind that an enlisted member cannot come from the same unit as the accused. Article 25(c)(2), UCMJ, defines the term "unit." Normally, enlisted members should not be detailed until after the accused has submitted a request for them.

5. The names of the detailed and individual counsel do not appear in the convening order.

6. A convening order may contain a provision for the withdrawal of cases previously referred to other courts and for the referral of those cases to the new court. Normally, this would be done in cases in which trial proceedings have not begun or in which the accused has not requested trial by military judge alone.

7. Section 0133 of the JAGMAN and para. 3.G.3 of the MJM provides that the convening order must be personally signed by the convening authority and should show his name, grade, and title, including

organization or unit. Failure of the convening authority to personally sign the convening order constitutes jurisdictional error.

PR 10.3.5. ***Miscellaneous***

1. In a one-officer command, the commanding officer is the SCM.

2. A copy of a convening order and any amendments thereto should be sent to each person named in the convening order.

3. Reporters and interpreters are not named in a convening order. They are assigned their responsibilities by a convening authority, or by one of his subordinates, or by the trial counsel. Such assignments may be oral or in writing.

4. Usually a convening order does not contain any reference to a particular accused. Reference to a particular accused may appear in a modification, for example, where enlisted personnel are detailed as members of a court at the request of an accused.

PR 10.3.6. ***Modifications to the convening order***

1. A convening authority may modify his convening order, thereby adding or deleting members from the court. A change in personnel should be accomplished by written amendment, although oral modifications are permissible if confirmed ultimately in writing.

2. The convening authority is given broad discretion to modify his convening order prior to the actual assembly of the court. He may change the members of the court without showing cause. In addition to the convening authority's own power to change the members before assembly, he may delegate, under regulations of the Secretary, authority to excuse individual members to the staff judge advocate or other principal assistant. SECNAV has authorized such a delegation in section 0136 of the JAGMAN. Before the court-martial is assembled, the CA's delegate may excuse members without showing cause; however, no more than one-third of the total number of members detailed by the CA may be excused by the CA's delegate in any one court-martial. After assembly, the CA's delegate may not excuse members.

3. Once the court is assembled, no member of the court may be excused by the CA or by the military judge except for good cause shown on the record or as a result of challenge under R.C.M. 912. "Good cause" is defined as a critical situation (i.e., illness, emergency leave, or military exigencies).

a. R.C.M. 505(c)(2)(A) requires the convening authority to show on the record good cause why it was necessary to relieve a member after assembly.

b. If a court-martial is reduced below a quorum, or if enlisted members are requested, the convening authority may appoint new members to meet the necessary minimum membership for the court.

4. The form to be followed for amending convening orders is found in Appendix 6, MCM (2005 ed.). A sample GCM amended convening order appears at the end of the chapter as Appendix B.

5. When the convening authority orally modifies his written convening order, it is necessary that the record of trial specifically show the modification in order for the court to have jurisdiction. More specifically, a written confirmation of the oral modification must be included in the record of trial. Failure to include such written confirmation is jurisdictional error.

PR 10.4. ***APPENDIX A – SAMPLE SPCM CONVENING ORDER***

LETTERHEAD

15 Feb 20CY

SPECIAL COURT-MARTIAL CONVENING ORDER 1-CY

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

MEMBERS

Lieutenant Commander James P. Hoar, U.S. Navy
Lieutenant Blair E. Wiegand, U.S. Navy
Lieutenant Junior Grade Christine M. Fantini, U.S. Naval Reserve
Ensign Suzanne F. Simmons, U.S. Naval Reserve
Ensign Andrew B. Tully, U.S. Navy

/s/
BRIAN J. MURPHY
Captain, U.S. Navy
Commanding Officer
Naval Justice School
Newport, Rhode Island

PR 10.5. ***APPENDIX A – SAMPLE GCM CONVENING ORDER***

DEPARTMENT OF THE NAVY
Naval Surface Group, Middle Pacific
Pearl Harbor, Hawaii 96860

5 Feb CY

GENERAL COURT-MARTIAL AMENDING ORDER 1A-CY

Chief Operations Specialist CWO3 David T. Campbell, U.S. Navy, is detailed as a member of the general court-martial convened by order number 1-CY, this command, dated 29 January 20CY, vice Lieutenant Kurt B. Larson, U.S. Navy, relieved.

/s/
RICHARD J. CLAIRMONT
Rear Admiral, U.S. Navy
Commander, Naval Surface Group
Middle Pacific
Pearl Harbor, Hawaii

NOTE TO STUDENT: THIS TYPE OF AMENDING ORDER IS USED TO PERMANENTLY REMOVE AN OFFICER MEMBER FROM A PREVIOUSLY ESTABLISHED GENERAL OR SPECIAL COURT-MARTIAL AND TO REPLACE THAT MEMBER WITH A NEW OFFICER MEMBER.

PR 10.6. ***APPENDIX C - COURTS-MARTIAL CHECKLIST FOR NAVY STAFF JUDGE ADVOCATES***

A. Request for services from TSO.

B. Convening orders, drafting charges, service record review.

C. Status list.

D. Case file:

1. Copy right side of service record and performance evaluations;

2. ICRs, NCIS reports, miscellaneous writings (such as letter from Mom or from accused while UA), relevant messages, memo to division officer, etc.; and

3. chronology recording when events occurred—such as delivery to NLSO, DC called about sanity issue, you called finance center / BUPERS / or civilian police (with whom you spoke and what was said).

E. Work closely with TC:

1. Serve accused when (s)he is aboard;

2. supply sufficient copies of charge sheet, etc.;

3. ensure that service record entries are accurate; and

4. make DC work through TC.

F. Accused works for command, not for DC:

1. Use check-in / check-out chits for visits to DC, and retain them in case file; and

2. conversely, work with division officer and disbursing office to ensure that command fulfills its responsibilities (e.g., accused is paid if so entitled, personal effects returned, brig visits, accused's family has POC).

G. Work with division officer:

1. Advise that accused is in brig (may be going to brig or may be transferred after trial), will need to get sea bag in order (onboard, not off-base), will need transfer performance evaluation reflecting the SPCM conviction (to be completed after trial, of course);

2. keep division informed of changes in trial date and results of trial; and

3. keep witnesses informed of when needed (work with TC).

H. If accused still attached to command when CA's action taken, ensure service record entries are made (including page 13 warning / counseling if appropriate). If not, ensure promulgating order forwarded to accused's new command.

I. Trial team at sea:

1. Message NLSO to get trial teams—follow format in applicable legal manual, especially noting companion cases and prior attorney-client relationships.

2. Make special efforts to accommodate attorneys

a. For each case, prepare case file folders marked TC, DC, or MJ (which include the charge sheet and convening order). For counsel, include lists of witnesses, LPO, LCPO, division officer, and their phone numbers. TC's folder should include all applicable reports with copies (s)he may provide to DC.

b. Provide temporary work space, a private space (stateroom) where DC may interview clients, and a space for courts-martial (wardroom).

3. Coordinate trial team visit with battle group judge advocate if possible.

4. Ask NLSO / LSSS to provide legal assistance, ADSEP advice, *Booker* advice for SCMs.

J. Notes on SCMs

1. Use good officers and prepare SCM package yourself so that busy officers will be more cooperative;

2. provide a copy of the trial guide with plastic covers and a grease pen;

3. maintain separate case files as with other courts-martial;

4. ensure that service record entries are made, including page 13 *Booker* waivers and page 13 counseling / warnings if appropriate; and

5. inform division officer of trial results.

PR 10.7. ***APPENDIX D - COAST GUARD STAFF JUDGE ADVOCATE COURT-MARTIAL PREPARATION CHECKLIST***

SPCM/Art. 32 U.S. v. _____

Command: _____

Pretrial restraint from _____ to_____

Date charges preferred: _____

Speedy trial deadline: _____

Convening authority: _____

Date charges referred: _____

Pretrial Agreement: ____YES ____NO

TC: _____ ATC: _____

DC: _____ ADC: _____

IMC: _____ CDC: _____

IO: _____ MJ: _____
Periods of Authorized pretrial delay:
_____ to _____
_____ to _____

Trial date and location: _____

Pretrial Confinement:
_____ Confinement ordered using NAVPERS 1840/4.
_____ Time & date confinement commenced.
_____ Advice letter to confinee (enclosure 8a to MJM).
_____ C.O.'s decision on need to continue the confinement (within 48 hrs) [MJM 3.C.3.].
_____ C.O.'s confinement memo (signed and forwarded to designated IRO ASAP after confinement commenced) [RCM 305(h)(2)(C)].
_____ C.O.'s memo delivered to IRO.
_____ Accused provided with representation
_____ Command rep identified to represent command at IRO hearing
_____ IRO hearing held (preferably within 48 of confinement) [MJM 3.C.4].

Forwarding Case:
_____ Review charges

_____ Review investigations

For Article 32: [DATE OF REQUEST:_____]

_____ Prepare request package to NLSO for DC Include copies of:
1. Charge sheet (copy)
Any investigation reports,
Names, commands, and phone numbers of potential witnesses.
MLC/District (l) POC.

For SpCM: [DATE OF REQUEST:_____]

_____ Letter sent to the appropriate NLSO forwarding case file and requesting DC for trial. Include if available:

1. Charge sheet (original for TC)
2. Convening order (original for TC)
3. CGI investigation (if applicable)
4. Any documentary evidence,
5. Location of real evidence,
6. CA's position within CG command structure
7. Command POC
8. MLC/District (l) POC.

Article 32 Preparation (if applicable):

_____ Identify IO
_____ Appointing ltr from CA to IO**.**
_____ Prepare SJA letter appointing GC.
_____ Prepare SJA letter appointing DC.
_____ Prepare modification to IO Appointing Letter to include new charges, if necessary.
_____ IO completes & submits report of investigation.
_____ Send copy of Art. 32 report to DC and TC.
_____ SPCMA forwards charges to GCMA if a GCM is recommended [MJM 3.D.2.b., RCM 401(c)(2)].
_____ Article 34 advice prepared and sent to GCMA.
_____ Prepare digest as means for GCMA to inform SJA of intentions.
_____ Prepare member selection package, if Art 34 advice recommends referring charges to GCM. Recommended numbers: GCM: 8; SPCM: 5
_____ Obtain alpha roster from HRSIC for all officers assigned to the area where the court-martial will be convened.
_____ Make notations on the list noting individuals who should not be considered (such as trial counsel, accusers, case attorney, court-reporter)
_____ Pull all the questionnaires available for members on the roster. Make appropriate notation on roster for those who do/do not have questionnaires available.
_____ Route package to convening authority for selection.
_____ Send copy of Art. 34 advice to DC and TC if charges are referred to GCM.

Convening Order/Referral:

_____ Convening Order prepared and signed.
_____ Convening authority refers charges to trial.
a. Ensure that CA has no accuser/victim/witness problem.
For additional charges, use an "instruction" in block 14a: "to be tried in conjunction with those charges preferred on _____."
Number and date of convening order matches block 14a.
_____ Provide copy of convening order and referred charge sheet to TC and DC.
_____ Members' questionnaires completed; forward to TC (use MLC form, if possible) [MJM 3.H.6.c.].
_____ Prepare amended Convening Order, if applicable (to replace members or to include enlisted members)

Counsel Assignments:

_____ SJA letter detailing TC [MJM 3.H.4.a.].
_____ SJA letter detailing DC [MJM 3.H.2.a.].

Witnesses/Members:

____ Grants of immunity, as required [MJM E.K., encl. 13].

a. Signed by GCMA.

b. Ensure local AUSA has no prosecutorial interest (send letter to AUSA confirming this fact).

____ Defense requests for expert witnesses.

____ Prepare notification letters for court members, telling them uniform, time, place of trial.

Pretrial Agreement Negotiations:

_____ Assist CA and TC in PTA negotiations and drafting PTA.

_____ Review PTA for accuracy and completeness.

_____ Present PTA to CA, giving SJA recommendation.

PR 10.8. ***APPENDIX D - SERVICE RECORD ACCOUNTABILITY***

A. There should be a single service record monitor in your office who should be kept informed of all service records entering or leaving the office. (S)he can prepare an update list daily and should inventory the service records in the office regularly.

B. No service record should leave your office without a record transmittal sheet dated and receipted by the transmittee (disbursing, admin, personnel, division, NLSO, registered mail clerk, etc.) and retained by your service record monitor

PR 10.9. ***APPENDIX E - CONVENING SPCM CHECKLIST FOR NAVY STAFF JUDGE ADVOCATES***

A. **Navy pretrial procedures**

1. Check the service record out from personnel or PSD.

2. Copy the enlistment contract; pages 1, 2, 4, 5, 7, 9; all page 13's relating to NJP or disciplinary matters; and enlisted evaluations. These will be needed for preparation of CA's action if accused is convicted.

3. Establish liaison with the local NLSO regarding the pending charges. Follow their desired procedure regarding the forwarding of the charge sheet to their office.

4. Prepare the charge sheet, DD Form 458.

5. Prepare list of possible members from which the CO may choose the panel. If possible, avoid using members you know should be disqualified, such as accused's division officer or others from his / her same department. Have the CO select the panel and prepare the convening order.

6. After the charges have been preferred by the legal clerk, have the CO sign both the charge sheet and convening order.

7. Make sufficient copies of the charges and convening order. Check with the NLSO, but you will normally need the original and five copies of the charge sheet and six copies of the convening order. They will be distributed as follows: original charge sheet plus one copy to the trial counsel; one to defense counsel; one to the military judge; one to the command files; and one to be served on the accused. Note, the original convening order remains in the command files, therefore the copy for the record of trial (ROT) should be a certified copy.

8. Serve the accused with the charges and note the service on the original charge sheet prior to forwarding the others to the NLSO.

9. Forward appropriate copies of the charge sheet and convening order to the NLSO. Include the service record and copies of the investigation.

10. Make all arrangements necessary for the accused to see his / her lawyer and for the witnesses to be interviewed by counsel.

11. After being notified of the time and date of the trial, inform all witnesses and members (if necessary).

12. Arrange for a bailiff to escort the accused to the trial and to take custody after trial. Bailiff should be indoctrinated by NLSO staff for courtroom duties and by brig staff for any confinement, etc.

13. If confinement is expected, ensure the accused has a full sea bag by the date of the trial. His division officer should do this.

14. If confinement is expected, prepare a confinement order and assemble the pay record, health record, and dental record. Have TEMADD orders prepared prior to trial. If the accused receives more than 30 days effective confinement, or a BCD and any confinement, these must be changed to TEMDU orders later.

B. **Marine Corps pretrial procedures**

1. Assemble service record book, preliminary inquiry (or NCIS investigation).

2. Audit service record book to assure it is up-to-date and contains no errors.

3. Complete request for legal services. Be sure to list witnesses and any who are pending transfer, discharge, or who will be unavailable within the near future. Also list five (5) approved court-martial

officer members by full name, rank, unit, and phone number. Also request telephone notification to the legal officer (LO) when a specific TC is assigned.

4. Make copies of request for legal services and allied papers and forward to Law Center / LSSS. (Be certain to have legal clerk who receives it sign your log as receiving the service record book.)

5. Upon receipt of the convening order and charge sheet upon which charges have been preferred, check to see that first page is completed and signed.

6. Have adjutant / personnel officer receipt for sworn charges and cause unit commander or his / her designee to notify personally the accused of charges and complete the notification block.

7. Have CA sign convening order first, then complete referral block.

8. Return charge sheet and convening order to Law Center / LSSS for service by TC.

9. After reasonable period of time, call TC for a trial date and notify prospective members that, if utilized, they will be needed during a specified time frame.

10. Assign a bailiff (senior to accused) and have them read the bailiff's handbook to learn their duties. Advise TC who has been selected.

11. Prepare applicable parts of page 13, SRB.

12. If confinement is expected, prepare confinement orders, assemble health and dental records, and secure physical examination immediately before trial (or notify medical people of need).

CHAPTER 11

CHAPTER 11

PR 11. THE ACCUSER CONCEPT AND UNLAWFUL COMMAND INFLUENCE

PR 11.1. *INTRODUCTION*

The Uniform Code of Military Justice (UCMJ) is structured to give the convening authority extensive areas of permissible involvement in the military justice system. For example, he may administer nonjudicial punishment; he may determine to what type of court-martial a case will be referred; he may choose the participants at a court-martial; he may determine what charges will be prosecuted; he may authorize searches and seizures; he may order an accused into pretrial restraint; he may approve or deny pretrial agreements; he may suspend a punishment imposed at a court-martial; and he may review the actions of a court-martial to determine if they are correct in law and in fact. However, the Uniform Code of Military Justice also defines certain areas of impermissible involvement by the convening authority. The accuser concept defines one of these impermissible areas; unlawful command influence defines another.

PR 11.2. *THE ACCUSER CONCEPT*

PR 11.2.1. *Introduction.*

A fundamental theme permeates the UCMJ: An accused is entitled to have the decisions affecting the outcome of his special or general court-martial decided by a convening authority who is unbiased and impartial. The convening authority who abandons this neutral role and whose motives may reasonably be perceived as prosecutorial becomes an "accuser" and is thereafter prohibited from acting in the case. Once an accuser, a convening authority is prohibited from convening the accused's court-martial, referring charges to a court-martial, and taking post-trial action. In such cases, the charges must be forwarded to superior competent authority for disposition by another convening authority superior both in rank and in command to the accuser. Section 0129b of the JAGMAN defines "superior competent authority" for both the Navy and Marine Corps. Significantly, the accuser concept applies only to special and general courts-martial. It does not apply to summary courts-martial.

PR 11.2.2. *Types of Accusers.*

Article 1(9), UCMJ, defines three types of accusers:

1. The person who signs and swears to charges;

2. any person who directs that charges nominally be signed and sworn by another; or

3. any other person who has an interest other than an official interest in the prosecution of the accused.

PR 11.2.2.1. *Type-one accuser -- the person who signs and swears to charges.*

Article 1(9), UCMJ, designates as a statutory accuser any person who signs the accuser block of the charge sheet, regardless of motive. Thus, it would be absolutely fatal should the convening authority's signature appear as the accuser on the charge sheet. Usually an SPCM or GCM convening authority will not sign or swear to charges; typically, such actions will be done by a subordinate (e.g., the preliminary inquiry officer). But, if the subordinate who signs and swears to charges succeeds to command, he cannot then convene an SPCM or GCM to try these charges -- because he would be an "accuser."

PR 11.2.2.2. *Type-two accuser -- any person who directs that charges nominally be signed and sworn by another.*

In order to be disqualified from convening a GCM or SPCM, the action by the convening authority must indicate that he has made a prior determination as to the accused's guilt or has a personal interest in the proceedings. Any action by a convening authority which is merely official and in the strict line of duty cannot be regarded as sufficient to disqualify him. Problems have arisen in the past in determining when an act is an official act and when the convening authority has directed a subordinate to act as his ***alter ego*** in preferring the charges.

1. **A convening authority directs another to prefer a specific charge.** In *United States v. Corcoran*, the accused was ordered by his department head to sweep the pier for failing to make morning quarters. The convening authority heard the accused refuse to obey the order and told the department head that "he wanted the accused written up for disobeying a lawful order." The C.M.A. held the convening authority was a type-two accuser because he directed a specific charge be brought.

2. **A convening authority directs changes in charges.** In *United States v. Smith*, the convening authority directed the trial counsel to amend a charge and specification to allege robbery vice larceny. In this instance, the Court of Military Appeals (C.M.A.) decided that the convening authority was merely acting in his official capacity under Article 34(c), UCMJ, by ensuring that the facts conformed to the pleading. In other cases, the Court of Military Appeals has stated that the test to be used in deciding these cases is the reasonable person test. If, after considering all of the circumstances, a reasonable person would conclude that the convening authority had a personal interest in the matter, then he would be declared an accuser and disqualified as the convening authority.

3. **GCM convening authority directing disposition of case to ensure uniform application of discipline in subordinate commands.** This problem may arise where a lower echelon command has disposed of an alleged offense by means of NJP or by initiating administrative discharge proceedings, etc. Where a superior commander learns of such action and directs the preferral of charges and trial by court-martial, it would appear that he would become a type-two accuser. There is little case law on this issue.

a. In *United States v. Wharton*, the accused, an Air Force major, overturned his automobile at high speed while being pursued by the highway patrol. His passenger was fatally injured. Wharton was awarded NJP, but a superior commander set this aside and directed that a charge of involuntary manslaughter be preferred and subsequently referred that charge to a GCM. The accused contended that the convening authority was a type-two accuser, but the Air Force Board of Review held the convening authority was not, since there was nothing to indicate he had an other than official interest in the case. In discussing the accused's contention that command control had deprived subordinate commanders of their power to dispose of the case in a lower forum, the Board reasoned that the GCM convening authority had a legal responsibility as a superior convening authority to choose an appropriate forum and to insure that subordinate officers do not nullify such a choice.

b. *Wharton* was originally viewed with some skepticism in light of *United States v. Hardy*, in which the court held that, once a subordinate commander has referred a particular case to a special court-martial, his superior commander may not lawfully order him to withdraw the case from the special court-martial to clear the way for referral of that same case to a general court-martial. The court viewed the order as command influence and therefore a "jurisdictional" defect existed regarding the general court-martial. However, in *United States v. Blaylock*, the court repudiated *Hardy* insofar as the intervention in a court-martial by a superior officer might give rise to a jurisdictional defect. In *Blaylock*, the accused was referred by the colonel to a special court-martial where, under Army practice, a bad-conduct discharge would not be authorized. The accused requested an administrative discharge in lieu of court-martial from the general court-martial convening authority. This authority denied the requested discharge and referred the case to a special court-martial which was authorized to award a bad conduct discharge. The defense made no motions regarding jurisdiction or the referral. On appeal, the jurisdiction issue was raised and addressed. The court determined that the general court-martial convening authority had the power to convene the court under the UCMJ and had the power and responsibility to assure that crimes are referred to tribunals that can mete out adequate punishment. Additionally, the court was convinced that the general court-martial convening authority's position as the supervisory power over special and summary courts-martial empowered him to cause withdrawal and rereferral of charges which in his view should have been tried by a different kind of court-martial.

The *Blaylock* court emphasized that courts should continue to ensure that there is no ***unlawful*** command influence under Article 37, UCMJ, and that a withdrawal and rereferral is not done arbitrarily or unfairly to the accused. There must be a proper reason for withdrawal. In *Blaylock*, the defense had no evidence of unlawful command influence or improper reasons for withdrawal; therefore, the decision of the Army Court of Military Review upholding the conviction was affirmed.

c. The general principle underlying *Wharton* has been applied to a number of cases where charges had been preferred, but not referred, to trial and a superior commander directed a convening authority to refer the charges to a particular type of forum.

(1) In *United States v. Hawthorne*, the Commanding General, 4th Army, issued a policy directive aimed at elimination of Regular Army repeat offenders. The Court of Military Appeals recognized the authority of the commander to issue policy directives to regulate matters of discipline; however, in this case, it concluded that the directive was unlawful command control. The court condemned the directive because it concluded that the directive tended to control the judicial process by directing the forum rather than merely attempting to improve discipline and because it directed the policy be read by all court members thus denying the accused an impartial jury.

(2) In *United States v. Harrison*, C.M.A. held that a policy directive concerning disposition of self-inflicted "gun shot incidents" within the 4th Infantry Division was a proper exercise of command responsibility as the purpose was prevention of gun shot incidents rather than influencing any ultimate disciplinary action.

d. In *United States v. Shelton*, the Air Force Court backed away from *Wharton* and took a more literal reading of Article 1(9) as to type-two accusers. It held that a convening authority who directed a subordinate commander to sign and swear to charges was a type-two accuser. Whether such literal interpretation will be applied to the Navy and Marine Corps method of processing cases remains to be seen.

e. The above cases demonstrate the close relationship between the accuser concept and unlawful command control -- unlawful command influence. To analyze these cases in light of the accuser concept, the critical point to consider is whether the commander is exercising a proper official function, such as establishment of a uniform disciplinary policy. When the policy directive is intended to reach a mandatory result as to the ultimate issue of punishment, the superior has exceeded his official function. In such a circumstance, if he has directed charges to be preferred, he would also become a type-two accuser. A personal interest results from the attempt to substitute his judgment for that of his subordinates, when the subordinate is charged with making an independent judgment.

PR 11.2.2.3. ***Type-three accuser -- any person who has an interest other than an official interest in the prosecution of the accused.***

The appellate courts have consistently applied an objective test to consider whether a convening authority would be disqualified as a type-three accuser. In *United States v. Gordon*, the court said:

. . . [W]e do not believe the true test is the animus of the convening authority. This undoubtedly was the early rule, but as we view it, the test should be whether the appointing authority was so closely connected to the offense that a reasonable person would conclude that he had a personal interest in the matter.

The same objective test was applied by the Court of Military Appeals in *United States v. Conn*.

1. **Convening authority as the "victim."**

-- In *United States v. Gordon, supra*, the accused burglarized General Edwards' home and also attempted to burglarize the home of the GCM convening authority. Later, the accused was apprehended and confessed. The case was referred to trial, alleging only the burglary of General Edwards' home. In finding that the GCM convening authority was an accuser, the Court of Military Appeals stated:

We cannot peer into the mind of a convening authority to determine his mental condition, but we can determine from the facts whether there is a reasonable probability that his being the victim of an offense tended to influence a delicate selection. We are convinced that in this case it is reasonable to assume that tendency present.

2. **Direct order of convening authority violated**

a. In *United States v. Marsh*, the accused failed to report to Fort Lawton, Washington, for overseas transportation and surrendered at Fort McPherson, Georgia, where General Hodge was the commanding officer. According to a procedure devised by General Hodge's headquarters, the accused was issued the standard travel order along with a direct order to proceed to the Fort in Washington, the direct order being given for the purpose of impressing on the accused that, if he failed to report to the station, the violation of the direct order could be used to support a long term of confinement. The accused failed to obey and was charged with a willful disobedience (Article 90) of the direct order that was issued by the post confinement officer "By command of

General Hodge." He was convicted by a court convened by General Hodge.

Held: General Hodge was an accuser, as he had a personal interest in seeing that this particular order was obeyed. The test was not the animus of the general, but whether he was so closely connected to the offense that a reasonable person would conclude that he had a personal interest in the matter.

b. In *United States v. Keith*, the accused was turned into the Marine Corps Recruit Depot, Parris Island, as UA. He was there given a written order directing that he proceed to Camp Pendleton, California, issued by the Commanding General, Headquarters Marine Corps Recruit Depot, and signed D. E. Shelton, by direction. The accused was informed in the order that deviation from the prescribed travel schedule would constitute disobedience of an order, a serious military offense, punishable as a court-martial should direct. He disobeyed the order and was tried and convicted of disobedience of a lawful order (Article 92) by a court convened by the Commanding General, Headquarters Marine Corps Recruit Depot, the officer who issued the order. On appeal, the defense contended that the case fell within the rule of the *Marsh* case, and that the Commanding General was an accuser.

Held: The order involved was little more than the standard transfer order. It was not a separate, distinct order by the Commanding General. In contrast to the *Marsh* case, the order was not given merely to aggravate the nature of the crime, thus, increasing the possible punishment. Nor was there any attempt to impress upon Keith that the order was a ***personal*** order as had been in *Marsh*. Since the only interest of the convening authority was official, he was not an accuser.

c. In *United States v. Doyle*, Rear Admiral Hartman, COMELEVEN, Military Chairman of the 1955 San Diego Community Chest Fund Drive, requested each of the Eleventh Naval District's 40 naval units to appoint an officer to conduct the drive within his unit. On 23 July 1955, Rear Admiral Hartman issued instructions for conducting the drive which stated that all contributions should be forwarded "directly to United Success Drive Headquarters." On 26 July 1955, Lieutenant Doyle was named by his commanding officer to conduct the drive. He failed to turn in the funds he collected. He was tried by GCM convened by Rear Admiral Hartman for several offenses, including larceny and failure to obey Rear Admiral Hartman's instructions. On appeal, Lieutenant Doyle, citing *Marsh*, contended that Rear Admiral Hartman was an accuser "because it was his order the accused had violated. . . ."

Held: The convening authority's "order cannot be construed as a personalized order of a superior officer to a subordinate; nor was it charged as such, but rather as the violation of a lawful general order. In fact, the chronology of events conclusively demonstrates the order was not a direct, personal order of Admiral Hartman to the accused for, if it applied to any persons, it applied to a class, and it was already existent before the accused came within its purview. Such factors are sufficient to distinguish this case from *United States v. Marsh.*"

d. In *Brookins v. Cullins*, the C.M.A. held that the CA was disqualified on the ground that the facts and circumstances constituted him an accuser where it appeared that the accused was charged, among other offenses, with participating in a riot, and it appeared that the CA had been present at the time, may have been the object of disrespectful language, spent almost five hours talking separately to the contesting groups of men, and had been extensively briefed on the investigation of the riot by an NCIS agent, his executive officer, and by his legal officer who had the responsibility for drafting the charges and making recommendations as to their disposition. The court did not decide whether ***merely*** witnessing the commission of an offense would be sufficient to disqualify the CA.

e. In *United States v. Deford*, the court indicates that a convening authority is not an accuser by reason of the fact that he had, as nonjudicial punishment, imposed the restriction the accused was charged with breaking.

3. **Miscellaneous personal interests**

a. Where an alleged offense involves a pet project of the convening authority, he may be an accuser. In *United States v. Shepherd*, an Army major general was so much involved in a weight reduction ("fat boy") program that he was the subject of an article in LIFE magazine (10 Sept 1956). The general had been quoted by LIFE as saying, "I cannot tolerate a fat soldier." The accused was a 300-lb. captain who had not lost weight in accordance with the convening authority's program and had ordered an NCO to submit a phony progress report. At the time the convening authority approved accused's sentence of dismissal and total

forfeiture, 71 men had been awarded NJP, administrative discharges or courts-martial. The court held that the convening authority was an accuser because of his extreme personal interest in the weight reduction program.

b. Where a convening authority makes statements indicating his personal belief in the guilt of the accused, he may become an accuser. However, the convening authority was not held to be an accuser where he made statements merely assuring the local community that the accused would receive a fair trial in order to quell public outrage over the rape and murder of a young girl.

c. In *United States v. Jackson*, a Major Zike was concerned over the possibility that two prosecution witnesses (husband and wife) were planning to commit perjury. The major became angry at this prospect; he communicated his anger in what the court described as "very dramatic terms". "...[I]f his wife committed perjury, she could be the first woman on the base to go to jail." The court's holding was that Major Zike, who had succeeded to command, was disqualified from reviewing and taking post-trial action on the case. The court's reasoning involved an analysis of whether the major had become an accuser, using the test set out in *United States v. Gordon* and *Brookins v. Cullins*, both *supra*.

4. **Other actions in same case**. As a general rule, actions taken in an official capacity will not render a convening authority an accuser.

a. In another of its pronouncements on the accuser concept, the appellate courts faced both the disqualification to convene and disqualification to review issues. In *United States v. Conn*, the accused (an Army second lieutenant) was charged with multiple specifications of possession/use of marijuana and conduct unbecoming an officer (use of marijuana in the presence of enlisted personnel who were members of the accused's MP unit). The defense argued that the preferring of charges (later withdrawn) for alleged conspiracy to commit perjury and unlawful influencing of witnesses concerning the article 32 investigation made the convening authority an accuser as a matter of law, and that briefings on the ongoing investigation, reading of witness statements, conferring with the staff judge advocate and prosecutor, directing the accused's immediate arrest, and ordering a helicopter to accomplish that arrest, were more than the performance of official military justice functions. Using the objective analysis noted above, the court held that the record could not be reasonably construed to show the convening authority acted in any more than an official capacity in the case, and that he was therefore not a type-three accuser, nor disqualified to review and take action on the record of trial.

b. In *United States v. Busse*, the convening authority apparently engaged in unlawful command control by modification of the court-martial membership list and by a personal conversation with the senior member on the "appropriateness" of past sentencing. After learning of these acts, the military judge excused all of the members of the court. The court rejected appellate counsel's argument that the unlawful command control, which had been corrected by the military judge, should be equated with a personal, vice official, interest in the prosecution of the case. The court indicated that there was nothing in the record which disclosed that the convening authority had a personal interest in the accused or the charges, and held that the military judge had no obligation to search, sua sponte, for an accuser issue where the record was otherwise clear.

c. The Navy Court of Military Review held, in *United States v. King*, that the CA was neither an accuser nor disqualified to review the case where a *JAG Manual* investigation into the same facts that led to the court-martial had been endorsed by direction by a subordinate of the convening authority.

PR 11.2.3. ***An officer subordinate to the accuser.***

Although Article 1(9), UCMJ, does not so indicate, case law and R.C.M. 504(c)(2) clearly provide that an officer who is subordinate to an accuser will also be disqualified as an accuser. It is for this reason that Articles 22(b) and 23(b), UCMJ, require, in instances where the convening authority has become an accuser, that the charges shall be forwarded to another convening authority who is both superior in grade and in the chain of command. This procedure is mandated in both special and general courts-martial. This "junior accuser" disqualification may occur when the purported convening authority stands in one of the following positions in relation to an accuser:

PR 11.2.3.1. ***Subordinate in the chain of command.***

PR 11.2.3.2. ***Junior in rank and outside the chain of command.***

PR 11.2.3.3. ***Successor in command, at least where junior in rank.***

a. This junior accuser" concept is applicable whether or not the superior accuser ordinarily would act as convening authority. For example, if the home of CINCLANT were burglarized by a sailor on leave from his ship in Norfolk, his subordinate commanders would be precluded from acting as convening authority, even though CINCLANT would not ordinarily act as convening authority in such a case.

b. Defense counsel can be creative with the "junior accuser" concept in the following scenario: a disqualified convening authority forwards the charges to a superior competent authority, who directs them to another convening authority junior to him but senior to the disqualified convening authority. If the defense can show the superior competent authority is a type-two or type-three accuser, the final convening authority would be disqualified as well because he is now junior to an accuser.

PR 11.2.4. ***Remedy for accuser problems.***

Whether one falls within the class of persons authorized to convene a court-martial under Articles 22(a) and 23(a), UCMJ (e.g., CO of air wing or vessel) is jurisdictional and cannot be waived. However, it is not jurisdictional whether the convening authority is disqualified as an accuser under Articles 22(b) and 23(b), UCMJ. Therefore, if not raised at trial, such error is waived. Should the error be raised at trial by the defense, it is remedied by referring the charges to another convening authority superior in both grade and the chain of command.

PR 11.3. *UNLAWFUL COMMAND INFLUENCE*

PR 11.3.1. ***Introduction.***

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 military justice is the fair and impartial evaluation of probative facts by judge and/or court members. The second notion is that nothing but legal and competent evidence presented in court can be allowed to influence the judge and/or court members. If unlawful command influence exists, the findings and sentence of the court may be invalidated. If the accused has pleaded guilty, it is possible that only the sentence may be invalidated. In some instances, the unlawful command influence could arise from an impermissible personal interest so that the convening authority is also an accuser. In other instances, the convening authority may be disqualified from taking an action on review. Unlike the accuser concept, command influence is also improper if it affects a summary court-martial. There are several ways in which command influence issues may arise.

PR 11.3.2. ***Statutory prohibitions.***

Article 37, UCMJ, broadly prohibits conduct on the part of anyone subject to the Code in attempting to unlawfully influence the judicial process defined in the military law. While it is not itself a punitive article, violations of the prohibitions set forth in this article could be punished under Article 98, UCMJ. More importantly, article 37 defines prohibited conduct, which, if determined to exist in the course of a trial, provides a basis for relief to ensure the fairness and impartiality of the trial proceedings or judicial process regardless of whether punitive action is taken against the offending individual.

1. Article 37, UCMJ, has two distinct features. The first is protection of the military judge, court members, and counsel from certain ***specific acts*** by a convening authority or commander. The second feature is a ***general prohibition*** to protect the impartiality of the judicial process in the military by protecting the exercise of independent judgment by individuals charged with such responsibility under the Code.

2. The first part of Article 37, UCMJ, is reflected in the following provisions of R.C.M. 104:

. . . . No convening authority or commander may censure, reprimand, or admonish a court-martial or other military tribunal or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court-martial or tribunal, or with respect to any other exercise of the functions of the court-martial or tribunal or such persons in the conduct of the proceedings.

. . . . In the preparation of an effectiveness, fitness, or efficiency report or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of a member of the armed forces, or in determining whether a member of the armed forces should be retained on active duty, no person subject to the code may: (A) Consider or evaluate the performance of duty of any such person as a member of a court-martial; or (B) Give a less favorable rating or evaluation of any defense counsel because of the zeal with which such counsel represented any accused.

R.C.M. 104(b)(2) expressly precludes a convening authority from preparing a fitness report on a military judge of a GCM or SPCM. If any convening authority is also the commanding officer of an SPCM military judge, by Secretarial regulation, he is precluded from commenting on the performance of the individual as a military judge.

3. The second feature of Article 37, UCMJ, is contained in the following general proscription:

. . . No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts. . . .

a. This provision has been used to emphasize the "direct link" provisions of Article 6(b), UCMJ, regarding the SJA or legal officer and the convening authority in military justice administration to the exclusion of others in the chain-of-command.

b. Specifically excluded from the above are general informational courses on military law, and statements and instructions made in open court by the military judge, president without a military judge, or counsel.

c. In *United States v. Rosser*, the court found prejudicial error in the military judge's denial of a defense motion for a mistrial. The facts showed that the accused's immediate commander, who was also the accuser in the case, engaged in improper activity by: stationing himself at the courtroom door and eavesdropping on the proceedings in the presence of expected witnesses, carrying on conversations with witnesses, and communicating with one of the court members who later denied such contact. The appearance, if not the fact, of unlawful command influence prevailed.

PR 11.3.3. *Command relationship to the court-martial process.*

The problem of unlawful command influence or command control, which attempts to substitute the judgment of a superior for that of an independent decision of the individual court member or reviewing authority, may arise in various contexts. In the main, the appellate courts have looked to the ***type of contact***: regulation, memorandum, or lecture; ***who made the contact***: the convening authority, the staff judge advocate, trial counsel, or higher authority; the ***content of the contact***; what was said or written, was it informational or directory; ***who was contacted***: only court members, all officers of the command, military judge; ***the timing of the contact***: was it immediately before or after a trial, or unrelated to the trial; and, finally, was there a ***reasonable likelihood of prejudice to the accused*** at his trial.

PR 11.3.3.1. *General informational lectures or policy directives.*

The appellate courts have consistently found that general orientation lectures or publication of general command policies are proper under appropriate conditions.

a. In *United States v. Piatt*, the accused USMC drill instructor was charged with maltreatment of recruits and various assaults. The day before the trial, the Commandant of the Marine Corps addressed all commissioned and staff noncommissioned officers. All the members were present at those speeches. The commandant alluded to drill instructors who pit recruits against each other unlawfully as being "supercowards," "bad," and they should "seek other employment." These were circumstances remarkably similar to allegations against the accused. The defense moved to dismiss due to the overall chilling effect this unlawful command influence would have on discovery, the members, and obtaining extenuation and mitigation witnesses. Through voir dire of the prospective defense witnesses and the members, the trial judge found no chilling effect on the defense witnesses and no corruption of the members and therefore denied the motion. N.M.C.M.R. found that the Commandant's speeches did not constitute actual or perceived unlawful command influence and the trial judge did not abuse his discretion in denying the motion for a change of venue and dismissal. The court's holding in this case is questionable in light of the C.M.A.'s holding in *United States v. Brice*.

b. In *United States v. Isbell*, an Army policy directive on "retention of thieves in the Army" was proper where there was a general distribution and it was informational in nature. However, when the same directive was read to court members ***immediately prior to trial*** with the ***personal comments*** of the commanding officer, the C.M.A. found improper command influence.

c. An orientation lecture by a staff judge advocate to members of command on selection of court members and sentencing was held to be proper where he emphasized that responsibility for sentencing rested with court.

d. A Plan of the Day, distributed immediately prior to the accused's trial for larceny, wherein the commanding officer expressed his view that no punishment was too severe for a theft, was held to be command influence.

e. In *United States v. Miller*, the court found improper command influence where the victim of the crime, an Army captain, communicated with two members of the court with the intent of ensuring stern disciplinary action against the accused. The military judge's denial of the challenges for cause against these members by the defense was held to be legal error.

PR 11.3.3.2. ***Lectures to designated court members.***

Like other lectures, the appellate courts have held that general orientation lectures to designated court members are permissible. However, the courts have limited such lectures to advice as to trial procedure and the role of the member.

a. For example, a general lecture on the general duties of court members, given to detailed court members prior to the referral of any cases to the court, was held proper in *United States v. Danzine*. However, when the lecture was given by the staff judge advocate immediately prior to trial in the courtroom with the law officer, trial counsel and defense counsel present, the C.M.A. found unlawful interference with the court because, at that stage of the proceedings, the instructions, if any, that were to be given to the members should have come from the law officer.

b. The trial counsel's attempt to inform court members of a departmental or command policy statement on drug abuse was an unlawful attempt to influence the members and was presumed prejudicial even with limiting instructions by the military judge. Every in-court reference to policy will not result in unlawful command influence; a case-by-case approach is required.

c. As a practical matter, it appears that any lectures to the members are risky and should be accomplished by the SJA, not the commanding officer. Lectures must be for the sole purpose of instructing members of the command in substantive and procedural aspects of courts-martial and should be given to the entire command as opposed to detailed court-martial members as a segregated group.

PR 11.3.3.3. ***Policy directives affecting the discretion of the convening authority to refer charges or to review certain courts-martial.***

The appellate courts have held that a commanding officer has broad discretion in determining whether to refer charges to trial. As to the review process, the convening authority similarly is given broad discretion as to the

approval or disapproval of findings and sentence. The appellate courts have also upheld policy statements by superior authority in areas affecting good order and discipline, provided that such directives do not require the convening authority to abdicate his independent judgment in the performance of his court-martial functions.

a. In *United States v. Rivera*, the C.M.A. held that a SECNAV directive on the reference of homosexuals to trial was not unlawful command influence where the convening authority understood that he was not required to refer such cases to trial. The C.M.A. stated that it was not the content of the directive that controlled, but whether the convening authority understood that he could accept or reject the policy statement.

b. In *United States v. Blaylock*, the court found that a superior convening authority can, absent ***specific evidence*** of unlawful command influence or improper reasons, withdraw (or order the junior convening authority to withdraw) charges from a particular forum (here a non-BCD SPCM).

c. In the area of approval of sentences, the C.M.A. held in *United States v. Prince*, that a requirement in the *JAG Manual*, that stated that a convening authority who suspends a BCD in a larceny case must state his reasons in his action, was an unlawful restriction on the discretion of the convening authority in taking clemency action on a case which he had convened. The C.M.A. pointed out that it had previously held that a convening authority may take mitigating action on findings and sentence for any reason in *United States v. Nassey*.

d. C.A.A.F. unanimously found that the circumstances were such that a *Dubay* hearing was required where a Navy Captain (O-6) changed his original recommendation of suspending or remitting a dismissal after “top down” pressure.

PR 11.3.3.4. *Selection of court members.*

The C.M.A. analyzes improper selection of court-martial members as an Article 25, UCMJ, violation. These violations occur most frequently in the form of "packing" courts-martial with members predisposed to guilty findings or harsher punishments and the systematic exclusion of junior personnel as members of courts-martial. Counsel should address these issues as both unlawful command influence/control and Article 25, UCMJ, violations.

a. In *United States v. Hedges*, the C.M.A. reversed where the facts showed a hand-picked court disposed toward law enforcement tried the accused on a murder charge. The court noted that the president was a lawyer, two members were provost marshals, and another member was executive officer of the Marine Barracks (which was responsible for the operation of the confinement facility where the accused was held).

b. In *United States v. Crawford*, the accused requested enlisted members for his court-martial. The issue raised was whether the commanding officer had excluded certain enlisted grades from consideration in appointing enlisted members to the court. The C.M.A. stated that the provision for enlisted members would be violated by a convening authority who systematically excluded all enlisted persons of the lower pay grades from consideration when appointing enlisted members to a court, although this was held not to have occurred in the instant case. *United States v. Aho*, discusses the necessity for developing the exclusion issue at trial.

c. In *United States v. Greene*, the C.M.A. found the improper selection of court members, all senior officers, where the evidence indicated that such a court was drawn only from lieutenant colonels and colonels, and junior officers were systematically excluded from consideration by the convening authority.

d. In *United States v. McClain*, the court held that it was improper to systematically exclude enlisted personnel (below E-7) and junior officers to obtain a court membership less disposed to lenient sentences. The court focused on the intent of the convening authority in excluding certain personnel.

PR 11.3.3.5. *Withdrawal of charges and modification of convening order*

a. The C.M.A. found that withdrawal of charges and referral to an article 32 investigation was not for good cause where the withdrawal was based on DC's submission of a request for defense witnesses.

b. Modification of the convening order to place a senior member on the court as president after the accused had entered pleas was held to be improper in *United States v. Whitley*.

PR 11.3.3.6. *Command contact of defense witnesses.*

Attempts to influence the testimony of potential witnesses is unlawful command influence, whether intentional or not.

a. In *United States v. Thomas*, one of the infamous 3rd Armored Division cases in Germany, the convening authority gave a series of lectures within the division concerning subordinate commanders who testify on behalf of the defense. The court found that, although he acted in good faith, his remarks were reasonably perceived as discouraging favorable character testimony and thus constituted unlawful command influence.

b. In *United States v. Levite*, before trial, the accused's company commander and sergeant major talked to defense character witnesses and criticized them for associating with the accused and for their willingness to testify. Both sat as spectators at the trial and "gave strange looks" to the defense witnesses. After trial, the witnesses were again counseled. The court held that the prohibition against unlawful command influence applies to command personnel, not just convening authorities. The court found that the government had not shown beyond a reasonable doubt that such conduct did not affect the findings and sentence.

c. In *United States v. Jameson*, two defense witnesses were fired and transferred because of their testimony during the sentencing portion of the trial. In addition, a recruit training battalion commanding officer lectured her Marines that they were encouraged to testify for the defense, but would be held accountable for any testimony which deviated from Marine Corps policy. These post-trial actions could not have affected the findings nor the sentence of the court-martial, but the defense's position was that potential providers of R.C.M. 1105 clemency matters were deterred from providing any information because of the fate of the two defense witnesses and the commanding officer's remarks. The court held that the government did not meet its burden of proving beyond a reasonable doubt that the convening authority's action was unaffected by unlawful command influence and, therefore, returned the case for a new review and action by officers not previously involved in the case.

d. In *United States v. Jones*, which was a companion case to *Jameson*, *supra*, the court ordered a rehearing on sentence because the unlawful influence which arose out of the Jameson trial took place prior to the *Jones* case. That unlawful command influence, it was contended, had eliminated any source of potential defense presentencing witnesses.

e. In *United States v. Gore*, the court overturned the findings and sentence when it found that the convening authority, instructed a potential extenuation and mitigation witness that under no circumstances was he to help the accused by testifying at his court-martial. After initially agreeing to testify and to round up other potential witnesses for the accused the witness, after talking with his CO told the defense counsel, “I can't help you, Lieutenant . . . I'm not testifying . . . . My skipper said no way. He said that I can't help Constructionman **Gore.**" Also the witness refused to testify telephonically. When asked about the potential witness questionnaires, the witness said, "Lieutenant, my CO said we cannot help Constructionman Gore**.** End of story."

PR 11.3.3.7. *Communication with the military judge.*

Criticism of a military judge's decisions is inextricably tied to influence because criticism of past action tends to, and is generally intended to, influence future actions. In *United States v. Ledbetter*, the trial judge had awarded allegedly lenient sentences in three related cases including the *Ledbetter* case itself. He subsequently received several inquiries from the SJA regarding the appropriateness of the sentences. The C.M.A. held that the issue of possible prejudice to the accused was moot, since the sentence in the case *sub judice* had already been decided, but the court went on to say that inquiries outside the adversary process which question or seek justification of a military judge's decision are forbidden unless they are made by an independent judicial commission set up in accordance with ***ABA Standards relating to The Function of the Trial Judge, paragraph 9.1(a)***.

In *United States v. Allen*, the convening authority's staff judge advocate telephoned the Deputy Judge Advocate General complaining that the military judge detailed to this national security case was a "light sentencer" and was pro defense. The Deputy JAG then telephoned the Chief Judge of the Trial Judiciary to relay the SJA's concerns. The Chief Judge replaced the originally detailed judge with an out-of-circuit judge specially designated to try national security cases. Due to a conflict with another national security case, the out-of-circuit judge was relieved and the originally detailed judge was restored and presided over the remainder of the trial. The C.M.A. found no

prejudice, but denounced the manipulations that had taken place.

PR 11.3.4. ***Burden of proof, waiver, and forum selection.***

1. The accused bears the burden of raising the unlawful command influence issue by alleging sufficient facts which, if true, constitute unlawful and prejudicial command influence. Once effectively raised, the government must prove beyond a reasonable doubt that the accused received a fair trial and that the outcome of the court was not unlawfully influenced. Something more than mere assertions of impartiality by the person influenced is required to rebut the presumption of innocence, and any doubt must be resolved in favor of the accused.

2. The C.A.A.F. has not yet directly applied the doctrine of waiver to the issue of command influence raised for the first time on appeal. The rationale here is that, even though unlawful command influence is not a jurisdictional error, waiver should not attach because unlawful command influence strikes at the heart of the court-martial system and gravely affects the military community. But the more recent trend is for the C.A.A.F. to analyze whether the defense took some action to correct the influence.

3. The presence of unlawful command influence does not automatically render guilty pleas improvident. The test is whether there is a reasonable possibility that the presence of command influence would have affected the accused's pleas. In these cases, the appellate courts search the record of trial for indications that the unlawful influence created a misapprehension which was a substantial factor in the accused's decision to plead guilty. In cases where unlawful command influence has been exercised, no reviewing court may properly affirm findings and sentence unless it is persuaded beyond a reasonable doubt that the findings and sentence have not been affected by the command influence.

4. Selecting trial by military judge alone is not a proper remedy to avoid unlawful command influence or a "stacked court." The accused's forum selection must be free of this type of pressure.

PR 11.3.5. ***The appearance doctrine.***

The appearance doctrine states that even the appearance of unlawful command influence must be avoided and may require remedial action to dispel the appearance of unfairness in the public's eyes.

1. Actual command influence impacts on an individual's ability to receive an impartial determination of the issues in his/her case. The appearance that a command has manipulated the court-martial system to prevent an accused from receiving an impartial hearing impacts on the public's confidence that the military can resolve criminal matters in a fair and impartial manner. In the first instance, the accused is the victim and, in the second, the military justice system is the victim.

2. Although the appearance doctrine has been referred to in many cases over the years, there appear to be only two occasions in which the C.M.A. has found that a violation of the appearance doctrine required remedial action absent a finding of actual unlawful command influence.

a. In *United States v. Rosser*, the defense counsel moved for a mistrial based on the accused's company commander's stationing himself at the courtroom door to eavesdrop on the proceedings in the presence of witnesses, conversing with government witnesses and a court-martial member, and that member concealing relevant qualification information from the court. The A.C.M.R. found no abuse of discretion in the military judge's denial of the motion. The C.M.A. reversed, holding that the military judge erred as a matter of law by not considering "the total effect of such conduct on the appearance of fairness and freedom from command influence mandated by Congress and by our decisions for court-martial proceedings."

b. In *United States v. Zagar*, the convening authority's SJA instructed the court-martial members on military justice procedures. This instruction occurred the day before trial and its content created the impression the accused was presumed guilty until proven otherwise. The military judge denied defense counsel's challenge for cause against each member and A.B.R. affirmed. The C.M.A. reversed, holding the combination of timing, status of the person instructing, and the lecture's content created "untoward appearances — appearances which are certain to sap public confidence in the essential fairness of military law administration."

PR 11.3.6. ***Review of command influence issues***

1. To avoid conflicting affidavits and trials de novo on appeal, the appellate courts have directed that cases involving allegations of command influence be returned to the convening authority, or to a different convening authority depending on the type of unlawful command influence involved, for a factual hearing on the issue before a military judge who will decide the issue initially.

2. **Corrective action.** The appropriate remedy for unlawful command influence depends on when the influence is discovered, when the attempt to remedy is made, and also on the pervasiveness of the improper influence. If it is discovered before trial, a possible remedy may be a full and effective retraction of the unlawful acts or statements. However, if it has been discovered too late, or if a simple retraction would not be sufficient, a judge should grant a change of venue or a continuance until the influence subsides. If the influence has not spread extensively, the judge can permit the defense counsel to remove by challenge any court members affected by the unlawful influence. If the influence is not adequately converted earlier, a reviewing authority may correct the findings or sentence or order a rehearing, or another trial, as appropriate.

CHAPTER 12

CHAPTER 12

PR 12. SPEEDY TRIAL

PR 12.1. *INTRODUCTION*

This chapter discusses an accused's constitutional and statutory right to a speedy trial. Section 1302 discusses the past and present treatment of the statutory right to a speedy trial as provided by R.C.M. 707, MCM (2005 ed.). Subsequent sections address the development of the right to a speedy trial through case law. Both statutory and case law has created several avenues through which an accused may seek judicial enforcement of his right to a speedy trial. This chapter will highlight when this right applies to an individual accused, what constitutes a violation of that right by the government, and the legal ramifications of a violation of that right.

A. The right to a speedy trial is derived from the Magna Charta and the English common law. It is specifically guaranteed by the Sixth Amendment of the U.S. Constitution and Article 10, UCMJ:

> When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him.

The protections provided by Article 10, UCMJ, to an accused are broader than those provided by the Sixth Amendment. Article 10, also provides that:

> [u]pon the preferring of charges, the proper authority shall take immediate steps to determine what disposition should be made thereof in the interest of justice and discipline, and the person accused shall be informed of the charges against him as soon as practicable.

Finally, Article 33, UCMJ, is designed to implement a speedy trial by general court-martial:

> When a person is held for trial by general court-martial the commanding officer shall, within eight days after the accused is ordered into arrest or confinement, if practicable, forward the charges, together with the investigation and allied papers, to the officer exercising general court-martial jurisdiction. If that is not practicable, he shall report in writing to that officer the reasons for delay.

B. The term "arrest or confinement" as it appears in Article 10, UCMJ, has been interpreted by the appellate courts to mean pretrial restraint, which includes restriction.

C. The remedy for denial of the right to a speedy trial is dismissal of the charges. R.C.M. 707(d) provides for dismissal with or without prejudice. The charge must be dismissed with prejudice if an accused's constitutional right to a speedy trial has been violated.

D. Congress attempted to reinforce the accused's right to a speedy trial by the enactment of Article 98, UCMJ, which makes it an offense to delay unnecessarily the disposition of any case of a person charged with an offense.

PR 12.2. *THE SPEEDY TRIAL RULE IN THE MANUAL FOR COURTS-MARTIAL*

R.C.M. 707 was drastically revised in 1991. The amended rule applies to all cases in which arraignment occurs on or after 6 July 1991. The rule is based on ABA Standards For Criminal Justice, Speedy Trial (1986) and The Federal Speedy Trial Act, 18 U.S.C. Sec. 3161.

PR 12.2.1. *Starting the clock.*

R.C.M. 707(a) provides that the accused shall be brought to trial within 120 days after the earlier of:

1. preferral of charges;

2. imposition of restraint under R.C.M. 304(a) (2)-(4); or

3. entry on active duty under R.C.M. 204.

These three occurrences constitute the "triggering events" that start the 120-day clock. **"ON DAY NUMBER 1, EVERYONE ASSOCIATED WITH A CASE SHOULD KNOW WHAT DAY WILL BE NUMBER 120."** Note that conditions on liberty do not "trigger" the speedy trial clock, nor does imposition of liberty risk unless these commander's tools are used as a subterfuge for pretrial restriction. Actual preferral, when the accuser signs the charges and specifications under oath before a commissioned officer, is the "trigger."

When the triggering event is the imposition of restraint under R.C.M. 304, despite the language of R.C.M. 707, the government has considerablely less than 120 days.

PR 12.2.2. ***Accountability.***

The date of preferral of charges, the date on which pretrial restraint is imposed, or the date of entry on active duty under R.C.M. 204, does not count for purposes of computing the 120-day period, but the date on which the accused is brought to trial does count. An accused is "brought to trial" under this rule at the time of arraignment (when the accused is asked, "How do you plead?") under R.C.M. 904. This is a major change from the pre 1991 rule which defined "brought to trial" as the time the government presents evidence. If the accused is an adjudged prisoner serving the sentence of another court-martial, he is not considered to be in pretrial confinement. Note that C.A.A.F. has stated that arraignment is sufficient; there need be no representation by the government that it is ready to proceed to trial on the merits. The court points out that the accused receives some protection from the arraignment process, because, among other things, the government may not refer additional charges to the same court without the consent of the accused. While the R.C.M. 707 clock stops at arraignment, that is not necessarily the case for the Article 10 (pretrial confinement) speedy trial clock.

PR 12.2.3. ***Multiple clocks.***

When charges are preferred at different times, accountability for each charge is determined from the date on which the charge was preferred or on which pretrial restraint was imposed on the basis of that offense. Even when charges are preferred at the same time, earlier imposition of pretrial restraint will only start the clock for the charged offenses that were the bases for imposing pretrial restraint.

PR 12.2.4. ***Events which affect time periods.***

R.C.M. 707(b)(3) addresses four events which may affect time periods of the speedy trial clock.

PR 12.2.4.1. ***Dismissal or mistrial.***

When charges are dismissed, or if a mistrial is granted, a new 120-day clock begins to run on the date on which charges are again preferred or restraint is reimposed. Withdrawal of charges from court-martial is not tantamount to a "dismissal" within the meaning of the rule. The true intent behind the convening authority's actions determines whether the dismissal was genuine. In *United State v. Britton*, the Court of Military Appeals defines an intent to dismiss:

> Dismissal, mistrial, and a break in pretrial restraint all contemplate that the accused no longer faces charges, that conditions on liberty and pretrial restraint are lifted, and that he is returned to full-time duty with full rights as accorded to all other servicemembers. Reinstitution of charges requires the command to start over. The charges must be re-preferred, investigated, and referred in accordance with the Rules for Courts Martial, as though there were no previous charges or proceedings.

Furthermore, a convening authority cannot attempt to "withdraw" charges in an attempt to create a limbo status for the charges until such time as the prosecution is prepared to present its case. However, in *United States v. Bolado*, the Navy-Marine Corps Court of Military Review concluded that charges can only be withdrawn when they have been referred, otherwise they have been dismissed. Therefore, even if a convening authority may intend to reinstate charges in the future, an otherwise clear dismissal will not be treated as a withdrawal.

PR 12.2.4.2. ***Release from pretrial restraint.***

Release from pretrial restraint for a significant period of time stops the clock when the pretrial restraint is the only event to trigger the speedy trial clock. A "significant period" of time is not specifically defined, but has been found to be as short as five days. The clock will restart on the date new charges are preferred or the date that restraint is reimposed.

PR 12.2.4.3. ***Government appeals.***

R.C.M. 707(b)(3)(C) grants the government a new 120-day clock upon proper government appeal. Once the parties are given notice of either the government's decision not to appeal under R.C.M. 908(b)(8), or the decision of the Court of Military Review under R.C.M. 908(c)(3), a new 120-day period begins (unless it is determined that the appeal was filed solely for the purpose of delay with the knowledge that it was totally frivolous and without merit). The new clock applies to all charges being tried together, whether or not the subject of the appeal.

PR 12.2.4.4. ***Rehearings.***

If a rehearing is ordered or authorized by an appellate court, a new 120-day time period under this rule shall begin on the date that the responsible convening authority receives the record of trial and the opinion authorizing or directing a rehearing. This section was added to the amended rule and codifies the decision in *United States v. Moreno*.

PR 12.2.5. ***Excludable delay.***

Any pretrial delay approved by the convening authority or by the military judge shall be excluded when determining whether the speedy trial clock has run. Requests for delay before referral will be submitted to the convening authority and requests after referral will be submitted to the military judge. In addition, all periods of time covered by stays issued by appellate courts shall be excluded. A list of specific circumstances are now listed in the discussion following R.C.M. 707(c)(1) as possible reasons for a convening authority or military judge to grant a reasonable delay. They include:

[T]ime to enable counsel to prepare for trial in complex cases; time to allow examination into the mental capacity of the accused; time to process a member of the reserve component to active duty for disciplinary action; time to complete other proceedings related to the case; time requested by the defense; time to secure the availability of the accused, substantial witnesses, or other evidence; time to obtain appropriate security clearances for access to classified information or time to declassify evidence; or additional time for other good cause.

The purpose of the discussion section following R.C.M. 707(c)(1) is to provide guidance for granting pretrial delays. Under R.C.M. 707, “the government is accountable for all time prior to trial unless a competent authority grants a delay.” Decisions granting or denying pretrial delays will be subject to review for both abuse of discretion and the reasonableness of the period of delay granted. In *United States v. Thompson*, defense-requested delays that were approved by the investigating officer and ***ratified*** by the convening authority were properly excluded from speedy trial calculation. The delays at issue were granted at specific request of the defense and directly benefited the defense. Neither delay was caused or induced by acts or omissions of the government that denied or interfered with the accused’s rights. The appeal did not involve other acts or omissions by the government amounting to purposeful or negligent delay, the convening authority’s decision to approve delays occurred prior to referral of charges to court-martial, and all relevant facts surrounding the delay and the convening authority’s approval were well-documented and presented no barrier to review by military judge.

R.C.M. 707(c) is amended to read as follows:

“(c) Excludable delay. All periods of time during which appellate courts have issued stays in the proceedings, or the accused is hospitalized due to incompetence, or is otherwise in the custody of the Attorney General, shall be excluded when determining whether the period in subsection (a) of this rule has run. All other pretrial delays approved by a military judge or the convening authority shall be similarly excluded.”

PR 12.2.6. ***Motions.***

The accused must make a timely motion to the military judge under R.C.M. 905 for speedy trial relief. Counsel should provide the court with a chronology detailing the processing of the case to be made a part of the appellate record. Once the issue of speedy trial has been raised by the defense, the burden is upon the government to show by a preponderance of the evidence that the accused was brought to trial within 120 days.

PR 12.2.7. ***Remedy.***

A failure to comply with the right to a speedy trial will result in dismissal of the affected charges. The dismissal may be with or without prejudice to the government's right to reinstitute charges for the same offense at a later date. The charges must be dismissed with prejudice where the accused has been deprived of his or her constitutional right to a speedy trial. The military judge has the discretion to dismiss with or without prejudice. The court shall consider, among others, each of the following factors in determining whether to dismiss with or without prejudice: the seriousness of the offense; the facts and circumstances of the case that lead to dismissal; the impact of a re-prosecution on the administration of justice; and any prejudice to the accused resulting from the denial of a speedy trial.

PR 12.2.8. ***Waiver.***

Under R.C.M. 707(e), a plea of guilty which results in a finding of guilty generally waives any speedy trial issue as to that offense. The issue is preserved if the accused is allowed to enter a conditional plea under R.C.M. 910(a)(2). This rule apparently reverses case law that preserved speedy trial issues for appeal despite a guilty plea. However, the accused cannot waive a speedy trial motion as a provision in a pretrial agreement.

PR 12.3. *THE RIGHT TO SPEEDY TRIAL IN PRETRIAL CONFINEMENT CASES*

In general, R.C.M. 707 provides that the accused be brought to trial within 120 days. This clock could be triggered by several events: (1) preferral of charges; (2) the imposition of pretrial restraint (excluding conditions on liberty); (3) entry on active duty pursuant to R.C.M. 204; (4) notice of government appeal; or (5) the responsible CA's receipt of record of trial and appellate notice directing rehearing.

PR 12.3.1. ***The case law.***

United States v. Burton, provided for the 90-day speedy trial clock that was applicable in cases involving pretrial confinement. In *United States v. Kossman*, the court threw out the concept of a set speedy trial clock, whether it be 120 or 90 days, and employed the Article 10, UCMJ, standard of **"reasonable diligence."** Failure by the government to exercise reasonable diligence in bringing a case to trial in a timely fashion would serve as the basis for denial of the accused's right to a speedy trial, and dismissal with prejudice is the only available remedy. This now means that government prosecutors could be faced with defense motions to dismiss in cases well under the 120-day rule based upon allegations of failure to exercise reasonable diligence in bringing the case to trial in a timely fashion. Conversely, prosecutors may now successfully defend against such motions to dismiss in cases well over the 120-day or the old 90-day rules if they can show that they were in fact exercising such reasonable diligence. However, R.C.M. 707's 120-day clock still applies to all cases, and Article 10 is an **additional** requirement that must be considered in pretrial confinement cases.

PR 12.3.2. ***Accountability Under Article 10***.

In *United States v. Cooper*, the C.A.A.F. held that the Article 10 duty imposed on the Government immediately to try an accused who is placed in pretrial confinement does not terminate simply because the accused is arraigned. In *Cooper*, the accused was arraigned on day 114 of his pretrial confinement. On day 196, the accused's speedy trial motion was litigated. CAAF stated that there are undoubtedly times when the Government is not prepared to go forward with its case immediately following arraignment. As a result, the protections of Article 10 must extend beyond that point.

PR 12.3.3. ***Speedy trial attacks.***

A confined accused has three avenues of attack based on speedy trial. First, there is the Sixth Amendment claim, which as Judge Wiss' dissent in *Kossman*, notes, is largely illusory. Second, there is the protection afforded by R.C.M. 707; and, third, even if a confined accused is brought to trial within the 120-day requirement of that rule, the accused may still gain dismissal of the charges under Article 10, if he establishes that the Government could readily have gone to trial much sooner but negligently or spitefully chose not to.

PR 12.3.4. ***United States v. Kossman Standard.***

As a practical matter, the *Burton* presumption proved to be virtually irrebuttable, resulting in dismissal of the affected charges with prejudice. R.C.M. 707 purported to establish a 120-day period for the government to bring an accused (including a confined accused) to trial and allow the military judge discretion to dismiss charges with or without prejudice for a violation of the rule. In *Kossman*, the C.M.A. expressly overruled the *Burton* presumption, holding that the decision in *Burton* was not a binding interpretation of Article 10, but rather an attempt by the Court to enforce Congress' mandate in the face of the procedural vacuum existing at the time. Moreover, the Court acknowledged that R.C.M. 707 was a proper exercise by the President of his power to prescribe procedural rules for courts-martial and thus, has the force of law. According to the Court, however, the President's regulation cannot overrule the greater speedy trial protection afforded an accused by Congress under Article 10. Thus, even where the Government complies with the 120-day requirement of R.C.M. 707, a confined accused may still bring a motion to dismiss charges with prejudice under Article 10. If the military judge finds an Article 10 violation in the case of a confined accused, the judge must dismiss with prejudice. In nonconfinement cases under R.C.M. 707, the military judge has discretion to dismiss with or without prejudice.

By overruling *Burton*, the Court did away with the bright-line presumption and returned instead to the pre-Burton standard of reasonable diligence. In evaluating the merits of such a motion, the Court determined that military judges should resort to the pre-Burton standard of "reasonable diligence."

It suffices to note that the touch stone for measurement of compliance with the provisions of the Uniform Code is not constant motion, but reasonable diligence in bringing the charges to trial. Brief periods of inactivity in an otherwise active prosecution are not unreasonable or oppressive.

The Court also noted that R.C.M. 707, although not dispositive on the issue, provides good guidance to the both the Bench and Bar in resolving such motions. In *United States v. Hatfield*, the Court held that the military judge did not abuse his discretion by dismissing the charges and specifications for want of a speedy trial. The trial judge was well within his discretion when he concluded that it had taken the government "an excessively long time to shepherd this uncomplicated and unproblematic case to trial." The accused was in pretrial confinement (charged with articles 107, 123, and 134 - adultery and bigamy) for nearly one month before a defense counsel was identified by the NLSO. (The accused was in pretrial confinement for 106 days total). Counsel should review *Hatfield* for a quick lesson in how vitally important it is for parent and tenant commands to communicate with each other.

The *Kossman* court noted that some of the relevant factors in determining whether the Government proceeded with reasonable diligence include (1) the complex nature of the case; (2) logistical impediments and operational considerations; and, (3) ordinary judicial impediments, such as crowded dockets, unavailability of judges and attorney caseloads. Counsel should also review *United States v. Tibbs* and its progeny for other relevant considerations in proving "reasonable diligence."

Trial Tip. Keep a chronology of the Government's movement toward trial. Each step in the court-martial process should be documented in your chronology to present to the court to refute an Article 10 speedy trial motion. With your chronology, you can establish that the Government proceeded with an "active prosecution," and exercised "reasonable diligence" in getting the accused into court at the earliest possible time.

PR 12.3.5. ***Additional charges.***

When an accused is charged with offenses in addition to those for which he was confined, those offenses may have different inception dates for speedy trial purposes. It is possible that government accountability for these additional offenses begins when the government has in its possession substantial information on which to base preferral of charges. Therefore, an argument could be made that if an accused goes into pretrial confinement on 1 January on Charge I, on 15 January the government learns he has committed an additional offense, and on 25 January prefers

this as Charge II, the inception date for speedy trial purposes for Charge II could arguably be 15 January—not 25 January when the charge was preferred.

PR 12.3.6. *Accused in the hands of civilian authorities.*

If the accused is confined by civilian authorities and is "immediately available" for pickup by military authorities, the government has a reasonable time to arrange for his transportation and arrival at his ultimate destination before the speedy trial period begins to run. If the accused is confined for civilian offenses prior to his being released to military control, that delay will not be chargeable to the government. Likewise, if the accused is apprehended by military authorities and released to civilian authorities or a foreign government for prosecution, the military is not accountable for such periods of confinement.

PR 12.4. *WAIVER OF THE SPEEDY TRIAL ISSUE*

PR 12.4.1. *Generally*.

The general rule is that the issue is waived if not raised at trial. There may be an exception, however, where the denial of speedy trial amounts to a denial of due process.

In *United States v. Schalck*, the accused pleaded guilty to UA and willful disobedience at a general court-martial and was sentenced to a BCD. At the appellate level, the accused asserted the defense of lack of a speedy trial for the first time in that he was confined for a period of 96 days to trial without charges being preferred against him. The Board of Review agreed with the accused and dismissed the charges against him. The C.M.A. indicated that the issues of speedy trial and denial of due process are "frequently inextricably bound together and the line of demarcation not always clear." The government argued that the accused had been, in fact, advised of the charges against him and used a chronology sheet in argument before the C.M.A. The court recognized the well-established rule that the right to a speedy trial is "personal and can be waived if not promptly asserted by timely demand," but held that "in the posture of the record" the delay in preferring charges against the accused was not waived by his failure to raise the issue at trial and by his plea of guilty. Since the record was devoid of evidence on the point, the C.M.A. disagreed with the Board of Review to the extent that it felt the case should be reheard and the issue litigated.

PR 12.4.2. *Status of the law.*

If the accused fails to object at the trial level to a lack of a speedy trial, he will be precluded from raising the issue at the appellate level in the absence of evidence indicating a denial of military due process or manifest injustice. However, failure to raise issue at trial does not preclude the appellate courts from considering issue. In *United States v. Britton*, the defense did not raise speedy trial at the trial level. Air Force Court of Military Review dismissed the charges for denial of speedy trial. C.M.A. held that failure to raise the issue does not preclude C.M.R. in the exercise of its powers from granting relief.

CHAPTER 13

CHAPTER 13

PR 13. SUMMARY COURTS-MARTIAL

PR 13.1. *INTRODUCTION.*

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

As the SCM has no "civilian equivalent," but is strictly a creature of statute within the military system, persons unfamiliar with the military justice system may find the procedure something of a paradox at first blush. While it is a criminal proceeding at which the technical rules of evidence apply, and at which a finding of guilty can result in loss of liberty and property, there is no constitutional right to representation by counsel and it, therefore, is not a true adversary proceeding. The United States Supreme Court examined the SCM procedure in *Middendorf v. Henry*. Holding that an accused at SCM was not a "criminal prosecution" within the meaning of the sixth amendment, the Supreme Court cited its rationale previously expressed in *Toth v. Quarles*:

[I]t is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. But trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function. To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served . . . [M]ilitary tribunals have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts.

PR 13.2. *CREATION OF THE SUMMARY COURT-MARTIAL*

PR 13.2.1. *Authority to convene.*

An SCM is convened (created) by an individual authorized by law to convene SCMs. Article 24, UCMJ, R.C.M. 1302a, MCM (2005 ed.), and JAGMAN, § 0120c indicate those persons who have the power to convene an SCM. Commanding officers authorized to convene GCMs or SPCMs are also empowered to convene SCMs. Thus, the commanding officer of a naval vessel, base, or station, all commanders and commanding officers of Navy units or activities, commanding officers of Marine Corps battalions, regiments, aircraft squadrons, air groups, barracks, etc., have this authority.

The authority to convene SCMs is vested in the office of the authorized command and not in the person of its commander. Thus, Captain Jones, U.S. Navy, has SCM convening authority while actually performing his duty as Commanding Officer, USS *Ship*, but loses his authority when he goes on leave or is absent from his command for other reasons. The power to convene SCMs is nondelegable and in no event can a subordinate exercise such authority "by direction." When Captain Jones is on leave from his ship, his authority to convene SCMs devolves upon his temporary successor in command (usually the executive officer) who, in the eyes of the law, becomes the commanding officer.

Commanding officers or officers in charge not empowered to convene SCMs may request such authority by following the procedures contained in JAGMAN, § 0121b.

PR 13.2.2. *Restrictions on authority to convene.*

Unlike the authority to impose nonjudicial punishment, the power to convene SCMs and SPCMs may be restricted by a competent superior commander. Further, the commander of a unit which is attached to a naval vessel for duty therein should, as a matter of policy, refrain from exercising his SCM or SPCM convening powers and should refer such cases to the commanding officer of the ship for disposition. This policy does not apply to commanders of units which are embarked for transportation only. Finally, JAGMAN, § 0124c(2) requires that the permission of the

officer exercising general court-martial jurisdiction over the command be obtained before imposing nonjudicial punishment or referring a case to SCM for an offense which has already been tried in a state or foreign court. Offenses which have already been tried in a court deriving its authority from the United States may not be tried by court-martial.

It is important to note that, even if the convening authority or the SCM officer is the accuser, the jurisdiction of the SCM is not affected and it is discretionary with the convening authority whether to forward the charges to a superior authority or to simply convene the court himself.

PR 13.2.3. ***Mechanics of convening.***

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

While R.C.M. 1302(c) authorizes the convening authority to convene a SCM by a notation on the charge sheet signed by the convening authority, the better practice is to use a separate convening order for this purpose. Appendix 6b of the MCM (2005 ed.), contains a suggested format for the SCM convening order. A completed form is included as Appendix A to this Chapter.

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

PR 13.2.4. ***Summary court-martial officer.***

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

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

PR 13.2.5. ***Jurisdictional limitations: persons.***

Article 20, UCMJ, and R.C.M. 1301(c) provide that an SCM has the power (jurisdiction) to try only those enlisted persons who consent to trial by SCM. The right of an enlisted accused to refuse trial by SCM is absolute and is not related to any corresponding right at nonjudicial punishment. No commissioned officer, warrant officer, cadet, aviation cadet and midshipman, or person not subject to the UCMJ (Article 2, UCMJ) may be tried by SCM. The forms later in this chapter may be used to document the accused's election regarding his right to refuse trial by SCM.

The accused must be subject to the UCMJ at the time of the offense and at the time of trial; otherwise, the court-martial lacks jurisdiction over the person of the accused.

PR 13.2.6. *Jurisdictional limitations: offenses.*

An SCM has the power to try all offenses described in the UCMJ except those for which a mandatory punishment beyond the maximum which may be imposed at a SCM is prescribed by the UCMJ. Cases which involve the death penalty are capital offenses and cannot be tried by SCM. *See* R.C.M. 1004 for a discussion of capital offenses. Any minor offense can be disposed of by SCM.

In 1977, the United States Court of Military Appeals ruled that the jurisdiction of SCMs is limited to "disciplinary actions concerned solely with minor military offenses unknown in the civilian society." Read literally, this would have precluded SCM's from trying civilian crimes such as assault, larceny, drug offenses, etc. Following a reconsideration of that decision, the court rescinded that ruling and affirmed that "'with the exception of capital crimes, nothing whatever precludes the exercise of summary court-martial jurisdiction over serious offenses' in violation of the Uniform Code of Military Justice."

PR 13.3. *REFERRAL TO SUMMARY COURT-MARTIAL*

PR 13.3.1. *Introduction.*

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

PR 13.3.2. *Preliminary inquiry.*

Every court-martial case begins with either a complaint by someone that a person subject to the UCMJ has committed an offense or some inquiry which results in the discovery of misconduct. In any event, R.C.M. 303 imposes upon the officer exercising immediate nonjudicial punishment (Article 15, UCMJ) authority over the accused the duty to make, or cause to be made, an inquiry into the truth of the complaint or apparent wrongdoing. This investigation is impartial and should touch on all pertinent facts of the case, including extenuating and mitigating factors relating to the accused. Either the preliminary investigator or other person having knowledge of the facts may prefer formal charges against the accused if the inquiry indicates such charges are warranted.

PR 13.3.3. *Preferral of charges.*

Charges are formally made against an accused when signed and sworn to by a person subject to the UCMJ. This procedure is called "preferral of charges." Charges are preferred by executing the appropriate portions of the charge sheet. Implicit in the preferral process are several steps.

PR 13.3.3.1. *Personal data.*

Block I of page 1 of the charge sheet should be completed first. The information relating to personal data can be found in pertinent portions of the accused's service record, the preliminary inquiry, or other administrative records.

PR 13.3.3.2. *The charges.*

Block II of page 1 of the charge sheet is then completed to indicate the precise misconduct involved in the case. Each punitive article found in Part IV, MCM (2005 ed.), contains sample specifications. A detailed treatment of pleading offenses is contained in the criminal law portion of the course.

PR 13.3.3.3. *Accuser.*

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

PR 13.3.3.4. *Oath.*

The oath must be administered to the accuser and the affidavit so indicating must be executed by a person with proper authority. Article 136, UCMJ, authorizes commissioned officers who are judge advocates, staff judge advocates, legal officers, law specialists, summary courts-martial, adjutants, and Marine Corps, Navy, and Coast

Guard commanding officers, among others, to administer oaths for this purpose. JAGMAN, § 0902a(1) further authorizes officers certified by the Judge Advocate General of the Navy as counsel under

Article 27, UCMJ, all officers in pay grade 0-4 and above, executive officers, and administrative officers of Marine Corps aircraft squadrons to administer oaths. No one can be ordered to prefer charges to which he cannot truthfully swear. Often, the legal officer will administer the oath regardless of who conducted the preliminary inquiry. When the charges are signed and sworn to, they are "preferred" against the accused. For example:

III. **PREFERRAL**		
11a. **NAME OF ACCUSER (*Last, First, MI*)** HOOVER, Jay E.	b. **GRADE** PN1	c. **ORGANIZATION OF ACCUSER** USS FOX (DD 983)
d. **SIGNATURE OF ACCUSER** **/s/ *Jay E. Hoover***		e. **DATE** 5 Jul 20CY

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 5th day of July, 20CY, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

John Mitchell — *Typed Name of Officer*

USS FOX (DD 983) — *Organization of Officer*

Lieutenant — *Grade*

Legal Officer — *Official Capacity to Administer Oath (See R.C.M. 307(b) - must be commissioned officer)*

/s/ ***John Mitchell*** — *Signature*

PR 13.3.4. ***Informing the accused.***

Once formal charges have been signed and sworn to, the preferral process is completed when the charges are submitted to the accused's immediate commanding officer. Normally, the legal officer or discipline officer will actually receive these charges and, indeed, may have drafted them. Often, in the Navy, the accused's immediate commanding officer for Article 15, UCMJ, purposes is also the SCM convening authority (commanding officer of a ship, base, or station, etc.). In the Marine Corps, the company commander is normally the immediate commander for Article 15, UCMJ cases, and he does not possess SCM convening authority. Thus, the remaining discussion is premised on the assumption that the Marine Corps company commander has forwarded the charges to the battalion commander (who has convening authority) recommending trial by SCM.

Assuming that the legal/discipline officer of the SCM convening authority has the formal charges and the preliminary inquiry report, the first step which must be taken is to inform the accused of the charges against him. The purpose of this requirement is to provide an accused with reasonable notice of impending criminal prosecution in compliance with criminal due process of law standards. R.C.M. 308 requires the immediate commander of the accused to have the accused informed as soon as practicable of the charges preferred against him, the name of the person who preferred them, and the person who ordered them to be preferred.

The important aspect of this requirement is that notice must be given from official sources. The accused should appear before the immediate commander or other designated person giving notice and should be told of the existence of formal charges, the general nature of the charges, and the name of the person who signed the charges as accuser. A copy of the charges can also be given to the accused, although not required by law at this time. No attempt should be made to interrogate the accused. After notice has been given, the person who gave notice to the accused will execute item 12 at the top of page 2 of the charge sheet. If not the immediate commander of the accused, the person signing on the "signature" line should state their rank, component, and authority. The law does not require a formal hearing to provide notice to the accused, but the charge sheet must indicate that notice has been given. A failure to properly record the notice to the accused will not necessarily void subsequent processing steps or trial, but care should be taken to avoid such possibilities.

For example:

12.
On 5 July, 20CY , the accused was informed of the charges against him/her and of the name(s) of the accuser(s) known to me (*See R.C.M. 308(a)). (See R.C.M. 308 if notification cannot be made.)*

Able B. Seaweed — *Typed Name of Immediate Commander*

USS FOX (DD 983) — *Organization of Immediate Commander*

Commander, USN
Grade

/s/***A. B. Seaweed***
Signature

PR 13.3.5. ***Formal receipt of charges.***

Item 13 in block IV on page 2 of the charge sheet records the formal receipt of sworn charges by the officer exercising SCM jurisdiction. Often this receipt certification and the notice certification will be executed at the same time, although it is not unusual for the notice certification to be executed prior to the receipt certification -- especially in Marine Corps organizations. The purpose of the receipt certification is to establish that sworn charges were preferred before the statute of limitations operated to bar prosecution.

Article 43, UCMJ, states that "[e]xcept as otherwise provided in this section (article), a person charged with an offense is not liable to be tried by a court-martial if the offense was committed more than five years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command." A couple of notable exceptions are: (a) no limitation for trying and punishing a person charged with absence without leave or missing movement in time of war, or with any offense punishable by death; (b) the time limit for punishing a person under Article 15, UCMJ is two years; and, (c) periods in which an accused is absent without authority or fleeing from justice shall be excluded in computing the period of limitation.

Periods of time during which the accused was in the hands of the enemy, in the hands of civilian authorities for reasons relating to civilian matters, or absent without authority in territory where the United States could not apprehend him do not count in computing the limitations set forth in Article 43, UCMJ. Thus, the receipt certification is extremely important and must be completed in exacting detail to preserve the right to prosecute the accused.

Where the accused is absent without leave at the time charges are sworn, it is permissible and proper to execute the receipt certification even though the accused has not been advised of the existence of the charges. In such cases, a statement indicating the reason for the lack of notice should be attached to the case file. When the accused returns to military control, notice should then be given to him. The receipt certification need not be executed personally by the SCM convening authority and is often completed for him by the legal officer, discipline officer, or adjutant. For example:

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13. The sworn charges were received at 1300 hours, 5 July 20CY at USS FOX (DD 983)

_____.
Designation of Command or Officer Exercising Summary Court-Martial Jurisdiction (See R.C.M. 403)

FOR THE [1] Commanding Officer

John Mitchell — Legal Officer
Typed Name of Officer — *Official Capacity of Officer Signing*

Lieutenant, USN
Grade

/s/ ***John Mitchell***
Signature

PR 13.3.6. ***The act of referral.***

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

At this point, the importance of serializing convening orders becomes clear. A court-martial can only hear a case properly referred to it. The simplest and most accurate way to describe the correct court is to use the serial number and date of the order creating that court. Thus, the referral might read "referred for trial to the summary court-martial appointed by my summary court-martial convening order 1-CY dated 15 January 20CY." This language precisely identifies a particular kind of court-martial and the particular SCM to try the case.

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

V. **REFERRAL : SERVICE OF CHARGES**

14a. **DESIGNATION OF COMMAND OF CONVENING AUTHORITY**	b. **PLACE**	c. **DATE**
USS FOX (DD 983)	At sea	5 Jul CY

Referred for trial to the summary court-martial convened by my summary court-martial convening order number 1-CY dated , 1 July ,20CY , subject to the following instructions: [2] none
By _____ of _____
Command or Order

Able B. Seaweed — Commanding Officer
Typed Name of Officer — *Official Capacity of Officer Signing*

Commander, USN
Grade

/s/***Able B. Seaweed***
Signature

PR 13.4. *PRETRIAL PREPARATION*

PR 13.4.1. *General.*

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

PR 13.4.2. *Preliminary preparation.*

The charge sheet should be carefully examined, and all obvious administrative, clerical, and typographical errors corrected. The SCM officer should initial each correction he makes on the charge sheet. If the errors are so numerous as to require preparation of a new charge sheet then, the charges must be resworn and rereferred. In this connection, Article 30, UCMJ, requires that the person who swears to the charges be subject to the UCMJ. In addition, the accuser must either have knowledge of or have investigated the charges and swear that the charges are true in fact to the best of his/her knowledge and belief. The accuser may rely upon the results of an investigation conducted by others in preferring charges. The oath that the accuser takes must be administered by a commissioned officer authorized to administer such oaths. If the SCM officer changes an existing specification to include any new person, offense, or matter not fairly included in the original specification, R.C.M. 603 requires the new specification to be resworn and rereferred. The SCM officer should continue his examination of the charge sheet to determine the correctness and completeness of the information on pages 1 and 2 thereof:

1. The accused's name, social security number, rate, unit, and pay grade;

2. pay per month;

3. initial date and term of current service;

4. data as to restraint, including the correct type and duration of pretrial restraint;

5. signature, rank or rate, and armed force of the accuser;

6. signature and authority of the officer who administered the oath to the accuser;

7. date of receipt of sworn charges by the officer exercising SCM jurisdiction (important, as it stops the running of the statute of limitations);

8. block V, referring charge(s) to a specific SCM for trial (compare with convening order to ensure proper referral); and

9. the charge(s) and specification(s). Check for proper form and determine the elements of the offense. "Elements" are facts which must be proved in order to convict the accused of an offense. The SCM officer should also review the evidence relating to the charges. Problems in connection with proof of the charges should be brought to the attention of the convening authority.

PR 13.4.3. *Pretrial conference with accused.*

After initial review of the court-martial file, the SCM officer shall hold a preliminary proceeding with the accused. The accused's right to counsel is discussed later in this chapter. If the accused is represented by counsel, all dealings with the accused should be conducted through his counsel. Thus, the accused's counsel, if any, should be invited to attend the pretrial conference. At the pretrial conference, the SCM officer should follow the suggested guide found in appendix 9, MCM (2005 ed.), and should document the fact that all applicable rights were explained to the accused by completing blocks 1, 2, and 3 of the form for the record of trial by SCM found at appendix 15, MCM (2005 ed.).

PR 13.4.3.1. *Purpose.*

The purpose of the pretrial conference is to provide the accused with information concerning the nature of the court-martial, the procedure to be used, and his rights with respect to that procedure. It cannot be overemphasized that no attempt should be made to interrogate the accused or otherwise discuss the merits of the charges. The proper time to

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

PR 13.4.3.2. ***Advice to accused – rights.***

R.C.M. 1304(b) requires the SCM to serve on the accused a copy of the charge sheet and inform the accused of the following:

a. the general nature of the charges;to conduct an SCM;

b. that the charges have been referred to a summary court for trial and the date of referral (the SCM officer should complete the last block on page 2 of the charge sheet noting service on the accused); For example:

15.
On 8 July, 20CY, I (caused to be) served a copy hereof on (eachof) the above named accused.

John H. Smith — Lieutenant, JAGC. USN
Typed Name of Trial Counsel — *Grade or Rank of Trial Counsel*

/s/ ***John H. Smith***
Signature

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

c. the identity of the convening authority;

d. the names of the accuser;

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

f. that during the trial the summary court-martial will not consider any matters, including statements made by the accused to the SCM officer unless admitted in accordance with the Military Rules of Evidence;

g. the accused's right to plead guilty or not guilty;

h. the accused's right to cross-examine witnesses and have the SCM officer cross-examine witnesses on the accused's behalf;

i. the accused's right to call witnesses and produce evidence with the assistance of the SCM officer as necessary;

j. the accused's right to testify or to remain silent with the assurance that no adverse inference will be drawn by the SCM officer from such silence;

k. if any findings of guilty are announced, the accused's rights to remain silent, to make an unsworn statement, oral or written or both, and to testify, and to introduce evidence in extenuation or mitigation;

l. the accused's right to object to trial by summary court-martial; and,

m. the maximum sentence which the summary court-martial may adjudge.

(a) ***E-4 and below.*** The jurisdictional maximum sentence which an SCM may adjudge in the case of an accused who, at the time of trial, is in pay-grade E-4 or below extends to reduction to the lowest pay-grade (E-1); forfeiture of two-thirds of one-month's pay [convening authority may apportion collection over three months; or a fine not to exceed two-thirds of one month's pay; confinement not to exceed one month; hard labor without confinement for forty-five days (in lieu of confinement); and restriction to specified limits for two months.

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

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

PR 13.4.3.3. ***Advice to accused regarding counsel***

a. In 1972, the Supreme Court held, with respect to "criminal prosecutions," that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor or felony, unless he was represented by counsel at this trial."

b. The Supreme Court, in *Middendorf v. Henry*, held that an SCM was not a "criminal prosecution" within the meaning of the sixth amendment, reasoning that the possibility of loss of liberty does not, in and of itself, create a proceeding at which counsel must be afforded. Rather, it reasoned that an SCM was a brief, non-adversarial proceeding, the nature of which would be wholly changed by the presence of counsel. It found no factors that were so extraordinarily weighty as to invalidate the balance of expediency that has been struck by Congress.

c. In *United States v. Booker*, the C.M.A. considered the Supreme Court's decision in *Middendorf* and concluded that there existed no right to counsel at an SCM.

d. The discussion to R.C.M. 1301 states the following: "Neither the Constitution nor any statute establishes any right to counsel at summary courts-martial. Therefore, it is not error to deny an accused the opportunity to be represented by counsel at a summary court-martial. However, appearance of counsel is not prohibited. The detailing authority may, as a matter of discretion, detail, or otherwise make available, a military attorney to represent the accused at a summary court-martial. R.C.M. 1301(e) provides that an accused may be represented by civilian counsel at his own expense if an appearance by such counsel will not unreasonably delay the proceedings and if military exigencies do not preclude it.

e. **Booker warnings**

(1) Although holding that an accused had no right to counsel at an SCM, the C.M.A. ruled in *Booker*, that, if an accused was not given an opportunity to consult with independent counsel before accepting an SCM, the SCM will be inadmissible at a subsequent trial by court-martial. The term "independent counsel" has been interpreted to mean a lawyer qualified in the sense of Article 27(b), UCMJ, who, in the course of regular duties, does not act as the principle legal advisor to the convening authority.

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

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

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

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

(3) If an accused has been properly advised of his right to consult with counsel and to refuse trial by SCM, as well as the legal ramifications of these decisions, his elections and / or waivers in this regard should be made in writing and should be signed by the accused. Recordation of the advice/waiver should be made on page 13 (Navy) or page 12 (Marine Corps Unit Punishment Book) of the accused's service record with a copy attached to the record of trial. The forms found later as Appendixes in this chapter may be used to comply with the requirements of *United States v. Booker*. The "Acknowledgement of Rights and Waiver," properly completed, contains all the necessary advice to an accused and, properly executed, will establish a voluntary, knowing, and intelligent waiver of the accused's right to consult with counsel and/or his right to refuse trial by SCM. The "Waiver of Right to Counsel" may be used to establish a voluntary, knowing, and intelligent waiver of counsel at an SCM. Should the accused elect to waive his rights, but refuse to sign these forms, this fact should be recorded on page 13/page 12 of the service record with a copy attached to the record of trial.

(4) Assuming that the requirements of *Booker* have been complied with (proper advice and recordation of election/waivers), evidence of the prior SCM will be admissible at a later trial by court-martial as evidence of the character of the accused's prior service pursuant to R.C.M. 1001(b)(2). Unless the accused was actually represented by counsel at his SCM or affirmatively rejected an offer to provide counsel, however, the SCM would not be considered a "criminal conviction" and would not be admissible as a prior conviction under R.C.M. 1001(b)(3), nor for purposes of impeachment under Mil.R.Evid. 609, MCM (2005 ed.). While these cases would seem to allow a prior SCM's use as a "conviction" to trigger the increased punishment provisions of R.C.M. 1003(d) if the accused had been actually represented by counsel or had rejected the services of counsel provided to him, the discussion following R.C.M. 1003(d) opines that convictions by SCM may not be used for this purpose. As the discussion and analysis sections of MCM (2005 ed.), have no binding effect and represent only the drafters' opinions, this issue remains unresolved.

PR 13.4.4. *Final pretrial preparation*

PR 13.4.4.1. *Gather defense evidence.*

At the conclusion of the pretrial interview, the SCM officer shall give the accused a reasonable period of time to decide whether to object to trial by summary court-martial. The SCM officer should obtain from the accused the names of any witnesses or the description of other evidence which the accused wishes presented at the trial if the case is to proceed. He should also arrange for a time and place to hold the open sessions of the trial. These arrangements should be made through the legal officer, and the SCM officer should insure that the accused and all witnesses are notified of the time and place of the first meeting.

An orderly trial procedure should be planned to include a chronological presentation of the facts. The admissibility and authenticity of all known evidentiary matters should be determined and numbers assigned all exhibits to be offered at trial. These exhibits, when received at trial, should be marked "received in evidence" and numbered (prosecution exhibits) or lettered (defense exhibits). The evidence reviewed should include not only that contained in the file as originally received, but also any other relevant evidence discovered by other means. The SCM officer has the duty of insuring that all relevant and competent evidence in the case, both for and against the accused, is presented. It is the responsibility of the SCM officer to insure that only legal and competent evidence is received and considered at the trial. The Military Rules of Evidence apply to the SCM and must be followed.

PR 13.4.4.2. *Subpoena of witnesses.*

The SCM is authorized by Article 46, UCMJ, and R.C.M.'s 703(e)(2)(C) and 1301(f) to issue subpoenas to compel the appearance at trial of civilian witnesses. In such a case, the SCM officer will follow the same procedure detailed for an SPCM or GCM trial counsel in R.C.M. 703(c) and JAGMAN, § 0146. Appendix 7 of the MCM (2005 ed.), contains an illustration of a completed subpoena, while JAGMAN, § 0146 details procedures for payment of witness fees. Depositions may also be used, but the advice of a lawyer should be first obtained.

PR 13.5. *TRIAL PROCEDURE.*

Note that the script in Appendix 9 to the MCM still indicates that bread and water is an available punishment at summary court-martial. IT IS NOT.

PR 13.6. *POST-TRIAL RESPONSIBILITIES OF THE SCM*

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

PR 13.6.1. *Accused acquitted on all charges.*

In cases in which the accused has been found not guilty as to all charges and specifications, the SCM must:

1. Announce the findings to the accused in open session;

2. inform the convening authority as soon as practicable of the findings;

3. prepare the record of trial in accordance with R.C.M. 1305, using the record of trial form in appendix 15, MCM (2005 ed.);

4. cause one copy of the record of trial to be served upon the accused, and secure the accused's receipt; and

5. forward the original and one copy of the record of trial to the convening authority for his action.

PR 13.6.2. *Accused convicted on some or all of the charges.*

In cases in which the accused has been found guilty of one or more of the charges and specifications, the SCM must:

1. Announce the findings and sentence to the accused in open session;

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

a. The right to submit in writing to the convening authority any matters which may tend to affect his decision in taking action and the fact that his failure to do so will constitute a waiver of this right; and

b. the right to request review of any final conviction by SCM by the Judge Advocate General in accordance with R.C.M. 1201(b)(3).

3. if the sentence includes confinement, inform the accused of his right to apply to the convening authority for deferment of confinement;

4. inform the convening authority of the results of trial as soon as practicable [such information should include the findings, sentence, recommendations for suspension of the sentence, and any deferment request;

5. prepare the record of trial in accordance with R.C.M. 1305, using the form in appendix 15, MCM (2005 ed.);

6. cause one copy of the record of trial to be served upon the accused and secure the accused's receipt; and

7. forward the original and one copy of the record of trial to the convening authority for action.

PR 13.7. ***APPENDIX A - SAMPLE SUMMARY COURT-MARTIAL CONVENING ORDER***

USS FOX (DD-983)
FPO New York 09501

1 July 20CY

SUMMARY COURT-MARTIAL CONVENING ORDER 1-CY

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

ABLE B. SEEWEED
Commander, U.S. Navy
Commanding Officer, USS FOX
FPO New York 09501

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

DOCUMENTING COMPLIANCE WITH "*BOOKER*" AT SCM (SRB page 13/11)

[1 July 20CY]: SNM consulted with independent military counsel prior to deciding whether to accept or refuse the summary court-martial held on this date. SNM accepted trial by summary court-martial.

NAME
RANK, SERVICE
POSITION
BY DIRECTION

PR 13.8. ***APPENDIX B - SUMMARY COURT-MARTIAL ACKNOWLEDGMENT OF RIGHTS AND WAIVER***

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

confinement for _____ months;

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

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

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

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

_____
Signature of accused and date

_____
Signature of witness and date

PR 13.9. ***APPENDIX C - WAIVER OF RIGHT TO COUNSEL AT SUMMARY COURT-MARTIAL***

I have been advised by the summary court-martial officer that I cannot be tried by summary court-martial without my consent. I have also been advised that if I consent to trial by summary court-martial I may be represented by civilian counsel provided at my own expense. If I do not desire to be represented by civilian counsel provided at my own expense, a military lawyer may be appointed to represent me upon my request, if such appearance will not unreasonably delay the proceedings and if military exigencies do not preclude it. It has also been explained to me that if I am represented by a lawyer (either civilian or military) at the summary court-martial, or if I waive (give up) the right to be represented by a lawyer, the summary court-martial will be considered a criminal conviction and will be admissible as such at any subsequent court-martial. On the other hand, if I request a military lawyer to represent me and a military lawyer is not available to represent me, or is not provided, and I am not represented by a civilian lawyer, the results of the court-martial will not be admissible as a prior conviction at any subsequent court-martial. I further understand that the maximum punishment which can be imposed in my case will be the same whether or not I am represented by a lawyer. Understanding all of this, I consent to trial by summary court-martial and I waive (give up) my right to be represented by a lawyer at the trial.

_____	_____
Signature of Summary Court-Martial	Signature of Accused
_____	_____
Date	Typed Name, Rank, Social Security Number of Accused

PR 13.10. ***APPENDIX D - ADDENDA TO TRIAL GUIDE - SPECIAL EVIDENCE PROBLEM -- CONFESSIONS***

NOTE: Before you consider an out-of-court statement of the accused as evidence against him, you must be convinced by a preponderance of the evidence that the statement was made voluntarily and that, if required, the accused was properly advised of his rights.

A confession or admission is not voluntary if it was obtained through the use of coercion, unlawful influence, or unlawful inducement, including obtaining the statement by questioning an accused without complying with the warning requirements of Article 31(b), UCMJ, ***and*** without first advising the accused of his rights to counsel during a custodial interrogation. You must also keep in mind that an accused cannot be convicted on the basis of his out-of-court self-incriminating statement alone, even if it was voluntary, for such a statement must be corroborated if it is to be used as a basis for conviction. If a statement was obtained from the accused during a custodial interrogation, it must appear affirmatively on the record that the accused was warned of the nature of the offense of which he was accused or suspected, that he had the right to remain silent, that any statement he made could be used against him, that he had the right to consult lawyer counsel and have lawyer counsel with him during the interrogation, and that lawyer counsel could be civilian counsel provided by him at his own expense or free military counsel appointed for him. After the above explanation, the accused or suspect should have been asked if he desired counsel. If he answered affirmatively, the record must show that the interrogation ceased until counsel was obtained. If he answered negatively, he should have been asked if he desired to make a statement. If he answered negatively, the record must show that the interrogation ceased. If he affirmatively indicated that he desired to make a statement, the statement is admissible against him. The record must show, however, that the accused did not invoke any of these rights at any stage of the interrogation. In all cases in which you are considering the reception in evidence of a self-incriminating statement of the accused, you should call the person who obtained the statement to testify as a witness and question him substantially as follows:

SCM: (After the routine introductory questions) Did you have occasion to speak to the accused on _____?

WIT: (Yes) (No) _____.

SCM: Where did this conversation take place, and at what time did it begin?

WIT: _____.

SCM: Who else, if anyone, was present?

WIT: _____.

SCM: What time did the conversation end?

WIT: _____.

SCM: Was the accused permitted to smoke as he desired during the period of time involved in the conversation?

WIT: _____.

SCM: Was the accused permitted to drink water as he desired during the conversation?

WIT: _____.

SCM: Was the accused permitted to eat meals at the normal meal times as he desired during the conversation?

WIT: _____.

SCM: Prior to the accused making a statement, what, if anything, did you advise him concerning the offense of which he was suspected?

WIT: (I advised him that I suspected him of the theft of Seaman Jones' Bulova wristwatch from Jones' locker in Building 15 on 21 January 20CY.)

SCM: What, if anything, did you advise the accused concerning his right to remain silent?

WIT: (I informed the accused that he need not make any statement and that he had the right to remain silent.)

SCM: What, if anything, did you advise the accused of the use that could be made of a statement if he made one?

WIT: (I advised the accused that, if he elected to make a statement, it could be used as evidence against him at a court-martial or other proceeding.)

SCM: Did you ask the accused if he desired to consult with a lawyer or to have a lawyer present?

WIT: (Yes.) (No.)

SCM: (If answer to previous question was affirmative) What was his reply?

WIT: (He stated he did (not) wish to consult with a lawyer (or to have a lawyer present).)

NOTE: If the interrogator was aware that the accused had retained or appointed counsel in connection with the charge(s), then such counsel was required to be given notice of the time and place of the interrogation.

SCM: To your knowledge, did the accused have counsel in connection with the charge(s)?

WIT: (Yes.) (No.)

SCM: (If answer to previous question was affirmative) Did you notify the accused's counsel of the time and place of your interview with the accused?

WIT: (Yes.) (No.)

SCM: What, if anything, did you advise the accused of his rights concerning counsel?

WIT: (I advised the accused that he had the right to consult with a lawyer counsel and have that lawyer present at the interrogation. I also informed him that he could retain a civilian lawyer at his own expense and additionally a military lawyer would be provided for him. I further advised him that any detailed military lawyer, if the accused desired such counsel, would be provided at no expense to him.)

SCM: Did you provide all of this advice prior to the accused making any statement to you?

WIT: (Yes.)

SCM: What, if anything, did the accused say or do to indicate that he understood your advice?

WIT: (After advising him of each of his rights, I asked him if he understood what I had told him and he said he did. (Also, I had him read a printed form containing a statement of these rights and sign the statement acknowledging his understanding of these rights.))

SCM: (If accused has signed a statement of his rights) I show you Prosecution Exhibit #2 for identification, which purports to be a form containing advice of a suspect's rights and ask if you can identify it?

WIT: (Yes. This is the form executed by the accused on _____ 20___. I recognize it because my signature appears on the bottom as a witness, and I recognize the accused's signature, which was placed on the document in my presence.)

SCM: Did the accused subsequently make a statement?

WIT: (Yes.)

SCM: Was the statement reduced to writing?

WIT: (Yes.) (No.)

SCM: Prior to the accused's making the statement, did you, or anyone else to your knowledge, threaten the accused in any way?

WIT: (Yes.) (No.)

SCM: Prior to the accused's making the statement, did you, or anyone else to your knowledge, make any promises of reward, favor, or advantage to the accused in return for his statement?

WIT: (Yes.) (No.)

SCM: Prior to the accused's making the statement, did you, or anyone else to your knowledge, strike or otherwise offer violence to the accused should he not make a statement?

WIT: (Yes.) (No.)

SCM: (If the accused's statement was reduced to writing) Describe in detail the procedure used to reduce the statement in writing.

WIT: _____.

SCM: Did the accused at any time during the interrogation request to exercise any of his rights?

WIT: (Yes.) (No.)

NOTE: If the witness indicates that the accused did invoke any of his rights at any stage of the interrogation, it must be shown that the interrogation ceased at that time and was not continued until such time as there had been compliance with the request of the accused concerning the rights invoked. If the witness testifies that he obtained a written statement from the accused, he should be asked if and how he can identify it as a written statement of the accused. When a number of persons have participated in obtaining a statement, you may find it necessary to call several or all of them as witnesses in order to inquire adequately into the circumstances under which the statement was taken.

SCM: I now show you Prosecution Exhibit 3 for identification, which purports to be a statement of the accused, and ask if you can identify it?

WIT: (Yes. I recognize my signature and handwriting on the witness blank at the bottom of the page. I also recognize the accused's signature on the page.)

SCM: (To accused, after permitting him to examine the statement when it is in writing) The Uniform Code of Military Justice provides that no person subject to the Code may compel you to incriminate yourself or answer any question which may tend to incriminate you. In this regard, no person subject to the Code may interrogate or request any statement from you if you are accused or suspected of an offense without first informing you of the nature of the offense of which you are suspected and advising you that you need not make any statement regarding the offense of which you are accused or suspected; that any statement you do make may be used as evidence against you in a trial by court-martial; that you have the right to consult with lawyer counsel and have lawyer counsel with you during the interrogation; and that lawyer counsel can be civilian counsel provided by you or military counsel appointed for you at no expense to you. Finally, any statement obtained from you through the

use of coercion, unlawful influence, or unlawful inducement, may not be used in evidence against you in a trial by court-martial. In addition, any statement made by you that was actually the result of any promise of reward or advantage, or that was made by you after you had invoked any of your rights at any time during the interrogation, and your request to exercise those rights was denied, is inadmissible and cannot be used against you. Before I consider receiving this statement in evidence, you have the right at this time to introduce any evidence you desire concerning the circumstances under which the statement was obtained or concerning whether the statement was in fact made by you. You also have the right to take the stand at this time as a witness for the limited purpose of testifying as to these matters. If you do that, whatever you say will be considered and weighed as evidence by me just as is the testimony of other witnesses on this subject. I will have the right to question you upon your testimony, but if you limit your testimony to the circumstances surrounding the taking of the statement or as to whether the statement was in fact made by you, I may not question you on the subject of your guilt or innocence, nor may I ask you whether the statement is true or false. In other words, you can only be questioned upon the issues concerning which you testify and upon your worthiness of belief, but not upon anything else. On the other hand, you need not take the witness stand at all. You have a perfect right to remain silent, and the fact that you do not take the stand yourself will not be considered as an admission by you that the statement was made by you under circumstances which would make it admissible or that it was in fact made by you. You also have the right to cross-examine this witness concerning his testimony, just as you have that right with other witnesses, or, if you prefer, I will cross-examine him for you along any line of inquiry you indicate. Do you understand your rights?

ACC: _____.

SCM: Do you wish to cross-examine this witness?

ACC: _____.

SCM: Do you wish to introduce any evidence concerning the taking of the statement or concerning whether you in fact made the statement?

ACC: _____.

SCM: Do you wish to testify yourself concerning these matters?

ACC: _____.

SCM: Do you have any objection to my receiving Prosecution Exhibits 2 and 3 for identification into evidence?

ACC: (Yes, sir (stating reasons).) (No, sir.)

SCM: (Your objection is sustained.)

--

(Your objection is overruled. These documents are admitted into evidence as Prosecution Exhibits 2 and 3.)

--

(There being no objection, these documents are admitted into evidence as Prosecution Exhibits 2 and 3.)

NOTE: If the accused's statement was given orally, rather than in writing, anyone who heard the statement may testify as to its content if all requirements for admissibility have been met.

PR 13.11. ***APPENDIX E - SAMPLE INQUIRY INTO THE FACTUAL BASIS OF A PLEA OF GUILTY TO THE OFFENSE OF UNAUTHORIZED ABSENCE***

1. **Assumption**. Assume the accused has entered pleas of guilty to the following charge and specification:

Charge: Violation of the Uniform Code of Military Justice, Article 86

Specification: In that Seaman Virgil A. Tweedy, U.S. Navy, on active duty, Naval Justice School, Newport, Rhode Island, did, on or about 5 July 20__, without authority, absent himself from his unit, to wit: Naval Justice School, Newport, Rhode Island, and did remain so absent until on or about 23 July 20__.

2. **Procedure**. The summary court-martial officer, after he has completed the inquiry indicated in the TRIAL GUIDE as to the elements of the offense, should question the accused substantially as follows:

SCM: State your full name and rank.

ACC: Virgil Armond Tweedy, Seaman.

SCM: Are you on active duty in the U.S. Navy?

ACC: Yes, sir.

SCM: Are you the same Seaman Virgil A. Tweedy who is named in the charge sheet?

ACC: Yes, sir.

SCM: Were you on active duty in the U.S. Navy on 5 July 20__?

ACC: Yes, sir.

SCM: What was your unit on that date?

ACC: The Naval Justice School.

SCM: Is that located in Newport, Rhode Island?

ACC: Yes, sir.

SCM: Tell me in your own words what you did on 5 July that caused this charge to be brought against you.

ACC: I stayed at home.

SCM: Had you been at home on leave or liberty?

ACC: Yes, sir.

SCM: Which one was it?

ACC: I had liberty on the 4th of July.

SCM: When were you required to report back to the Naval Justice School?

ACC: At 0800 on the 5th of July.

SCM: And did you fail to report on 5 July 20__?

ACC: Yes, sir.

SCM: When did you return to military control?

ACC: On 23 July 20__?

SCM: How did you return to military control on that date?

ACC: I took a bus to Newport and turned myself in to the duty officer at the Naval Justice School.

SCM: When you failed to report to the Naval Justice School on 5 July, did you feel you had permission from anyone to be absent from your unit?

ACC: No, sir.

SCM: Where were you during this period of absence?

ACC: I was at home, sir.

SCM: Where is your home?

ACC: In Blue Ridge, West Virginia.

SCM: Is that where you were for this entire period?

ACC: Yes, sir.

SCM: During this period, did you have any contact with military authorities? By "military authorities" I mean not only members of your unit, but anyone in the military.

ACC: No, sir.

SCM: During this period, did you go on board any military installations?

ACC: No, sir.

SCM: Were you sick or hurt or in jail, or was there anything which made it physically impossible for you to return?

ACC: No, sir.

SCM: Could you have reported to the Naval Justice School on 5 July 20__ if you had wanted to?

ACC: Yes, sir.

SCM: During this entire period, did you believe you were an unauthorized absentee from the Naval Justice School?

ACC: Yes, sir; I knew I was UA.

SCM: Do you know of any reason why you are not guilty of this offense?

ACC: No, sir.

CHAPTER 14

CHAPTER 14

PR 14. TRIAL BY COURTS-MARTIAL GENERALLY AND THE ARTICLE 39(a) SESSION

PR 14.1. *INTRODUCTION*

PR 14.1.1. *Types of court-martial sessions.*

There are three types of sessions which occur in a trial by court-martial with military judge and members:

PR 14.1.1.1. *Article 39(a) sessions*

- counsel, the accused, the military judge, and reporter are present, but the members are absent;

PR 14.1.1.2. *Open sessions*

- all participants, including members, are present; and

PR 14.1.1.3. *Closed sessions*

- only the court members are present to deliberate and vote on findings -- and sentence, if the accused is found guilty.

PR 14.2. *R.C.M. 802 CONFERENCE*

- Out-of-court conferences between counsel and the military judge are also authorized. These conferences may be useful for resolving administrative matters to facilitate the orderly progress of the trial.

The first part of this chapter presents a discussion of out-of-court conferences and a chronology of events in a trial with military judge and members. The second part details the events that occur in an Article 39(a) session.

PR 14.2.1. *CONFERENCES*

A. At the request of any party, or on his own motion, the military judge may order one or more out-of-court conferences to consider matters, the resolution of which would promote a fair and expeditious trial. These conferences may be held at any time after referral and may occur both before and during trial. The purpose of such a conference would be to inform the military judge of anticipated issues and to resolve matters upon which all parties can agree. Litigation of issues is not envisioned or permitted since no party can be compelled to settle a trial issue at this forum.

The following matters might be discussed:

1. Scheduling difficulties, so that witnesses and members are not inconvenienced;

2. matters within the military judge's discretion, such as:

   a. conduct of voir dire; or

   b. seating arrangements in the courtroom; and

3. anticipated issues or problems likely to arise at trial, such as unusual motions or objections.

In addition, the parties may agree to resolve triable issues. A witness request, for example, if litigated and approved at trial, could delay the proceedings and involve expense and inconvenience. Such an issue could be resolved at a pretrial conference by an agreement between the parties. R.C.M. 802 makes clear, however, that the military judge may not issue a binding ruling at the conference. Any resolution must be by mutual agreement. As stated in R.C.M. 802(c), "No party may be prevented under this rule from presenting evidence or from making any argument,

objection, or motion at trial."

B. There is no particular procedure or method prescribed for a conference under R.C.M. 802. It may be conducted by radio or telephone, for that matter, and the presence of the accused is neither required nor prohibited. The conference need not be made a part of the record of trial, but matters agreed upon at the conference shall be included in the record either orally or in writing. No admissions made by the accused or counsel shall be used against the defense unless reduced in writing and signed by both the accused and counsel.

PR 14.3. *CHRONOLOGY OF EVENTS AT TRIAL*

PR 14.3.1. *Preliminary formalities.*

All trials, whether ultimately to be heard before the members or by judge alone, commence with an Article 39(a) session.

PR 14.3.1.1. *Calling the session to order.*

This is done by the military judge.

PR 14.3.1.2. *Announcement of the convening of the court and referral of charges.*

This is normally done by the TC, who refers to the convening order, any modifications thereto, and indicates the date of service of charges upon the accused.

PR 14.3.1.3. *Announcement of persons present at the Article 39(a) session.*

The persons involved include counsel, military judge, members, and the accused. If the orders detailing the military judge and counsel have not been reduced to writing, an oral announcement of such detailing is required. The convening order will detail the members.

PR 14.3.1.4. S*wearing of the reporter, if not previously sworn.*

Article 42(a), UCMJ, sets forth the requirement for swearing the reporter. Section 0130d(3)(a) of the JAGMAN prescribes that a reporter may be given a one-time oath. Coast Guard reporters are detailed in accordance with MJM, 3.H.5.

PR 14.3.1.5. *Counsel qualifications and status.*

a. Affirmation by TC of the qualifications and status as to oaths of all members of the prosecution.

b. Statement by defense counsel of his or her qualifications and status as to oaths and introduction of individual military counsel and / or civilian counsel.

PR 14.3.1.6. *Advisement of rights to counsel.*

A personal inquiry by the military judge of the accused to determine whether the accused understands his rights to counsel as set forth in Article 38(b), UCMJ, and R.C.M. 901(d)(4).

PR 14.3.1.7. *Swearing of court personnel.*

Swearing of military judge and detailed counsel, if not sworn previously. Individual military counsel who is not certified in accordance with Article 27(b), UCMJ, and/or civilian counsel, must be sworn in each case.

PR 14.3.1.8. *Statement of the charges.*

The stating by TC of the general nature of the charges.

PR 14.3.1.9. ***Challenge of the military judge.***

Disclosure of grounds for challenge of the military judge and challenge of the military judge for cause, if any.

PR 14.3.1.10. ***Forum selection.***

Inquiry by the military judge of the accused to determine that the accused understands his right to request trial by military judge alone. If the accused is enlisted, a determination by the military judge that the accused understands his right to request that at least one-third of the membership of the court be enlisted persons.

PR 14.3.2. ***Additional proceedings heard at an Article 39(a) session.***

If a request for trial by military judge alone is granted, the military judge will declare that the court is assembled. If there is no request, or if a request is disapproved, assembly will occur at the first session of court with members present.

PR 14.3.2.1. ***Arraignment.***

Arraignment procedure includes the reading of the charges by TC, unless waived by the accused, and stating the information from page 2 of the charge sheet as to preferral, referral, and service of the charges on the accused.

a. If service is within three days of the trial by special court-martial, or within five days of the trial by general court-martial, an accused may object to proceeding with the trial until these statutory periods have run.

b. Arraignment is complete when the accused is called upon to plead by the military judge.

PR 14.3.2.2. ***Motions.***

Prior to receiving the pleas of the accused, he is given the opportunity to present post-arraignment motions, either to seek dismissal of any charge and specification or for other appropriate relief.

PR 14.3.2.3. ***Entry of pleas.***

Entry of the pleas of the accused.

PR 14.3.2.4. ***Providency Inquiry.***

If the accused pleads guilty to any offense, including any lesser included offense (LIO), the judge conducts an inquiry into the voluntariness of the accused's plea. Whether or not the judge enters findings at this stage depends on whether the government will be presenting evidence on the merits (for instance, where the accused has plead guilty to an LIO and the government intends to prove the greater offense alleged).

PR 14.3.2.5. ***Miscellaneous concerns.***

The military judge may also resolve other evidentiary and procedural matters at the Article 39(a) session to expedite the subsequent trial on the merits.

PR 14.3.3. ***Convening the court with members at the conclusion of the Article 39(a) session.***

1. Once the members are seated, certain preliminaries are repeated (calling of the court to order, announcement of convening of the court, and persons present, etc.).

2. Swearing of the members of the court.

3. Announcement of the assembly of the court.

4. Introductory remarks and preliminary instructions by the military judge concerning the duties of the court members.

5. Voir dire and challenges of court members by counsel.

6. Announcement by the military judge of the prior arraignment and pleas of the accused.

PR 14.3.4. ***Trial on the merits***

1. Opening statements by counsel.

2. Presentation of evidence by counsel.

3. Final argument of counsel.

4. Instructions on findings by the military judge.

5. Closing the court for deliberations and voting by the members on the issue of the guilt or innocence of the accused.

6. Announcement, in open court, of the findings of the court members.

PR 14.3.5. ***Sentencing procedure.***

1. Matters presented by the prosecution.

a. Service data concerning the accused from the first page of the charge sheet.

b. Personal data relating to the accused and of the character of the accused's prior service as reflected in the personal records of the accused.

c. Evidence of previous convictions.

d. Matters in aggravation.

e. Evidence of rehabilitative potential.

2. Advice by the military judge concerning the accused's rights to make a sworn or unsworn statement in mitigation and extenuation or to remain silent. This advice, called the allocution rights, must be given, but failure to give complete advice is not necessarily prejudicial error.

3. Presentation of matters in extenuation and mitigation by the defense.

4. Arguments of counsel on sentence.

5. Instructions on sentence and voting procedure by the military judge.

6. Closing the court for the members to deliberate and vote on sentence.

7. Announcement in open court of the sentence arrived at by the members.

PR 14.4. *THE ARTICLE 39(a) SESSION.*

Article 39(a), UCMJ, provides that the military judge may call the court into session, without the members being present, any time after the service of charges, subject to the limitations of Article 35, UCMJ. R.C.M. 803 makes it clear that the Article 39(a) session is a part of the trial and not a pretrial conference as is provided for in R.C.M. 802. The following sections will deal primarily with Article 39(a) sessions called by the military judge to dispose of matters prior to assembly of the court. However, the military judge may call Article 39(a) sessions at any stage of the trial to hear motions or other matters out of the presence of the court members. For example, arguments on

objections and challenges, the giving of the allocution rights, and the preparation of instructions for the members normally take place during specially called Article 39(a) sessions. Further, R.C.M. 803 and 1102 provide that Article 39(a) sessions may be held after the announcement of sentence in order to dispose of matters raised by reviewing authorities—such as questions of jurisdiction or allegations of misconduct by trial participants. In *United States v. Reynolds*, the court held that a military judge erred in conducting an Article 39(a) session over the telephone, however footnote 4 of the opinion leads us to believe that video-teleconferencing may very well be permissible.

PR 14.5. *PRESENCE OF THE ACCUSED AND PUBLIC TRIAL*

Article 39(a) requires that all proceedings of the court, except the deliberations and voting by the members, be conducted in the presence of the accused. The right of the accused to be present, however, may be waived.

PR 14.5.1. *Trial in absentia.*

a. R.C.M. 804(b) provides:

The further progress of the trial to and including the return of the findings and, if necessary, determination of a sentence shall not be prevented and the accused shall be considered to have waived the right to be present whenever an accused, initially present: (1) Is voluntarily absent after arraignment (whether or not informed by the military judge of the obligation to remain during the trial) . . . .

b. In *United States v. Cook*, the accused was arraigned and entered pleas of guilty to UA. The military judge rejected the pleas when the issue of the accused's mental condition was raised. The case was continued to inquire into the accused's sanity. When the court reconvened, the accused was an unauthorized absentee. The military judge directed that the trial continue. The C.M.A. reversed, saying that the military judge had erred in not exploring the issue of the voluntariness of the accused's absence in light of the evidence concerning the issue of the accused's mental responsibility at the time. In remanding, the C.M.A. stated that a factual hearing at the trial level with accused and his counsel present could be had to determine whether the absence of the accused was voluntary.

c. In *United States v. Staten*, the accused voluntarily absented himself between the end of his trial and the ordering of a rehearing on the sentence. A rehearing on the sentence was convened in the absence of the accused on the theory that the rehearing was a continuation of the original trial. The C.M.A. held that the provisions of permitting trial in absentia apply only to the original proceedings and that a rehearing on sentence was not part of the original trial to the extent that the rehearing on sentence could not be held without the accused being present when he absented himself prior to the ordering of the rehearing. In *United States v. Peebles*, the accused had been released from confinement and from military control; the defense counsel had lost contact with him, and nothing in the record indicated that the accused had been notified of the date of the rehearing. Under these circumstances, the court held that the accused's absence was not voluntary, and the rehearing should not have proceeded in his absence.

d. In *United States v. Houghtaling*, C.M.A. approved a trial in absentia where, after arraignment, the accused escaped from confinement and his whereabouts were unknown at the time that the case was ordered to proceed.

e. Implicit in all of the above decisions is one fundamental prerequisite to any trial in absentia: The government must make a showing that the absence is in fact unauthorized and voluntary. This can be accomplished by appropriate service record entry or by witness testimony establishing efforts made to locate an accused; however, the record must establish sufficient government evidence as to the voluntary nature of the absence. The court cannot rely on defense counsel's assertions in an 802 conference that the accused was notified of the proper trial date.

f. In *United States v. Knight*, the Army court held that an accused's absence is not voluntary if he is confined in a civilian jail even though the incarceration was due to his own misconduct.

PR 14.5.2. ***Temporary absence from trial***

a. In *United States v. Goodman*, a Navy Board of Review found waiver where the accused was excused during the testimony of a medical witness concerning the mental condition of the accused. The witness testified that the best interest of the accused would be served if he was excluded, and his counsel expressly waived his presence.

b. The right of an accused to be present during all phases of his trial is found in the sixth amendment. When an accused is in custody, there is a substantial question as to whether he may voluntarily waive his presence.

PR 14.5.3. ***Disruptive accused.***

Removal of a disruptive accused from the courtroom is not violative of the accused's sixth amendment rights. The Supreme Court stated that there are three constitutionally permissible means for a trial judge to handle a disruptive accused: ". . . (1) bind and gag. . .; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly." R.C.M. 804(b) also permits removal because of disruptive behavior. R.C.M. 804(c)(3), however, states that physical restraint shall not be imposed on the accused during open sessions of the court-martial unless ordered by the military judge. The discussion following R.C.M. 604(b) provides practical guidance for dealing with disruptive accuseds.

PR 14.5.4. ***Proper appearance of the accused.***

R.C.M. 804(c) provides that the accused will be properly attired in the uniform prescribed by the military judge or president of the court without a military judge. An accused will wear the insignia of his rank or grade and may wear any decorations, emblems, or ribbons to which he is entitled. The responsibility for being properly attired rests with the defense; however, upon request, the accused's commander shall render such assistance as may be reasonably necessary to ensure the accused's proper attire.

a. In *United States v. Rowe*, the C.M.A. reversed where the record failed to show that the court was aware of the accused's Vietnam service. This decision was based upon the previous MCM, which placed greater responsibility upon the government to ensure the accused's proper attire. The case may have been decided differently under current rules.

b. In *United States v. Scoles*, the C.M.A. found that the president of the court had abused his discretion in ordering the accused to wear fatigues to facilitate the identification of the accused at trial.

PR 14.5.5. ***The right to a public trial.***

A public trial is a substantial right guaranteed an accused by the sixth amendment. R.C.M. 806 incorporates portions of the Military Rules of Evidence to limit the use of closed sessions only when necessary to determine admissibility of a victim's past sexual behavior, to hear classified information when its disclosure would be detrimental to national security, or to prevent disclosure of government information when such disclosure would be detrimental to the public interest. A comprehensive discussion and citations of authority on this issue can be found in *United States v. Grunden*. R.C.M. 806 codified the military judge's power to issue orders (protective orders) limiting trial participants' extrajudicial statements that present a substantial likelihood of material prejudice to a fair trial by impartial members.

PR 14.6. ***INQUIRIES BY THE MILITARY JUDGE PRIOR TO ARRAIGNMENT***

PR 14.6.1. ***Accused's understanding of his rights to counsel.***

PR 14.6.1.1. ***The Donohew inquiry.***

The accused may waive any or all of his rights to the various types of counsel under Article 38(b), UCMJ. It is the responsibility of the trial judge to ensure that any such waiver is knowing and voluntary. Prior to accepting a waiver, therefore, he must inquire into the accused's understanding of his rights under Article 38(b). The inquiry must be made personally (i.e., not through the defense counsel) and it is required even where the accused is represented by a lawyer.

2. The *Donohew* inquiry has been incorporated into R.C.M. 901(d)(4), which requires that each of the following rights be explained to the accused:

a. The right to be represented by military counsel detailed to the defense;

b. the right to a civilian lawyer provided at the accused's own expense, subject to reasonable limitations;

c. the right to individual military counsel of his choice, if reasonably available, free of charge; and

d. the right, if granted individual military counsel, to request retention of detailed counsel as associate counsel. The request may be granted or denied in the sole discretion of the detailing authority.

3. The inquiry into each of the above rights should consist of three basic parts:

a. The advice as to the counsel rights as explained by the military judge;

b. personal acknowledgement of understanding by the accused; and

c. personal indication of waiver or nonwaiver by the accused.

The C.M.A. has condemned the practice of conducting a *Donohew* inquiry "en masse." Other courts have also condemned the practice, but will test for prejudice to ensure that the proper advice was given. In a joint or common trial where two or more accused are represented by the same lawyer, the military judge should ensure that each accused understands his right to effective assistance of counsel, including the right to separate representation.

PR 14.6.2. ***Accused's request to be tried by military judge alone.***

PR 14.6.2.1. ***Requirements for trial by military judge alone.***

Under Article 16, trial by military judge alone is permitted if:

a. A military judge has been detailed to the court; and

b. before the end of the initial Article 39(a) session, or, in the absence of such a session, before assembly, the accused, knowing the identity of the military judge and having consulted with defense counsel, makes written or oral request for trial by military judge alone; and

c. the military judge approves. Although the military judge's decision is a matter within his discretion, the request should be approved unless a substantial reason exists for denying it. The basis of any denial must be made a matter of record.

PR 14.6.2.2. ***Capital cases.***

A general court-martial composed of a military judge alone does not have jurisdiction to try a capital case.

PR 14.6.2.3. ***Timeliness of request.***

Article 16, UCMJ, requires the request to be made prior to assembly. Request may be made prior to trial, at an Article 39(a) session held prior to assembly, or at trial after the military judge has called the court to order but prior to announcement of assembly. If the accused has not made a request for trial by military judge alone prior to trial, the military judge should inform the accused of this right prior to assembly. Although the request should be timely, the C.M.A. indicated, in *United States v. Morris*, that the military judge could approve such a request even after assembly. R.C.M. 903(e) is in accord and states, ". . . the military judge may until the beginning of the introduction of evidence on the merits, as a matter of discretion, approve an untimely request . . ."

PR 14.6.2.4. ***Voir dire before request is made.***

Defense counsel has an opportunity to voir dire the military judge before making a request for trial by military judge alone.

PR 14.6.2.5. ***Inquiry into request.***

Where the accused has requested trial by military judge alone, the military judge should determine whether it is understandingly made. The C.M.A. has held, however, that failure of the military judge to make such a determination is ordinarily not reversible error in the absence of objection.

PR 14.6.2.6. ***Ruling on the request.***

The accused does not have an absolute right to trial by military judge alone, since Article 16, UCMJ, and R.C.M. 903(c) make such request subject to approval by the military judge. Neither the UCMJ nor the Rules for Court-Martial provide guidelines respecting the exercise of the military judge's discretion. The discussion following R.C.M. 903(c)(2)(B), however, indicates that the request should be granted unless there is a substantial reason why, in the interest of justice, the military judge should not sit as fact-finder. The military judge may hear argument from either counsel on the issue. The discussion also indicates that, if the request is denied, the basis for the denial must be stated on the record. In *United States v. Ward*, the military judge stated on voir dire that he had a favorable impression of the credibility of a person who was expected to be called as a witness for the defense. The judge declined to recuse himself at the request of the TC, then he denied the accused's request for trial by military judge alone. The C.M.A. affirmed, noting that the right to trial by military judge alone is not absolute and holding that the trial judge had not abused his discretion. Later, the court noted in *United States v. Bradley*, that the military judge must recuse himself or disapprove the request for trial by judge alone after the military judge has allowed the accused to withdraw his guilty pleas, which pleas had been accepted and findings of guilty entered. In *United States v. Sherrod*, the court ruled that, when the military judge is disqualified to sit as judge alone, he is also disqualified to sit with members. Reading *Bradley* and *Sherrod* together, a military judge who has accepted guilty pleas of an accused, enters findings of guilty, and later permits withdrawal of those pleas, must recuse himself.

PR 14.6.2.7. ***Withdrawal of the request.***

R.C.M. 903(d)(2) indicates that a request for military judge alone may be withdrawn by the accused as a matter of right any time before it is approved or, even after approval, if there is a change of the military judge. R.C.M. 903(e), however, states that a military judge, in his discretion, may approve an untimely withdrawal request until the beginning of the introduction of evidence on the merits. Situations have existed where the judge was held to have abused his discretion in denying the request to withdraw. In *United States v. Thomas*, C.M.A. found no abuse of discretion when the military judge refused to allow the defense to withdraw its request for trial by judge alone. The request was motivated solely by a change in trial tactics.

PR 14.6.3. ***Request for enlisted representation.***

1. Part of the advice given to an enlisted accused concerning choice of forum includes an explanation of the right to be tried by a court-martial composed, in part, of enlisted members. A request for enlisted members may be made in writing or orally.

2. If the accused indicates that he does not wish enlisted representation, the Article 39(a) session proceeds.

3. If the accused desires enlisted representation, the court may not be assembled unless at least one-third of the members actually sitting on the court are enlisted persons or unless the convening authority has directed that the trial proceed in the absence of enlisted members.

4. Article 25(c), UCMJ, provides that any enlisted member on active duty with the armed forces is eligible to serve on GCM's and SPCM's for the trial of any enlisted accused provided he is not a member of the same unit as the accused and provided the accused has personally requested, prior to assembly, that enlisted members serve on the court. R.C.M. 912(f)(4) indicates that the requirement that enlisted members be from a unit other than that of the accused may be waived by a failure to object.

5. One-third of the membership must be enlisted personnel unless eligible enlisted members cannot be obtained because of physical conditions or military exigencies. In such a case, the convening authority must make a detailed written statement to be appended to the record stating why they could not be obtained.

6. Article 25(c)(1) provides that the right of the accused to request enlisted representation may be cut off if there has been no request before the conclusion of an Article 39(a) session held prior to trial or, in the absence of such a session, before the court is assembled.

7. As a matter of right, the accused may withdraw a request for enlisted members anytime before the end of the initial Article 39(a) session, or, in the absence of such a session, before assembly. In the military judge's discretion, an accused may be permitted to withdraw a request until the beginning of the introduction of evidence on the merits. In exercising his discretion, the military judge should balance the reason for the untimely withdrawal request against any expense, delay, or inconvenience which could result from approving the withdrawal.

PR 14.7. *PLEAS BEFORE COURTS-MARTIAL*

PR 14.7.1. *Types of pleas.*

Generally, the accused may plead as follows: guilty; not guilty to an offense as charged, but guilty of a named LIO; guilty with exceptions, with or without substitutions, not guilty of the exceptions, but guilty of the substitutions, if any; or not guilty.

1. The term “irregular pleading" includes such contradictory pleas as guilty without criminality (nolo contendere) or guilty to a charge after pleading not guilty to all specifications under the charge. When a plea is ambiguous, the military judge shall have it clarified before proceeding further.

2. Entry of a plea is not a jurisdictional prerequisite for trial. In *United States v. Taft*, the accused was arraigned and presented several motions at the conclusion of which TC proceeded to put on the government's case. The C.M.A. held that the provisions of Article 45(a), UCMJ, were intended to ensure trial on the merits when the accused failed to plead rather than to set up an indispensable prerequisite to the exercise of jurisdiction.

PR 14.7.2. *General effect of pleas.*

The entry of any plea, guilty or not guilty, is regarded as a waiver of any matter which should have been, but was not raised by motion under the provisions of R.C.M. 905(b)(1) and 906. If the accused stands mute, there is no waiver.

PR 14.7.3. *Conditional pleas.*

Upon obtaining the approval of the military judge and the consent of the government, the accused may enter a conditional guilty plea, reserving in writing the right, on review or appeal, to obtain review of an adverse determination as to any specified pretrial motion. If the accused prevails on review as to that pretrial motion, the accused will be permitted to withdraw the guilty plea. The TC is authorized to consent to a conditional plea on behalf of the government.

PR 14.7.4. *Guilty pleas.*

PR 14.7.4.1. *When permissible.*

a. A plea of guilty may not be received as to any offense for which the death penalty may be adjudged; such a plea may be received to a noncapital LIO.

b. The court may not accept a plea of guilty without determining that it was understandingly and voluntarily made; that is, that the plea is "provident." The "record of trial must reflect the basis for the refusal . . . .”

c. The court should not receive a plea of guilty when the accused has refused counsel. R.C.M. 910(c)(2), discussion.

PR 14.7.4.2. ***Meaning and effect.***

A plea of guilty admits every element charged and every act or omission alleged. It authorizes conviction of the offense without further proof. A plea of guilty does not, however, admit the jurisdiction of the court or the sufficiency of the specifications. A plea of guilty waives the right against self-incrimination, the right to a trial on the merits, and the right to confront and cross-examine witnesses. Any admission or waiver involved in a plea of guilty has effective existence only so long as the plea stands (i.e., it cannot be used against the accused if the plea is later rejected). Even though the accused pleads guilty, the prosecution may introduce evidence of the circumstances surrounding the offense.

PR 14.7.4.3. ***Where guilty plea constitutes waiver.***

A voluntary plea of guilty waives non-jurisdictional defects occurring in earlier stages of the trial.

a. The C.A.A.F. has held consistently that a plea of guilty following the denial of a motion to suppress evidence waives the right to a review of the ruling on appeal. Additionally, there is no requirement that a military judge advise the accused that such a waiver will ensue as a consequence of his plea of guilty.

b. R.C.M. 707(e) reads, "except as provided in R.C.M. 910(a)(2), a plea of guilty which results in a finding of guilty waives any speedy trial issue as to that offense." This change overturned a line of cases where the C.M.A. held that a guilty plea did not waive an erroneous denial of speedy trial.

PR 14.7.4.4. ***Where guilty plea is not waiver.***

A guilty plea does not waive an objection to the validity of findings not predicated upon a plea of guilty or as to the sentence.

PR 14.7.4.5. ***Withdrawal of plea.***

After a plea of guilty has been entered, but before it has been accepted, the accused has a right to change his plea to not guilty. After the plea has been accepted, the accused may withdraw his plea up until the time sentence is announced if the military judge, in his discretion, permits him to do so.

PR 14.7.5. ***Procedure for determining providency of guilty plea:***

the *Care* inquiry. R.C.M. 910 provides that, before a plea of guilty may be accepted, the military judge (or president of an SPCM without military judge or SCM) must determine, by personal inquiry of the accused, whether the plea is provident (i.e., voluntary and intelligent).

1. The inquiry must be personally conducted by the military judge. The military judge must elicit the personal response of the accused.

2. In *United States v. Care*, the C.M.A. prescribed standards for conducting this inquiry which have since been adopted by R.C.M. 910. The *Care* inquiry is applicable to all types of courts-martial and consists of an explanation and inquiry concerning the following:

a. The accused's understanding of his right to plead not guilty and place the burden of proving his guilt beyond a reasonable doubt on the prosecution, whether or not the accused believes himself to be guilty;

b. the accused's understanding that he can be convicted on his plea alone, without the necessity of other evidence;

c. the accused's understanding that he should plead guilty only if he believes he is guilty and should not permit any other consideration to influence him;

d. the accused's understanding that he gives up certain rights by his guilty plea:

(1) the right against self-incrimination;

(2) the right to be tried by a court-martial—however, a failure to so advise held not prejudicial in some circumstances; and

(3) the right to confront and cross-examine witnesses against him;

e. the accused's understanding of the elements of the offense and that he admits each of them by his plea;

f. the accused's personal statement, under oath, as to the facts constituting the offense which form the basis for each of the elements his plea admits;

g. the accused's understanding of the maximum punishment which can be imposed for the offense to which he is pleading guilty, and the effect of any applicable escalator clause;

h. the accused's understanding that the maximum punishment can be imposed;

i. whether the accused has discussed the meaning and effect of his plea with defense counsel;

j. the accused's understanding of any pretrial agreement pursuant to which he is pleading guilty;

k. whether the decision to negotiate a plea originated with the accused;

l. whether anyone has used force or coercion to make the accused plead guilty;

m. whether the accused believes it is in his own best interest to plead guilty;

n. whether the accused's plea is the product of his own will and a desire to confess his guilt;

o. the accused's understanding that he may withdraw his plea at any time before sentence is announced in the discretion of the court; and

p. the inquiries listed in subparagraphs (j) and (k), *supra*, may not be inquired into by the president of an SPCM without military judge.

3. *Conclusion of inquiry.* Based upon the foregoing inquiry and whatever additional inquiry is deemed necessary, the military judge should make a finding that the accused has made a knowing, conscious waiver of his rights before accepting the plea.

The C.M.A. held, in *United States v. Richardson*, that it was prejudicial error for a military judge to consider information elicited from the accused during the *Care* inquiry in assessing a punishment. Without expressly overruling *Richardson*, the court held, in *United States v. Holt*, that an accused's sworn testimony during providency can be offered by the government in sentencing as evidence "directly relating to the offenses" under R.C.M. 1001(b)(4). Testimony by the accused as to uncharged misconduct can be objected to by the defense counsel and should properly be disallowed.

For a verbatim example of a *Care* inquiry, see MCM (2005 ed.), app. 8. Because of continuing developments in this area, the latest case law must be consulted in addition to any trial guide.

PR 14.7.6. *Problems encountered in determining providency*

PR 14.7.6.1. *The "substantial misunderstanding" cases.*

As stated previously, the maximum authorized punishment must be explained to the accused. However, not all misadvice as to the maximum punishment results in an improvident plea. To render a guilty plea improvident, the erroneous advice must cause the accused to labor under a substantial misunderstanding as to the sentence he can receive.

a. *Punitive discharge.* In *United States v. White*, the accused was advised he could be sentenced to a bad-conduct discharge (BCD) and confinement for six months. In fact, no discharge was authorized and the maximum confinement authorized was four months. The C.M.A. summarily characterized the error as being substantial and held the accused's pleas were improvident. In *United States v. Santos*, the accused pleaded guilty pursuant to a pretrial agreement which provided, inter alia, that any punitive discharge adjudged would be suspended for one year. The accused was sentenced to a bad-conduct discharge, which the convening authority suspended in accordance with the agreement. The accused was then processed for an administrative discharge. On appeal, N.C.M.R. held that the accused's guilty pleas had been improvidently entered since the accused believed that he would be allowed to serve in the Navy for the one-year probationary period and earn remission of his discharge. The court noted it had no jurisdiction to halt the accused's processing for administrative separation from the service, but held that, because of the misunderstanding, his pleas must be set aside to satisfy basic notions of fundamental fairness.

b. *Forfeitures and fines.* In *United States v. Brown*, the accused was correctly advised of the maximum amount of pay he could be sentenced to forfeit, but was not informed he could be sentenced to pay a fine as an alternative. The C.M.A. held the difference between the two was not substantial and affirmed.

c. *Confinement.* It is often difficult to determine the maximum term of confinement authorized because two or more offenses may be multiplicious for purposes of determining the maximum authorized punishment. For providency purposes, it is sufficient to note that the multiplicity issue often results in the accused being incorrectly advised of the maximum sentence to confinement which he could receive.

(1) *Substantial misunderstandings.* In the following cases, it was held that the accused's pleas of guilty were based on a substantial misunderstanding as to the authorized term of confinement and were, therefore, improvident:

United States v. Lynch, -- life versus 10 years;
United States v. Bowers, -- 30 years versus 15 years;
United States v. Harden, -- 20 years versus 10 years;
United States v. Castrillon-Moreno, --10 years versus 2 years
United States v. Dowd, -- 7 years versus 2 years.

(2) *Insubstantial misunderstandings*

(a) In *United States v. Muir*, C.M.A. held that, even though the military judge improperly informed the accused that the maximum confinement was 2 years versus 1 year, the advice was not a substantial variation requiring invalidation of guilty pleas.

(b) In *United States v. Saulter*, the accused was advised he could be sentenced to confinement for 30 years; on appeal, it was determined he could have been sentenced to only 12 years. N.C.M.R. distinguished *United States v. Harden, supra*, and affirmed. N.C.M.R. acknowledged that the difference between 30 years and 12 is substantial, but found no fair risk of prejudice to the accused since he was sentenced to 2 years, he had a pretrial agreement limiting confinement to 2 years, and, as part of the pretrial agreement, the convening authority withdrew eight specifications from the court-martial. The court found, in effect, that the accused would have pleaded guilty to obtain the benefits of his agreement, even had he been advised that he could be sentenced to 12 years of confinement.

(c) In *United States v. Frangoules*, where all parties (MJ, TC, DC, and accused) were apparently in disagreement as to the maximum confinement authorized because of multiplicious offenses, the C.M.A. found the pleas provident since the accused was still willing to plead guilty regardless of the ultimate decision as to the legal maximum. (There was a pretrial agreement limiting confinement to 1 year, with provision for part of the year to be suspended.)

PR 14.7.6.2. ***The sanity issue.***

Where there is an indication that the accused is or has been insane, the military judge must inquire into the matter. This is true even though defense counsel does not wish to raise insanity as a defense.

PR 14.7.6.3. ***Cases where accused desires to plead guilty although maintaining innocence.***

In *North Carolina v. Alford*, the petitioner had pleaded guilty to second-degree murder to avoid capital punishment. Upon trial judge's inquiry into his plea, Alford denied his guilt but persisted in his plea. The Supreme Court held that a person may knowingly, voluntarily, and understandingly submit to imposition of a prison sentence without admitting guilt. The Court believed Alford's choice to avoid trial and thereby limit his exposure to punishment to be quite reasonable in view of the strong evidence against him. The *Alford* decision means that the Constitution permits acceptance of a guilty plea where the accused asserts his innocence; it does not mean that the Constitution requires it nor that it is acceptable under the UCMJ.

Article 45(a), UCMJ, specifically requires the court to reject a guilty plea where the accused claims innocence. There is little doubt that this provision is valid despite *Alford* because the Supreme Court made it clear that an accused had no constitutional right to plead guilty.

PR 14.7.7. ***Matters inconsistent with guilty plea.***

After a plea of guilty has been accepted, the accused, in his testimony or otherwise, may make a statement which is inconsistent with his plea. If this occurs (and it frequently does) during the accused's testimony (sworn or unsworn) prior to sentence, the court must conduct an additional inquiry into the providence of the plea. This inquiry consists of the following:

1. The court should explain the inconsistent matter to the accused;

2. the court should give the accused a chance to explain the inconsistency or withdraw it; and

3. if the accused does not explain the inconsistency or withdraw the statement, the court must change his plea to not guilty, and the trial will proceed as if the accused had pleaded not guilty.

The court should not immediately change the plea to not guilty without giving the accused a chance to explain or withdraw the inconsistency.

An adequate *Care* inquiry into the factual basis for the plea will ordinarily eliminate the possibility of subsequent inconsistent statements. In those instances where it does not, the court should resolve any doubts about further inquiry in favor of conducting the inquiry.

What is inconsistent? Whether or not a statement is inconsistent is determined on the basis of the substantive law as to the elements of the offense. The test is whether the statement tends to negate any essential element or raise an affirmative defense. If, in a bench trial, the military judge decides to change the plea to not guilty because of an inconsistency arising after findings, he must recuse himself. If the determination to change the plea occurs before findings, no such action is required. However, a military judge may not arbitrarily reject a guilty plea. In *United States v. Penister*, the accused was found to have raised no inconsistency when he pleaded a lack of recollection of key events, but was convinced as to their reliability by other evidence.

PR 14.7.8. ***Entry of findings.***

1. If the accused pleads guilty and the military judge determines that his plea is provident, he may accept the plea and find the accused guilty in accordance with it. In this event, the military judge informs the court that the accused has been found guilty and the court proceeds with the sentencing stage of the proceedings. Where the accused has pleaded guilty to a LIO and the prosecution intends to try to prove his guilt of the greater offense, the military judge should not enter a finding as to the LIO; rather, he should inform the members of the accused's plea and instruct them that the plea of guilty establishes all elements of the LIO without the necessity of further proof.

2. If the accused has pleaded guilty to some specifications but not others, the military judge should consider, and solicit the views of the parties, whether to inform the members of the offenses to which the accused has pleaded guilty. It is ordinarily appropriate to defer informing the members of the specifications to which the accused has pleaded guilty until after findings on the remaining specifications are entered.

3. At an SPCM without a military judge, entry of a plea, acceptance of the plea, and findings of guilt are held in open court in the presence of all members. The president of an SPCM without a military judge may find the accused guilty upon acceptance of his plea without closing the court to vote.

PR 14.7.9. ***Confessional stipulations.***

A confessional stipulation is a stipulation entered into by the accused which amounts to a confession of guilt as to the specification concerned. It is sometimes used by the defense after entering a plea of not guilty. Strategically, this preserves many of those issues normally waived by a plea of guilty while permitting the accused to throw himself upon the mercy of the court, as well as make it possible to negotiate a pretrial agreement. The discussion following R.C.M. 811(c) states:

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

This portion of the discussion following R.C.M. 811(c) adopts the rule established in *United States v. Bertelson*.

PR 14.7.10. ***Military judge's role in plea bargaining process.***

Pretrial agreements are negotiated between the accused and the convening authority, and the trial judge should not intervene in the plea bargaining process. *United States v. Caruth*, discusses the dangers inherent in discussing a case with the judge prior to trial.

CHAPTER 15

CHAPTER 15

PR 15. REVIEW OF COURTS-MARTIAL

PR 15.1. *INTRODUCTION*

The review of courts-martial can be divided into two distinct areas: post-trial processing and appellate review. Post-trial processing includes such functions as: recording the results of trial; promulgation, authentication and distribution of the record of trial; clemency submissions by the accused; recommendations by the staff judge advocate and/or legal officer; and, the convening authority's action. Appellate review includes such functions as: judge advocate review; review in the Office of the Judge Advocate General; review by the Courts of Criminal Appeal; review by the United States Court of Appeals for the Armed Forces; and, review by the United States Supreme Court. This chapter will cover both areas and highlight the rules and case law impacting on the subject matter in each area. The nature and extent of the review of a case depends on such factors as the type of court-martial [i.e., summary (SCM), special (SPCM), or general court-martial (GCM)], the findings, the sentence, and the accused's inclination to petition for discretionary appellate review. This chapter does not concern government appeal or petitions for extraordinary relief.

PR 15.2. *REPORT OF RESULTS OF TRIAL*

PR 15.2.1. *General.*

Immediately following the final adjournment of a court-martial, the TC (TC) must notify the accused's immediate commander, the convening authority (CA) or the convening authority's designee and, if appropriate, the officer-in-charge of the confinement facility of the results of trial. Appendix A-1-j(1) of the JAGMAN contains the prescribed form for the results of trial.

PR 15.2.2. *Necessity.*

The report of the results of trial is important for several reasons: first, it is the only evidence that the trial actually took place and what the outcome of the trial was until the record of trial is produced; second, the convening authority is required to consider the results of trial before taking his action; and third, it is the only official document that can be used to execute forfeitures and/or reduction in rate in accordance with Articles 57, 58a and 58b of the Uniform Code of Military Justice (UCMJ).

PR 15.3. *RECORDS OF TRIAL*

PR 15.3.1. *Types of records of trial.*

When proceedings at the trial-court level are completed, a record of trial **must** be prepared. If the accused has been acquitted, found not guilty only by reason of lack of mental responsibility, or if the charges were withdrawn or dismissed prior to findings, the record of trial consists only of the original charge sheet, a copy of the convening order, and sufficient information to establish jurisdiction over the person and the offense(s)—if not shown on the charge sheet. When the trial has resulted in conviction, the contents of the record of trial are dictated by the type of court-martial and the adjudged sentence. The record of trial by a SPCM which did not adjudge a bad-conduct discharge (BCD), confinement for more than six months, or forfeiture of pay for more than six months, need contain only a summarized report of the proceedings and testimony. All other Special Courts-Martial will require a verbatim record of trial. The record of trial for a GCM must be verbatim if any part of the sentence adjudged includes more than six months confinement, forfeiture of pay of greater than two-thirds pay per month, any forfeiture of pay for more than six months or a punitive discharge. As a practical matter, the record is prepared by a court reporter, but the TC is ultimately responsible for its preparation. Therefore, the TC reviews the record and makes any necessary corrections before the record of trial is authenticated.

PR 15.3.2. *Verbatim.*

The contents of a "verbatim" record of trial are listed in the discussion following R.C.M. 1103(b)(2)(B), in R.C.M. 1103(D) and in R.C.M. 1103(b)(3). Like most terms of art, the term "verbatim" has been the subject of considerable judicial interpretation. In *United States v. Boxdale*, the Court of Military Appeals (C.M.A.) held that "[i]nsubstantial omissions from a record of trial do not affect its characterization as a verbatim transcript" and further that

"when . . . there is a substantial omission from the record, a presumption of prejudice results." Such omissions were considered insubstantial as to the accused, and his record of trial was deemed verbatim. In *United States v. Richardson*, the court decided that not every sidebar conference between trial judge and counsel need be recorded; however, in *United States v. Sturdivant*, it held that an unrecorded sidebar discussion dealing with the question of challenge of court members did constitute a "substantial omission ... notwithstanding the fact that the substance of the discussion could reasonably be ascertained and no indication of legal error was apparent." In *United States v. Martin*, the court reporter's recording equipment malfunctioned. Recognizing that a BCD could not be approved without a verbatim record, the convening authority ordered a rehearing on sentence only, at which a BCD was again imposed. N.C.M.R. held that, even though the sentencing proceedings were completely verbatim, the otherwise summarized record invalidated the record and therefore was not sufficient to affirm a BCD.

In *United States v. Barton*, C.M.A., faced the novel question of whether a videotape transcription constitutes a transcript, verbatim or otherwise. The court held that videotapes cannot be substituted for written or printed transcripts of trial proceedings, verbatim or summarized. R.C.M. 1103(j) now makes it possible for videotape transcription to be used under certain circumstances if authorized by the Secretary concerned. The Secretary of the Navy, however, has not yet chosen to permit this kind of transcription.

PR 15.3.3. *Authentication*.

Article 54(a), UCMJ, dictates that the record be authenticated by the signature of the military judge except when that signature cannot be obtained by reason of the judge's death, disability, or absence; and only in these exceptional cases will it be authenticated by the TC. In cases tried before judge alone, the reporter may authenticate the record if both the military judge and the TC are unable to do so by reason of their death, disability, or absence. Except when extraordinary delay would result, DC shall be permitted to examine the record before authentication.

The Court of Military Appeals has narrowly interpreted the term "absence." In *United States v. Cruz-Rijos*, the court held that a short, temporary absence was insufficient to authorize substitute authentication. In *United States v. Credit*, the court held that it was not enough to show that the military judge, who was regularly assigned in Bangkok, Thailand, could not be expected to be present to authenticate the record in Okinawa, Japan. Having earlier intimated as much, in *United States v. Cruz-Rijos*, the court stated in *Credit* that only emergency situations may justify substitute authentication. In *United States v. Rippo*, No. 77-2267 (N.C.M.R. 30 Aug. 1977) (unreported), the military judge who tried the case was assigned temporarily to the west coast from the east coast for trial. In order to prevent the delay inherent in mailing the record across the country, the military judge authorized the TC to authenticate the record. Citing the lack of an emergency condition, N.C.M.R. held that the record reflected insufficient basis for substitute authentication and set aside the convening authority's action. R.C.M. 1103(b)(3)(E) requires a written explanation for substitute authentication to be attached to the record of trial.

PR 15.4. *SERVICE OF THE RECORD ON THE ACCUSED*

PR 15.4.1. *R.C.M. 1104(b)*.

R.C.M. 1104(b) requires that a copy of the record of trial be served on the accused as soon as the record has been authenticated. This is to provide him with the opportunity to submit any written "matters" which may reasonably tend to affect the convening authority's decision whether to approve the trial results. The content of such "matters" is not subject to the Military Rules of Evidence.

PR 15.4.2. *R.C.M. 1107*.

R.C.M. 1107 requires the convening authority to consider any "matters" submitted by the accused under R.C.M. 1105 prior to acting on the findings and sentence. Appellate courts "will not guess" as to whether or not the convening authority considered these "matters." Absent some tangible proof that these "matters" were, in fact, presented to the convening authority, remand will be ordered to obtain a new convening authority's action.

PR 15.4.3. *Time periods*.

The option of the accused to submit matters to the convening authority must be exercised within specifically defined time periods:

1. For a GCM and an SPCM, the accused must submit matters within 10 days after the authenticated record of trial or, if applicable, the recommendation of the staff judge advocate or legal officer has been served upon him, whichever is later. The 10-day time period may be extended for good cause by the convening authority or the staff judge advocate for not more than 20 additional days. A request for an extension of time may only be denied by the convening authority.

2. The accused at an SCM must submit matters within 7 days after sentence is announced, but this period, for good cause, may be extended for up to 20 additional days.

PR 15.5. *CLEMENCY MATTERS*

PR 15.5.1. *Matters submitted by accused*.

R.C.M. 1105 states that "the accused may submit to the convening authority any written matters which may reasonably tend to affect the convening authority's decision whether to disapprove any findings of guilty or to approve the sentence." To emphasize the importance of this right, Judge Crawford stated in *United States v. Bono*, that "one of the last best chances an appellant has is to argue for clemency by the convening authority." In most cases, the DC will be active in drafting the clemency petition and seeking favorable endorsements. In *United States v. Titsworth*, the court stated that "the duties of a defense counsel do not end with the conclusion of the trial. He is responsible for preparing the *Goode* response; and when in his professional judgment a petition for clemency may lead to a more favorable sentence for the accused, he has the obligation to prepare such a petition."

PR 15.5.2. *Examples*.

The following is a list of potential items which can and/or should be raised in the clemency petition along with a recommendation by the sentencing authority if one has been offered. This is, of course, a non-exclusive list. What actually goes into a clemency petition is going to be case specific.

PR 15.5.2.1. *Allegations of legal error*.

Neither the SJA nor the convening authority are required to check the record of trial for legal error. However, if such allegations are raised by the trial DC, the SJA is required to comment on those allegations. This may be a good opportunity to get relief for the accused at the early stages of review. Such allegations, if not raised by the trial DC, are <u>not</u> waived on appeal.

PR 15.5.2.2. *Recommendations by the sentencing authority*.

It is not uncommon for the defense to approach the military judge, members, or other persons to inquire of their willingness to recommend clemency in a particular case. Such a recommendation should be specific as to the amount and character of the clemency recommended and should state the reasons for the recommendation. The Staff Judge Advocate Recommendation to the convening authority must include any recommendations made by the sentencing authority whether the recommendation comes from the military judge or the members.

PR 15.5.2.3. *Portions of the ROT/documents submitted at trial.*

The convening authority is not required to look at the record of trial before taking his or her action and, in most cases, probably will not. However, the SJA must state in his recommendation to the CA that the CA must consider any matters submitted by the accused and the convening authority must state that he has considered any matters submitted by the accused. A trial DC should not rely on the SJA recommendation as a means of getting favorable information either from the accused's service record or about the accused to the convening authority -- raise it in your clemency petition.

PR 15.5.2.4. *Matters in mitigation raised at trial*.

For the same reasons as stated above, the trial DC should include these matters in the clemency petition because this is the only way that he or she can be certain the convening authority will see them.

PR 15.5.2.5. ***Matters in mitigation not available at trial.***

Such things as: exemplary conduct in confinement; attending Alcoholics Anonymous meetings, stress management classes or drug awareness classes; voluntary restitution to victims; willingness to testify in a related court-martial; and, similar positive behavior can strengthen an accused's chances for clemency.

-- Although the convening authority is only required to consider written clemency matters, that does not mean that you cannot submit matters in other forms. Such things as day-in-the-life type videotapes, which place the accused in a favorable light, or photographs of family members may have an effect on a convening authority. The types of matters that can be submitted are only limited by your imagination and the accused's particular situation. Also, there is no rule that says you can't go to the convening authority in person and plead your client's case.

PR 15.5.3. ***Caveat.***

A few words of caution in the area of post-trial representation of an accused can be gleaned from several appellate cases. In *United States v. Gilley,* the Court of Appeals for the Armed Forces (CAAF) found ineffective assistance of counsel where DC submitted, as clemency, letters from the appellant's family that were scathing in their insults to the entire Air Force judicial system and its participants. (e.g. "I hope you low-lifed bastards along with that lying, no good whore and her bastard kids that lied about [appellant], enjoy your freedom now, and burn in hell later.") CAAF held that DC failed to make an evaluative judgment on what items to submit to the CA. Inclusion of these letters fell measurably below the performance ordinarily expected of fallible lawyers. On the other hand, in *United States v. Lewis*, the trial DC refused to submit a letter from the accused because he felt it was "inappropriate". The court found that even if DC's judgment was correct, he did not have the authority unilaterally to refuse to submit matters which the client desired to have submitted. Counsel's duty is to advise, but the final decision as to what, if anything, to submit rests with the accused. Client control and documentation of advice become important DC practice.

PR 15.5.4. ***Appellate brief of trial DC.***

In addition to matters of clemency, Article 38(c), UCMJ, provides that DC may prepare and have forwarded with the record of trial a brief setting forth an assignment of errors committed at the trial, as well as other matters that should be considered by reviewing authorities. The Article 38 brief is an often overlooked tool at the trial DC's disposal and can be a very effective device for securing post-trial relief for an accused.

PR 15.5.5. ***Post-trial advice.***

PR 15.5.2.1. ***Trial DC.***

A convicted accused is entitled to representation by counsel until completion of the appellate review of his case. JAG Instruction 5810.2A [hereinafter JAGINST 5810.2A] and MJM 5.C.1., require the trial DC to advise the accused in detail of his appellate rights including the right to post-trial representation, the right to request clemency, and the right to request deferment of a sentence to confinement. The form listed as Enclosure (1) to JAGINST 5810.2A or enclosure 17 of the MJM are called the Appellate Rights Statement and may be used by the DC to document post-trial advice to the accused. The original signed statement should be attached to the original record of trial. Duplicate originals or certified copies should be attached to copies of the record of trial and one duplicate original should be provided to the accused.

PR 15.5.2.2. ***Appellate Defense Counsel.***

The accused is entitled to be represented before NMCCA, CAAF or the Supreme Court by civilian counsel provided by him or by military counsel detailed by the military. If the accused desires representation by detailed counsel before NMCCA, he will so indicate in the Appellate Rights Statement. If the accused petitions CAAF for a grant of review, the petition will reflect his desires regarding counsel. A trial DC "may be obligated to obtain information or affidavits needed by the client in connection with the appellate review."

PR 15.5.2.3. *Relief from Post-trial Representation*.

In an effort to ensure uninterrupted post-trial representation, the Court of Military Appeals, in *United States v. Palenius*, created the requirement that a trial DC may be relieved from post-trial duties only upon application to the authority before whom the review of the case is pending. Application by the trial DC will normally be approved where appellate representation has been provided or waived, or where continued representation by trial DC is not possible. This requirement extends only to general courts-martial and special courts-martial where a punitive discharge has been approved.

PR 15.6. *STAFF JUDGE ADVOCATE OR LEGAL OFFICER RECOMMENDATION*

PR 15.6.1. *In general*.

In addition to the input from the accused, the convening authority must receive a written recommendation from his staff judge advocate (SJA) or legal officer (LO) prior to taking action on a GCM or a SPCM case involving a bad-conduct discharge or confinement for one year.

PR 15.6.2. *Commissioned officer*.

The staff judge advocate or legal officer must be a commissioned officer. If, under other circumstances, the accused is materially prejudiced by the failure of the SJA or LO to submit a recommendation, a new convening authority's action will be required.

PR 15.6.3. *"The" Staff Judge Advocate.*

In *United States v. Aquino*, the Navy-Marine Corps Court of Criminal Appeals stated that the person whose title is "staff judge advocate" to the convening authority must complete the recommendation. An "assistant" staff judge advocate or "deputy" staff judge advocate is permitted to complete the recommendation only if he/she is acting as staff judge advocate for some reason (disqualification of the staff judge advocate, leave/TAD status of the staff judge advocate, etc.).

PR 15.6.4. *Disqualification*.

Care must be taken to ensure that the SJA or LO is not disqualified from submitting the recommendation. Disqualification will result when the SJA/LO acted as a member, military judge, TC, assistant TC, or, more commonly, the investigating officer in the same case. The discussion to R.C.M. 1106(b) states that an SJA or legal officer may also be ineligible when they have served as the DC in a companion case; testified as to a contested matter; has other than an official interest in the same case; or, must review that officer's own pretrial action (such as the pretrial advice under Article 34) when the sufficiency or correctness of the earlier action has been placed in issue. If the SJA or LO is disqualified, or if the convening authority in his discretion would prefer an SJA recommendation instead of one from his legal officer, the convening authority may request that another SJA be designated to prepare the recommendation.

PR 15.6.5. *Purpose*.

The purpose of the recommendation is simply to assist the convening authority in deciding what action to take on the case. The recommendation is intended to be a concise written communication summarizing:

1. The findings and sentence adjudged;

2. a recommendation for clemency by the sentencing authority, if any;

3. the accused's service record, including length and character of service, awards and decorations, and any records of nonjudicial punishment and previous convictions;

4. the nature and duration of pretrial restraint, if any;

5. obligations imposed upon the convening authority because of a pretrial agreement; and,

6. a specific recommendation as to the action to be taken by the convening authority on the sentence.

PR 15.6.6. ***Legal error.***

Identifying legal error is not one of the required goals of this recommendation. Nevertheless, an SJA must respond to an allegation of legal error by the accused or DC made either under R.C.M. 1105(b) or in response to the SJA recommendation pursuant to R.C.M. 1106(f)(4). The response by an SJA may consist of a statement of agreement or disagreement and need not be accompanied by a written analysis or rationale. Failure of an SJA to comment on an allegation of legal error will, in most cases, require remand to the convening authority for preparation of a suitable recommendation, unless the allegation of legal error "clearly has no merit." In *Allen*, *supra*, DC alleged that the SJA erred in his recommendation to the convening authority by opining that the military judge had properly ruled on numerous trial motions, including one where the SJA incorrectly stated that the defense had agreed to a local expert witness. The SJA's failure to comment on these allegations of legal error necessitated remand.

Note that the SJA's disagreement with the allegation(s) of legal error need not be a detailed point-counterpoint. In fact, CAAF has suggested that a staff judge advocate can completely address the allegation of legal error by restating the allegation and opining that he/she disagrees with the allegation, and is of the opinion that no corrective action is required.

None of the above comments, however, should be interpreted so as to prohibit the SJA or LO from including any additional matters deemed appropriate under the circumstances. Such additional matters may include information outside the record.

To assist the SJA or LO in preparing the recommendation, the JAGMAN provides a sample form at appendix A-1-k(1).

In cases of acquittal of all charges and specifications, and cases where the proceedings were terminated prior to findings with no further action contemplated, the SJA or LO recommendation is not required.

PR 15.6.7. ***Service on the accused.***

Prior to forwarding the recommendation to the convening authority, the SJA or LO must serve a copy on the accused's DC. A separate copy of the recommendation must also be served on the accused. If such service on the accused is impractical or the accused so requests in writing or on the record, the accused's copy shall be forwarded to the accused's counsel. An explanatory statement shall be attached to the record. The appellate rights statement used in Navy, Marine Corps, and Coast Guard trials indicates the accused's desires in this regard.

1. The DC will then have ten (10) days in which to submit, for the convening authority's consideration, a written response to the recommendation. Although the 10-day time period may be extended for an additional 20 days for good cause, failure to submit a response within the applicable period will waive any errors in the recommendation, except those amounting to plain error. R.C.M. 1106(f)(7) provides that the SJA / LO may supplement his recommendation based upon DC's response. However, DC must be served with any post-trial recommendation containing new matter and given a further opportunity to comment.

2. R.C.M. 1106(f)(2) discusses the designation of counsel for the response when several counsel are available. It also provides for substitute counsel when necessary.

PR 15.6.8. ***Corrective action.***

R.C.M. 1106(d)(6) states that, in the case of any error in the recommendation not otherwise waived, appropriate corrective action shall be taken by appellate authorities without returning the case for further action by a convening authority.

NOTE: A detailed SJA'S/Legal Officer's recommendation checklist has been appended to this Chapter as Appendix A.

PR 15.7. *CONVENING AUTHORITY'S ACTION*

PR 15.7.1. *Responsibility*.

The first official action to be taken with respect to the results of a trial is the convening authority's action (CA's action). All materials submitted by the accused, SJA/LO, and DC are preparatory to this official review. Article 60, UCMJ, JAGMAN, § 0151, and MJM 5.F.1., place the responsibility for this initial review and action on the convening authority. This is true even when the accused is no longer assigned to the convening authority's command. Although responsibility for a CA's action is nondelegable, R.C.M. 1107, JAGMAN, § 0151, and MJM 5.F.1., acknowledge the fact that circumstances may exist making it impracticable for the convening authority to act. Situations of impracticability might arise:

1. When the command has been decommissioned or inactivated before the convening authority could act;

2. when the command has been alerted for immediate overseas movement;

3. when the convening authority is disqualified because he has other than an official interest in the case; or

4. because a member of the court-martial which tried the accused has become the convening authority.

PR 15.7.2. *Forwarding*.

If any of these situations exist, the convening authority must forward the case to an officer exercising general court-martial jurisdiction with a statement of the reasons why the convening authority did not act. A Navy command should send the case to the area coordinator or his designee, unless a GCM convening authority in the convening authority's chain of command has directed otherwise. A Marine command should send the case to an officer exercising general court-martial jurisdiction over the command. A Coast Guard command should send the case to Commandant (G-LMJ) with a request that an alternate convening authority take action.

PR 15.7.3. *Disqualification of CA to take action.*

A CA will be disqualified from taking post-trial action if he is an accuser, has a personal interest in the outcome of the case, or has a personal bias toward the accused. A CA will also be disqualified if he displays an inelastic attitude toward the performance of his post-trial responsibility.

PR 15.7.4. *Scope and Content.*

The CA's action is a legal document attached to the record of trial setting forth, in prescribed language, the convening authority's decisions and orders with respect to the sentence, the confinement of the accused, and further disposition. The convening authority is required to take action taken with respect to the sentence and this is a matter falling within the convening authority's sole discretion. He may, for any reason or no reason, disapprove a legal sentence in whole or in part, mitigate it, suspend it, or change (commute) a punishment to one of a different nature as long as the severity of sentence is not increased. His decision is a matter of command prerogative and is to be made in the interests of justice, discipline, mission requirements, clemency, and other appropriate reasons. The convening authority is not required to take action upon the findings however, the convening authority may, as a matter within his discretion, disapprove such findings or approve a finding of guilty to a lesser included offense. The CA may not change a finding of not guilty to a finding of guilty.

PR 15.7.5. *Considerations*.

In taking his action, the convening authority is required to consider the results of trial, the SJA/LO recommendation when required, and any matter submitted by the accused as previously discussed. Additionally, the convening authority may consider the record of trial, personnel records of the accused, and such other matters as he/she deems appropriate. Any adverse matters considered from outside the record of trial, of which the accused is not reasonably aware, must be disclosed to the accused to provide an opportunity for his rebuttal.

PR 15.7.6. ***SJA/LO responsibility.***

The SJA or LO, who usually drafts the CA's action pursuant to the convening authority's wishes, must take care to insure that it expresses the convening authority's intent and complies with applicable R.C.M.s and JAGMAN. Incompleteness or ambiguity may result in return of the record for completion or clarification by a higher reviewing authority, or simply construction of the ambiguous action in favor of the accused.

PR 15.7.7. ***Action***.

In taking action on the sentence, the convening authority must observe certain rules.

1. When mitigating forfeitures, the duration and amount of forfeitures may be changed as long as the total amount forfeited is not increased and neither the amount nor duration of the forfeitures exceeds the jurisdiction of the court-martial.

2. When mitigating confinement or hard labor without confinement, the convening authority should use the equivalencies at R.C.M 1003(b)(6) & (7) as appropriate.

3. The sentence may not be increased in severity or duration.

4. No part of the sentence may be changed to a punishment of a more severe type.

5. The sentence as approved must be one which the court-martial could have adjudged.

6. The convening authority has no authority to approve a punitive discharge when one is not adjudged by a court-martial. A convening authority cannot "commute" any sentence to a BCD, even with the accused's consent. A bad-conduct discharge is a more severe punishment and can only be approved when included in the sentence of the court-martial.

7. A CA may commute a punitive discharge to confinement and/or forfeitures and there is no set amount of confinement or forfeitures that is equivalent to a punitive discharge.

8. A sentence of death can be commuted to a DD, confinement for life, and total forfeitures. The latter is a less severe sentence.

9. It is often difficult to compare two authorized punishments of different types and decide which is less severe. For example, is a punitive reprimand more or less severe than forfeiture of $25 per month for 12 months? The C.M.A. has opted for " . . . affirmance of [the CA's] judgment on appeal, unless it can be said that, as a matter of law, he has increased the severity of the sentence."

PR 15.7.8. ***Administrative discharge***.

A punitive discharge cannot be commuted to an administrative discharge, as the latter could not have been adjudged by the court-martial.

PR 15.7.9. ***Suspension***.

R.C.M. 1108 states: "Suspension of a sentence grants the accused a probationary period during which the suspended part of an approved sentence is not executed, and upon the accused's successful completion of which the suspended part of the sentence shall be remitted." The accused receives an opportunity to show by his good conduct during the probationary period that he is entitled to have the suspended portion of his sentence remitted. In this context, "suspend" means to withhold conditionally the execution, and "remit" means to cancel the unexecuted sentence.

1. The conditions of the suspension must be in writing and served on the accused in accordance with R.C.M. 1108. While a close reading of R.CM. 1008(c) may imply that a convening authority must serve an accused with a copy of the conditions of suspension on or after the convening authority acts to suspend the sentence, the Navy –Marine Court has indicated that service of a copy of a PTA on an accused satisfies the requirement. Unless otherwise stated, an action suspending a sentence includes as a condition that the probationer

not violate any punitive article of the UCMJ. The suspension period must be for a definite period of time which is not unreasonably long. This period shall be stated in the CA's action.

2. Two provisions must be included in the CA's action in regard to suspension of sentence: for the suspension to be remitted at the end of the suspension period without further action; and, for permitting the suspension to be vacated prior to the end of the suspension period.

PR 15.7.10. ***Vacation.***

"Vacating" means to do away with the suspension and impose that part of the sentence that was suspended. In order to serve as the basis for vacation of the suspension of a sentence, an act of misconduct must occur within the period of suspension. The order vacating the suspension must be issued prior to the expiration of the period of suspension. The running of the period of suspension is interrupted by the unauthorized absence of the probationer or by commencement of proceedings to vacate the suspension. R.C.M. 1109 indicates that vacation of a suspended sentence may be based on a violation of the UCMJ.

PR 15.7.11. ***Effect of PTA***.

When all or part of the sentence has been suspended as a result of a pretrial agreement, case law indicates that the suspension may be vacated for violation of any of the lawful requirements of the probation, including the duty to obey local civilian law (as well as military law), to refrain from associating with known drug users or dealers, and to consent to searches of his person, quarters, and vehicle at any time.

PR 15.7.12. ***Hearings***.

Procedural rules for hearing requirements depend on the type of suspended sentence being vacated.

PR 15.7.12.1. ***Sentence of any GCM or a SPCM including an approved BCD or confinement for one year***.

If the suspended sentence was adjudged by any GCM, or by a SPCM which included an approved BCD or confinement for one year, the following rules apply. After giving notice to the accused in accordance with R.C.M. 1109(d), the officer having SPCM jurisdiction over the probationer holds a hearing to inquire into the alleged violation of probation. The vacation hearing is similar in form to a formal pretrial investigation (Art. 32, UCMJ) and shall follow the procedure prescribed in R.C.M. 405(g), (h)(1), and (i). The accused has the right to counsel at the hearing, but does not have the right to request individual military counsel. The record of the hearing and the recommendations of the SPCM authority are forwarded to the officer exercising GCM jurisdiction, who may vacate the suspension. Appendix 18, MCM (2005 ed.), provides a form for use as the vacation hearing record.

PR 15.7.12.2. ***Sentence of SPCM not including a BCD or confinement for one year, or sentence of SCM***.

If the suspended sentence was adjudged by a SPCM and does not include a BCD or confinement for one year, or if the sentence was adjudged by an SCM, the following rules apply. The officer having SPCM jurisdiction over the probationer holds a hearing to inquire into the alleged violation of probation. The procedure for the hearing is similar to that prescribed for a formal pretrial investigation and shall follow the rules prescribed in R.C.M. 405(g), (h)(1), and (i). The probationer must be accorded the same right to counsel at the hearing that he was entitled to at the court-martial which imposed the sentence. Such counsel need not be the same counsel who originally represented the probationer, and the probationer does not have the right to request individual military counsel. If the officer having SPCM jurisdiction over the probationer decides to vacate all or a portion of the suspended sentence, he must record the evidence upon which he relied and the reasons for vacating the suspension in his action.

PR 15.7.13. ***Execution***.

An order executing the sentence directs that the sentence be carried out. In the case of confinement, it directs that it be served; in the case of a punitive discharge, that it be delivered. The decision as to execution of the sentence is closely related to other post-trial decisions involving suspension, deferment of confinement, and imposition of post-trial restraint. No sentence may be executed by the convening authority unless and until it is approved by him. Once approved, every part of the sentence, except for a punitive discharge, dismissal, or death, may be executed by

the convening authority in his initial action. Of course, a suspended sentence is approved, but not executed.

1. A punitive discharge may only be executed by:

(a) The officer exercising general court-martial jurisdiction who reviews a case when appellate review has been waived under R.C.M. 1112(f); or

(b) the officer then exercising general court-martial jurisdiction over the accused after appellate review is final under R.C.M. 1209. If more than six months has passed since the approval of the sentence by the convening authority, the officer exercising general court-martial jurisdiction over the accused shall consider the advice of his staff judge advocate as to whether retention of the accused would be in the best interest of the service. The advice shall include:

-- The findings and sentence as finally approved;

-- an indication as to whether the servicemember has been on active duty since the trial and, if so, the nature of that duty; and

-- a recommendation whether the discharge should be executed.

2. Dismissal may be ordered executed only by the Secretary of the Navy (or SECDOT for CG personnel) or by such Under Secretary or Assistant Secretary as the Secretary may designate.

3. Death may be ordered executed only by the President.

4. Though a punitive discharge may have been ordered executed, it shall not in fact be executed until all provisions of SECNAVINST 5815.3, concerning Naval Clemency and Parole Board action, have been complied with. Parallel Coast Guard guidance is located at Article 8-F-6.d of the PERSMAN and 5.D.3.b. of the MJM.

PR 15.7.14. ***Pertinent cases.***

There have been several cases where the action of the convening authority on a particular sentence has been called into question. In many of the cases the action has been found to be correct or, if error has occurred, it can be attributable to the convening authority's reliance on the staff judge advocate recommendation which were discussed in a previous chapter. The following cases highlight errors made in the convening authority action where appellate action was required.

1. *United States v. Dvonch* - the convening authority (CA) in this case improperly failed to consider two letters submitted by the accused's trial DC that appellate government counsel conceded were not included in the materials forwarded to the convening authority by staff judge advocate before CA took action. The court set aside the action of the convening authority and returned the record to the convening authority for a new action.

2. *United States v Thompson* - the SJA recommendation erroneously stated the amount of forfeiture as $400 per month even though the DC correctly stated the amount as $200 per month in his reply to the SJA recommendation. In his action in this case, the convening authority merely stated "the sentence is approved." The question then arose what monthly forfeiture did the CA approve? The court held that the CA approved the amount stated in the SJA recommendation in the absence of compelling evidence to the contrary. The court disapproved the forfeiture in its entirety rather than return the record for a new action.

3. *United States v. Smith* - a general court-martial adjudged a dishonorable discharge to the accused in conjunction with the rest of his sentence. The convening authority (CA) stated in his action "... the sentence is approved and, except for the sentence extending to bad conduct discharge, will be executed." Seven months after the CA acted, he stated in a signed affidavit that it was always his intention to approve the adjudged dishonorable discharge and a corrected action was attached to the affidavit. However, the affidavit was prepared long after the record was forwarded to the United States Navy-Marine Corps Court of Criminal Appeals for review. The issue then became was the purported corrective action effective? The court answered in the negative stating that the CA retains the power to correct administrative errors during the 10-day period following service of the

action on the accused or his DC. In the instant case, by the time the CA attempted to correct the action he was without power to act absent direction by higher authority. The record was returned for a new action.

NOTE: Appendix B to this Chapter contains a detailed checklist for preparing a convening authority's action.

PR 15.8. *POST-TRIAL RESTRAINT PENDING COMPLETION OF APPELLATE REVIEW*

PR 15.8.1. *Status of the accused*.

The accused's immediate commander must initially determine whether the accused will be placed in post-trial restraint pending review of the case. Specifically, he must decide whether he will confine, restrict, place in arrest, or set free the accused pending appellate review. This decision is necessary because an accused who has been sentenced to confinement by a court-martial is not automatically confined as a result of the sentence announcement. Even though the sentence of confinement runs from the date it is adjudged by the court, the sentence will not be executed until the convening authority takes his action. Thus, an accused cannot be confined on the basis of his court-martial sentence alone. An order from the commanding officer is required. As a post-trial confinee, he is referred to as an adjudged prisoner. Later, when his sentence is executed, his status will change to that of a sentenced prisoner.

PR 15.8.2. *Criteria*.

Since the sentence of confinement runs from the date adjudged, whether or not the accused is confined, a commanding officer will usually take prompt action with respect to restraint. R.C.M. 1101(b) indicates that post-trial confinement is authorized when the sentence includes confinement or death. The C.M.A. believes that post-trial restraint is also authorized where the sentence includes a punitive discharge, but no confinement.

PR 15.8.3. *Cases where post-trial restraint is not authorized*.

1. It is clear that the MCM and UCMJ do not authorize post-trial restraint if the accused is acquitted or sentenced to no punishment or monetary penalties only. In a case where the accused is acquitted and found to be a danger to himself or others as a result of insanity, a commanding officer has the power to restrain him until delivery to medical authorities. This power does not stem from the UCMJ, but from the power of the commanding officer to protect the health and security of his command as, for example, by quarantining the diseased.

2. Post-trial restraint may change to pretrial restraint when a case is sent back for rehearing.

PR 15.8.4. *The decision to restrain*.

Before an accused may be restrained pursuant to R.C.M. 1101, a decision must be made that such restraint is "necessary." It is the commanding officer's decision whether or not to confine. He may, however, delegate this authority to the TC.

PR 15.8.5. *The nature of post-trial restraint*.

The *Navy Corrections Manual*, SECNAVINST 1640.9, now eliminates the former distinction between post-conviction prisoners whose sentences have not been ordered executed (adjudged prisoners) and those whose sentences to confinement have been ordered executed (sentenced prisoners). The result is that, under the provisions of Article 404.30D, personnel sentenced to confinement by a court-martial may be assigned to work (i.e., to perform hard labor) and to participate in other aspects of the corrections program on an unrestricted basis.

PR 15.9. *DEFERMENT OF THE CONFINEMENT PORTION OF THE SENTENCE*

PR 15.9.1. *Definition*.

As indicated in the previous section, the confinement portion of a sentence runs from the date the sentence is adjudged. Deferment of a sentence to confinement is a postponement of the running and service of the confinement portion of the sentence, together with a lack of any other post-trial restraint. It is not a form of clemency.

PR 15.9.2. ***Who may defer****?*

Only the convening authority or, if the accused is no longer under his jurisdiction, the officer exercising general court-martial authority over the command to which the accused is attached may defer the sentence.

PR 15.9.3. ***When deferment may be ordered****.*

Deferment may be considered only upon written application of the accused. If the accused has requested deferment, it may be granted anytime after the adjournment of the court-martial, as long as the sentence has not been executed.

PR 15.9.4. ***Action on the deferment request****.*

The decision to defer is a matter of command discretion. As stated in R.C.M. 1101(c)(3), "The accused shall have the burden to show that the interests of the accused and the community in release outweigh the community's interests in confinement." The factors to consider are basically the same as for a decision to impose post-trial restraint. They include:

1. The probability of the accused's flight to avoid service of the sentence;

2. the probability of the accused's commission of other offenses, intimidation of witnesses, or interference with the administration of justice;

3. the nature of the offenses (including the effect on the victim) of which the accused was convicted;

4. the sentence adjudged;

5. the effect of deferment on good order and discipline in the command; and,

6. the accused's character, mental condition, family situation, and service record.

Although the decision to grant or deny the deferment request falls within the convening authority's sole discretion, that decision can be tested on review for abuse of discretion.

PR 15.9.5. ***Imposition of restraint during deferment****.*

No restrictions on the accused's liberty may be ordered as a substitute for the confinement deferred. An accused may, however, be restrained for an independent reason (e.g., pretrial restraint resulting from a different set of facts).

PR 15.9.6. ***Termination of deferment****.*

Deferment is terminated when:

1. The CA takes action, unless the CA specifies in the action that service of the confinement after the action is deferred (In this case, deferment terminates when the conviction is final.);

2. the sentence to confinement is suspended;

3. the deferment expires by its own terms; or

4. the deferment is rescinded by the officer who granted it or, if the accused is no longer under his jurisdiction, by the officer exercising general court-martial authority over the accused's command. Deferment may be rescinded when additional information comes to the authority's attention which, in his discretion, presents grounds for denial of deferment under paragraph 4, above. The accused must be given notice of the intended rescission and of his right to submit written matters. He may, however, be required to serve the sentence to confinement pending this action.

PR 15.9.7. ***Procedure***.

Applications must be in writing and may be made by the accused or by his DC at any time after adjournment of the court. The granting or denying of the application is likewise in writing.

PR 15.9.8. ***Record of proceedings***.

Any document relating to deferment or rescission of deferment must be made a part of the record of trial. The dates of any periods of deferment and the date of any rescission are stated in the convening authority or supplementary action.

PR 15.9.9. ***Necessity for request by accused***.

In *United States v. Ledbetter*, the accused twice requested deferment; both requests were denied. On the 88th day of post-trial confinement, the convening authority reconsidered the second request and granted it. Held: the running of the confinement was not tolled. Once a deferment request has been denied, the accused must again request deferment before his release will qualify as such.

PR 15.9.10. ***Review of denial of deferment request***.

Despite the language of Article 57(d), UCMJ, which states that the accused's convening authority may, "in his sole discretion," decide to defer the service of a sentence to confinement, the C.M.A. has ruled that "sole discretion" is not absolute or unreviewable. The court adopted as its standard of review of the CA's exercise of discretion the *ABA Standards for Criminal Justice, Criminal Appeals*, 2.5(b), 1980, which provides that:

Release should not be granted unless the [CA] finds that there is no substantial risk the appellant will not appear to answer the judgment following conclusion of the appellate proceedings and that the appellant is not likely to commit a serious crime, intimidate witnesses or otherwise interfere with the administration of justice. In making this determination, the [convening authority] should take into account the nature of the crime and length of sentence imposed as well as the factors relevant to pretrial release.

The court made clear that the burden of demonstrating these improbabilities lies on the accused.

PR 15.10. ***PROMULGATING ORDERS***

PR 15.10.1. ***In general***.

A promulgating order publishes the results of the court-martial, the convening authority's action, and any subsequent action with regard to the case. It is a method of record-keeping and informing all those officially interested in the progress of the case. Promulgating orders are issued for every SPCM and GCM, including those resulting in acquittal. The results of a summary court-martial need only be promulgated to the accused.

PR 15.10.2. ***Who issues***.

The convening authority normally issues a promulgating order to publish the results of trial and his action on the case. Any action taken on the case subsequent to the initial action, such as action under R.C.M. 1112(f) or action to execute a discharge, shall be promulgated in supplementary orders by the authority authorized to take such action. Where the findings and sentence set forth in the initial promulgating order are affirmed without modification upon subsequent review, no further order need be issued.

PR 15.10.3. ***Form and Content***.

The form for the initial promulgating order is set out in Appendix 17, MCM (2005 ed.) Each promulgating order published by a command during the calendar year is numbered consecutively with the year following the number of the order. For example, the 10th special court-martial order published by a command during 20__ would be "Special Court-Martial Order No. 10-20__." In the center of the page, the title of the command issuing the order is set forth along with the date of the order, which is the date of the action of the authority issuing the order. For example, if the date of the CA's action is 15 March 20__, the date of the court-martial order would also be 15 March 20__.

PR 15.10.3.1. ***Authority section***.

The next section of the court-martial order is called the "authority" section. It indicates the place where the trial was held, the command and organization of the convening authority, and the serial number and date of the convening order.

PR 15.10.3.2. ***Arraignment section***.

The authority section is followed by the "arraignment and the accused" section of the order. The arraignment section simply contains a statement that the accused was arraigned and tried. The accused section contains the grade, name, social security number, branch of service, and unit of the accused.

PR 15.10.3.3. ***Charges section.***

The court-martial order next sets forth the "charge(s) and specification(s)" upon which the accused was arraigned. The specifications should be summarized indicating specific factors such as value, amount, duration, and other circumstances which affect the maximum punishment. The specification may be photographically reproduced from the charge sheet if necessary. Findings should be indicated in parentheses after each charge and specification.

PR 15.10.3.4. ***Pleas section***.

The "plea(s)" section follows the "charge(s) and specification(s)" section of the court-martial order.

-- If the accused was acquitted of all charges and specifications, the date of the acquittal should be shown: "The findings were announced on _____ 20__."

-- If the accused was convicted of one or more specifications, it is necessary to include the sentence in the court-martial order.

PR 15.10.3.5. ***Action section.***

The "action" section contains the CA's action verbatim including the heading, date, and signature or evidence of signature. It may be photographically reproduced from the actual CA's action.

PR 15.10.3.6. ***Authentication section***.

At the end of the court-martial order is the "authentication" section. This section simply contains the signature of the authority issuing the court-martial order or the signature of a subordinate officer designated by him to sign "by direction." The name, rank, title, and organization of the officer actually signing the court-martial order must be shown. If signed "by direction," such fact must be shown together with the name, rank, title, and organization of the person issuing the order.

PR 15.10.3.7. ***Combination Convening Authority's Action/Promulgating Order.***

Change 3 to JAGMAN §0155 made clear that a combination convening authority's action and promulgating order is permitted. Note that for such a document to suffice as the convening authority's action, **it must be personally signed by the convening authority**, and may not, under any circumstances, be signed "by direction" as a separate promulgating order may be as indicated in paragraph 6, *supra*.

PR 15.10.4. ***Distribution.***

1. The original goes in the record of trial.

2. A duplicate original is placed in the accused's service record only if the accused has been convicted.

3. Certified or plain copies go to many places.

PR 15.10.5. ***Supplemental orders.***

Action on the case occurring after the initial promulgating order has been published will be published by issuing a supplementary promulgating order. Appendix 17, MCM (2005 ed.), provides the necessary forms.

PR 15.11. *WAIVER/WITHDRAWAL OF APPELLATE REVIEW*

PR 15.11.1. *In general*.

In accordance with Article 61 and R.C.M. 1110, an accused may waive or withdraw appellate review after any general court-martial, except one in which the approved sentence includes death, and after any special court-martial in which the approved sentence includes a bad-conduct discharge or confinement for one year.

PR 15.11.2. *Form*.

In accordance with R.C.M. 1110(d), a waiver or withdrawal of appellate review shall:

1. be in writing;

2. state that the accused and DC have discussed the accused's right to appellate review, the effect that waiver or withdrawal will have on that review and that the accused understands these matters;

3. state that the waiver or withdrawal is submitted voluntarily; and,

4. be signed by the accused and DC.

PR 15.11.3. *To whom submitted*.

A *waiver* shall be submitted to the convening authority and shall be attached to the record of trial. A *withdrawal* may be filed with the officer exercising general court-martial jurisdiction over the accused, who shall promptly forward it to the Judge Advocate General, or directly with the Judge Advocate General.

PR 15.11.4. *Time limits*.

An accused may sign a *waiver* any time after sentence is announced however, a waiver must be filed within 10 days after an accused or DC has been served a copy of the CA's action, unless an extension is granted. The convening authority or other person taking such action, for good cause, may extend the period for filing by not more than 30 days. A waiver of appellate review is ineffective if filed prior to the time convening authority's action is served on the accused and DC. A *withdrawal* may be submitted any time before appellate review is completed. In either case, however, once appellate review is waived or withdrawn, it is irrevocable and the case will thereafter be reviewed locally in the same manner as an SCM or an SPCM not involving a bad-conduct discharge or confinement for one year. Appendices 19 and 20 of the MCM (2005 ed.), provide forms for waiver or withdrawal. A sample waiver/withdrawal is also included below.

PR 15.11.5. *Right to counsel.*

PR 15.11.5.1. *In general*.

An accused shall have the right to consult with counsel qualified under R.C.M. 502(d)(1) before submitting a waiver or withdrawal of appellate review.

PR 15.11.5.2. *Waiver*.

An accused may consult with any civilian, individual military or detailed DC who represented the accused at the court-martial concerning whether to waive the appellate review unless such counsel has been excused. If counsel who represented the accused has not been excused, but is not immediately available to consult with the accused, associate counsel shall be detailed to advise the accused upon request by the accused. Such counsel shall communicate with the counsel who represented the accused at the court martial. If counsel who represented the accused at the court-martial has been excused, substitute counsel shall be detailed to advise the accused concerning waiver of appellate rights.

PR 15.11.5.3. ***Withdrawal.***

The accused shall have the right to consult with appellate defense counsel concerning withdrawal of appellate review. An accused also has the right, upon request by the accused, to have an associate DC detailed if appellate defense counsel is assigned but is not immediately available to consult with the accused concerning withdrawal of appellate review. Such counsel shall communicate with appellate defense counsel. If no appellate defense counsel has been assigned, defense counsel shall be detailed for the accused. An accused may also consult with civilian counsel, at no expense to the government, even if the accused was not represented by civilian counsel at the court-martial.

PR 15.11.6. ***Benefits of Waiver/Withdrawal.***

The following are some of the reasons an accused may find it beneficial to waive/withdraw appellate review:

1. discharge (DD 214) will be expedited;

2. no longer required to keep command/NAMALA/COMDT (G-LMJ) informed of changes of address;

3. no longer subject to the UCMJ;

4. easier to obtain employment; and,

5. very few cases (<1%) are set aside.

PR 15.12. ***MANDATORY REVIEW***

PR 15.12.1. ***Judge advocate review.***

Article 64, UCMJ, and R.C.M. 1112 require that all Summary Courts-Martial (SCM), all Special Courts-Martial (SPCM) that did not include a BCD or one year confinement and all other noncapital courts-martial where appellate review has been waived or withdrawn by the accused be reviewed by a judge advocate who has not been disqualified by acting in the same case as an accuser, investigating officer, member of the court-martial, military judge, or counsel, or otherwise on behalf of the prosecution or defense. Section 0153(a)(1) of the JAGMAN states that records requiring review under R.C.M. 1112 shall be forwarded to the SJA of an officer who exercises general court-martial jurisdiction (OEGCMJ) and who, at the time of trial, could have exercised such jurisdiction over the accused. For Navy commands, this would be the SJA of the area coordinator (or the area coordinator's qualified designee), unless otherwise directed by an OEGCMJ superior in the convening authority's chain of command. For Marine Corps commands, this would be the SJA of the OEGCMJ who exercised such jurisdiction over the accused at the time the court-martial was held. In all cases, the action of the convening authority in forwarding the record for judge advocate review shall identify the judge advocate to whom the record is forwarded by stating his official title. R.C.M. 1112 states, however, that no review under this section is required if the accused has not been found guilty of an offense or if the convening authority disapproved all findings of guilty.

PR 15.12.1.1. ***Contents.***

The judge advocate's review is a written document containing the following:

(a) Conclusions as to:

-- whether the court-martial had jurisdiction over the accused and over each offense for which there is a finding of guilty which has not been disapproved by the convening authority;

-- whether each specification, for which there is a finding of guilty which has not been disapproved by the convening authority, stated an offense;

-- whether the sentence was legal;

(b) a response to each allegation of error made in writing by the accused; and,

(c) in cases requiring action by the OEGCMJ, as noted below, a recommendation as to appropriate action and an opinion as to whether corrective action is required as a matter of law.

PR 15.12.1.2. ***Finality of review***.

After the judge advocate has completed his review, most cases will have reached the end of mandatory review and will be considered final within the meaning of Article 76, UCMJ. If this is the case, the judge advocate review will be attached to the original record of trial and a copy forwarded to the accused. The review is not final, however, and a further step is required if:

(a) The judge advocate recommends corrective action; or

(b) the sentence as approved by the convening authority includes a dismissal, a dishonorable or bad-conduct discharge, or confinement for more than six months.

PR 15.12.1.3. ***Action by the OEGCMCA***.

The existence of either of these two situations will require the SJA to forward the record of trial to the OEGCMJ. With the SJA's review in hand, the OEGCMJ will take action on the record of trial in a document similar to CA's action. He will promulgate it in a similar fashion as well. He may disapprove or approve the findings or sentence in whole or in part; remit, commute, or suspend the sentence in whole or in part; order a rehearing on the findings or sentence, or both; or dismiss the charges.

PR 15.12.1.4. ***Action by the JAG or Law Specialist***.

If, in his review, the judge advocate stated that corrective action was required as a matter of law, and the OEGCMJ did not take action that was at least as favorable to the accused as that recommended by the judge advocate, the record of trial must be sent to the JAG for resolution. In all other cases, however, the review is now final within the meaning of Article 76, UCMJ.

PR 15.12.2. ***Special courts-martial involving a bad-conduct discharge or confinement for one year***.

Assuming that appellate review has not been waived or withdrawn by the accused, a special court-martial (SPCM) which includes a sentence to a bad-conduct discharge or confinement for one year, whether or not either is suspended, will be sent directly to the Judge Advocate General/COMDT (G-LMJ).

PR 15.12.2.1. ***Action by the JAG or COMDT (G-LMJ)***.

After detailing appellate defense and government counsel, the JAG shall refer the case to the Navy-Marine Corps Court of Criminal Appeals (NMCCA) or Coast Guard Court of Criminal Appeals (CGCCA). NMCCA has review authority similar to that of the convening authority, except that it may not suspend any part of the sentence. It is also limited to reviewing only those findings and sentence which have been approved by the convening authority.

PR 15.12.2.2. ***Action by NMCCA/ CGCCA***.

In considering the record of trial, NMCCA/ CGCCA may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, giving due weight, of course, to the fact that the trial court saw and heard the witnesses. Finally, NMCCA may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact, and which NMCCA concludes should be approved on the basis of the entire record. A finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused.

PR 15.12.2.3. ***Effect of a set aside by NMCCA/ CGCCA***.

If the Court of Criminal Appeals sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

PR 15.12.2.4. ***Action by the convening authority***.

The Judge Advocate General shall, unless there is to be further action by the President, the Secretary concerned, the Court of Appeals for the Armed Forces, or the Supreme Court, instruct the convening authority to take action in accordance with the decision of the Court of Criminal Appeals. If the Court of Criminal Appeals has ordered a rehearing but the convening authority finds a rehearing impracticable, he may dismiss the charges.

PR 15.12.2.5. ***Review by CAAF***.

After review by NMCCA/ CGCCA, the case will go to the Court of Appeals for the Armed Forces (CAAF) for review in the following two instances:

(a) If certified to CAAF by JAG; or,

(b) if CAAF grants the accused's petition for review.

PR 15.12.2.6. ***Action by CAAF***.

In any case reviewed by it, CAAF may act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by NMCCA.

PR 15.12.2.7. ***Review by the Supreme Court*** .

Finally, review by the Supreme Court of the United States is possible under 28 U.S.C. § 1259 and Article 67(a), UCMJ.

PR 15.12.3. ***General courts-martial***.

All General Court-Martial (GCM) cases in which the sentence, as approved, includes:

(1) death;

(2) dismissal of a commissioned officer, cadet, or midshipman;

(3) dishonorable or bad-conduct discharge; or,

(4) confinement for one year or more will be reviewed in precisely the same way as an SPCM involving a bad-conduct discharge or confinement for one year. Cases involving death must be reviewed by the Court of Appeals for the Armed Forces.

PR 15.12.4. ***Review in the Office of the Judge Advocate General (JAG).***

The record of trial in each general court-martial case that is not otherwise reviewed under Article 66, i.e., those not involving death, dismissal, punitive discharge, or confinement of one year or more where appellate review has not been waived or withdrawn, shall be examined in the Office of the Judge Advocate General under Article 69(a), UCMJ, and R.C.M. 1201(b). If any part of the findings or sentence is found to be unsupported in law or if reassessment of the sentence is appropriate, the JAG may modify or set aside the findings or sentence or both. As an alternative measure, JAG may forward the case for review to NMCCA.

PR 15.12.4.1. ***Action by the JAG***.

The findings or sentence, or both, in a court-martial case not reviewed under subsection (a) of Article 69 or under Article 66, i.e. SPCM cases in which a BCD was not approved, may be modified or set aside, in whole or in part, by the JAG on the ground of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence. The accused has a two year time limit in which to file an application in the Office of the Judge Advocate General under this subsection.

PR 15.12.4.2. ***Effect of a set aside by the JAG***.

If the JAG sets aside the findings or sentence, he may, except when the setting aside is based on lack of sufficient evidence to support the findings, order a rehearing. If he sets aside the findings and sentence and does not order a rehearing, he shall order that the charges be dismissed. If the JAG orders a rehearing but the convening authority finds a rehearing impractical, the convening authority shall dismiss the charges.

PR 15.13. ***DISCRETIONARY REVIEW***

PR 15.13.1. ***Court of Appeals for the Armed Forces (CAAF).***

In cases reviewed by it, CAAF has authority to act only in regard to matters of law. CAAF does not have the authority to:

-- weigh the evidence;

-- judge the credibility of witnesses; or,

-- make new findings of fact. In *United States v. Lowry*, CMA held, *inter alia*, that CMA has no authority to review questions of fact, even when a constitutional question is involved and, absent specific findings of fact, all conflicts in the evidence are regarded as having been decided in the light most favorable to the government.

1. Whether there is sufficient evidence to sustain a finding of guilty, however, is a matter of law.

2. Other evidentiary matters which CAAF may decide as a matter of law are:

(a) whether an affirmative defense has been reasonably raised by the evidence so that an instruction must be given thereon; and,

(b) whether there is sufficient evidence to support a determination that a confession was made voluntarily.

PR 15.13.2. ***Certification by JAG***.

In a case certified by JAG to CAAF, action by CAAF need only be taken with respect to the issues raised by him. In a case reviewed by CAAF upon petition of an accused, the court need only take action with respect to the issues specified in the grant of review. In a line of cases, the CAAF has held that it has jurisdiction to hear whether punishments awarded at courts martial are being administered in a manner inconsistent with the eighth amendment of the Constitution.

PR 15.13.3. ***Petition by accused***.

The accused may petition the Court of Appeals for the Armed Forces for a review of a decision of the Court of Criminal Appeals within sixty days from the earlier of:

1. the date on which the accused is notified of the decision of the CCA; or,

2. the date on which a copy of the decision of the CCA, after being served on appellate counsel of record for the accused, is deposited in the United States mails for delivery by first class certified mail to the accused at an address provided by the accused or, if no such address was provided, at the latest address listed for the accused in his official service record.

PR 15.13.4. ***Procedure***.

The procedure for appeal is as follows:

1. JAG sends to the accused by certified mail a "promulgation package" consisting of a copy of the NMCCA decision, with an endorsement notifying him of his right to appeal and a form petition with instructions telling the accused, step-by-step, what should be done with regard to the matter of appealing to C.A.A.F.; and

2. if the accused is in a military confinement facility, the package will be forwarded to the commanding officer or officer in charge of the confinement facility for delivery to the accused. The commanding officer or officer in charge of such a facility should ensure that the certificate of personal service is completed and returned to JAG.

PR 15.13.5. ***Review by the Supreme Court***.

Under 28 U.S.C. § 1259 and Article 67(h), UCMJ, decisions of the Court of Military Appeals may be reviewed by the Supreme Court of the United States by writ of certiorari in the following instances:

1. cases reviewed by CAAF;

2. cases certified to CAAF by the JAG;

3. cases in which CAAF granted a petition for review; and,

4. cases other than those described above in which CAAF granted relief.

The Supreme Court may not review by writ of certiorari any action of the Court of Military Appeals that refuses to grant a petition for review.

PR 15.14. *NAVY/MARINE CORPS APPELLATE LEAVE ACTIVITY*

PR 15.14.1. ***In general***.

The Navy-Marine Corps Appellate Leave Activity (NAMALA) is the command tasked with the primary responsibility for Navy and Marine Corps personnel awaiting appellate review of courts-martial. It is located at the Washington Navy Yard, Building 111, Washington, D.C. The commanding officer is typically a Navy lieutenant commander and the executive officer is typically a Marine Corps captain.

PR 15.14.2. ***Mission***.

The mission of NAMALA is the centralized administration of Navy and Marine Corps personnel awaiting appellate review of court-martial convictions. NAMALA does not take cognizance over those individuals who are in confinement or on voluntary appellate leave. Service records will be sent to NAMALA when all of the following have been completed: a punitive discharge has been approved; all confinement has been served; the convening authority (CA) has acted; and, voluntary appellate leave has become mandatory appellate leave (which occurs automatically once the CA has acted).

PR 15.14.3. ***Function***.

NAMALA is a "one-stop shopping for appellate leave" activity in that they are responsible for virtually any issue involving an appellant. NAMALA is responsible for: monitoring the status of appeals; maintaining service records; coordinating the payment of medical claims; disseminating information; implementing decisions of the Court of Criminal Appeals and the Clemency and Parole Board; promulgating supplemental court-martial orders; and,

processing discharges and closing out records.

PR 15.14.4. ***Action.***

PR 15.14.4.1. ***Navy personnel.***

As per BUPERSINST 1900.9, the following actions should be taken.

(a) Commands.

-- transfer enlisted members awarded a punitive discharge to the Transient Personnel Unit per MILPERSMAN 1640-060 regardless of the duration of confinement, including no confinement, in the sentence.

-- if drug/alcohol related incidents are involved, ensure member receives medical evaluation and is offered inpatient treatment if applicable.

-- ensure personal property and/or household goods are shipped to the member's home of record or location requested by the member. Property should not be transferred to a Navy storage facility.

-- forward a copy of the CA's action to the member's assigned command and the Personnel Support Detachment (PSD) servicing that command. If the punitive discharge is suspended, remitted or disapproved, include a recommendation on action to take in the member's case, i.e., process for administrative separation or return to duty.

(b) *TPUs/Brigs.*

-- initiate tracer action via message to the CA with follow-up tracers every 30 days thereafter on any CA action not received within 60 days of court-martial. Include Immediate Superior in Command (ISIC) and Office of the Judge Advocate General (OJAG) on second and subsequent tracer actions.

-- complete appellate leave/separation processing in accordance with Enclosures (2) and (3) of BUPERSINST 1900.9 prior to the member beginning voluntary/mandatory appellate leave.

-- ensure the member completes a separation physical and has a blood sample for Human Immune Virus (HIV) testing drawn no more than 90 days prior to beginning voluntary or mandatory appellate leave.

(c) *PSDs.*

-- execute any pay matters or reduction in rate approved in the CA's action. Ensure all service record entries are completed prior to transferring said records to NAMALA.

-- administratively drop the member from Navy strength accounts when the CA approves the unsuspended punitive discharge.

-- administratively transfer the member to NAMALA per enclosure (2) of BUPERSINST 1900.9.

PR 15.14.4.2. ***Marine Corps personnel.***

As per MCO 1050.16A, the following actions will be taken prior to directing involuntary appellate leave or approving voluntary appellate leave.

-- recover all government property, including uniform clothing required by MCO P10120.28G.

-- complete a DD Form 214 (Certification of Release or Discharge from Active Duty) to the fullest possible extent and place the completed form in the service record prior to transfer to the NAMALA.

-- mail certified true copies of the appellate leave orders, court-martial orders, and pages 3 and 12 of the service record to the DFAS, Kansas City Center (FBJRA), Kansas City, MO 64197.

-- ensure a separation physical and HIV testing has been completed no later than 90 days prior to the Marine beginning appellate leave.

-- ensure Marines undergoing treatment for infectious/contagious disease are not placed in a leave status except under the conditions outlined in MCO P1050.16A.

-- if drug/alcohol related incidents are involved, ensure medical evaluation and inpatient treatment are completed if recommended by a medical doctor or elected by the Marine.

-- ship personal property and/or household goods to the home of record or location requested by the Marine.

-- transportation in-kind is authorized for Marines ordered on involuntary appellate leave. Neither a mileage allowance nor transportation in-kind is authorized for Marines requesting voluntary appellate leave. Marines assigned overseas with their dependents who become eligible for appellate leave are authorized transportation for their dependents to a designated place in the United States, Puerto Rico, or a territory or possession of the United States.

-- Marines shall surrender their identification cards and those of their dependents prior to being placed on appellate leave. Identification cards will be issued to Marines and their dependents to expire 6 months from the date of issue. Personnel on appellate leave may have identification cards reissued by any command authorized to issue identification cards. The command should contact NAMALA to update the Marine's current status.

-- after entering an involuntary appellate leave status, transfer the Marine by service record to the NAMALA.

PR 15.14.5. ***Appellant Status.***

PR 15.14.5.1. ***Pay and Benefits***.

A military member on appellate leave will be in a no-pay status. The member and dependents are, however, entitled to full medical and dental benefits. If the member gets married or otherwise gains dependents while on appellate leave, those dependents will be entitled to medical benefits.

PR 15.14.5.2. ***Death of member***.

If a member on appellate leave dies prior to final review of his/her court-martial, then the court-martial will automatically be set aside and all rights/benefits would be afforded to the member's survivors.

PR 15.14.5.3. ***Leave.***

The member is entitled to be paid for any accrued leave until such leave is exhausted prior to going on appellate leave unless the member's end of current contract (ECC) has expired.

PR 15.14.5.4. ***Further Misconduct***.

The appellant is subject to the Uniform Code of Military Justice (UCMJ) until his/her review is finally completed and may be subject to further disciplinary action.

PR 15.14.5.5. ***Termination of Involuntary Appellate Leave***.

(a) *For rehearing/suspension*. Appellate leave will be terminated if a rehearing of any portion of the member's court-martial has been directed or if an approved punitive discharge or dismissal is suspended for a probationary period. Prior to terminating appellate leave, NAMALA will transfer the member by service record to the CA.

(b) *For set aside of punitive discharge/dismissal*.

-- Beyond obligated service -- Marine Corps members will be separated as per MCO P1900.16F if the jurisdiction provisions of R.C.M. 202, MCM (2005 ed.) do not apply. Navy enlisted personnel will be separated for either expiration of enlistment or convenience of the government and characterization will be the type warranted by service record. Navy officer personnel will be eligible for administrative separation processing under SECNAVINST 1920.6C.

-- Remaining obligated service -- Marine Corps enlisted members may be separated for the convenience of the government pursuant to MCO P1900.16F without terminating appellate leave. Marine Corps officer members, upon notification of the results of the court-martial, are required to either terminate appellate leave or resign. Navy personnel will be separated in the same manner as described in subparagraph above.

PR 15.14.5.6. ***Upon Final Review***.

(a) *Enlisted personnel*. If the sentence of the court-martial as approved by the convening authority is affirmed upon final review, enlisted personnel will be separated with a bad conduct/dishonorable discharge.

(b) *Officer personnel*. If the sentence of the court-martial as approved by the convening authority is affirmed upon final review, officers will be dismissed from the Naval service.

PR 15.14.5.7. ***Executing final decisions***.

The commanding officer, Navy and Marine Corps Appellate Leave Activity is the GCMCA who executes any punitive discharges that have been finally approved by the appellate court. Supplemental promulgating orders will also be issued by NAMALA.

PR 15.15. ***NEW TRIAL UNDER ARTICLE 73; R.C.M. 1210; JAGMAN, § 0163; MJM 5.K.***

PR 15.15.1. ***In general***.

Article 73, UCMJ, provides that, under certain limited conditions, an accused can petition JAG to have his case tried again even after his conviction has become final by completion of appellate review. The trial authorized by article 73 is not a rehearing such as is ordered where prejudicial error has occurred. It is not another trial such as that ordered to cure jurisdictional defects. It is a trial de novo as if the accused had never been tried at all.

PR 15.15.2. ***Grounds for petition.***

There are only two grounds for petition:

1. Newly discovered evidence; or,

2. fraud on the court.

3. Sufficient grounds will be found to exist only if it is established that an injustice has resulted from the findings or sentence and that a new trial would probably produce a result substantially more favorable to the accused. The petition must be received by JAG/ COMDT (G-L) within 2 years after approval by the convening authority of the court-martial sentence.

PR 15.15.3. ***Newly discovered evidence***.

The evidence, to be considered newly discovered, must have been discovered since the first trial; also, petitioner must have exercised due diligence to discover it if its existence could have been known at the time of the first trial. The evidence must, of course, be admissible and of such probative weight as to probably produce a substantially more favorable result for the accused.

PR 15.15.4. ***Fraud***.

The fraud must have had a substantial contributing effect on the findings of guilty or on the sentence as originally adjudged. Some examples are: confessed or proven perjury or forgery; willful concealment by the prosecution from the defense of exculpatory evidence; or disqualifying grounds for challenge of any member or military judge.

PR 15.15.5. ***Form of petition.***

1. A petition for a new trial shall be written and shall be signed under oath or affirmation by the accused, or by a person possessing the power of attorney of the accused for that purpose, or by a person with the authorization of an appropriate court to sign the petition as the representative of the accused.

2. R.C.M. 1210(c) lists the information which should be contained in the petition. Strict compliance is suggested.

PR 15.15.6. ***Procedure***.

1. The accused submits a petition to JAG/COMDT (G-L) within two years after approval of the original sentence by the convening authority. If the case is pending before CCA or CAAF, JAG/COMDT (G-L) must refer the petition to that court for action and take no further action until directed by the court.

2. R.C.M. 1210(c) lists the information which should be contained in the petition. Strict compliance is suggested.

3. JAG/COMDT (G-L), in considering the petition, may upon request allow oral argument.

4. If the petition is granted, JAG/COMDT (G-L) designates an appropriate convening authority to convene a court for the new trial.

5. Review by the convening authority and intermediate reviewing authorities is the same as in any other case. The individual who executes the sentence will credit the accused with any part of the original sentence served and/or will set aside so much of the unexecuted original sentence as exceeds the approved sentence of the new trial.

PR 15.16. *TYPES OF ERROR AND THEIR EFFECT*

PR 15.16.1. ***In general.***

While there are errors which are considered to be harmless and require no corrective action at all, there are numerous errors which can adversely affect court-martial proceedings. Some are easily correctable in that they only involve the trial record and its failure to reflect accurately what happened at trial. Others involve improper or inconsistent action by the court, but which can be corrected without material prejudice to the accused. Still others are of such a substantial nature that they affect the propriety of the trial itself, in whole or in part, and will result in a declaration of disapproval or nullity. This section addresses this latter type of error. Three broad areas will be covered: lack of jurisdiction, denial of military due process, and all other errors which may prejudice the substantial rights of the accused.

It merits repeating that a convening authority is not required to identify errors when he takes action. Appellate authorities, however, are tasked with this responsibility and they may ultimately direct the convening authority to correct error anyway. In order to avoid this from happening after a lengthy passage of time, a convening authority may choose, in his discretion, to identify and correct errors early and before his own CA's action.

PR 15.16.2. ***Lack of jurisdiction***.

To have jurisdiction to act, a court-martial must:

1. Be properly convened;

2. be properly constituted;

3. have charges properly referred to it;

4. have jurisdiction over the person; and

5. have jurisdiction over the offense.

Otherwise, the trial is a nullity. If the court-martial lacked jurisdiction over the person or the offense, the charge(s) will be dismissed. If, however, the court was improperly convened or constituted, or if charges were improperly referred, a subsequent proceeding may be ordered by the same or a different convening authority. The term used for the subsequent trial when the first court lacked jurisdiction is "another trial." Failure of a specification to state an offense is treated as a jurisdictional defect, and "another trial" may be ordered in this case as well. Note, however, that an accused cannot be required to stand trial a second time for an offense of which he was acquitted, even if the initial proceedings are set aside as the result of a jurisdictional defect.

PR 15.16.3. ***Denial of military due process.***

Except for errors of jurisdiction, the results of trial may not be overturned on the basis of an error of law unless that error "materially prejudices the substantial rights of the accused." Under this standard, errors are usually tested for specific prejudice; a specific cause-and-effect relationship must be shown between the error and the results of trial. Otherwise the error is considered to be harmless. In other cases, however, the error may be so fundamental as to be considered presumptively prejudicial. This is the case with a denial of a right guaranteed by the Constitution or the UCMJ. This is considered to be a denial of due process and the accused is entitled to relief. All findings of guilty affected by the error must be disapproved. The convening authority may then either dismiss the charges or order a subsequent proceeding, known as a rehearing. Some examples of due process errors follow.

PR 15.16.3.1. ***Pretrial investigation rights.***

Chapter XX discusses the accused's rights at the formal pretrial investigation mandated by Article 32, UCMJ. In *United States v. Ledbetter*, and *United States v. Chestnut*, C.M.A. set aside the findings and sentence because the accused was denied the opportunity to cross-examine available witnesses at the Article 32 investigation. In *United States v. Worden*, the findings and sentence were set aside because the accused's counsel was not allowed to prepare for the Article 32 investigation, either by consulting with the accused or by interviewing the witnesses. In *United States v. Tomaszewski*, the accused was offered an officer, but not a lawyer, to represent him at the Article 32 investigation, with the same result. In commenting on the need for reversal in such cases, Judge Fletcher has written:

This Court once again must emphasize that an accused is entitled to the enforcement of his pretrial rights without regard to whether such enforcement will benefit him at trial. Thus, Government arguments of "if error, no prejudice" cannot be persuasive.

Despite the foregoing language from *Chestnut*, the court, in a later opinion by the then Chief Judge, held that the presumption of prejudice arising from misconduct by the investigating officer is rebuttable.

PR 15.16.3.2. ***The right to counsel at trial.***

The accused's right to counsel, including the military lawyer of his choice if reasonably available, is discussed in Chapter VII. The denial of a request for individual military counsel is reviewed for an abuse of discretion. If an abuse of discretion is found in the denial of such a request, reversal will follow. Chief Judge Darden, writing for a unanimous Court of Military Appeals, has written: "The occurrence of such error dictates reversal without regard to the existence or amount of prejudice sustained."

PR 15.16.3.3. ***Confessions and admissions.***

If a statement, obtained from the accused without fully advising him of his rights, is improperly admitted in evidence at trial, reversal is required "regardless of the compelling nature of the other evidence of guilt."

PR 15.16.3.4. ***Errors founded solely on the United States.***

Errors of this type do not precisely fit the definition of due process errors, as the possibility exists that reviewing authorities could find a constitutional error harmless. On the other hand, constitutional errors are not tested for specific prejudice to the accused; the government must demonstrate that the error was harmless beyond a reasonable doubt to avoid reversal.

The *Ward* test was applied again in *United States v. Pringle*, In *Pringle*, C.M.A. found that the accused had been denied his sixth amendment right of confrontation by the admission into evidence of an inartfully redacted confession. The court held that reversal was required since the government had failed to show that the error was harmless beyond reasonable doubt.

PR 15.16.3.5. ***Sleeping or inattentive court members.***

When a member falls asleep, or nearly so, during the trial, the military judge must take remedial action or reversal will follow. Failure of the DC to move for a mistrial, challenge the inattentive member, or request other relief does not constitute waiver.

PR 15.16.3.6. ***In United States v. Penn.***

The court held no denial of due process or equal protection in denying those attached to or embarked in vessels the opportunity to refuse nonjudicial punishment.

PR 15.16.4. ***Materially prejudicial errors other than due process errors.***

Errors other than denial of due process errors are tested for specific prejudice to the accused in accordance with Article 59(a), UCMJ. The test is whether the competent evidence of record is of such quantity and quality that a court of reasonable and conscientious members would have reached the same result had the error not been committed. If this question is answered in the affirmative, the error is said to have been harmless, or, more properly, the error is said not to have materially prejudiced the substantial rights of the accused. The so-called compelling evidence rule is, in reality, just another way of saying an error was harmless, or that the error did not materially prejudice the substantial rights of the accused. The presence of compelling evidence of guilt leads to the conclusion that a court of reasonable and conscientious members would have reached the same result had the error not been committed. The list of possible errors in a contested criminal trial is almost endless; the following discussion covers some of the important issues which have been addressed by the Court of Military Appeals.

PR 15.16.4.1. ***Command influence and control.***

Appellate review of this issue is discussed in Chapter X, *supra*. The C.M.A. has enunciated various standards for judging the prejudicial effect of command influence. Among these are: appearance of impropriety; rebuttable presumption of prejudice; reasonable doubt as to the impact of the influence; no reviewing court may properly affirm findings and sentence unless convinced beyond a reasonable doubt that findings and sentence were not affected by command influence.

PR 15.16.4.2. ***Defense requests for witnesses.***

When a defense request for a witness is erroneously denied, the record is examined for specific prejudice to the accused. In making this assessment, C.M.A. has weighed various factors, such as:

(a) the military status of the witness ["...[T]he opinion of a serviceman's commanding officer occupies a unique and favored position in military judicial proceedings.";

(b) whether the witness' expected testimony would go to the core of the defense;

(c) whether the witness' expected testimony would have been merely cumulative of that of other witnesses;

(d) the probable impact of the witness' expected testimony on the findings and sentence; and

(e) whether the convening authority has exercised clemency with regard to the adjudged sentence, to the extent that any possible prejudice has been cured. Subtle changes have occurred in the law regarding the accused's right to witnesses during the sentencing portion of the court-martial. Prior to 1 August 1981, the denial of a request for a material witness to testify for the defense (at government expense) during extenuation and mitigation or rebuttal could constitute error and cause a rehearing for sentencing or reassessment of the sentence. The are now limits to the right to live appearances of defense extenuation and mitigation witnesses produced at the government's expense. The MCM appears to favor substitute forms of presentation of evidence at sentencing that are sufficient to meet the needs of the court-martial in determining an appropriate sentence without having to produce live witnesses at government expense. Some of the suggested substitutes are stipulations, depositions, and affidavits.

PR 15.16.4.3. ***Instructions by the military judge.***

Errors and omissions in the military judge's instructions are tested for prejudice to the accused, but C.M.A. has been very liberal in granting relief. The court has held that any reasonable doubt concerning the adequacy of the instructions is to be resolved in the accused's favor.

PR 15.16.4.4. ***Misconduct by the TC.***

Opportunities abound for the overly zealous military prosecutor to commit reversible error. In *United States v. Pettigrew*, C.M.A. found prejudicial error in the TC's argument, which characterized the accused's testimony as perjury. The court did not feel that the evidence of record supported the allegation. In *United States v. Nelson*, prejudicial error was found in TC's interjection of inadmissible hearsay into his argument. *Nelson* also contains an interesting discussion of the concept of waiver by trial DC's failure to object to an improper argument. The decision also indicates that, if TC's argument becomes flagrantly inflammatory, the military judge has a sua sponte duty to stop it.

In addition to improper arguments, a TC may cause reversible error in other ways, such as by not ensuring that the defense is served with a copy of a prosecution witness' grant of immunity.

PR 15.16.5. ***Cumulative error.***

Numerous violations of fundamental rules which, if considered individually, would probably have no measurable effect on the court, may, in cumulative effect, constitute prejudicial error. There are many cases which could be cited as examples of this type of error.

1. *United States v. Yerger*, the first cumulative error case under the UCMJ and widely cited since, involved a trial wherein the TC repeatedly used leading questions after several times being admonished by the ruling officer. The ruling officer received substantial amounts of hearsay evidence over objection of the DC, and the prosecution repeatedly referred to uncharged misconduct.

2. In *United States v. Exposito*, an entire shore patrol investigative report was received in evidence as was the testimony of a witness who claimed he saw a certain log which was material to the case, but who did not make any of the entries himself, and whose testimony was shown to be erroneous in several instances when the log itself was admitted into evidence. This case gives an extensive list of the C.M.A. citations in the area of cumulative error. *Exposito* also illustrates that cumulative errors may affect only one of several findings of guilty.

3. In *United States v. Walters*, the legal officer (military judge) fraternized with the members during a recess. He had several conversations with TC outside of the presence of the accused, and there were several conferences with counsel and the legal officer outside of the accused's presence. In addition, the legal officer suggested that it might not be a bad idea if the civilian DC were to "return to law school," and he requested the DC to render a legal opinion in regard to West German laws, which were in issue in the case, which the DC refused to do—placing him in an embarrassing position. The court held this case to be within the ambit of the doctrine of cumulative error and reversed conviction of the offense tainted by the errors.

PR 15.16.6. ***Remedies for prejudicial error***

1. If a prejudicial error affects all findings of guilty, then the findings and sentence must be disapproved. A rehearing may be ordered if there is sufficient evidence of record to support the findings of guilty.

2. If the error affects some, but not all, findings of guilty, the findings affected by the error are disapproved. The convening authority then has two options:

(a) Dismiss the disapproved findings and reassess the sentence on the basis of the remaining findings of guilty; or

(b) order a rehearing.

PR 15.17. *POST-TRIAL SESSIONS*

PR 15.17.1. *In general.*

This section discusses the means to resolve various court-martial errors. In some cases, the error can be corrected without overturning the trial results. If so, a certificate of correction, proceeding in revision, or Article 39(a) hearing may apply. Other errors are more substantial and may require overturning the case because of material prejudicial to the substantial rights of the accused. In such cases, a rehearing may be possible. Still others may affect the jurisdictional status of the court and result in the trial being declared a nullity. Even then, however, "another trial" may be possible.

PR 15.17.2. *Certificates of correction.*

1. In examining the record, the convening authority may find that it is incomplete in some material respect. The court may have performed its duties properly but, due to clerical error or inadvertence, the record does not reflect what actually occurred at the trial. Before he takes action, the convening authority may return the record to the military judge, president of an SPCM without a military judge, or the SCM for a certificate of correction. Notice shall be given to all parties with an opportunity to examine and respond to the proposed correction.

2. The certificate is prepared in accordance with Appendix 13 or 14, MCM (2005 ed.). It corrects the record of trial and states the reasons for the error in the original. It is then authenticated in the same manner as the record of trial, a copy is served on the accused, and the certificate is appended to the record directly after the original authentication.

3. The certificate may be used only to make the record correspond to what actually occurred. It cannot in any way rectify errors which actually occurred at trial. For example, a certificate would be proper where the record does not show:

(a) That a witness was sworn;

(b) that a challenged member withdrew from the courtroom;

(c) whether a motion was granted or denied; or

(d) whether the court was instructed properly. In *United States v. Anderson*, the authenticated record of trial revealed a patently erroneous instruction to the members that stated that arguments of counsel do constitute evidence in the case. This instruction was attacked at N.M.C.M.R. by appellate defense counsel. The appellate government counsel reacted by filing a motion to attach a certificate of correction. Defense moved for discovery to review the electronic recordings and stenographic notes. The motion was denied. C.M.A. reviewed this denial and found that error existed because of the failure of the government to provide the accused with a hearing where there would be an opportunity for all parties to be heard with respect to the propriety of attaching a certificate of correction.

PR 15.17.3. ***Proceedings in revision.***

1. Where there is an apparent error or omission in the record, or where the record shows improper or inconsistent action by a court-martial with respect to a finding or sentence that can be rectified without material prejudice to the substantial rights of the accused, the convening authority may return the record to the court for appropriate action. In no case, however, may the record be returned:

(a) For reconsideration of a finding of not guilty of any specification, or a ruling which amounts to a finding of not guilty;

(b) for reconsideration of a finding of not guilty of any charge, unless the record shows a finding of guilty to a specification laid under that charge that sufficiently alleges a violation of some article of the UCMJ; or

(c) for increasing the severity of the sentence, unless the sentence prescribed for the offense is mandatory.

(d) A court-martial may also be reconvened for revision proceedings on the initiative of the military judge.

2. To summarize, three conditions must exist before revision proceedings may be used:

(a) There is an apparent error or omission in the record, or improper or inconsistent action by the court; and

(b) such defect affects the findings or sentence; and

(c) the defect can be corrected without material prejudice to the substantial rights of the accused.

(d) Note: the error or omission referred to is not a reporter's error or omission whereby the record does not correctly reflect what actually occurred. Instead, this action is taken when the record correctly shows what happened, but what happened amounts to a defect.

3. *Examples where revision is proper*

(a) The findings are inconsistent, such as guilty of the specification but not guilty of the charge.

(b) The court failed to announce a finding as to a specification.

(c) The military judge failed to ascertain that the accused was aware of his rights concerning military counsel.

(d) The military judge failed to take judicial notice of a general regulation at trial.

4. *Examples where revision is improper*

(a) The convening authority wishes the court to reconsider a finding of not guilty.

(b) The convening authority wishes the court to increase the severity of the sentence. Exception: A revision is proper for such action if a more severe sentence is mandatory (i.e., spying in time of war (Article 106) has a mandatory sentence of death).

(c) Supplying an omitted instruction on the sentence cannot be corrected by proceedings in revision.

(d) An attempt to cure a defective plea-bargain inquiry unless the accused is given the opportunity to plead anew.

5. *Procedure*

(a) The convening authority in writing returns the record to the TC, pointing out the defect and directing proceedings in revision, or, as noted earlier, the court may reconvene on its own motion.

(b) The court reconvenes and trial resumes as though the court had adjourned.

(1) Only members who participated in the original findings and sentence may sit in revisions.

(2) If the court has been dissolved by order, there cannot be proceedings in revision. This is a good reason why convening orders should not be canceled.

(3) Members may be absent from the revision proceedings so long as a quorum is present.

(4) Although the same military judge, TC, and DC should participate in the revision proceedings, the convening authority may appoint new ones.

(c) In cases in which the convening authority has directed the revision proceedings, TC reads the communication from the convening authority in open court and announces that it will be inserted in the record.

(d) The military judge or president of an SPCM without a military judge should give the court any instructions necessary for the accomplishment of the revision action.

(e) If necessary, the court immediately closes to reconsider the findings or sentence (as the case may be) so as to cure the defect.

(f) As soon as it has determined its action, the court will announce that action in the presence of counsel, the accused, and the military judge, if any.

(g) A record of the proceedings in revision is prepared and authenticated in the same manner as the original record of trial.

PR 15.17.4. ***Article 39(a) sessions.***

R.C.M. 1102 authorizes a post-trial Article 39(a) hearing for the purpose of inquiring into and resolving any matter which may arise after trial and which may substantially affect the legal sufficiency of any finding of guilty or sentence. Basically, it is intended to be a fact-finding mechanism. For example, such a session may be called to examine allegations of misconduct by a member or by counsel. Prior to the adoption of R.C.M. 1102, this type of hearing was called a *Dubay* hearing, based on the case of *United States v. Dubay*.

PR 15.17.5. ***Rehearings.***

The convening authority may order a rehearing on the findings and sentence whenever the findings and sentence are disapproved because of prejudicial error occurring at the trial. The convening authority must determine, however, that there will be sufficient admissible evidence available to support a finding of guilty at the rehearing. A rehearing may also be ordered only as to the sentence where, for example, some findings of guilty have been dismissed and the sentence is no longer appropriate for the remaining findings, or where prejudicial error occurred at the sentencing stage of the trial.

1. A rehearing cannot be ordered as to any offense of which the accused was acquitted, nor may a rehearing be ordered if any part of the sentence is approved. The sentence is always disapproved when any rehearing is ordered.

2. The convening authority may take a reasonable length of time to decide whether a rehearing is practical.

PR 15.17.6. ***Rules relating to rehearing.***

1. *Steps in accomplishing a rehearing*. The convening authority takes action, disapproving the entire sentence and ordering trial before a court to be designated later. A statement of the reasons for disapproval is included in the convening authority's action.

2. The convening authority designates the court and forwards to the TC:

(a) The charges and specifications upon which the rehearing shall be held;

(b) the record of the first trial;

(c) all pertinent papers accompanying the record of the original trial; and,

(d) a statement setting forth his reasons for disapproving the original sentence. (The reason for sending all this matter to the TC is to inform him of the error made at the first trial which necessitated the rehearing.)

3. The rehearing may be held as to any offense of which the accused was found guilty at the first trial or a lesser included offense (LIO) thereof. If the accused was found guilty at the first trial of only an LIO of an offense charged, the rehearing can only be ordered as to such LIO or an even lower LIO. Additional charges may also be referred to trial with the offenses for which a rehearing has been ordered.

PR 15.17.7. ***Rehearing procedure.***

1. The procedure of the rehearing is the same as any trial and just as complete. No person who acted as a member at the first trial may act as a member at the rehearing. The military judge, TC, and DC at the first trial may act in the same capacity at the rehearing.

2. The accused at a rehearing only on sentence may not withdraw any plea of guilty upon which findings of guilty are based. If such a plea is found to be improvident, however, the rehearing shall be suspended and the matter reported to the authority ordering the hearing.

PR 15.17.8. ***The sentence at a rehearing***.

The court at the rehearing cannot adjudge a greater sentence than that adjudged at the original trial as properly reduced by reviewing authorities (Art. 63, UCMJ), except:

1. Where additional charges are referred to the rehearing (To compute the maximum punishment in such a case, add the punishment imposable for the additional charges to the original sentence adjudged as reduced on review. Be aware, however, of the situation where the first court finds the accused guilty of two charges but, on rehearing, a not guilty finding was entered on one of these. The maximum must be reduced accordingly. Also, be aware of the jurisdictional maximum of the court.);

2. where a mandatory sentence is prescribed by the UCMJ; and

3. where the convening authority reduced the adjudged sentence in compliance with a pretrial agreement and where the accused at the rehearing fails to plead guilty in compliance with the agreement. In such a case, the sentence at the rehearing is not limited by the CA's action but by the adjudged sentence.

The court members should not be aware of the basis for the sentence limitation. Upon rehearing, the members are not to be told of the prior sentence nor are they limited by the prior sentence. The convening authority, however, ***may not*** approve any sentence in excess of the first court-martial. The members are not instructed about this. It is error for the TC to advise them of the sentence awarded at the original trial. In adjudging the sentence, the court should not consider any credit that the accused is entitled by virtue of the execution of any part of the original sentence. The referral endorsement on the charge sheet by the convening authority will contain a statement of the

maximum punishment which the court may adjudge without stating the reason therefor.

PR 15.17.9. ***Record of the rehearing***.

The record of the rehearing is prepared and authenticated just as in any trial. The accused receives a copy. The record of the original proceedings should be appended to the record of the rehearing.

PR 15.17.10. ***The convening authority's action***.

The convening authority takes the initial action upon the record and may approve it without regard to whether any portion of the sentence adjudged at the original trial was executed or served by the accused.

1. In computing the punishment, the accused must serve under the new sentence; however, any portion of the original sentence served by the accused must be credited to him.

2. To insure that the accused will be administratively credited with the portion of the original sentence served by him, the convening authority should state the following in his action on the rehearing:

"The accused will be credited with any portion of the punishment served from _____ 20_ to _____ 20_ under the sentence adjudged at the former trial of this case."

PR 15.17.11. ***"Another trial."***

When the convening or higher authority finds a jurisdictional error, the entire trial is declared invalid. At the subsequent trial, persons who participated in the former trial are ineligible to act as court members, but the same military judge may preside. The accused may request trial by military judge alone even though the original trial was with members. The procedure at the subsequent trial is the same as at the original trial. The sentence is limited to that adjudged at the previous trial or, if the sentence was reduced by the convening or other authority, then the sentence as reduced forms the basis of the limitation. This is true except when the convening authority has reduced the adjudged sentence in compliance with a pretrial agreement and where the accused at the rehearing fails to plead guilty in compliance with the agreement. In such a case, the sentence at the rehearing is not limited by the convening authority's action but by the adjudged sentence. Whatever the sentence limitation may be, the court is not informed of its basis or rationale. If the accused is convicted and sentenced at the subsequent trial, the convening authority may approve the sentence; but, when the sentence is executed, the accused must be credited with any portion of the original sentence which was served or executed.

PR 15.18. ***SPEEDY REVIEW***

PR 15.18.1. ***Post-trial restraint cases.***

In *Dunlap v. Convening Authority*, the C.M.A. held that "beginning 30 days after June 21, 1974, a presumption of denial of speedy disposition of the case will arise when the accused is continuously under restraint after trial and the CA does not promulgate his formal and final action within 90 days of the date of such restraint after completion of the trial. The 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."

Dunlap involved a general court-martial conviction. In *United States v. Brewer*, C.M.A. held that the *Dunlap* standard also applies to the supervisory authority's action (a secondary level of court-martial review which existed prior to MCM, 1984) in SPCM in which the sentence, as approved by the convening authority, includes a BCD. Post-trial restriction may not be a sufficient degree of restraint to trigger the *Dunlap* presumption. In *United States v. Slama*, the court said, " . . . the standard applies only to cases in which the period of post-July 21 [1975] arrest or confinement exceeds 90 days." In computing the 90-day period, day one is the day after the post-trial restraint is imposed, and the date of the CA / SA action is included. This is called the "24-hour clock" method of calculation.

After several years of applying the *Dunlap* rule almost automatically in cases where post-trial restraint exceeded 90 days, the Court of Military Appeals has softened its stance and stated that, in cases tried after 18 June 1979, applications for relief because of delay of final action will be tested for prejudice.

Since the *Dunlap* decision addressed only those cases involving post-trial restraint, a showing of specific prejudice has always been necessary in those cases which do not involve post-trial restraint. The effect of *Banks* was to remove the automatic presumption of prejudice upon a showing of continuous post-trial confinement in excess of 90 days and to return post-trial confinement cases to the same status as those not involving confinement.

The C.M.A. appears to be aware, however, of the need to be vigilant in finding prejudice whenever lengthy post-trial delay in review occurs. Consider, for example, the case of *United States v. Clevidence*. In this case, the accused was sentenced to a BCD, confinement at hard labor, and forfeitures for three months for two specifications of failing to go to his appointed place of duty, one specification of disrespect, and four specifications of failure to obey lawful orders. The accused spent 77 days in post-trial confinement and thereafter was given appellate leave. The record of trial was not authenticated by the military judge, however, until 200 days after the sentence was adjudged. Moreover, the supervisory authority's action was not accomplished for an additional 113 days. In reversing the accused's conviction, C.M.A. stated:

We are reluctant to dismiss charges because of errors on the Government's part and we would especially hesitate to do so if the case involved more serious offenses. However, it seems clear that unless we register our emphatic disapproval of such "inordinate and unexplained" delay in a case like this, we may be faced in the near future with a situation that would induce a return to the draconian rule of *Dunlap*.

Since it appears that under the circumstances of this case, the delay in post-trial review was prejudicial to Clevidence and since we are sure that, in the exercise of our supervisory authority over military justice, we must halt the erosion in prompt post-trial review of courts-martial, we reverse the decision . . . , set aside the findings and sentence, and dismiss the charges against appellant.

In *United States v. Gentry*, the court set aside findings of guilty and dismissed two charges involving the use of marijuana by a lieutenant junior grade when the convening authority did not take his post-trial action in the case until 490 days after sentence was announced. The court noted:

That no reason appears in the record -- nor is any alleged -- explaining the inordinate delay in the post-trial processing of this routine case;

It further appearing that appellant -- a lieutenant (junior grade) -- was not confined after trial and remained on active duty; that he was shunned by his commander and ordered by him to stay off station and to maintain a low profile; that he was not promoted due to the pendency of the convening authority's action, notwithstanding that he was selected for promotion one and one-half years before that action and was selected each year thereafter; and

That appellant, anticipating prompt action by the convening authority and early dismissal, nevertheless had to reject two civilian job offers only after withholding decision on each for as long as possible;

[T]his case is another example of the "erosion of prompt post-trial review of courts-martial" which must be halted. . . .

In *United States v. Henry*, the Navy-Marine Corps Court of Military Review refused to find "prejudice per se" stating instead that "appellant must plead and demonstrate some real harm or legal prejudice flowing from the delay." However, the court also stated "we are troubled and frustrated by the frequency that this occurs in spite of repeated condemnations from this Court and the U.S. Court of Military Appeals." The same court in *U.S. v. Thomas*, adopted the speedy trial standard set out in *U.S. v. Kossman*, in which the court stated that the "touch stone for compliance with the provisions of the Uniform Code is not constant motion, but reasonable diligence ..." as the standard for speedy review. In *Thomas*, there was a delay of 22 months total, but the court focused on the SJA's lack of diligence (14 months) in preparing his recommendation and addendum when they decided to set aside the bad conduct discharge.

In *United States v. Tardif*, the court held that despite its earlier reluctance to grant relief absent the showing of "actual prejudice" in cases of excessive post-trial delay, it was not prohibited from granting such relief.

In *Toohey v. United States*, the court held that an accused has a constitutional right to a speedy post-trial review and that this right is separate and distinct from the "sentence appropriateness" review grant to the appellate courts under Article 66, UCMJ.

In *United States v. Jones*, the court addressed actual prejudice. In *Jones*, following his release from custody, the appellant had applied for a position as a driver. He submitted to the court his own declaration and declarations from three officials of a potential employer that stated that he would have been considered for employment or actually hired if he had possessed a DD-214, even if his discharge was less than honorable. The employer was aware of Jones' court-martial conviction. The court held that the unrebutted declarations were sufficient to demonstrate ongoing prejudice beyond what would have been a reasonable time for post-trial proceedings (363 days from the date he pleaded guilty and was sentenced and the date the case was docketed with the Navy-Marine Corps Court). In making its determination the court looked at the following four *Barker v. Wingo* factors: (1) length of delay; (2) reasons for delay; (3) whether or not there had been a demand for a timely review; and (4) resulting prejudice. In relief the court set aside the BCD.

PR 15.19 ***APPENDIX A - SJA'S / LEGAL OFFICER'S RECOMMENDATION CHECKLIST***

SJA's / LO's RECOMMENDATION ICO

____ Offenses, pleas, findings, and adjudged sentence set out.

____ Clemency recommendations by any member, military judge, or any other person, if any.

____ Summary of accused's service record.
- ____ Length of service.
- ____ Character of service (average pros and cons, average evaluation traits).
- ____ Decorations / awards.
- ____ Records of prior nonjudicial punishments.
- ____ Previous convictions.
- ____ Other matters of significance.

____ Nature and duration of pretrial restraint, if any.
- ____ Judicially ordered credit to be applied to confinement if any.

____ Current confinement status.

____ Existence of pretrial agreement noted, if any.
- ____ Terms and obligations CA is obligated to take or reasons why CA is not obligated to take specific action under the agreement.

____ All R.C.M. 1105 matters and other clemency submitted prior to recommendations with all matters submitted attached as enclosures.

____ All claims of legal error addressed and statement whether corrective action on the findings or sentence is appropriate when an allegation of error is raised under R.C.M. 1105 or when deemed appropriate by the SJA. [***Note***: For SJA's only, legal officers do not address legal error.]
- ____ All R.C.M. 1105 or other clemency matters noted and statement that they were taken into consideration.

____ Specific recommendation concerning action to be taken by CA on adjudged sentence after considering any clemency matters, any claims of legal error, and any pretrial agreement.

____ Optional matters, if any.
- ____ Accused notified and given opportunity to rebut adverse matters which are not part of the record and with knowledge of which the accused is not chargeable.

____ Recommendation signed by SJA or commissioned officer acting as legal officer.

____ Served on accused and counsel.
- ____ Statement stating why accused not personally served.
- ____ Date to accused: _____; counsel: _____.

____ If R.C.M. 1105 or R.C.M. 1106 matters or other matters are raised after original recommendation,

addendum to recommendation noting these issues completed. [***Note***: Only SJA may respond to legal errors.]

____ If addendum raises new matter, has accused and counsel been served and given opportunity to respond prior to CA taking action.

For Coast Guard version use enclosure 18.d. of the MJM.

PR 15.20. ***APPENDIX B - CONVENING AUTHORITY'S ACTION CHECKLIST***

CONVENING AUTHORITY'S ACTION ICO

____ R.C.M. 706 hearing ordered if accused lacks mental capacity.

____ Action taken not earlier than 10 days after the later of service of the record of trial or staff judge advocate's/legal officer's recommendation.
- ____ Waiver of right to submit matters, in writing, by accused.
- ____ Time period extended.

____ Optional: offenses, pleas, findings, and adjudged sentence properly promulgated.

____ Action states CA considered:
- ____ Result of trial.
- ____ SJA's/LO's recommendation.
- ____ Members' or military judge's clemency recommendation, if any.
- ____ Clemency matters submitted by anyone, if any.
- ____ Legal errors raised, if any.
- ____ Other matters raised under R.C.M. 1105 and R.C.M. 1106, if any. [***Note***: Indicate that no matters were received if that is the case; also indicate a failure of accused or counsel to respond to SJA's/LO's recommendation.]

____ Optional additional matters considered, if any.
- ____ Record of trial.
- ____ Personnel records of accused.
- ____ Other matters deemed appropriate by CA.
  - ____ Notification to accused and opportunity to rebut, if matters adverse to accused from outside record, with knowledge of which the accused is not chargeable are considered.

____ Specific action with regard to findings, if applicable.
- ____ Rehearing on findings ordered.
  - ____ If rehearing or new trial ordered, reasons for disapproval set forth.
- ____ If no rehearing ordered on disapproved charges and specifications, statement of dismissal.
- ____ If "other" trial ordered, reasons for declaring the proceedings invalid stated.

____ Specific action with regard to sentence adjudged.
- ____ Sentence consistent with pretrial agreement, if any.
- ____ CA executed portions of sentence not suspended, except for punitive discharge.
- ____ If sentence mitigated, equivalencies under R.C.M. 1003 complied with.
- ____ Sentence limited if record of trial does not meet requirements of R.C.M. 1103(b)(2)(B) or (c)(1).
- ____ Rehearing on sentence ordered.

____ Automatic reduction addressed, if accused not reduced to E-1 as part of adjudged sentence.

____ If portion of sentence suspended, accused has been informed of conditions in writing.

____ Place of confinement noted, if approved by CA.

____ Deferment date noted, if granted.
- ____ Deferment rescinded.

____ Credit for illegal pretrial confinement directed.

____ Any reprimand ordered executed included in action.

____ Companion cases noted, if any.

____ Signed by CA with authority to sign stated below.

____ If substitute CA, action notes CA is acting pursuant to a specific request.

____ If action on rehearing or new trial, limitations of R.C.M. 810(d) complied with.

____ Served on accused and/or counsel.

For Coast Guard CA action, see enclosure 18.c. of the MJM.

PR 15.21. ***APPENDIX C - COURT-MARTIAL CHECKLISTS***

GENERAL COURT-MARTIAL POST-TRIAL CHECKLIST ICO

____ Prepare report of results of trial form, if required; attach to ROT. JAGMAN, § 0149, A-1-j. Post-trial checklist not required if court-martial results in an acquittal.

____ Art. 32 appointing order inserted in ROT.
- ____ Report of investigation (DD Form 457).
- ____ Art. 34 advice.
- ____ Waiver of Art. 32.

____ Convening order inserted in ROT.
- ____ Modifications inserted, if any.

____ Charge sheet inserted in ROT.

____ ROT examined by TC.

____ ROT examined by DC, when unreasonable delay will not result.

____ Original verbatim ROT and 4 copies prepared or original summarized ROT and 1 copy if verbatim not required.

All exhibits included:
- ____ Prosecution.
- ____ Defense.
- ____ Appellate.
  - ____ Pretrial agreement.
  - ____ Motions.
  - ____ MJ alone request, if any.
  - ____ Written continuance requests with ruling.
  - ____ Written special findings by military judge.
  - ____ Enlisted members request.
  - ____ Members questionnaires.
  - ____ Voir dire questions submitted.
  - ____ Members' questions.
  - ____ Appellate rights statement.
    - ____ Special power of attorney.
  - ____ Waiver of appellate review.
  - ____ Other _____.

____ Page check: sequential; # of pages: ____.

____ Index sheet.

____ Copy of ROT served on accused; attach receipt in ROT (or explanation in lieu of).

____ ROT and copies delivered to staff judge advocate/legal officer.

____ Staff judge advocate's/legal officer's recommendation prepared; inserted in ROT.
- ____ SJA's/LO's recommendation checklist complied with.

____ Staff judge advocate's/legal officer's recommendation served on DC and accused; receipt in ROT (or explanation in lieu of). Date to: accused,_____; counsel, _____.

____ Accused's response to staff judge advocate's/legal officer's recommendation inserted in ROT, if provided.

____ Forward all responses and recommendations (including supplementary responses and recommendations) to

CA for review.

____ Allegations of legal error raised by accused in response addressed in an addendum to the recommendation. [SJA only.]

____ All other R.C.M. 1105, 1106, or other clemency matters addressed.

____ All supplementary recommendations raising new matter served on DC or accused; receipt in ROT (or explanation in lieu of).

____ Attach other matters submitted by accused or DC, and any action on same, to ROT.

____ Deferment requests.

____ All clemency requests.

____ Other matters.

____ Prepare CA's action/promulgating order using CA's input.

____ CA's action checklist complied with.

____ Prepare appropriate copies for distribution JAGMAN §§ 0153, 0155; R.C.M. 1114(c)(3).

____ Promulgating order checklist complied with.

____ Attach CA's action or statement as to why he/she cannot take action; include letter of reprimand, if any.

____ Complete time sheet and the back of the cover of the ROT.

____ Forward ROT to appropriate authority. [***Note***: If case assigned an NMCM number, it must always be forwarded to Navy and Marine Corps Appellate Review Activity, Code 40.31.]

____ Waiver of appellate review in writing.

____ Forward ROT to a judge advocate for review, this may be the SJA for CA.
[***Note***: Appellate review with sentence to death may not be waived.]

____ Judge advocate's review inserted in original ROT and all copies.

____ Copy of review to accused.

____ Forward ROT and copies to the Navy and Marine Corps Appellate Review Activity, Code 40.31.

____ Forward one copy of the ROT to the President, Naval Clemency and Parole Board, if sentence includes an unsuspended punitive discharge or confinement for 8 months or more.

____ Prepare appropriate service record entries (usually pages 4, 7, 9, and 13).

____ Optional: retain copy of ROT, CA's action, and promulgating order.

____ Conditions on suspension, proof of service on probationer, and any records of procedures in connection with vacation of suspension.

____ Appellate court directives (i.e. orders to conduct a rehearing, supplemental orders, etc.).

____ Records of former trial of the same case if case was a rehearing or new or other trial of the same case.

____ Compliance with requirements for National Security and classified information.

SPECIAL COURT-MARTIAL INCLUDING A BCD OR ONE YEAR CONFINEMENT POST-TRIAL CHECKLIST

ICO

____ Prepare report of results of trial form, if required; attach to ROT. Post-trial checklist not required if court-martial results in an acquittal.

____ Convening order inserted in ROT.
- ____ Modifications inserted, if any.

____ Charge sheet inserted in ROT.

____ ROT examined by TC.

____ ROT examined by DC, when unreasonable delay will not result.

____ ROT authenticated by each military judge participating in proceedings or substitute authentication.

____ Original verbatim ROT and 4 copies prepared.

All exhibits included:
- ____ Prosecution.
- ____ Defense.
- ____ Appellate.
  - ____ Pretrial agreement.
  - ____ Motions.
  - ____ MJ alone request, if any.
  - ____ Written continuance requests with ruling.
  - ____ Written special findings by military judge.
  - ____ Enlisted members request.
  - ____ Members' questionnaires.
  - ____ Voir dire questions submitted.
  - ____ Members' questions.
  - ____ Appellate rights statement.
    - ____ Special power of attorney.
  - ____ Waiver of appellate review.
  - ____ Other _____.

____ Page check: sequential; # of pages: ____.

____ Index sheet.

____ Copy of ROT served on accused; attach receipt in ROT (or explanation in lieu of).

____ ROT and copies delivered to staff judge advocate/legal officer.

____ Staff judge advocate's/legal officer's recommendation prepared; inserted in ROT.
- ____ SJA's / LO's recommendation checklist complied with.

____ Staff judge advocate's/legal officer's recommendation served on DC and accused; receipt in ROT (or explanation in lieu of). Date to accused _____; counsel _____.

____ Accused's response to staff judge advocate's/legal officer's recommendation inserted in ROT, if provided.

____ Forward all responses and recommendations (including supplementary responses and recommendations) to CA for review.
- ____ Allegations of legal error raised by accused in response addressed in supplementary recommendation. [SJA only.]
- ____ All other R.C.M. 1105, 1106, or other clemency matters addressed.
- ____ All supplementary recommendations raising new matter served on DC or accused; receipt in ROT

(or explanation in lieu of).

____ Attach other matters submitted by accused or DC, and any action on same, to ROT.
- ____ Deferment requests.
- ____ All clemency requests.
- ____ Other matters.

____ Prepare CA's action /promulgating order using CA's input. (or statement as to why he/she cannot take action)
- ____ CA's action checklist complied with.
- ____ Prepare appropriate copies for distribution JAGMAN §§ 0153, 0155; R.C.M. 1114(c)(3).
- ____ Promulgating order checklist complied with.
- ____ include letter of reprimand, if any.

____ Complete time sheet and the back of the cover of the ROT.

____ Forward ROT to appropriate authority. [***Note***: If case assigned an NMCM number, it must always be forwarded to Navy and Marine Corps Appellate Review Activity, Code 40.31.]
- ____ Waiver of appellate review in writing.
  - ____ Forward ROT to SJA of OEGCMA for review. [***Note***: ROT may have to be forwarded to OEGCMA for action or the Judge Advocate General for action.]
  - ____ Judge advocate's review inserted in original ROT and all copies.
    - ____ Copy of review to accused.
  - ____ Forward ROT to Office of the Judge Advocate General, Code 40.31.
  - ____ Forward one copy of the ROT to the President, Naval Clemency and Parole Board if sentence includes an unsuspended punitive discharge.

- ____ No waiver of appellate review.
  - ____ Send ROT and two copies to the Navy and Marine Corps Appellate Review Activity, Code 40.31.
  - ____ Forward one copy of the ROT to the President, Naval Clemency and Parole Board if sentence includes an unsuspended punitive discharge.

____ Prepare appropriate service record entries (usually pages 4, 7, 9, and 13).

____ Optional: retain copy of ROT, CA's action, and promulgating order.

____ If initiated as Art. 32, appointing order inserted in ROT.
- ____ Report of investigation (DD Form 457).
- ____ Art. 34 advice.
- ____ Waiver of Art. 32.

____ Conditions on suspension, proof of service on probationer, and any records of procedures in connection with vacation of suspension.

____ Appellate court directives (i.e. orders to conduct a rehearing, supplemental orders, etc.).

____ Records of former trial of the same case if case was a rehearing or new or other trial of the same case.

____ Compliance with requirements for National Security and classified information.

SPECIAL COURT-MARTIAL NOT INCLUDING A BCD OR ONE YEAR CONFINEMENT POST-TRIAL CHECKLIST

ICO

____ Prepare report of results of trial form, if required; attach to ROT. Post-trial checklist not required if court-martial results in an acquittal.

____ Convening order inserted in ROT.
- ____ Modifications inserted, if any.

____ Charge sheet inserted in ROT.

____ ROT examined by TC.

____ ROT examined by DC, when unreasonable delay will not result.

____ ROT authenticated by each military judge participating in proceedings or substitute authentication.

____ Original summarized ROT and 1 copy prepared.

All exhibits included:
- ____ Prosecution.
- ____ Defense.
- ____ Appellate.
  - ____ Pretrial agreement.
  - ____ Motions.
  - ____ MJ alone request, if any.
  - ____ Written continuance requests with ruling.
  - ____ Written special findings by military judge.
  - ____ Enlisted members request.
  - ____ Members' questionnaires.
  - ____ Voir dire questions submitted.
  - ____ Members' questions.
  - ____ Appellate rights statement.
  - ____ Other _____.

____ Page check: sequential; # of pages: ___.

____ Index sheet.

____ Copy of ROT served on accused; attach receipt in ROT (or explanation in lieu of).

____ ROT and copies delivered to staff judge advocate / legal officer.

____ Attach accused's response to ROT, if provided.

____ Attach other matters submitted by accused or DC, and any action on same, to ROT.
- ____ Deferment requests.
- ____ Clemency requests.
- ____ Other matters.

____ Comment to CA on all matters raised under R.C.M. 1105 and any other clemency matter. [Only SJA's may respond to legal error.]

____ Forward all responses and recommendations to CA for review.

____ Prepare CA's action/promulgating order using CA's input. (or statement as to why he/she cannot take action)
- ____ CA's action checklist complied with.
- ____ Prepare appropriate copies for distribution JAGMAN §§ 0153, 0155; R.C.M. 1114(c)(3).

____ Promulgating order checklist complied with.
____ include letter of reprimand, if any.

____ Complete time sheet and the back of the cover of the ROT.

____ Forward ROT to SJA of OEGCMA for review. [***Note***: ROT may have to be forwarded to OEGCMA for action or the Judge Advocate General for action.]

____ Judge advocate's review inserted in original ROT and all copies.

____ Copy of review to accused. Date to accused _____.

____ Maintain and distribute ROT in accordance with JAGMAN, § 0154b(2) and (3).
____ Shore activities: maintain 2 years after final action.
____ Fleet activities: maintain 3 months after final action.

____ Prepare appropriate service record entries (usually pages 4, 7, 9, and 13).

____ If initiated as Art. 32, appointing order inserted in ROT.
____ Record of investigation (DD Form 457).
____ Art. 34 advice.
____ Waiver of Art. 32.

____ Conditions on suspension, proof of service on probationer, and any records of procedures in connection with vacation of suspension.

____ Appellate court directives (i.e. orders to conduct a rehearing, supplemental orders, etc.).

____ Records of former trial of the same case if case was a rehearing or new or other trial of the same case.

____ Compliance with requirements for National Security and classified information.

CHAPTER 16

CHAPTER 16

PR 16. ARTICLE 32 INVESTIGATIONS AND ARTICLE 34 ADVICE: THE REFERRAL PROCESS IN A GENERAL COURT-MARTIAL

PR 16.1. *INTRODUCTION.*

This chapter discusses the requirements of the UCMJ for investigation and advice prior to referral of charges to a general court-martial (GCM). This material is intended to supplement Chapter IX, *Referral of Charges to a Court-Martial*, *supra. See also* Chapter XIII, *Speedy Trial*, *supra*, for a discussion of the reporting requirements of Article 33, UCMJ, when an individual is being held in arrest or confinement awaiting a GCM.

A. Article 32, UCMJ, provides for an investigation of charges prior to their referral to a GCM. The C.M.A. has indicated that the pretrial investigation of charges serves a dual purpose: "It operates as a discovery proceeding for the accused and stands as a bulwark against [referral] of baseless charges." In this same vein, Article 34(a), UCMJ, requires that, prior to referral to a GCM, a pretrial investigation will be reviewed by the convening authority's staff judge advocate for his written advice to the convening authority concerning the evidence and issues presented by the investigation and allied papers.

B. The question of who possesses the power to order an Article 32 investigation was, until recently, a difficult one to answer. In *United States v. Donaldson*, the Court of Military Appeals found prejudicial error in convening an Article 32 investigation where the convening authority, an officer in charge, lacked even NJP power over a particular accused, a Marine Corps major. Thus, *Donaldson* seemed to require that the accused be within the disciplinary authority of the officer ordering the investigation. In *United States v. Lillie*, the accused was transferred permanently from the situs of the alleged misconduct. When the misconduct was later discovered, a pretrial investigation was directed by Lillie's former command. After the pretrial investigation appointing order was executed, the accused was returned to that command in a TAD status. The N.C.M.R. noted that, while technically the accused was not "at the command" of the convening authority at the time the investigation was directed, the record nevertheless provided abundant support for the logic of the investigation being ordered at that command and appellant's amenability to the investigation when it was actually conducted. The apparent ambiguity in these two cases was fostered by the *Manual for Courts-Martial, 1969 (Rev.)*, which gave no definitive rule. The problem was resolved, however, by the *Manual for Courts-Martial, 1984*. It and current versions state, at R.C.M. 405(c): ". . . an investigation may be directed under this rule by any court-martial convening authority. . . ." It should be noted that a subordinate convening authority who directs an Article 32 investigation need not be absolutely neutral and detached; it is the investigating officer who must remain impartial.

PR 16.2. *THE ARTICLE 32 PRETRIAL INVESTIGATION*

PR 16.2.1. *Thorough and impartial investigation.*

The provisions of Article 32(a), UCMJ, require that the pretrial investigation be a "thorough and impartial investigation . . . to include inquiry as to the truth of the matter set forth in the charges, consideration of the form of charges, and a recommendation of the disposition which should be made of the case in the interest of justice and discipline."

1. Although the language of Article 32, UCMJ, would appear to require a pretrial investigation in every case prior to referral to a GCM, the C.M.A. has indicated that the right to a pretrial investigation may be waived by an accused.

2. When an accused has been afforded the rights of a party before a formal *JAG Manual* investigation or a court of inquiry, such investigation may be used in lieu of a pretrial investigation, where the accused does not request additional investigation after preferral of charges.

3. The C.M.A. has held that the pretrial investigation is a substantial right afforded the accused and not a mere formality. In *United States v. Nichols*, the C.M.A. held that the substantial rights of the accused had been prejudiced where he was not allowed to have civilian counsel at the Article 32 investigation because he lacked a clearance. This conclusion was reached despite the fact that military counsel was appointed to represent the accused at the pretrial investigation; however, no witnesses were called, and the only evidence considered was the file prepared by the Army's Criminal Investigations Division. The next day, the pretrial

investigating officer (PTIO) submitted his report recommending trial by GCM.

PR 16.2.2. *Personnel of the pretrial investigation*

PR 16.2.2.1. *Pretrial investigating officer (IO).*

R.C.M. 405(d), discussion, indicates that an IO should be a lieutenant commander or major, or above, or be an officer with legal training. The accuser should not be appointed as an IO.

a. Full disclosure by the IO of his prior connection with the case with no objection by the accused will waive a subsequent challenge to the qualifications of the IO.

b. In *United States v. Collins*, the IO specifically advised the accused's DC that additional charges could be preferred against the accused if he made any more threats toward a government witness. The IO did not actually prefer any additional charges, but was directed by the appointing authority to determine by additional investigation proceedings whether the facts were supportive of the charge and to recommend disposition. Upon examination of the *ABA Standards, The Function of the Trial Judge* (1972) (and, in particular, the sections dealing with witness protection, disruptive behavior, and criminal contempt) and, upon concluding that no higher standard should apply to an investigative judicial officer, the court determined that it could not, as a matter of law or fact, find the IO manifested a lack of impartiality or that either investigation was improperly conducted. Adopting the criteria from the *ABA Standards*, the court held that nothing in the record demonstrated that the actions of the IO were so integrated with the conduct of the accused that he contributed to such conduct, or became otherwise involved, or that his objectivity could reasonably be questioned. R.C.M. 405(e) is amended to read as follows:

(e) Scope of investigation. The investigating officer shall inquire into the truth and form of charges, and such other matters as may be necessary to make a recommendation as to the disposition of the charges. If evidence adduced during the investigation indicates that the accused committed an uncharged offense, the investigating officer may investigate the subject matter of such offense and make a recommendation as to its disposition, without the accused first having been charged with the offense. The accused's rights under subsection (f) are the same with regard to investigation of both charged and uncharged offenses.

PR 16.2.2.2. *Counsel for the government.*

The commander who directed the investigation may, as a matter of discretion, detail counsel to represent the government. Counsel for the government, or an individual assigned as counsel for an investigation, is not disqualified from acting later as trial counsel. Counsel for the government may not act as legal advisor to the investigating officer. In *United States v. Payne*, the court was extremely critical of the IO's *ex parte* conversations with the prosecuting attorney, declaring that the IO owes the accused the same duty of neutrality, detachment, and independence as does the trial judge.

PR 16.2.2.3. *Counsel for the accused.*

The accused has the right to Article 27(b) counsel at a pretrial investigation. The accused has several alternatives in exercising his right to counsel.

a. *Civilian counsel*. The accused has the right to be represented by civilian counsel at his own expense unless the time necessary to obtain such counsel would "unduly delay" the investigation.

b. *Detailed counsel.* Counsel certified under Article 27(b), UCMJ, must be detailed to represent an accused at an Article 32, UCMJ, investigation. If the accused is successful in obtaining a military counsel of his own selection, the detailed counsel shall be excused unless the accused petitions the detailing authority to keep detailed counsel and the detailing authority grants the request.

c. *Individual military counsel (IMC).* The accused has the same right to IMC for the pretrial investigation as at a special or general court-martial.

PR 16.2.3. *Rights of the accused at a pretrial investigation.*

R.C.M. 405(f) details the rights of an accused at a pretrial investigation:

1. The right to be informed of the offenses charged, the name of the accuser, the names of the witnesses against him, and the purpose of the investigation;

2. the right to counsel as previously discussed;

3. the right to be present and the right to confront and to cross-examine witnesses [Availability of military witnesses is initially determined by the IO. This decision is subject to that of the immediate commanding officer of the witness, which, in turn, is subject to review by the military judge as a pretrial motion. The test of availability is, in essence, a sliding scale; the difficulty of producing a witness is to be measured against the importance of the expected testimony, although distance alone is an insufficient basis upon which to deny the presence of a witness. R.C.M. 405(g)(1) states: "A witness is 'reasonably available' when the significance of the testimony and personal appearance of the witness outweighs the difficulty, expense, delay, and effect on military operations of obtaining the witness' appearance." The presence of civilian witnesses will be dependent upon their willingness to appear. No subpoena power is available, but transportation expenses and per diem allowance may be paid to those who voluntarily appear. As a general rule, transcripts of former testimony and sworn statements of witnesses are properly considered by an Article 32 investigation officer; and, such consideration does not abridge the right to confrontation, so long as DC is afforded full opportunity to cross-examine subject witnesses.;

4. the right to be informed of evidence known to the IO and to have produced those documents or physical evidence, under the control of the government, relevant to the investigation and not cumulative, which are reasonably available;

5. the right to have the IO call and examine (or have DC examine) witnesses requested by the accused;

6. the right to present evidence in his own behalf, including matters of defense, extenuation, and mitigation; and

7. the right to remain silent or present testimony in any form.

PR 16.2.4. ***Procedure before pretrial investigation***

PR 16.2.4.1. ***Advice to the accused.***

At the outset of the pretrial investigation, the IO must advise the accused of his rights as enumerated above. He must also advise the accused of his rights under Article 31b, UCMJ.

PR 16.2.4.2. ***Rules of evidence.***

The Military Rules of Evidence, other than Mil.R.Evid. 301, 302, 303, 305, 412 and section V (privileges), do not apply. The IO is not required to rule on objections. Upon request, the IO should note the objection in the record. All testimony, however, should be taken under oath, except for the accused, who may make an unsworn statement. Additionally, no unsworn written statements may be considered by the IO over defense objection except in time of war.

PR 16.2.4.3. ***Hearings.***

The pretrial investigation must be conducted in the presence of the accused and his counsel. The IO has discretion to close the investigation to the public, even over the objection of the accused, where public disclosure of evidence not admissible at trial might prejudice the accused. The place of the hearing may be moved from time-to-time, to the end that all available evidence be received. For example, where a civilian witness refuses to travel at his own expense, the IO, DC, and accused may "move" the investigation to the witness.

PR 16.2.4.4. ***Examination of witnesses and record of proceedings.***

The examination of witnesses who are present, other than the accused, must be upon oath or affirmation. The IO reduces the substance of the testimony to writing. An alternative to this procedure, used at many commands, is to detail a reporter to make a verbatim transcript of the pretrial investigation. This procedure provides a means of preserving pretrial investigation testimony for possible use at trial.

PR 16.2.5. ***Report of the pretrial investigating officer***

1. R.C.M. 405(j) requires the IO to submit a written report of the investigation to the officer who directed the investigation. This report should include the following elements:

a. A statement of names, organizations, or addresses of DC and whether DC was present throughout the taking of evidence or, if not present, the reason why;

b. the substance of the testimony taken on both sides, including any stipulated testimony;

c. any other statements, documents, or matters considered by the IO, or recitals of the substance or nature of such evidence;

d. a statement of any reasonable grounds for belief that the accused was not mentally responsible for the offense or was not competent to participate in the defense during the investigation;

e. a statement whether the essential witnesses will be available at the time anticipated for trial and the reasons why an essential witness may not be then available;

f. an explanation of any delays in the investigation;

g. the IO's conclusion whether the charges and specifications are in proper form;

h. the IO's conclusion whether reasonable grounds exist to believe that the accused committed the offenses alleged; and

i. the recommendations of the IO, including disposition.

2. The report may be made using appendix 5 of the MCM (2005 ed.). In addition, the IO may prefer charges and attach a charge sheet, if appropriate.

3. *Distribution of the report.* The IO will ensure that the report is forwarded to the commander who ordered the investigation. That commander shall promptly cause a copy of the report to be delivered to each accused.

PR 16.2.6. ***Defects in the Article 32 pretrial investigation.***

The requirements of Article 32, UCMJ, are not jurisdictional and may be waived by the accused. R.C.M. 405(a), discussion, states that defects in the pretrial investigation which result in prejudice at trial may require a "delay in disposition of the case or disapproval of the proceedings." Upon a showing of prejudice, the military judge may adjourn the trial to permit additional pretrial investigation to cure the defect or may grant other appropriate relief. Objections based on inadequacy of the pretrial investigation must ordinarily be made prior to pleas, or are waived. Whether corrective action need be taken and the type of relief afforded depends upon the time objection is made and the type of defect.

PR 16.2.6.1. ***Time of objection.***

The accused may preserve the right to gain relief from any error at the pretrial investigation by making an objection to the IO promptly upon discovery of the alleged defect.

a. Most objections must be made at the pretrial investigation itself to preserve the objection.

b. After receiving a copy of the IO's report, the accused has five days in which to make an objection to the report itself.

c. R.C.M. 405(k) states:

. . . [F]ailure to make a timely objection under this rule, including an objection to the report, shall constitute waiver of the objection. Relief from the waiver may be granted by the investigating officer, the commander who directed the investigation, the convening authority, or the military judge, as appropriate, for good cause shown.

If timely objections were made to the IO during the investigation, notations of such objections should be in the IO's report if a party so requests. If they are not, and the accused does not object within five days after receiving the report, the objections will probably be waived in the absence of good cause.

PR 16.2.6.2. *Objection at trial.*

Where relief has not been granted before trial, objection should be made again before entry of pleas. In the absence of timely objection, however, the C.M.A. has granted relief in several cases. In *United States v. Donaldson*, the C.M.A. held that an officer in charge of a Marine major did not have power to convene an Article 32 investigation concerning his alleged offenses. Thus, it was error to proceed over the defense objection to this substantial defect despite the fact that there was no substantial prejudice. The court also held that failure to object to the fact that two additional charges were never investigated constituted waiver. Note also that, if timely objection is made, the accused is entitled to relief without regard to whether prejudice has been shown. "This Court again must emphasize that an accused is entitled to enforcement of his pretrial rights without regard to whether such enforcement will benefit him at trial."

PR 16.3. *THE ARTICLE 34 STAFF JUDGE ADVOCATE'S ADVICE*

PR 16.3.1. *When required.*

Article 34(a), UCMJ, provides: "Before directing the trial of any charge by general court-martial, the convening authority shall refer it to his staff judge advocate for consideration and advice. . . "

The purpose of the SJA advice is to give the convening authority legal guidelines in determining whether a charge alleges an offense, coupled with the SJA's opinion whether trial should be by GCM or otherwise.

PR 16.3.2. *Who may draft SJA advice*

The preparation and signing of the SJA advice must be personally accomplished by the SJA, although he may call upon his subordinates for assistance. The convening authority must communicate directly and personally with his SJA in reference to trial as well as other matters relating to military justice.

Ineligibility: No person who has acted as IO, military judge, or member of the court, prosecution, or defense, in any case may later act as SJA in the same case. The appellate courts have construed this provision rather narrowly.

PR 16.3.3. *Form and content*

PR 16.3.3.1. *Required contents.*

The SJA advice must be both written and signed by the SJA. R.C.M. 406(b) requires that it contain the following elements:

a. A conclusion with respect to whether each specification alleges an offense under the code;

b. a conclusion with respect to whether the allegation of each offense is warranted by the evidence indicated in the report of investigation (if there is such a report);

c. a conclusion with respect to whether a court-martial would have jurisdiction over the accused and the offense; and

d. a recommendation of the action to be taken by the convening authority.

The discussion portion of R.C.M. 406(b) states:

The advice need not set forth the underlying analysis or rationale for its conclusions. Ordinarily, the charge sheet, forwarding letter and indorsements, and reports of investigation are forwarded with the pretrial advice. In addition, the pretrial advice should include when appropriate: a brief summary of the evidence; discussion of significant aggravating, extenuating, or mitigating factors; and any previous recommendations, by commanders or others who have forwarded the charges, for disposition of the case. However, there is no legal requirement to include such information and failure to do so is not error.

PR 16.3.3.2. ***Errors.***

Information included in the report should be accurate. Any misleading information contained in the report, even if the information was not required to be there, may be cause for appropriate relief under R.C.M. 906(b)(3).

PR 16.3.3.3. ***Standard.***

The standard used to determine the sufficiency of the evidence is probable cause. This standard was set out in *United States v. Engle*, before it was set forth in the MCM. In *Engle*, supra, the court concluded that the appropriate standard is that degree of proof which would convince a reasonable, prudent person that there is probable cause to believe a crime was committed and the accused committed it.

PR 16.3.4. ***Effect of defects in Article 34, UCMJ, SJA advice.***

The requirements of Article 34, UCMJ, are not jurisdictional and may be waived by the accused.

1. Objections based on inadequacy of SJA advice ordinarily must be made prior to plea or are waived.

2. Defects in the SJA advice require corrective action only where prejudice is shown.

3. Even when a timely objection has been made to the sufficiency of the Article 34 advice, such objection is normally waived by a subsequent plea of guilty. This is in accordance with the rule that a plea of guilty waives all defects that relate to the accused's guilt or innocence. There are, however, some exceptions to this rule. In *United States v. Engle*, trial DC moved for a new Article 34 advice on the ground that the one upon which the convening authority had already referred the matter to trial by GCM contained a material misstatement of the evidence and omitted mention of other matters that could have affected the judgment of the convening authority in making his decision to refer the case to court-martial. When the motion was denied, the accused entered a plea of guilty on all charges and specifications. The Navy-Marine Corps Court of Military Review did not address the matter of alleged waiver of the defect by virtue of the guilty plea. Reversing the N.M.C.M.R., the C.M.A. stated:

[t]he doctrine [of waiver of the defect in the Article 34 advice]] is inapplicable. The inadequacies the defense perceived . . . related not only to the question of accused's guilt, but also to whether the convening authority should refer the charges to trial before a general court-martial, with its extensive sentencing power. . . . A plea of guilty may indicate a willingness to disregard an error in the proceedings that might otherwise have affected findings of guilty as to offenses covered by the pleas, but it does not signify surrender of an objection to the validity of findings not predicated upon a plea of guilty or as to sentence. . . . Consequently, the accused's plea . . . did not foreclose review of all material aspects of accused's assignment of error.

Although some of the errors in *Engle* related to requirements under the *Manual for Courts-Martial, 1969 (Rev.)*, the principle of waiver announced in that case is still believed to be good law.

PR 16.4. ***ARTICLE 32 / 34 CHECKLIST***

-- ***Article 32 investigation.***

1. Obtain service record from personnel or PSD.

2. Establish liaison with local NLSO regarding pending charges and obtain name of Article 32 investigating officer.

3. Draft charges on DD Form 458. Complete charge sheet through block IV only; ***do not*** refer charges.

4. Prepare the appointing order for the Article 32 investigating officer.

5. Make sufficient copies of charge sheet and appointing order for distribution to all necessary parties and one copy for the command files. The original appointing order will be attached to the investigation; it is not kept in the command files.

6. Forward the charge sheet, appointing order (and the copies of each), plus the service record and any investigative reports, to the NLSO.

7. After receipt of the completed Article 32 investigation and the IO's report, forward to your CO for a determination as to disposition.

8. If a GCM is desired, forward service record, the investigation, and IO's report to the GCM authority requesting the appropriate action.

PR 16.5. ***CHECKLIST FOR ARTICLE 34 ADVICE / REFERRAL OF CHARGES***

A. Upon receipt of a request for a GCM by a summary or SPCMCA, review the service record and investigation.

B. Prepare the advice and recommendation concerning the charges for the flag officer per Article 34, UCMJ, and R.C.M. 406, MCM, 1984.

C. If the flag officer agrees to refer the charge(s) to a GCM, then prepare block V of the charge sheet (DD Form 458).

D. Prepare a list of possible members, so the CA may pick the panel, and prepare the convening order for signature.

E. After referral, serve the accused with a copy of the charges and note this on the charge sheet.

F. Prepare sufficient copies of the charge sheet and convening order for distribution to all parties. Retain the original convening order and send a certified copy with the original charge sheet for inclusion in the record of trial.

G. Copy the enlistment contract and pages 1, 2, 4, 5, 7, 9 (and any page 13's relating to NJP's or disciplinary matters) and enlisted evaluations. These may be needed for preparation of the CA's action if the accused is convicted.

H. Forward the service record, charge sheet, Article 34 advice, IO's report with the investigation, and any other investigative reports to the NLSO for action.

I. Contact the accused's command for a bailiff and other requirements for the accused in case he / she is confined (sea bag, pay record, health record, etc.).

J. Prepare a confinement order and TEMADD orders in case the accused is confined.

PR 16.6. ***APPENDIX A - SAMPLE APPOINTING ORDER FOR ARTICLE 32 PRETRIAL INVESTIGATION***

DEPARTMENT OF THE NAVY
Naval Justice School
360 Elliot St.
Newport, Rhode Island 02841-1523

22 Aug 20CY

In accordance with R.C.M. 405, MCM (2005 ed.), Lieutenant Commander Pretrial I. Officer, JAGC, U.S. Navy, is hereby appointed to investigate the attached charges preferred against Seaman Watt A. Accused, U.S. Navy. The charge sheet and allied papers are appended hereto. The investigating officer will be guided by the provisions of R.C.M. 405, MCM (2005 ed.), and current case law relating to the conduct of pretrial investigations. In addition to the investigating officer hereby appointed, the following personnel are detailed to the investigation for the purposes indicated:

COUNSEL FOR THE GOVERNMENT

Lieutenant I. Will Convictim, JAGC, U.S. Navy, certified in accordance with Article 27(b), Uniform Code of Military Justice;

DC

Lieutenant I. Gettum Off, JAGC, U.S. Naval Reserve, certified in accordance with Article 27(b), Uniform Code of Military Justice.

CONVENING T. AUTHORITY
Captain, JAGC, U.S. Navy
Commanding Officer
Naval Justice School
Newport, Rhode Island

DEPARTMENT OF THE NAVY
Naval Justice School
360 Elliot St
Newport, Rhode Island 02841-1523

2 Sep 20CY

FIRST ENDORSEMENT on LCDR Pretrial I. Officer, JAGC, USN, Investigating Officer's Report of 30 Aug CY

From: Commanding Officer, Naval Justice School
To: Commander, Naval Education and Training Center, Newport

Subj: ARTICLE 32 INVESTIGATION ICO SEAMAN WATT A. ACCUSED, U.S. NAVY, 123-45-6789

1. Forwarded.

2. Recommend trial by general court-martial.

CONVENING T. AUTHORITY

PR 16.7. ***APPENDIX B - SAMPLE ARTICLE 34 LETTER***

MEMORANDUM

From: Staff Judge Advocate
To: Commander, Naval Education and Training Center, Newport

Subj: ADVICE AND RECOMMENDATIONS CONCERNING THE CHARGES AGAINST SEAMAN WATT A. ACCUSED, U.S. NAVY, 123-45-6789

Ref: (a) Article 32, UCMJ
(b) R.C.M. 406, MCM (2005 ed.)

Encl: (1) Charge sheet
(2) Article 32 investigation w/ fwd ltr CO, NAVJUSTSCOL

1. Per reference (a), an investigation has been conducted into the following charge and specification against Seaman Watt A. Accused, U.S. Navy, 123-45-6789.

Charge and Specification: See enclosure (1).

2. The charge and specification have been forwarded with a recommendation for trial by general court-martial by Commanding Officer, Naval Justice School, Newport, Rhode Island. The investigating officer, Lieutenant Commander Pretrial I. Officer, JAGC, U.S. Navy, recommended trial by general court-martial of the charge and specification. The investigation was conducted on 30 August 20CY. The pretrial investigation report and forwarding letter, dated 2 September 20CY, are attached [enclosure (2)].

3. Per reference (b), the following advice concerning the charge and specification is furnished:

a. The investigation was conducted in substantial compliance with reference (a). The evidence consisted of one government exhibit received into evidence.

b. The specification alleges an offense under the UCMJ.

c. The allegations in the specification are warranted by the evidence adduced at the investigation.

d. Court-martial jurisdiction has been established over the accused and the offense.

Subj: ADVICE AND RECOMMENDATIONS CONCERNING THE CHARGES AGAINST SEAMAN WATT A. ACCUSED, U.S. NAVY, 123-45-67894.

Discussion of the charge and specification:

a. Elements:

(1) That the accused, on or about 1 June 20CY, absented himself from his organization, that is, Naval Justice School, Newport, Rhode Island;

(2) that he remained so absent until 18 August 20CY;

(3) that the absence was without authority from anyone competent to give him leave;

(4) that the accused intended at the time of absenting himself, or at some time during his absence, to remain away permanently from his organization; and

(5) that the accused's absence was terminated by apprehension.

b. Discussion of proof:

(1) IO Exhibit (2), a true copy of a NAVPERS 1070/606 (Record of Unauthorized Absence) from the service record of the accused, provides evidence which establishes probable cause to believe that, on or about 1 June 20CY, the accused absented himself from his organization, to wit: Naval Justice School, Newport, Rhode Island; that he remained so absent until 18 August 20CY; that the absence was without authority from anyone competent to give him leave; and that the absence was terminated by apprehension. The intent of the accused to remain away permanently can be inferred from the length of the absence (78 days), and the accused's apprehension in Tucson, Arizona, some distance from Newport, Rhode Island.

(2) If the intent of the accused to remain away permanently is not proved beyond a reasonable doubt, the accused may be found guilty of a lesser included offense of unauthorized absence in violation of Article 86, UCMJ.

(3) The statute of limitations, for both Article 85 and Article 86, is five years. The receipt of the preferred charges by Commanding Officer, Naval Justice School, Newport, Rhode Island, on 20 August 20CY, has tolled the running of the statute of limitations and this issue is moot.

4. Maximum authorized punishment:

a. Dishonorable Discharge, confinement for 3 years, forfeiture of all pay and allowances, and reduction to E-1, in the event the accused is convicted of a violation of Article 85, UCMJ.

Subj: ADVICE AND RECOMMENDATIONS CONCERNING THE CHARGES AGAINST SEAMAN WATT A. ACCUSED, U.S. NAVY, 123-45-6789

b. Dishonorable Discharge, confinement for 1 year 6 months, forfeiture of all pay and allowances, and reduction to E-1, in the event the accused is convicted of a violation of Article 86, UCMJ.

5. Additional information relative to case:

a. A review of the accused's service record reflects the following misconduct resulting in disciplinary action:

CO's NJP - 14 Jan CY - Violation of Article 86, UCMJ, UA from 15 Oct CY(-1) to 23 Dec CY(-1).

AWARDED: 15 days restriction, 15 days extra duty, and forfeiture of $50.00 pay per month for one month.

b. The accused is 24 years of age, single, and enlisted in the U.S. Navy on 1 January 20CY(-1), for a period of 4 years. His GCT is 45, his ARI is 53, and he completed the 12th grade of school. His average performance marks are 3.4. He is entitled to no awards, medals, or decorations.

6. In summary, my advice is that there has been substantial compliance with reference (a), the specification alleges an offense under the Code and the allegations in the offense are warranted by the evidence contained in the investigation. I recommend the charge and specification be referred to trial by general court-martial.

7. You may indicate your agreement or disagreement with the foregoing in the place provided below. If you agree with the advice and recommendation herein, you should sign the referral to trial on page two of the Charge Sheet (DD Form 458) [enclosure (1)].

R. U. GUILTY

APPROVED / DISAPPROVED

CHAPTER 17

CHAPTER 17

PART A

PR 17.A. GLOSSARY OF WORDS AND PHRASES; COMMON ABBREVIATIONS

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.

AFFIRMATION - a solemn and formal external pledge, binding upon one's conscience, that the truth will be stated.

AIDER AND ABETTOR - one who shares the criminal intent or purpose of the perpetrator, and seeks to help him carry out his scheme and, hence, is liable as a principal.

ALIBI - a defense that the accused could not have committed the offense alleged because he was somewhere else when the crime was committed.

ALLEGE - to assert or state in a pleading; to plead in a specification.

ALLEGATION - the assertion, declaration, or statement of a party to an action, made in a pleading, setting out what he expects to prove.

ALL WRITS ACT - a Federal statute, 28 U.S.C. § 1651(a), 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.

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 (BCD) - 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 (CO) - a commissioned officer in command of a unit or units, an organization, or an area of the Armed Forces.

COMMISSIONED OFFICER - an officer of the Naval Service or Coast Guard who holds a commission in an officer grade, Chief Warrant Officer (W-2) and above.

COMMON TRIAL - a trial in which two or more persons are charged with the commission of an offense which, although not jointly committed, was committed at the same time and place and is provable by the same evidence.

COMPETENCY - the presence of those characteristics, or the absence of those disabilities, i.e., exclusionary rules, which renders a particular item of evidence fit and qualified to be presented in court.

CONCURRENT JURISDICTION - jurisdiction which is possessed over the same parties or subject matter at the same time by two or more separate tribunals.

CONCURRENT SERVICE OF PUNISHMENTS - two or more punishments being served at the same time.

CONFESSION - a statement made by an accused which admits each and every element of an offense charged.

CONFINEMENT - physical restraint, imposed by either oral or written orders of competent authority, depriving a person of his freedom.

CONSECUTIVE SERVICE OF PUNISHMENTS - two or more punishments being served in series, one after the other.

CONSPIRACY - a combination of two or more persons who have agreed to accomplish, by concerted action, an unlawful purpose or some purpose not in itself unlawful, by unlawful means, and the doing of some act by one or more of the conspirators to effect the object of that agreement.

CONSTRUCTIVE ENLISTMENT - a valid enlistment arising in a situation where the initial enlistment was void, but the enlistee unconditionally continues in the military and accepts military benefits.

CONSTRUCTIVE KNOWLEDGE - a state wherein a person is inferred to have knowledge of an order, regulation, fact, etc. as a result of having a reasonable opportunity to gain such knowledge, e.g., presence in an area where the relevant information was commonly available.

CONTEMPT - in Military Law, the use of any menacing word, sign or gesture in the presence of the court, or the disturbance of its proceedings by any riot or disorder.

CONTRABAND - items, the possession of which is in and of itself illegal.

CONVENING AUTHORITY (CA) - 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.

COUNSELING - directly or indirectly advising, recommending, or encouraging another to commit an offense.

COURT-MARTIAL - a military court, convened under authority of government and the UCMJ, for trying and punishing offenses committed by members of the Armed Forces and other persons subject to Military Law.

COURT OF INQUIRY - a formal administrative fact-finding body convened under the authority of Article 135, UCMJ, whose function it is to search out, develop, analyze, and record all available information relative to the matter under investigation.

U.S. COURT OF APPEALS FOR THE ARMED FORCES (CAAF) - the highest appellate court established under the UCMJ to review the records of certain trials by court-martial, consisting of five judges appointed from civil life by the President, by and with the advice and consent of the Senate, for a life term. Before 1995 known as the Court of Military Appeals

COURT OF CRIMINAL APPEALS- 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 and Courts of Military Review

CREDIBILITY OF A WITNESS - his worthiness of belief.

CULPABLE - deserving blame; involving the breach of a legal duty or the commission of a fault.

CULPABLE NEGLIGENCE - Culpable negligence is a degree of negligence greater than simple negligence. This form of negligence is also referred to as recklessness and arises whenever an accused recognizes a substantial

unreasonable risk yet consciously disregards that risk.

CUSTODIAL INTERROGATION - questioning initiated by law enforcement officers or others in authority after a suspect has been taken into custody or otherwise deprived of his freedom of action in any significant way.

CUSTODY - that restraint of free movement which is imposed by lawful apprehension.

CUSTOM - a practice which fulfills the following conditions: (a) it must be long continued; (b) it must be certain or uniform; (c) it must be compulsory; (d) it must be consistent; (e) it must be general; (f) it must be known; (g) it must not be in opposition to the terms and provisions of a statute or lawful regulation or order.

DAMAGE - any physical injury to property.

DANGEROUS WEAPON - a weapon used in such a manner that it is likely to produce death or grievous bodily harm.

DECEIVE - to mislead, trick, cheat, or to cause one to believe as true that which is false.

DEFERRAL - discretionary action by proper authority, postponing the running of the confinement portion of a sentence, together with a lack of any post-trial restraint.

DEFRAUD - to deprive another person of something of value by cheating, deceiving, misleading, tricking, or causing that person to believe as true something which is false.

DEMONSTRATIVE EVIDENCE - anything, such as charts, maps, photographs, models, drawings, etc., used to help construct a mental picture of a location or object which is not readily available for introduction into evidence.

DEPOSITION - the testimony of a witness taken out of court, reduced to writing, under oath or affirmation, before a person empowered to administer oaths, in answer to interrogatories (questions) and cross-interrogatories submitted by the parties desiring the deposition and the opposite party, or based on oral examination by counsel for accused and the prosecution.

DERELICTION IN THE PERFORMANCE OF DUTY - willfully or negligently failing to perform assigned duties or performing them in a culpably inefficient manner.

DESIGN - on purpose, intentionally, or according to plan and not merely through carelessness or by accident; specifically intended.

DESTROY - sufficient injury to render property useless for the purpose for which it was intended, not necessarily amounting to complete demolition or annihilation.

DETENTION OF PAY - the temporary withholding of pay resulting from a court-martial sentence or nonjudicial punishment. No longer a legal 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 (DD) - the most severe punitive discharge; reserved for those warrant officers (W-1) and enlisted members who should be separated under conditions of dishonor, after having been convicted of serious offenses of a civil or military nature warranting severe punishment; it may be awarded only by a GCM.

DISORDERLY CONDUCT - behavior of such a nature as to affect the peace and quiet of persons who may witness the same and who may be disturbed or provoked to resentment thereby.

DISRESPECT - words, acts, or omissions that are synonymous with contempt and amount to behavior or language which detracts from the respect due the authority and person of a superior.

DOCUMENTARY EVIDENCE - evidence supplied by writings and documents.

DOMINION - control of property; possession of property with the ability to exercise control over it.

DRUNKENNESS - (1) as an offense under the UCMJ, intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties; (2) as a defense in rebuttal of the existence of a criminal element involving premeditation, specific intent, or knowledge, intoxication which amounts to a loss of reason preventing the accused from harboring the requisite premeditation, specific intent, or knowledge; (3) as a defense to general intent offenses, involuntary intoxication which amounts to a loss of reason preventing the accused from knowing the nature of his act or the natural and probable consequences thereof.

DUE PROCESS - a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the enforcement and protection of private rights; such an exercise of the powers of the government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe.

DURESS - unlawful constraint on a person whereby he is forced to do some act that he otherwise would not have done.

DYING DECLARATION - a statement by a victim, concerning the circumstances surrounding his death, made while in extremis and while under a sense of impending death and without hope of recovery.

ELEMENTS - the essential ingredients of an offense which are to be proved at the trial; the acts or omissions which form the basis of any particular offense.

ENTRAPMENT - a defense available when actions of an agent of the government intentionally instill in the mind of the accused a disposition to commit a criminal offense, when the accused has no notion, predisposition, or intent to commit the offense.

ERROR - a failure to comply with the law in some way at some stage of the proceedings.

EVIDENCE - any species of proof, or probative matter, legally presented at trial, through the medium of witnesses, records, documents, concrete objects, demonstrations, etc., for the purpose of inducing belief in the minds of the triers of fact.

EXCULPATORY - anything that would exonerate a person of wrongdoing.

EXECUTION OF HIS OFFICE - engaging in any act or service required or authorized to be done by statute, regulation, the order of a superior, or military usage.

EX POST FACTO LAW - a law passed after the occurrence of a fact or commission of an act which makes the act punishable, imposes additional punishment, or changes the rules of evidence to the disadvantage of a party.

EXTRA MILITARY INSTRUCTION - extra tasks assigned to one exhibiting behavioral or performance deficiencies for the purpose of correcting those deficiencies through the performance of the assigned tasks; also known as Additional Military Duty or Additional Military Instruction.

FEIGN - to misrepresent by a false appearance or statement, to pretend, to simulate or to falsify.

FINE - a type of court-martial punishment in the nature of a pecuniary judgment against an accused, which, when ordered executed, makes him immediately liable to the United States for the entire amount of money specified.

FORMER JEOPARDY - a defense in bar of trial that no person shall be tried for the same offense by the same sovereign a second time without his consent; also known as Double Jeopardy.

FORMER PUNISHMENT - a defense in bar of trial that no person may be tried by court-martial for a minor offense for which punishment under Articles 13 or 15, UCMJ, has been imposed.

FORMER TESTIMONY - testimony of a witness given in a civil or military court at a former trial of the accused, or given at a formal pretrial investigation of an allegation against the accused, in which the issues were substantially

the same.

FORFEITURE OF PAY - a type of punishment depriving the accused of all or part of his pay as it accrues.

GRIEVOUS BODILY HARM - a serious bodily injury; does not include minor injuries, such as a black eye or a bloody nose, but does include fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs and other serious bodily injuries.

HABEAS CORPUS - "You have the body"; an order from a court of competent jurisdiction which requires the custodian of a prisoner to appear before the court to show cause why the prisoner is confined or detained.

HARMLESS ERROR - an error of law which does not materially prejudice the substantial rights of the accused.

HAZARD A VESSEL - to put a vessel in danger of damage or loss.

HEARSAY - an assertive statement, or conduct, which is offered in evidence to prove the truth of the assertion, but which was not made by the declarant while a witness before the court in the hearing in which it is offered.

IN CONCERT WITH - together with, in accordance with a design or plan, whether or not such design or plan was preconceived.

INCAPACITATION - the physical state of being unfit or unable to perform properly.

INCULPATORY - anything that implicates a person in a wrongdoing.

INDECENT - an offense to common propriety; offending against modesty or delicacy; grossly vulgar, or obscene.

INFERENCE - a fact deduced from another fact or facts shown by the state of the evidence.

INSANITY - see, MENTAL CAPACITY and MENTAL RESPONSIBILITY, *infra*.

INSPECTION - an official examination of persons or property to determine the fitness or readiness of a person, organization, or equipment, not made with a view to any criminal action.

INTENTIONALLY - deliberately and on purpose; through design, or according to plan, and not merely through carelessness or by accident.

IPSO FACTO - by the very fact itself.

JOINT OFFENSE - an offense committed by two or more persons acting together in pursuance of a common intent.

JOINT TRIAL - the trial of two or more persons charged with committing a joint offense.

JURISDICTION - the power of a court to hear and decide a case and to award an appropriate punishment.

KNOWINGLY - 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 (LIO) - an offense necessarily included in the offense charged; an offense containing some but not all of the elements of the offense charged, so that if one or more of the elements of the offense charged is not proved, the evidence may still support a finding of guilty of the included offense.

LEWD - lustful or lecherous; incontinence carried on in a wanton manner.

LOST PROPERTY - property which the owner has involuntarily parted with by accident, neglect, or forgetfulness and does not know where to find or recover it.

MATTER IN AGGRAVATION - any circumstances attending the commission of a crime which increases the enormity of the crime.

MATTER IN EXTENUATION - any circumstances serving to explain the commission of the offense, including the reasons that actuated the accused, but not extending to a legal justification.

MATTER IN MITIGATION - any circumstance having for its purpose the lessening of the punishment to be awarded by the court and the furnishing of grounds for a recommendation of clemency.

MENTAL CAPACITY - the ability of the accused at the time of trial to understand the nature of the proceedings against him and to conduct or cooperate intelligently in his defense.

MENTAL RESPONSIBILITY - the ability of the accused at the time of commission of an offense to appreciate the criminality of his or her conduct, or to conform his or her conduct to the requirements of the law.

MILITARY DUE PROCESS - due process under protections and rights granted military personnel by the Constitution or laws enacted by Congress.

MILITARY JUDGE - a commissioned officer, certified as such by the respective Judge Advocates General, who presides over all open sessions of the court-martial to which he is detailed.

MISLAID PROPERTY - property which the owner has voluntarily put, for temporary purposes, in a place afterwards forgotten or not easily found.

MISTRIAL - discretionary action of the military judge, or the president of a special court-martial without a military judge, in withdrawing the charges from the court where such action appears manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the trial.

MORAL TURPITUDE - an act of baseness, vileness, or depravity in private or social duties, which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man.

MOTION TO DISMISS - a motion raising any defense or objection in bar of trial.

MOTION FOR APPROPRIATE RELIEF - a motion to cure a defect of form or substance which impedes the accused in properly preparing for trial or conducting his defense.

MOTION TO SEVER - a motion by one or more of several co-accused that he be tried separately from the other or others.

NEGLIGENCE - unintentional conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm. The failure of a person to exercise the care that a reasonably prudent person would exercise under similar circumstances; something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would or would not do.

NONJUDICIAL PUNISHMENT (NJP) - 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 (OIC) - a member of the Armed Forces designated as such by appropriate authority.

OFFICIAL RECORD - a writing made as a record of a fact or event, whether the writing is in a regular series of records or consists of a report, finding, or certificate and made by any person within the scope of his official duties provided those duties included a duty to know, or to ascertain through appropriate and trustworthy channels of information, the truth of the fact or event, and to record such fact or event.

ON DUTY - in the exercise of duties of routine or detail, in garrison, at a station, or in the field: does not relate to those periods when, no duty being required of them by order or regulations, military personnel occupy the status of leisure known as "off duty" or "on liberty."

OPERATING A VEHICLE - driving or guiding a vehicle while in motion, either in person or through the agency of another, or setting its motive power in action or the manipulation of the controls so as to cause the particular vehicle to move.

OPINION OF THE COURT - a statement by a court of the decision reached in a particular case, expounding the law as applied to the case, and detailing the reasons upon which the decision is based.

ORAL EVIDENCE - the sworn testimony of a witness received at trial.

OWNER - a person who has the superior right to possession of property in the light of all conflicting interests therein.

PAST RECOLLECTION RECORDED - memoranda prepared by a witness, or read by him and found to be correct, reciting facts or events which represent his past knowledge possessed at a time when his recollection was reasonably fresh as to the facts or events recorded.

PER CURIAM - "by the court"; a phrase used in the report of the opinion of a court to distinguish an opinion of the whole court from an opinion written by any one judge.

PER SE - taken alone; in and of itself; inherently.

PERPETRATOR - one who actually commits the crime, either by his own hand, by an animate or inanimate agency, or by an innocent agent.

PLEADING - the written formal indictment by which an accused is charged with an offense; in Military Law, the charges and specifications.

POSSESSION - actual physical control and custody over an item of property.

PREFERRAL OF CHARGES - the formal accusation against an accused by an accuser signing and swearing to the charges and specifications.

PREJUDICIAL ERROR - an error of law which materially affects the substantial rights of the accused and requiring corrective action.

PRESUMPTION - a fact which the law requires the court to deduce from another fact or facts shown by the state of the evidence unless that fact is overcome by other evidence before the court.

PRETRIAL INVESTIGATION - an investigation pursuant to Article 32, UCMJ, that is required before convening a GCM, unless waived by the accused.

PRIMA FACIE CASE - introduction of substantial evidence which, together with all proper inferences to be drawn therefrom and all applicable presumptions, reasonably tends to establish every essential element of an offense charged or included in any specification.

PRINCIPAL - (1) one who aids, abets, counsels, commands, or procures another to commit an offense which is subsequently perpetrated in consequence of such counsel, command or procuring, whether he is present or absent at the commission of the offense; (2) the perpetrator.

PROBABLE CAUSE - (1) for apprehension, a reasonable grounds for believing that an offense has been committed and that the person apprehended committed it; (2) for pretrial restraint, reasonable grounds for believing that an offense was committed by the person being restrained; and (3) for search, a reasonable grounds for believing that items connected with criminal activity are located in the place or on the person to be searched.

PROVOKING - tending to incite, irritate, or enrage another.

PROXIMATE CAUSE - that which, in a natural and continuous sequence, unbroken by an efficient intervening cause, produces a result, and without which the result would not have occurred.

PROXIMATE RESULT - a reasonably foreseeable result ordinarily following from the lack of care complained of, unbroken by any independent cause.

PUNITIVE ARTICLES - Articles 78 through 134, UCMJ, which generally describe various crimes and offenses and state how they may be punished.

PUNITIVE DISCHARGE - a discharge imposed as punishment by a court-martial, either a bad-conduct discharge or a dishonorable discharge.

RAPE - an act of sexual intercourse with a female, not the accused's wife, done by force and without her consent.

REAL EVIDENCE - any physical object offered into evidence at trial.

RECKLESSNESS - an act or omission exhibiting a culpable disregard for the foreseeable consequences of that act or omission; a degree of carelessness greater than simple negligence.

RECONSIDERATION - the action of the convening authority in returning the record of trial to the court for renewed consideration of a ruling of the court dismissing a specification on motion, where the ruling of the court does not amount to a finding of not guilty.

REFERRAL OF CHARGES - the action of a convening authority in directing that a particular case be tried by a particular court-martial previously created.

RELEVANCY - that quality of evidence which renders it properly applicable in proving or disproving any matter in issue; a tendency in logic to prove or disprove a fact which is in issue in the case.

REMEDIAL ACTION - action taken by proper reviewing authorities to correct an error or errors in the proceedings or to offset the adverse impact of an error.

REMISSION - action by proper authority interrupting the execution of a punishment and cancelling out the punishment remaining to be served, while not restoring any right, privilege or property already affected by the executed portion of the punishment.

REPROACHFUL - censuring, blaming, discrediting, or disgracing of another's life or character.

RESISTING APPREHENSION - an active resistance to the restraint attempted to be imposed by the person apprehending.

RESTRICTION IN LIEU OF ARREST - moral restraint, less severe than arrest, imposed upon a person by oral or written orders limiting him to specified areas of a military command, with the further provision that he will participate in all military duties and activities of his organization while under such restriction.

RESTRICTION TO LIMITS - moral restraint imposed as punishment.

REVISION - a procedure to correct an apparent error or omission or improper or inconsistent action of a court-martial with respect to a finding or a sentence.

SALE - an actual or constructive delivery of possession of property in return for a valuable consideration and the passing of such title as the seller may possess, whatever that title may be.

SEARCH - a quest for incriminating evidence.

SEIZURE - to take possession of forcibly, to grasp, to snatch, or to put into possession.

SELF-DEFENSE - the use of reasonable force to defend oneself against immediate bodily harm threatened by the unlawful act of another.

SELF-INCRIMINATION - the giving of evidence against oneself which tends to establish guilt of an offense.

SET ASIDE - action by proper authority voiding the proceedings and the punishment awarded and restoring all rights, privileges and property lost by virtue of the punishment imposed.

SIMPLE NEGLIGENCE - the absence of due care, i.e., an act or omission by a person who is under a duty to use due care which exhibits a lack of that degree of care for the safety of others which a reasonably prudent man would have exercised under the same or similar circumstances.

SLEEP - a period of rest for the body and mind during which volition and consciousness are in partial or complete abeyance and the bodily functions partially suspended; a condition of unconsciousness sufficient sensibly to impair the full exercise of the mental and physical faculties.

SOLICITATION - any statement, oral or written, or any other act or conduct, either directly or through others, which may reasonably be construed as a serious request or advice to commit a criminal offense.

SPECIFICATION - a formal statement of specific acts and circumstances relied upon as constituting the offense charged.

SPONTANEOUS EXCLAMATION - an utterance concerning the circumstances of a startling event made by a person while he was in such a condition of excitement, shock, or surprise, caused by his participation in or observation of the event, as to warrant a reasonable inference that he made the utterance as an impulsive and instinctive outcome of the event, and not as a result of deliberation or design.

STATUTE OF LIMITATIONS - the rule of law which, unless waived, establishes the time within which an accused must be charged with an offense to be tried successfully.

STRAGGLE - to wander away, to rove, to stray, to become separated from, or to lag or linger behind.

STRIKE - to deliver an intentional blow with anything by which a blow can be given.

SUBPOENA - a formal written instrument or legal process that serves to summon a witness to appear before a certain tribunal and to give testimony.

SUBPOENA DUCES TECUM - a formal written instrument or legal process which commands a witness who has in his possession or control some document or evidentiary object that is pertinent to the issues of a pending controversy to produce it before a certain tribunal.

SUBSCRIBE - to write one's signature on a written instrument as an indication of consent, approval, or attestation.

SUPERIOR COMMISSIONED OFFICER - a commissioned officer who is superior in rank or command.

SUPERVISORY AUTHORITY - an officer exercising General Court-Martial jurisdiction who acts as reviewing authority for SCM and SPCM records after the convening authority has acted.

SUSPENSION - action by proper authority to withhold the execution of a punishment for a probationary period

pending good behavior on the part of the accused.

THREAT - an avowed present determination or intent to injure the person, property, or reputation of another presently or in the future.

TOLL - to suspend or interrupt the running of.

USAGE - a general habit, mode or course of procedure.

UTTER - to make any use of or attempt to make any use of an instrument known to be false by representing, by words or actions, that it is genuine.

VERBATIM - in the exact words; word for word.

WANTON - behavior of such a highly dangerous and inexcusable character as to exhibit a callous indifference or total disregard for the probable consequences to the personal safety or property of other persons; heedlessness.

WARRANT OFFICER - an officer of the Armed Forces who holds a commission or warrant in a warrant officer grade, pay grades W-1 through W-4.

WILLFUL - deliberate, voluntary and intentional, as distinguished from acts committed through inadvertence, accident, or ordinary negligence.

WRONGFUL - contrary to law, regulation, lawful order or custom.

PART B

PR 17.B. 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 (now MILPERSMAN)

CA Convening Authority

CAAF Court of Appeals for the Armed Forces

CG.Ct.Crim.App. Coast Guard Court of Criminal Appeals (informally also CGCCA)

CBW Confinement on Bread and Water

CCU Correctional Custody Unit

CDO Command Duty Officer

CG Commanding General; Coast Guard

CH Charge

CHNAVPERS Chief of Naval Personnel

CID Criminal Investigations Division

C.M.A. United States Court of Military Appeals

CMC Commandant of the Marine Corps

CMO Court-Martial Order

C.M.R. Court of Military Review; Court-Martial Reports

CNO Chief of Naval Operations

CO Commanding Officer

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

FRCrimP 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 Offenses

LO Legal Officer

LOD Line of duty

MCM Manual for Courts-Martial, United States, 1984

MFNG Motion for a finding of not guilty

MJ Military Judge

MILPERSMAN Naval Military Personnel Manual (formerly BUPERSMAN)

MP Military Police

M.R.E. / Mil.R.Evid. Military Rules of Evidence

N/A Not Applicable

NCO Noncommissioned Officer

NG Not guilty

NCIS Naval Criminal Investigative Service

NJP Nonjudicial Punishment

NLSO Naval Legal Service Office

NAVY REGS U.S. Naval Regulations, 1990

N.M.C.M.R. Navy-Marine Corps Court of Military Review

N.M.Ct.Crim.App Navy-Marine Corps Court of Criminal Appeals

NMCCA *Informal* alternative for N.M.Ct.Crim.App.

NPM Nonpunitive Measures

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

OTH Other Than Honorable Discharge

PCS Permanent Change of Station

PIO Preliminary Inquiry Officer

PO Petty Officer

PTA Pretrial Agreement

PTI Pretrial Investigation

PTIO Pretrial Investigating Officer

R.C.M. Rule for Courts-Martial

RED Reduction

REST; R Restriction

RIR Reduction in Rate

ROT Record of Trial

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

TEP Table of Equivalent Punishments

TMP Table of Maximum Punishments

UA Unauthorized Absence

UCMJ Uniform Code of Military Justice

UD Undesirable Discharge (now OTH)

UPB Unit Punishment Book

USC United States Code

USCA United States Code Annotated

U.S.C.M.A. United States Court of Military Appeals

VA Veterans Administration

W.A. Wrongful Appropriation

WO Warrant Officer

XO Executive Officer

CHAPTER 18

CHAPTER 18

CR 18. BASIC CONCEPTS OF CRIMINAL LIABILITY IN THE MILITARY

CR 18.1. *Purpose of military criminal law.*

The purpose of any system of criminal law is to define and minimize socially intolerable conduct. The needs of society ultimately determine what conduct will be outlawed. The military has long been recognized as a society that is separate and distinct from American civilian society. Therefore, military needs for preparedness, security, discipline, and morale may require criminalization of conduct that is tolerated in civilian society. Thus, military criminal law includes not only common law crimes (such as larceny and assault), but also purely military offenses (such as disrespect and unauthorized absence).

CR 18.1.1. *Crime defined.*

In the military, conduct which is harmful to military society has been defined by Congress in its enactment of a Federal statute, the Uniform Code of Military Justice (UCMJ). Punitive action is carried out under rules promulgated by the President of the United States through Executive order, embodied in the Manual for Courts Martial (MCM).

CR 18.2. *GENERAL REQUIREMENTS FOR CRIMINAL LIABILITY*

This section presents a legal analysis of the concept of crime. Every crime has two components: (1) an act or omission or actus reus; and (2) a mental state or mens rea

CR 18.2.1. *The Act.*

In the field of ethics, guilt depends upon the state of mind alone. It is impossible, however, to fathom the intentions of the mind except as they are demonstrated by outward actions, or overt acts. Accordingly, evidence of a prohibited act or omission is a necessary requisite to criminal liability.

1. *More than evil thinking.* While evil thought alone is no crime, the law has defined as socially harmful and made punishable certain activity not far removed from mere evil thinking. For example, solicitation (requesting another to commit a crime) and communicating a threat are not much more than verbalized thought; but, the verbalization of such thought is an act which the law considers more than merely thinking about a crime. This is based upon the rationale that imposing a penalty at the early stage prevents the ultimate harm that such threats foretell.

2. *Acts short of completed crimes.* In other instances, acts of preparation and acts tending to effectuate a criminal objective are sufficient to qualify as "acts" for purposes of criminal liability even though the criminal objective is not achieved.

3. *Nature of the act of commission or omission.* It is essential that the act be either a willed movement or the omission of a possible, legally required performance. There is no legal duty, however, absent assigned duty such as that of a military policeman or guard, requiring an individual to stop a crime in which he is not criminally involved. The fact that the consequences of the act or omission were unintentional, or that the act or omission was done under the stress and strain of difficult circumstances, does not render it less an "act" for purposes of criminal responsibility. The circumstances surrounding the act or omission, however, may be sufficient to negate the required mental element and thus legally excuse criminal liability. (*See* discussion of general intent below.)

CR 18.2.2. *The Mental Element.*

1. *General concept.* Crime requires a certain mens rea, or "mind at fault."

2. *Types of mens rea.* Military law, based on the UCMJ, recognizes five types of mens rea: (1) general intent; (2) specific intent; (3) negligence; (4) willfulness; and (5) knowledge. The type of mens rea varies with different offenses and affects the manner of proving guilt and the availability of certain defenses.

(a) *General intent offenses.* General intent is defined as an intent to do or fail to do an act, the actus reus. For example, in assault and battery, the actus reus is an offensive touching. Because there is a general intent to do the actus reus, the mere fact of commission or omission of a required act permits the prosecution to rely on inference to prove general intent. Thus, by merely proving the actus reus, the prosecution has established prima facie the required mens rea in general intent offenses.

(b) *Specific intent offenses.* Specific intent has been defined as something which "involves a further or ulterior purpose beyond the mere commission of the act." A specific intent offense requires, as an element of the offense, proof of an intent particularized by the offense. The prosecution cannot rely on the inference that is permitted to find general intent. Rather, the specific mental state must be proven beyond a reasonable doubt. It is important to note several peculiarities with regard to specific intent. First, more than one offense may involve the same general intent, but may or may not have the same specific intent, or a specific intent may not be present at all. Second, a specific intent offense can be a lesser-included offense (LIO) of a general intent offense. Third, the actus reus may be the same in any two offenses, but the presence or absence of specific intent is what differentiates the crimes. Examples of specific intent and its peculiarities follow.

(c) *Negligence offenses.* Some of the offenses under the UCMJ require only a negligent act. The degree of negligence required varies. Some offenses, such as assault and UA, are both general intent and negligence offenses because they may be committed either through intentional or negligent acts. Therefore, in one case, an assault may be prosecuted as a general intent offense and, in another case, another assault may be treated as a negligence offense.

1. *Negligence defined.* Negligence has been defined as any conduct, except conduct intentionally or wantonly and willfully disregarding on an interest of others, which falls below the standard established by law for the protection of others against unreasonable risk of harm.

2. *Causal relationship required.* In all crimes involving a negligent state of mind, there must exist a causal relationship between the negligent act or omission and the harm prohibited by the statute. There are, therefore, two questions which must be answered: (1) Is the accused guilty of negligence; and (2) was that negligence the proximate cause of the alleged harm or injury? In determining proximate cause, the test applied is whether or not the negligent conduct played a "material role" in the criminal result.

3. *Degrees of negligence.* There are three degrees of negligence recognized by the UCMJ: (1) simple negligence; (2) culpable negligence; and (3) wantonness. The ability to distinguish between degrees of negligence is important in determining whether the prosecution has met its burden of proving the element of negligence required by a particular offense. For example, the offenses of negligent homicide and involuntary manslaughter have negligence as an element to be proven by the prosecution. In the case of involuntary manslaughter, the degree of negligence required is culpable negligence; whereas in the case of negligent homicide, the degree of negligence required is simple negligence.

(i) *Simple negligence.* Simple negligence is defined as ". . . The absence of due care, that is, an act or omission of 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 careful person would have exercised under the same or similar circumstances."

(ii) *Culpable negligence.* Culpable negligence is defined as that ". . . degree of carelessness greater than simple negligence. It is a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others of that act or omission." Culpable negligence has also been defined as recklessness. Recklessness is defined in the MCM as the exhibiting of "a culpable disregard of foreseeable consequences to others from the act or omission involved."

(iii) *Wantonness offenses.* Wantonness is a callous disregard for the ***probable*** consequences of an act. The U.S. Court of Military Appeals has defined wantonness as a legal equivalent to general intent. The MCM defines *wanton* as "the wanton disregard of human life. . . Such disregard is characterized by heedlessness of the probable consequences of the act or omission, or indifference to the likelihood of death or great bodily harm." In defining wanton, the MCM states that it includes the lesser degree of "reckless" and further states that, if motor vehicles are involved, it may connote "willfulness." The *Manual* does recognize, however, that offenses involving wantonness are aggravated offenses. In fact, in situations where death occurs, malice may be implied from wanton conduct such that a charge of murder could result.

(d) *Knowledge offenses.* Knowledge is closely related to, and often confused with, the concept of intent. In fact, the courts have recognized that offenses that have knowledge as an element are equivalent to specific intent offenses. Many offenses require that the accused possess a certain specific knowledge at the time he commits the offense as an element of the offense. In such offenses, the prosecution must present evidence of the accused's knowledge in order to establish a prima facie case. In other offenses, knowledge is not an element of proof, but the lack of knowledge is an affirmative defense. When the affirmative defense of lack of knowledge is raised in such cases, the burden is then placed upon the prosecution to prove the accused's knowledge beyond a reasonable doubt. Finally, in still other offenses, the accused's knowledge is irrelevant; that is, knowledge is not an element the prosecution is required to prove, and lack of knowledge is not available as an affirmative defense.

(1) Knowledge has been defined as the "mental capability to entertain conscious thought." It is the same mental capability that is the prerequisite for specific intent. It is important to note, when discussing knowledge as an issue in current military law, that constructive knowledge is almost ***never*** the test. Case law and revisions in the *Manual* have almost completely eliminated references to constructive knowledge. The only exception to this is the offense of dereliction of duty, a violation of Article 92, UCMJ. The MCM (2005 ed.) states that the accused must have known or "reasonably should have known" of the duty he was derelict in performing before he may be convicted.

(2) The three contexts in which knowledge can arise are further illustrated:

(i) *Knowledge required as an element of the offense; lack of knowledge as an affirmative defense.* The prosecution must present evidence of the accused's knowledge in order to establish a prima facie case. The accused may either present no evidence—thus putting the prosecution to the test of meeting its burden of proof—or the defense may present evidence of the accused's lack of the requisite knowledge—thus negating an element of the offense. For example, disobedience of a lawful order that is not a general order requires, as an element of the offense, that the accused know of the order. The prosecution's failure to prove that the accused knew about the order will result in a finding of not guilty to any one of these types of orders violations. Likewise, assuming the prosecution established a prima facie case of disobedience, presentation of evidence tending to show lack of knowledge of that order by the defense may tend to negate the prosecution's evidence such that proof beyond a reasonable doubt may not be found. Therefore, while knowledge and intent are generally independent concepts, it is in this context that knowledge is functionally indistinguishable from a specific intent. Accordingly, offenses which require certain specific knowledge as an element of proof should be considered specific intent offenses. With regard to orders violations under Articles 90 and 91, there are two types of knowledge. There is knowledge that an order was given and understood—referred to by the courts as "comprehension"—and there is knowledge that the order was given by a commissioned officer superior to the receiver of the order, or by a warrant, noncommissioned, or petty officer—referred to by the courts as "recognition."

(ii) *Knowledge not required as an element; lack of knowledge an affirmative defense.* In offenses not requiring knowledge as an element of proof, the prosecution need not present evidence of an accused's knowledge in order to establish a prima facie case. If the defense raises the issue that the accused was ignorant that is, lacked knowledge the prosecution must prove the accused's knowledge beyond a reasonable doubt. Because knowledge has been equated to specific intent, honest lack of knowledge or honest ignorance would be an affirmative defense.

(iii) *Knowledge not required as an element; lack of knowledge not a possible defense.* This issue is most often discussed as ignorance (or mistake) of law or facts.

(1) *Ignorance of fact.* In most instances, a mistake or ignorance of fact will give rise to a defense. Some offenses, however, in reflecting society's desire to provide special protection against a particular harm, impose strict criminal liability wherein the accused's lack of knowledge, no matter how honest or reasonable, will not constitute a defense.

(2) *Ignorance of law.* "Ignorance or mistake of law, including general orders or regulations, ordinarily is not a defense."

(3) *Deliberate ignorance.* While finding the principle inapplicable on the facts before it, the Court of Military Appeals appeared to agree that deliberate ignorance may, in a proper case, be the equivalent of actual knowledge. As applied in the Federal courts, deliberate ignorance requires

something more than "mere negligence, foolishness, or stupidity" of the accused, but must be based on a purposeful avoidance of truth, an awareness of the "high probability" of the fact in issue, and absence of an actual belief by the accused of the nonexistence of that fact. Whether this principle is simply a form of circumstantial evidence, or whether it will be widely applied in the military, remains to be developed.

(e) *Willfulness offenses.* Generally speaking, willfulness and specific intent are synonymous. Certain UCMJ offenses use the term willful in a slightly more complicated manner. For example, Articles 90 and 91, UCMJ, prohibit ***willful*** disobedience of superiors. In these offenses, willful has been defined not just as an intentional act, but as an act which was intentionally defiant of authority. It should also be noted that, although Article 126, UCMJ, uses the term "willfully and maliciously" in defining arson, it has recently been held that arson is not an offense requiring specific intent.

CR 18.2.3. *Motive*.

Motive is not a type of mens rea, nor is it an element of any offense. An evil motive will not, by itself, make an act criminal; nor will a good motive, not amounting to a defense, exonerate an individual from criminal liability. Evidence of the accused's motives, however, is often admissible as circumstantial evidence of intent. Sometimes, as a practical matter, the distinction between motive and intent becomes unclear; however, the two concepts should not be confused.

CR 18.2.4. *Elements of the Offense*.

Each specific offense is defined in terms of specific facts about which the prosecution must present evidence in order to make a prima facie case, and which the prosecution must prove beyond reasonable doubt in order to convict. Such essential facts constitute the elements of the offense. Thus, each crime is defined not in vague, abstract terms, but in terms of what the accused allegedly did.

As part of its discussion on each offense, this study guide lists the elements of each offense. Another generally reliable source of the elements of offenses is MCM, Pt. IV, which provides a discussion of most of the offenses under the code. Caution is necessary when using Part IV of the MCM. The MCM does not discuss all of the offenses under the code. Also, it may not reflect recent judicial interpretations of substantive law that would take precedence over the MCM's provisions. A third ***generally*** reliable reference concerning elements of the offenses is the current edition of the *Military Judge's Benchbook*, which lists the elements of each offense in the form that they would be discussed during instructions on findings.

CHART 1

Mens Rea	Offense	Act + State of mind Actus Reus (Mens Rea)	Affirmative Defense	Standard
NEGLIGENCE (1) Simple	(1) a. UA	(1) a. Failure to go.	(1) a. Thought set alarm b. Thought light was green.	No Defense
(2) Culpable	(2) Involuntary Manslaughter	(2) b. Fast draw with loaded pistol.	(2) Thought safety was on.	(General Defense)
(3) Wantonness	(3) Unpremeditated Murder	(3) Fired loaded pistol through door into room knowing occupied w/ people.	(3) Thought door would stop bullet.	Honest and reasonable.
GENERAL INTENT	(1) UA	(1) Left work.	(1) Thought had permission to leave when job was finished.	Honest and reasonable
	(2)Aggravated Assault	(2) Pointed pistol at individual and fired, but missed.	(2) Thought pistol was unloaded	
SPECIFIC INTENT	(1) Desertion	(1) Left organization never to return.	(1) Thought discharged when 1st Sgt told him he was no longer in USMC.	Honest
	(2) Larceny	(2) Took property of another to keep.	(2) Thought it was his own.	
	(3) Premeditated Murder	(3) Pointed pistol at another w/ intent to kill and fired.	(3) Thought victim was enemy.	
KNOWLEDGE	Disrespect	Told individual to "Shut Up."	Didn't know individual was Superior.	Honest
WILLFULNESS	Disobedience of superior's orders.	Failed to obey order to get Regulation haircut.	Didn't know giver of order was superior.	Honest

CR 18.3. *PRINCIPALS.*

CR 18.3.1. *Parties at common law.*

At common law there were four categories of parties to a crime: (1) principal, first degree; (2) principal, second degree; (3) accessory before the fact; and (4) accessory after the fact.

CR 18.3.2. *Parties Under the UCMJ*.

There are no "degrees of principals" in military law. There are simply two categories of parties to crimes under the code: principals (Article 77) and accessories after the fact (Article 78).

1. *Principals*. Article 77 combines three of the common law parties into one class: (1) principal, first degree (perpetrator); (2) principal, second degree (aider and abettor); and (3) accessory before the fact.

2. *Accessory after the fact.* Article 78 provides that one who is an accessory after the fact has committed an ***independent*** crime under the UCMJ.

3. *Purpose of Article 77, UCMJ.* Congress enacted this statutory scheme in order to eliminate difficulties in pleading due to subtle distinctions among the parties at common law. Although the pleadings have been greatly simplified, it is still necessary to be familiar with the common law background since the trial counsel must still adopt a particular theory to establish the accused's liability as a principal. The military judge, in turn, will instruct the court members on the law governing the particular theory of liability as a principal.

CR 18.3.3. *Accomplice.*

An accomplice is not a defined party under the UCMJ. The term is, however, used to describe "all persons who participate in the commission of a crime to an associate who knowingly and voluntarily cooperates, aids, or assists in its commission. . . ." It is most frequently used in the instructions given by the military judge to court members when individuals falling within the above description testify at trial and their credibility is placed at issue.

CR 18.3.4. *Article 77 is Not a Punitive Article.*

Article 77 is not a punitive article. It merely defines the principals to crimes. Each principal, regardless of type, is criminally liable for the acts of the perpetrator in the same degree as the perpetrator, except where the liability requires the formation of a specific intent. In the offenses requiring such specific intent, the principals, regardless of degree, are criminally liable only for the offense for which their own individual intent can be proven by the prosecution. MCM, Pt. IV, § 1b(4). Therefore, once the prosecution proves that a person is a principal in the commission of a crime, and if the crime involves an element of specific intent and that element has been established (1) that person is liable as a principal; (2) is charged under the appropriate punitive article; and, (3) is liable for the same punishment as if he had been the actual perpetrator.

CR 18.3.5. *Perpetrator.*

(Common Law principal, first degree).

A perpetrator is one who "commits an offense"; that is, who actually commits the crime either by his own hand, or "causes an act to be done"; that is, by an animate or inanimate agency or by an innocent human agent. Note that the Article 77 concept of perpetrator is split into two parts: "commits" [Article 77(1)], and "causes . . . to be done" [Article 77(2)]. If the accused "commits: the offense, he actually does the deed that constitutes the crime. For example, the accused personally strikes another individual with his fist without that individual's consent and the individual is injured; the accused is guilty of assault and battery. Whereas if the accused "causes an act be done," he does the deed that constitutes the crime through an indirect means. In this regard, it is not necessary that the accused do the act by his own hand in order to be a perpetrator, nor is physical presence at the scene of the crime required.

1. *Two types of perpetrators.* There are two basic means of causing an act to be done—animate or inanimate agency, or innocent human agent. In the case of animate or inanimate agency, the individual uses something other than his own body to commit the crime. In the case of an innocent human agent, the accused gets another *innocent* person to do an act which constitutes a crime. For example, an accused plants drugs on an

innocent person to carry aboard ship. The innocent carrier, who has no knowledge of the drugs, is not guilty of introduction or possession. The accused who placed the drugs is guilty of introducing drugs on board a naval vessel. By using an innocent human agent, acting in his place, the accused is treated as a perpetrator and, thus, as a principle. It is as if they carried the drugs aboard the ship.

Thus, Articles 77(1) and 77(2) together restate the common law definition of a principal in the first degree. At least one court has held that this statutory bifurcated handling of the perpetrator concept does not create any criminal liability that did not already exist at common law.

CR 18.3.6. *Aider and Abettor.*

(Common law principal, second degree).

1. *Definition.* An aider and abettor is one who, although not the perpetrator of the crime, is present, shares the criminal purpose, 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. In order for an accused to be guilty as an aider and abettor, the perpetrator must have committed a crime punishable under the Uniform Code of Military Justice.

2. *Requirements.* To prove an individual guilty on the theory of aiding and abetting, the prosecution must show that the alleged aider and abettor did in some way associate himself with the venture, that he participated in it as something he wished to bring about, and that he sought by his actions to make it successful. Assisting, encouraging, or inciting may be manifested by acts, words, signs, motions, or any conduct which unmistakably evinces a design to encourage, incite, or approve of the crime. *McCarthy*, 11 C.M.A. 758, 29 C.M.R. 574; *Ford*, 12 C.M.A. 31, 30 C.M.R. 31; *United States v. Pritchett*, 31 M.J. 213 (C.M.A. 1990). In addition, the aider and abettor must share the criminal intent, or purpose, of the active perpetrator of the crime [*United States v. Seberg*, 5 M.J. 895 (A.F.C.M.R. 1978)] and must by his presence aid, encourage, or incite the major actor to commit it. *United States v. Jackson*, 6 C.M.A. 193, 19 C.M.R. 319 (C.M.A. 1955). *United States v. Outlaw*, 2 M.J. 814, 816 (A.C.M.R. 1976), *petition denied*, 5 M.J. 1104 (C.M.A. 1976), *United States v. Richards*, 56 M.J. 282 (2002). From this, it can be seen that there are three basic requirements which must be met before an individual can be found guilty as a principal to a crime on the theory of aiding and abetting: presence, participation, and intent.

(a) *Presence.* The aider and abettor must be present at the scene of the crime or where he needs to be to aid the perpetrator when the crime is committed. More than inactive presence is required. "The aider and abettor must . . .encourage, or incite the major actor to commit (the crime). .. ."

One who is so situated as to be able to aid the perpetrator and thereby help ensure successful completion of the crime is "present" for purposes of being an aider and abettor. Distance from the exact scene of the crime is not controlling. What is required is that the aider and abettor be located where he or she can assist in some significant way. "The standard of relationship to the offense by which conviction as an aider and abettor must be measured, therefore, lies somewhat between proof of participation as a paramount agent, on the one hand, and speculative inference based on mere presence at the scene of the crime, on the other . . . ." Thus, the concept of aiding and abetting does not provide for "a dragnet theory of complicity. Mere inactive presence at the scene of the crime does not establish guilt. . . ."

(b) *Participation.* An aider and abettor must participate by aiding, inciting, counseling, or encouraging the perpetrator in the commission of the offense. Mere inactive presence and mental approval are not enough, nor is approval subsequent to the act sufficient to constitute participation. A concert of action is required. Thus, a bystander does not become an aider or abettor merely by being present at the commission of a crime. Also, it has been held that, where all that was proven was that a guard agreed to "see nothing" in return for a bribe, the evidence was insufficient to hold that guard liable as an aider and abettor. The court reasoned that the guard's agreement to "see nothing" could have been related to any criminal activity and that it would be "no more than sheerest speculation to contend there is sufficient showing that he participated in the venture as something he desired to bring about" when no other evidence of his participation or intent was shown. Even knowing presence, a "going along for the ride" situation in a drug transaction, has been without a showing of more, insufficient to make one an aider and abettor. If, however, a person has a legal duty to interfere and fails to do so because of one's specific intent to encourage or protect the perpetrator, that person is an aider and abettor. The existence of the duty to interfere, as well as the accused's knowledge that he had this duty, must be clearly established by the evidence. Thus, proving that the accused was the senior occupant in a military vehicle at the time the driver wrongfully appropriated it was not sufficient by itself to establish that the accused aided and abetted the wrongful appropriation.

Notice that the prosecution will often be forced to prove the participation of the alleged aider and abettor by means of the testimony of the perpetrator, which will often be given under a grant of immunity and therefore subject to impeachment. On such occasions, the presence or absence of evidence to corroborate the perpetrator's testimony can be critical. Where an immunized perpetrator testified that the accused aided and abetted the perpetrator's larceny by accepting some of the stolen goods, the failure of the perpetrator to mention this fact in either of his two pretrial statements to law enforcement authorities, combined with the grant of immunity, effectively impeached his testimony. Since the remaining evidence of participation by the accused was deemed vague and ambiguous, the evidence was insufficient as a matter of law to sustain the accused's conviction for larceny on a theory of aiding and abetting. (In the context of larceny, the aiding and abetting may even occur after the taking, so long as it occurs during the asportation phase of the offense. Thus, where a thief took another serviceman's paycheck and several hours later asked the accused to forge the owner's endorsement on the check so the thief would be able to cash it, the accused's forgery of the signature made him an aider and abettor to the larceny of the check even though the taking had occurred hours earlier.)

(c) *Intent.* It is not enough to show that there was presence, participation, or a duty to interfere in order to support a conviction based on the theory of aiding and abetting. The unlawful intent of the aider and abettor must be shown to be the same as the perpetrator. (Although it may be proved by direct evidence, the intent to aid must ordinarily be proved by circumstantial evidence. Such an intent may be inferred from all the circumstances accompanying the doing of the act and from the accused's conduct subsequent to the act.)

3. *Liability of aider and abettor.* As a general rule, the aider and abettor will suffer the same criminal liabilities, for the natural and probable results of the crime committed, as the perpetrator. One need not agree to or even know all details, minor or otherwise, of the planned crime in order to aid and abet the commission of that crime. Sometimes, however, the aider and abettor's criminal liability will be quite different because of the circumstances of the case. For example, an aider and abettor in an assault may not realize that the perpetrator had a knife and would be inclined to use it rather than his fists; the perpetrator may be guilty of murder, while the aider and abettor may only be guilty of involuntary manslaughter.

On the other hand, where the aider and abettor understands that a certain factor must be fulfilled to accomplish the crime and agrees, then the manner in which that factor is accomplished is irrelevant and the aider and abettor is equally liable with the perpetrator. For example, ***A*** understands that, for ***B*** to rob the victim, some kind of force will be required to be used. ***B,*** without *A's* knowledge, hits the victim with a pipe. ***A*** is equally guilty with ***B*** for the robbery, even though he would not have used any kind of a weapon.

CR 18.3.7. *Accessory Before the Fact.*

1. *Definition.* An accessory before the fact is one who "counsels, commands, or procures" or who "causes" another to commit an offense; and that offense (or one closely related) is committed pursuant to such counseling, commanding, procuring, or causing.

2. *Counseling.* The accessory before the fact advises that the crime be committed or the manner in which it is to be accomplished. The counseling may include ". . . any specific contribution of advice, afterwards acted on, constitutes the offense. . . . The amount of advice or encouragement rendered is not material if it has effect in inducing the commission of the crime." The advice must be given with the intent to encourage and promote the crime. For example, an ensign asks the chief engineer how to scuttle the ship. The chief engineer tells the ensign how, and the ensign does it. The chief engineer is not an accessory before the fact if he is not aware that the ensign actually intended to scuttle the ship and did not intend that the ensign do so. The fact that the crime was actually committed in a manner different from that counseled is not a defense. The counselor is still an accessory before the fact and is ". . . considered equally as guilty as the actual perpetrator of offenses incidental to or in execution of that offense which is counseled, or which are among its probable consequences. . . ."; Thus, where instead of administering poison to the victim as planned, the perpetrator changes his mind and shoots the victim, the person who counseled the crime is an accessory before the fact.

3. *Commanding.* Any demanding of another that an act be done toward the commission of a crime is "commanding." While it is not limited to its technical meaning in the military, the word command, as applied to the case of principal and accessory, is where the person having control over another as a master over a servant, orders a thing to be done. Furthermore, if the offense commanded is committed, but by different means than those commanded, the one who commanded the crime is still guilty as an accessory before the fact.

4. *Procuring.* The accessory before the fact "hires" another to commit a crime. It also means "to obtain, to bring about, and may be synonymous with 'aid' or 'abet'."

5. *Causes another to commit and offense.* This language was discussed with respect to perpetrators and incorporates the common law concept of an accessory before the fact as well as that of a perpetrator.

The crime about which the accessory before the fact counsels must actually occur, or the accused is only a solicitor and not a principal.

CR 18.3.8. ***Special Rules Applying to Principals.***

1. *Responsibility for other crimes.* A principal can be convicted of other crimes committed by another principal if they are the natural and probable consequence of the common design, as long as those offenses are not "purely collateral offenses."

2. *Withdrawal.* A principal other than the perpetrator may repent and withdraw from the common venture before commission of a substantive offense, and thus escape responsibility for any further acts committed by the perpetrator. There are three basic factors to which the courts look to determine whether the withdrawal is effective in absolving an accessory before the fact, or an aider and abettor, of guilt of the substantive offense if committed. MCM, pt. IV, § 1b(7). Those three factors are: (1) Withdrawal must occur before the crime is completed, that is, it must be a timely withdrawal; (2) the intent to withdraw must be communicated by words or acts to the perpetrator or to law enforcement authorities; and (3) the withdrawal must effectively countermand or negate the prior acts of the accessory before the fact or aider and abettor. Thus, a mere change of mind, or mere disapproval without further effort to prevent the commission of the substantive offense, will not suffice as a withdrawal.

3. *Lesser-included offenses.* Aiders and abettors and accessories before the fact may be found guilty of LIO's to the same extent as the perpetrator. Of course, the aider and abettor or the accessory before the fact may be found guilty of the LIO while the perpetrator is found guilty of the offense charged, and vice versa. This is particularly true, as previously noted, where an offense requires a specific mental element and the LIO does not.

4. *Attempts.* If the perpetrator commits an attempt, the aider and abettor or accessory before the fact may be charged as a principal to the crime of attempt (Article 80), even though the crime contemplated was not in fact committed.

5. *Guilt of other principals.* In military law, there is no requirement that the perpetrator be convicted or even tried before trying the accessory. Even though the perpetrator is acquitted, the aider and abettor or accessory before the fact can be convicted.

6. *Proof of perpetrator's crime at accomplice's trial.* In a prosecution of ***A*** under a theory that he is guilty as an accessory before the fact, or an aider and abettor, the prosecution must prove that ***B*** in fact committed the crime. For this purpose, the prosecution ***cannot*** introduce into evidence a record of the prior conviction of ***B***, but would have to prove the fact of ***B***'s crime by other evidence, such as testimony by witnesses that ***B*** committed the crime.

CR 18.3.9. ***Instructions.***

The military judge must know the theory of principals under which the prosecution is proceeding in order to instruct the members properly. Where the state of the evidence is such that the members might reasonably find the accused guilty either as a perpetrator or as an aider and abettor, however, it is proper for the military judge to instruct the members on ***both*** theories. Moreover, the accused may properly be found guilty even though the individual members may disagree on which of the two theories of guilt is the correct one. Thus, one-third of the members may vote for a finding of guilty because they are convinced the accused was the perpetrator (and ***not*** the aider and abettor), another third of the members may vote for a finding of guilty because they are convinced that the accused was the aider and abettor (and ***not*** the perpetrator), and the remaining one-third of the members may vote for a finding of not guilty, yet the finding of guilty stands and is perfectly proper since two-thirds of the members were convinced beyond a reasonable doubt that the accused is guilty even though they may have disagreed on the theory.

CR 18.3.10. ***Pleading***.

A person who is not a perpetrator of an offense, but is liable as a principal under Article 77, is charged just as though he or she had committed the acts. Indeed, this is the very purpose of Article 77, to eliminate the difficulties in pleading due to the subtle distinctions among accessory before the fact, aider and abettor, and perpetrator. In drafting the specification, it normally is not necessary to plead the facts which describe the accused as a principal. Where the specification would be contradictory on its face or otherwise misleading, however, the specification should explain the theory which makes the accused a principal.

CR 18.4. *ACCESSORY AFTER THE FACT.*

CR 18.4.1. *General concept.*

"Accessory after the fact" is a separate, distinct crime under the Uniform Code of Military Justice. Note that the accessory after the fact does not help the offender commit the principal offense, but merely aids or assists the principal **after** the crime has been committed. Mere failure to report a known offense will not make an individual an accessory after the fact. It may, however, constitute a violation of general lawful regulation under Article 92, namely Article 1137, *U.S. Navy Regulations*, which requires naval servicemembers to report known offenses to proper authority.

CR 18.4.2. *Elements of the offense.*

The prosecution must prove beyond reasonable doubt that:

1. An offense punishable by the Uniform Code of Military Justice was committed;

2. the accused knew that the person aided had committed the offense;

3. the accused received, comforted, or assisted the offender; and

4. the accused did so for the purpose of hindering or preventing the apprehension, trial, or punishment of the offender.

CR 18.4.3. *An offense punishable by the code was committed (first element).*

1 *An offense was committed.* The prosecution must prove beyond reasonable doubt that the alleged principal, the person the alleged accessory aided, did in fact commit the offense. The principal's offense must be a completed offense at the time the accessory after the fact renders the principal assistance. Thus, the trial of an accessory after the fact must encompass proof of: (1) The principal's crime; and (2) the accessory's crime of unlawfully assisting the principal.

(a) *Effect of not trying the principal.* Article 78, as an independent punitive article enacted by Congress, abrogates the common law rule that principals must be tried before the accessory after the fact. Therefore, regardless of whether any of the principals are tried for the commission of the crime, the accessory after the fact can be tried for his role.

(b) *Effect of principal's extrajudicial confession.* The fact that the principal's confession is an exception to the hearsay rule as an admission against penal interest does not permit admission of that confession into evidence at the accessory's court-martial. The confrontation clause of the sixth amendment must first be overcome. This confrontation problem preventing admission of a principal's extrajudicial confession is overcome when the principal testifies in person at the accessory's trial, since the accessory has thus been afforded the opportunity to confront and cross-examine the principal.

(c) *Effect of principal's conviction.* MCM, pt. IV, § 2c(5), specifically prohibits the use of evidence of the principal's conviction to establish the element of an offense having been committed. Additionally, the prosecution may not elicit testimony from a principal that the principal has been previously convicted for the offense.

(d) *Effect of principal's acquittal.* Despite the fact that the principal was previously tried and acquitted of the alleged crime, the accessory after the fact may still be tried and, if the prosecution can prove the commission of the crime by the alleged principal, the accessory after the fact may be convicted.

2. *Offenses "punishable by the code."* "Punishable by the code" means ***any*** offense "described by the code;" that is, the gravamen is the nature of the offense rather than the status of the principal. Thus, the principal who committed the offense need not be subject to the code. Hence, a person subject to the code who hides stolen loot for a civilian violates Article 78 since larceny is "described by the code" in Article 121.

CR 18.4.4. *Accused's Knowledge (second element).*

As previously noted, Article 78 is the military equivalent to 18 U.S.C. § 3. The elements of both offenses are the same. There has been no military court decision interpreting the knowledge element of Article 78. There have been, however, Federal cases holding that the knowledge that the government must prove is ***actual*** knowledge. These decisions, as well as the decisions in *United States v. Bissonette*, and *United States v. Nystrom*, hold that actual knowledge can be proven by circumstantial evidence since it is most unlikely that the government would have direct evidence of actual knowledge of an accused. Because the United States Court of Military Appeals has previously analogized the Federal statute with the military law on accessory after the fact, it can be assumed that the knowledge required for accessory after the fact in military law is also actual knowledge.

Another issue relating to the knowledge of the accused for this offense should be addressed. In *United States v. Foushee*, the accused was convicted as an accessory after the fact to assault with intent to commit murder. The perpetrator of the crime had stabbed the victim with a knife, and the accused did assist the perpetrator by concealing him in the former's room. The court concluded that the accused could only be found guilty of being an accessory after the fact to assault with a dangerous weapon because the evidence did not establish that the accused knew that the perpetrator had intended to kill the victim or even to inflict grievous bodily harm on him. Thus, it appears that the knowledge of an accused must include knowledge of the intent of the perpetrators.

CR 18.4.5. *Accused's Assistance to Principal (third element).*

Assistance to the principal includes direct or indirect assistance. It is not limited to concealing or harboring the principal to affect his personal escape. There must be a person to be assisted, however, in order for the offense of accessory after the fact to be committed. Where the assistance cannot be rendered because the person to be assisted died prior to the rendering of assistance, the accessory after the fact charge was not viable although an attempted accessory after the fact under Article 80 was a viable charge.

CR 18.4.6. *Accused's Intent (fourth element).*

1. *Specific intent.* The accessory after the fact must specifically intend to assist the principal to avoid apprehension, prosecution, or punishment. Merely receiving stolen goods, therefore, would not, by itself, make one an accessory after the fact of larceny. If the goods are concealed by the receiver for the purpose of hindering the apprehension or prosecution of the thief, however, then the receiver would also become an accessory after the fact. Likewise, giving first aid at the scene of a crime, knowing full well that the one aided had just violated the code, is not a violation of Article 78 unless the first aid was rendered for the purpose of hindering apprehension, trial, or punishment. The key issue in determining when aid within the meaning of Article 78 is rendered, therefore, is the intent of the person furnishing the assistance.

2. *Effectiveness.* It is not necessary that the aid rendered actually accomplish its purpose. All that is required is that the accused, with the requisite knowledge, aided the offender with the requisite intent.

CR 18.4.7. *Principals As Accessories After the Fact.*

While an accessory before the fact may also, under certain circumstances, appear to be an accessory after the fact to the same crime, it is generally recognized that a principal cannot also be an accessory after the fact.

CR 18.4.8. *Accessory After the Fact As an LIO*.

The offense of being an accessory after the fact to an offense is ***not*** an LIO of the primary offense.

CR 18.4.9. *Pleading*.

The specification must allege both the principal's offense and the manner in which the accused aided, received, comforted, or assisted the principal.

This offense is always alleged under Article 78, regardless of what offense to which the accused was an accessory after the fact.

CR 18.4.10. *Instructions*.

Military Judges' Benchbook, Inst. No. 3-1.

CR 18.4.11. *Providency inquiry*.

On a plea of guilty, the military judge must explain to the accused and must question the accused on the elements of Article 78 ***and*** the elements of the principal offense.

CR 18.4.12. *Punishment.* *MCM, pt. IV, § 3e.*

CR 18.5. *REQUESTING COMMISSION OF AN OFFENSE.*

C.M.A. has since held that the offense of "requesting the commission of an offense" does not exist under Article 134. *United States v. Taylor*, 23 M.J. 314 (C.M.A. 1987).

CR 18.6. *SOLICITATION.*

CR 18.6.1. *Article 82 solicitations.*

Article 82 provides that a person who requests another to commit desertion, mutiny, an act of misbehavior before the enemy, or sedition is guilty of the offense of solicitation.

1. *Form of solicitation.* Solicitation may be accomplished by a verbal request, letter, or other means; and the accused may act alone or in concert with others. Any act or conduct which reasonably may be construed as a serious request or advice to commit one of the offenses listed in Article 82 constitutes solicitation in violation of Article 82.

2. *Instantaneous offense.* The offense is complete the moment the request is made or the advice given. It is not necessary that the person solicited act upon the advice. Indeed, it is not even necessary that the person solicited agree to the request. But, the request made or the advice given must be a serious request or advice.

3. *Punishment.* The maximum punishment for solicitation under Article 82 varies depending on the act solicited and whether the act was attempted or committed.

CR 18.6.2. *Article 134 Solicitations*.

Solicitations to commit offenses other than the violation of the articles enumerated in Article 82 may be charged as violations of Article 134.

Example.
A and B are having lunch together in a diner and notice a pocketbook containing starter checks sitting unattended. A suggests that B take the pouch and put it in his backpack. This request is a solicitation to commit larceny, in violation of Article 134.

1. *Form of solicitation.* Same as for Article 82. *See* above.

2. *Instantaneous offense.* Same as for Article 82. *See* above.

3. *Punishment.* MCM, pt. IV, § 105e, provides that Article 134 solicitations carry the same punishment as is provided for the offense solicited except that in no case can the punishment extend to death or confinement in excess of five years. Note, however, that the maximum punishment for solicitation to commit espionage is any punishment other than death which a court-martial may direct. For example, a person found guilty of soliciting another to commit larceny is subject to the punishment that may be imposed for the offense of larceny. Additionally, where soliciting is charged, but the offense is really a separate and distinct substantive offense, the maximum punishment is that authorized for the closely related offense.

CR 18.6.3. *Specific Intent Offenses.*

Solicitation is a specific intent offense. It requires that the accused entertain the specific intent that the offense actually be committed.

CR 18.6.4. *Related Offenses.*

Some crimes require, as an element of proof, some act of solicitation by the accused. These offenses are separate and distinct from solicitations under Articles 82 and 134. Solicitation, however, is a substantive offense which is different from the offense of attempt.

CR 18.6.5. *Pleading*.

Pleading formats under Articles 82 and 134 are essentially similar. In Article 82 pleadings, the intended offense is merely cited; in Article 134 pleadings, the intended offense is described more specifically.

CR 18.6.6. *Instructions*.

Military Judges' Benchbook, Inst. No. 3-60 (Article 134); Inst. No. 3-6 (Article 82).

CR 18.7. *CONSPIRACY.*

CR 18.7.1. *Elements of the Offense*.

1. That the accused entered into an agreement with one or more persons;

2. that the object of the agreement was to commit an offense under the code; and

3. that, thereafter, the accused or at least one of the co-conspirators performed an overt act to effect the object of the conspiracy.

CR 18.7.2. *Agreement With Two or More Persons (first element).*

1 *Agreement.* Agreement refers to a meeting of the minds by the parties involved. Once there is a meeting of the minds as to a scheme, the agreement exists. There is not an agreement in existence where there is conversation ". . . directed solely toward the formation of the alleged conspiracy."

2. *Form of the agreement.* The agreement in a conspiracy ". . . need not take any 'particular form or be manifested in any formal words.'" The agreement may be formal or informal, written or oral, expressed or implied. "Acts of the parties, a course of conduct, speak louder than words."

3. *Co-conspirators.*

(a) *Who can conspire?* The accused must be subject to the code, but the co-conspirator(s) need not be. Thus, an accused can conspire with a civilian not subject to the code as long as the object offense is a substantive offense punishable by the code. The fact that an accused may even be physically or legally incapable of perpetrating the intended substantive offense does not limit his liability for conspiracy. For example, a bedridden conspirator, who knowingly furnished an automobile to be used in a robbery, and a prison guard, who agrees with prisoners he is guarding to effect their escape from confinement, are both guilty of conspiracy.

(b) *Two conspirators required.* By definition, two or more people must participate. The offense of conspiracy does *not* exist when one of the co-conspirators is an undercover government agent because a "meeting of the minds" does not occur.

An acquittal of a co-conspirator does not preclude the possibility of a conviction of the other conspirator. If a conspirator is convicted in a separate trial, the evidence will be carefully scrutinized to determine that it supports his complicity; an acquittal of a co-conspirator, however, will not in itself serve to overturn conviction of the other conspirator, absent some compelling evidentiary reason.

(c) *Adoption of the conspiracy.* One may join a conspiracy after its formulation, as well as participate in its formation, with the same legal consequences. One who knows of the agreement between the others and cooperates in affecting the object of the conspiracy, such as by committing an overt act, can be found guilty as a co-conspirator. If the accused joins the conspiracy ***after*** the occurrence of an overt act, however, and the objectives of the conspiracy are accomplished, the overt act which occurred prior to the accused's joining the conspiracy are ***not*** attributable to the accused. The overt act must occur ***after*** the accused joined the conspiracy and the accused cannot be held criminally liable for any acts that occurred prior to the accused's joining the conspiracy.

(d) *Mere presence insufficient.* The mere presence of a person at the time an agreement is reached by other parties is not sufficient, standing alone, to establish participation in a conspiracy.

4. *Contents of agreement.* It is sufficient if the minds of the parties arrive at a common understanding to accomplish the object of the conspiracy by concerted action. The agreement need not be in detail, state the means by which the conspiracy is to be accomplished, identify ***all*** co-conspirators, or state what part each conspirator is to play. Additionally, the prosecution is not required to prove that the accused conspirator participated in or had knowledge of all of the details of the execution of the conspiracy, nor must it establish that the accused conspirator knew the identity of all co-conspirators and their particular connection with the criminal purpose.

5. *Proving the agreement.* The agreement can seldom be proved by direct evidence. The agreement or common understanding to accomplish the object of the conspiracy may be inferred from "the conduct of the parties, or from their declarations to each other or in the presence of each other, or from other circumstantial evidence."

CR 18.7.3. *Object of the Agreement (second element).*

1. *Object offense.* The object of the agreement must, at least in part, involve the commission of some offense under the code. Thus, any given offense of conspiracy will involve at least one other offense under the code, and may include more than one. Counsel must be aware of the elements of the object offenses and the court must be instructed on the elements of such object offenses. To establish the providency of the plea, both the elements of conspiracy and the elements of the object offense must be explained to the accused.

Conspiracy and the substantive offense which is the object of the agreement are separate offenses and are separately punishable. The completed offense and the conspiracy to commit it should, therefore, be charged separately. Also, an agreement to commit several offenses is but a single conspiracy.

2. *Offenses requiring a concert of action.*

(a) *Not prosecuted as conspiracy.* **"**A charge of conspiracy will not lie where the substantive offense itself involves concert of action." This rule, known as *Wharton's Rule*, has been consistently applied to such offenses as dueling, bigamy, incest, and adultery—with bribery also being added more recently. Hence, if only the principal actors are involved, there is no conspiracy in such offenses. Where the offense is capable of commission by a single individual, however, this rule, or exception to the rule, does not apply. An exception to *Wharton's Rule* was announced wherein the Army Court of Military Review held that the offense of conspiracy to transfer marijuana did not merge with the substantive offense of transfer of marijuana even though the latter required a duality of action between the transferor and the transferee. The rationale given for the decision was similar to that announced by the Supreme Court in *Iannelli v. United States, supra*, in that transfer of marijuana and the conspiracy to transfer pose a potentially greater threat to the public than do the crimes excepted by *Wharton's Rule*, and therefore should not merge, and should be separately punished.

(b) *Conspiracy with a third party.* Where a substantive crime requires a concert of action (such as bribery), a third party, not necessary to the concert of action, can be found to have conspired with one of the principal actors. For example, ***A*** and ***B*** conspire to accept bribes from ***C***. ***B*** is guilty of conspiracy to commit bribery even though the offense of bribery only requires the participation of ***A*** and ***C***, and, under Wharton's Rule, conspiracy to commit bribery and the substantive offense of bribery would merge.

CR 18.7.4. ***Overt Act (third element)***.

1. *Requirement of an overt act.* At some time after the agreement or understanding, the accused, or at least one of the other parties to the agreement, must have performed some act which tended to effect the object of the conspiracy or agreement. Therefore, without the occurrence of an overt act in furtherance of accomplishing the substantive offense, the offense of conspiracy is not complete, and no criminal liability for conspiracy is available.

(a) *Nature of the act.* The "overt act" is "an open, manifest act from which criminality may be implied… done in pursuance and manifestation of intent or design." It must be an act that is independent of the agreement itself. It must follow the agreement or take place at the time of the agreement. It must be done by one or more of the conspirators (i.e., parties to the agreement), but not necessarily the accused. The accused does not have to consent to, or participate in, the overt act, nor even have knowledge of the overt act or any other detail of the execution of the agreement.

"The offense of conspiracy is continuous so long as overt acts in furtherance of its purpose are done, as every overt act is deemed to be a renewal of the unlawful agreement." As long as the conspiracy continues, an overt act in furtherance of the agreement committed by one conspirator becomes the act of all without any new agreement specifically directed to that act; and each conspirator is equally guilty although he does not participate in or have knowledge of all of the details of the execution of the conspiracy.

As long as the acts done by the co-conspirators are acts ". . . which follow incidentally as probable and natural consequences in the execution of the common scheme," all of the conspirators are guilty of those acts as well as the substantive offense if committed.

The overt act must be done to effectuate the object of the agreement. If an act is done prior to an agreement, it will not be sufficient to constitute the overt act required for a conspiracy conviction. It must be a manifestation that the agreement is being executed, that the conspiracy is at work.

The overt act need not be in itself criminal. It can be as innocent as a telephone call, mailing a letter, or simply standing in a location favorable to committing the intended or object offense. These innocent acts may, under the circumstances, manifest that the conspiracy has proceeded beyond mere agreement. The crime of conspiracy to possess and distribute cocaine was complete once the three co-conspirators pooled their money to purchase the cocaine which was to be divided among them. But the overt act may well be a criminal act and can be the commission of the intended offense itself. Although committing the intended offense may constitute the overt act, it is not essential that the object offense be committed. Any overt act is enough.

". . . [O]ne need not share in the original formation of a conspiracy, but if he joins the conspiracy after its formation and prior to its consummation with knowledge of the agreement or assent of minds between the original parties to accomplish by concerted action an unlawful purpose and commits an overt act to effect the unlawful purpose of the conspiracy, he is guilty as a co-conspirator . . . ."

Can the overt act be a ***failure*** to act? Possibly, depending on the nature of the object offense. In a prosecution for violation of Article 133 for conspiracy to commit extortion, a specification sufficiently stated an offense where it alleged that the overt act done to effect the object of the conspiracy was the act of withholding the possession of a diamond ring from its owner. The overt act must be alleged and proved although, where more than one overt act is alleged, all of the alleged overt acts need not be proved.

The "overt act" is generally a question of fact which may be proven by circumstantial evidence. What is sufficient to constitute an overt act is a question of fact to be determined by the fact-finder.

(b) *Distinguishing "overt acts" in attempts.* Unfortunately, the law has adopted the same term "overt act" for the act required in both the offenses of attempt (Article 80) and conspiracy (Article 81). These

acts, however, are different in degree. In attempts, the overt act must directly tend to effectuate the intended crime and must be more than mere preparation to commit the offense. In conspiracy, it matters not how preliminary or preparatory in nature the overt act is, as long as it is a manifestation that the agreement is being executed. For another example, suppose a conspirator calls the intended victim and invites him to the scene of a planned robbery. The call would constitute the overt act necessary to complete the offense of conspiracy, even though it is clearly not sufficient to support attempted robbery.

(c) *Withdrawal (abandonment).*

(i) C*ontinuing nature of conspiracy.* A conspiracy, once established, may be inferred to continue until the contrary is established. A conspiracy continues over into a subsequent enlistment only if the commission of one or more overt acts occurs during that subsequent enlistment; the fact of discharge and reenlistment does not constitute a withdrawal nor eliminate an accused's criminal liability.

(ii) *Time of withdrawal.* 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. A conspirator who abandons or withdraws from the conspiracy ***after*** the overt act has been performed, remains guilty of conspiracy and all offenses committed pursuant thereto occurring prior to the withdrawal, but not for offenses committed thereafter.

(iii) *Status of remaining conspirators.* Neither the withdrawal from a conspiracy nor the joining of a conspiracy by a new person creates a new conspiracy, nor affects the status of the remaining members.

(iv) *What constitutes withdrawal.* MCM, pt. IV, § 5c(6), states that, in order for a withdrawal to be effective, it must consist of affirmative conduct which is ". . . wholly inconsistent with adherence to the unlawful agreement and which shows that the party has severed all connection with the conspiracy." The MCM does not provide any examples to illustrate what would constitute affirmative conduct adequate to constitute an effective withdrawal, however, case law is very concise on what does ***not*** amount to a withdrawal.

(v) *Factors constituting withdrawl.* In 1978, the Supreme Court announced its decision in *United States v. United States Gypsum Co.*, in which it suggested at least three factors which should be considered in determining whether or not withdrawal from a conspiracy had been effective. Those factors were: (1) accused's affirmative notification to each other member of the conspiracy that he will no longer participate in the undertaking such that they understand that they can no longer expect his participation or acquiescence; (2) accused's disclosures of the illegal scheme to law enforcement officials; or, (3) accused does affirmative acts inconsistent with the object of the conspiracy and communicates in a manner reasonably calculated to reach co-conspirators. While disclosure to a government agent of the existence of a continuing conspiracy by a co-conspirator may be sufficient to constitute effective withdrawal, such disclosure must be complete. There must be no acquiescence to subsequent acts of the remaining co-conspirators by the co-conspirator desiring to have an effective withdrawal.

(1) In *Hubble* the court stated that the law is very specific on what must be done to withdraw from a conspiracy. First, the withdrawal must be done before the commission of an overt act by any conspirator. Second, it must consist of affirmative conduct and demonstrate that the party has severed all connection with the conspiracy and is imposed, in part, in the hopes of dissuading the other co-conspirators from committing the crime.

(2) In *United States v. Miasel,* the Court of .Military.Appeals. found conduct "wholly inconsistent with the theory of continuing adherence" to a conspiracy to commit sodomy where the accused (before acts of sodomy were committed on the victim) walked away from the group and stated he was unable to continue.

(3) Two Boards of Review have indicated that there must be (1) an abandonment of the design to commit the substantive offense, and (2) communication of that abandonment to the co-conspirators before an effective withdrawal can be found.

CR 18.7.5. *Duration of Conspiracy*.

It is generally difficult to establish precisely when a conspiracy begins or ends. It becomes important to establish the beginning and ending of a conspiracy when a determination must be made as to the admissibility of statements and acts of an alleged co-conspirator of the accused at the accused's court-martial. Under the present rules of evidence, MCM, Mil. R. Evid. 801(d)(2)(E), it appears that, for purposes of determining the admissibility of statements and acts of co-conspirators at the accused's court-martial, it is solely a determination for the military judge as to whether a conspiracy existed at the time the statement or act was made. Thus, extreme care must be taken, both by the prosecution to prevent reversal and by the defense to prevent prejudice to the accused, in determining the inception, duration, and termination of a conspiracy because case law interpreting military application of the new rule has not yet developed.

1. *Rule.* Acts and declarations of a conspirator or co-actor, pursuant to, and in furtherance of, an unlawful combination or crime, are admissible against all co-conspirators or co-actors during the existence of the conspiracy and as such are not hearsay.

2. *Inception of conspiracy.* Before the acts or declarations of a conspirator are admissible, the prosecution must prove that a conspiracy existed.

3. *"During the course of the conspiracy."* Before a co-conspirator's statement is admissible against an accused at the accused's court-martial, it must be made during "the course . . .of the "conspiracy." This seems to mean that the statement was made while the plan was in existence and before its complete execution or other termination.

4. *"In furtherance of the conspiracy."* It is also the case that a co-conspirator's statement must be "in furtherance of the conspiracy" to be admissable against an accused. Under the furtherance requirement, the declaration not only must occur before the termination of the conspiracy and after the formation of the agreement, and relate in content to the conspiracy, but also must be made with the intent to advance the objects of the conspiracy. If the government fails to show that the statement of the co-conspirator was made in furtherance of the conspiracy, the statement could still be admissible ***if*** the government could establish that the statement was made in the presence of the accused or was authorized to be made by the accused.

5. *Termination of the conspiracy.* Once the joint enterprise underlying the conspiracy is ended, either as a result of the accomplishment of the objective, abandonment, or withdrawal of members of the groups, subsequent acts and declarations can only affect the actor or declarant.

CR 18.7.6. *Corroboration of the co-conspirator's statement*.

Unlike the old military rule of evidence upon which all military case law prior to 1 September 1980 was based, the present military rules of evidence do not appear to require corroboration of the co-conspirator's statement prior to its admission into evidence. This is consistent with Federal practice. Before admitting a co-conspirator's statement, however, the trial judge must be satisfied by a preponderance of the evidence that a conspiracy existed. In reaching that decision, the trial judge may consider any nonprivileged evidence whatsoever, including the proffered hearsay statements themselves. There is no requirement that there be independent indicia of reliability for admission of the statements.

CR 18.7.7. *Statute of limitations*.

Because it is difficult to determine when the conspiracy was initiated with regard to each co-conspirator, it has been held that the last overt act establishes the time for the running of the statute of limitations. The "last overt act" is the most recent act alleged and proved committed during the conspiracy.

CR 18.7.8. *Single conspiracy to commit several different offenses*.

"The object of the conspiracy may be a number of wrongful acts, rather than a single wrongful act. Still the conspiracy remains the same unlawful combination. Even though the allegations charge different overt acts to different defendants, the question remains whether there was a single agreement to combine to commit all of the overt acts. If there is but one agreement to combine there is only one conspiracy even though there be many objects thereof."

CR 18.7.9. ***Special conspiracies under Article 134.***

The U.S. Code, Title 18, prohibits certain specific conspiracies which require no proof of an overt act. Such conspiracies should be prosecuted in military courts under Article 134, UCMJ, but only if there is no similar offense under the code.

CR 18.7.10. ***Pleading.***

When there is one agreement to commit several different offenses, a separate conspiracy specification may be pleaded for each offense. Where there is "sufficient doubt as to the facts or the law . . . to warrant making one transaction the basis for charging two or more offenses," multiple conspiracies may be alleged.

CR 18.7.11. ***Instructions.***

The military judge is required to instruct the members on the elements of conspiracy ***as well as*** those of the contemplated offense. During providency, the military judge must lay out both sets of elements on the record.

CR 18.8. ***ATTEMPTS.***

CR 18.8.1. ***Scope.***

Article 80 provides for the substantive offense of attempt, and all attempts to commit various offenses under the code, other than the exceptions noted hereafter, should be charged as violations of Article 80. Each of the exceptions has an attempt to commit the offense provided for within the body of the article itself. Hence, attempted desertion, mutiny, etc., are charged as violations of Article 85 or 94, etc., rather than under Article 80.

The exceptions are: (1) Article 85 — Desertion; (2) Article 94 — Mutiny or Sedition; (3) Article 100 — Subordinate compelling surrender; (4) Article 104 — Aiding the enemy; (5) Article 106a — Espionage; and (6) Article 128 — Assault.

CR 18.8.2. ***Elements of the offense.***

1. That the accused did a certain overt act;

2. that the act was done with the specific intent to commit a certain offense under the code, and;

3. that the act amounted to more than mere preparation and apparently tended to effect the commission of the intended offense.

The Court of Military Appeals reduced these elements to simplified language. "The elements of the offense denounced are: (1) an overt act, (2) specific intent, (3) more than mere preparation, (4) tending to effect the commission of the offense, and (5) failure to effect its commission."

CR 18.8.3. ***Accused's act (first element).***

An overt act is an outward act done in pursuance and manifestation of an intent or desire.

CR 18.8.4. ***Accused's intent (second element).***

The accused must specifically intend to commit the offense he is charged with attempting. The attempt offense does not require an "intent to attempt," but rather an intent to commit the object of one's criminal purpose or, simply stated, to commit the object, the substantive crime. Thus, the offense of attempt is a specific intent crime. While crimes sounding in negligence are ruled out—there are no such crimes as attempted negligent homicide, attempted missing movement through neglect, attempted involuntary manslaughter, or attempted reckless driving—one can attempt to commit a general intent crime. General intent crimes can be, and often are, specifically intended. For example, unauthorized absence is a general intent crime. If the accused specifically intended to "go UA" and committed the required overt act, he would be guilty of attempted UA. For example, consider the case where the accused was charged with an attempted violation of a general regulation (prohibiting drug sales). The accused contended on appeal that he would have to have actual knowledge of the regulation before he could be found guilty.

The court disagreed, and held that the specific intent that must be proved is an intent to commit the criminal act and not an intent to violate a particular regulation. The accused need not know exactly which criminal act he is attempting to be guilty of an attempt so long as he believes he is attempting a crime.

Quite often, there may be no direct evidence of the accused's intent. The intent must then be inferred from the available circumstantial evidence. This evidence must be such that, according to common human experience, it is reasonable to draw such an inference. For example, where there was insufficient evidence to infer the accused's action in willfully damaging an aircraft amounted, this amounted to sabotage since no evidence of specific intent to commit sabotage was presented at trial. Evidently, common human experience did not permit drawing an inference that the accused had a specific intent to commit rape where the accused, at 0240 hours, undressed outside the victim's home, crept into her house in the nude, entered the victim's bathroom where she was standing nude after taking a shower, leered at her, and then leaned toward her, reaching in the direction of her neck and shoulder with his hand, and only stopped and ran away when the victim began screaming.

CR 18.8.5. ***Nature of the overt act (third element).***

The overt act must be an act which goes beyond mere preparation and tends to effect the commission of the intended offense regardless of whether it is or is not successful.

1. *More than mere preparation.* The Air Force Board of Review, stated:

The rule is that: "Mere acts of preparation, not proximately leading to the consummation of the intended crime, will not suffice to establish an attempt to commit it . . ., for there must be some act moving directly toward the commission of the offense after the preparations are made . . . ." It seems obvious that there will always be an area between mere acts of preparation and the final step in its commission which cannot be delineated . . . .

. . . Holmes, J. said: "Preparation is not an attempt. But some preparations may amount to an attempt. It is a question of degree. If the preparation comes very near to the accomplishment of the act, the intent to complete it renders the crime so probable that the act will be a misdemeanor, although there is still a *locus poenitentiae,* in the need of a further exertion of the will to complete the crime. . . .

"The line of demarcation between preparation and a direct movement toward the offense . . . is one of fact, not of law." The *Manual for Courts-Martial* defines preparation as the "devising or arranging the means or measures necessary for the commission of the offense." For example, in one case, the accused was convicted of wrongfully possessing cocaine and attempting to sell the drug. He appealed, asserting that his acts amounted at most to mere preparation and did not constitute an attempt. The Army Court of Military Review, having reaffirmed the rule that "(a)n act does not constitute an attempt unless it is accompanied by the specific intent to complete the ultimate offense—in this case, the sale of cocaine," stated:

Possessing a small quantity of cocaine does not alone manifest an intent to sell it. Each successive act, however, (becomes) . . . increasingly indicative of an intent to sell and (moves) . . . closer to exceeding the bounds of mere preparation. We (now) . . . focus on the final act (returning to the car, . . . still in possession of cocaine, where the buyer was waiting as instructed), calling it *the* overt act, safe in the knowledge that we (are) . . . not inferring intent from the overt act alone, but from the entire sequence of events.

The sequence of events which the court was referring to, and which the court found as acts going beyond mere preparation and constituting a direct movement towards the sale of cocaine, were: That the appellant

. . . possessed the drug in question; Nelms (the informant) was introduced to him as a prospective buyer; in reaching agreement with Nelms, appellant resolved significant details such as quantity, price, and the time and place of the sale; appellant waited for Nelms, who ostensibly had gone to the car, appellant joined him there still possessing the cocaine.

These events the court found to be directed toward completion of the ultimate offense and near to the consummation of the intended offense. Restating the rule "in terms of its factual context," the court concluded that

. . . the greater the specificity of intent required for an attempt, the more unequivocal must be the acts alleged to constitute the attempt. In the present case, acknowledging the presence of a marketable quantity of cocaine to begin with, there is nothing the least bit equivocal about the series of acts that were leading inexorably to the completed

sale only to be prevented, so the appellant thought, by the police.

"The overt act need not be the last act essential to the consummation of the offense." For example, ***X*** intends to burn down his neighbor's house. With this intent in mind, he buys a box of matches and gasoline for use in igniting the blaze. The act of buying the gas and matches is mere preparation. If ***X*** goes further and pours gasoline on the house and lights the match, this is certainly more than preparation. If a match is thrown onto the gasoline, attempted arson has clearly occurred even though the match immediately goes out without igniting any of the house. Thus, while mere preparation does not constitute the offense of attempt, what evidence is sufficient to support a finding of more than mere preparation and sufficient to support an attempt is a matter of degree and a factual issue to be resolved in each case by the fact-finder.

2. Note the language of MCM, pt. IV, § 4(b)(4), on this aspect: "an act [which] apparently tended to effect commission of the intended offense." The act tends to effect commission of the intended crime ". . . if a reasonable [person] . . . in the same circumstances as the defendant might expect the intended criminal consequence to result from the defendant's acts."

(a) *Substantial step toward the intended crime.* It is not necessary that every act essential to consummation of the object crime be performed. Stated otherwise, it is not necessary that the last act in the chain be accomplished.

(b) *Accused's absure belief.* The acts committed by the accused must be of a nature which " apparently would result" in the commission of a crime. For example, an accused believes that, by invoking the rites of witchcraft, he can cause his division officer's death. Since it would be patently unreasonable that such an act would tend to effect the commission of an intended offense, then, despite the accused's belief, there is no attempt. Distinguish this situation, however, from a reasonable mistake of fact by the accused, which is discussed below ("Defense of impossibility").

3. *Factors in determining whether a sufficient overt act has been committed.* The United States Court of Military Appeals listed the following factors for consideration in determining whether an attempt has been committed, even though the object offense is not consummated: (1) The character of the interruption; (2) the nearness of the consummation of the offense; and (3) the nature of the intended offense.

4. *Defense of impossibility.* The Court of Military Appeals stated the following with regard to the defense of impossibility:

The two reasons for "impossibility" are . . . (1) If the intended act is not criminal, there can be no criminal liability for an attempt to commit the act. This is sometimes described as "legal impossibility". (2) If the intended substantive crime is impossible of accomplishment because of some physical impossibility unknown to the accused, the elements of a criminal attempt are present. This is sometimes described as "impossibility in fact".

(a) *Factual impossibility.* Short of the patently absurd limitation already discussed, it generally is ***not*** a defense that the intended offense, though proscribed by law, was, under the circumstances, factually impossible to commit. The American Law Institute's Model Penal Code, § 5.01, states that a person is guilty of criminal attempt if he ". . . purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believed them to be. . . ."

The issue of factual impossibility or mistake of fact frequently comes up where the accused has been charged with possession or distribution of a controlled substance. In one case, an airman first class was charged with distributing what he **honestly** believed to be Quaaludes. The "Quaaludes" were actually glycerin suppositories. The court held the true nature of the substance, in this case suppositories, is no defense to attempted distribution or possession. On the other hand, if the accused know that what he was selling was not really a controlled substance, then he is not guilty of attempted distribution. Instead, he is guilty of larceny by false pretenses. Therefore, the government should consider charging both offenses in the alternative.

(b) *Legal impossibility.* If what the accused believed to be a substantive offense is actually no crime at all, the accused cannot be convicted of a criminal attempt.

CR 18.8.6. ***Effect of completion of attempted crime.***

Article 80(c), UCMJ, provides that a person subject to the code may be ". . . convicted of an attempt to commit an offense although it appears at the trial that the offense was consummated." For example, suppose an accused is charged with attempted larceny. At trial, it is proved the larceny was actually committed. The accused may still be convicted of attempted larceny. However, the accused may not be convicted of larceny unless a larceny charge was preferred and referred for trial.

CR 18.8.7. ***Voluntary abandonment.***

Pursuant to MCM, pt. IV, § 4c(4), voluntary abandonment is an affirmative defense when the perpetrator completely and voluntarily abandons the intended crime prior to completion, "solely because of the person's own sense that it was wrong."

Voluntary abandonment will ***not*** be a defense when the abandonment occurs because of a fear of immediate detection or apprehension. Of course, whether the accused ceased his efforts to commit an offense because of a sincere change of heart or because of a fear of immediate detection or apprehension is a matter that will be determined by the facts of each case. However, voluntary abandonment of an attempted offense is not a defense when the accused's actions have progressed into their last stages and the victim has already suffered substantial harm. In one case, the Court of Military Appeals found the accused guilty of attempted distribution under an aider and abettor theory. A government informant contacted the accused for the purpose of procuring some crack cocaine. The accused did not have any drugs, but indicated he knew a drug dealer in town and drove the informant to meet with the drug dealer. The dealer indicated she could procure the cocaine from another source, and agreed to meet the informant later that evening. The dealer procured the drugs, but later became suspicious of the informant and never actually distributed the drugs. The Court here found that the dealer's procurement of the cocaine was a substantial step toward its distribution. Since the suspicion of the informant's identity arose after she procured the cocaine, she already had taken that substantial step toward the crime of distribution. The fact that she did not consummate the transaction did not alter her liability for attempted distribution. Under an aider and abettor theory, the accused's conviction was upheld.

CR 18.8.8. ***Lesser included offense.***

Article 80 is always an LIO of a substantive offense charged [Article 79, UCMJ], except where the offense cannot be specifically intended (e.g., negligent homicide).

CR 18.8.9. ***Pleading.***

With the exception of the attempt-type assault pleadings, attempt pleadings follow the general format illustrated in the sample Article 80 pleading. Note that, unlike Article 81 (conspiracy), the overt act is not alleged.

CR 18.8.10. ***Instructions.***

Similar to the situation with conspiracy, the military judge must instruct on two sets of elements; those of attempt as well as the elements of the attempted offense.

CR 18.8.11. ***Punishment.***

MCM, pt. IV, § 4e, provides that an attempt to commit an offense carries a punishment exactly the same as if the offense intended had been consummated, except that death or confinement in excess of 20 years may not be adjudged.

CR 18.9. *REVIEW OF RELATIONSHIP BETWEEN CRIMINAL CONDUCT AND PARTIES TO CRIMES*

CR 18.9.1. ***In general.***

From previous discussion it can be seen that, in any given set of circumstances, elements of solicitation, conspiracy, principals and attempts may coexist. These concepts do not always stand alone, but are frequently intermingled. In assessing what offenses are involved in a given set of facts, never forget that in addition to, or in lieu of, a completed object offense, solicitation, conspiracy, and attempts may also be charged. Likewise, careful thought must be given

to the relationship of "parties" (i.e., principals and accessories after the fact).

CR 18.9.2. *The spectrum of crime.*

The various levels of criminal conduct range from solicitation to commit a crime, through the actual commission of the crime, to being an accessory after the fact to the crime. Criminal activity may, therefore, be envisioned as a spectrum of progression through time.

THE SPECTRUM OF CRIME

Solicitation	Conspiracy	Attempt	Object Crime	Accessory After The Fact

1. *Solicitation.* If committed, solicitation occurs at the very outset of a criminal venture. It is the first criminal step after the birth of the venture in the accused's mind (i.e., the first act of putting the evil scheme to work). It consists simply of requesting, seriously and in any manner, another person to commit an offense. Nothing more is needed. Note that the solicitor is also "counseling" the commission of an offense and thus may become a principal and a conspirator if the object offense is committed or attempted.

2. *Conspiracy.* If committed, conspiracy is the second criminal step outside the sanctuary of the mind and upon the stairway to completion of the object offense. When the person solicited agrees to participate in a concerted action with the "solicitor" to commit a crime, then a conspiracy agreement is formed. When an overt act is committed by any of the conspirators, the crime of conspiracy is complete. The overt act need only manifest that the conspiracy is at work. A conspirator, like a solicitor, may become a principal to the commission or attempted commission of the object crime.

3. *Attempt.* If committed, an attempt occurs on the very threshold of completion of the object crime. When an overt act amounting to more than mere preparation, and which apparently tends to effect the object offense, is committed, an attempt has been committed—provided that the person intended to commit a crime.

(a) *Overt act.* An overt act for an attempt would constitute an overt act for conspiracy. The overt act in conspiracy, however, can be far removed from the threshold of the object crime; it can be simply a preparatory act, which would not be sufficient for an attempt.

(b) *Specific intent.* The overt act must be done with the specific intent to commit the object offense. Therefore, one cannot be guilty of an "attempt" to commit a crime based solely on negligence (e.g., negligent homicide).

4. *Relationship between preparatory offenses and object offenses.*

(a) *Negligent offenses.* It should be apparent that purely negligent crimes are completed without any accompanying offenses of solicitation, conspiracy, or attempt.

(b) *General intent offenses.* It should also be apparent that, although some crimes involving "general intent" can be specifically intended, and hence attempted, they can be committed without an intervening "attempt" (e.g., unauthorized absence caused by over-sleeping).

(c) *Specific intent offenses.* Crimes requiring a specific intent always involve an attempt. For example, larceny is a wrongful taking with intent permanently to deprive another of personal property of some value. It always includes an overt act with specific intent, the act being more than mere preparation and apparently tending to effect commission of the larceny. The only difference between the completed larceny and the defined attempted larceny is that, in the "attempt," the overt act failed. Article 80 permits conviction of such an "attempt," however, even though the evidence shows that it in fact did not fail. Even in crimes involving a required specific intent, it should be apparent that they can be and frequently are committed without the crimes of solicitation and conspiracy having also been committed. Thus, larceny can be committed by an individual working alone; no solicitation or conspiracy need occur.

5. *Accessory after the fact.* If committed, this crime occurs after a preceding offense has been committed. So long as some offense is committed, it is not necessary that an intended offense actually be committed, although that probably is the usual case. Thus, one may be guilty of being an accessory after the fact to an attempt.

CR 18.9.3. *The spectrum of criminals.*

Each of the levels of criminal conduct corresponds to a specific type of criminal party. When the object crime is attempted or committed, all parties to that crime or its attempt are divided into two categories: principals and accessories after the fact. For example, one who solicits a crime becomes an accessory before the fact (and therefore a principal) if the crime is attempted or committed pursuant to the solicitation. Likewise, one who attempts a crime becomes a perpetrator (and therefore a principal) of a criminal attempt.

THE SPECTRUM OF CRIMINALS

Solicitor	Conspirator	Attempter	Accessory Before The Fact	Aider And Abettor	Perpetrator	Accessory After The Fact

1. *Principal.*

(a) *Included parties.* Under Article 77, a principal is one who:

commits the object offense;

(2) aids in its commission;

(3) abets (encourages) its commission;

(4) counsels (advises) its commission;

(5) commands (requests) its commission;

procures (hires) its commission; or

causes an act to be done which, if directly performed, would be punishable by the code.

(b) *Relationship of parties to conduct short of the completed crime.* Any one of the seven specific acts which make one a principal can also be committed by a solicitor, conspirator, or attempter. For example, one who conspires with others to commit a crime is guilty as a principal if the crime is committed pursuant to the unlawful agreement. The conspirator becomes at least an accessory before the fact, and, depending on the role the conspirator played in the actual commission of the crime, may also be an aider and abettor or the actual perpetrator.

2. *Accessory after the fact.* The accessory after the fact aids or assists a person known to have committed a crime, with the intent of assisting the criminal to evade apprehension, prosecution, or punishment. A perpetrator and an aider and abettor cannot also be accessories after the fact to their own crimes.

CHAPTER 19

CHAPTER 19

CR 19. PLEADING

CR 19.1. *CHARGE AND SPECIFICATION.*

CR 19.1.1. *General format of military pleadings.*

Pleadings in military criminal cases follow a traditional format of charge and specification. Together, the charge and specification, much like criminal information in civilian prosecutions, set forth the statutory authority for the prosecution and the specific factual averments which constitute the alleged offense. Military pleadings tend to be shorter than most civilian information or indictments.

CR 19.1.2. *The charge.*

The charge portion of the military pleading is merely a citation of the article of the UCMJ which the accused allegedly violated. Corresponding citations to the U.S. Code are not used; the article of the UCMJ is sufficient. For example, in a larceny case, the charge would be as follows:

Charge: Violation of the UCMJ, Article 121

CR 19.1.3. *The specification.*

The specification contains allegations of facts constituting the offense charged. *Manual for Courts-Martial*, Part IV, subparagraph (f) of each punitive article, contains sample formats for specifications for most of the common offenses under the UCMJ. However, care is necessary when using the *Manual for Courts-Martial* samples. Each sample must be tailored to the facts in each case. Although the samples in the *Manual for Courts-Martial* appear to be accurate, subsequent cases must be constantly examined to ensure that any case-law modifications are followed.

CR 19.1.4. *Each specification a separate offense.*

Each specification alleges a distinct, separate offense. Thus, each specification is similar to a count in civilian criminal pleadings to which pleas must be entered and for which findings must be returned.

CR 19.2. *NUMBERING OF CHARGES AND SPECIFICATIONS*

CR 19.2.1. *Terms.*

1. *Charge.* An "original" charge (i.e., one alleged when the charge sheet was prepared) is simply labeled "Charge." Where other allegations arise subsequent to the preferral of the initial charge, such "additional" charge(s) and corresponding specification(s) are placed on a new charge sheet and go through the formal requirements of preferral and referral.

2. *Specification.* All specifications, whether original or additional, are simply labeled "Specification" and, if necessary, given a number. A specification of an Additional Charge would not be referred to as an "Additional Specification."

CR 19.2.2. *Numbering.*

1. One charge or specification only. If there is only one charge, it is referred to simply as "Charge" and is not numbered. Likewise, if there is only one specification under a particular charge, it is called "specification" and is not numbered.

2. Multiple charges and specifications.

(a) Charge. If there is more than one charge, the first one is numbered with a Roman numeral "I," the second "II," etc. It is traditional and customary to list the charges in the order of their normal numerical sequence in the UCMJ (i.e., an Article 86 is listed before an Article 121 charge). Trial counsel may, however, desire charges to be arranged in a different sequence in order to make the order of proof more

logical, chronological, or for other reasons.

(b) Specification. If there is more than one specification under a particular charge, the first one is numbered with an Arabic numeral "1," the second "2," etc.

(c) Additional charges and specifications. The same numbering and listing system is used for additional charges (i.e., Roman numerals for the charges—if more than one—and Arabic numerals for the specifications—if more than one under that charge). For example, additional charges placed on a later charge sheet would be labeled Additional Charge or Additional Charge I and Additional Charge II.

3. Multiple specifications under one charge. All specifications alleging violations of a particular article of the UCMJ are listed as separate specifications under a single charge. See the examples immediately below. An additional charge, however, must be pleaded separately from original specifications alleging violations of the same UCMJ article.

Example.

Charge I: Violation of the UCMJ, Article 85

Specification 1: (words alleging desertion)
Specification 2: (words alleging another offense of desertion)

Charge II: Violation of the UCMJ, Article 86

Specification 1: (words alleging an unauthorized absence)
Specification 2: (words alleging another unauthorized absence)

[ADDITIONAL CHARGE SHEET]

Additional Charge I: Violation of the UCMJ, Article 86

Specification: (words alleging yet another unauthorized absence)

Additional Charge II: Violation of the UCMJ, Article 92

Specification 1: (words alleging an orders violation)
Specificatoin 2: (words alleging a second orders violation)

4. *Article subdivisions.* The particular *subdivision* of an article of the UCMJ is not cited in the charge. For example:

a. "Article 86," ***not*** 86(2) nor 86(3).
b. "Article 85," ***not*** 85(a), nor 85(b), nor 85(c), nor 85(a)(1).

Note: Articles 106a (espionage), 112a (drugs), and 123a (bad checks). In these cases, the article number cited actually contains the letter "a", making it a separate offense. For instance, Article 112 punishes being drunk on duty. Article 112a is a separate punitive article punishing a number of different types of drug related offenses.

CR 19.3. *SPECIFIC CONTENTS OF SPECIFICATIONS*

CR 19.3.1. *Overview.*

The purpose of this section is to provide a detailed guide to drafting specifications. Specifications contain factual allegations about two matters: (1) The alleged offense and (2) jurisdiction. Much of the material in this section is relevant when ascertaining if a specification adequately informs the accused of the allegations against which he must defend. Also relevant is the doctrine of variance which is more fully discussed in section 0205.E of this chapter.

1. *Allegations about the alleged offense.* The specification must allege, either expressly or by fair implication, all the elements of the alleged offense and all necessary words importing criminality (e.g., "wrongfully," "unlawfully," "without authority"). MCM, pt. IV, is a generally reliable guide to pleading the offense, subject to the caveats discussed in this chapter.

2. *Jurisdictional allegations.* Court-martial jurisdiction exists over every offense committed by military personnel simply by virtue of their status as members of the military. It is not necessary that the offense is "service connected."

CR 19.3.2. *Description of the Accused.*

1. *Identification.*

(a) *Name.* Recite the accused's full name: first name, middle name or initial, last name. If the accused is known by an alias, the accused should be charged under his true name. If the accused does not admit which name is his true name, the accused should be charged under the name appearing on his enlistment contract, with the alias also recited (e.g., "Seaman John P. Jones, U.S. Navy, USS NEVERSAIL, alias Rear Admiral Raymond P. Johnson, U.S. Navy, Fourth Naval District. . . .").

(b) *Military association.* The specification should recite the accused's rank or grade, armed force, and unit or organization. If the accused's rank or grade has changed since the date of the alleged offense, the accused should be identified by his present grade, followed by his grade at the time of the offense (e.g., "Seaman Bart Gregory, U.S. Navy, then Seaman Apprentice, U.S. Navy, USS NEVERSAIL. . . .").

Examples.

(1) "In that Yeoman Third Class Sara L. Smith, U.S. Navy, Naval Justice School, Newport, Rhode Island, . . ."

(2) "In that Seaman Erin Leann Rich, U.S. Navy, USS Shark, . . ."

(3) "In that Staff Sergeant Michael D. Andy, U.S. Marine Corps, Marine Fighter Attack Squadron 314, Marine Aircraft Group 11, Third Marine Aircraft Wing, Fleet Marine Force Pacific, . . ."

1. *Jurisdiction.* A court-martial generally has jurisdiction to try only military members on active duty. Therefore, each specification should clearly recite the accused's active duty status. One way of pleading jurisdiction over the accused is to use the words "on active duty" immediately after the description of the accused. For example:

"In that Ensign Bertha D. Blooze, U.S. Navy, USS VULCAN, **on active duty**, did, . . ."

It should be noted, however, that the omission of the words "on active duty" from a specification do not prevent it from stating an offense. It is still recommended that "on active duty" be alleged in every specification.

(a) *Special problems.* Sometimes more than just "on active duty" will be necessary. When special circumstances cause court-martial jurisdiction to be asserted or retained over one who would not normally be subject to such jurisdiction, those circumstances should be pleaded.

(1) *Jurisdicition retained after expiration of enlistment.* For example, suppose that the accused is not tried until after the expiration of his or her current enlistment, but charges were ***preferred*** before the expiration. The specification should recite:

"In that Seaman Fritz D. Katz, U.S. Navy, Naval Air Station, Willow Grove, Pennsylvania, on active duty, over whom court-martial jurisdiction is asserted by virtue of the preferral of this specification, on 29 December 20CY(-1), before the expiration of his enlistment on 1 January 20CY, did . . ."

(2) *Reservists failing to report for active duty.* Suppose that a reservist failed to report for active duty for training. The resulting unauthorized absence (UA) specification should allege the facts surrounding the activation:

"In that Boatswain's Mate Third Class Jacob D. Snake, U.S. Naval Reserve, Naval Support Activity, Philadelphia, Pennsylvania, on active duty, who was lawfully ordered on 11 January 20CY to a period of forty-five days active duty for training to commence on 2 February 20CY, did . . ."

CR 19.3.3. *Description of time of offense.*

The time and place of the commission of the offense charged should be stated in the specification with sufficient precision to identify the offense and enable the accused to understand the particular act or omission alleged.

1. *Use of "on or about."* In alleging the time of an offense, it is proper and usually advisable to allege it as "on or about" a specified day. This phrase must be construed reasonably in the light of the circumstances of the particular case. Where time ***is*** of the essence of the crime, an allegation concerning the date of the offense becomes a matter of substance. For example, the date of the offense would doubtless be of substance in a prosecution for statutory rape. Otherwise, allegation of the time is not a matter of substance, and an approximation of the date of occurrence is sufficient unless it is so inaccurate or vague as to prevent the accused from preparing a defense.

2. *Hour.* The exact hour of the offense is ordinarily not alleged except in certain absence offenses (e.g., failure to go to appointed place of duty, Article 86(1), UCMJ). However, if the exact hour of the offense is alleged, use the 24-hour clock system.

3. *Extended periods.* When the accused's alleged conduct extends over a period of time, or when the exact date of the alleged conduct cannot be precisely stated, it is proper to allege that the offense occurred over a period of time (e.g., from on or about 15 January 20CY to on or about 22 February 20CY). When the

accused has committed a series of acts which are parts of a continuous course of action, such as conspiracy, the conduct may be alleged as a single continuing offense over a period of time.

4. *Practical suggestions.* As a general rule, it is wiser to allege "on or about" a specific date rather than pleading that a single offense occurred sometime during an extended period. Should the date proven at trial vary from that alleged, fatal variance will result only if the discrepancy in dates has misled the accused. Pleading an extended period of time is useful, however, when the offense consisted of separate acts committed over a period of time, such as conspiracy or embezzlement. Combining several instances of use of marijuana into only one specification alleging wrongful use of marijuana over a period of time is permissible, so long as the accused is not misled. Instead of being liable for punishment for several separate, distinct offenses, the accused is subject to punishment as if he or she had committed only one offense. Accordingly, attempts to combine separate, distinct crimes into a single continuing offense are generally unwise.

CR 19.3.4. *Description of the Place of Offense*.

It is usually unnecessary to go into such details as the name of the street or the number of the building, if any, in which the offense takes place. However, some acts are offenses only if committed in a particular place. In that event, it may be necessary in a given case to identify the street, building, or location. In an exemplary case, a specification alleged that the accused violated a lawful general order by appearing "at Frankfurt am Main, Germany . . . in a public establishment in a field uniform." The order prohibited wearing of such a uniform "outside military installations." The Court of Military Appeals held that the specification did not contain sufficient averment that the public establishment was outside of a military installation and concluded that the specification did not show sufficient facts to show an order violation.

CR 19.3.5. *Description of Type of Principal*.

1. *Article 77 rule.* Under Article 77, all principals are charged as if each was the actual perpetrator. For example, if ***A*** is an accessory before the fact to ***B***'s larceny, the specification against ***A*** would nonetheless allege: "In that ***A*** (jurisdictional data). . . did steal . . ."

2. *Exception.* Notwithstanding the provisions of Article 77, it occasionally may be wise to specify the role the accused played in the criminal enterprise. An example of such a rare exception is where the specification did not charge the accused as the driver but merely as a passenger. "Thus, in the absence of any allegation that the accused was the driver of the vehicle, or that as a passenger he aided and abetted the driver in unlawfully fleeing the scene of an accident, the specification wholly fails to allege an offense." The court also held the specification to be "fatally defective" under the doctrine of the military superior-subordinate relationship ". . . because of the failure to allege that the accused as a passenger was senior in rank and command under conditions which would permit him to issue orders to the driver."

CR 19.3.6. *Description of Victim*.

1. *General rule.* If the offense alleged constitutes an offense against the person or property of an individual, that person should be described as follows:, first name, middle initial, and last name. If a military person, the victim's rank or grade and armed force should also be alleged. This will identify that individual more specifically.

2. *Rank-related offenses.* Some offenses ***require*** that the rank or grade of a victim be alleged in order to set forth an offense. For example, in disobedience of a superior officer, in violation of Article 90, rank may be essential to establish the element of "superiority."

3. *Status-related offenses.* Some offenses require that the victim's status as a person subject to the UCMJ be alleged and proven. For example, using provoking words (Article 117) is an offense only if the person toward whom the words were used is one subject to the UCMJ. *See* sample specification, MCM, pt. IV, § 42f, which identifies the victim as: "wrongfully use provoking words, to wit: . . . towards Sergeant____, U.S. Air Force . . ." If the victim were a reservist, it would be necessary to add active duty status (e.g.: ". . . towards Lieutenant Junior Grade Howard J. Levitz, U.S. Naval Reserve, on active duty").

4. *Unknown victim.* Occasionally the exact identity of the victim may be uncertain. For example, in one case, assault victims were described merely as "armed forces policemen." The Court of Military Appeals held that, under the circumstances, such pleading was sufficiently particular. The court noted that the specification provided further identifying information in its allegations of date, time, and place. Moreover, the accused had pleaded guilty and had not moved for appropriate relief in the nature of a bill of particulars. There was no risk that the allegation of the victims' identity was so vague as to risk misleading the accused. For example, in one case murder specifications alleging numbers of "Oriental human beings whose names are unknown" formed the basis of conviction. Vague descriptions of the victim are unwise, because they invite defense assertions that the pleading is fatally defective. Thus, when the exact identity of the victim is unknown, he should be described as accurately as possible, such as by any alias or by a general physical description (e.g., "a Caucasian adult male of unknown identity").

CR 19.3.7. *Description of Value.*

In property offenses, such as larceny, the value of the property determines the authorized maximum punishment. Whenever value is an aggravating matter, it must be specifically alleged. Exact value should be alleged, if known. If only an approximate value is known, it may be alleged as "of a value of about. . . ." If several items are the subject of the offense, the value of each item should be stated, followed by a statement of aggregate value—e.g., ". . . one shirt, value $3.50; one pair of shoes, value $14.00; one camera, value $220.00; one package of chewing gum, value $0.20; of a total value of $237.70."

CR 19.3.8. *Description of Property.*

1. *Generic terms.* In describing property, generic terms should be used, such as "a watch" or "a knife," and descriptive details such as make, color, and serial number usually should be omitted. However, in some instances, details may be essential to the offense. For example, the length of a knife may be important in prosecuting a violation of a general regulation or in a carrying concealed weapons case, in order to establish its dangerous nature.

2. *Specific identity.* Specifications should sufficiently identify property in order to inform the accused of what he/she must defend against and in order to protect the accused from a second prosecution for the same offense. The courts are usually tolerant of somewhat vague descriptions of property when the record clearly establishes that the accused was not misled by the lack of specificity in pleading. Thus, the Court of Military Appeals upheld a larceny specification which alleged "goods, of a value of about $1,678.00. . . ." The Court of Military Appeals noted that the accused had pleaded guilty to the specification. Moreover, the military judge specifically inquired into the defense's understanding of what specific property was involved. On the record, the defense counsel stated the various items that comprised the alleged "goods," and also stated that there was no possibility that the accused had been misled. In another example, the Court of Military Appeals reluctantly upheld a larceny specification which alleged that the accused stole "foodstuffs." The Court of Military Appeals held that there was no risk of the accused having been misled, but that the individual items were known and, for sake of precision, should have been alleged. Also worth noting is a case where the Court of Review determined that a specification which, in describing the subject of a larceny, did not contain the words "property of the U.S. Navy" was not fatally defective (accused was not misled, no objection by accused to specification and ownership was fairly implied).

CR 19.3.9. *Description of Written Instruments, Orders, and Oral Expressions.*

1. *Written instruments.* When a written instrument or a part of it forms the gist of the offense, the specification should set forth the writing, preferably verbatim. MCM, R.C.M. 307 (discussion).

Examples:

A is charged with forgery of a check. A verbatim copy of the check (photocopy if possible) should be inserted in the specification.

A is charged with wrongful possession of a pass. A copy of the pass should be inserted in the specification.

2. *Other orders (Article 92(2), UCMJ).* When the order allegedly violated is other than a general order or regulation, such "other lawful order" should be quoted verbatim or described exactly in the

specification. This fully apprises the accused of the specific misconduct allegedly committed. When the order is an oral order, not only should it be quoted verbatim, but the phrase "or words to that effect" should be added after the quotation. "Or words to that effect" will provide for the possibility of a minor variance in proof of the exact words used in the order. Where the written order is not quoted verbatim or may be violated in more than one way, the specification must also allege the manner in which it was violated.

3. *Negating exceptions.* If the order contains exceptions, it is generally not necessary that the specification contain an allegation negating the exceptions. For example, in once case, the accused was charged with violation of a Far Eastern Command regulation by wrongfully possessing a hypodermic needle and syringe. The regulation prohibited possession of hypodermic needles and syringes except for treatment of disease or household use; but the specification did not allege that the accused's possession was not for treatment of disease or household use. The Court of Military Appeals held that such a negation of the regulation's exceptions was unnecessary in the pleadings.

4. *Orders.* A specification alleging a violation of a general order or regulation, under Article 92(1), UCMJ, must clearly identify the specific order or regulation allegedly violated. The general order or regulation should be cited by its identifying title or number, section or paragraph, and effective date. It is not necessary to recite the text of the general order or regulation verbatim. For example, a specification alleging a violation of the general regulation prohibiting possession of ***alcoholic beverages*** aboard a ship will cite the applicable general regulation as ". . . Article 1162, U.S. Navy Regulations, dated 14 September 1990. . . ."

CR 19.3.10. *Amendments to Specifications: R.C.M. 603.*

1. *Prior to arraignment.* MCM, R.C.M. 603(b) permits minor changes to the charges and specifications prior to arraignment by "Any person forwarding, acting upon or prosecuting charges on behalf of the United States except an Article 32 investigating officer . . ." This would allow a legal/discipline officer, legal clerk, or trial counsel to make appropriate pen-and-ink change, e.g. changes to reflect appropriate pretrial confinement dates, changes in rank, etc.

2. *After arraignment.* The military judge may, under R.C.M. 603, grant motions to permit minor changes in the charges and specifications at any time after arraignment, but prior to findings so long as no substantial rights of the accused are prejudiced.

3. *Minor changes defined.* " . . . [A] specification may be amended if the change does not result (1) in a different offense or in the allegation of an additional or more serious offense, or (2) in raising a substantial question as to the statute of limitations, or (3) in misleading the accused." Minor changes include those necessary to correct inartfully drafted specifications or those which reduce the seriousness of the offense. However, changing the period of unauthorized absence by only one day after arraignment not minor when the authorized period of confinement was doubled.

CR 19.4. *SUFFICIENCY OF A SPECIFICATION*

CR 19.4.1. *Sufficiency.*

Each specification must usually include, either expressly or by fair implication, allegations of all the facts that constitute elements of the offense charged, as well as all necessary words importing criminality. Thus, when the specification is read, it must describe acts that are clearly and unequivocally an offense.

1. *Pleading Elements.* As a general rule, all of the elements of the offense alleged must be pleaded, either expressly or by fair implication, or it is fatally defective. The sample specifications in MCM, pt. IV, are generally reliable forms that include all the elements of each offense. If a specific intent or state of mind is an element of the offense, it must be alleged.

2. *Words Importing Criminality.* If the alleged act is ***not*** itself an offense, but is made an offense either by applicable statute (including Articles 133 and 134) or regulation or custom having the effect of law, then words importing criminality—such as "wrongfully," "unlawfully," "without authority," or "dishonorably" (depending upon the nature of the particular offense involved)— should be used to describe the accused's acts.

Examples.

Assaults. Sample specification, MCM, pt. IV, § 54f(2), alleges assault consummated by a battery, describing the accused's acts as " . . . did . . . unlawfully strike. . . ." "Unlawfully" is a necessary word importing criminality; without it, the specification would describe an act (i.e., " . . . did . . . strike . . .") which might or might not be an offense. Not all strikings of another person are criminal; the accused, for example, may have struck in self-defense. Without "unlawfully," the assault consummated by a battery sample specification would be fatally defective for failure to state an offense. Compare, however, sample specification, MCM, pt. IV, § 54f(1), which alleges simple assault and describes the accused's conduct as " . . . did . . . assault. . . ." The word "assault" itself denotes a criminal act; therefore, other words such as "unlawfully" are unnecessary.

Possession of marijuana. A specification which alleged that the accused ". . . did . . . have in his possession marijuana... "was held to be fatally defective for failure to allege an offense. Under some circumstances, possession of marijuana can be lawful; therefore, a word importing criminality, such as "wrongfully" or "unlawfully," is necessary. However, the Court of Military Appeals held that, although a specification alleging attempted distribution of LSD did not allege that the attempt was "wrongful," the specification could be reasonably construed to fairly embrace an element of wrongfulness since the LSD was alleged to be a controlled substance within the specification.

Jumping from a ship. A specification that the accused "did, wrongfully and unlawfully, . . . through design jump from USS INTREPID (CVS 11) into the sea," is sufficient to state an offense in violation of Article 134 since the pleading eliminates any possibility that the accused was pushed or slipped, or that the incident otherwise resulted from misfortune, accident, or negligence. It also makes clear that the accused did not jump overboard in the course of his legitimate duties or for some purpose which might be completely innocent.

Striking noncommissioned officer. A specification alleging that the accused did strike his superior noncommissioned officer who was then in the execution of his office stated an offense despite the lack of a specific averment of wrongfulness or unlawfulness.

(a) *Caveat.* The mere addition of a word, or many words "importing criminality," however, will not always result in alleging an offense. If the alleged act of the accused would not under any circumstances be an offense, the mere addition to the specification of words importing criminality will not convert the act into an offense. For example: " . . . Rollo . . . did, with deliberate premeditation unlawfully, wrongfully, maliciously and willfully entertain thoughts with intent to rape Sophia Loren," alleges no offense. Thought alone, no matter how evil, is no crime.

3. *Matters in aggravation.* Aggravating circumstances which increase the maximum authorized punishment ***must*** be alleged in order to permit the possible increased punishment. Other matters in aggravation may be pleaded to a reasonable extent, but extensive recitations of aggravating circumstances is usually unwise. Thus, failure to allege matters in aggravation does not render the specification fatally defective because of insufficiency, but it does prevent imposition of more severe punishment.

(a) *Required matters in aggravation.* If the maximum punishment authorized is based upon a particular aggravating fact or circumstance, that aggravating matter must be pleaded in order to permit use of the increased maximum punishment.

Examples.

Unauthorized absence (UA). The maximum authorized punishment for UA depends upon the length of the absence. Thus, the duration of the UA must be pleaded.

Drunken driving. A drunken driving specification did not allege that the accident resulted in personal injury. Although the evidence established that a personal injury did result, the aggravated punishment for drunken driving resulting in a personal injury was not authorized because the aggravated circumstances were not pleaded.

Desertion. In order to trigger the increased maximum confinement sentence (three years vice two) for desertion terminated by apprehension, the apprehension must be pleaded.

(b) *Nonessential matters in aggravation.* There is no legal prohibition against including aggravating facts which do not affect the authorized maximum punishment. For example, the quantity of drugs is frequently alleged in a specification alleging distribution of drugs. Quantity does not affect the authorized maximum punishment in most drug offenses, but it is a factor which may be important in determining an appropriate sentence in each case. Similarly, value does not have to be alleged in a robbery specification, but it is a factor that will be considered in sentencing. ***Extensive*** additions to specifications are usually unwise, however. Although not impermissible, such additional, nonessential aggravating matters are not favored. For example, The Court of Military Appeals allowed the addition of the words ". . . as a result of said absence missed said ship when she sailed . . ." to a UA specification, but clearly indicated a strong disapproval of such pleading.

4. *Specificity.* The specification must be sufficiently specific, detailed, and precise to notify the accused of the specific conduct charged, to enable the accused to prepare a defense, and to protect the accused against double jeopardy. Specificity must not be confused with elaborate detail. Only the basic operative facts that make the accused's conduct criminal should be pleaded. Specific evidence supporting the factual allegations should not be included in the specification. Detailed pleading of evidence only invites confusion and variance at trial.

Example. Proper pleading.

". . . did . . . steal one camera, of a value of $350.00, the property of the Navy Exchange, Naval Education and Training Center, Newport, Rhode Island. . . ."

Example. Improper pleading.

". . . did . . . wrongfully take, with intent to deprive the owner permanently thereof, one Bigbux CV-8E camera, serial number 8E-9018787, of a value of $350.00, the property of the Navy Exchange, Naval Education and Training Center, Newport, Rhode Island, by entering said Navy Exchange, removing said camera from its shelf, and concealing said camera under said accused's coat, and thereby removing said camera from the premises of said Navy Exchange."

5. *Duplicity.* One specification should not allege more than one offense, either conjunctively or in the alternative.

Example.

A specification should not allege that the accused "lost and destroyed" or "lost or destroyed" certain property.

(a) *Apparent exceptions.* (1) If two acts or a series of acts constitute one offense, they may, of course, be alleged conjunctively; and (2) Series of acts constituting a continuing course of conduct.

Example. Burglary requires two acts—breaking and entering—to constitute the one offense.

Example. Commission of adultery on several occasions.

Example. Negotiating a series of bad checks.

(b) *Liberal application.* Case law has been quite liberal in permitting duplicity (i.e., pleading several offenses in one specification).

Examples.

Specification of alleged marijuana use at two different places during a period of six months. Upon arraignment, the accused unsuccessfully moved for relief for several reasons, including duplicity. The Court of Military Appeals expressly approved ". . . the practice of pleading a series of acts of the same kind which can be considered part of a course of action . . . [because] 'where but a single statutory prohibition is involved . . . the effect of joining several violations as one redounds to the benefit of the defendant.'"

Specification alleging several acts of sodomy. The court used the following language in upholding the pleading: ". . . a continuous series of acts extending over a period of time and motivated by a single impulse may properly be

alleged as a single offense. . . . In these circumstances it was both reasonable and fair for the Government to forgo measurement of the separateness of each act to charge all as a single offense."

CR 19.4.2. *The test for legal sufficiency of a specification.*

1. *The test.* The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet; and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction. Furthermore, when the pleadings have not been attacked prior to findings and sentence, it is enough to withstand a broadside charge that they do not state an offense, if the necessary facts appear in any form or by fair construction can be found within the terms of the specification.

2. *Flexible application.* If the accused does not question the sufficiency of the specification prior to completion of the trial (e.g., by a motion for appropriate relief), this test is liberally applied: Do ". . . the necessary facts appear in *any form*, or by fair construction . . . within the terms of the specification?" If the specification is not attacked until after trial, it is clearly not enough for the accused to argue that the specification could have been made more definite and certain. In fact, absent a showing of prejudice, the specification must be so defective that it "cannot within reason be construed to charge a crime." On the other hand, if the accused asks for clarification or further particularity at the trial, reviewing authorities will be much more exacting in testing the sufficiency of the specification.

3. *Three-pronged test.*

a. Are all of the elements stated?

b. Does it adequately inform the accused of the nature of the allegations?

c. Will the specification and the record protect the accused against double jeopardy?

4. *Application of the three-pronged test.* As a general rule, all the elements of the alleged offense must be stated, expressly or by fair implication, in the specification. Failure to allege the essential elements of the offense can result in the specification being found fatally defective as can be seen by some of the examples below. Military appellate courts, applying the three-pronged test, have occasionally permitted variations and exceptions to the "all elements stated" rule. It must be remembered, however, that such deviations were allowed only after many months of appellate litigation of such a basic issue, and, in many cases, only because of the factual or procedural context of each specific case. The best practice is to follow the format in the sample pleadings in this study guide and the *Manual for Courts-Martial* sample specifications and to stay abreast of any changes mandated by new appellate decisions.

(a) *Examples of failure to allege the essential elements of an offense:*

(1) *Unauthorized absence*. The Navy-Marine Corps Court of Military Review has held that the element "without authority" is necessarily implied in a specification alleging all the remaining elements of desertion (Article 85).

(2) *Robbery*. A specification alleged an offense of robbery, ***except*** that it failed to allege that the property was stolen ***from the person or in the presence of*** the victim, an essential element of robbery. ***Held***: Robbery was not alleged. The government argued that it was implied by several parts of the specification, and especially since the offense was charged as a violation of Article 122. The Court of Military Appeals stated: ". . . mention of the Article which forms the statutory basis for the imposition of criminal liability can assist at times in relieving possible ambiguities in the statement of an offense. . . . Constantly, however, this Court has looked primarily to the words of the specification, rather than to the designation of the Article alleged to have been violated, in determining what offense, if any, has been alleged."

(3) *Disrespect*. The specification alleged disrespect towards an NCO in violation of Article 91, but failed to allege that the NCO was then in the execution of his office. ***Held***: The specification was fatally defective.

(4) *Document alteration*. The specification alleged that accused "knowingly and willfully" attempted to alter an official correspondence by attempting to erase certain words. ***Held***: No offense. The Court of Military Appeals stated:

The absence of an allegation of criminality in the above specification is immediately apparent. . . . The act . . . does not constitute criminal conduct without an allegation that the attempt was made without authority or was otherwise wrongful. . . . While a plea of guilt admits the facts alleged, that does not cure a specification which does not exclude all hypotheses of innocence. Since within the terms of the specification there is room to find that the accused was acting under proper authority—and this would be consistent with innocence . . . the facts set out are not sufficient, in and of themselves, to state an offense.

(5) *Forgery*. A "forgery" specification alleging an "intent to deceive" instead of an "intent to defraud" was fatally defective. These intents ***are not*** the same. The same specification was also defective in that it failed to allege that the forgery would apparently operate to the legal prejudice of another. A specification alleging a forgery of a check omitted the customary words "which check would, if genuine, apparently operate to the legal prejudice of another." However, a photographic copy of the check was contained within the specification. ***Held***: This fairly ***implied*** that he had forged an instrument "which would, if genuine, apparently operate to the legal prejudice of another." The Court of Military Appeals distinguished this holding by observing that forgery of a credit reference was at issue, not forgery of a check. The Court of Military Appeals cited 23 *Am. Jur*. Forgery § 46: "If the instrument on its face shows its legal efficacy, there is no necessity for an allegation of any extrinsic matter to give the instrument alleged to have been forged any force and effect beyond what appears on its face." Nonetheless, the Court of Military Appeals admonished prosecutors to observe approved forms and thus not imperil the prosecution by raising avoidable questions about the sufficiency of the pleadings.

(6) *Misbehavior before enemy*. Under a charge of violating Article 99, misbehavior before the enemy, the specification failed to ***expressly*** allege "before" or "in the presence of the enemy," an essential element of this offense, but it did allege that he was cowardly "while being transported from the rear area to the front lines." ***Held***: This specification did adequately allege an offense in violation of Article 99. The Court of Military Appeals stated: "The charge and specification, by alleging the act, the cowardice, and the article charged, informed the accused of the precise offense involved. The use of the words 'to the front lines' in the specification certainly carry some connotation of the presence of enemy units. . . . While not condoning the carelessness with which this specification was drafted, we hold it to be sufficient as a matter of law."

(7) *General order*. In one example, a specification alleging that the accused did "violate a lawful order . . .," that did not contain words importing criminality (i.e., that he "wrongfully" violated the order), was held by the Court of Military Appeals to state an offense. The Court of Military Appeals stated that "(a)n allegation charging the violation of a lawful general order ***implicitly*** contains a charge that the act committed by the accused was itself an offense and therefore unlawful. . . . Further words . . . would be repetitious. . . ." However, although the specification was not defective, the findings of guilty were ultimately set aside. The specification did not allege the "knowledge" element, therefore the court reasoned that the government could only have proceeded under violation of Article 92(1). Since the commanding officer of the ship issuing the order did not have authority to publish a general order as defined by applicable regulations, the findings of lower court were deemed legally insufficient. While this holding addressed the "words of criminality" issue, in a related case, the Court of Military Appeals addressed the problem of a specifications failure to allege that the order violated was a ***general*** order. The accused was charged with possession of drugs and drug paraphernalia. The order's violation charge stated the accused "did violate a lawful regulation, to wit: Paragraph 16.1, U.S. Army Artillery and Missile Center Regulation 210-1 by having in his possession a hypodermic needle and stimulant drugs, to wit: amphetamine and benzedrine." The Court of Military Appeals reaffirmed the decision in *United States v. Baker*, wherein the court stated:

The count (specification) in question purports to allege the accused failed to obey a lawful order, set forth as "Division Order 5050.4". . . . It, however, fails to state the essential element of knowledge. The staff legal officer and board of review, . . . opined that characterization of the order as a "Division" order was sufficient to imply the order was a "general" directive and, hence, to eliminate the requirement for allegation and proof of knowledge. *See United States v. Tinker, supra*. We disagree, for it is obvious that divisions publish many kinds of orders, which may or may not be general in nature.

(8) *Article 85a(2) desertion*. A specification alleged unauthorized absence with intent to prevent completion of basic training and useful service in violation of Article 134. ***Held***: This adequately

alleged the offense of "desertion with intent to shirk important service" under Article 85a(2), even though these words were not expressly alleged. "Desertion is desertion by whatever name described if its factual ingredients are specified on the charge sheet." The accused could not have possibly been misled.

(9) *Criminal conduct not contained within specification*. A specification alleged that the accused violated an order "to use condoms in sexual intercourse with any partner…" The accused engaged in sodomy failing to wear a condom or advise his partner of his HIV status. On appeal, accused indicated that the order specifically precluded sexual intercourse and not sodomy. ***Held***: The specification implied that the term sexual intercourse could be "resaonably understood to include sodomy and oral sodomy", acts the accused admited to have engaged in during his providence inquiry.

(10) *Article 134 - lewd acts*. A specification alleged that the accused "wrongfully committed an indecent, lewd and lascivious act with Lee Kap Yong by forcefully grabbing Lee and trying to embrace him." ***Held***: This alleged an offense under Article 134. The word "embrace" could mean an innocent act or one of the intimacies of love. "What meaning was intended by the pleader is apparent from the further allegation that the act charged was 'indecent, lewd and lascivious;' in other words, what was done by the accused was done in a manner repugnant to common propriety, and in a way which was designated to excite lust or sexual impurity. The additional allegation 'defines the character of the accused's act' and excludes the possibility that the act was innocent."

(11) *Article 133 - indecent acts*. A specification alleged that the accused (an officer) did "wrongfully and indecently induce an enlisted man to disrobe in his presence and to pose in various stages of undress." The accused moved to dismiss the specification on the grounds that no offense was alleged. The Court of Military Appeals held that the specification stated an offense under Article 133. "[T]he allegation actually defines the character of the accused's act" and it was not necessary for the government to allege "how and in what manner" the act was indecent. It properly alleged conduct unbecoming an officer and a gentleman.

(12) *Mere blank-filling insufficient*. While the drafters of the punitive articles took great pains to ensure the correctness of sample specifications, merely completing the blanks in a particular form of a specification set out in the *Manual for Courts-Martial* does not guarantee a legally unassailable charge. The specification must set out every essential element of the offense, either directly or by necessary implication. For example, the specification alleged that the accused caused to be issued a naval speedletter which informed the accused's wife of his death. The letter was also signed by the accused, although the signature block contained the name of a fictitious officer. *Held*: The specification failed to allege an offense, even though the MCM sample specification for forgery had been carefully followed. The instrument allegedly forged was not the proper subject of a forgery. It did not have apparent legal efficacy.

(13) *Pleading violations of Federal statutes*. Even following precisely the words of a statute may not suffice if the language quoted from the statute fails to allege all the elements of the offense prohibited by the statute. Consider the case where the accused was prosecuted under Article 134, UCMJ, for a violation of 18 U.S.C. § 643, failure of a government custodian to account for funds. The specification cited the Federal statute and used its language to describe the accused's conduct. Nonetheless, the Court of Military Appeals held that the specification failed to state an offense because it did not allege that the failure to account was willful. Although the statute did not use the word "willful," willfulness was found by the court to be an element of the offense. In another case, the court held that the specification was defective because it failed to allege the use of a telephone or other instrument of commerce in communicating a bomb threat, an allegation essential to the legal sufficiency of a specification charging a violation of a Federal statute proscribing such threats.

(14) *Article 129 - burglary*. In *United States v. Hoskins*, a burglary specification failed to include the word "break," substituting instead the word "burglariously." The Court of Military Appeals held that the specification was fatally defective. The words "break and enter" are essential and cannot be replaced by using the word "burglariously" to imply the intent with which a breaking and entering is committed.

(b) *Adequately informs the accused of what allegations must be met.* In addition to the requirement to state all of the elements in an alleged offense, the specification must be specific enough to identify the particular incident or conduct giving rise to the charge against the accused. After reviewing all the factual and procedural circumstances of the case, appellate courts will evaluate the specification in terms of whether it contains sufficient information about the alleged offense not to mislead the accused and thus enable him to prepare

a defense.

Examples of problems in specificity:

(1) *Specific dates*. Failure to allege the specific date of an offense is ordinarily not prejudicial, unless it misleads the accused. An exception to this general rule is the offense of unauthorized absence. Failure to allege the specific duration of the offense may affect the permissible maximum punishment (may make the offense more serious, may mislead the accused or be barred by the statute of limitations).

(2) *Failure to name purchasers*. A specification alleged ". . . did . . . wrongfully sell to four military personnel on board . . . certain instruments (described). . . ." At trial, the accused pleaded guilty and made no request for further information. The Court of Military Appeals determined" . . . An insertion of the names of the individuals to whom the sales were made would have rendered the specification more definite and certain . . . " but, " . . . (t)he period was identified, the place of sales was mentioned, and every necessary ingredient was included except the names of the four purchasers. These could have been identified readily had the Government been required to prove the allegations, and, had the accused wanted more specific information, a motion could have been made."

(3) *Description of stolen property*. A specification alleged ". . . did . . . attempt to steal personal property of some value, the property of Kenneth R. Clowdus." Upon arraignment, the defense counsel requested further particularity of the specification as to the nature of the personal property involved. The law officer denied the request. *Held*: This was prejudicial error. The Court of Military Appeals stated:

The modern tendency has been toward allowing the pleading of legal conclusions and the elimination of detailed factual allegations from counts charging misconduct. . . . In light of this trend, use of no descriptive averment beyond 'personal property' may well suffice to allege the subject of an attempted larceny. . . . But resort to such pleading is always subject to a motion for further particularization. . . . It was well within its (the Government's) power to allege that the accused had sought to steal a footlocker, a footlocker and its contents, or the contents of a footlocker.

(4) *Disjunctive pleading*. A specification alleged "did . . . wrongfully appropriate, lawful money and / or property of a value of about $755.51. . . ." *Held*: Even though accused pleaded guilty, this disjunctive specification is too vague as to permit affirming a conviction.

(c) *Will the specification and record protect the accused against double jeopardy?* The Fifth Amendment guarantees that a person shall not be tried twice for the same offense. For example, unless the specification and record are sufficiently detailed to identify a particular theft, an accused could be tried a second time for the same theft, without being able to establish that he or she had already been tried for that theft. Thus, by specifically identifying the incident or conduct with which the accused has been charged, the specification protects against double jeopardy.

Examples:

(1) A specification alleged that the accused did at ". . . Austin, Texas, and Bergstrom Air Force Base, Texas, from on or about 1 April 1959 to on or about 30 September 1959, wrongfully use marijuana. . . ." ***Held:*** Sufficient. "The allegations of place and time are general, but they can be considered with the evidence in the record of trial; together they would be entirely sufficient to protect the accused against another prosecution for the same acts." Furthermore, the court found that denial of the defense motion at trial for relief in the nature of a bill of particulars lacked merit because the defense presumably had a copy of the Article 32 investigation and the substance of the evidence recorded provided the defense with the information it requested on the motion. Of course, such a general allegation of time is usually unwise. Means could probably have successfully asserted former jeopardy against a subsequent prosecution for ***any*** marijuana use at Austin, Texas, or Bergstrom Air Force Base during the period of 1 April 1959 to 30 September 1959.

(2) A specification alleged, ". . . did . . . during the period from 11 August 1952 to 11 September 1952, wrongfully sell to four military persons on board . . . certain . . . military permits (described). . . ." ***Held:*** Sufficient. There is ". . . no substantial reason to hold that the record would not prevent a second prosecution for the same offense. If perchance there were other sales between the two dates, the accused does not stand to be prejudiced as his conduct in selling unauthorized passes is the source of the disorder and the

sales during the particular period involved are grouped into one offense. Any other sales not mentioned could not be the predicate for another disorder as a plea of once in jeopardy would bar any prosecution for similar acts during the same period."

CR 19.5. *DEFECTS IN PLEADING*

CR 19.5.1. ***Misdesignation***.

1. *Ordinarily harmless error.* Ordinarily, a misdesignation in the charge of the article of the UCMJ violated constitutes ***harmless*** error. For example, a specification actually alleged an offense of desertion with intent to shirk important service, but was charged as a violation of Article 134, UCMJ, instead of Article 85, UCMJ. ***Held***: Harmless error. Reviewing authorities could correct the error by approving the conviction as a violation of Article 85. The Court of Military Appeals stated: "The offense alleged at the trial of any case depends, not primarily on the particular statute under which it is laid, but rather on the *facts* which are alleged. This is true despite the perfectly sound assertion that in unusual cases a statutory reference may be necessary to a proper understanding of the charge."

2. *Governed by the specification.* Thus, ***criminality*** is governed by the contents of the specification and not by the article under which it is charged.

3. *Incorrect citations of statutes, orders, or regulations.* If the specification incorrectly cites a statute, order, or regulation allegedly violated by the accused, such misdesignation is harmless error ***unless*** the accused has been misled. The Court of Military Appeals has stated:

. . . (A)n incorrect designation of a statute or regulation violated by the accused does not invalidate the specification of a charge. If the conduct is proscribed by another regulation and no "additional or different principle of law is required to support the conviction; and the accused has no burden of defense which he did not have at trial," he is not harmed by the incorrect designation.

In the same case, the Court of Military Appeals held that the conduct alleged in the specification might have violated two different regulations (a statute and a Navy custom) and the defenses available to the accused would vary depending on the statute, regulation, or custom in issue. Accordingly, the court held that the lack of specificity was misleading to the accused and fatal.

CR 19.5.2. ***Failure to State an Offense.***

A court-martial has no jurisdiction to try a specification which fails to allege an offense. The proceedings are a nullity with respect to such a defective specification. Regardless of plea, evidence, failure to move for appropriate relief or to dismiss, or attempted waiver at trial, a specification which fails to state an offense can be attacked for the first time on appeal.

CR 19.5.3. ***Lack of Specificity***.

A specification lacks specificity when, even though it sufficiently alleges an offense, it is vague or ambiguous in a material allegation. The extent of appellate relief will be largely determined by whether or not relief was requested at trial and whether the specification states an offense.

1. *Relief requested at trial.* If the accused requests further particularity at trial and it is not granted, it may be held that prejudicial error was committed.

Example. A specification alleged that the accused did " . . . attempt to steal ***personal property of some value,*** the property of . . . Clowdus." Upon arraignment, the accused requested, but was denied, further particularity as to the ***nature*** of the "personal property" allegedly stolen. ***Held:*** Denial of the request for further particularity was prejudicial error and C.M.A. reversed the conviction, stating: "A rehearing may be held upon a properly amended specification. . . ."

Contra-example. The Court of Military Appeals took up a case in which the specification alleged wrongful use of marijuana at two different places and during a six-month period, and the accused requested, but was denied, further particularity upon arraignment. The Court held the defect to be harmless error since the record of the Article 32

investigation showed the circumstances of the charge, including the dates and places of the separate acts by the accused. Hence, "denial of the motion did not deprive the accused of any information required to assist him in preparation of his defense." In another example, the Court of Military Appeals addressed the instance where the specification on its face was sufficient, but where several larcenies committed on different occasions were alleged within one specification. The defense counsel was aware that it might be duplicitous and requested clarification at trial. The accused was denied particularization and was merely informed orally that the Government intended to rely on one or all of the various theories which it had embodied in the count. A generalized reply of this nature, under the circumstances depicted in this record, does not discharge the burden of the United States to particularize a general averment of criminal conduct, especially when the count in question is so phrased as to permit the prosecution to range widely through proof of different offenses in order to satisfy the fact finders of the accused's guilt. In short, the purpose of a bill of particulars is to narrow the scope of the pleadings and not to enlarge it. Denial of the defense's motion for appropriate relief was deemed prejudicial error.

2. *No request at trial for relief.* Military courts have established that if the accused does not request further particularity at trial, the deficiency will ordinarily be deemed waived and nonprejudicial.

CR 19.5.4. *Duplicity*.

If the specification is duplicitous, but the accused does not move at trial for appropriate relief, it usually will ***not*** be deemed prejudicial error.

1. *Continuing course of similar conduct.* If the duplicity is merely a continuing course of similar conduct, denial of relief at trial will usually be held nonprejudicial. The duplicity inures to the accused's benefit because, instead of being prosecuted for several separate specifications, the accused is criminally liable for only one.

2. *Distinct offenses.* When the duplicity consists of different types of offenses (e.g., housebreaking and larceny), denial of appropriate relief, such as election of an appropriate offense, will usually be held to have been prejudicial. Denial of relief may also be prejudicial when the specification alleges several distinct, but similar, crimes which are not part of a continuing course of conduct (e.g., larceny of a watch from ***A***, a radio from ***B***, and money from ***C*** at separate times).

CR 19.5.5. *Variance*.

A variance consists of a difference between the pleadings and the proof, and may be fatal or immaterial. A variance is fatal if the evidence establishes a different offense than that which was pleaded, or if the accused was misled by the variance from the pleading, or if it disables the accused from later effectively asserting former jeopardy. Thus, the Court of Military Appeals has established a dual test to determine whether the accused has suffered substantial prejudice such that the variance is fatal: "(1) has the accused been misled to the extent that he has been unable to prepare for trial, and (2) is the accused fully protected against another prosecution for the same crime."

Examples:

1. *Identity of victim.* In one case, the specification alleged that the accused did, at a certain place and date, with intent to do bodily harm, commit an assault on Han Sun U, a Korean male, by striking him on the body with a dangerous weapon, to wit: a .30 caliber carbine. The accused was found guilty, except for the words "Han Sun U," substituting therefor the words "an unknown." ***Held***: Variance not fatal. This was the same offense, the accused was not misled, and the evidence in the record was sufficiently descriptive of the victim to protect the accused against being tried again for the same offense. A variance is fatal only when it operates to substantially prejudice the accused's rights. In another case, the accused was charged with several offenses, including rape, which was alleged to have occurred "on or about 20 October 1989…" The accused was convicted of the rape, although the victim had actually been raped approximately three weeks earlier. At trial, the accused made a motion to dismiss based upon the date variance, which was denied by the military judge. On appeal, the court determined no fatal variance existed.

2. *Identity of owners of property.* In one case, the specification stated that accused stole certain sums of money alleged to be the property of certain individuals. Accused was Unit Savings Officer (Army) and the individuals named were owners in the Army Savings Plan. At trial, the evidence produced indicated that the property belonged to the United States and was deposited on behalf of the individuals. ***Held***: The variance was not

fatal since the accused, under the circumstances, could not have been surprised by the evidence at trial and was adequately protected by the record against double jeopardy. The Court of Military Appeals has also held that nonfatal variance may occur when the government proves that a person other than the one alleged in the specification owned or possessed the property which was stolen.

3. *Identity of authority issuing order*. In one case, the specification alleged that accused willfully disobeyed an order of Captain ***S***. Evidence showed that the order violated was issued "by command of LtGen ***H***." ***Held***: This constituted a fatal variance between the pleading and the proof. The Court of Military Appeals stated: "Undoubtedly, under a proper factual situation an intermediate may, by placing his authority behind the order, become the one whose order is violated. But to do this, the intermediate officer must have authority to issue such an order in his own name and it must be issued as his, not as the representative of the superior." Compare this result to an example where the accused consented to an amendment of the specification changing the title of officer issuing the order. The court determined that no fatal variance existed since the accused was not prejudiced in any way as the accused agreed to the amendment of the specification and "stipulated" to the change.

4. *Substance of accused's statement*. In one example, the accused was charged with perjury for allegedly falsely saying he never had a tool in his hand when ***A*** and ***B*** were in his room. At trial, the proof established that his false testimony was to the effect that he did not use a tool in the fight with ***C*** (while ***A*** and ***B*** were present). ***Held***: Fatal variance. The Court of Military Appeals stated: "It is fundamental . . . that the allegation of criminality and proof must correspond; that regardless of what is disclosed by the evidence, proof, in order to be effectual, must correspond substantially with the allegations of the pleadings."

5. *Unit in unauthorized absence cases*. Specification alleged accused was deserter from his parent unit. Evidence showed that while he was attached to a confining facility and that he ultimately escaped from that facility. Accused was ultimately convicted of unauthorized absence. ***Held***: Not a fatal variance because an individual can be temporarily assigned to another activity for administrative reasons and still be absent from parent unit if absent from temporary unit. Additionally, the defense failed to object or move for relief, and there was no evidence that the accused was misled. The rationale used in this example was also used by the Court in another case where accused was charged with desertion from 5th Regiment, Overseas Replacement Draft. The trial counsel moved to amend the unit but the defense objected, arguing it was a fatal variance, and that it could not be amended at trial. Rather, the defense maintained that the charge could be dismissed and the accused retried on a different specification. The convening authority withdrew the charges, had them redrafted, and referred them to another court for trial. At second trial, same defense counsel moved to dismiss because of former jeopardy. ***Held***: No former jeopardy, as the court indicated that whatever error occurred was deliberately induced by the defense.

CR 19.6. *JOINDER*

CR 19.6.1. *Joinder of Offenses.*

"In the discretion of the convening authority, two or more offenses charged against an accused may be referred to the same court-martial, whether serious or minor offenses or both, regardless whether related." MCM, R.C.M. 601(e)(2). The discussion to R.C.M. 601(e)(2) encourages, but does not require, a convening authority to dispose of all known offenses at a single court-martial. Thus, a convening authority has much broader discretion in this area then does a federal prosecutor in a federal district court, who is limited to joining only charges that are similar in character or are part of a common scheme or plan.

1. *Severance.* Under MCM, R.C.M. 906(b)(10), an accused may bring a motion to sever charges. However, the motion will only be granted to prevent "manifest injustice" to the accused. "Joinder of minor and major offenses, or of unrelated offenses is not alone sufficient ground to sever offenses." MCM, R.C.M. 906(b)(10)(discussion). The military judge's ruling is reviewed for abuse of discretion, utilizing a three step test. In determining if the military judge abused his discretion, appellate authorities must determine (1) whether the evidence of one offense would be admissible proof of the other;(2) whether the military judge has provided a proper limiting instruction; and, (3) whether the findings reflect an impermissible crossover. *Id.* at 76. Applying this standard the Court of Appeals for the Armed Forces found no abuse of discretion by the trial judge who denied a motion to sever with an accused who was charged with two rapes, committed two days apart, on two unrelated victims. The Court has also found no abuse of discretion when the trial judge denied a motion to sever with an accused who was charged with attempted murder, rape, sodomy, robbery and related charges committed on two different victims, a month apart from each other.

2. *Rationale.* The policy behind the encouraging convening authorities to try all known offenses together is to protect the accused from a succession of prosecutions and possibly a succession of federal convictions. "Being called upon to defend himself in a number of trials may be harassing to a defendant and be a disadvantage far outweighing the prejudice which may result from a joinder." The U.S. Supreme Court has also addressed this issue in a case where the accused argued unsuccessfully that his four separate trials for the murders of his wife and three children on the same occasion were motivated by a prosecutorial desire to keep prosecuting until the death penalty was achieved. The death penalty was adjudged in the third trial. Another policy favoring the joinder of all known offenses is the economy of a single trial. It should be recognized, however, that the joinder of offenses may also operate to the detriment of an accused. This may be so for several reasons:

. . . (1) he may become embarrassed or confounded in presenting separate defenses; (2) the jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime or crimes charged; or (3) the jury may cumulate the evidence of various crimes charged and find guilt when, if considered separately, it would not so find.

CR 19.6.2. *Joinder of Parties.*

1. *The MCM.*

Allegations against two or more accused may be referred for joint trial if the accused are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense. . . . Related allegations against two or more accused which may be proved by substantially the same evidence may be referred to a common trial.

The discussion to R.C.M. 601 cautions convening authorities to consider the potential complications regarding the procedural and evidentiary rules in joint trials. It is clear, however, that military procedure provides for the possibility of a joint trial for multiple accuseds.

2. *Severance.* Under MCM, R.C.M. 906(b)(9), an accused may bring a motion requesting to be tried separately on the grounds that they will be prejudiced by a joint trial. Such a motion should be liberally granted when good cause has been shown. MCM, R.C.M. 906(b)(9)(discussion). However, the military judge's ruling will be reviewed for abuse of discretion.

CR 19.7. *MULTIPLICITY*

CR 19.7.1. *Introduction.*

This section will discuss two distinct, yet very closely related concepts, multiplicity and the unreasonable multiplication of charges. Writing on this important, but often misunderstood, area of the law has been likened to the "Gordian Knot, the Sargasso Sea, and being damned to the inner circle of the Inferno to endlessly debate over it." While a difficult issue, a basic understanding of this area is critical for those drafting charges and those litigating in a military courtroom.

CR 19.7.2. *General concepts*.

1. *Multiplicity.* **"**Multiplicity is a concept that derives from the Double Jeopardy Clause of the U.S. Constitution to prevent defendants from being punished twice for the same act." *Quirzo*, 53 M.J. at 604.

2. *Unreasonable Multiplication of Charges.* "What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." R.C.M. 307(c)(4) (Discussion).

CR 19.7.3. *Multiplicity Explained*.

The question of multiplicity involves an examination of the charges to determine if they describe separate offenses. If the offenses are separate, then they may be separately charged and punished. The difficulty is in determining when a charge is a separate offense, vice when the government is violating the accused's constitutional right by punishing her twice for the same offense. Over time, the courts have used several tests to determine whether offenses are separate.

1. *Baker Test.* From 1983 until 1993, the court used the "fairly embraced" doctrine established in *United States v. Baker*, for determining when an offense was a lesser included offense. The fairly embraced test was also applied by the court to determine what were separate offenses for multiplicity purposes. If under the facts of the case, one charge was fairly embraced within a second charge it was multiplicious and the accused could not be found guilty of both. While not always easy to apply, the *Baker* "fairly embraced" test developed a well established body of case law that allowed one to determine with reasonable certainty what charges were "fairly embraced" and, therefore, were multiplicious with each other. The *Baker* test was firmly rejected by the court in the case of *United States v. Teters*.

2. *Teters Test.* In *United States v. Teters*, the Court of Military Appeals adopted the federal multiplicity (double jeopardy) analysis articulated by the Supreme Court in *Blockburger v. United States*, or the so-called "elements test" of multiplicity.

(a) *Teters in a nutshell.* Congress has the power to define military crimes and to establish maximum punishments for violations. However, this power is limited by the Fifth Amendment prohibition against being punished twice for a single offense. "A constitutional violation occurs if a court, contrary to the intent of Congress, imposes multiple convictions and punishments under different statutes for the same act or course of conduct." The question then becomes, what was the intent of Congress? Did Congress intend for multiple convictions? In the absence of evidence to the contrary, like the clear language in the statute or congressional history, the court adopted the *Blockburger* strict elements test to determine congressional intent. Simply put, does each charge require proof of an element that the other does not? If they do, the two charges are not multiplicious and the accused may be convicted and punished for both offenses. In *Teters*, the court concluded that larceny was a separate offense from forgery, even when the forgery of stolen checks was the means for accomplishing the larceny. *Id.* at 377.

Teters appeared to establish a very firm strict elements test. However, over time the test has been relaxed by a number of later appellate decisions. Some of note follow:

In *United States v. Foster*, the court specifically adopted the *Teters* test as the test for determining if something was a lesser included offense (LIO). If all the elements of one offense are "necessarily included" within the elements a different offense, it is a LIO. However, the *Foster* court went further in two significant areas. First, it specifically held that the terminal element of Article 134 (the conduct was prejudicial to good order or service discrediting) is not to be considered when using the strict elements test. But for this, an Article 134 offense could never be an LIO or multiplicious with a non-Article 134 offense. Clearly, this effect was not what Congress intended with all Article 134 offenses. Second, the court expanded on the "strict elements" to include elements which were "rationally included" or "expressly included" within the elements of the other offense. In other words, in comparing the elements of the offenses, the language of the common statutory elements need not be identical. One or more of the common elements may be legally less serious than the greater offense. The *Foster* court then found that indecent acts are a lesser included offense of the charged crime of rape and affirmed the lower court ruling upholding the conviction.

In *United States v. Oatney*, the court clarified its holding in *Foster*. The accused was convicted of both obstruction of justice and communicating a threat for what was a clearly a single act. On appeal the appellant argued that under the *Foster* "rationally derivative" test that the communication of a threat was a LIO of the obstruction charge and was therefore multiplicious. The court rejected the argument, while making it clear that *Foster* was not a return to the old *Baker* "fairly embraced" test. *Teters* requires a comparison of the elements. Foster allows a qualitative comparison when applied to potential lesser included offenses. Could the "greater" offense be committed without committing the "lesser" offense? If so, one is not the LIO of the other and they are not multiplicious with the other. Accordingly, the accused may be charged and convicted of both offenses. Additionally, *Oatney* is important because it rejected the notion there remained a difference between multiplicity for findings and multiplicity for sentencing. If not multiplicious, then the accused may be punished for both.

3. *Examples:*

(a) Drug use and conduct unbecoming an officer charges arising from the same transaction are multiplicious; Four specifications of indecent assault are multiplicious with conduct unbecoming an officer when the indecent assaults serve as basis for Article 133 violation;

(b) Rape and adultery charges arising from the same event are not multiplicious;

But also consider contrary result of case in which rape and adultery charges arising from the same event are multiplicious;

(c) Forging checks by "making" them and same checks by "uttering" them are not multiplicious;

(d) Attempted murder and assault with intent to commit murder are multiplicious, expanding strict elements test to include both those statutorily required and those alleged in the specification;

(e) Possession with intent to distribute is a lesser included offense, and thus multiplicious with, distribution of the same quantity of marijuana;

(f) Communicating a threat not multiplicious with obstruction of justice when a single act gave rise to both charges;

(g) Assault with intent to commit rape is multiplicious with attempted rape. Attempted rape is an LIO and multiplicious with felony murder; Assault with intent to commit rape is multiplicious with rape, as it is a lesser included offense;

(h) Making a false official statement and filing a false claim based on same false statement are not multiplicious. Larceny and filing false claim are not multiplicious when the false claim is method used to commit the larceny;

(i) Charging distribution of LSD and marijuana in two specifications for a single transaction was not multiplicious;

(j) Charge of wrongful use of marijuana and wrongful use of methamphetamine arising out of single usage not multiplicious;

(k) Introduction of methamphetamine with intent to distribute not multiplicious with later distribution of same methamphetamine. Both were distinct acts, the first offense ended when the drugs entered the military base, the second occurred when the distribution actually occurred.

CR 19.7.4. ***Remedy.***

The defense may move to dismiss a specification or a charge based on the fact it would be multiplicious with another charged specification or charge. Absent plain error, an unconditional guilty plea will waive any multiplicity issues on appeal. Since multiplicity is based on the prohibition against double jeopardy, the issue will be deemed waived if not raised at trial.

CR 19.7.5. ***Multiplicity for sentencing.***

When an accused is found guilty of more than one offense, the maximum allowable punishment may be imposed for each ***separate*** offense which the accused has been found guilty. MCM, R.C.M. 1003(c)(1)(C). In the pre-*Teters* world the courts drew a distinction between multiplicity for findings and multiplicity for sentencing. It was possible for guilty findings to be entered on two charges and then have a trial judge rule the two were factually multiplicious for sentencing. The result was a lower maximum punishment authorized to be adjudged in the case. The discussion to R.C.M. 1003(c)(1)(C) continues to use the expression multiplicity for sentencing and implies that an offense not multiplicious for findings could be found multiplicious for sentencing. However, the Court of Appeals for the Armed Forces in *Oatney*, clearly rejected the continued use of "multiplicity for sentencing" indicating that in applying the *Teters* strict elements test offenses that are separate for findings are also separate for sentencing. *Oatney*, 45 M.J. 185. In *United States v. Morrison*, the court held that congressional intent to permit "conviction and punishment" for two offenses is presumed when the strict elements test is satisfied.

CR 19.7.6. ***The unreasonable multiplication of charges.***

This is a separate and distinct concept from multiplicity and should not be overlooked by a defense counsel seeking to minimize the maximum punishment their client could receive.

1. *Basis.* The basis is found in R.C.M. 307(c)(4), which says, "what is substantially one transaction should not be made the basis for an unreasonable multiplication of charges. While this language has been in the MCM since at least 1984, it did not become a primary focus for dismissal of charges until after adoption of the *Teters* test. In *Foster*, the court reminded trial judges that they were empowered under R.C.M. 307(c)(4) to prevent overly imaginative prosecutors from unreasonable piling on charges for what amounts to single criminal act.

2. *Quiroz.* The case of *United States v. Quiroz,* provides an excellent discussion on the differences between multiplicity and the unreasonable multiplication of charges. The *Quiroz* court clearly established that the language of R.C.M. 307(c)(4) provided the trial judge with very broad equitable powers to prevent the unreasonable multiplication of charges. The court rejected the government's assertion that failing to raise unreasonable multiplication of charges at trail resulted in waiver or forfeiture of the issue on appeal. The court then established a framework and standard for addressing unreasonable multiplication of charges. The court suggested the following factors be considered:

Did the accused object at trial?
Is each charge or specification aimed at distinctly separate criminal acts?
Do the charges or specifications misrepresent or exaggerate the appellant's criminality?
Do the charges or specifications unfairly increase the appellant's punitive exposure?
Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charge?

These factors are all-inclusive and are intended to provide a framework for the appellate court to use. They are also an indication to trial judges what factors are important to the appellate court. The range of options available when a charge or specification is found to be an unreasonable multiplication of charges includes dismissal, consolidation of charges/specifications, or considering the offenses as a single offense for sentencing. It may be that the best time to resolve potential unreasonable multiplication of charges issues be after findings have been entered.

CR 19.8. *LESSER INCLUDED OFFENSES (LIO).*

CR 19.8.1. *Text of Article 79.*

An accused may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein.

CR 19.8.2. *Manual definition of lesser included offense.*

A lesser included offense is:

An offense necessarily included in the offense charged;

an attempt to commit the offense charged; or

an attempt to commit an LIO of the offense charged.

Example: The accused is charged with desertion, but may be found guilty of the following lesser included offenses:

Unauthorized absence (Article 86);

attempted desertion (Article 85); or

attempted unauthorized absence (Article 80).

CR 19.8.3. *"Necessarily included" doctrine.*

A lesser offense is necessarily included in a greater offense, if all of the elements of the lesser offense are necessary elements of the greater offense. In other words, "(i)f the specification neither expressly contains an averment of the element of an offense nor fairly implies its existence, it cannot be said to be included within the actual crime charged, for, although proven by the evidence, it is not then "stated." . . . Put differently, the standard for determining if one violation of the UCMJ is included in another is whether, considering the allegations and the proof, "each requires proof of an element not required to prove the other."

CR 19.8.4. *Current law.*

1. *Teters.* In *Teters* the Court of Appeals for the Armed Forces abandoned the fairly embraced test of *Baker* to prevent multiplicious charges. A component of the fairly embraced test is the concept of merger which permits LIO's to be subsumed into the greater offense for purposes of findings. "[T]he assimilation of this relatively ancient doctrine of merger into the modern law of double jeopardy seems long overdue." The court adopted the *Teters* strict elements test to determine what offenses were "necessarily included" with each other so as to make one a lesser included offense of the other. If a the strict elements of one offense are all included in a second offense, the first offense is the LIO of the second offense. As an LIO, it is multiplicious with the greater offense. It is necessary that the concepts of LIO's and multiplicity be studied together for a complete understanding of the issues involved.

2. *The rule.* In *Teters* the Court of Appeals for the Armed Forces adopted the rule of construction to discern congressional intent with reference to multiplicity as set forth by the Supreme Court in *Blockburger v. United States*. This narrowly defined bright-line rule is as follows:

The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

Therefore, in deciding whether an offense charged in one specification is "necessarily included" in that charged in another, so as to merge into the greater offense, the court is concerned only with the statutory elements and not with pleadings and proof. The Court of Appeals for the Armed Forces now applies the "strict elements" test of *Blockburger v. United States*, 284 U.S. 299.

In comparing the elements of the offenses, however, the language of the common statutory elements need not be identical. One or more of the common elements may be legally less serious than the greater offense. Also, those elements required to be alleged in the specification, along with the statutory elements, are considered elements of the offense for purposes of the strict elements test.

3. *General vs. specific intent.* In *United States v. Douglas*, the Army Court of Military Review reaffirmed the position taken by the Court of Military Appeals in 1959 in finding that a specific intent offense may be an LIO of a general intent offense. For example, assault with the intent to rape is a specific intent offense which is an LIO of the general intent offense of rape.

CR 19.8.5. *Significance of the LIO determination*.

R.C.M. 307c(4) says what is substantially one transaction should not be made the basis for an unreasonable multiplication of charges. Therefore, LIO's should not be pleaded when the greater offense is also charged if the strict elements test of *Teters*, is met. R.C.M. 907(b)(3)(B) indicates that the proper remedy for pleading an LIO is dismissal before pleas are entered unless it is necessary to enable the prosecution to meet contingencies of proof through trial, review, and appellate action.

Identification of LIO's within a charged offense allows defense counsel to plead an accused guilty by exceptions and substitutions. The government still has the option of proceeding on the greater offense.

A military judge or members may find an accused guilty of any LIO reasonably raised by the evidence admitted on the greater offense. This may be accomplished by exceptions and substitutions. Where members are involved, findings of an LIO requires a carefully tailored findings worksheet.

Distinguishing which LIO's are raised by evidence on the greater offense impacts on both instructions and defenses, such as the statute of limitations.

CR 19.8.6. *Instructions on LIO's*.

The military judge must sua sponte instruct on elements of any LIO that is reasonably raised by the evidence. This sua sponte obligation exists even in the absence of a request by the defense counsel for such instructions.

1. *Instructions on elements of LIO's.* The judge must not only mention LIO's, but must also give complete instructions on the elements of each LIO raised by the evidence.

2. *"Reasonably" raised by the evidence.* The military judge does not judge the credibility of the evidence raising the LIO since that is the province of the court members. For example, the accused, during the Dominican Republic intervention of 1965, allegedly murdered a civilian. At his trial, the accused testified that he believed the victim was a "rebel" and that he fired in front of the victim to prevent his escape, not meaning to hit him. The law officer refused to instruct the members on the LIO of involuntary manslaughter, although he did instruct on voluntary manslaughter. The Court of Appeals for the Armed Forces (then the Court of Military Appeals) held that failure to instruct on involuntary manslaughter was prejudicial error. Although the accused's theory was, in light of the other evidence, at best implausible, the Court of Appeals for the Armed Forces stated that it was up to the triers of fact to make that determination upon properly drawn instructions. The possibility of an LIO may be raised by the testimony of prosecution or defense witnesses, including solely the testimony of the accused.

3. *Express defense waiver of LIO instructions.* The Court of Appeals for the Armed Forces has indicated that "[t]he doctrine of waiver would be invoked if the record demonstrated 'an affirmative, calculated, and designed course of action by a defense counsel before a general court-martial' to the end that he led the presiding law officer to believe he did not desire instructions on lesser included offenses." The court went on to state that "only the rare case will fall into the exceptional class . . . (which) discloses . . . an express request for lack of instructions regarding lesser degrees . . . (or) "deluding" tactics which might . . . (lead) the law officer to conclude that the defense counsel consented to such an omission." In fact, the Court of Military Appeals has ruled that a military judge had a sua sponte obligation to instruct and, at footnote 5, the court reemphasized the importance of the trial judge instructing on "all factual issues and offenses raised . . . in the evidence" out of a "desire that the fact finding function be exercised to the fullest by the jury."

However, a defense counsel must affirmatively waive an LIO instruction when the evidence reasonably raises the LIO.

CR 19.8.7. *Multiple LIO's*.

Some offenses consist of two or more LIO's. In such a case, if the LIO's are reasonably raised by the evidence and properly instructed upon, the court ***can*** convict the accused of more than one LIO—instead of the greater compound offense charged. For example: Accused was charged with robbery "by means of force and violence, stealing from the presence of Lehr, against his will, seventy Deutsche Marks and a Volkswagen taxi of a value of about . . . the property of Kuchta." The Court found the accused not guilty of robbery, but guilty of: (1) Wrongful appropriation of the alleged items; and (2) assault and battery on Lehr. ***Held***: The findings were permissible. These two offenses were LIO's of robbery, were raised by evidence and instructed upon. Even though they were merged in the one specification, they can be treated as though they were separately alleged. This is, of course, a rather rare occurrence. This type of duplicitous finding should be carefully distinguished from duplicitous pleading which is prohibited. Duplicitous findings, therefore, are permitted while duplicitous pleading is not.

CR 19.8.8. *Is one offense an LIO of another*?

In most cases, it is rather simple to determine if one offense is an LIO of another. After carefully evaluating the factual context of the charges, the following method will be helpful:

1. *Examine the Manual for Courts-Martial.* MCM, pt. IV, lists the common LIO's for most of the offenses under the UCMJ. If the offense is listed as an LIO of the other, it is likely, although no longer *certainly*, an LIO. However, test it against the rules in MCM, pt. IV, § 2, and examine the current case law in the area to be certain. If the offense is not listed as an LIO of the other, it nevertheless may actually be an LIO of the other if it satisfies the *Teters/Foster* test determining LIO's. It is never safe to assume that it is not an LIO merely because it is not listed as an LIO in the *Manual for Courts-Martial*. The *Manual for Courts-Martial* is intended as a guide only and was not designed to be all-inclusive.

2. If not listed in MCM, pt. IV, and if research fails to find a case squarely on point, apply the concepts of the "strict elements" test set forth in *Teters* and *Foster*, and argue the facts of the case.

CR 19.8.9. *Findings of guilty to an LIO*.

When a court finds an accused not guilty of the offense charged, but guilty of an LIO, this is done by the process of exception and substitution. The court deletes (i.e., excepts) the words in the specification that pertain to the offense charged and substitutes language appropriate to the LIO. For example, the accused is charged with burglary, but found guilty of housebreaking. The charge sheet might read:

The court, in returning its findings, would announce that it found the accused:

Charge. Violation of the UCMJ, Article 129.

Specification. In that Seaman James Stokos, U.S. Navy, USS NEVERSAIL, on active duty, did, onboard Naval Education and Training Center, Newport, Rhode Island, on or about 10 April 20CY, in the nighttime, unlawfully break and enter the dwelling house of Captain Harm (NMN) Rab, U.S. Navy, with intent to commit rape therein.

Of the Specification of the Charge: GUILTY, except for the words "unlawfully break and enter," and "rape," substituting therefore the words "unlawfully enter" and "a criminal offense, to wit: communicating a threat, respectively; of the excepted words, NOT GUILTY: of the substituted words, GUILTY. Of the charge: NOT GUILTY, but GUILTY of a violation of Article 130, UCMJ.

CHAPTER 20

CHAPTER 20

CR 20. ABSENCE OFFENSES

CR 20.1. *UNAUTHORIZED ABSENCE (UA)*

CR 20.1.1. *In general.*

Article 86, was created to address "every case not elsewhere provided for in which any member . . . is through the member's own fault not at the place where the member is required to be . . ." . There are three types of Article 86 offenses. They are:

1. *Article 86(1) — failure to go to an appointed place of duty;*

2. *Article 86(2) — going from an appointed place of duty; and*

3. *Article 86(3) — UA from unit, organization, or place of duty.*

Each of these offenses is an independent and distinct crime.

CR 20.2. *FAILURE TO GO TO APPOINTED PLACE OF DUTY*

CR 20.2.1. *Elements:*

1. That a certain authority appointed a certain time and place of duty for the accused;

2. that the accused knew of that time and place;

3. that the accused failed to go to his appointed place of duty at the prescribed time; and

4. that the accused's failure to go to his appointed place of duty was without authority.

CR 20.2.2. *Element 1.*

The first element assumes that some type of order was given to the service member. Specifically, the order directed the member to appear for duty at a particular place and time. Accordingly, many of the issues relating to orders offenses (Chapter IV) will be applicable to this first element. For example, if the person appointing the place for duty had no lawful authority to do so, the accused would have a defense relating to the lawfulness of the order.

1. *A certain time.* There must be a certain time of duty appointed by the authority. Without this precise time, the service member will be unaware of the exact nature of his/her obligation. Additionally, without this time it will be impossible to claim that the service member failed to go to his appointed place of duty. In order to obtain a conviction, trial counsel will have to prove that a specific time was appointed.

Example:

Accused is awarded extra duty as a result of a summary court-martial conviction. Extra duty customarily begins between 1800 and 1830. The accused does not show up during this time periods. Accused charged at a special court-martial with violating Article 86(1), failure to go. ***Held***: Not Guilty. The evidence failed to establish that a specified time was appointed for these duties. Moreover, there was no indication that the accused was ever aware of the customary time for extra duty. Accordingly, no specific time for duty had been appointed.

2. *A certain place.* In order for the evidence to support this element, the accused must have been ordered to a ***specifically*** appointed place of duty. Historically, the *Manual for Courts-Martial* contemplated that a place of duty for an Article 86(1) and Article 86(2) violation be a precise location such as a ship's compartment. In an attempt to be more exact, courts have stated that this appointed place of duty refers to a specifically appointed place of duty such as kitchen police, reveille formation, or first floor of a barracks rather than a broader general place of duty such as a command, a post, or a unit. Courts have referred to this requirement as far more demanding than the broader, general place of duty required for an Article 86(3) offense.

Example:

> Accused is charged with, among other things, violating Article 86(1)—failing to report to his appointed place of duty. The specification alleges 3d Platoon, Company C, 3d Battalion, 6th Infantry as his place of duty. ***Held:*** Not Guilty. A specific place of duty must be assigned. The location of this order is very general. Certainly, it is no different than report to NETC, Newport, RI.

The place of duty need not be on a military base. As long as there is a military purpose to the appointed place of duty, the obligation is satisfied. For example: Duty driver is ordered to pick up the commanding officer—who is returning from TAD—at Gate 17, Boston Airport at 1600. Although the place of duty is not a military reservation, the duty driver is still obligated to comply with the order. Additionally, the place of duty may be a rendezvous for several persons or just for one individual. Examples of this would include muster for restricted men and duty as helmsman on the bridge.

CR 20.2.3. *Element 2.*

The *Manual for Courts-Martial* requires that the accused had ***actual*** knowledge of the time and place of duty in order to effect an Article 86(1) offense. Constructive knowledge is insufficient; however, actual knowledge can often be demonstrated by the use of direct or circumstantial evidence.

CR 20.2.4. *Element 3.*

Article 86 is an instantaneous offense. The offense is complete at the moment that the accused fails to appear at his appointed place of duty at the prescribed time. The fact that the accused later went to his appointed place of duty is ***not*** a defense. His late arrival, however, can be used as evidence in extenuation and mitigation for purposes of sentencing.

CR 20.2.5. *Element 4.*

1. *Requirements.* The failure of the accused to go to his appointed place of duty at the time prescribed is not, in and of itself, criminal. Military personnel are frequently absent from duty without being in violation of Article 86 (e.g., leave, liberty, sick call). Criminal liability attaches only when the failure to go is without the permission to be absent from some authority competent to give that permission. For example, consider the case where an accused's guilty plea to unauthorized absence was rejected. The accused received special liberty from his command to resolve a civilian criminal traffic charge, but because of legal complications he was subsequently placed in civilian confinement for two days. The court held that the accused's appearance at his civilian trial was with the knowledge and approval of his command and that circumstances beyond his control prevented him from returning to his unit. The key factor to the court was that the accused was given command authority to attend the court hearing. The court distinguished these facts from cases where the accused was detained by civilian authorities while in a leave or liberty status. In a similar case, *United States v. Arseneau,* the Navy-Marine Corps Court of Criminal Appeals again rejected the pleas of the accused under similar facts. In *Arseneau,* the accused was given permission by his command to leave work for the purpose of being questioned by the Norfolk Police Department. After questioning, the accused was arrested and placed in jail. The accused remained in civilian jail for about 100 days before being released on bail. The accused's guilty plea to unauthorized absence for the period of time in jail was rejected by the appellate court. The court held

that because the accused went to the police department with the authority of his command, the entire absence was with authority.

2. *Proving "without authority."* In order to obtain a conviction, the government must prove, beyond a reasonable doubt, that the absence was not authorized by anyone competent to authorize it. In the ordinary Article 86(3) absence case, the UA is proved by introducing a page from the accused's service record. In the Marine Corps, no service record entries are required for absences less than 24 hours. Accordingly, no records would exist for Article 86(1) and (2) offenses. In the Navy, absences of less than one day are recorded on page 13 of the service record. In the absence of such records, it becomes necessary to prove the negative fact—that the absence was not authorized. Usually, there are witnesses who can testify as to the absence itself. Consider the case where the government's evidence consisted only of testimony that the accused was absent. The government failed to present any evidence that no one in position of authority gave him authority to be absent at the respective musters. Accordingly, the accused's conviction was reversed. This problem could have been avoided had the trial counsel called the supervisors of the accused as witnesses. During direct examination, trial counsel should have then asked questions such as: "Did you give the accused permission to be absent?" and "To your knowledge, did anyone else in authority give the accused permission to be absent?"

CR 20.2.6. *Lesser Included Offenses (LIO's).*

An attempt under Article 80, UCMJ, is the only LIO of this UA offense. Unauthorized absences under both Article 86(2) and 86(3) are not LIO's of Article 86(1). Accordingly, when an accused is improperly charged with failing to report to a general place of duty vice a specific place of duty, the accused may not be found guilty of an Article 86(3) violation. *See Sheehan, supra*.

CR 20.2.7. *Pleading Problems*.

1. *General requirements.* The specific place of duty, as well as the words, "without authority," must be alleged. For example, the Court of Military Appeals affirmed the accused's guilty plea to a specification that failed to allege "without authority" because the accused entered into a pretrial agreement, plead guilty to the faulty specifications, failed to challenge the defective specification at trial, and survived a detailed providency inquiry that included discussion of the absence being without authority. But, consider a contrary result where the court rejected the guilty pleas to specifications missing "without authority" because the defense counsel had challenged the specifications at trial, the accused only plead guilty after the military judge denied a motion to dismiss for failure to state an offense, and there was no pretrial agreement in the case.

2. *Recommended provisions.* It is not necessary to state the specific time that the accused was to be at his place of duty. However, it is generally good practice to include this information in the specification. Additionally, because it is an instantaneous offense, the duration of the absence is ***not*** alleged.

3. *Sample specification:*

Charge. Violation of the Uniform Code of Military Justice, Article 86.

Specification. In that Ensign Ernest E. Eveready, U.S. Navy, USS NOTAWAKE, on active duty, did, on board USS NOTAWAKE, at sea, on or about 30 January 20CY, without authority, fail to go at the time prescribed to his appointed place of duty, to wit: 0800 junior officer of the deck watch on the bridge of USS NOTAWAKE.

CR 20.2.8. *Instruction*.

Military Judges' Benchbook, Inst. No. 3-10-1 at p. 196.

CR 20.3. *GOING FROM APPOINTED PLACE OF DUTY*

CR 20.3.1. *Elements:*

1. That a certain authority appointed a certain time and place of duty for the accused;

2. That the accused knew of that time and place;

3. That the accused went from his appointed place of duty; and

4. That the accused's failure to go to his appointed place of duty was without authority.

CR 20.3.2. *Similarities with Article 86(1).*

1. *Elements.* Elements (1), (2), and (4) are the same as those required for an Article 86(1) offense. (*See* section 0302, *supra*.) Element (1) requires that the accused was appointed a specific place and time of duty. Element (2) requires actual knowledge of the time and place. Element (4) requires that the absence be committed without proper authority. The only element which differs from the two offenses is element (3). In an Article 86(1) offense, the accused never reports to his appointed place of duty. In an Article 86(2) offense, element (3) requires that the accused report to his place of duty and then subsequently depart from that area.

2. *Instantaneous offenses.* Both crimes, Article 86(1) and 86(2), are instantaneous offenses. In the case of an Article 86(2) offense, the crime is complete when the accused ***goes from*** his appointed place of duty. Therefore, the fact that the accused returned to his place of duty after he has already left does not operate as a defense. This evidence would only be relevant as a matter of mitigation during sentencing.

3. *General intent offenses.* Article 86(1) and (2) are general intent or negligence type offenses. Accordingly, the accused need not specifically intend to leave his place of duty. As a result, if a service member assumes his watch as a lookout, begins drinking out of the excitement associated with his next liberty port, and then falls into the ocean due to the alcohol, he would still be guilty of violating Article 86(2).

CR 20.3.3. *Element 3.*

1. *Requirements.* The third element of Article 86(2) requires proof of two different facts. First, the government must show that the accused reported for or assumed the duty he was required to perform. Second, it must be proven that, after reporting for his duties, he left the place of duty.

Example:

> Accused is assigned as a Barracks Guard from 1200 to 1800. The Barracks Chief calls the barracks at 1530 and 1810, but the accused is nowhere to be found. Accused is charged with violating Article 86(2), going from his place of duty. Held: Not Guilty. The record of trial was "devoid of any evidence establishing that, on the date alleged, the accused reported for and entered upon the duty to which he was assigned." Since there is no evidence that he did in fact report, he cannot be found guilty of violating Article 86(2), UCMJ.

2. *Failure to perform the duty.* If the accused arrives and assumes his duty, yet refuses to work—he is not guilty of violating Articles 86(1) or 86(2). Under those circumstances, he has neither failed to go or left from his duty. However, depending upon the circumstances, the accused might be guilty of dereliction of duty or of violating a lawful order.

CR 20.3.4. ***Lesser Included Offenses***.

Articles 86(1) and 86(3) are not LIO's of Article 86(2). Accordingly, a finding of not guilty to Article 86(2) cannot result in a finding of guilty to another absence offense which has not been charged.

CR 20.3.5. ***Pleading Problems***.

1. *General requirements.* Similar to an Article 86(1) offense, the specific place of duty, as well as the words, "without authority," must be alleged.

2. *Recommended provisions.* Unlike an Article 86(1) offense, the exact time at which the offense occurred is generally unknown. Accordingly, the specific time is generally not alleged within the specification.

3. *Sample specification:*

Charge. Violation of the Uniform Code of Military Justice, Article 86.

Specification. In that Signalman Third Class Wana I. Sign, U.S. Navy, USS FRANKENSTEIN, on active duty, did, on the signal bridge on board USS FRANKENSTEIN, at sea, on or about 30 January 20CY, without authority, go from his appointed place of duty, to wit: 0800 to 1200 signal bridge watch.

CR 20.3.6. ***Instruction***.

Military Judges' Benchbook, Inst. No. 3-10-1 at p. 196.

CR 20.4. ***ABSENCE FROM UNIT, ORGANIZATION, OR PLACE OF DUTY***

CR 20.4.1. ***Elements:***

1. That the accused absented himself from his unit, organization, or place of duty at which he was required to be;

2. That the absence was without authority from anyone competent to grant leave; and

3. That the absence was for a certain period of time.

CR 20.4.2. ***Element 1***.

1. *The accused must be absent.* In order to be "absent," the accused must have failed to be present at his unit, organization, or general place of duty. There is no requirement that the accused remain completely outside of naval jurisdiction in order to be in a UA status. However, care must be given when drafting the specification to ensure that what is alleged is what will be proved. For example, in one case the accused was assigned to Naval Technical Training Center, Meridian, Mississippi (NTTC). NTTC was located on board Naval Air Station (NAS), Meridian. The accused absented himself from his place of work at NTTC, but continued to live in the barracks on board NAS, Meridian. The court held that his failure to go to NTTC, as the specification alleged, and not his presence on board NAS, Meridian, was dispositive of the absence issue. Or, consider the case where the accused was assigned to the legal hold unit at Naval Station, San Diego. The accused stopped reporting for work, but continued to live in the barracks and use the base facilities. At his court-martial, he was charged with and plead to an absence from Naval Station, San Diego, not absence from the legal hold unit. The court rejected his plea, because the accused was not absent from his unit as alleged in the specification.

2. *Commencement of UA.* Generally, a UA commences in one of three ways:

(a) When the accused simply gets up and leaves his unit, organization, or place of duty;

(b) when the accused fails to return at the proper time from authorized leave or liberty; or

(c) when the accused is not where he is supposed to be at the time he is required to be there.

3. *Unit, organization, or place of duty.* Unlike Article 86(1) or 86(2) offenses, an absence in violation of Article 86(3) relates to a general place of duty. The customs of the U.S. Navy and Marine Corps have created the individual definitions for each of the terms: "unit," "organization," and "place of duty." They are, however, not precisely defined. For example, certain commands, such as Naval Air Station, Lemoore, California, may be properly considered as either an "organization" or a "place of duty."

(a) *Organization.* This term usually connotes a larger command or mid-level military activity. For example: a shore command in the Navy or a Marine air group.

(b) *Unit.* The term "unit" is normally used to connote a lower level military entity such as a ship or air squadron in the Navy or a company, squadron, or battery in the Marine Corps.

(c) *Place of duty.* The term "place of duty" under Article 86(3) follows the general terms of "unit" and "organization." Accordingly, courts have concluded that the "place of duty" referred to in Article 86(3) is a general place of duty. In short, the requirements for this "place of duty" are significantly broader than the specific place of duty required in Article 86(1) and (2). When alleging a violation of Article 86(3), therefore, one ***is not limited to a specific place***, but may instead allege a general place of duty.

(d) *Determining the unit, organization, or place of duty.*

(1) *Generally.* A service member is generally attached or assigned to a specific unit or organization. The unit, organization, or place of duty of an accused is an administrative determination made in accordance with the regulations of the particular armed service. The general rule is that a member is attached to the ship or station to which he is administratively assigned for accounting purposes. Ordinarily, this can be identified by the ship or station which holds his service record. However, in some circumstances, service records are retained in central administrative offices. Alleging the central administrative office would be incorrect—and fatal.

(2) *Recommended methods.* Perhaps one of the safest ways to ensure that the appropriate unit or organization is alleged is to look at the personnel record of the accused. When the individual joined his unit or organization, an entry was made within his service record book. This entry will most likely be dispositive of the accused's unit or organization. For example, look for the page 5 entry in a Navy service record—or a page 3 entry in a Marine Corps service record.

(3) *Permanent change of station (PCS).* A person en route pursuant to a PCS order is considered to be attached to the activity to which he is ordered to report. To determine the unit, organization, or place of duty to which the accused has been ordered to report, examine the wording of the PCS orders.

(4) *Temporary additional duty (TAD).* When a service member is TAD, he is actually attached to two different commands. He has not detached from his permanent duty assignment while attached to a temporary command. Absence of a service member from his TAD command makes him also absent from his parent command; therefore, "a specification

could allege an accused absent from either unit without running the hazards of fatal variance or, because of the dates alleged in the specifications, subject the accused to the possibility of double jeopardy." *See United States v. Atkinson*, 39 M.J. 462 (C.M.A. 1994) and *United States v. Mitchell*, 7 C.M.A. 238, 240, 22 C.M.R. 28, 30 (1956).

(e) *Misdesignation of the term "unit," "organization," or "place of duty."* Misdesignation of a unit as an organization, or an organization as a place of duty, ***is not a fatal error***. However, when a specific unit is alleged and the evidence proves that the accused was absent from an entirely different unit, ***the defect is fatal***. For example, if the specification mistakenly alleges Naval Air Station, Miramar, as a unit, the defect is nonfatal. Yet, if the evidence subsequently proves that the accused was actually absent from Naval Station, San Diego, the specification would be fatally defective.

CR 20.4.3. *Element 2*.

1. *Requirements.* The requirement of proving "without authority" is generally the same for Article 86(1) and (2) offenses as it is in an Article 86(3) offense. However, since Article 86(3) offenses are generally of a longer duration, the reporting requirements assist the government in prosecuting such an offense. A service record entry is prepared in all cases of absences over 24 hours (page 6 entry in the Navy; page 12 entry for Marine Corps service records). As such, the government may simply choose to present this documentation to show, among other things, that the absence was "without authority." However, in some circumstances it may be necessary for chain of command witnesses to testify that no authority had been given the accused to be absent.

2. *Inference.* Service record documentation of an absence only creates an inference of "without authority." It is critical, therefore, to ensure that an agent of the U.S. Government has not instructed the accused not to return to his place of duty.

Example:

> Accused was scheduled to transfer from Fort Gordon, Georgia, to Vietnam during the war. In July of 1969, he was told to "go home and wait for orders." He never received his orders and finally reported to Fort Lewis, Washington, in December 1971. ***Held:*** Not Guilty. An agent of the U.S. Government directed the accused to return home and await orders. The order was never countermanded. The military judge substituted January 1970 as the inception date of the UA, concluding in his special findings that after January 1970 it was no longer reasonable for the accused to sit at home and wait for orders to arrive. The appellate court rejected the military judge's substituted language and set aside the guilty finding. The accused was "at all times . . . where he was required to be by the order." His absence was authorized. The accused, therefore, could not be found guilty of violating Article 86, UCMJ.

CR 20.4.4. *Element 3*.

1. *Instantaneous offense.* Article 86(3) is an instantaneous offense. It is committed at the instant the accused absents himself without authority. The duration of the absence, however, is a matter in aggravation for the purpose of increasing the maximum punishment authorized for the offense. The duration of the absence is not, in itself, an essential element of an Article 86(3) offense.

2. *"One-day" rule.* If the termination date of the absence is ***not*** alleged, ***or*** is alleged but not proven, the accused can only be convicted of, and punished for, a one-day absence (the "one-day" rule).

Similarly, if the government proves the termination date, but fails to show any prior inception date, the accused may only be convicted of a one-day UA, the date of termination. In instance, the Court of Military Appeals faced a situation where no ***inception*** date was shown. The trial court returned a guilty finding to the alleged UA of 3 December 1969 to 1 April 1977, even though there was

considerable evidence that the accused was still present at his unit until about 1 January 1970. In taking his action on the record of trial, the convening authority approved only a UA from 2 January 1970 to 1 April 1971 by an action he termed one of "clemency" (though it actually appeared to be an attempt to eliminate appellate review difficulties). The Court of Military Appeals held that proof of an inception date was essential to a successful UA prosecution, and thus the convening authority had acted improperly in approving a date for commencement where there had been no evidence at trial that the UA commenced on that date. However, the court ***did*** find a commencement date of 9 January 1970, since a record book entry introduced at trial indicated that the accused had been dropped from the rolls of his unit on that date because of his UA. The court further stated that, had ***no*** inception been found, only a one-day UA, the date of the alleged termination, could have been upheld.

Example:

Government alleges that the accused was absent without authority for two months. At trial, the government presented evidence of the date of the inception. However, the government failed to admit admissible evidence of a termination date. ***Held:*** Accused was only guilty of a one-day UA vice a two-month absence.

CR 20.4.5. ***General Intent.***

A simple (i.e. ***nonaggravated***) UA offense under Article 86(3), like the Article 86(1) and (2) offense, is a ***general*** intent offense. The accused need not have specifically intended to be UA. Indeed, he might have specifically intended the exact opposite. For example, the accused fully intends to go to work on time. To assist him, he sets three alarm clocks. Nevertheless, he oversleeps and doesn't get there on time. He is still UA, though he may have a good case in mitigation.

CR 20.4.6. ***Lesser Included Offenses.***

An attempt offense under Article 80 is the only LIO to a violation of article 86(3). Article 86(1) and 86(2) are not LIO's of Article 86(3). Accordingly, a finding of not guilty to Article 86(3) cannot result in a finding of guilty to another absence offense which has not been charged.

CR 20.4.7. ***Pleading Problems.***

1. *General requirements.* As with all Article 86 offenses, the specification should state that the accused's absence was "without authority." Additionally, in the event that there are any aggravating factors associated with this absence (*see* section 0305, *infra*), those must be alleged within the specification in order to qualify for the greater sentence.

2. *Recommended provisions.* The specific time of the absence, as well as the time of termination, is generally not alleged in an Article 86(3) specification. Identifying the time would only be appropriate for short-term absences when the time periods would qualify the offense for an aggravated sentence. For example, if the time frames identify the absence as one in excess of 72 hours, it would be better to state the times than simply the dates.

3. *Sample specification.*

Charge. Violation of the Uniform Code of Military Justice, Article 86.

Specification. In that Hull Technician Third Class Will B. Seedy, U.S. Navy, USS SLEEZEBALL, on active duty, did, on or about 1 April 20CY, without authority, absent himself from his unit, to wit: USS SLEEZEBALL, located at Newport, Rhode Island, and did remain so absent until on or about 13 August 20CY.

CR 20.4.8. ***Instruction.***

Military Judge's Benchbook, Inst. No. 3-10-2 at p. 197. Note that the instruction identifies the specific termination date as an element of the absence offense. While not a required element, it is an

aggravating element when it can be alleged and proven to increase the maximum potential punishment. As a practical matter, one should always allege the termination date and, if applicable, that the absence was terminated by apprehension.

CR 20.5. *AGGRAVATING FACTORS*

CR 20.5.1. *Categories of Aggravation.*

In addition to the three types of absence offenses delineated by Article 86, there are a variety of aggravating circumstances which would make an Article 86(3) offense more significant. These aggravating circumstances fall into four main categories:

1. Duration of the absence;

2. special type of duty from which the accused absents himself;

3. specific intent which accompanies the absence; and

4. manner in which the absence was terminated.

CR 20.5.2. *Specific aggravation.*

1. *Duration of the absence.*

(a) UA of more than three (3) days will authorize a maximum sentence to include six (6) months' confinement and forfeiture of 2/3 pay per month for six (6) months.

(b) UA of more than thirty (30) days will authorize a maximum sentence to include a Dishonorable Discharge, confinement for a period of one (1) year, and total forfeiture of pay.

2. *Special type of duty from which the accused absents himself.* UA from responsibilities as a guard—on watch or on duty—will authorize a maximum sentence to include three (3) months' confinement and forfeiture of all pay and allowances.

3. *Specific intent which accompanies the absence.* UA from the responsibilities as a guard—on watch or on duty—with the specific intent to abandon it will authorize a maximum sentence to include a bad-conduct discharge, confinement for six (6) months, and total forfeiture of all pay and allowences.

UA, with the specific intent to avoid maneuvers or field exercises, authorizes the maximum sentence of a bad-conduct discharge, confinement for a period of six (6) months, and forfeiture of all pay and allowances.

4. *Manner in which the absence was terminated.* UA for more than (30) thirty days, terminated by apprehension, will authorize a maximum sentence of a dishonorable discharge, confinement for eighteen (18) months, and total forfeiture of all pay and allowances.

CR 20.5.3. *Special Considerations*.

1. *Matters must be stated in the pleading.* In order to use the higher or aggravated scales of punishment provided in these absence offenses, the special matter in aggravation must be plead, proven, and instructed upon.

2. *Not essential elements.* The aggravating elements of these more serious absence offenses are not essential elements to an absence offense. Instead, they simply constitute special matters in aggravation which must be established beyond a reasonable doubt in order to increase the authorized maximum punishment. If the aggravating element is not proven, but the basic

elements of the absence offense are proven, the court-martial may still convict for the basic UA offense. The finding of guilty would come through exceptions and substitutions to the original specification and charge.

CR 20.6. *PROVING ABSENCE OFFENSES*

CR 20.6.1. *Proving military status of the accused.*

In a case involving UA, the accused's status as a member of the military could in fact become a contested issue. The military status could be challenged by the defense in two ways:

1. First, the defense can make a motion to dismiss the charges on the grounds that the court-martial lacks jurisdiction over the person. In addressing this motion, the standard of proof is the "preponderance of the evidence."

2. Second, in the event that the military judge rules against the defense on the motion, the issue can be raised on the case-in-chief. If the issue is raised on the merits, the government would have to prove "beyond a reasonable doubt" that the accused was on active duty.

CR 20.6.2. *Proof of Absence.*

In the ordinary UA case, the inception of, termination of, and lack of authority for the absence are usually proved by putting in evidence the appropriate entry from the accused's service record, which contains the words "on unauthorized absence." This is a hearsay document which, if properly prepared and authenticated, is admissible under the "public records" exception to the hearsay rule. Thus, it usually is easy to present a prima facie case of an 86(3) offense. If proper service record entries are not available, however, trial counsel will have to call witnesses to establish inception, termination, and lack of authority. For the Navy, any UA should be noted on page 13 of the service record as an administrative remark. An OCR document, the present page 6 of the enlisted service record was created to record UA's that ***exceed*** 24 hours—since those absences affect the unauthorized absentee's pay status. Accordingly, once an accused initially absents himself, that absence is recorded via a page 13 entry. As soon as the absence exceeds 24 hours, a page 6 entry is also made. For Marines, no service record entries are made for UA's of less than 24 hours. UA's in excess of 24 hours are recorded on page 12, Offenses and Punishments, of the service record. Note that there may be other documents, such as muster chits, morning reports, and even other service record pages for Marines, which may be admissible under Mil.R.Evid. 803(6) and (8) as records of regularly conducted business activities or public records to establish the offense. These other non-testimonial sources of evidence concerning a UA offense may help to save or streamline prosecution of an offense where the main service record entries usually relied upon are inadmissible for some reason. It must be remembered that public records are admissible as exceptions to the hearsay rule only if they are prepared in accordance with applicable regulations. For example, in one case offered documents were not admitted because they had not been signed by the proper official. They thus constituted incompetent hearsay, even though there had been no objection by the defense. However, where a document is not admissible as an official (public) record, it often may be admitted as a business entry (a record of regularly conducted business activity).

CR 20.7. *TERMINATION PROBLEMS*

CR 20.7.1. *General issues.*

There are generally two issues which must be resolved regarding the termination of an individual's unauthorized absence. First, when did the unauthorized absence terminate? An Article 86(3) type absence of over three days or over thirty days carries increased maximum potential punishment. Second, did the absence terminate by surrender or by apprehension? An absence of over thirty days terminated by apprehension increases the maximum potential punishment.

CR 20.7.2. *Methods of Termination.*

An individual's UA terminates upon his return to military control.

1. *Termination by surrender to military authority.* The vast majority of absences terminate by the servicemember surrendering himself to military authority. If a person intends to surrender, submits himself to military authority, ***and*** discloses to that authority his status as an unauthorized absentee, such authority is bound to exercise control over him. MCM, pt. IV, § 10c(10)(a). This exercise of control is considered to be a surrender. However, if an accused discloses his status to military authority—but does so without the intent to terminate his absence—or subsequently frustrates efforts by the military to exercise control over him, it is not a proper surrender. Additionally, a casual presence is insufficient to terminate an absence. The accused must inform the military of his status as an unauthorized absentee. Accordingly, if his presence is known—but his UA status is unknown to competent authority—his absence is not terminated. Some of the more common examples of casual presence are:

(a) Returning to the office temporarily for one's own purposes is insufficient to terminate the absence.

(b) While overseas, reporting to the American Vice Counsel to obtain a passport. A simple visit to the U.S. Legation cannot be construed as a return to military control.

(c) The accused's mere presence in his barracks on the host base was not the equivalent of presence with his unit.

(d) Apprehension on other offenses when the accused fails to mention his status, or conceals critical information regarding unit or organization, does not terminate the absence.

(e) Telephone calls to military authorities do not terminate the absence. The accused must take an affirmative action beyond the phone call in order to terminate the absence.

(f) Consultation with Navy chaplain was insufficient to terminate absence when accused was merely encouraged to surrender himself to military authority and no control over the accused was exercised by the chaplain. Alternatively, in another example, consultation with military doctor was held sufficient to terminate absence when accused revealed his UA status and Navy doctor exercised control by taking him to a psychiatrist and ordering him to another appointment the following duty day.

2. *Termination by apprehension.* In some cases, the member is apprehended and returned to military control. The member is apprehended either by military authorities or he is apprehended by civilian authorities. The term apprehension means the absentee's return to military control was involuntary, vice voluntary. Apprehension by military authority of a known absentee terminates a UA.

(a) *Apprehension by civilian authorities on the behalf of the military.* After a service member has been absent without authority for thirty days, the member's command will generally issue a DD-553 (Absentee Wanted by the Armed Forces). A sample DD-553 is appended to this chapter. The DD-553 is entered into the FBI's NCIC Wanted Person File and serves as authority for federal, state, and local law enforcement to apprehend the absent service member. A significant number of UA service members are apprehended pursuant to a DD-553 following routine traffic stops. As this is not a voluntary return to military control, the UA has terminated by apprehension. But, consider the case where the U.S. Navy-Marine Corps Court of Military Review held that a service member who honestly seeks to terminate his UA status by revealing his status to civil authorities may not be found to have been apprehended when civil authorities then hold the member pursuant to the DD-553. In essence, the service member voluntarily terminated the UA by attempting to turn himself into civil authorities.

Frequently, the UA service member is taken into custody by civil authorities on purely civilian charges, vice a DD-553. Under this circumstance, the UA is not terminated until the service member

is being held for the military pursuant to the DD-553. While in custody for the civilian offense, the service member remains in an UA status.

(b) *Delivery to military authority*. If a known absentee is delivered by anyone to military authority, this will terminate the UA. MCM, pt. IV, § 10c(10)(c).

CR 20.7.3. ***Location of Termination.***

An unauthorized absentee need not return to his own duty station in order to terminate the absence; the accused need only return to military control. For example, it is sufficient for a Navy absentee, who is apprehended by civilians and delivered to an Air Force Base, to legally terminate a UA. The accused, however, must be returned to military authorities.

CR 20.7.4. ***Apprehension by Civil Authorities Without Prior Military Request.***

Unless the servicemember is apprehended due to a DD Form 553 request, a UA terminates when civil authorities notify military authority that they are holding the accused and that he is available for return to military control. MCM, pt. IV, § 10c(10)(e). If the accused is apprehended by civilian authorities, the accused's UA status does not terminate until military authorities are notified that the accused is available for return to military control, regardless of the disposition of the civilian case.

CR 20.7.5. ***Evidentiary Problems.***

1. *Early termination date*. If the government proves the inception date alleged, but the evidence indicates that the absence terminated on a date earlier than the one alleged in the specification, the accused may be properly convicted of the lesser period of time.

2. *Later inception date.* If the government proves an inception date later than the one alleged, and a termination date as alleged, the accused may be properly convicted of the lesser period.

3. *Single absence instead of multiple absences.* If the government alleges two distinct periods of UA, but the proof shows only one continuous absence encompassing both time periods, the accused can be properly convicted only of the specification containing the proven inception date.

4. *Early termination and subsequent absence.* If the government alleges one absence, but the evidence proves two distinct periods of UA which fall within the period alleged, the accused can be convicted of both. The maximum punishment, however, will be limited to the maximum for the offense charged. For example, if Seaman A is charged with an absence from 1 January 20CY to 1 August 20CY, but the defense presents evidence that the accused surrendered to authorities on 10 January and then absented himself again, the accused could be convicted of two periods of absence. (1 specification from 1-10 January 20CY, and 1 specification from 10 January to 1 August 20CY). The punishment, however, would be limited to the maximum punishment allowable for an absence from 1 January until 1 August.

5. *Former jeopardy*. If the court-martial convicts the accused of a lesser period, he may not be tried again upon the original time periods. Former jeopardy would prevent such a prosecution.

CR 20.8. ***AFFIRMATIVE DEFENSES***

CR 20.8.1. ***Generally.***

Affirmative defenses to UA are generally based upon the theory that an absence which is due to no fault of the absentee is not a crime and should be excused. MCM, pt. IV, § 10c(6), provides: "When, however, a person on authorized leave, without fault, is unable to return at the expiration thereof, that person has not committed the offense of absence without leave."

CR 20.8.2. ***Types of defenses.***

There are generally three types of affirmative defenses to UA offenses: mistake of fact; ignorance of fact; and impossibility.

1. *Mistake of Fact.*

(a) *Article 86(1), 86(2), and nonaggravated 86(3) offenses*. These offenses are general intent crimes. No specific intent is necessary to convict an accused of these offenses. In order to constitute an defense, therefore, any mistake of fact must be honest and reasonable. The honest and reasonable standard is significant because it places a higher standard upon the accused. For example, an accused who honestly believes that he does not have duty, yet intentionally fails to check the roster, may not prevail with a mistake of fact defense because his conduct might be found unreasonable by the fact finder.

(c) *Aggravated Article 86(3) offenses.* Some aggravated Article 86(3) offenses are specific intent crimes. Accordingly, a mistake of fact defense would only require that the mistake be honest, vice an honest and reasonable mistake.

2. *Ignorance of Fact.*

(a) *Article 86(1) and 86(2) offenses*. Knowledge of the time and place of the accused's duty is an affirmative element which must be established by the government in order to prove an Article 86(1) or 86(2) offense. Accordingly, a claim of ignorance or lack of knowledge would simply be a general defense and not an affirmative defense.

(b) *Article 86(3) offenses.* Knowledge is not an element of an Article 86(3) offense. Presumably, therefore, the lack of knowledge, or ignorance of the accused regarding his need to be at his unit or organization, would raise an affirmative defense.

3. *Impossibility.* If a servicemember is unable to return to his unit prior to the expiration of leave or liberty due entirely to the existence of a mishap, he may have a valid impossibility defense. The defense only exists if the mishap is neither foreseeable or due to the service members own fault. Thus, if the problem could have been foreseen—or it was due to the accused's negligence—no valid defense exists. Additionally, the defense only exists if the impossibility arose before the accused's absence became unauthorized.

(a) *Some examples of foreseen mishaps.*

(1) An accused who missed the train due to his own fault, but needed to return to his duty station, had no valid defense.

(2) An accused who got on the wrong airplane did so due to his own negligence and, as such, had no valid defense.

(3) An accused who scheduled the last available flight to return to this ship prior to deployment, only to have the flight cancelled due to mechanical problems, had no valid defense. The accused was at fault by planning the last available flight.

(4) An individual who remained at the scene of an accident only to assist was absent not due to an impossibility, but as a convenience to others. Accordingly, the accused had no valid defense.

(5) An accused who voluntarily remained with his car as it was being repaired did not have a valid defense. An accused who took forty hours to get to base after his car failed to start, neglected to take reasonable steps and did not have valid defense.

(6) An accused's need to pick up his children and take them home, preventing him from returning to work at the appointed time, did not rise to the level of a valid defense.

(b) *Three general categories of occurrences that are not foreseeable.* There are three general categories of unforeseeable mishaps: (1) impossibility due to acts of God; (2) impossibility due to acts of a third party; and (3) impossibility due to physical disability/ inability.

(1) *Acts of God.* An unexpected, sudden natural occurrence which is the sole cause of the accused's absence would amount to a defense (e.g., an unexpected flood, snowstorm, hurricane, or earthquake). If the particular occurrence is expected to occur, however, it is not a defense because it is foreseeable. For example, in the area where snowstorms customarily occur during a particular season, one must anticipate an ordinary snowfall to occur and take appropriate action to ensure timely arrival. In the event that a particularly severe storm is forecasted, one must act accordingly.

(2) *Act of third party.*

a. *Wrongful acts of another.* If the accused's failure to arrive back from leave or liberty is due entirely to the wrongful acts of another, a valid defense would exist. For example, if the accused is returning to work with plenty of time to spare and is involved in an accident not due to his own fault, a valid defense exists. The accused must, however, exert sufficient effort to overcome this inability and attempt to report at the appropriate time and place.

b. *Detention by civilian authorities.* If the absentee is on leave or liberty, and is held beyond that period by civilian authorities due to no fault of his own, he will have a valid defense to an absence offense due to impossibility.

(i) *Tried by civilians and acquitted of the offense.* If the accused is found to be not guilty of the civilian charges, he was detained by civilian authorities and unable to return due to no fault of his own. In this circumstance, the accused has a valid defense.

(ii) *Tried by civilians and convicted of the offense.* If the accused is found guilty, his absence was caused by his own fault and is not excused. In such a situation, the UA period begins at the time his leave or liberty was due to expire.

(iii) *Not tried by civilians (or tried, but no verdict was returned).* In the event that there is no finding as to the accused's guilt or innocence regarding the offense for which he was detained, the military may choose to litigate the issue. The accused will only be guilty of the absence if the prosecution can prove that he is guilty of the offense for which he was detained. Therefore, in the event that the government intends to prosecute the accused for the absence offense, there are two options:

(one) charge the accused with the UA offense. Present prima facie case in the case-in-chief and allow the defense to raise the affirmative defense of impossibility. If this defense is raised, then prove that the accused actually committed the crime for which the civilian authorities detained him—thus establishing that his absence was through his own fault; or

(two) charge the accused with the absence offense **and** the offense for which he was detained. Only if he is found guilty of the later offense can he be guilty of the absence.

c. *Impossibility must occur while the accused is in a leave/liberty status.* If the accused is an unauthorized absentee when he is picked up and detained, his detention will not constitute a valid defense for any period of his detention. He is an unauthorized absentee for the entire period. The accused's UA status does not change due to the creation of an

impossibility. If the absence was extended because of a civilian arrest, then it is a factor in extenuation.

d. *Deliver to civilian authorities pursuant to Article 14, UCMJ.* A member of the armed forces who has been turned over to civil authorities upon their request is not absent without authority.

Example:

The commanding officer gives accused permission to attend a civilian court session. Accused attends session and is immediately taken to jail and imprisoned. Accused pleads guilty to a period of unauthorized absence while in civilian confinement. ***Held***: Not Guilty. Conviction is reversed because accused's plea is improvident. The commanding officer authorized the accused's absence from the command.

General rules regarding detention by civilian authorities:

Result of Civilian Trial	Accused UA When Detained	Accused on Leave or Liberty when Detained
Acquittal	Guilty of UA	Not Guilty of UA
Conviction	Guilty of UA	Guilty of UA
Release without Completed trial	Guilty of UA	Guilt of UA depends on determination by court-martial of his guilty of offense for which he was detained.

(3) *Impossibility due to physical disability.* If a service member is on leave or liberty and fails to return to his unit because of a physical inability, not due to his own fault, a defense to the absence exists.

a. *Must not be due to the accused own fault.* In order for the defense to be valid, the accused cannot be responsible for creating the disability. For example, if the accused cannot report to work because he is still intoxicated from the previous night's overindulgence, he does not have a valid defense. Similarly, he cannot claim a physical inability defense when he has been apprehended for breaking the law. The disability or inability must be to the accused and not a third party. Thus, an individual whose wife has taken ill cannot use that to support this type of defense. Consider these examples:

While on leave, the accused was stricken with a recurring illness which forced his absence.

Accused was on liberty when he was struck on the head and robbed. Due to his head injury, he was unable to return to his unit.

While on leave, the accused became too sick to travel. This illness made it impossible for him to return to his duty station.

4. *Other Defenses.* Most of the defenses discussed in Chapter 10 of this Study Guide may be applied to absence offenses. Three additional defenses, however, are highlighted below.

(a) *Drunkenness.* Voluntary intoxication can be a defense to a specific intent offense. Accordingly, if the accused is charged with an aggravated Article 86(3) offense, evidence of intoxication may be relevant. Evidence of intoxication, however, may also be relevant in determining the termination date of an absence.

(b) *Duress.* The duress defense has been used successfully in absence offense cases. To establish the affirmative defense of duress, it must be shown that the accused possessed a reasonable fear that they or another innocent person would suffer immediate serious bodily injury if they did not commit the act. If the accused had any reasonable opportunity to avoid committing the act without subjecting himself or an innocent third party to the threatened harm, then the defense does not exist.

(c) *Statute of limitations.* Article 43, UCMJ, provides the statute of limitations for all military offenses. In 1986, Article 43 was substantially rewritten and created a different statute of limitations for absence offenses. The current statute of limitations applies to all UA's commencing ***on*** or ***after*** 14 November 1986. Accordingly, one must first determine which statute of limitations applies to the case. The post-1986 Article 43 eliminates a statute of limitations for any absence offenses.

CR 20.9. *DESERTION*

CR 20.9.1. *Generally.*

There are three separate offenses created by Article 85. These offenses are:

1. Unauthorized absence with the specific intent to remain away from one's unit, organization, or place of duty permanently;

2. Unauthorized absence with the intent to shirk important service or avoid hazardous duty; and

3. Attempted desertion.

Each of these offenses is an independent and distinct crime.

CR 20.9.2. *Unauthorized Absence With the Intent to Remain Away Permanently*.

1. *Elements:*

(a) That the accused absented himself from his unit, organization, or place of duty;

(b) That such absence was without authority;

(c) That the accused, at the time the absence began or at some time during the absence, intended to remain away from his unit, organization, or place of duty permanently; and

(d) That the accused remained absent until the date alleged.

2. *Generally.* Article 85 is an unauthorized absence offense with the additional element that the accused had the specific intent to remain away from his unit, organization, or place of duty permanently. The specific intent aspect of the offense is the most difficult to prove.

3. *Requisite Intent.* The specific intent required for this offense is that the accused intended to remain away from his unit, organization, or place of duty permanently. It does not require that the accused intended to remain away from the U.S. Navy or his particular armed service. An accused's claim that he wants to stay in the Navy, but leave his unit, is not a defense to this crime.

4. *Duration of Intent.* The intent to remain away permanently does not have to exist throughout the entire period of the absence. It is only necessary that the accused formulate this specific intent at some time during the absence. Desertion is an instantaneous offense. Any time

the accused attains this intent, the crime is complete. While a matter in mitigation, an accused who changes his mind and returns to his unit does not have a defense.

5. *Evidence of the intent to remain away permanently.* Absent an admission from the accused, the intent to remain away permanently is often very difficult for the government to prove. It may, however, be established by direct or circumstantial evidence. In determining the accused's intent, all the evidence in the case must be carefully weighed. No single factor will be determinative of the issue of intent.

6. The following examples may, when considered with all of the other evidence in a case, support an inference of an intent to remain away permanently:

(a) reenlistment in the same or another armed service a prolonged absence;

(b) disposal of the accused's military uniforms or military identification;

(c) purchase of a one-way ticket to a distant place, especially when the new location is not the service member's home of record;

(d) changing name, assuming an alias or a new identity;

(e) obtaining civilian employment;

(f) failing to surrender when in the vicinity of military authority;

(g) leaving the country;

(h) commencing an absence while awaiting trial on other charges;

(i) terminating the absence by apprehensio; or

(j) history of prior UA's.

7. *Totality of the Circumstances.* None of these factors is determinative of the intent to remain away permanently. Each, in conjunction with other factors, could be sufficient to prove the requisite intent. In one example, the Court of Military Appeals emphasized that the length of the accused's absence, by itself, was insufficient to establish the intent required for desertion. However, the court concluded that the length, in conjunction with the fact that the accused was apprehended 3,000 miles from his duty station, supported an inference of an intent to remain away permanently. In another example, the Coast Guard Court of Military Review found the intent element was satisfied by the following facts: the accused's absence was terminated by apprehension after 144 days; the accused no longer had an Armed Forces ID card; the accused's physical appearance when caught; the accused's failure to contact military authorities; and the accused fled to Canada, some 3000 miles away from his home and command. Each case is different, but absent an admission, the government is left to build a circumstantial evidence case on the intent element.

8. *Terminated by Apprehension.* As with Article 86(3) offenses, an Article 85(1) offense carries the optional element of termination by apprehension. If alleged and proven, this aggravating element increases the maximum potential punishment faced by the accused.

CR 20.9.3. ***Unauthorized Absence With the Intent to Shirk Important Service or to Avoid Hazardous Duty***.

1. *Elements:*

(a) That, at the time and place alleged, the accused absented himself from his unit, organization, or place of duty;

(b) that such absence was without authority;

(c) that the accused had, at the time of the absence, an impending duty which was hazardous or impending service which was important;

(d) that the accused knew of the impending duty or service at the time of the absence; and

(e) that the accused absented himself from his unit, organization, or place of duty with the intent of avoiding the duty or shirking the service.

2. *Generally*. The gravamen of this offense is that the accused absented himself with the specific intent to avoid hazardous duty or important service. Accordingly, the government must prove that the accused had actual knowledge of the hazardous duty or important service. Avoiding hazardous duty must be the specific intent for, rather than a consequence of, the absence. For example, in one instance the accused, an Army doctor, left her unit without authority on the eve of her unit's deployment in support of Operation Desert Storm. The accused asserted at trial that she had gone UA because she had moral, ethical, philosophical, and legal objections to the war, but not with the intent to avoid hazardous duty. The Court of Appeals for the Armed Forces held that while that may have motivated her decision, it did not undermine the specific intent element of the offense. In fact, it served to support an inference that her absence was with the intent to avoid hazardous duty.

3. *Terminology:*

(a) "Hazardous duty" includes duty in a combat area or any duty performed before or in the presence of the enemy, a rebellious mob, or a band of renegades. It is not limited to actual front-line combat.

(b) "Important service" is service above and beyond ordinary service. There must be a "critical quality" to the duty to make it "important."

(1) *Examples of "important service" are:*

a. attending basic training;

b. member of a rifle company in a war zone;

c. cook aboard an icebreaker operating in the Antarctic;

d. servicemember assigned to a Coast Guard vessel performing surveillance of foreign fishing trawlers; and

e. servicemember assigned to a military intelligence unit about to be deployed to a combat area.

(2) *Not "important service" for purposes of Article 85*:

a. attending ones own court-martial; and

b. accused attempting to avoid brig time was not considered to be "important service" for purposes of Article 85.

(c) "Quits" within the statute refers to when an accused "goes absent without authority." It is not necessary that the accused report to the place of hazardous duty or important service in order to "quit" it. The gravamen of the offense is deliberately avoiding the hazardous duty or important service.

4. *Factual issue.* The question of whether the duty constitutes "important service" or "hazardous duty" is an **objective** question of fact dependent on evidence of circumstances surrounding the service to be performed. Whether an intent to avoid some particular service existed is a **subjective** question of fact depending on proof of his direct statements or circumstances reflective of his state of mind. Notwithstanding, intent to avoid hazardous duty or to shirk important service is usually inferred by the fact finder from circumstances surrounding the absence.

CR 20.9.4. ***Attempted Desertion***.

1. *Elements:*

(a) That the accused did a certain overt act;

(b) That the act was done with the specific intent to desert;

(c) That the act amounted to more than mere preparation; and

(d) That the act apparently tended to effect the commission of the offense of desertion.

2. *Generally.* Article 85 is one of five punitive articles that contain the offense of attempt as an offense in addition to the principal offense. Therefore, an attempt to desert is charged as an offense under Article 85 and not under Article 80.

3. *Lesser included offenses.* Article 85 does not encompass attempted UA. However, attempted UA under Article 80 can be a LIO to desertion or attempted desertion under Article 85.

CR 20.9.5. ***Defenses***.

The same affirmative defenses are available for desertion as were discussed earlier regarding UA's under Article 86. Desertion is a specific intent offense. Accordingly, any mistake of fact defense need only show that the mistake was honest, vice honest and reasonable.

CR 20.9.6. ***Pleadings and Instructions***.

1. *Generally.* A specification should state that the absence was "without authority." However, the words "absent in desertion" have been found to be sufficient in the event that "without authority" is not placed into the specification. Counsel should avoid creativity in the creation of a specification. Excessive language could result in failing to state an offense.

2. *Sample specification:* (Desertion with intent to remain away permanently, terminated by apprehension.)

Charge: Violation of the Uniform Code of Military Justice, Article 85.

Specification: In that Seaman Recruit Jonathan B. Rollo, U.S. Navy, USS NEVERSINK, on active duty, did, on or about 1 January 20CY, without authority and with intent to remain away therefrom permanently, absent himself from his unit, to wit: USS NEVERSINK, located at Newport, Rhode Island, and did remain so absent in desertion until he was apprehended on or about 22 February 20CY.

3. *Instruction: Military Judges' Benchbook*, DA Pam. 27-9 (2002), Inst. No. 3-9-1, p. 187.

4. *Sample specification.:* (Desertion with intent to remain away permanently, "terminated otherwise," i.e., other than by apprehension)

Charge: Violation of the Uniform Code of Military Justice, Article 86.

Specification: In that Seaman Recruit Jonathan B. Rollo, U.S. Navy, USS NEVERSINK, on active duty, did, on or about 1 January 20CY, without authority and with intent to remain away therefrom permanently, absent himself from his unit, to wit: USS NEVERSINK, located at Newport, Rhode Island, and did so remain absent in desertion until on or about 22 February 20CY.

5. *Instruction.* The same instruction as above applies except that, since it is not alleged, the military judge could not instruct upon apprehension—nor can the accused be convicted of or punished for it.

CR 20.10. *MISSING MOVEMENT*

CR 20.10.1. *Generally.*

Article 87 was designed to address all incidents when the accused is scheduled to move with his ship, aircraft, or unit and fails to do so. There are two offenses created by Article 87. These offenses are:

1. Missing movement through design; and

2. missing movement through neglect.

CR 20.10.2. *Elements.*

The two offenses are identical, but for the intent element. One crime, the more severe offense, addresses the servicemember who misses a movement through his own design (intentionally). The other offense addresses a movement which is negligently missed. The elements for each offense are:

1. That the accused was required in the course of duty to move with a ship, aircraft, or unit;

2. that the accused knew of the prospective movement;

3. that the accused missed the movement; and

4. that the accused missed the movement through design or neglect.

CR 20.10.3. *Element 1*.

That the accused was required in the course of duty to move with a ship, aircraft, or unit.

1. *Generally.* Article 87, UCMJ, indicates that guilt under this article is predicated upon the duty to move with a ship, aircraft, or unit. As such, two questions must be addressed. Initially, whether the accused is required to move. Secondarily, whether the accused must move with something that can be considered a ship, aircraft, or unit.

2. *Duty to move.* This element requires the same proof necessary in order to show an Article 86 absence offense. Proof of a UA at the time that the ship, aircraft, or unit moved would also prove that the accused should have moved with the unit and had no authority to miss the movement.

3. *What is a "unit"?*

(a) The term "unit" is not limited to any specific technical category such as those listed in a Table of Organization and Equipment. "Unit" only requires that there is an "integrity of organization" at the time of the move.

(b) Permanent change of station or standard transfer orders involving only one or several men would not constitute the movement of a "unit." Rather, this is a transfer from one unit to another unit.

(c) Once it is shown that there was a "unit" involved in the movement, the mode of transportation is not important. It could be either military or commercial and would include travel by ship, plane, truck, bus, or even forced march.

Example:

Accused's unit (an artillery battery) was transferred from CONUS to West Germany. Accused was authorized to travel individually. Accused failed to travel at designated time. ***Held:*** Accused guilty of UA. The court stated that a servicemember who is "transferred incident to the relocation of a unit and who willfully absents himself incident to or in conjunction with the transfer is guilty of `missing movement.'"

4. *Ship or aircraft.* In the event that the accused is to travel individually (i.e. not with his "unit"), it will be necessary to show that the accused missed the movement of a ship or aircraft.

(a) *Military vesseal or aircraft.* Evidence that the accused was to travel aboard a military vessel or aircraft would certainly be sufficient to fall within this provision. In the event that it is a military mode of transportation, the accused need not be assigned or stationed with the ship or aircraft. It is sufficient if the accused is merely assigned as a passenger to that vessel or aircraft.

(b) *Military contracted vessel or aircraft.* A person who is required to travel individually aboard a military contracted vessel may also be guilty of missing movement. Military Sealift Command (MSC) ships, for example, are considered military ships. While travel by MSC ships is no longer common, a person required to travel individually aboard one who wrongfully misses its movement has violated Article 87.

(c) *Civilian aircraft.* If the servicemember is ordered to move individually on a commercial aircraft, he will only be guilty of missing movement if there is a nexus between missing the civilian flight and the "foreseeable disruption to naval operations caused by missing the particular flight." In that incident, the Court of Military Appeals dealt with an accused who was given technical arrest orders and an airline ticket back to his parent unit, but intentionally missed the flight. The court reasoned that while an unauthorized absence, SR Gibson's failure to board that particular aircraft did not cause a foreseeable disruption to naval operations justifying punishment for the more severe offense of missing movement.

Example of nexus issue:

The accused, a Corpsman, was ordered to Camp Lejeune, North Carolina, to join a unit deploying in support of in support of Operation Desert Shield. The accused intentionally missed his scheduled commercial fight. Given the important nature of the duty and that the Navy suffered from a critical shortage of Corpsman, the court found nexus between accused's absence and a foreseeable disruption to naval operations.

CR 20.10.4. ***Element 2.***

1. *Generally.* In order to be found guilty of a missing movement offense, the accused must have had ***actual*** knowledge that the movement was going to occur. MCM, pt. IV, §

11c(5). The knowledge need not be of the exact hour or date of the scheduled movement. Instead, it is sufficient if the accused is aware of the approximate date of the movement.

2. Whether through circumstantial or direct evidence, it must be proven that the accused had actually been informed of the prospective movement. Evidence that the accused had an "opportunity to know" of the movement is insufficient.

3. *Examples of evidence which would be sufficient are:*

(a) Testimony that the accused was personally informed or present at quarters when the word was passed;

(b) evidence that the scheduled movement was published in the plan of the day and had been brought to the attention of the accused; or

(c) evidence of personal actions on the part of the accused which are apparently in response to knowledge of the scheduled movement

CR 20.10.5. *Element 3*.

In proving that the accused missed the movement, the government must address three issues. These issues are:

1. That the "movement" was a significant change of location;

2. that the "movement" actually did occur; and

3. that the accused actually missed the movement.

(a) The government must first prove that the "movement" was a significant change of location. "Movement," as used in Article 87, is a term of art, and failure of the military judge to define it in his instructions to the court is error. "Movement" contemplates a major transfer of a ship, aircraft, or unit involving a substantial distance and period of time. There are no specific times and distances which would make one movement more significant than another. Instead, a determination of whether a movement is substantial is a question to be determined by reviewing the duration, distance, and overall mission of the change of location.

(b) Second, the government must prove that the "movement" actually did occur. If no movement took place, there is nothing to miss and no Article 87 violation. If the scheduled movement is canceled, the offense of missing movement is not committed, regardless of the accused's purpose and absence at the scheduled time.

(c) Third, the government would need to present evidence that the accused actually missed the movement. The fact that the ship was to depart at some particular time—and the accused was absent from his unit at that time—will not be sufficient to prove a missing movement offense. If the ship departs late and, due to the late departure, the accused, though late, arrived in time to depart with the ship, there would be no crime. A guilty plea to another specification alleging a UA covering the same period of time as alleged in a missing movement specification cannot be used to prove that the accused missed the movement. Independent evidence must be introduced to prove that he missed the movement.

CR 20.10.6. *Element 4*.

1. *That the accused missed movement through design.* Design means on purpose, intentionally, or according to plan and not merely carelessness or accident. "Design" implies premeditation and constitutes "specific intent."

(a) As in most cases involving specific intent (except where there is a statement by the accused that he intended to miss the movement), the government will have to

prove the specific intent to miss the movement by circumstantial evidence; that is, by proof of facts from which an inference of the specific intent to miss the movement may be drawn. Examples of the circumstantial evidence tending to show design to miss movement: Failure to get inoculations where the unit was scheduled for foreign duty; dislike of a particular duty station where the unit was scheduled for deployment; or removal of personal property from ship on eve of deployment.

2. *"That the accused missed the movement through neglect."* This Article 87 offense is intended to cover those situations where the accused does ***not*** consciously intend to avoid the scheduled movement, but through a negligent act or omission on his part fails to be present at the time of a scheduled movement.

(a) "Through neglect" means the omission by a person to take such measures as are appropriate under the circumstances to assure that he will be present with his ship, aircraft, or unit at the time of a scheduled movement, or the commission of some act without giving attention to its probable consequences in connection with the prospective movement.

(b) In the ordinary missing movement case, the simple act of being UA at the time the ship is to sail, the aircraft to depart, or the unit to move, meets the requirement of this element and, if knowledge is proven, makes out a prima facie case of missing movement through neglect.

CR 20.10.7. ***Multiple Movements***.

If the unit has arranged multiple movements in order to transfer the entire command, the accused may be convicted of multiple specifications of missing movement for missing each of the moves if he has been ordered to make each of the movements. In one instance the Navy-Marine Corps Court of Military Review reviewed a case where the accused was ordered to move first with the advanced party, then with the main party, and finally with the fly-on party. Each movement was intentionally missed, resulting in an order to move with the next group. The court allowed each missed movement to stand as a separate offense.

CR 20.10.8. ***Defenses***.

Since missing movement is an absence offense, the same affirmative defenses available to UA are available to this offense. Additionally, it is important to note that, if the accused is ordered to move, the order itself must be lawful. If the order is unlawful, the accused cannot be convicted of missing movement.

CR 20.10.9. ***Pleadings and Instructions***.

1. *Sample specification*:

Charge: Violation of the Uniform Code of Military Justice, Article 87.

Specification: In that Fireman Henry Z. Voodoo, U.S. Naval Reserve, USS ZOMBIE, on active duty, did, at Kingston, Jamaica, on or about 23 September 20CY, through design, miss the movement of USS ZOMBIE with which he was required in the course of duty to move. (Note: Substitute "neglect" for "design" when appropriate.)

CR 20.11. ***REFERENCES TO CONSULT.***

CR 20.11.1. ***Navy Unauthorized Absences. MILPERSMAN, Sample 10-Day Letter And Sample DD-553***

CR 20.11.2. ***Marine Corps Unauthorized Absences.***

MCO P5800.16A, *Marine Corps Manual for Legal Administration* (LEGADMINMAN); MCO P1080.39B (PRIM); MCO P4050.38C, *Marine Corps Personal Effects and Baggage Manual*; MCO P1070.12K, *Marine Corps Individual Records and Administration Manual* (IRAM)

MILPERSMAN 1600-010

DESERTERS

Responsible Office	NAVPERSCOM (PERS-68)	Phone:	DSN COM FAX	882-4451 (901) 874-4451 882-2626

1. Policy

a. A member may be declared a deserter

(1) immediately, if the facts and circumstances of the member's absence, without regard to the length, indicate the member committed the offense of desertion, as defined in Article 85 of the Uniform Code of Military Justice (UCMJ); or

(2) if the member has been absent without authority for 30 consecutive days; or

(3) immediately, if member is absent without authority, without regard to length of absence, and has gone to, or shown intention of going to any foreign country, or remains in any foreign country and requests or accepts any type of asylum or residence from that country or its governmental agencies.

b. The member's parent command is responsible for all documentation throughout the deserter process. If a member has been transferred, the next gaining command is considered the parent command.

c. Members are considered to have returned to military control when they

(1) surrender to military authorities;

(2) are delivered to military authorities;

(3) are apprehended by military authorities; or

(4) have died. A member will continue to be listed as a deserter until Navy Personnel Command (NAVPERSCOM) (PERS-68) is notified of the member's death by certificate. If the date of death precedes the date of declaration of desertion, the parent command is responsible for determining whether removal of the

status of deserter (or unauthorized absence) (UA) is appropriate.

d. Termination of UA is a legal term for the purpose of criminal aspects, and will form the basis of a later charge and specification per the UCMJ. Termination of UA occurs when

(1) a member surrenders to military authorities,

(2) is apprehended by military authorities,

(3) is apprehended by civil authorities on behalf of the military authorities solely on the basis of the member's absence or desertion from the military, or

(4) is made available by civil authorities after an arrest for a civil offense.

2. **This Section Covers.** This section covers the following topics:

Topic	See MPM
Apprehension of Absentees and Deserters	1600-020
Acceptance and Disposition of Returned Deserters	1600-030
Procedures for Commands to Which Enlisted Absentees are Attached	1600-040
Procedures When an Enlisted Absentee Returns to Naval Jurisdiction	1600-050
Declaration of Desertion	1600-060
Declaration of Return from Desertion	1600-070
When a Deserter Surrenders/is Delivered to a Naval Hospital	1600-080
Removal of Marks of Desertion	1600-090
Lost Time	1600-100
Assignment to Navy Correctional Units (CCU)	1600-110

MILPERSMAN 1600-020

APPREHENSION OF ABSENTEES AND DESERTERS

Responsible Office	NAVPERSCOM (PERS-68)	Phone:	DSN COM FAX	882-4451 (901) 874-4451 882-2626

References	Uniform Code of Military Justice (UCMJ) Manual for Courts-Martial (MCM)

1. **Policy**

a. Responsibility for coordinating apprehension and return of unauthorized absentees (UA) rests normally with member's commanding officer (CO). Units may request assistance directly from:

Navy Absentee Collection and Information Center (NACIC)
2834 Greenbay Road
North Chicago, IL 60064-3094
1-800-423-7633

b. Responsibility for accurate declaration of Navy deserters rests primarily with member's CO. NACIC is responsible for coordinating apprehension and return of Navy deserters from civil law enforcement authorities.

NOTE: No Navy activity will cause apprehension of, collect, transport, or facilitate release from civil authorities of a Navy deserter unless authorized by NACIC.

2. **NACIC.** Managed by Navy Personnel Command (NAVPERSCOM) (PERS-68), NACIC operates on a 24-hour a day basis. Responsibilities include control, accounting, and dissemination of information concerning members classified as deserters as well as providing timely and complete deserter information to civil law enforcement agencies, and initiating return of deserters apprehended by civil authorities. NACIC is the only entry point of warrants for desertion into National Crime Information Center, Wanted Persons File.

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3. **Rules for Apprehension**

a. Naval personnel will not normally apprehend suspected absentees and deserters outside confines of military installations.

b. Members of Armed Forces may only apprehend absentees and deserters under circumstances prescribed by UCMJ, article 7(b); and MCM, RCM 302(b).

c. Any civilian officer having authority to apprehend offenders under laws of United States; or of a state, territory, commonwealth, or possession; or District of Columbia is authorized to apprehend deserters from Armed Forces and deliver them to custody of those forces. This authority is derived from UCMJ, article 8; and MCM, RCM 302(b).

d. United States authorities may apprehend absentees and deserters in foreign countries only when authorized by an international agreement with local authorities, or when such apprehension is within purview of an existing international agreement. In the latter case, possible international implications and adverse foreign reactions must be given careful consideration. Outside of jurisdiction of United States, major commands will take such initial actions as the local situation may warrant, within primacy of international agreements, to secure cooperation in apprehending absentees and deserters.

3. **Command Actions**. Commands are responsible for monitoring a member's status while confined by civil authorities or hospitalized. Absentees will not be declared deserters when circumstances surrounding absence are beyond their control, such as

a. civil arrest and confinement,

b. hospitalization, or

c. other unusual circumstances determined to be unintentional.

4. **Military Attachés or Mission Chiefs**. Military attachés or mission chiefs in foreign countries will not accept surrender of a deserter or absentee and return them to military control, unless United States is directly responsible for presence of

that member in the country where assistance is requested. Normally, such deserters and absentees will be advised to report at their own expense to a proper United States military installation within United States or overseas. Unless they are citizens of the country in which assistance is requested, absentees and deserters will be reported to authorities of such foreign countries with a view towards deportation. If member departs the foreign country or is deported, the military attaché or mission chief will make arrangements, if possible, when such departure is known, to have member taken into custody upon arrival within a territory where United States military officers have authority to apprehend.

MILPERSMAN 1600-030

ACCEPTANCE AND DISPOSITION OF RETURNED DESERTERS

Responsible Office	NAVPERSCOM (PERS-68)	Phone:	DSN COM FAX	882-4451 (901) 874-4451 882-2626

1. **Policy**. Any military installation or command, manned by active duty members, may receive absentees and deserters. Absentees/deserters should be subsequently transferred to the nearest installation of their branch of service which has the facilities to process absentees/deserters. Navy Absentee Collection and Information Center (NACIC) will direct the movement of apprehended Navy deserters.

2. **Procedures**

a. **Officers** will be returned to the command from which deserted, regardless of length of absence, unless otherwise directed by NACIC.

b. **Enlisted** personnel, **absent for 179 days or less**, will normally be returned to their original duty station from which they deserted; however,

(1) deserters absent from an overseas shore activity, unit homeported overseas, or deployed unit (absent from homeport for more than 90 days consecutively), who return to military control within the 48 contiguous United States, Puerto Rico, Alaska, or Hawaii, will be transferred to the Navy processing unit closest to the point of apprehension/surrender.

(2) deserters absent from an overseas shore activity, unit homeported overseas, or deployed unit, who return to military control in an overseas area other than where the parent command is located, contact NACIC for guidance.

(3) deserters absent from an overseas shore activity or unit homeported overseas, absent for 179 days or less, who return to military control in the overseas area where the parent command is located, will normally be returned to their parent command for disciplinary processing.

(4) deserters absent 179 days or less, assigned to an at-sea ship or unit not deployed, will be returned to Transient Personnel Unit (TPU) at homeport of unit for further transfer to the unit upon return to port.

(5) deserters absent 179 days or less, assigned to an at-sea submarine not deployed, will be returned to the submarine's parent squadron/group or the TPU at the submarine's homeport.

(6) deserters **absent for 180 days or more** will be returned to the Navy processing unit closest to the point of apprehension/surrender. Navy processing activities for the purpose of this article are

Transient Personnel Unit, Puget Sound, Silverdale, WA;
Transient Personnel Unit, Jacksonville, FL;
Transient Personnel Unit, Great Lakes, IL;
Transient Personnel Unit, Norfolk, VA;
Transient Personnel Unit, San Diego, CA; and
Transient Personnel Unit, Pearl Harbor, HI.

c. When a member fails to return to a command after being issued Technical Arrest Orders (TAO) by NACIC,

(1) the **receiving command** will,

(a) within 48 hours after a member's failure to return via TAO, notify NACIC via naval message of the member's status.

(b) forward member's service and health records to NACIC via registered mail if they have them.

(2) **NACIC** will,

(a) following receipt of the naval message, roll the member's UIC to 41104 (BUPERS Deserter Account).

(b) initiate and transmit a Deserter Declaration message, complete DD 553 (Rev. 5-04), Deserter/Absentee Wanted by the Armed Forces (signed by the OIC/AOIC), and enter a new arrest warrant into the National Crime Information Center (NCIC) system.

(c) escort members assigned to UIC 41104 who are subsequently apprehended to the nearest TPU, regardless of the length of absence/desertion.

NOTE: In the event a member successfully returns via TAO, the respective command shall notify NACIC of such within 48 hours via naval message. NACIC must be in receipt of this message before transmitting a Return to Military Control (RMC) message.

d. Waivers of the above policy may be authorized if substantial extenuating circumstances exist. If a deserter cannot be returned to the parent command within 30 days from their date of return (excluding hospitalization), notify NACIC, info Navy Personnel Command (NAVPERSCOM) (PERS-68), requesting a waiver of this policy. Waiver request shall be by message, info the parent command and their immediate superior in command.

MILPERSMAN 1600-040

PROCEDURES FOR COMMANDS TO WHICH ENLISTED ABSENTEES ARE ATTACHED

Responsible Office	NAVPERSCOM (PERS-68)	Phone:	DSN COM FAX	882-4451 (901) 874-4451 882-2626

References	U.S. Navy Regulations DFAS-DJMS Procedures Training Guide (DFAS PTG) NAVSO P-3069, Source Data System Procedures Manual (SDSPROMAN)

1. **Procedures upon Initial Absence**

a. Take the following actions:

(1) List member on the daily Absentee Report as prescribed by U.S. Navy Regulations. Ensure full identification data is recorded, as well as time and date of start of absence.

(2) Provide a copy of the daily Absentee Report to the disbursing officer or Personnel Support Activity Detachment (PERSUPP DET) servicing the command.

(3) Inspect the local living quarters for clues to member's whereabouts.

(4) Question cohorts about possible whereabouts.

(5) Inquire member's local next-of-kin or friends about possible whereabouts.

(6) Check with local disbursing officer/PERSUPP DET for member's requested distribution of funds; inquire of that institution as to recent, large withdrawal of funds.

(7) Inquire of local hospitals (military and civilian).

(8) Inquire of local law enforcement agencies (military and civilian).

(9) Inquire of local transportation management office about member acquiring recent long-distance transportation arrangements.

(10) Inquire of local religious and counseling services as to recent visits and the member's possible over-powering concerns which might have caused or contributed to the absence.

b. If member's whereabouts remain unknown and foul play is suspected, strong consideration should be given to request the assistance of professional criminal investigative agencies. This is of special importance at overseas locations.

c. If circumstances indicate the person does not intend to return, declare the member a deserter (manifest intent) per this article.

d. In foreign ports where the aid of civil authorities is required, the CO will furnish a copy of the DD 553 (Rev. 5-04), Deserter/Absentee Wanted by the Armed Forces, to the nearest consulate of the United States.

e. If UA is less than 24 hours, make a NAVPERS 1070/613 (Rev. 10/81), Administrative Remarks entry to the service record with the exact hours and date, both beginning and ending, and circumstances of UA.

f. If absent over 24 hours, prepare and distribute NAVPERS 1070/606 (Rev. 10-02), Record of Unauthorized Absence, per DFAS PTG or NAVSO P-3069.

2. **Procedures on the 10th Day of Absence.** Take the following actions:

a. Disbursing office will stop all allotments.

b. Notify the member's next-of-kin via the following letter, with a copy to the Staff Chaplain at the appropriate Naval Reserve Readiness Command within the geographical location of the member's next of kin addressee:

"I regret the necessity to inform you that your (son/daughter/husband//etc.), (insert rate and full name), who enlisted in the Navy on (date) and was attached to (parent command), has been on unauthorized absence since (date). Should you know of the member's whereabouts, please urge to surrender to the nearest naval or other military activity immediately. The gravity of this offense increases with each day of absence. At this time all pay and allowances, including allotments, have been suspended pending their return to Navy jurisdiction. Should member remain absent for 30 days, we will be required to declare member a deserter and information will be provided to the Federal Bureau of Investigation (FBI), National Crime Information Center Wanted Persons File, which is available to all Federal, state, and local law enforcement agencies. A Navy Reserve Chaplain living near you is available for counsel in resolving this serious problem. Communication with a chaplain in this situation is considered confidential. If you desire to confer with a Navy Chaplain regarding this unauthorized absence, you may contact: Staff Chaplain, Naval Reserve Readiness Command, (address and telephone)."

3. **Procedures when a Member Fails to Report on Transfer Orders**

a. Take the following action:

(1) Contact the member's previous command to verify member's status and ensure absence is not a result of modification or cancellation of orders.

(2) Make a "Failed to Report" diary entry, as applicable.

(3) Prepare NAVPERS 1070/613 from information contained on the advance copy of transfer orders or the command's EDVR, showing:

b. "(date) Issued orders by (name of transferring command) to report to (prospective command) not later than (hour and date). Failed to report per such orders and is on unauthorized absences from that time and date."

c. Open a skeleton service record, and file the original NAVPERS 1070/613 and all other available documents. Request

duplicate record from Navy Personnel Command (NAVPERSCOM) (PERS-324).

d. Prepare and distribute a NAVPERS 1070/606.

4. **Additional Procedures When Member Misses Movement**. Make the following NAVPERS 1070/613 entry:

"(date): Missed sailing of this vessel from (place of sailing) on (date), enroute to (destination). Member (had/did not have) knowledge of the scheduled time for movement, and (had/did not have) knowledge of the ship's destination. Movement of this vessel (was/was not considered substantial - i.e., not merely a shift of berths in homeport, etc.)."

NOTE: If member misses movement from a foreign port, furnish the nearest U.S. consul a report containing information regarding the disposition to be made of any absentee should the member be apprehended or seek consular aid after the unit's departure.

MILPERSMAN 1600-050

PROCEDURES WHEN AN ENLISTED ABSENTEE RETURNS TO NAVAL JURISDICTION

Responsible Office	NAVPERSCOM (PERS-68)	Phone:	DSN COM FAX	882-4451 (901) 874-4451 882-2626

References	Uniform Code of Military Justice (UCMJ)

1. **Procedures when Member Returns to Parent Command**. Take the following actions:

a. If absence was less than 24 hours, make NAVPERS 1070/613 (Rev. 10-81), Administrative Remarks, entry started per MILPERSMAN 1600-040.

b. If absence was greater than 24 hours, prepare and distribute NAVPERS 1070/606 (Rev. 10-02), Record of Unauthorized Absences, started per MILPERSMAN 1600-040.

c. If member returned after 10 days, notify the next of kin of member's return, with a copy of the letter to the Naval Reserve Readiness Command originally notified per MILPERSMAN 1600-040.

d. Initiate appropriate disciplinary and administrative separation action as appropriate/desired.

2. **Procedures when Member Returns to a Command other than Parent Command**. Take the following actions:

a. Communicate immediately with the member's parent command, obtain confirmation of member's status.

b. Verify with member date and hour absence began, complying with the UCMJ, Article 31(b) (reading members their rights before questioning).

c. Coordinate transportation for member to return to their parent command. Since there are no means to temporarily house members in this status, except in military facilities, it is

essential that the most direct and immediate transportation be secured. Passenger Reservation Requests (PRRs), if used, must state that member is traveling under Technical Arrest Orders (TAOs) in a disciplinary status, or failed to report in compliance with funded official change of station, or temporary additional duty (TEMADD) orders.

d. For surrenderee traveling in connection with funded permanent change of station (PCS)/temporary duty (TEMDU)/TEMADD orders, endorse the orders using NAVCOMPT 3067-6C (Rev. 9-76), Detaching (Departing) Endorsements to Orders, and type in the remarks block:

"I understand that all expenses and travel costs in connection with this transfer which are in excess of the original costs of my (PCS/TEMDU/TEMADD) orders will be charged against my pay record."

e. If member is not in possession of original copy of funded orders, then TAO need to be issued and a NAVPERS 1070/613 entry made indicating member is not in possession of funding (PCS/TEMDU/TEMADD) orders.

f. If surrenderee is not traveling under funded orders, issue TAOs using NAVCOMPT 536 Rev. 12-79), Standard Transfer Orders. Clearly indicate on the orders "TRANSFERRED IN A DISCIPLINARY STATUS" and include the following statement:

"(DATE) I acknowledge receipt of these orders. I have read and understand that failure to comply with these orders render me liable to charges of further unauthorized absence, disobedience of orders, and/or manifest desertion as the circumstances warrant. I also understand that all expenses and travel costs in connection with this transfer will be charged against my pay record." (Signed by authorized official (rate/rank/name)).

g. Prepare a NAVPERS 1070/613 entry as follows:

"I understand that all expenses and travel costs in connection with this transfer which are in excess of the original costs of my (PCS/TEMDU/TEMADD) orders will be charged against my pay record. Written Technical Arrest Orders were issued and delivered this date transferring (rate/rank/name) to (name of parent command) in a disciplinary status in his/her own custody to report no later than (hour and date). I acknowledge receipt of such orders and acknowledge this statement being entered in my service record."

_____
(Signature of member and date)

Witnessed:

h. Provide the original TAO, Pay Adjustment Authorization (PAA), and NAVPERS 1070/613 to the member and forward a signed copy of each to the gaining command.

i. Ensure the absentee's appearance does not reflect discredit to the Naval Service. Utilization of a PAA for haircut and clothes may be required.

MILPERSMAN 1600-060

DECLARATION OF DESERTION

Responsible Office	NAVPERSCOM (PERS-68)	Phone:	DSN COM FAX	882-4451 (901) 874-4451 882-2626

References	(a) DODD 1325.2 of 2 Aug 2004 (b) Uniform Code of Military Justice (UCMJ) (c) NAVSUP Publication 485, Naval Supply Procedures, Volume 1, Afloat Supply (d) NAVSUP Publication 490, Transportation of Personal Property, Revision 3, Para. N6005

1. **Policy**. Date and time of desertion always start from the initial unauthorized absence (UA). If UA over leave or liberty, UA/desertion commences at the time leave or liberty expired.

2. **Procedures**. When conditions outlined in MILPERSMAN 1600-010 are met,

a. prepare DD 553 (Rev. 5-04), Deserter/Absentee Wanted by the Armed Forces per reference (a).

NOTE: Write "unknown" in the fields for which information is not available and leave the distribution block of DD 553 blank.

b. declare the member a deserter by transmitting the declaration of desertion message using the format supplied below. Note in the remarks section if this is a case of desertion under aggravated circumstances by meeting any of the following:

(1) As detailed in enclosure (1) of reference (a).

(2) The individual is suspected of other reference (b) violations such as articles 80, 81, 94, 95, 133, or 134.

(3) The individual is in the rank of E-7 or above.

c. file a copy in the member's service record.

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NOTE: If the command does not possess member's service record, obtain a duplicate from Navy Personnel Command (NAVPERSCOM), Records Support Branch (PERS-312).

d. forward DD 553 to Navy Absentee Collection and Information Center (NACIC) either by mail to the address listed below or as an E-Mail attachment to nacic grlk@navy.mil. Include the following:

(1) A copy of OPNAV 5527/1 (Rev. 6-98), Incident Report, if applicable;

(2) A copy of member's NAVPERS 1070/602 (Rev. 7-72), Dependency Application/Record of Emergency Data;

(3) Enlistment contract;

(4) Photograph of the member (if available); and

(5) A copy of latest leave papers, or last known address.

NOTE: The DD 553 and declaration of desertion message are required to enter the member into the FBI's National Crime Information Computer (NCIC) Wanted Persons File. NACIC is the only activity authorized to enter desertion warrants into the NCIC.

e. if member deserted from a foreign port, forward a copy of DD 553 to the nearest United States (U.S.) consul.

f. if additional information is received, forward it to NACIC. Mailing address:

Officer-in-Charge
Navy Absentee Collection and Information Center
2834 Green Bay Road
North Chicago, IL 60064-3094

3. **Critical Precaution**

a. Desertion cases are complicated because, in most cases, returnees are separated from their field service record. Service records are always required to adjust pay accounts and for evidence to sustain desertion/UA charges. Incorrect service record processing and documentation, including courts-martial

charge sheets, may result in unnecessary delays in bringing offenders to trial and possibly losing a case at a court-martial. Ensure complete, timely, and accurate submission of all documentation.

b. Commands are responsible for the accurate completion and submission of DD 553, declaration of desertion message, and completing appropriate service record entries prior to forwarding records and documents to NACIC. Records received by NACIC that are improperly closed out, or improperly completed, or with inaccurate forms, will be returned to the command for correction and not included in NAVPERSCOM deserter unit identification code (UIC) (41104).

4. **Disposition of Personal Effects and Service Records**

a. **Service Records:** Retain a deserter's record on board for 120 days. On the **121st** day forward all records via registered mail to:

Officer in Charge
Navy Absentee Collection and Information Center
2834 Green Bay Road
North Chicago, IL 60064-3094

Mark outside envelope "**DESERTER - DO NOT OPEN IN MAIL ROOM.**" Ensure the following documents are inserted in the record and are completed accurately to prevent return to the command for reprocessing:

(1) NAVPERS 1070/606 (Rev. 10-02), Record of Unauthorized Absence

(2) NAVPERS 1070/613 (Rev. 10-81), Administrative Remarks

(3) Copy of NAVSUP 29 (Rev. 5-78), Inventory of Personal Effects Lost - Abandoned - Unclaimed

(4) Copy of DD 553 (Rev. 5-04), Deserter/Absentee Wanted by the Armed Forces

(5) Copy of declaration of desertion message

b. Decommissioning units will send records to NACIC, with annotation on NAVPERS 1070/613 included in the records, citing

when the unit is to be decommissioned. Contact NACIC within 60 days of decommissioning date to arrange for deletion of these members from the command's Enlisted Distribution and Verification Report (EDVR) (accounting category code (ACC) 109 - Deserter).

c. **Overseas shore activities, units home-ported overseas, and deployed units (absent from homeport for more than 90 days consecutively) may forward to NACIC all applicable records and documents after member is declared a deserter and absent 31 days or more. Annotate in the remarks section of the declaration message that the command meets the requirements of this paragraph and wants (or does not want) the deserter transferred to the deserter UIC (41104) as soon as possible.**

d. **Personal Effects:** Per reference (c), send personal effects to:

Officer in Charge
Cheatham Annex
Fleet and Industrial Supply Center Norfolk
108 Sanda Avenue
Williamsburg, VA 23187-8792

e. **On Board Ship Automatic Teller Machines (ATM):** Any monies in a deserter's ATM account on board a ship will be handled per reference (d).

5. **Action by NAVPERSCOM**

a. Upon receipt of the declaration of desertion message, NACIC will change the member's on board personnel accounting status to Deserter ACC 109. If member returns to military control within 180 days of the UA date, NACIC will change the member's ACC to the appropriate status. Allow 60 days for this transaction to reflect on command's EDVR. When a member is absent 181 days or more, and NACIC is in receipt of all records, NACIC will then transfer member to NAVPERSCOM Deserter UIC (41104). In the case of deployed units and commands overseas, NACIC will transfer member to NAVPERSCOM Deserter UIC (41104) upon receipt of all records.

b. Replacements will be provided according to priorities in the requisition system and availability of assets.

6. **Message Format**. Use the following formatted message:

```
FROM:  (Originating activity)
TO:    NAVPERSCOM DET NAVABSCOLLINFOCEN GREAT LAKES//.001//

INFO:  COMNAVPERSCOM MILLINGTON TN//PERS-68//
               EPMAC NEW ORLEANS LA//JJJ//
               DFAS CENTER CLEVELAND OH//JJJ//
               FISC CHEATAM ANNEX WILLIAMSBURG VA //JJJ//
BT
UNCLAS//01626//
SUBJ:  REPORT CONTROL SYMBOL BUPERS 1600-3, REPORT OF DECLARATION OF
DESERTION (PERS-68)
MSGID/GENADMIN/(Originator)//
POC//Name/Rate/Rank/Telephone//
RMKS/1.  (Member's rate, full name, branch/class, SSN.)
2.  DECL DESERTER (date), HAVING BEEN ON UNAUTHORIZED ABSENCE SINCE
(unauthorized absence time and date) FROM (activity name and UIC).
3.  MEMBER IS CURRENTLY CARRIED IN ACCOUNTING CATEGORY CODE (ACC) ON
COMMAND'S EDVR.
4.  IDENTIFYING INFORMATION: (Items A-H required items.)
    A.  HEIGHT (in inches):
    B.  WEIGHT:
    C.  COLOR HAIR/COLOR EYES:
    D.  SEX/RACE:
    E.  CITIZENSHIP (U.S., immigrant, alien, non-immigrant,
alien/Filipino, etc.):
    F.  VISIBLE SCARS, MARKS, AND TATTOOS (verify by medical record):
    G.  ALIAS(ES) (if known/suspected):
    H.  DATE AND PLACE OF BIRTH:
    I.  HOME OF RECORD:
    J.  DRIVER'S LICENSE NUMBER, STATE OF ISSUE:
    K.  EAOS:
5.  DD 553 MAILED TO NACIC.  (If not, expected date of mailing.)
6.  MEMBER'S CURRENT SECURITY CLEARANCE:  (Level/special access
program(s).)  Info COMNAVINTCOM/COMNAVSECGRU as appropriate.
7.  NEXT OF KIN (NOK) AND READINESS COMMAND CHAPLAIN HAVE BEEN
NOTIFIED.  (If not, action being taken to notify them.)
8.  POV DATA (If known, license plate number, state of plate, year,
make and model, color, and other identifying information.)
9.  REMARKS:  (Suspected to be armed and dangerous/suicidal
tendencies, has mental disorder, fled to avoid trial (include
charges and any amplifying data), etc., and include any details.
Provide any information that could assist law enforcement in
attempting to locate and/or apprehend the member, including
information such as NOK names, addresses, phone numbers, etc.)//BT
```

NOTE: Assigned REPORT CONTROL SYMBOL BUPERS 1600-3, REPORT OF DECLARATION OF DESERTION.

October 2005 CD

MILPERSMAN 1600-070

DECLARATION OF RETURN FROM DESERTION

Responsible Office	NAVPERSCOM (PERS-68)	Phone:	DSN COM FAX	882-4451 (901) 874-4451 882-2626

References	18 U.S.C. 922 DODD 1325.2 of 2 Aug 2004

1. **Procedures**

a. MILPERSMAN 1600-050 provides actions to be taken upon return of a deserter to military control. The activity to which a member returns will submit **DD 616 (Rev. 12-99), Report of Return of Absentee** to all recipients of **DD 553 (Rev. 5-04), Deserter/Absentee Wanted by the Armed Forces** as detailed in MILPERSMAN 1600-060, and the following message to report the member's return to military control. This message must be submitted even if the deserter has been (or will be) discharged.

```
FROM:  (Originating activity)
TO:    COMNAVPERSCOM DET NAVABSCOLLINFOCEN
       GREAT LAKES IL//001//
       (Member's parent command)
INFO:  COMNAVPERSCOM MILLINGTON TN//PERS-68//
       EPMAC NEW ORLEANS LA//JJJ//
       DFAS CENTER CLEVELAND OH//JJJ//
       FISC CHEATHAM ANNEX WILLIAMSBURG VA//JJJ//
BT
UNCLAS//N01626//
SUBJ:  REPORT CONTROL SYMBOL BUPERS 1600-2, RETURN OF DESERTER
NAVPERSCOM (PERS-68)//
MSGID/GENADMIN/(Originator)//
POC/Name/Rate or Rank/Telephone//
RMKS/1.  (Member's rate, full name, branch, SSN)
2.  DESERTER FROM (command) SINCE (time and date).
3.  (Apprehended/Surrender) BY/TO (military/civilian
authorities) AT (time and date) AT (location).
4.  RETURNED MIL CONTROL (time and date) AT (location).
5.  RETAINED ON BOARD FOR (disciplinary action/disposition/
```

pending return to parent command/or transfer to (activity)).
6. NOK/READINESS COMMAND STAFF CHAPLAIN HAVE BEEN NOTIFIED OF MEMBER'S RETURN TO MILITARY CONTROL. (If not, expected date of notification or intentions, e.g., parent command to notify.)
7. REMARKS: (as appropriate)//
BT

b. The deserter's parent command to which they are assigned for disciplinary action or disposition is responsible for completing NAVPERS 1070/606 (Rev. 10-02), Record of Unauthorized Absence.

c. In addition to those actions listed in MILPERSMAN 1600-050:

(1) **Surrenderees.** Members who surrender will not be placed in civilian jails. Commander, Navy Personnel Command (COMNAVPERSCOM) (PERS-68) or Officer in Charge, Navy Absentee Collection and Information Center (NACIC) may grant an exception in unusual circumstances.

(2) **Apprehendees**

(a) Commands will not pick up or escort deserters unless authorized by NACIC. NACIC will determine disposition and transport/coordinate with the nearest shore patrol if an escorted local move is required. Do not accept deserters from civilian authorities until approval is obtained from NACIC.

(b) If member is being held by civil authorities for civil charges, NACIC must be advised. NACIC will issue a military detainer and arrange escorts upon their return to military control. If the deserter is convicted and sentenced to confinement, NACIC will assign responsibility of the member's case to an area coordinator for review and appropriate action.

d. Per 18 U.S.C. 922 (Brady Bill), Navy is required to notify the Federal Bureau of Investigation (FBI) of the final disposition of all military deserters. In support of this, all Navy activities will forward to NACIC the deserter's final disposition via message within 60 days of the deserter's return. Describe venue (non-judicial punishment or type of court martial), conviction status, list of offenses, list of punishment awarded, charges dismissed, discharge, and characterization. Request for extensions to exceed the 60 days

may be made via message to COMNAVPERSCOM DET NAVABSCOLLINFOCEN GREAT LAKES IL//001//.

2. Information

a. If a member was declared erroneously, notify NACIC and Defense Finance and Accounting Service (DFAS) Cleveland by message **immediately** to prevent undue financial hardship, and to prevent member from being entered, or to remove member from the FBI National Crime Information Center Wanted Persons File.

b. A declared deserter discharged in absentia, as authorized by COMNAVPERSCOM, is considered returned to military control for administrative purposes the day of discharge. The discharging activity must, however, prepare the Return to Military Control message to clear member from the deserter files. Indicate in the remarks section the authority used for discharge in absentia.

c. It is imperative when a declared deserter is discharged from Navy, placed on the Temporary Disability Retired List (TDRL), or starts Appellate Leave after physically returning to a command, a Return to Military Control Message; DD 214, Certificate of Release of Discharge from Active Duty; or other appropriate documentation reflecting the member's separation from service be transmitted to NACIC. Documentation is required in order to reflect the member accurately in the Enlisted Master File, remove the status of desertion, and clear the warrant for arrest from the National Crime Information Computer (NCIC).

MILPERSMAN 1600-080

WHEN A DESERTER SURRENDERS/IS DELIVERED TO A NAVAL HOSPITAL

Responsible Office	NAVPERSCOM (PERS-68)	Phone:	DSN COM FAX	882-4451 (901) 874-4451 882-2626

1. **Absentee UA from Naval Hospital while under Treatment**

a. When a member surrenders or returns to military control to a hospital where they were assigned for treatment,

(1) if member was under TEMADD orders, return them to their permanent duty station for disciplinary action upon completion of treatment.

(2) if member was under TEMDU TREATMENT or TEMDU orders, disciplinary action will be taken by the commanding officer (CO) of the hospital; however, if disciplinary action warrants courts-martial action, the CO may have the member transferred to the nearest disciplinary activity for court-martial action and further disposition.

b. When a member surrenders or returns to military control to a hospital after being absent from another activity,

(1) if member requires medical treatment that results in a period of hospitalization of 30 days or more, comply with the procedures set forth above.

(2) if member required no medical treatment, or medical treatment of less than 30 days, the member will be returned to their permanent duty station for disciplinary action and/or disposition upon completion of treatment, if applicable.

NOTE: The CO of the naval hospital conducts preliminary inquiry or pre-trial investigation on return of deserters or absentees transferred for disciplinary action but with extended hospitalization, provided such action does not interfere with medical treatment.

October 2005 CD

MILPERSMAN 1600-090

REMOVAL OF MARKS OF DESERTION

Responsible Office	NAVPERSCOM (PERS-68)	Phone:	DSN COM FAX	882-4451 (901) 874-4451 882-2626

1. **Procedures**

a. A mark of desertion entry will be removed as an erroneous entry when member's records are closed for desertion, but member:

(1) was subsequently tried and convicted or acquitted of Unauthorized Absence (UA); or

(2) subsequently was charged with UA and a request for discharge for the good of the service under Other Than Honorable (OTH) conditions has been approved.

b. A mark of desertion will not be removed when a member has been charged with desertion, and when member's request for discharge for the good of the service under OTH condition has been approved by the separation authority.

c. All other cases, including the following, will be sent to Navy Absentee Collection and Information Center (NACIC) for final disposition:

(1) When there is a determination by a board of medical survey that the member was mentally incompetent at the time of absences; or

(2) when the records show that the member was under military control at the time the desertion entry was made.

d. The mark will be removed by submission of NAVPERS 1070/607 (Rev. 12-75), Court Memorandum. The mark must be removed as soon as practical after trial and promulgation of sentence. Action taken will be reported to NACIC via letter or message, with a copy to the command's disbursing office that holds member's pay records.

October 2005 CD

MILPERSMAN 1600-100

LOST TIME

Responsible Office	NAVPERSCOM (PERS-06)	Phone:	DSN COM FAX	882-3164 (901) 874-3164 882-2615

Governing Directives	10 U.S.C. 972 DOD 7000.14-R, DOD Financial Management Regulations, Volume 7A, Military Pay Policy and Procedures Active Duty and Reserve Pay

1. **What is Lost Time**? The table below defines the different types of lost time.

LOST TIME due to...	IS DEFINED as periods of...
unauthorized absence (UA)	UA in excess of 24 hours that is not excused as unavoidable by the member's commanding officer per DOD 7000.14-R, volume 7A.
confinement by civil authorities or confinement by military authorities for civil authorities	confinement by civil authorities (foreign or domestic), or confinement by military authorities for civil authorities in excess of 24 consecutive hours that are not excused as unavoidable by the member's commanding officer. confinement by civil authorities (foreign or domestic) in excess of 24 consecutive hours for an offense which results in court-martial conviction that has been approved and upheld.
confinement by military authorities	military confinement in excess of 24 consecutive hours while awaiting action of higher authority or during trial by court-martial conviction and while serving sentence of a court-martial that has been approved and upheld.
sickness due to misconduct (SKMC)	hospitalization or incapacitation in excess of 24 consecutive hours due to injury, disease, or the intemperate use of drugs or alcohol which are found to be due to the member's own misconduct.

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2. **Rules About Lost Time**. Follow the below rules when determining lost time:

a. There must be an absence of more than 24 consecutive hours before any period can be considered as lost time.

b. The calendar day during which absence first occurs, regardless of the hour, is counted as a day of absence from duty. The calendar day of return, regardless of the hour, is counted as a day of duty. A calendar day begins at 0001 and ends at 2400.

c. When time is lost, normal expiration of enlisted dates must be extended by the number of days lost on a day-for-day basis. This applies to expiration of

(1) enlistment.

(2) extension of enlistment.

(3) active service.

(4) obligated service.

(5) current contract.

d. The requirement to make up lost time does not apply to Fleet Reservists, retired personnel, or members placed on appellate leave. While lost time will be added to the current enlistment to calculate the correct EAOS, such lost time does not preclude administrative separation or punitive discharge.

NOTE: Time a member spends on Appellate Leave is counted as active duty time for computing longevity. However, this time is not counted for pay purposes unless the member's Bad Conduct Discharge (BCD)/Dishonorable Discharge (DD) is subsequently dismissed or set-aside and the member is recalled to active duty, or recalled for the purpose of administrative separation processing by reason of Review Action (MILPERSMAN 1910-126).

e. Members transferring to the Fleet Reserve or retired list will merely have their lost time deducted from their final active service computation.

f. **Examples**:

```
    95 09 30 (Fleet Reserve Transfer Date)
  - 75 01 28 (commenced active duty)
    20 08 02 (total active duty)
           01 (plus 1 day when adding inclusive dates)
    20 08 03
  -    01 02 (minus lost time during career)
    20 07 01 (adjusted total active service)
```

g. When there is lost time, the member's Pay Entry Base Date (PEBD) and Active Duty Service Date (ADSD) must be adjusted. Refer to DOD 7000.14-R, volume 7A to determine how an absence effects pay and allowances.

h. If member is apprehended by civil authorities while in an authorized absence status (leave or liberty), and is subsequently confined by civil authorities pending trial, and his or her EAOS is imminent, the command may

(1) retain member in the Navy by reason of "In Hands of Civil Authorities (IHCA)" pending outcome of the civil matter and a final determination on lost time (if any), or

(2) process for administrative separation based on commission of a serious offense (provided the government has sufficient evidence to show by a preponderance of evidence that misconduct did occur).

i. Incarceration by civilian or military authorities suspends the running of the member's active service obligations (unless member is granted regular leave that has already been earned). While incarcerated, such time may be considered lost time, however, a final determination cannot be made until criminal charges are resolved. If convicted, the commanding officer (CO) may declare the time lost to not be excused; if acquitted, the CO may declare the time lost to be excused (entitled to back pay if applicable).

3. **Computing Lost Time**. Below are some examples of how to compute lost time.

IF...	THEN there is...
UA commenced 0800, 9 March, and ended 0800, 10 March (24 hrs)	no lost time since UA did not exceed 24 hours
UA commenced 0800, 9 March, and ended 0830, 10 March (24 hrs, 30 min)	1 day lost time - 9 March
UA commenced 2345, 9 March, and ended 0015, 11 March (24 hrs, 30 min)	2 days lost time, 9 and 10 March **NOTE**: First day of absence is a day of absence and the day of return is a day of duty.
confined by civil authorities while on liberty at 1700, 9 March, and was convicted by the civil authorities on 5 April and was released to military control on the same day	27 days lost time - 9 March to 4 April
confined by civil authorities while on liberty 1700, 9 March and was acquitted of all charges on 5 April and released to military control the same day	no lost time (member was acquitted) **NOTE:** Time is not charged as lost time because it is excused.
confined by civil authorities while in UA status (UA commenced 1 Mar), at 1400, 9 March and was acquitted of all charges on 15 March and released to military control the same day.	14 days lost time - 1-14 March **NOTE:** Member was UA when confined, all time is considered lost time even though the member was acquitted of the civil charge.

MILPERSMAN 1600-110

ASSIGNMENT TO NAVY CORRECTIONAL CUSTODY UNITS (CCU)

Responsible Office	NAVPERSCOM (PERS-68)	Phone:	DSN COM FAX	882-4689 (901) 874-4689 882-2626

References	SECNAVINST 1640.9B, Department of the Navy Corrections Manual SECNAVINST 1640.7D, Administering Correctional Custody, DON Corrections Manual OPNAVINST 1640.7A, Manual for the Operation of a Waterfront Brig/Correctional Custody Unit (CCU)

1. **Policy**. The correctional custody program is designed to provide a means of disposing of minor disciplinary infractions (normally Article 15 offenders). This program provides a maximum opportunity to effect a change in behavior, military bearing, attitude, and to return to the member's command as a productive Sailor. A member who is being processed for administrative separation is not awarded correctional custody.

2. **Authorized Correctional Custody Units (CCUs)**. The following is a list of authorized CCUs:

a. Jacksonville, FL PCF/CCU

b. Norfolk, VA Brig/CCU

c. Pensacola, FL PCF/CCU

d. Puget Sound Brig/CCU

e. Pearl Harbor Brig/CCU

f. Yokosuka, Japan PCF/CCU

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3. **How to Transfer a Member to a CCU.** Follow the steps below to transfer a member to a CCU.

Step	Action
1	Contact the desired CCU to determine • **space availability,** and • **required clothing items while in a CCU.**
2	Arrange and provide transportation. Because all assignments are temporary additional duty (TEMADD), all transportation costs will be incurred by the member's command.
3	Obtain certification of member's fitness for assignment to a CCU. Medical authority will document fitness on SF 600, Chronological Record of Medical Care.
4	Prepare TEMADD orders.
5	Ensure on the day of transfer, the member wears the proper uniform of the day and has a regulation haircut.
6	Transfer the member with the following items in the member's possession: • **TEMADD orders.** • **Copy of NAVPERS 1626/7 (Rev. 12-88), Report and Disposition of Offenses.** • **Service, medical, and dental records** (the pay record will be retained on board member's parent command). • **Copy of SF 600 (Rev. 6-97), Chronological Record of Medical Care** documenting fitness. • **Required clothing items** (civilian clothes are not authorized while in CCU). **NOTE:** If the member does not have required clothing items, the member shall be required to purchase the missing items using **DD 504 (Rev. 9-01), Request and Receipt for Health and Comfort Supplies.**

4. **Commanding Officer's (CO's) Responsibilities.** The CO shall:

a. visit the CCU during the member's assignment (if operations and command mission permit);

b. designate a command representative to make weekly visits to the member and attend pre-release orientation (if operations and command mission support. Unless operations are continuous

out of area from the location of the CCU, weekly visits are mandatory);

c. upon member's return, ensure the member is assimilated back into the command in a positive and productive manner.

FROM: (*Originating activity*)
TO: **COMNAVPERSCOM DET NAVABSCOLLINFOCEN GREAT LAKES IL//001//** (*Member's parent command*) [*if originating activity not parent command*]
INFO: **COMNAVPERSCOM MILLINGTON TN//PERS-84//**
EPMAC NEW ORLEANS LA//JJJ//
DFAS CENTER CLEVELAND OH//JJJ//
FISC CHEATHAM ANNEX WILLIAMSBURG VA//JJJ// [*if applicable*]

UNCLAS//N01626//
SUBJ: REPORT CONTROL SYMBOL PERS 1600-2, RETURN OF DESERTER NAVPERSCOM (PERS- 84)//
MSGID/GENADMIN/(*Originator*)**//**
POC//*Name*/*Rate*/*Rank*/*Telephone*//
RMKS/
1. (*Member's rate, full name, branch/class, SSN*)**.**
2. **DESERTER FROM** (*command*) **SINCE** (*time and date*)**.**
3. (*Apprehended/Surrendered*) /**BY/TO** (*military/civilian authorities*) **AT** (*time and date*) **AT** (*location*).
4. **RETURNED MIL CONTROL** (*time and date*) **AT** (*location*)**.**
5. **RETAINED ON BOARD FOR** (*disciplinary action/disposition/pending return to parent command/or transfer to (activity)*)**.**
6. **NOK/READINESS COMMAND STAFF CHAPLAIN HAVE BEEN NOTIFIED OF MEMBER'S RETURN TO MILITARY CONTROL.** (*If not, expected date of notification or intentions, e.g., parent command to notify*)
7. **REMARKS:** (*as appropriate*)//

b. The deserter's parent command to which they are assigned for disciplinary action or disposition is responsible for completing the NAVPERS 1070/606, Record of Unauthorized Absence.

c. In addition to those actions listed in MILPERSMAN 1600-050:

(1) Surrenderees. Members who surrender will not be placed in civilian jails. Commander, Navy Personnel Command (**COMNAVPERSCOM) (PERS-84) or Officer in charge, Navy Absentee Collection and Information Center) (NACIC)** may grant an exception in unusual circumstances.

(2) Apprehendees

(a) Commands will not pick up or escort deserters, unless authorized by NACIC. NACIC will determine disposition and transport/coordinate with the nearest base shore patrol if an escorted local move is required. Do not accept deserters from civilian authorities until approval is obtained from NACIC.

(b) If member is held by civil authorities for civil charges, NACIC must be advised. NACIC will issue a military detainer and arrange escorts upon their return to military control. If the deserter is convicted and sentenced to confinement, NACIC will assign responsibility of the member's case to an area coordinator for review and appropriate action.

(c) In accordance with 18 U.S.C. 922 (Brady Bill), Navy is required to notify the Federal Bureau of Investigation (FBI) of the final disposition of all military deserters. In support of this, all Navy activities will forward to NACIC the deserter's final disposition via message within 60 days of the deserter's return. Describe venue (non-judicial punishment or type of court-martial), conviction status, list of offenses, list of punishment awarded, charges dismissed, discharge, and characterization. Requests for extensions to exceed the 60 days may be made via message to COMNAVPERSCOM DET NAVABSCOLLINFOCEN GREAT LAKES IL//001//.

2. Information

a. If a member was declared erroneously, notify NACIC and Defense Finance and Accounting Service (DFAS) Cleveland by message immediately to prevent undue financial hardship, and to prevent member from being entered, or to remove member from FBI National Crime Information Center Wanted Persons File.

b. A declared deserter discharged in absentia, as authorized by COMNAVPERSCOM, is considered returned to military control for administrative purposes the day of discharge. The discharging activity must, however, prepare the Returned to Military Control message to clear member from the deserter files. Indicate in the remarks section the authority used for discharge in absentia.

c. It is imperative when a declared deserter is discharged from Navy, placed on the Temporary Disability Retired List (TDRL), or starts Appellate Leave after physically returning to a command, a Return to Military Control Message; DD 214, Certificate of Release of Discharge from Active Duty ; or other appropriate documentation reflecting the member's separation from Service be transmitted to NACIC. Documentation is required in order to reflect the member accurately in the Enlisted MasterFile, remove the status of desertion, and clear the warrant for arrest from the National Crime Information Computer (NCIC0.

ADMINISTRATIVE REMARKS
NAVPERS 1070/613
S/N 0106-LF-010-6991
SHIP OR STATION

USS NEVERSAIL (AS 00)

9 Jun CY: On unauthorized absence over liberty as of 0730, 8 June 20CY. Surrendered on board USS NEVERSAIL (AS 00) at 1100, 8 June 20CY. On unauthorized absence for about 3 hours, 30 minutes.

R.T. Little
R. T. LITTLE, LNC, USN, Legal Officer
By direction of the Commanding Officer

- -

9 Jun CY: Missed sailing of this vessel from Newport, Rhode Island, on 8 June 20CY en route shakedown cruise, Atlantic Ocean. YN3 Fred P. Jones, USN, was informed by his leading petty officer of the time and date of scheduled movement of the ship two days prior to the ship's getting underway and of the ship's destination.

R. T. Little
R. T. LITTLE, LNC, USN, Legal Officer
By direction of the Commanding Officer

DEPARTMENT OF THE NAVY
USS NEVERSAIL (AS00)
FPO AE 09577-1234

1610
Ser PU 00/001
June 17, 20CY

Mr. and Mrs. Ronald Jones
235 Long Street
Los Angeles, CA 14790-9999

Dear Mr. and Mrs. Jones:

I regret the necessity of informing you that your son, Yeoman Third Class Fred P. Jones, who enlisted in the Navy on June 24, 20CY$^{(-2)}$, and was attached to the USS NEVERSAIL (AS 00), has been on unauthorized absence since June 8, 20CY. Should you know of his whereabouts, please urge him to surrender to the nearest naval or other military activity immediately. The gravity of the offense increases with each day of absence. At this time all pay and allowances, including allotments, have been suspended pending return to Navy jurisdiction. Should he remain absent for 30 days, we will declare him a deserter. Information will be provided to the FBI National Crime Information Center Wanted Persons File, which is available to all Federal, state, and local law enforcement agencies.

A Navy Reserve chaplain living near you is available for counsel in resolving this serious problem. Communication with a chaplain in this situation is considered confidential. Therefore, a chaplain may be a valuable resource to assist you in determining your best course of action. If you desire to confer with a Navy chaplain regarding this unauthorized absence, you may contact: Staff Chaplain, Naval Reserve Readiness Command Region NINETEEN, 960 North Harbor Drive, San Diego, CA 92132-5108; telephone: (619) 532-1837.

Sincerely,

Tough S. Nails
TOUGH S. NAILS
Captain, U.S. Navy
Commanding Officer

Copy to:
Naval Reserve Readiness Command Region NINETEEN

(1) JONES, Ronald Mr. & Mrs.
235 Long Street, Los Angeles, CA 14790-9999

(2)

17. CERTIFICATION *(See footnotes on reverse.)*
The undersigned states: That he is a commissioned officer of the United States Navy *(Military Department)*, presently assigned as the Commanding Officer, USS NEVERSAIL (AS 00) *(from which the alleged deserter absented himself or herself)*, and in the performance of official duties imposed by Department of Defense Directive 1325.2 and SECNAVINST 1620.7

(Regulations of the Service concerned which implement DOD Directive 1325.2, e.g., Army Regulations 190-9 and 630-10), he~~/she~~ has conducted an investigation into the absentee status of YN3 Fred P. Jones, USN *(Name and rank of alleged deserter),* a member the United States Armed Forces serving on active duty with USS NEVERSAIL (AS 00)/U.S. Navy *(Unit and Service from which the alleged deserter absented himself or herself)* by questioning his unit cohorts; by examining and verifying the field service records of said service member which reflect his duty status; by requesting the member's next of kin to urge his voluntary return to military control if they are aware of his whereabouts; by inquiring to the fullest extent possible into the feasibility of other explanation for member's absence, to include sickness, injury, hospitalization, and confinement by civil law enforcement officials.

That based on the aforesaid investigation, the undersigned has personal knowledge that, on or about 8 June 20CY *(Date),* YN3 Fred P. Jones, USN *(Name and rank of alleged deserter)* did, without authority and with intent to remain away therefrom permanently, absent himself from his unit to wit: *(See item 3 above)* located at *(See item 3),* in violation of Section 885, Title 10, United States Code and he has remained continuously so absent until 8 July 20CY *(Date this statement is executed).* I state under penalty of perjury (under the laws of the United States of America) that the foregoing is true and correct. Executed on 8 July 20CY *(Date).*

18. COMMANDING OFFICER

a. TYPED NAME *(Last, First, Middle Initial*)
NAILS, Tough S.
b. GRADE
CAPT, USN
c. TITLE
Commanding Officer

d. ORGANIZATION AND INSTALLATION
USS NEVERSAIL (AS 00)
FPO AE 09577-1234
e. SIGNATURE *(All copies*)

Tough S. Nails
f. DATE SIGNED *(YYMMDD*)

CY0708

DD FORM 553, SEP 89 ***Previous editions are obsolete***
S/N 0102-LF-008-3900
19. REMARKS: ***(List peculiar habits and traits of character: unusual mannerisms and speech; peculiarities in appearance; clothing worn; aliases (names); marks and scars; tattoos; facial characteristics; complexion; posture; build; other SSN's used by individual; or other data that may assist in identification. List known facts, e.g., armed and dangerous, drug user, suicidal tendencies, guards are needed, etc.)***

YN3 Jones frequently wears a Los Angeles Dodgers baseball hat.

INFORMATION

1. Authority to Apprehend.

a. Any civil officer having authority to apprehend offenders under the laws of the United States, or of a State, territory, commonwealth possession, or the District of Columbia may summarily apprehend deserter from the Armed Forces of the United States and deliver them into custody of military officials. Receipt of this form and a corresponding entry in the FBI's NCIC Wanted Person File, or oral notification from military officials of Federal law enforcement officials that the person has been declared a deserter and that his/her return to military control is desired, is authority for apprehension.

b. Civil authorities may apprehend absentees (AWOLs) when requested to do so by military authorities.

2. Payment of Reward of Reimbursement for Expenses.

a. Rewards. Receipt of this form, or oral written notification from military authorities of Federal law enforcement officials, prior to apprehension of the individual, that the person is an absentee and that his/her return to military control is desired will be considered as an offer of reward. Persons or agency representatives (except marked officers or employees of the Federal Government or service members) apprehending or delivering absentees to military control are authorized:

(1) Payment for apprehension and detention of absentees until military authorities assume custody, or,

(2) Payment for apprehension and delivery of absentees to a military installation.

b. Reimbursement for Expenses. Reimbursement may be made for actual expenses incurred when conditions for payment of a reward cannot be met. If two or more persons perform these services, payment will be made jointly or severally, but total payment to all may not exceed prescribed limitations.

c. Payment. Payment will be made to the person or agency representative actually making arrest and detention or delivery by the disbursing officer servicing the military facility to which the absentee is delivered and will be in full satisfaction of all expenses of apprehending, keeping and delivering the absentee. Payment may be made whether the absentee surrenders or is apprehended. Payment will not be made for information leading to apprehension, nor for apprehension not followed by return to military control. Both reward and reimbursement may not be paid for the same apprehension and detention or delivery.

3. Individual claims he/she is not Absent Without Authority. When a detained claims that he/she is not absent without leave and does not have the papers to prove his/her claim, the apprehending person or agency representative should communicate directly by the most rapid means available, with the nearest military installation manned by active duty personnel. When necessary, communicate directly (telephone or telegraph) with the Deserter Information Point of the military service concerned.

a. U.S. Army. United States Army Deserter Information Point (USADIP), Fort Benjamin Harrison, Indiana 46249, telephone collect:
(317) 542-3355.

b. U.S. Navy. Commander, Bureau of Naval Personnel (PERS 843), Washington, D.C. 20370-5000, telephone: 1-800-336-4974 (in Virginia, call 1-800-572-0266).

c. U.S. Marine Corps. Commandant, U.S. Marine Corps, Code MPH-57, Washington, D.C. 20380, telephone collect: (202) 694-2180/8526.

d. U.S. Air Force. USAF Manpower Personnel Center, Randolph Air Force Base, Texas 78148, telephone collect: (512) 652-5118/2148.

NOTES:
[1] For use only when a service member fails to report to a gaining unit of assignment during a permanent change of station.
[2] For use only when statement is executed outside the United States, its territories, possession and commonwealth.

DD FORM 553 Reverse, SEP 89 S/N 0102-LF-008-3900

MARINE CORPS UNAUTHORIZED ABSENCES

A. ***References***

1. MCO P5800.16A, *Marine Corps Manual for Legal Administration* (LEGADMINMAN), Chapter 5

2. MCO P1080.39B (PRIM)

3. MCO P4050.38C, *Marine Corps Personal Effects and Baggage Manual*

4. MCO P1070.12K, *Marine Corps Individual Records and Administration Manual* (IRAM)

B. ***Checklist***

1. UA entry (in excess of 24 hours) run on unit diary.

2. Page 12 SRB "from UA" entry made (IRAM 4014).

3. Inventory of government and personal property of absentee accomplished within 24 hours.

4. After 48th hour of absence, ensure the CO telephoned NOK (if not in CONUS, only if dependents reside locally).

5. Prior to 10th day of UA, letter mailed to NOK and copy filed on document side of SRB (fig. 5-1, LEGADMINMAN).

6. Unit diary entry run declaring deserter status and dropping from roles to desertion on 31st day.

7. SRB pages 3, 12, and 23 completed per IRAM:

a. Chronological record (page 3);

b. offenses and punishments (page 12) administratively declaring deserter status and dropping from rolls; and

c. markings page (page 23).

8. DD 553 prepared and distributed (per para. 5002 of LEG-ADMINMAN):

a. Date published matches that of page 12 entry date (normally 31st day of UA);

b. if insufficient information, priority message sent to MMRB-10;

c. if incomplete information, permission requested from MHL-30; and

d. original sent to CMC (MHL-30) (Report Symbol MC-5800-01) within seven days of administrative declaration of desertion on page 12.

9. DD 553 distributed properly (para. 5002.2e(4) LEGADMINMAN):

a. Copy on document side of SRB;

b. copy to NOK and all known associates; and

c. copy to units assigned admin responsibility and appropriate area police (*see* MCO 5800.10).

10. If deserter has dependents, see para. 5004 of LEGADMINMAN:

a. Retrieved dependent ID cards;

b. if ***not*** surrendered, notify local medical facilities and military activities;

c. a ***terminate*** DD 1172 submitted to DEERS; and

d. dependents directed to vacate quarters.

11. Return of deserter within 91 days:

a. "To UA" entry made in diary;

b. page 12 entry recording date, hour, and circumstances of return to military control (*see* 4014 of IRAM);

c. page 12 SRB entry made removing mark of desertion (not removed if apprehended and / or convicted by civil authorities except as per LEGADMINMAN); and

d. if mark of desertion removed, notify disbursing office in writing of removal per LEGADMINMAN.

12. If no return by 91st day of absence:

a. Audit of SRB, pages 3, 12, and 23 completed and entries correct; and

b. forward SRB along with health and dental records to CMC (MHL-3030).

C

OFFENSES AND PUNISHMENTS

6 Jul 20CY-1. I certify that I have been given the opportunity to consult with a lawyer provided by the government at no expense to me in regard to a pending NJP for violation of Article(s) 86 of the UCMJ. I understand that I have the right to refuse the NJP; I ~~(do)~~ (do not) choose to exercise that right. I further understand that acceptance of NJP does not preclude my command from taking other adverse administrative action against me. I ~~(will)~~ (will not) be represented by a civilian/military lawyer.

Signature of the accused, Larry Carpenter.

6 Jul 20CY-1. Viol Art. 86, UA from 0730, 2 Jul 20CY-1 to 0730, 5 Jul 20CY-1. Awd 7 days restriction and extra duties for 30 days. Not appealed.

I. M. Hardcore
I.M. Hardcore
GySgt, USMC
By direction of the Commanding Officer

GOOD CONDUCT MEDAL PERIOD COMMENCES:	SELECTED MARINE CORPS RESERVE MEDAL/ARMED FORCES RESERVE MEDAL PERIOD COMMENCES:
CARPENTER, LARRY K.	987 65 4321
NAME (Last) (First) (Middle)	SSN

NAVMC 118-12 (REV. 7-91) (EF)
SN: 0109-LF-062-8500
Previous editions are obsolete.

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OFFENSES AND PUNISHMENTS (1070)
Designed Using FormFlow 2.15, HQMC/ARAE, Mar 98

CHAPTER 21

CHAPTER 21

CR 21. OFFENSES AGAINST AUTHORITY

CR 21.1. *INTRODUCTION*

This chapter analyzes different types of misconduct that involve offenses against authority. It discusses Articles 89 through 92 of the Uniform Code of Military Justice.

CR 21.2. *CONCEPTS COMMON TO ALL ORDERS OFFENSES*

Despite the wide variety of orders offenses, all of them possess certain common concepts. For example, all orders must be lawful if they are to be enforceable in a punitive forum. Some of these common indicia may be more easily understood in terms of defenses available to an accused charged with a particular orders offense. Thus, an accused charged with the willful disobedience of his superior commissioned officer has a defense to the charge if it is shown that the order was unlawful. This section discusses some of these common concepts.

CR 21.2.1. *Lawfulness.*

The lawfulness of an order is a question of law to be determined by the military judge, not the trier of fact.

1. *Inference of lawfulness.* An order requiring the performance of a military duty or act may be inferred to be lawful and it is disobeyed at the peril of the subordinate." The inference of lawfulness thus created by the MCM makes it unnecessary for the prosecution to introduce evidence to establish the lawfulness of an order. The accused has the burden of rebutting the inference, but once rebutted, the prosecution must prove beyond a reasonable doubt that the order was lawful.

The inference of lawfulness does not apply to a patently illegal order (i.e., an order that a reasonable man would know is a demand to commit an obviously illegal act). However, the duty to disobey an unlawful order applies only to positive acts that constitute crimes and are so manifestly beyond the legal power or discretion of the commander as to preclude rational doubt about their unlawfulness. The order from an E-4 to an E-1 to continue driving a 2 1/2-ton truck with failing brakes was patently illegal and not a defense to the resulting death of a civilian.

2. *Lawful authority.* The person issuing the order must have authority to give such an order. Authorization may arise by law, regulation, or custom of the service.

A commander has plenary power over his subordinate officers regarding command functions. In the ordinary course of his authority, he can enlarge or restrict the powers of particular subordinates. A civilian DoD policeman cannot issue an order to a service member that can be enforced under 92(2) or 92(3).

Subordinates may be empowered to give lawful orders to superiors. For example, sentinels or members of the armed forces police in the execution of their duties may lawfully issue orders to their superiors.

Whether the issuance of a certain order is authorized may depend on the circumstances under which it is given. An order given during an emergency might be lawful, while the same order given under normal circumstances might not be lawful. For example: While flying over the Atlantic, a plane commander orders personnel to jettison all personal property including baggage, etc. Is this order lawful? Like all orders, it is inferred to be lawful. But, assume the reasons for the order are shown to be as follows: 1) the plane commander wants the plane to go faster so he won't be late for a date. *Order is unlawful.* It is an order ". . . which has for its sole object the attainment of some private end . . . ."; 2) Two of the plane's four engines have quit and the plane is losing altitude. The ordered action may lighten the plane enough to enable it to return to base. *Order is lawful*. Evidence does ***not*** rebut; rather, it fully supports the inference.

Geographical, political, or economic circumstances may have a bearing on whether a particular order is authorized. Activities of American military personnel in foreign countries may have different consequences as compared to the same activities performed in the United States. In one instance, the Court of Military Appeals addressed a circumstance where the accused was ordered by the XO not to barter cigarettes to the natives in a foreign port. American cigarettes were scarce and black markets flourished in the port. He was convicted of a violation of this order. ***Held***: Order was lawful. In view of the disorders created by such undercover transactions, and the difficulty

in controlling them, the authority of the XO could reasonably include any order or regulation that would tend to discourage participation in such activities. Under the circumstances, the fact that the order prohibited the disposition of personal property owned by the accused does not render it unlawful.

3. *Orders related to military duty.* Orders that do not relate to a military duty are unlawful. To establish the illegality of the order, the accused must show that there is no rational connection between the order and proper military service objectives and responsibilities.

The term "military duty" includes not only those activities usually thought of as military duties, but also includes all activities which are reasonably necessary to safeguard or promote the morale, discipline, and usefulness of the members of any particular command and which are directly connected with the maintenance of good order. An order may not interfere with private rights or personal affairs absent a valid military purpose.

The fact that an ordered act will accomplish both a military and a private objective will not render the order unlawful. MCM, pt. IV, § 14c(2)(a)(iii), provides that an order which has for its ***sole*** object the attainment of some private end is unlawful.

Examples of orders which ***do*** relate to military duties:

First sergeant's order directing accused to disassociate himself from his friend's dependent wife was lawful; marriage had not ended, several domestic disturbances had occurred at on-base quarters involving friend, friend's wife, and accused; and order was limited to the time during which the wife was married to the friend.

Order to "shut up" from superior petty officer immediately on heels of disrespectful language by subordinate towards superior commissioned officer, given to preclude additional disrespectful language, was a lawful order relating to maintenance of good order and discipline.

Order directing service member not to engage in sexual activity without informing his partner that he was infected with Human Immunodeficiency Virus (HIV) and to take precautions against spreading the virus, thereby preventing him from spreading the infection to the civilian population, was a public duty of the highest order and, thus, was a valid military objective.

Examples of orders which ***do not*** relate to military duties:

Order to accused, who works in the paint shop, to paint the Admiral's privately owned automobile. Reason: Sole object is a private end.

An order not to consume alcoholic beverages could not properly be used as a diagnostic tool to see whether the individual involved was an alcoholic, as he would be identified if he disobeyed the order not to drink alcohol, and an order not to drink alcoholic beverages until the next alcoholic rehabilitation committee meeting was accordingly unlawful.

Order to accused to donate money to charity. Reason: Donation is necessarily a matter of personal decision. If an order *serves a military purpose,* however, the fact that an accused will have to expend funds to carry out the order will not render it unlawful. For example: An order to get a regulation haircut or to have a uniform cleaned relates to a military duty (proper appearance) and would be lawful, notwithstanding the fact that in carrying out the order the accused will be required to spend his own money. However, if an accused has no funds when the order is given, this may constitute the defense of impossibility of compliance.

Examples of orders that will accomplish both a military and a private objective:

The accused was ordered to perform certain work in an Officers' Mess. He refused to comply, contending that the work he had been ordered to do was for the private benefit of the officers of the mess. ***Held:*** Messing of officers at Fort McNair is a military necessity. While the individuals would benefit from his services, the work would also be performed for the benefit of the military command.

3. *Orders that are contrary to the Constitution, provisions of an act of Congress are unlawful.* MCM, pt. IV, § 14c(2)(a)(iv).

(a) *Orders contrary to Article 31, UCMJ.* Orders which have allegedly compelled the accused to incriminate him/herself in violation of Article 31's mandate that "[n]o person subject to this Chapter (the UCMJ) may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him" have generated much litigation in the past. Consider the case in which the Court of Military Appeals held that the accused could not be convicted of dereliction of duty for failure to report drug abuse by others on those occasions when the accused was also a principal to the same drug use. The privilege against self-incrimination excuses his compliance.

Many "old" cases have held that orders to an accused to do or submit to any number of tests amounted to orders to incriminate himself, and consequently were illegal. For example, an order to submit a handwriting sample was determined to be illegal because it violated Article 31. Or consider that it was held that an order to submit to a blood test was unlawful. At one time, it was determined that an order to produce a urine specimen was unlawful.

Subsequent cases have held that such tests need not be preceded by Article 31 warnings. Hence, an accused need not be advised of his Article 31 rights prior to requesting him to submit to such tests. It would seem then that an order to so submit could be enforced against an accused who refuses to participate. It must be remembered that oral self-incrimination and "verbal acts" that incriminate may not be legally ordered.

(b) *Orders contrary to Article 15, UCMJ, or other orders.* Some orders have been determined to be contrary to Article 15, UCMJ. For example, in once case the accused was awarded 14 hours extra duty at mast (NJP). After the 19th hour, he refused to go on, despite a direct order by the CMAA to continue. He was convicted of willful disobedience of the order of the CMAA. ***Held***: The CMAA's order violated both the terms of the NJP imposed by the accused's CO and Article 15. Consequently, the order was unlawful.

While military authorities are authorized to issue orders, they may not use this authority perversely to hamper an accused in military justice proceedings. An accused and his counsel are entitled to ample opportunity to prepare a defense, and an order which prohibits contacts with witnesses against the accused is unlawful and unenforceable. An order to have no contact with witnesses may be too broad to be enforceable.

4. *Orders that unreasonably limit the exercise of personal rights.* While an order may reasonably limit the exercise of a person's rights, if it constitutes an arbitrary or unreasonable interference with the private rights or personal affairs of individuals, it is unlawful. For example, an accused was convicted of willful disobedience of a lawful order requiring him to inform his future sexual partners that he was infected with the AIDS virus and to protect his sexual partners from any contact with his bodily fluids and excretions. On appeal the order was found to be a lawful exercise of the superior's command authority in that it helped to safeguard the overall health of the organization, and helped to ensure unit readiness and the ability of the unit to accomplish its mission. Note that the order at issue only required the accused to warn other service members of his medical condition. In another unrelated case, the court extended the warning requirement to include civilians, as well as other service members.

The accused was convicted of violating an order not to drink alcoholic beverages. ***Held***: In the absence of circumstances tending to show its connection to military needs, an order prohibiting the use of alcoholic beverages without limitation as to time or place is so broadly restrictive of the private rights of an individual as to be arbitrary and unlawful. Of similar import is a case which held that a naval regulation prohibiting all loans between naval personnel could not be upheld. Or an order restricting soldiers from having any alcohol in their system during working hours was held to be arbitrary, unreasonable and standardless. But consider the results where an order establishing a minimum drinking age for all navy personnel was lawful or the case where an order not to drive issued to a service member diagnosed with a sleep disorder satisfied a valid military purpose.

One case of interest concerned the issue of whether a military order could be lawfully used to control alcohol use. The member in question, a Seaman Roach, had been involved in numerous alcohol incidents, one of which involved a civilian arrest for assaulting a police officer. He was also absent without authority for four days prior to sailing on deployment. The CO at NJP awarded 30 days' restriction—suspended for three months. In addition, the CO told Seaman Roach that he would be permitted to go on liberty during a one-day layover in port, but that he was forbidden to consume any alcohol while on liberty. He went on liberty and consumed alcohol and, upon returning to the ship, set fire to the paint locker. The fire was eventually extinguished with relatively minor damage. The Coast Guard Court of Military Review set aside a conviction for willful disobedience. They held that there was no valid military need for the order and that it was in violation of regulations promulgated by the Commandant of the Coast Guard for dealing with incidents of alcohol abuse, and therefore illegal. On appeal, pursuant to Article 67(b)(2),

UCMJ, the Court of Military Appeals deferred to the judgment of the Coast Guard court in construing Coast Guard regulations. In dicta, however, the court recognized that an appropriate military order could be used to control alcohol or drug abuse. In his dissent, Judge Cox found a valid military nexus for the order in the safety of the vessel and crew.

In another alcohol case, the court held that a military order not to drink alcoholic beverages was lawful. Here, a second lieutenant was given an order "not to drink any alcoholic beverages" as a part of an order given to him subsequent to his release from pretrial confinement and placement in pretrial restriction. The court found it to be a valid order where the second lieutenant was suspected of committing several offenses while under the influence of alcohol, and the order was given to protect potential victims from assault.

An example of an order overly broad in scope and not connected with moral and discipline occurred where the accused was convicted of failing to obey a lawful order from his first sergeant "not to write any checks." ***Held***: The order was so broad in duration and words that it was not sufficiently connected with the morale, discipline, and usefulness of the military service.

Alternatively, consider the case where it was held that an order not to talk to civilian galley workers was not over broad where the valid military purpose of this policy was to promote good order and discipline in an environment in which civilian employees the vast majority of whom had physical or mental disabilities were at an increased risk of abuse and injury by non-disabled military personnel.

A regulation, promulgated by an overseas commander, which established a six-month waiting period before an application for permission to marry by a member of that command would even be considered, was held to be unreasonable and, hence, unlawful. For a commander to restrain the free exercise of a serviceman's right to marry the woman of his choice for six months just so he might better reconsider his decision is an arbitrary and unreasonable interference with the latter's personal affairs which cannot be supported by the claim that the morale, discipline, and good order of the command require control of overseas marriages.

However, a military commander, at least in foreign areas, may impose reasonable restrictions on the right to marry, such as requiring an applicant to meet with a military chaplain, to present medical certificates, and to obtain consent from a parent or guardian if the applicant is under 21 years of age.

The dictates of the accused's conscience, religion, or personal philosophy cannot justify or excuse the disobedience of an otherwise lawful order. Regulatory provisions of the services limit the type of duty to which one may be assigned while an application for conscientious objector status is pending. An order that contravenes one of these regulations would be illegal.

5. *Orders awarding punishment outside the scope of Article 15 or court-martial sentence.* An order that imposes a punishment is unlawful unless issued under Article 15, or pursuant to a court-martial sentence. Whether an order is issued for the purpose of punishment, or merely for training, will have to be determined in each case by a careful examination of the circumstances, including the nature of the duty to be performed and the relationship between the duty and the deficiency sought to be corrected. Some examples include the case where the accused placed two parachutes on the deck in a manner that a petty officer considered improper. He initially stated that he would put the accused on report, but he then ordered the accused 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 correct way to handle and carry parachutes. The accused refused, stating that he would not make a laughing stock of himself. The Navy Board of Review ***held:*** It is our opinion . . . that Holler's order to the accused was issued as a punitive action for disciplinary purposes and that it was not designed nor expected or intended to advance accused's skill in handling parachutes or the instruction of possible spectators in the proper manner to handle parachutes. Consequently, the order, although seemingly legal on its face, was in fact under the circumstances illegal.

Another example dealt with an accused who, while in pretrial confinement, was ordered to work in a rock quarry with sentenced prisoners. He refused to obey the order. ***Held:*** An unsentenced prisoner may be required to perform useful military duties to the same extent as a man who is not a prisoner. An unsentenced prisoner, however, cannot be given a punitive work assignment. Whether it was a punitive work order depended upon all the circumstances. Here, the accused was compelled to perform the same work and under identical conditions as sentenced prisoners. He wore the same prisoner uniform and was mingled on the job with sentenced prisoners. The stockade policy was to govern all by one set of working standards. This commingling constituted identical treatment requiring an unsentenced prisoner to serve a sentence before conviction. Therefore, the order was for

punishment and was unlawful.

One case concerned an accused was convicted of a violation of Article 92. He was transferred from a rear area to a firebase "because he had been in some trouble" at the rear area. Accused was ordered to remain at the firebase, but returned to the rear area instead. Accused argued that the order was illegal because it imposed punishment or, alternatively, was void because it was merely an order to obey the law (i.e., not to go UA from the firebase). ***Held:*** "Arduous as two days' duty at a forward firebase may be, it is not per se punishment, restriction, nor unnecessarily broad," conviction affirmed.

CR 21.2.2. ***Specificity***.

A military order must be a clear and specific mandate. It needs to be definite and certain in describing a thing or act to be done or omitted. An exhortation to "obey the law" or to "do your duty" has no specific subject and consequently does not constitute an order, as contemplated by Articles 90, 91, or 92. On the other hand, if the order is a positive command, the form in which it is expressed is immaterial.

In order to be a specific mandate, an order must particularize the conduct expected. An order which does ". . . not contemplate definite performance of any particular part of appellant's duties . . ." is not a specific mandate. Very often the requirement of specificity will raise close factual questions. Examples: A number of military appellate courts have held that an order "to train" lacks specificity and therefore, is unenforceable. When the courts have been able to find some element of specificity (e.g., to go to a particular place or do a particular act) they have upheld the order, notwithstanding the fact that the order called for a performance which the accused was already under a duty to fulfill, provided the order was not for the purpose of increasing punishment. An order ". . . to perform your normal dental care duties and see and treat such patients as may be assigned . ." was upheld by the Air Force Court of Military Review as was an order to an unauthorized absentee to return to base.

While the form of the order is immaterial, it must amount to a positive command in order for it to impose a duty to obey. A regulation may, however, combine advisory with mandatory provisions without losing legal effect.

If the meaning of a communication is uncertain, or if it is merely advisory or permissive, then it is ***not*** a positive mandate and the accused has no duty to obey it.

Examples:

"Jones, meet me in my office in five minutes." This is a ***positive*** command.

"Jones, if you can, meet me in my office in five minutes." This gives the recipient a choice of action. It is a request and not a positive mandate.

Expressing an order in a courteous manner rather than in a peremptory form does not change its nature.

"Jones, please meet me in my office in five minutes." In this case, the court held that an order from an enlisted club manager to the accused containing the word "please" was still a positive mandate to carry out an order. Additionally, the court held that the delayed compliance defense was not available to the accused who argued with the club manager for five minutes before complying with the order by turning over her ID card.

On the contrary, verbal abuse, standing alone, has been held insufficient to vitiate a legitimate work order that was issued in an abusive manner.

CR 21.2.3. ***Redundancy***.

An order which merely restates an existing general order, while it may be lawful on its face, will not be enforced as a violation of Article 90 where the "ultimate offense committed" is the violation of another order [Article 92(1) or Article 92(2)]. For example, the accused disobeyed an order from his company commander to remove a silver bracelet that he was wearing on his wrist. A violation of Article 90 was charged. C.M.A. stated:

. . . [T]he Captain acknowledged that he was simply telling the appellant to obey an existing battalion directive relative to matters of wearing apparel, a directive that he was duty bound to obey . . . . [T]he offense should have been brought under Article 92(2), Code, *supra*, the "ultimate offense committed" . . .Since, as noted, the battalion

directive was not introduced at trial, the appellant's conviction cannot be sustained.

This result is an unusual case since the court held that an accused could not be ***convicted*** for the underlying offense. In most instances, the issue is whether the accused should be ***punished*** for the charged or the "ultimate" offense. In determining this, a number of factors are examined: the intent of the officer giving the order; whether the order was merely exhortation to obey the law; whether there has been "express defiance" of the military; and whether the order was issued in the performance of proper military function. For example, in one instance the court found the accused's "ultimate offense" was disobedience of a commissioned officer's order to deploy, rather than missing movement through design and, thus, the maximum possible confinement was based on the disobedience offense; the accused had a preexisting duty to deploy with his unit at the time of the order, the order was an attempt by the commander to motivate the accused to voluntarily deploy with his unit, and there was evidence that the accused had repeatedly expressed his intent to defy the movement orders. Bear in mind as well where the court held that a conviction for disobeying the lawful order of a superior to "go to colors" was not subject to being set aside on the grounds that the accused was not charged with his "ultimate offense," failure to go to his appointed place of duty, although the punishment would be so limited.

If the sole purpose of repeated personal orders is to increase the punishment for an offense, disobedience of the repeated order is not a separate offense. However, in a case where the accused, who was UA, refused to return to his duty when ordered to do so at his home by senior personnel, it was held that the accused could be punished both for the willful disobedience and the absence offense where there was no evidence that the order was given to increase the potential punishment of the accused. The court focused on the need to punish direct defiance of an order so as to enhance military discipline.

Repeated personal orders are legitimate if given for the purpose of bolstering the persuasiveness of the first command. And repeated orders may be considered unreasonable multiplication for sentencing purposes.

CR 21.2.4. ***Duty to obey***.

In order to convict an accused of any order offense, it must be shown that he had a duty to obey the order.

1. *The order must apply to the accused.* The order must apply to the accused. A particular order may apply to all persons within an armed force or within a particular command, or it may apply merely to a specified class of persons within an armed force or within a particular command, or it may apply only to a particular person.

Examples:

"All personnel will _____." (Everyone);

"All non-rated personnel will _____." (A class);

"All OOD's upon being relieved will _____." (A class);

"Any person involved in an automobile accident will _____." (A class);

"ENS Joe Johnson will _____." (A specified person).

2. *If, by its terms, an order is not applicable to the accused, he has no duty to obey it.* For example, a case dealt with an airman third class who appropriated a C-47 aircraft and took off for a two-hour flight. He was charged with a violation of an Air Force regulation for taxiing onto a runway without clearance, by taking off without prior clearance from the control tower, and by operating the plane with less than the prescribed minimum crew. ***Held***: The regulation applied to qualified pilots in Air Force planes on ordinary flights and did not apply to one who was not a pilot and who took the plane without authority. On the other hand, a different decision held that a command relationship in the organizational sense is not fundamental to the application of a general regulation to an individual member of the service; accordingly, an accused who knowingly enters a military installation to which he is not assigned has a duty to obey regulations governing that installation.

While the prosecution must show that the accused had a duty to obey the order or regulation in question, the accused has the burden of production if he asserts that he falls within the purview of an exception to the order's regulatory

scheme.

3. *The order must be punitive in mature.* A regulation issued by higher authority directed to major commanders—which merely states certain ***policy criteria*** for the guidance of major commanders and which is not intended to operate immediately upon personnel generally, but instead requires implementing directives to be issued by the major commanders is not enforceable against an individual. It is important to note that a general regulation, which can result in a penal sanction, must be clearly punitive on its face. However, it may be the case that the failure of an order to warn explicitly that its violation may subject violators to criminal sanctions does not foreclose prosecution if the prohibited conduct is described clearly. Further, appellate courts are willing to dissect written orders and regulations and to hold that some parts are punitive and some administrative in nature.

CR 21.3. *VIOLATION OF GENERAL ORDERS OR REGULATIONS*

CR 21.3.1. *Essential elements.*

MCM, pt. IV, § 16(b)(1).

That there was in effect a certain lawful general order or regulation;

that the accused had a duty to obey it; and

that the accused violated or failed to obey the general order or regulation.

CR 21.3.2. *First element.*

"In effect" means operative at the time of the alleged offense. Generally, an order is effective as of the date it is published. The date "published" has been defined by the Court of Military Appeals as the date that the general order is received by the official repository for such publications on a base.

In drafting a specification under Article 92(1) and (2), be sure to allege the ***particular*** regulation or order—including its effective date (e.g., *U.S. Navy Regulations*, dated 14 September 1990) which was in effect at the time of the violation, even if it has since been canceled or superseded.

The fact that the specific alleged regulation was superseded before the accused's act is no defense if the same criminal prohibition was contained in a successor regulation, and the latter was in force at the time of the accused's crime.

1. *Lawfulness. See* prior discussion in this chapter.

2. *Authority to issue "general orders and regulations."* Unlike in earlier cases, the courts have greatly restricted the classes of "commander" who may issue general orders and regulations. The term "commander," as used in paragraph 171a, MCM, 1951, was defined as meaning a "major commander" who occupies a substantial position in effectuating the mission of the service.

The holding of flag or general rank and the possession of GCM authority are some indications of a substantial position in the military establishment.

Commanders who have been held to have authority to issue general orders: Commanding General, Marine Corps Base, Camp Lejeune, North Carolina.

Commanders who have been held not to have authority to issue general orders: Commanding Officer, Tachikawa Air Force Base, Japan, a colonel who did not have GCM authority; Commanding Officer, Naval Air Technical Training Center Memphis, Millington, Tennessee, a Navy captain who did not have GCM authority; further, C.M.A. said it was only a service school; Commanding Officer, Naval Hospital, Portsmouth, Virginia.

While the law remains unsettled, the courts have clearly interpreted Article 92(1) to mean that only a major commander has the authority to issue general orders and regulations. In deciding if a commander is a major commander, most of the following criteria must be met: 1) occupies a substantial position in effecting the mission of the service; 2) of flag or general rank; 3) possesses GCM authority; and 4) not many steps removed from department

level.

The authority to issue general orders and regulations has been granted to a narrow group of individuals: 1) an officer having GCM jurisdiction; 2) a flag or general officer in command; or 3) a commander superior to those in one and two.

Possession of general court-martial jurisdiction is indicative of commander's authority to issue general orders and regulations, however that fact alone is not controlling. The presence or absence of disciplinary authority is not controlling as many highly important organizations leave this function to administrative commands that support them.

3. *Proof.* The existence of the order or regulation in question is usually proved through the use of judicial notice. Mil.R.Evid. 201 permits a military judge to take judicial notice, whether requested or not, of an "adjudicative fact" that is "either (1) generally known universally, locally, or in the area pertinent to the event or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

Example: An orders violation can exist where government communication equipment is improperly utilized. Use/misuse of computers and communication systems is contained in the Joint Ethics Regulations and a violation of this regulation can subject the offender to an Article 92, UCMJ violation. A military judge can take judicial notice of the following DOD Directive in the appropriate case: "Federal government communication equipment including government owned telephones, facsimile machines, electronic mail, Internet systems, and commercial systems when use is paid for by the Federal Government shall be for official use and authorized purposes only." DOD Directive 5500.7-R, sec. 2-301, change 2 (1996).

The military judge may take judicial notice without being asked, so long as it is made a part of the record.

CR 21.3.3. *Second Element.*

That the accused had a duty to obey the order. *See* prior discussion in this chapter.

CR 21.3.3. *Third element.*

An order is ***violated*** when the infraction involves an act of commission on the part of the accused. Example: Article 1162, *U.S. Navy Regulations, 1990,* prohibits the possession of alcoholic beverages aboard ship for beverage purposes (except under certain conditions). Seaman Eli has a bottle of VO in his locker. By his act of commission, he has violated the regulation.

An accused has ***failed to obey*** an order when the infraction involves an act of omission on his part. Example: A regulation requires the OOD to make certain log entries every time the ship changes course. If the OOD does not make the appropriate entries, then his omission is a failure to obey.

The terms "violate or fail to obey" are almost synonymous and, although the pleader should try to be precise, misuse of these two terms will not result in error.

As previously noted, sometimes an order or regulation prohibits certain acts, but provides certain exceptions under specified conditions. Generally, it is not necessary for the prosecution to establish prima facie that the accused was not within any of the exceptions stated in the order.

The accused has the burden of proceeding in this area. Stated otherwise, it is for the accused to raise such an issue by some evidence indicating that his acts fall within one of the exceptions stated in the order or regulations. If he does raise such an issue, then the government must overcome it by evidence beyond a reasonable doubt (i.e., that the accused was not within that exception).

Of course, the government must prove, as part of its case-in-chief, that the accused's conduct is covered by the regulation in question.

CR 21.3.4. ***Knowledge***.

Knowledge of a general order need not be alleged or proved. Knowledge is not an element of this offense, and a lack of knowledge does not constitute a defense. Although the accused does not have to have knowledge of the Article 92 regulation violated, there must be some proper form of publication before knowledge is presumed or there will be a violation of constitutional due process. The court held that "publication" occurs when a general regulation is received by the official repository for such publications on a base, such as the master publications library.

Note, however, that due process requires that, when the requirements of a challenged regulatory scheme are "purely passive," there must be some showing of the probability of knowledge.

Occasionally, the accused must be shown to have actual knowledge of some underlying fact in order to convict him of an orders violation. For example, in order to prosecute someone for a conflict of interest in violation of SECNAVINST 5370.2, it must be shown that they had actual knowledge of the existence of the interest.

CR 21.3.5. ***Pleading.***

The general order or regulation need not be quoted verbatim. It is sufficient to identify it by article number, section or paragraph, title, and date. Example: Article 1151, *U.S. Navy Regulations, 1990*.

Failure to allege that the order was a "general" order renders the specification fatally defective. Additionally, an LIO of violating "an other lawful order" [92(2)] ***cannot*** properly be brought forward if knowledge has not been alleged.

The manner in which the accused violated or failed to obey the order should be alleged. Example: Accused did, on or about a specified date and at a certain place, violate a lawful general order, paragraph 2, Far East Command Circular No. 38, dated 27 August 1951, "by wrongfully having in his possession one (1) hypodermic syringe and one (1) needle."

When an order prohibits certain acts ***except*** under specified conditions, generally it is ***not*** necessary to allege that the accused does not come within the terms of the exceptions. Caveat: It may be necessary when alleging a violation of ***some unusual*** general regulation to negate the exception.

It is not absolutely necessary to allege that an accused "wrongfully" violated a lawful general regulation or order, since merely alleging a violation implies the unlawful nature of the conduct.

CR 21.3.6. ***Sample Specification.***

Charge. Violation of the Uniform Code of Military Justice, Article 92

Specification. In that Personnelman Third Class Jane E. Seymour, U.S. Navy, USS GHOSTTOWN, on active duty, did, on board USS GHOSTTOWN, at sea, on or about 15 December 20CY, violate a lawful general regulation, to wit: Article 1162, U.S. Navy Regulations, dated 14 September 1990, by wrongfully possessing alcoholic liquors for beverage purposes aboard a United States Navy ship, to wit: USS GHOSTTOWN.

CR 21.3.7. ***Instruction***.

Military Judges' Benchbook, Inst. 3-16-1.

CR 21.4. ***VIOLATION OF AN "OTHER LAWFUL ORDER" (OTHER THAN "GENERAL" ORDERS)***

CR 21.4.1. ***Essential Elements of an Article 92(2) Offense /***

That a member of the armed forces issued a certain lawful order;

that the accused had knowledge of the order;

that the accused had a duty to obey the order; and

that the accused failed to obey the order.

CR 21.4.2. *First Element.*

1. *Lawfulness. See* above discussion in this chapter. Orders issued by a superior officer, or a superior warrant, noncommissioned, or petty officer in the execution of his office may be inferred to be lawful.

What if the order was issued by one not a superior? In certain situations, subordinates are authorized to give orders to superiors. Such orders are lawful and the superior must obey them.

Examples:

Sentry—Art. 1038, *U.S. Navy Regulations, 1990.*

Shore Patrol—Art. 1039, *U.S. Navy Regulations, 1990.*

CO has authority over all persons in his command, whatever their rank—Art. 1025, *U.S. Navy Regulations, 1990.*

May an order to a superior by a subordinate be inferred to be lawful? The *Manual for Courts-Martial* is silent. The prosecution must affirmatively establish legality in such a case. Trial counsel may establish lawfulness by showing the status of the persons giving and receiving the order, the surrounding circumstances, and the specific authority of the person giving the order.

2. *Issuance*. Same as previously discussed; that is, the order must have been issued by a member of the armed forces. The order may be either oral or written. No particular form is required.

3. *In effect.* Same as previously discussed; that is, the order must be in effect at the time of the alleged violation.

CR 21.4.3. *Second Element.*

The prosecution must prove in its case-in-chief that the accused had ***actual*** knowledge of the order. Actual knowledge may be proved either by direct or circumstantial evidence. Example of direct evidence: Statements by accused admitting knowledge. Examples of circumstantial evidence of knowledge: Testimony that the order was read at quarters which was attended by the accused; testimony that the order was clearly posted on the bulletin board where accused passed daily. In one instance, however, the accused's conviction for unlawfully entering a female barracks during non-visiting hours in violation of a local regulation was set aside even though the authorized visiting hours were noted on a sign at the building's entrance. The court held that the accused lacked the actual knowledge required because the sign did not designate the authority issuing the order.

1. *Constructive v. actual knowledge.* The distinction between constructive knowledge and actual knowledge proved by circumstantial evidence is often troublesome. One way to draw the distinction is as follows. Since constructive knowledge is equivalent to saying that the accused ***should*** have known, it would not be a complete defense for the accused to prove that he did not ***in fact*** know. On the other hand, where actual knowledge is required and circumstantial evidence is offered to prove actual knowledge, it is open to the accused to offer evidence that he did ***not*** have actual knowledge. Thus, in the latter case, where an order was announced at quarters (or formation) at which the accused was in attendance, there was circumstantial evidence to prove actual knowledge. However, the accused could put lack of actual knowledge in issue by evidence that he could not hear (perhaps because of where he was standing or because of loud background noise). The trier(s) of fact would then have to decide the issue in light of the evidence presented at trial. One may not, however, willfully and intentionally remain ignorant of a fact material to the accused's conduct in order to escape the consequences of criminal law. Deliberate avoidance of positive knowledge is the equivalent of actual knowledge.

CR 21.4.4. *Third element.*

That it was the duty of the accused to obey the order. 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. (See above discussion in this chapter on the subject.)

CR 21.4.5. ***Fourth element.***

"Failure to obey," as the term is used in Article 92(2), includes both acts of commission and acts of omission. The "failure to obey" may be willful, but it is sufficient to constitute an offense if the failure is the result of forgetfulness or simple negligence.

CR 21.4.6. ***Pleading, Sample Specifications, and Instructions.***

The particular order, or specific portion thereof, the accused is charged with having violated should be set forth in the specification. But, a comparison between MCM, pt. IV, § 16f(2) and (3), suggests that a verbatim quotation of the Article 92(2) order allegedly violated is required only in the case of oral orders. However, it is recommended that the particular order, or the specific portion thereof allegedly violated, including both oral and written orders, be set forth verbatim in article 92(2) specifications. The allegation of the language of an oral or written order should always be qualified by the phrases "or words to that effect."

Knowledge of the order must be alleged. A specification which alleges violation of any order other than a general order, but fails to include an allegation of ***knowledge***, results in a fatally defective specification (i.e., it does not allege an offense).

The specification must include an allegation that it was "an order that it was his/her (accused's) duty to obey."

The specification should expressly allege the ultimate fact (i.e., that the accused did "fail to obey the same"). Although it is very poor practice to fail to allege this expressly, such failure does not necessarily render the specification fatally defective.

Example: a specification alleged that, "having knowledge of a certain lawful order which it was his duty to obey, (accused) did transfer . . . Military Payment Certificates to a Korean National, a person not authorized to receive them." ***Held:*** This sufficiently implied that he failed to obey the order. "Since no objection was made at the trial and it clearly appears that the accused was not misled, we find no material prejudice to the substantial rights of the accused. . . ."

Ordinarily, the manner in which the order was violated need not be alleged, unless the order can be violated in more than one way or the specific language of the order is not quoted verbatim. Since the order has previously been quoted verbatim, the statement that the accused did "fail to obey the same" is sufficient to appraise him of his act of commission or omission. Compare the earlier discussion of general orders, where it is necessary to allege the manner in which the accused violated or failed to obey the order since the general order or regulation has not previously been quoted in the specification. Even when the Article 92(2) order has been quoted in the specification, if the order as quoted regulates more than one kind of conduct, or, if the order could be violated in more than one way, then the specific manner in which it was violated should be alleged. Example: An order prohibited the possession, use, transfer, disposition, or sale of several kinds of items. When alleging violation of such an order, the particular method by which it was violated should be alleged. Simply add the appropriate additional allegation at the end of the form in para. 16(f)(3) specification (e.g., "fail to obey the same by wrongfully having in his possession one hypodermic syringe and one needle").

CR 21.4.7. ***Sample specification.***

Charge. Violation of the Uniform Code of Military Justice, Article 92

Specification 1. In that Lance Corporal Frederick K. Goodley, U.S. Marine Corps, Marine Barracks, Naval Station, Norfolk, Virginia, on active duty, having knowledge of a lawful order issued by Lance Corporal Stanley N. Kowalski, U.S. Marine Corps, in the execution of his office as a military policeman, to "stop the car," or words to that effect, an order which it was his duty to obey, did, on board Naval Station, Norfolk, Virginia, on or about 6 June 20CY, fail to obey the same. (oral order).

Specification 2. In that Seaman Joshua A. Slobb, U.S. Navy, USS TUBB, on active duty, having knowledge of a lawful order issued by the Commanding Officer, USS TUBB, to wit: Paragraph 3.d(3), USS TUBB Instruction 1020.3E, dated 2 January 20CY, an order which it was his duty to obey, did, on board USS TUBB, at sea, on or about 2 March 20CY, fail to obey the same by wrongfully possessing food in a berthing space (written order).

CR 21.4.8. *Instruction*.

Military Judges' Benchbook, Inst. 3-16-2.

CR 21.5. *WILLFUL DISOBEDIENCE OF AN ORDER (UCMJ ART 90(2))*

CR 21.5.1. *Elements*.

That the accused received a lawful command from a certain commissioned officer;

that this officer was the superior commissioned officer of the accused;

that the accused then knew that this officer was the accused's superior commissioned officer; and

that the accused willfully disobeyed the lawful command.

CR 21.5.2. *First Element*.

1. *Lawfulness.* See the above discussion at CR 4.2 and MCM, Part IV, para. 14c(2)(a).

There is no distinction between "command" and "order." The terms are synonymous.

The order must be directed to the subordinate personally. It does ***not*** include violations of regulations, standing orders, or routine duties.

Example: "Jones, report to the OOD at once."

Contra example: division officer announces at quarters, which Seaman (E-3) Jones attended: "All non-rated personnel will report for a physical exam tomorrow." This is not an order directed to a subordinate (Seaman Jones) personally; however, it is a lawful order to a class of persons, of which Seaman Jones is a member. Hence, although Seaman Jones cannot be convicted of violating Article 90(2), even though he willfully failed to report for the physical, he could be convicted of violating Article 92(2), failing to obey "an other lawful order."

Example: Division officer at quarters states: "The following named men will report immediately to the Executive Officer: Jones, Brown, Smith, Jackson, etc." Jones deliberately failed to report. ***Query:*** Can Jones properly be charged with violation of Article 90? ***Answer:*** Yes. This order was directed to him personally, as well as to the others. Example: Petty Officer Brown tells Seaman Jones, per order of the division officer: "Jones, the division officer told me to tell you, Smith, and Jackson to report to him at once." ***Query:*** Is this order directed to Jones personally, rather than to him simply as a member of a class? Yes.

Note that the accused in the above example is guilty of violating the order of the division officer, not the petty officer. However, an intermediate may, by placing his authority behind the order, become the one whose order is violated; but, to do this, the intermediate must have the authority to issue such an order in his own name and it must be issued as his order, not as the representative of the superior.

2. *Deliberate failure to comply.* Even a ***deliberate*** failure to comply with a general order or regulation or with a standing order of a command is ***not*** a violation of Article 90(2) nor 91(2), but it is an offense under Article 92. Such orders cannot be directed to the subordinate personally.

3. *Nonperformance.* Nonperformance by a subordinate of a mere routine duty is neither a violation of Article 90(2) nor Article 91(2). The willful disobedience contemplated is an intentional defiance of authority, as when an enlisted person is given a lawful command by a commissioned officer to do or cease doing a particular thing at once and refuses or deliberately omits to do what is ordered. However, the fact that the act so ordered is of a "routine" nature would not give rise to a defense to the willful disobedience of a personally communicated order to be complied with immediately.

4. *Received order.* Actual knowledge of the order is required (see prior discussion in this chapter on actual knowledge). The form of the order is immaterial so long as it amounts to a positive mandate and is understood as such by the interested parties.

CR 21.5.3. *Second Element.*

1. *Superior commissioned officer*. Defined as one who is superior either in rank or command. An officer is superior in rank to an accused for the purpose of this offense if he is senior by one or more paygrades ***and*** is a member of the ***same*** armed force as the accused. Personnel of the Navy and Marine Corps are of the same armed force. Article 1(2), UCMJ. Therefore, willful disobedience by a Marine private of an order issued by a Navy ensign is a violation of Article 90(2). Personnel of the Coast Guard are of the same armed force as the Navy and Marine Corps ***only*** when operating as a service in the Navy.

An officer is "superior in command" to an accused if he is superior in the chain of command. An officer may be superior in command and, hence, be one's "superior" even though he is a member of another armed force (e.g., a Navy / Marine officer serving on the staff of a joint command). The "command" concept takes precedence over the "rank" concept (i.e., one who is superior in command is the superior of a person under his command, even though that other person is higher in grade). Example: CO of a ship is a Navy Commander and the medical officer is a Navy Captain. The CO is ***superior*** in the chain of command. Disobedience of the CO's order by the Navy captain could be disobedience of the order of a superior officer, a violation of Article 90.

The victim is the accused's "superior commissioned officer" if the victim, not being a medical officer or chaplain, is senior in grade to the accused and both are detained by a hostile entity so that recourse to the normal chain of command is prevented.

An officer normally has no authority over members of another service absent the "command" concept. In such cases, a charge cannot be brought under Article 90 because the victim of any disobedience would not be "superior"; nor would 92(2) be available since the duty to obey the order could not be shown.

CR 21.5.4. *Third Element.*

That the accused knew that the order was from his superior commissioned officer. This requires actual knowledge of the status of the victim as an element of proof. Prior to the promulgation of the MCM, however, much controversy existed in this area. Consequently, do not be misled by old case law. Knowledge is now clearly an element.

CR 21.5.5. *Fourth Element.*

"Willful" connotes a "specific intent," a deliberate flouting of authority. (A discussion of willfulness is provided in chapter I.) The "'willful disobedience' is an intentional defiance of authority." A failure to comply with an order through heedlessness, remissness, or forgetfulness is not willful disobedience; however, it is an offense under Article 92(2). On the other hand, so long as the disobedience is willful, it matters not what motivated the disobedience unless the motivation amounts to a defense. The disobedience need not be accompanied by disrespect.

Willful disobedience may be manifested by deliberately omitting to do that which is ordered, by expressly refusing to obey, or by doing the opposite of what is ordered.

1. *Disobedience.* Disobedience is a failure to comply at the time performance is required, not a declaration of future intent. If the order is to be executed in the future, a statement by the accused that he intends to disobey it is not disobedience. An order cannot be disobeyed until the time for performance has arrived. In a cases decided by A.F.C.M.R. the accused was convicted of willful disobedience of the order of his CO, "the next time you have to urinate you are to give the OSI a specimen . . . . "Accused immediately refused. Defense argued that the order was one to be executed in the future. Board held that immediate compliance was indicated. Three ***types*** of orders were discussed: 1) those intended for, and those capable of, immediate execution in full; 2) those not capable of being fully and immediately executed, but requiring certain preparatory steps capable of being commenced immediately; and 3) those not intended to require any action until some specified future time—regardless of whether present action is possible or not.

Refusal indicating intentional defiance is a violation of Article 90. As to three, the offense is not complete until the expressed intention to disobey is carried out; if there is ultimate obedience at the prescribed time, regardless of prior expression of intent to disobey, the offense is not complete. The time in which compliance is required is a question of fact. If an order does not indicate the time within which it is to be complied, either expressly or by implication, then a "reasonable" delay in compliance is not a crime.

CR 21.5.6. *Pleading and Instructions*.

Sample specification for an Article 90(2) offense. willful disobedience of superior officer. MCM, pt. IV, § 14f(4):

Charge. Violation of the Uniform Code of Military Justice, Article 90

Specification: In that Private Mo D. Lawn, U.S. Marine Corps, Marine Corps Security Force Company, Naval Station, Rota, Spain, on active duty, having received a lawful command from Captain John R. Bones, U.S. Marine Corps, his superior commissioned officer, and known by the said Jones to be his superior commissioned officer, to "get into that truck," or words to that effect, did, at Naval Station, Rota, Spain, on or about 6 February 20CY, willfully disobey the same.

Recitation of the entire order that the accused is charged with disobeying is not required.

Willful disobedience is a separate offense and is not multiplicious with missing movement, which was the subject of the original order.

CR 21.5.7. *Sample Instruction*.

Military Judges' Benchbook, Inst. 3-14-2.

CR 21.6. Article 91(2), UCMJ.

CR 21.6.1. *Elements.*

That the accused was a warrant officer or enlisted member;

that the accused received a certain lawful order from a certain warrant, noncommissioned, or petty officer;

that the accused then knew that the person giving the order was a warrant, noncommissioned, or petty officer;

that the accused had a duty to obey the order; and

that the accused willfully disobeyed the order.

CR 21.6.2. *First element.*

By its terms, Article 91 can only be violated by a warrant officer or an enlisted member. "Warrant Officer," as used in this article, means a warrant officer (W-1) who is not a commissioned warrant officer. Enlisted member includes any person in paygrades E-1 through E-9.

CR 21.6.3. *Second element.*

This element is discussed previously at CR 4.2. The discussion of form, transmission, personal nature, and knowledge of the order discussed earlier under willful disobedience of an order applies here—see CR 4.5. This article does not protect "acting" NCO's or "frocked" PO's.

CR 21.6.4. *Third element.*

MCM, pt. IV, § 15b(2), includes actual knowledge of the status of the victim as an element of proof. Do not be misled by case law preceding the effective date of the *1969 Manual* (1 August 1969). Knowledge is now clearly an element.

CR 21.6.5. ***Fourth element.***

Notice that Article 91 has no element of superiority. Accordingly, the victim of willful disobedience under Article 91 may be junior in rank and command to the accused. Remember, however, that the accused must have a duty to obey the order. It is difficult, though not impossible, to imagine a situation in which the accused would have a duty to obey and yet be senior in both rank and command.

Example: BM3 Smith is standing duty as a gate guard at NETC. LN1 Shultz, attached to the Naval Justice School, is driving onto the base. Petty Officer Smith tells Petty Officer Shultz to show his ID card. Shultz refuses and drives on to work.

Has Petty Officer Shultz violated Article 91?The answer is yes, even though Smith is not senior in rank or command. Smith (an E-4) is junior in rank to Shultz (an E-6). Smith is not senior in command since Shultz is not a member of the same command. Shultz does have a duty to obey all lawful orders of military law enforcement personnel, regardless of rank. Accordingly, Shultz is guilty of willful disobedience of a petty officer under Article 91. A petty officer acting as coxswain in a boat would have authority to issue necessary orders to more senior personnel.

CR 21.6.6. ***Fifth element.***

This element is identical to the willful disobedience concepts under Article 90, and is fully discussed at CR 4.5. and in CR 1.2.

CR 21.6.7. ***Pleading and instructions.***

Sample specification for an Article 91(2) offense. Willful disobedience of WO, NCO, or PO. MCM, pt. IV, § 15f(2):

Charge. Violation of the Uniform Code of Military Justice, Article 91

Specification. In that Fireman Jill S. Scott, U.S. Navy, USS DECOM, on active duty, having received a lawful order from Yeoman Third Class John B. Smith, U.S. Navy, a petty officer, then known by the said Scott to be a petty officer, to "empty that waste basket," or words to that effect, did, on board USS DECOM, located at Naval Station, Guam, on or about 11 April 20CY, willfully disobey the same.

CR 21.6.8. ***Instruction.***

Military Judges' Benchbook, Inst. 3-15-2.

CR 21.7. ***LIO's of 90(2) and 91(2)***.

CR 21.7.1. ***Article 92(2).***

Failure to obey an "other" lawful order. This LIO exists when: 1) evidence indicates that the failure to obey was ***not*** willful, but was through neglect; 2) evidence indicates that the accused lacked knowledge of the status of the person giving the order; or 3)) evidence indicates that the order was not personally directed toward the accused.

CR 21.7.2. ***Part IV, paras. 14d(3) and 15d(2) include attempted willful disobedience as LIO's.***

The Navy Court of Military Review was questioned whether such offenses actually exist.

CR 21.8. ***The "ultimate offense" Doctrine***.

One of the principles of military justice commonly encountered in willful disobedience cases is that of the "ultimate offense." In general, this concept means that an accused should be ***punished*** for underlying misconduct if there was a pre-existing order or duty, even though he / she may have simultaneously disobeyed an order of a superior. For example, if the accused is under a pre-existing obligation to appear in a correct uniform, failure to do so should be punished as a violation of that obligation, if, when the superior ordered the accused to comply, he was merely relying on the pre-existing duty.

Under these facts, the accused may be ***convicted*** of the orders violation, but may only be ***punished*** for the "ultimate offense."

Language from prior court decisions indicates that the court will apply the ultimate offense doctrine where it appears that the subsequent order is given only for the purpose of increasing the maximum punishment.

These decisions has stated that the ultimate offense doctrine was never intended to limit punishment for willful disobedience; it was only meant to apply to Article 92 violations and no authority or power exists to extend it to other articles. Therefore, where the accused's company commander ordered the accused to return to his appointed place of duty, the accused could be punished for both the willful disobedience and the UA. The court looked at the following factors:

The order was an independent exercise of authority;

there was no express reliance or reminder of a pre-existing order; and

the order was not given to aggravate punishment.

Compare this result to one where the accused was prosecuted for willful disobedience of an order to report for duty on the morning following his release from detention. The court held that this was a mere failure to report for routine duties as prescribed by routine orders punishable under Article 86(1). Here, there was no ". . . environment of defiance. . ." nor was the person giving the order making a measured attempt to secure compliance with a previously defied routine order. In this case, the court applied the ultimate offense doctrine to reverse the conviction of the accused for willful disobedience. The ultimate offense doctrine is alive and well and may be used to set aside findings of guilty as well.

CR 21.9. *DERELICTION IN THE PERFORMANCE OF DUTY.*

CR 21.9.1. *Dereliction defined.*

The term, dereliction, is so broad that it literally covers the whole field of infractions of duties, and must be interpreted, in its setting in Article 92(3) of the Code, to cover only those delinquencies not covered by other articles which deal with specific offenses relating to duties. Thus, where the accused has not only failed to perform his duty but has either not appeared at all or has appeared tardily at his place of duty, his offense should be charged as absence without leave under Article 86; where he inefficiently performs his duty as a sentinel or lookout because he is drunk or falls asleep or leaves before being relieved, his offense should be charged as misbehavior of a sentinel or lookout under Article 113; and where he fails to obey or disobeys a duty imposed by a lawful order, his offense should be charged under Articles 90(2), 91(2), 92(1), or 92(2), as the nature of the order and the qualification of the person giving the order may indicate, unless the duty is of a routine character or it becomes impracticable to allege the specific order of a superior.

CR 21.9.2. *Elements*.

That the accused had certain prescribed duties;

that the accused knew, or reasonably should have known, of the duties; and

that the accused (willfully) (through neglect or culpable inefficiency) was derelict in the performance of those duties.

CR 21.9.3. *First Element*.

"A duty may be imposed by treaty, statute, regulation, lawful order, standard operating procedure, or custom of the service." A directive that sets forth general standards of performance may impose a duty even though the order is not so specific that a failure to follow its terms could be charged as a violation of the order.

The "duty" contemplated by Article 92(3) is any military duty either assigned or incidental to a military assignment. The term does not include tasks voluntarily performed for additional pay after regular working hours. For example: Accused was secretary-treasurer of a commissioned officers' open mess. He performed this work after regular hours for extra pay. ***Held***: This was not a military duty in the sense of Article 92(3).

A general regulation, which requires a service member to report drug abuse of which he/she is aware, can create a duty and is not a violation of the fifth amendment. Where the witness to the offenses is already a principal or accessory to the drug abuse, however, the privilege against compelled self-incrimination excuses noncompliance and such failure is not dereliction. It has been held, for example, that an accused could not be found guilty of dereliction of duty in failing to report drug use by prisoners in his custody where the evidence showed that the accused was involved in smoking marijuana with the prisoners and his own misconduct was therefore so intertwined with that of the prisoners that his right against self-incrimination excused him from any duty to report the prisoners' misconduct.

CR 21.9.4. *Second Element.*

Constructive knowledge of the duties is the second element of the offense. Article 92(3) is one of only two places in the *Manual* where constructive knowledge is sufficient. The other is article 102, forcing a safeguard at MCM, pt. IV, § 26. It now appears possible to convict a person for willful dereliction of a duty of which he was only constructively aware. If the prosecution can show that the accused deliberately failed to perform some duty of which he should have known, conviction is now appropriate, though logically difficult to accept.

CR 21.9.5. *Third Element.*

1. *Derelict.*"A person is derelict in the performance of duties when that person willfully or negligently fails to perform that person's duties or when that person performs them in a culpably inefficient manner."

(a) *Willfully.* 'Willfully' means intentionally. It refers to the doing of an act knowingly and purposefully, specifically intending the natural and probable consequences of the act."

(b) *Negligently.* Negligently' means an act or omission of a person who is under a duty to use due care which exhibits a lack of that degree of care which a reasonably prudent person would have exercised under the same or similar circumstances."

"The standard to be applied is whether the conduct of the accused was adequate and proper in the light of circumstances prevailing at the time of the incident. In testing for negligence, the law does not substitute hindsight for foresight."

An accused cannot be convicted of dereliction in the performance of duty based upon the negligence of another under his control if the accused has not been negligent himself. Example: accused, riding as a passenger, was the NCO in charge of a truck. He did not know how to drive and, from where he was sitting, he could not see the speedometer. When the truck was about three-fourths of the way down a hill, he realized that it was going too fast and told the driver to slow down. It was too late. The vehicle went out of control and crashed into a bridge. ***Held:*** The driver may have been negligent when starting down the hill, but there was no evidence that the accused was aware of this until it was too late. There was no evidence that the accused was negligent.

(c) *Culpable inefficiency.* "Culpable inefficiency" is inefficiency for which there is no reasonable or just excuse." If an accused has the ability and the opportunity to perform his duties efficiently and does not, he is culpably inefficient.

2. *Dereliction distinguished from ineptitude.* 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.

(a) *Ineptitude.* Ineptitude is a genuine lack of ability properly to perform the duty despite diligent efforts to do so. In determining whether ineptitude exists, it requires looking at the duty imposed, the abilities and training of the accused upon whom duty is imposed, and the surrounding circumstances in which the individual is called upon to perform the duty.

Examples of dereliction in the performance of duty:

The accused, a commanding officer, was required by Army regulations to forward efficiency reports on his officers on certain specific dates. He failed to do so until about three months after an investigation was started. ***Held:*** He was derelict in the performance of his duties. It was the accused's failure to complete the efficiency reports of the officers named which caused the unreasonable delay in their transmittal. "In the absence of any evidence that the failure was unavoidable or was caused by ineptitude rather than by negligence, we conclude that the record supports the finding of guilty. . . ."

Air Force staff sergeant, having custody of postal clerks' fund as part of his job, is charged with negligent dereliction in fiscal control, resulting in loss of $3,000.00. On appeal, he argued that he repaid the funds before being charged, and, therefore, could not be punished since there was no loss to the government. Held: actual loss is not an element.

In September 1988, a Marine officer, in the performance of desert exercises, posts road guides singularly and at incorrect locations without keeping a roster of where he posted them, in violation of a specific instruction that states to post road guides in pairs at designated checkpoints and to keep a roster of the individuals posted. During the recovery operations, one lance corporal was not found. His body was discovered in December 1988. He died from exposure. ***Held:*** Simple negligence resulted in dereliction of duty.

Examples where evidence held insufficient to support dereliction of duty charges.

CR 21.9.6. ***Pleading***.

Generally, the specification need not set forth the particular regulation, order, or custom which the accused violated; nor must it assert that the accused was responsible for performing a certain duty; but, it must detail the nature of the inadequate performance The inadequacy of performance proved at trial must be substantially identical to that alleged in the specification.

Do not forget to plead at least constructive knowledge.

Sample specification.

Charge. Violation of the Uniform Code of Military Justice, Article 92

Specification. In that Engineman Second Class Marsha A. Reese, U.S. Navy, USS FLATBOTTOM, on active duty, who should have known of her duties on board USS FLAT-BOTTOM, located at San Diego, California, on or about 23 July 20CY, was derelict in the performance of those duties, in that she negligently failed to wind and compare all chronometers aboard USS FLATBOTTOM, as it was her duty to do.

Note: A specification under 92(3) can allege either willfulness, negligence, or culpable inefficiency.

CR 21.9.7. ***Instruction***.

Military Judges' Benchbook, Inst. 3-16-4. Remember that actual knowledge is ***not*** required in all cases despite the language of the instruction.

CR 21.10. ***DISRESPECT TO SUPERIORS (Articles 89 and 91(3), UCMJ)***

CR 21.10.1. ***Elements of Article 89, MCM, pt. IV, § 13b.***

That the accused did or omitted certain acts or used certain language to or concerning a certain commissioned officer;

that such behavior or language was directed toward that officer;

that the officer toward whom the acts, omissions, or words were directed was the superior commissioned officer of the accused;

that the accused then knew that the commissioned officer toward whom the acts, omissions, words were directed was the accused's superior commissioned officer; and

that, under the circumstances, the behavior or language was disrespectful to that commissioned officer.

CR 21.10.2. ***Elements of Article 91(3). MCM, pt. IV, § 15b(3):***

That the accused was a warrant officer or enlisted member;

that the accused did or omitted certain acts, or used certain language;

that such behavior or language was used toward and within sight or hearing of a certain warrant, noncommissioned, or petty officer;

that the accused then knew that the person toward whom the behavior or language was directed was a warrant, noncommissioned, or petty officer;

that the victim was then in the execution of office; and

that, under the circumstances the accused, by such behavior or language, treated with contempt or was disrespectful to said warrant, noncommissioned, or petty officer.

Note: If the victim was the superior noncommissioned, or petty officer of the accused, add the following elements:

That the victim was the superior noncommissioned, or petty officer of the accused; and

that the accused then knew that the person toward whom the behavior or language was directed was the accused's superior noncommissioned, or petty officer.

CR 21.10.3. ***Superior Commissioned Officer of the Accused or a WO, NCO, or PO***.

Generally, the same as previously discussed under Articles 90(2) and 91(2) regarding willful disobedience. Note the distinction in the text of the two articles with regard to this element. Article 89 requires the victim to be a superior, but Article 91(3) does not. Note also, however, that superiority of the victim under Article 91 will increase the maximum punishment for disrespectful conduct.

"Acting" (frocked) commissioned officers, WO's, NCO's, and PO's are not "superior" within the meaning of these two articles.

CR 21.10.4. ***Knowledge of the Status of the Victim***.

Same as previously discussed regarding willful disobedience under Articles 90(2) and 91(2). The accused's knowledge of the victim's status is usually proved by circumstantial evidence.

CR 21.10.5. ***The Disrespect***.

Article 89 proscribes "disrespect" and article 91(3) proscribes "disrespect" and "contempt." "Contempt" includes "disrespect" and also connotes "scorn". Hence, in this regard, there is no real difference between Articles 89 and 91(3); in effect, they both prohibit the same thing. The disrespectful behavior or language contemplated is that which detracts from the respect which is due to the authority and person of the superior.

1. *Disrespect may consist of words, acts, or a failure to act.* "Disrespect by words may be conveyed by abusive epithets or other contemptuous or denunciatory language." In one case, C.M.A. held that a statement made by the accused that he did not have to respect the flag was disrespectful to an officer who asked the accused why he did not stand at attention during colors. The remark, "Hi sweetheart," to a female officer is disrespectful, absent extraordinary circumstances tending to negate implied sexist familiarity from an enlisted person to an officer. For examples of disrespect by acts or failure to act, see the footnote.

The disrespect may refer to the victim as an officer (WO, NCO, or PO) or as a private individual. For example,

with respect to official capacity, the following constitutes an offense: "As a man you are 4.0, but as a gunnery officer you stink." - With respect to individual capacity, the following constitutes an offense: "As a gunnery officer you are 4.0, but as a man you stink."

2. *Whether the behavior in question is disrespectful will depend upon all the circumstances of the particular case.* Under certain circumstances, one may be privileged to engage in a greater degree of familiarity than is usually the rule; but, this privilege must not be abused. Example: Several officers are playing poker. While the subordinate may be somewhat more familiar than is usually the rule, he may not use obscene and abusive language towards a fellow player who is his superior. The fact that no disrespect was intended by the accused, or so understood by the superior, is a circumstance to be considered in applying this test.

3. *Truth is no defense.* Accused tells his superior officer, "You are a dirty, fat bastard." At his trial, the accused proves that the officer was at the time caked with dirt, grossly obese, and the son of an unwed mother. It is nevertheless disrespectful for a subordinate to so state.

CR 21.10.6. *Presence of the Superior*.

1. *Disrespect to a superior commissioned officer. Article 89, UCMJ.* It is immaterial whether or not the disrespectful behavior occurred within the presence of the superior officer. Example: Seaman Rollo returns from leave and, at morning quarters, learns that his division officer, who is now on leave at his home, has received orders to Outer Mongolia. In his exuberance, Rollo yells, "Hurray! At last I'm free of that S.O.B." He is guilty of disrespect, even though the officer was not present and didn't hear it.

In general, it is considered objectionable and inappropriate to hold one accountable under this article for what was said or done by him in a purely private conversation. MCM, pt. IV, § 13c(4). A purely private conversation is believed to be one carried on privately, and not publicly, between the accused and some person other than the superior officer concerned and not made during the conduct of government business.

Examples:

Two sailors are conducting a personal gripe session in low voices in a bar. One says, "If brains were ink, Ensign Jones wouldn't have enough to dot an 'i'." This is a purely private conversation and should not be prosecuted.

Same situation as above, except that the sailors talk in loud voices so that others in the bar hear them. This would not be a purely private conversation.

Accused, trying to collect travel money, tells a chief yeoman in the disbursing office, "Your stupid disbursing officer is cheating me out of $60.00." No one else hears him. This is not a purely private conversation.

(The difference between example (1) and examples (2) and (3) is that, in the latter, parties with whom the accused is unacquainted and share no expectation of privacy are made aware of the communication.)

Accused, a first lieutenant, was in a poker game with several other officers. During the course of the game, the accused failed to adhere to certain rules and, upon being corrected by another player, a major, he replied with abusive and disrespectful language. ***Held:*** While a poker game cannot be considered a public affair, it does not have the characteristics of a private transaction as the term is used in the Manual. This was not a purely private conversation.

2. *Disrespect to a warrant officer, noncommissioned officer, or petty officer. Article 91(3), UCMJ.* To constitute an offense under Article 91(3), disrespect to a WO, NCO, or PO, the disrespectful behavior or language must be within the sight or hearing of the WO, NCO, or PO. It is in this regard that Article91(3) differs from Article 89 (i.e., the disrespect does not have to occur within the sight or hearing of a commissioned officer). Therefore, if the WO, NCO, or PO does not actually see or hear the disrespectful behavior or language, an offense has not been committed under Article 91(3). Example: a superior NCO gave an order to an accused, turned and walked away. Accused mutters a disrespectful remark in a low voice when the superior NCO is 30-40 feet away. The superior NCO did not hear the remark, but it is overheard by another NCO standing near the subordinate. ***Held:*** Not an offense under Article 91(3).

It was held that "... [T]he words used, '... to Hell with *it*,' definitely excludes any reference to Corporal Van Alstyne personally and indicates, rather, a reference to the act, the accused's act of signing [a shipping questionnaire]. If the accused had intended to refer to Corporal Van Alstyne personally it would at least normally be expected that he would have said ... 'to hell with *you*.' ... The language could reasonably be construed as not being directed 'toward' anyone at all. ..."

CR 21.10.7. *Duty Status of the Victim at Time of the Disrespectful Behavior*.

1. *Disrespect to a superior commissioned officer*. Article 89. To constitute this offense, the superior commissioned officer need ***not*** be in the execution of his office at the time of the disrespectful behavior.

2. *Disrespect to a WO, NCO, or PO.* Article 91(3). It ***is*** an essential element of this offense that the WO, NCO, or PO be in the execution of his office at the time of the disrespectful behavior. In this regard, Article 91(3) differs from Article 89 (i.e., as to a commissioned officer, the disrespect does not have to occur while he is in the execution of his office). Indeed, it does not even have to occur within the commissioned officer's presence to constitute this offense. The WO, NCO, or PO is ordinarily in the execution of his office if he is on duty or is performing some military function.

(a) A discussion of the "abandonment of rank" is discussed later in this chapter.

CR 21.10.8. *Pleadings*.

If the words or acts that constitute the disrespectful conduct are innocuous, the pleadings will be fatally defective unless circumstances surrounding the behavior are alleged to detail the nature of the insubordination. The omission of the pronouns "his" or "her" may also affect the validity of a specification.

The accused's knowledge of the superiority or status of victim need not be alleged. Nonetheless, it is recommended that knowledge be alleged in order to avoid any challenges.

1. S*uperiority is not an essential element of Article 91*. If the superiority is pled and proved, however, it will increase the maximum authorized punishment. Disrespect to a ***superior*** WO, NCO, or PO carries a maximum punishment of a BCD and six months' confinement. If superiority is not pled and proved, the maximum is three months' confinement.

2. *Sample specifications.*

Charge. Violation of the Uniform Code of Military Justice, Article 89

Specification. In that Corporal Lance C. Gomez, U.S. Marine Corps, Marine Barracks, Naval Air Station North Island, Coronado, California, on active duty, did, at Naval Air Station North Island, Coronado, California, on or about 1 September 20CY, behave himself with disrespect towards Captain Cynthia E. Benton, U.S. Marine Corps Reserve, his superior commissioned officer, and known by said Gomez to be his superior commissioned officer, by saying to her "You are even more stupid than the last captain," or words to that effect.

Charge. Violation of the Uniform Code of Military Justice, Article 91

Specification. In that Boatswain's Mate Third Class Sarah L. Fester, U.S. Navy, USS SINK, on active duty, on board USS SINK, in Naples, Italy, on or about 18 May 20CY, was disrespectful in deportment towards Boatswain's Mate First Class John H. Small, U.S. Navy, her superior petty officer, and known by the said Fester to be her superior petty officer, who was then in the execution of his office, by contemptuously turning from and leaving him while he, the said Boatswain's Mate First Class Small, was talking to the said accused.

CR 21.10.9. *Disrespect as a lesser-included offense to other offenses.*

1. *To disobedience of a superior*. In some instances, disrespect and disobedience may be separate offenses.

2. *To assault*;

3. *To communicating a threat.*

Disrespect toward an NCO is a separate offense from provoking speeches and gestures and may be charged and punished separately.

CR 21.10.10. ***Military Judge's Instructions.***

1. *Article 89*. Military Judges' Benchbook, Inst. 3-13-1.

2. *Article 91*. Military Judges' Benchbook, Inst. 3-15-3.

CR 21.11. *COMPARISON AND RELATIONSHIP OF OFFENSES AGAINST AUTHORITY*

CR 21.11.1. *Orders Offenses.*

1. *General order or regulation (Article 92(1).).* To be a general order or regulation, the commander must have the authority to issue such an order and it must be applicable generally to an armed force or throughout the command. The violation or failure to obey may be willful or merely the result of negligence, carelessness, or forgetfulness.

2. *Any other lawful order. Article 92(2).* This covers any lawful order that is not a general order, which the accused had a duty to obey but which he failed to obey. The failure to obey may be willful or a result of negligence, carelessness, or forgetfulness. Knowledge is an element and must be proved. In this respect, it differs from a general order. Knowledge must be expressly alleged. As to general orders, knowledge need not be alleged since lack of knowledge is wholly immaterial.

The maximum punishment for violation of an other lawful order is a BCD, confinement for 6 months, etc. MCM, pt. IV, § 16e(2). Whereas, the maximum punishment for violation of a general order is DD, confinement for 2 years, etc.

Article 92(2) may be an LIO of the willful disobedience offenses, Articles 90(2) and 91(2), if there is a lack of proof of "knowledge of status" or "willfulness" or "a personally directed order." "Knowledge of the order" and "duty to obey" are sufficiently implied in the form specifications of the higher disobedience offenses to permit a finding of the LIO, Article 92(2). However, these two elements, "knowledge of the order" and "duty to obey," are apparently not sufficiently implied within the form specification found at MCM, pt. IV, § 16f(1). Furthermore, since Article 92(2) is not listed as an LIO of Article 92(1), it must be plead in the alternative.

3. *Willful disobedience. Articles 90(2) and 91(2).* Under Article 90(2), the victim is a superior commissioned officer; whereas, under Article 91(2), the victim is any WO, NCO, or PO. Under Article 90(2), the accused can be any person subject to the UCMJ; whereas, under Article 91(2), the accused must be a WO or enlisted person. Under Article 90(2), a commissioned officer is "superior" if he is higher by at least one grade and is a member of the same armed force as the accused; or he is in command of the accused, regardless if they are of the same armed force and who is higher in grade.

Article 91(2) refers to a WO, NCO, or PO and does not contain the "his superior" language. Under Articles 90(2) and 91(2), the order must be directed to the accused personally; whereas, under Article 92(2), it may be directed to him personally or as a member of a class. Under Article 92(1), it must never be personally directed.

CR 21.11.2. *Dereliction in the Performance of Duty (Article 92(3).)*

The act, which constitutes a dereliction of duty, may also constitute an Article 92(1) or (2) offense. It is not necessary to establish a specific violation of a particular order to prove the offense of dereliction of duty. Article 92(3) is primarily intended to cover those instances when it appears that the accused had a duty, usually a general or routine duty to perform and he either failed to perform it (willfully or negligently) or he performed it in a culpably inefficient manner.

CR 21.11.3. ***Disrespect. Articles 89 and 91(3).***

Under Article 89, the victim is a superior commissioned officer; whereas, under Article 91(3), the victim is a WO, NCO, or PO. The accused is the same as for Articles 91(2) and 90(2). For the "superiority" element, it is the same as for Article 90(2). For Article 91(3), superiority is not an essential element, but is an aggravating fact if pled and proved. Under article 91(3), the disrespect must occur within the sight or hearing of the victim; whereas, under Article 89, the victim need not know about or be present at the time of the disrespect. Under Article 91(3), the victim must be in the execution of his office; whereas, this is not required for an Article 89 offense.

OFFENSES AGAINST AUTHORITY

	Article	Offense	Perpetrator	Victim	Knowledge
DISRESPECT	**89**	**Disrespect to Superior Comm'd offr**	**Anyone junior to the victim**	**Need not be present nor in execution of office**	**Of superior status**
DISRESPECT	**91 (3)**	**Disrespect to WO, NCO, PO**	**Enlisted or WO**	**Must be present and in execution of office.**	**Of status**
DISRESPECT	**(superior = aggravation)**				
ORDERS	**92(1)**	**General Order**	**Anyone**		**Need not be pleaded nor proved**
ORDERS	**92(2)**	**Other lawful Order**	**Anyone**		**Must be pleaded and proved**
VIOLATIONS	**92 (3)**	**Dereliction**	**Anyone**		**Must plead and prove that accused knew of duty**
WILLFUL DISOBEDIENCE	**90(2)**	**Willful disobedience of superior comm'd offr**	**Anyone junior to the victim**	**Commissioned Officer**	**Of superior status of victim and of order**
WILLFUL DISOBEDIENCE	**91(2)**	**Willful disobedience of WO, NCO, PO**	**Enlisted or WO**	**WO, NCO, PO**	**Of status of victim and of order**
90(1)		**Assault on superior comm'd offr**	**Anyone junior To the victim**	**Must be in execution of office**	**Of superior status**

91(1) **(superior =**	**Assault on WO, NCO, PO aggravation)**	**Enlisted or WO**	**Must be in execution of office**	**Of status**
128	**Assault on commissioned officer, WO, PO**	**Anyone**	**Need not be in execution of office or superior**	**Of command WO, NCO, PO status**

CR 21.12. *DEFENSES TO OFFENSES AGAINST AUTHORITY*

CR 21.12.1. *Abandonment of rank.*

"A superior can abandon his rank and position of authority in dealing with subordinates." The concept of abandonment of rank applies to disrespect, disobedience, and assault where rank is an aggravating factor.

Examples of where the court held rank was abandoned:

Invitation to "put me on my back" defense to assault upon a superior commissioned officer in the execution of his office in violation of Article 90.
Use of racial slurs.
Excessive profanity towards accused.
Illegal arrest.
Encouraging the accused to get drunk and acting as a bartender.

Examples of where the court held rank was not abandoned:

Physically placing accused in his cubicle to quiet barracks disturbance.
Dousing a drunk in a cold shower.
Improperly or irregularly conducted searches.
Use of term "boy" when not used as racial slur (victim and accused were of same race).

CR 21.12.2. *Impossibility of compliance with orders.*

Impossibility, referred to as "inability" in MCM, R.C.M. 916(i), of compliance is an affirmative defense in the nature of a legal excuse. The impossibility may be a physical incapacity, in which event it may be caused by a temporary or permanent physical inability, or it may be the result of outside physical interference. Impossibility of compliance may also be due to 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.

If the condition arose through his own fault after the order was given, however, such a condition is not a valid defense to a charge of failure to obey under Article 92. Reason: Failure to obey under Article 92 ***may*** be simply the result of negligence. Therefore, if the impossibility arises through the accused's negligence, he has, nevertheless, violated Article 92 by failing to obey as a result of his own fault (i.e., negligence).

Impossibility, arising due to negligence after the order, is a valid defense to an Article 90 and Article 91 disobedience offense even though the condition arose through his own fault. Reason: It is essential to an Article 90 and Article 91 disobedience offense that the noncompliance be willful. Nothing less, including negligence, will suffice to constitute this offense. On the other hand, if the "impossibility" is deliberately created by the accused for the purpose of avoiding compliance, such a condition is not a valid defense; in fact, it is the means of accomplishing the offense.

Physical inability to carry out an order is a valid affirmative defense. For example, accused, who had received a substantial injury to his hand 8 days before, was ordered to tie sandbags. At his trial, accused maintained that he was unable to perform the assigned task. Held: The issue of physical incapacity was reasonably raised by the evidence and required, sua sponte, an instruction on the affirmative defense of impossibility of compliance.

An accused who, through no fault of his own, was physically prevented from complying with the order may assert impossibility of compliance as a defense. Example: The accused was ordered to go to his barracks; but, before he could comply with ***the order, through no fault*** of his own, while waiting for a bus, he was taken into custody by the Air Force Police. ***Held***: Under the circumstances, the failure to obey was excused.

There are many situations in which a person can be given a lawful order which involves the expenditure of his personal funds (e.g., get a haircut, get uniform cleaned, replace worn-out uniforms); however, if, at the time such an order is given, the accused is financially incapacitated (i.e., he neither has sufficient funds nor is able to obtain them), then the affirmative defense of impossibility is raised.

Also of interest is the delayed compliance defense. See relevant cases for further discussion on this point.

CR 21.12.3. ***Noncompliance because of a subsequent conflicting order.***

What should a subordinate do when he receives an order from a superior officer that amends, suspends, or modifies a previous order received from another superior or a pre-existing duty? ***Answer***: Fully inform the last superior of the requirements of the original order or duty and, if the last superior insists upon execution of his order, carry out that (last) order. Then report the circumstances ASAP to the superior who issued the original order.

Is the failure to carry out the original order a violation of the UCMJ? ***Answer***: No. Noncompliance as a result of a subsequent, apparently lawful order is an affirmative defense constituting a legal excuse. Failure to comply with either order, however, is no defense. Consider the case where the accused was required to be in two places at the same time; the enlisted dining facility for routine daily assignment and the quarterdeck for a muster. His decision to go to neither place, but to remain in his rack instead, amounted to a violation of both responsibilities.

CR 21.12.4. ***The accused can raise the existence of an exception to an order as an affirmative defense.***

For example: order prohibits possession of hypodermic needles except for the treatment of diseases. The prosecution has established issuance and knowledge of the order and accused's possession of one hypodermic needle—a prima facie case of violation of Article 92. Accused introduced substantial evidence indicating that he had a disease requiring treatment by frequent injections, which he administered to himself pursuant to a doctor's instructions, and that this was the reason for his possession. His theory of defense then is that his possession comes within an exception to the prohibition. The prosecution must now establish beyond a ***reasonable doubt*** that he did not possess the syringe for the treatment of a disease.

CHAPTER 22

CHAPTER 22

CR 22. ARTICLE 133 & 134 — THE GENERAL ARTICLES

CR 22.1. *INTRODUCTION*

CR 22.1.1. *Categories of Article 134 Offenses*.

Article 134 proscribes three distinct categories of offenses, which are often referred to as "Clauses 1, 2, and 3":

1. *Clause 1: Prejudicial to good order and discipline.* Includes conduct, disorders and neglects that are prejudicial to good order and discipline in the armed forces. (Abbreviated as "C to P" in this text.)

2. *Clause 2: Service discrediting.* Includes conduct of a nature to bring discredit upon the armed forces. (Abbreviated as "SD," or "service discrediting conduct," in this text.)

3. *Clause 3: Other Federal noncapital crimes.* Federal non-capital offenses which are not otherwise prohibited by the UCMJ. (Abbreviated as CONC in this text.) Under certain circumstances, includes the adoption of state law via the Federal Assimilative Crimes Act.

While examples follow that are offered as illustrations of conduct which is prejudicial to good order and discipline, it should be noted that the same conduct, depending upon the circumstances, could well be "service discrediting." There is no definitive line delineating the two types of misconduct. What constitutes one often defines the other. Consequently, one should not attempt to determine specific categories of exclusive "C to P" or "SD" conduct.

CR 22.1.2. *Scope.*

The phrase "persons subject to this chapter" includes all armed forces personnel, both officer and enlisted, over whom a court-martial can assert jurisdiction. Article 133, which states that "[A]ny commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct," applies only to officers and officer candidates (midshipmen, cadets). Article 134, on the other hand, has no such limitation. Often, the same misconduct is prohibited by both articles. If the accused is an officer, she would probably be prosecuted under Article 133.

A civilian serving in the field with the armed forces may be convicted of offenses in violation of the General Article ***if*** the court has jurisdiction over his person. Note that in most instances, there will be no jurisdiction over the civilian. For example, the accused was a civilian employed by the Army in Japan. He abused his position by obtaining gifts from a corporation doing business with the Army. He was charged with such misconduct in violation of the General Article. C.M.A. stated: "In view of the nature and peculiar circumstances of his employment . . . [he is] held to a similar high standard of conduct. Although not in uniform, . . . and was certainly well known to the people with whom he was dealing — that petitioner was serving with the Army, and that in his official capacity he represented that service and the Department of the Army. Any improper acts of his — and particularly those related to his official duties — would therefore reflect directly on the military service."

By contrast, consider the case where it was held that a civilian employee of the Army in Vietnam was not amenable to trial by court-martial. The charges were not laid under Article 134, but the case does give guidance for this particular type of circumstance which helps define who is a person subject to the UCMJ. A number of decisions have upheld the validity of trials by court-martial of civilians performing services for the armed forces ***in the field during time of war***. Certain of these decisions have construed the words "in the field" to embrace all military operations with a view towards action taken, indirectly or directly, against an enemy. For example, domestic staging operations and merchant shipping to a battle zone have been discussed in an early case; and the Supreme Court strongly suggests, however, that the permissible limits of military jurisdiction over civilians "in the field" extends no further than the actual area of battle "in the face of the enemy."

A prisoner in the custody of the armed forces, serving a sentence ***after*** the execution of his punitive discharge, may violate Article 134. For example: The accused was convicted of an assault on a person in the execution of MP duties in violation of Article 134. He had already been given a DD and was confined in the Army's Disciplinary Barracks serving out his sentence. ***Held***: Affirmed. "[S]ome conduct to the prejudice of good order and discipline does not depend upon the existence of a military relationship between the actor and the armed services. What is

important is the effect of the act upon the service. If the accused's conduct has a direct and palpable prejudicial impact upon good order and discipline, it constitutes a violation of Article 134."

CR 22.1.3. *Challenges to the Article's Specificity.*

In one important case, the Supreme Court ruled that Articles 133 and 134 were not unconstitutionally vague or imprecise. The Court ruled the same way in another case decided the same term. In both of these cases, the Court held that the articles were not violative of the due process clause of the fifth amendment and were capable of withstanding such assaults because of the narrowing interpretations placed upon the scope of the articles by military legal authorities and traditions.

CR 22.2. *DISORDERS AND NEGLECTS TO THE PREJUDICE OF GOOD ORDER AND DISCIPLINE - CLAUSE 1*

CR 22.2.1. *General Discussion.*

The "disorders and neglects" punishable under clause (1) of Article 134 include those acts or omissions to the prejudice of good order and discipline not specifically mentioned in other articles of the UCMJ.

"To the prejudice of good order and discipline" refers only to acts directly prejudicial to good order and discipline and not to acts which are prejudicial only in a remote or indirect sense. Almost any irregular or improper act on the part of a member of the military service could be regarded as prejudicial in some indirect or remote sense; however, this article does not include these distant effects. It is confined to cases in which the prejudice is reasonably direct and palpable. . . ."

It is this type of "narrowing" that the Supreme Court alluded to in the *Parker v. Levy* decision, which caused it to uphold Article 134 despite attacks against its purported overbreadth and imprecision.

Military courts have determined that Article 134 contemplates only those offenses that are prejudicial to good order and discipline. As was stated in one case: "Suffice it to say that the article contemplates only the punishment of that type of misconduct which is directly and palpably, as distinguished from indirectly and remotely, prejudicial to good order and discipline."

Prosecutions under this clause require the terminal element of "to the prejudice of good order and discipline" to be proved beyond a reasonable doubt. This element is an essential one and must be instructed upon as such. Failure to do so constitutes error.

While the terminal element must be proved by the prosecution, it need not be pleaded. C.M.R. observed ". . . we find no reason for the inclusion in the specifications of the words 'conduct of a nature to bring discredit upon the military service." In truth, we believe the suggested language to be nothing more than traditionally permissible surplusage in specifications. . . ." The one exception to this rule is in drunk and disorderly offenses. To get the benefit of the aggravated punishment, "C to P" or "SD" must be expressly pled.

There is no requirement that the conduct be prohibited by some order, regulation, or statute in order to fall within proscription against disorders and neglects to prejudice of good order and discipline.

1. *Examples of offenses which have been held to involve conduct to the prejudice of good order and discipline:*

(a) Appearing in improper uniform;

(b) careless discharge of firearms;

(c) impersonating an officer (*see* further discussion below);

(d) impersonating a noncommissioned officer;

(e) impersonating an OSI agent;

(f) jumping into the sea from a vessel;

(g) a breach of a custom of the service, such as fraternizing with enlisted personnel by an officer;

(h) receiving, buying, or concealing stolen property;

(i) negligent homicide;

(j) falsely making an identification card;

(k) making an obscene phone call;

(l) voyeurism;

(m) obstruction of justice;

(n) indecent assault;

(o) cross-dressing; and

(p) indecent exposure.

(q) other "C to P" offenses are addressed in the following chapters in this Study Guide:

(1) breaking restriction (Ch. VII);

(2) incapacitation for duty as the result of prior indulgence in intoxicating liquor (Ch. VII);

(3) drunk on station (Ch. VII);

(4) communication of a threat (Ch. VIII);

(5) false swearing (Ch. VII); and

(6) solicitation (Ch. I).

The Court of Appeals for the Armed Forces (formerly Court of Military Appeals, C.M.A) recognized a reckless endangerment theory where they decided that a specification alleging conduct prejudicial to good order and discipline stated an offense, under a reckless endangerment theory, for engaging in unprotected sexual intercourse after having been diagnosed as having the AIDS virus.

CR 22.2.2. *Discussion Of Some Specific Offenses Under Clause 1, Article 134.*

1. *Impersonating an Officer.* The elements necessary to prove the offense are as follows:

(a) That the accused wrongfully, willfully, and unlawfully impersonated a commissioned officer, WO, NCO, PO, an agent of a superior authority, or an official of a government in the manner alleged.

(b) "C to P."

(c) An aggravated form of this offense may be alleged by including the element of "with intent to defraud"; in which case, it must also be instructed upon. If a more serious offense (i.e., impersonation with the intent to defraud) is charged, but simple impersonation is proved, the accused may be found guilty of the latter. If the nonaggravated form of impersonation (no intent to defraud) is alleged, the final element is that the accused committed one or more acts which exercised or asserted the authority of the office the accused

claimed to have.

In dealing with the offense of impersonating an officer, C.M.A. said this:

[W]e here hold that the offense charged [impersonating an officer] falls under disorders to the prejudice of good order and discipline of the armed forces. . . . The gravamen of the military offense of impersonation does not depend upon the accused deriving a benefit from the deception or upon some third party being misled, but rather upon whether the acts and conduct would influence adversely the good order and discipline of the armed forces. It requires little imagination to conclude that a spirit of confusion and disorder and lack of discipline in the military would result if enlisted personnel were permitted to assume the roles of officers and masquerade as persons of high rank.

Prior law assumed that the military offense of impersonation was different than its civilian counterpart, impersonating an officer of the United States: ". . . it can be seen that in the military, the offense can be committed by falsely assuming the role or pretending to be a commissioned officer, whereas in order to violate the federal statute prohibiting impersonation of an officer of the United States, one must not only falsely assume the role or pretend to be an officer but one must also act in the pretended capacity." The Court of Military Appeals adopted a middle ground and followed the District of Columbia circuit's lead in doing so. The D.C. Circuit said:

The crime . . . has two elements: falsely pretending to be an officer or employee of the United States, and acting "as such." If acting "as such" is understood to mean performing an overt act that asserts, implicitly or explicitly, authority that the impersonator claims to have by virtue of the office he pretends to hold, the concerns of both the Fifth and Fourth Circuits can be accommodated. Attempting to exercise pretended authority is far more offense (sic) to the interests of the United States than "mere bravado." Moreover, it seems reasonable for Congress to have concluded that virtually everyone who pretends to be an officer or employee of the United States and in some manner asserts authority by acting "as such" seeks to cause the deceived person to follow some course he would not have pursued but for the deceitful conduct.

The Court of Military Appeals adopted this language as its own and held that ". . . both law and logic compel not only an allegation and a showing of the pretense of authority, but also an allegation and a showing of an act which 'must be something more than merely an act in keeping with the falsely assumed character.'" The court held that a bare allegation of false representation was deficient and failed to state an offense. In one case, a specification alleging impersonation of an OSI agent was deemed to be sufficient. In that particular specification, there was an allegation of more than a "'bare false representation'; it contains an assertion that the accused used an OSI business card to further his false impersonation and questioned a named individual in his assumed capacity as an OSI agent." Consequently, care must be taken when drafting a specification alleging impersonation without the intent to defraud, for the *Yum* case holds that some act beyond mere false impersonation is required if an offense is to be stated.

(d) *Pleading:* A sample specification is found in MCM, pt. IV, § 86f.

(e) *Instructions:* A sample instruction regarding this offense is found at paragraph 3-86-1 of the *Military Judges' Benchbook*, which conforms with the requirements of the *Yum* decision, and MCM, pt. IV, § 86b.

2. *False or Unauthorized Passes, Permits, Discharge Certificates, and Military Identification Cards.*

(a) False pass, permit, discharge, and ID card offenses are among the more commonly committed crimes in the military. Passes and ID cards are altered, forged, or wrongfully used in order to achieve a variety of illegal objectives.

(b) MCM, pt. IV, § 77, lists four categories of pass, permit, etc. offenses:

(1) Wrongful making, altering, counterfeiting, or tampering;

(2) wrongful sale, gift, loan, or disposition;

(3) wrongful use or possession; and

(4) wrongful use or possession with intent to defraud or deceive.

(c) *Wrongful making, altering, counterfeiting, or tampering.*

(1) *Elements*:

a. Wrongfully and falsely ***making***, ***altering***, ***counterfeiting***, or ***tampering with*** a certain military or official pass (etc.);

b. and that, under the circumstances, the conduct was "C to P" or "SD."

(2) *Discussion.* Unlike the "use," "possession," "sale," or "disposition" offense, knowledge is ***not*** an element in the "making" or "altering" offenses. It would seem, however, that lack of knowledge of its falsity or of its being unauthorized would be at least an affirmative ***defense***, if raised by the evidence, and would necessitate sua sponte instructions to the court. See the MCM for maximum punishment.

Forged armed forces ID cards are not writings which would on their faces, if genuine, apparently operate to the legal prejudice of another; thus, an allegation that they would do so in a forgery specification is defective in the absence of an allegation of extrinsic facts to show how the cards could be or were used to affect the legal rights of others. The same case held that a falsely made ID card was properly chargeable under Article 134.

(d) *Wrongful sale, gift, loan, or disposition.*

(1) *Elements:*

a. Wrongfully ***sold***, ***gave***, ***loaned***, or ***disposed*** of a certain military or official pass (etc.);

b. that the pass (etc.) was false or unauthorized;

c. that the accused ***knew*** that the pass (etc.) was false or unauthorized; and

d. that, under the circumstances, the conduct was "C to P" or of a nature to bring discredit upon the armed services.

(2) *Discussion.* The term "dispose," as used in this offense, includes all forms of disposition other than "sale."

It is interesting to note that the *Manual for Courts-Martial* prescribes a maximum punishment of a DD and three years' confinement for the sale of a false or unauthorized pass or ID card under Article 134, UCMJ, but also promulgates a maximum punishment of only a BCD and one year confinement for sale of military property worth less than $100.00 under Article 108. Since most military ID cards are worth considerably less than $100.00, the ability of the government to subject the accused to a greater punishment by merely charging the offense under Article 134 is suspect.

(e) *Wrongful use or **possession** (with intent to deceive or defraud).*

(1) E*lements:*

a. That the accused wrongfully ***used*** or ***possessed*** a certain military or official pass, (etc.);

b. that the pass (etc.) was ***false*** or ***unauthorized***;

c. that the accused ***knew*** the pass (etc.) was false or unauthorized;

d. that, under the circumstances, the conduct was "C to P" or of a nature to bring discredit upon the armed forces; and (if alleged)

e. that the use or possession was with the intent to deceive or defraud.

(2) *Discussion.* The element of intent to deceive or defraud, when alleged, constitutes an aggravated circumstance and authorizes a more severe punishment.

A.F.C.M.R. found jurisdiction appropriate concerning a specification of wrongful possession of an ID card where the accused found a wallet containing the card in an apartment complex parking lot close to the base and where the accused knew the owner to be a member of the same organization. The accused also attempted to use the card to negotiate a money order found in the wallet. Jurisdiction was predicated on the military's interest in the control and use of service ID cards.

An element of the offense of wrongful possession or use is that the accused knew the pass, etc., was false. It has been held to be error if the members are instructed instead that the accused must have known that the possession was unauthorized.

What if the accused has a genuine card which belongs to another in his possession? This situation arose in a case and the court said that "a true means of identification in the possession of one to whom it is properly issued becomes a false means of identification when wrongfully used by another."

(f) *Pass offenses under 18 U.S.C. § 499.*

C.M.R. has pointed out that pass offenses in the military spring from a Federal statute. All three judges considered that statute for the purpose of determining the nature of the offenses provided for in MCM, pt. IV, § 77. Although ***nearly*** all pass offenses contained in 18 U.S.C. § 499 are incorporated in the *Manual for Courts-Martial*, there are several that are not included. These omitted offenses could also be charged under Article 134, clause 3, and, hence, would not require the terminal element (i.e., "C to P" or "SD"). Charging under clause 3 of Article 134 is discussed later in this chapter.

(g) *Pleading pass offenses.* Examine the facts closely and utilize precisely the language for the selected offense as found in the sample specifications in MCM, pt. IV, § 77f. Utilize a variation of the pass offenses under 18 U.S.C. § 499 only when necessary. The sample specifications indicate that the pass should be set forth verbatim within the specification. This may be accomplished by placing a copy of the document on the charge sheet at the appropriate place. (Adhere to the best practice in drafting such specifications, i.e., set out the pass verbatim in the specification.)

(h) *Instructions.* In a wrongful use, possession, sale, or disposition of a pass (etc.) case, knowledge of the unauthorized or false character of the item is an element which must be instructed upon as well as pleaded and proved. As noted earlier, it has been held to be error for the members to be instructed that the accused must have known that the possession was unauthorized instead of being told that the accused must have known that the card, etc., was false. On the other hand, it is probably sufficient if the members determine that the accused intended to use the false card in the future. See the following cases with regard to the sufficiency of evidence and the instructions required in "intent to deceive cases."

On a charge of wrongful possession with intent to deceive, mere wrongful possession (without that intent) is a lesser included offense (LIO). If there is ***some evidence*** in the record which reasonably places this LIO in issue, it must be instructed upon. He went UA and, while UA, was asked by SP to produce his liberty card and ID card. Accused only gave ID card and was taken in custody to SP Headquarters. Later, a forged liberty pass bearing accused's name and service number was found in the patrol vehicle's rear seat on which accused had ridden. Accused later confessed that he had a forged liberty pass on his person when apprehended and knew it was forged. ***Held***: This evidence raised issue of LIO. The accused only admitted wrongful possession and, when faced with an obvious opportunity to use the card in order to deceive the shore patrol, he did not produce it. Failure to instruct on LIO was prejudicial.

On a charge of wrongful *sale* of a pass, a wrongful *disposition other than by sale* might be an LIO. However, the argument that such is not the case may be just as strong. Applying traditional property concepts, it appears evident

that one could act as a seller without having possession of the card or pass. There appear to be no cases either accepting or rejecting this approach insofar as pass and ID card offenses are concerned.

CR 22.3. *SERVICE DISCREDITING CONDUCT—CLAUSE 2*

CR 22.3.1. *General Discussion.*

Clause 2 of Article 134, proscribes "all conduct of a nature to bring discredit upon the armed forces." MCM, pt. IV, § 60c(3), defines "discredit" to mean "to injure the reputation of" and states that, "this clause of Article 134 makes punishable conduct which has a tendency to bring the service into disrepute or which tends to lower it in public esteem."

1. *Discrediting potential must be direct and substantial.* To be punishable under this clause, the discrediting potential must be direct and substantial. But, it is not necessary that actual discredit result from the accused's actions in order to constitute this offense. It is sufficient if, under the circumstances, the conduct was of a nature to bring direct and substantial discredit. For example, in one case the accused was charged with publicly associating with persons known to be sexual deviates, to the disgrace of the armed forces. The defense contended that, since the association was solely in the presence of sexual deviates, the element of disgrace to the service is necessarily lacking. ***Held:*** The defense argument meritless, and the evidence sufficient.

2. *Dual approach.* Clauses 1 and 2 frequently overlap; that is, acts which have a direct and palpable tendency to prejudice good order and discipline often are also committed under circumstances which have a direct and substantial tendency to injure the reputation of the armed forces. In actual practice, most cases are tried and reviewed under this dual approach. MCM, pt. IV, § 60c(6)(a), specifically provides "The same conduct may constitute a disorder or neglect to the prejudice of good order and discipline in the armed forces and at the same time be of a nature to bring discredit upon the armed forces." An example of a court case dealt with a rigged bingo game in an Airmen's Open Mess in which C.M.A. held that the game was an offense under Article 134, and stated: "We find in this case that the accused's behavior was not only prejudicial to good order and discipline, but it further reflected discredit on the armed forces. Open messes of officers and enlisted personnel are semi-public and perform valuable functions for the service. The bingo games and entertainment have a direct impact upon the morale of our forces overseas. We cannot but conclude, therefore, that patent dishonesty by an employee in one of these organizations constituted improper acts and conduct which directly and substantially affected adversely the good order and discipline in the armed forces of the United States and did directly and substantially bring discredit upon the armed forces."

CR 22.3.2. *Analysis Of Some Specific Offenses Under Article 134, Clause (2)*.

1. *Dishonorable Failure to Pay Just Debts.*

(a) *Elements:*

(1) That the accused was indebted to a certain person or entity in a certain sum;

(2) that this debt became due and payable on or about a certain date;

(3) that, while the debt was still due and payable, the accused dishonorably failed to pay this debt; and

(4) that, under the circumstances, the conduct of the accused was of a nature to bring discredit upon the armed forces. (Or "C to P.")

(b) *The debt must be sum certain.* If there is a genuine dispute as to whether the debt is due and payable, the dispute will constitute a defense to the charge. In one instance, for example, the accused was a manager of a club which showed a shortage in funds as a result of an audit. The accused signed an acknowledgment of indebtedness to make up the shortage from his own funds and attempted to make a monthly allotment to pay it off. His attempt was unsuccessful, however, and he did not make further efforts to make good on the note. At his later trial, he claimed that the shortage was not a "just" debt and that he had signed the acknowledgment because he was upset, although he admitted that he was not forced to sign it. The court held that his argument was without merit and that there was no genuine dispute as to the legality or the amount of the obligation; consequently, the

accused had no defense.

The courts have held that gambling losses are not "debts." Even a deliberate refusal to pay a gambling debt is not an offense under Article 134 because the courts consider the enforcement of such obligations to be in conflict with "the welfare and morals of society." In appropriate circumstances, however, the fact that the accused has incurred gambling debts may bear upon the question of whether the accused's failure to pay his ***other*** obligations was dishonorable.

In most instances, there must be a demand for payment by the creditor before the debt can be considered to have matured. Because "[t]he law does not require the doing of a useless act," no such demand is required if the accused has made clear his intent to defraud the creditor.

(c) *Wrongful and dishonorable failure to pay the debt.* "Wrongful" means without justification or excuse. A discharge in bankruptcy may constitute a defense to this charge because a subsequent refusal to pay would not then be wrongful. ". . . a discharge in bankruptcy, before a dishonorable failure to pay has occurred can do away with the basis for a later charge of a violation of the Uniform Code."

MCM, pt. IV, § 71c, provides that, "[f]or a debt to form the basis for this offense, the accused must not have had a defense, or an equivalent offset or counterclaim, *either in fact or according to the accused's belief*, at the time alleged." (Emphasis added). Thus, if the accused honestly believed that he was not under any legal and moral duty to pay the debt, his failure to do so should not be characterized as "dishonorable."

"Dishonorable" means that the failure to pay the debt was characterized by deceit, evasion, false promises, or other distinctly culpable circumstances indicating a deliberate nonpayment or grossly indifferent attitude toward one's just obligations. A mere negligent failure to pay a just debt is not an offense under the UCMJ. Mere inability to pay or the failure to pay over a long period of time, without more, has been held insufficient to support a charge of dishonorable failure to pay a just debt. On the other hand, failure to pay over a lengthy period of time, coupled with false denials of the existence of the debt, is sufficient to support a conviction.

Along this same line of reasoning, the mere failure to keep a promise to pay a debt is not itself dishonorable unless the promise was made with a fraudulent or deceitful purpose in order to evade responsibility for payment. There must be some proof of a fraudulent or deceitful purpose in order to support a conviction.

(d) *Terminal element.* Since this offense is charged under Article 134, the "terminal element" of conduct to the prejudice of good order and discipline or service discrediting conduct is required. If the dishonorable failure to pay a just debt occurs in the civilian community, it is more appropriately described as conduct that is service discrediting.

(e) *Some case illustrations:*

(1) The accused was requested a number of times over a period of several months to pay each of his debts; the evidence indicated that he was able to pay, but he evaded payment. ***Held:*** Evidence sufficient for conviction.

(2) Accused made a number of late payments on a loan; some were by checks which were returned for insufficient funds, but he finally made all payments good and the manager of the finance company testified that the accused's account was "satisfactory." ***Held:*** Evidence ***not*** sufficient. "The public nature of the offense has its source in a private relationship. If the private relationship is entirely satisfactory to the parties, there is no ill effect upon the civilian or military community. In other words, if the creditor is satisfied with the conduct of the debtor, there is no basis for concluding that the conduct of the debtor discredits the military service." This view is now reflected in MCM, pt. IV, § 71c, which provides that: "The offense is not committed if the creditor or creditors involved are satisfied with the conduct of the debtor with respect to payment."

(3) Accused failed to make rent payments or partial payments for two months, had made prior late payments on rent, failed to contact rental agency after getting formal and informal notice that rent was overdue, surreptitiously vacated the apartment, left the apartment dirty and damaged.

(4) Accused failed to pay a $1029.00 hotel bill. The accused lived in the hotel for some six months in a deserter status, but continued to draw his paycheck. When the Air Force finally stopped his

pay, he fell six weeks behind on the bill. The accused managed to stay in the hotel by telling the management that he had pay problem with the Air Force and that he was due back pay once it all got fixed. This, of course, was not true. This held sufficient to affirm conviction.

(f) *Pleading.* Use sample specification at MCM, pt. IV, § 71f.

2. *Carrying a Concealed Weapon.*

(a) *Elements.*

(1) That the accused carried a certain weapon concealed on or about the accused's person;

(2) that the carrying was unlawful;

(3) that the weapon was a dangerous weapon; and

(4) "C to P" or "SD."

(b) *Concealed weapon.* "A weapon is concealed when it is carried by a person and intentionally covered or kept from sight." This instruction has been approved in case law. The weapon does not have to be concealed on the accused's person, concealment in an automobile at "a place where it is readily available to him" is sufficient to support a conviction. Carrying a loaded weapon in a locked briefcase in the cab of the accused's pick-up truck was held to have met the element of being "on or about his person."

(c) *Dangerous.* The particular thing allegedly concealed may be found to be dangerous if it was designed for the purpose of doing grievous bodily harm or was used or intended to be used by the accused to do grievous bodily harm.

(d) *Pleading.* Both the Army *Military Judges' Benchbook*, and the sample specification in the *Manual for Courts-Martial* indicate that "unlawfully" is an element of the offense. Several cases have held that failure to allege that the carrying of the concealed weapon was "unlawful" results in a failure of the specification to state an offense since there may be occasion when it is authorized or otherwise proper to carry a concealed weapon.

3. *Violations of Local Law (domestic or foreign).*

(a) *Generally.* In discussing what constitutes "conduct of a nature to bring discredit upon the armed forces," MCM, pt. IV, § 60c(3), states: "Acts in violation of a local civil law . . . may be punished if they are of a nature to bring discredit upon the armed forces." This includes the local law of foreign countries as well as the local law of the states.

However, "[A] violation of a state statute does not by itself constitute a violation of Article 134, UCMJ. The violation must, in fact, and in law, amount to conduct to the discredit of the Armed Forces. Not every violation of a state statute is discrediting conduct."

(b) *Example:*

(1) The accused, a minor, was charged with possessing and drinking alcoholic beverages in a public place in violation of a state law which prohibited such conduct by minors ***unless*** accompanied by an adult. The specification merely alleged that the accused had been in possession and consumed alcoholic beverages as a minor in a public place. The court held that (1) the state statue did not prohibit a minor's drinking or possessing alcoholic beverages per se but prohibited such conduct unless accompanied by a parent, adult spouse, or guardian; and (2) since the "misconduct charged. . . has not been specifically denounced as a crime or offense by Congress, the third class of offenses [clause 3] mentioned in Article 134, *supra*, is of no concern. . . ." It went on to note that, even if the conduct had amounted to a violation of stae law, it still must be "C to P" or "SD" in order to be prosecuted under clause (1) or clause (2) of Article 134. The court held that there "was an absence of facts alleged" which would meet this last requirement and held that the specification failed to stae an offense.

(c) *Rare that an act, illegal under state law, is prosecuted under clause 2 of article 134.* Though it is rare that an act, illegal under state law, is prosecuted under clause 2 of Article 134, that was what occurred in one instance. In the case, the accused was charged with contributing to the delinquency of a minor and sexual exploitation of a minor in violation of New Mexico law. As this conduct occurred off base, the Federal Assimilative Crimes Act was inapplicable. The government's theory was that the conduct was service discrediting. In reversing the conviction as to these specifications, the court held that the military judge should have instructed the members that they could not convict the accused solely because he had violated New Mexico law, though they could consider the violation to determine whether the accused's conduct was service discrediting. Further, the judge should have instructed the members on the elements of the crimes prohibited by New Mexico law.

4. *Negligent Homicide.*

(a) *Elements.*

(1) That a certain person is dead;

(2) that this death resulted from the act or failure to act of the accused;

(3) that the killing by the accused was unlawful;

(4) that the act or failure to act of the accused which caused the death amounted to simple negligence; and

(5) "C to P" or "SD."

(b) *Homicide by simple negligence is an offense under the UCMJ.* "In light of past court-martial practices" with respect to the prosecution of negligent homicide and the "special need in the military" to make the killing of another as a result of simple negligence a criminal act, homicide by simple negligence is an offense under the UCMJ, and its prosecution under the UCMJ is not rendered unlawful by civilian case law which requires a higher degree of negligence in order to punish a civilian for the same offense in civil courts. The Navy Court of Military Review held that negligent homicide occurred when an automobile driven by the accused, who was intoxicated at the time, weaved across the center line of a highway and struck another vehicle, killing the driver. The court found that such conduct was "C to P" under the circumstances. It could also be construed as service discrediting. In another case, the Court of Appeals for the Armed Forces held that an accused who negligently allowed a fellow servicemember to drive the accused's vehicle while under the influence of alcohol, resulting in the intoxicated driver's death is guilty of negligent homicide. In another example, the Army Court of Military Review approved a negligent homicide conviction. The accused was driving his vehicle at a high rate of speed while intoxicated. He lost control of the vehicle; it rolled over; and his military passenger was killed. The court determined that operating a vehicle through a civilian community in such a manner as to result in the death of a fellow soldier demonstrated sufficient prejudice to good order and discipline as to sustain a conviction under Article 134. Also consider where a conviction for negligent homicide was affirmed when a woman left her baby in the care of her boyfriend (who subsequently killed the baby) after being warned that her boyfriend had previously abused the child. By leaving the baby with her boyfriend, in spite of the warnings, her action played a material role in the baby's death and was a proximate cause of the child's death. Finally, there is the case where the accused was in charge of a water-crossing exercise and failed to ensure that appropriate safety measures were in effect. Such a failure was the proximate cause of the death of an Army private, thereby supporting a conviction for negligent homicide.

It is also worth mentioning that the Navy-Marine Corps Court of Appeals extensively used their fact-finding power to overturn the accused's conviction for, inter alia, negligent homicide based on alleged medical malpractice in the performance of heart bypass surgery. Although the court decided this case on its facts, it indicated, in dicta, an unwillingness to find a physician criminally liable for simple negligence.

CR 22.4. *NOVEL SPECIFICATIONS UNDER CLAUSES 1 AND 2 OF ARTICLE 134*

CR 22.4.1. *Generally.*

As a general rule, the creation of "unestablished offenses" under the first and second clauses of Article 134 should be avoided whenever possible. An unestablished offense is one not recognized by the *Manual for Courts-Martial* or by case law. They are generally frowned upon by the courts, although it is difficult to predict what action they will take when confronted by any given specification, since the cases on point deal with allegations tailored to specific types of misconduct. Nonetheless, a review of some of these cases is helpful in gaining some insight into the problem. Refer to the footnote for a review of these cases.

CR 22.4.2. *Expansion of Violations Under Article 134.*

In certain instances the validity of prosecutions for particular violations of Article 134 have been recognized by the courts, but expansion of these offenses to cover novel fact situations has been resisted. That is, while a particular offense may be considered an "established" offense, its limitations are considered to be defined by the nature of its traditional application.

1. *Unlawful entry into property **without** intent to commit an offense therein is an offense under Article 134.* However, there is no offense of unlawful entry into property other than a building, structure, real property, or such form of personal property as is usually used for storage or habitation. This is based upon a most peculiar limitation. Article 130, ***Housebreaking,*** defines the places which may be the subject of unlawful entry with intent to commit a crime therein as a "building or structure." The types of property subject to Article 134 unlawful entry are deemed to be extended from the Article 130 limitations and do not extend so far as to include an automobile.

2. *Glue sniffing "with intent to become intoxicated" has been held to be an Article 134 offense if the intent is so alleged.* In this glue sniffing case, the specific substance inhaled was not alleged and the court strongly suggested that it should have been. Other cases have struck down seemingly similar specifications. An allegation that the accused did wrongfully sniff glue, such conduct being to the prejudice of good order and discipline in the Armed Forces" was held insufficient. An example of an insufficient specification was one where the accused was alleged to have: "wrongfully use an intoxicating chemical, to wit: Toluene" (was held to be insufficient).

3. Notwithstanding the reluctance of military courts to sanction the creation of new offenses under the first and second clauses of Article 134, occasionally, the courts will uphold the creation of a "new" offenses. In each of the following cases the offense prosecuted had not been "established" previously, but was considered to be viable by the reviewing court.

(a) Wrongfully, unlawfully, and through design jumping from a ship into the sea.

(b) Submission of a forged (false and unauthorized) loan recommendation to a credit union with intent to deceive.

(c) Keeping a disorderly house (house of prostitution) in government quarters.

(d) Disrespect to a superior airman (not an NCO) who was then in the execution of his office.

(e) Wrongfully, unlawfully, and knowingly affiliating with a group which advocates the overthrow of the U.S. Government.

(f) Willfully, wrongfully, and intentionally placing foreign objects into intake ducts of jet engines with knowledge of the destructive effects of foreign object injection, thereby endangering the engines and aircraft. The court found this to be an LIO of a charge under Article 80, attempting to damage military property. The language of C.M.A. is instructive here: "In general we discourage the use of specifically formulated specifications under Article 134 as lesser included offenses of ones charged under specific punitive articles. But we are satisfied that the existing language of Article 134 supports the validation of the offense found in this instance. Since the acts of the appellant constituted a military offense and since they were directly and palpably prejudicial to good order and discipline, we affirm. . . ."

(g) Communicating indecent, insulting, and obscene language (obscene telephone calls) was held to be more than simple disorderly conduct and hence properly chargeable as a more serious offense under Article 134.

(h) Obtaining services by false pretenses by using another's phone to make long-distance calls is an offense under Article 134.

(i) Voyeurism may be charged under Article 134 and is similar to a simple disorder.

(j) Indecent acts with a dead body has been held to be an offense under Article 134.

(k) The MCM (2005 ed.) was amended on 18 October 2005, to make the act of patronizing a prostitute an offense under Article 134. At the time of the printing of this publication, no appellate court had addressed whether or not patronizing a prostitute is a valid offense.

CR 22.4.3. ***Conclusion.***

It is difficult to ascertain which Article 134 offenses the appellate courts will reject although, on balance, it would appear they have upheld more "novel" Article 134 offenses than they have disallowed. It is clear that using the *Manual for Courts-Martial* model specifications is the safe and prudent course and that the creation of "new, novel" specifications is risky. Likewise, the use of a case-established offense without carefully noting its discussion of the specification's contents and the elements of the offense is pure folly.

CR 22.5. *CRIMES AND OFFENSES NOT CAPITAL (CONC) - CLAUSE 3*

CR 22.5.1. ***MCM interpretation of clauses.***

MCM, pt. IV, § 60c(1), states: "Clause 3 offenses involve noncapital crimes or offenses which violate Federal law. . . . If any conduct of this nature is specifically made punishable by another article of the code, it must be charged as a violation of that article." MCM, Pt. IV, § 60c(4)(a) further explains: "State and foreign laws are not included within the crimes and offenses not capital referred to in this clause of Article 134 . . . except when State law becomes Federal law of local application under section 13 of Title 18 of the United States Code (Federal Assimilative Crimes Act)."

CR 22.5.2. ***Two groups of Federal "crimes and offenses not capital."***

1. *Federal crimes and offenses of unlimited application.* These are crimes which are punishable regardless of where they may be committed. For example: counterfeiting and various frauds against the government not covered by Article 132.

2. *Federal crimes and offenses of local application.* These are crimes which are punishable only if they are committed in areas of Federal jurisdiction. This group consists of two types of congressional enactments.

(a) ***Specific*** Federal statutes defining ***particular*** crimes:

(1) Example: 18 U.S.C. § 2198: seducing a female passenger on board an American vessel by a master, officer, or seaman.

(b) A Federal statute, 18 U.S.C. § 13, which simply ***"adopts" certain state criminal laws.*** This is commonly known as the ***Federal Assimilative Crimes Act***.

CR 22.5.3. ***Federal Assimilative Crimes Act (FACA)***.

Text of the act: "Laws of states adopted for areas within Federal jurisdiction."

Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title [special maritime and territorial jurisdiction of the United States defined], is guilty of any act or omission which, although not made punishable by any enactment of Congress, should be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

2. *Discussion.* FACA constitutes a limited adoption by Congress of state criminal laws in areas of Federal jurisdiction located in the state concerned. It also adopts the criminal law of territories, possessions, and districts. It does ***not*** adopt the law of local authority, such as counties, cities, etc. ***State law is not adopted if other Federal law has defined an applicable offense for the misconduct involved.*** "This provision of the Code is a valid exercise of congressional authority and constitutes an adoption by Congress for Federal enclaves, of state criminal laws in those areas where Federal criminal law has not defined a certain offense or provided for its punishment." A violation or infraction of a state's **traffic code** can be charged using FACA even if the state does not regard the traffic code as part of its **criminal law**.

(a) *Example:* If A were to commit a certain act aboard the Naval Education and Training Center, Newport, Rhode Island, which did not constitute an offense specifically defined by Federal law or by another provision of the UCMJ, ***A*** could nonetheless be tried for committing that act by a court-martial if that act constituted a noncapital offense under Rhode Island law. The accused is charge with a clause three violation of Article 134, not with violating the Rhode Island law. This is so because FACA, under these circumstances, ***adopts*** the criminal law of the state where the Federal enclave is located and applies it just as though it were Federal law.

(b) FACA applies to valid state laws that were in existence at the time of the alleged offense, without regard to whether they were enacted before or after the passage of FACA or the acquisition of the Federal enclave in question. The law also incorporates into Federal law all additions, repeals, modifications, and amendments of the pertinent state law.

3. *The doctrine of preemption and FACA.* Only those offenses which have not already been defined by Federal law are assimilated by FACA. For example, the accused had consensual sexual intercourse with an Indian maid, who was over 16 but under 18 years of age, within the Colorado Indian Reservation—a Federal enclave in Arizona. Federal law set the statutory rape age at 16, but Arizona law set it at 18. The Court held that Congress intended to assimilate crimes, not acts, and since at the time there were Federal statutes that covered statutory rape, the doctrine of preemption precluded resort to the state law.

Of similar import is the case which held that, since prosecution of the accused under a specific article of the UCMJ was possible on charges of making false reports of armed robberies, the accused could not be tried under an assimilated Texas statute. On the other hand, if an actual void in Federal law exists, FACA fills the gap with state law. Thus, the Court of Military Appeals held that such a void existed in military law with respect to unauthorized entry into an automobile and that state law on the subject could be assimilated and prosecuted under FACA. Furthermore, it has also been determined that the offense of resisting apprehension, pursuant to Article 95, UCMJ, did not preempt charging the accused with eluding the police under the Maryland Code. Congress did not intend to limit the prosecution of resisting authority offenses to Article 95, nor was the offense of eluding a Maryland police officer a residuum of elements of Article 95, UCMJ.

4. *Basis for FACA prosecutions.* A trial based upon FACA is not for the enforcement of the underlying state statute, but of the Federal law.

(a) *Example:* Accused was driving a car at 30 mph on MCAS, Cherry Point, North Carolina, when his wife jumped out. He put her (nose bleeding and unconscious) back in the car, took her home, and put her to bed. The next morning she was dead. He was charged under Article 134 with violation of Section 20 - 166 of General Statutes of North Carolina, in that, while a driver of a vehicle involved in an accident resulting in injuries to Mrs. Rowe (wife), he wrongfully and unlawfully failed to render reasonable assistance to her, etc., and that such conduct was of a nature to bring discredit upon the armed forces. TC, from the start and throughout the trial, asserted that he was proceeding under FACA. The court was instructed strictly on this theory (i.e., clause 3, Article 134, based on FACA). The accused was convicted. ***Held:*** The evidence established an offense under the alleged North Carolina statute, which was assimilated. Affirmed. But, consider the result in a prosecution under clauses 1 and 2 of Article 134 (not under FACA) for the same basic offense (failure to report an accident). The court there held that the offense of leaving the scene of an accident without making one's identity known was not intended to extend to a situation in which the only property damaged was the driver's vehicle and the only personal

injury was to a passenger in the driver's vehicle.

5. *Constitutionality.* FACA has survived constitutional challenges. The Supreme Court has ruled that the statute does not represent an unconstitutional delegation of congressional legislative authority. On the other hand, if the specification with which the accused is charged is ambiguous as to exactly what misconduct is proscribed under which state law, it may fail to pass constitutional muster in other respects.

CR 22.5.4. ***General Considerations Regarding the Use of Clause 3***.

Drafting clause 3 specifications can be quite complex. It would seem that the better practice is to set out all of the essential elements and also specify the name and number of the statute which defines the offense. However, failure to add the latter is not always defective. It has been determined that, "It is well settled that if a specification sets out the essential elements of an offense it need not also specify the name or the number of the statute defining the offense, unless the designation is necessary to a proper understanding of the charge." This case also shows that precision drafting is required when writing a specification under this clause of Article 134. The court dismissed the specification then under review because it failed specifically to define the criminal conduct prohibited by the underlying statute.

Even though the specification may be correctly drawn, it may still be of no use to the prosecution because the underlying statute may not be effective in the area at which the court-martial is located. Many "noncapital" Federal statutes are effective only within the limits of the United States. Ordinarily this is not a problem but, since a great number of courts-martial are convened overseas, this limitation may preclude use of the statute. On the other hand, sometimes the courts will "stretch" the literal language of the statute in order to uphold a prosecution. For example, in one case the statute (Narcotic Drugs Import and Export Act, 21 U.S.C. §§ 171-185) applied to any territory "under the control" of the United States. The court looked to provisions of the applicable Status of Forces Agreement to conclude that the statute had effect over conduct that occurred at Yokota Air Base, Japan, since it was "under the control" of the United States.

Another area that causes some difficulty is the determination of the maximum punishment. MCM, R.C.M. 1003(c)(1)(B)(ii), indicates that the maximum punishment in such cases should be determined by reference to the United States Code: "When the United States Code provides for confinement for a specified period or not more than a specified period the maximum punishment by court-martial shall include confinement for that period. If the period is 1 year or longer, the maximum punishment by court-martial also includes a dishonorable discharge and forfeiture of all pay and allowances; if 6 months or more, a bad-conduct discharge and forfeiture of all pay and allowances." If state law is assimilated under the provisions of FACA, the state prescribed maximum punishment is also assimilated.

For further guidance regarding the use of the FACA—see the footnotes.

CR 22.5.6. ***More on pleading***.

MCM, pt. IV, § 60, does not contain any sample specifications specifically designed for pleading clause 3 offenses under Article 134. The only guidance, therefore, comes from the case law. As noted above, while it is not absolutely necessary to plead the particular Federal or state statute concerned when alleging a CONC, it is advisable to do so.

It is necessary to set forth all of the essential elements of the underlying Federal law when drafting a specification involving a "crime and offense not capital." With respect to such elements as knowledge, intent, or willfulness, the general rule is that, if these elements are expressed in the statute, they should be specifically alleged in the "indictment or the charge" either expressly or by implication. Where knowledge is only implied in the statute, it need not be alleged. But, consider the result where the court held that specifications alleging that accused used firearms during commission of drug trafficking offenses, as defined under the UCMJ, were sufficient to put accused on notice that he could be tried by court-martial under the general article, even though the specifications did not allege the particular Federal penal statutes that prohibited the same misconduct.

Under FACA, the misconduct must occur in a place over which the Federal Government exercises exclusive or current jurisdiction. This geographic requirement becomes an element of the offense which must be pled and proved beyond a reasonable doubt—usually by judicial notice.

As a practical matter, seldom does a situation arise that necessitates recourse to clause 3 of Article 134. Invariably the pleader is able to proceed using an allegation specifically described by the UCMJ and the *Manual for Courts-Martial*. However, it is preferable to avoid the creation of "new" clause 1 ("C to P") or clause 2 ("SD") offenses if a viable CONC approach is available. If clause 3 is used, and if there is any doubt as to the law or the facts, it would be well to consider the advisability of pleading two similar specifications to provide for the contingencies of proof:

One specification should clearly express the offense under a clause 3, Article 134, premise (i.e., fully identify the Federal statute (or the assimilated state statute) within the specification, but do not allege that it was "C to P" or "SD").

The second specification should clearly express the offense under a clause 1 or 2 premise (i.e., do not mention the Federal or state statute within the specification and, at the conclusion of the specification, allege expressly that it was "C to P" or "SD," or both in the alternative, whichever is more appropriate).

The court should be instructed that these two specifications have been provided to allow for the contingencies of proof.

CR 22.6. *ARTICLE 134'S LIMITATIONS*

CR 22.6.1. *The doctrine of preemption.*

Although described as the "general article," Article 134 (and its officer counterpart, Article 133) are limited in scope and effect. It was this restricted nature of the article that the Supreme Court focused upon in declaring it constitutional in the case of *Parker v. Levy*: "The effect of these constructions . . . has been twofold: It has narrowed the very broad reach of the literal language of the articles, and at the same time has supplied considerable specificity by way of examples of the conduct which they cover." One of the "constructions" alluded to is the "doctrine of preemption."

This doctrine was first applied by C.M.A. in a case where the accused was charged with larceny, was convicted of wrongful appropriation, and the Board of Review affirmed an offense of "wrongful taking" (without any intent) under Article 134. ***Held***: "Wrongful taking" is not an offense under the code.

. . . Article 134 should generally be limited to military offenses and those crimes not specifically delineated by the punitive Articles. . . . [T]here is scarcely an irregular or improper act conceivable which may not be regarded as in some indirect or remote sense prejudicing military discipline under Article 134. . . . We cannot grant to the services unlimited authority to eliminate vital elements from common law crimes and offenses expressly defined by Congress and permit the remaining elements to be punished as an offense under Article 134. . . . We are persuaded, as apparently the drafters of the Manual were, that Congress has, in Article 121, covered the entire field of criminal conversion for military law. We are not disposed to add a third conversion offense to those specifically defined.

The court equally disparaged the addition of an element to create an Article 134 offense. And the courts have held that "wrongful withholding," without intent, was not an offense.

The Court of Military Appeals has held, however, that the doctrine of preemption does not preclude prosecution for the crime of burglary of an automobile. The court noted that automobiles were not among the "protected" structures into which unlawful entry was proscribed by other articles of the UCMJ and concluded that the government was free to assimilate a state law which prohibited unlawful entry into an automobile. A "void" in military criminal law existed according to the court and the prosecution was at liberty to fill it with state law under FACA.

The Army Court of Military Review had concluded that Articles 108, 121, and 134 (1) and (2) did not preempt a prosecution under Article 134 (3) for the unlawful storage and disposal of explosive material in violation of a Federal statute.

The offense of eluding police, under the Maryland Code, is not preempted by the offense of resisting apprehension pursuant to Article 95, UCMJ. Likewise, the offense of flight from detention by post exchange detective to avoid apprehension by MP's is not preempted by Article 95.

"***Absence***" offenses constitute the next area in which the doctrine was applied. An accused was charged under Article 134 "without proper authority and with wrongful intent of permanently preventing completion of his basic

training and useful service as a soldier" by absenting himself for a specified period. ***Held***: No such offense under Article 134 because ***offenses sounding in UA*** may be reached ***only*** under ***Articles 85, 86, and 87*** (but the factual allegation stated desertion with intent to shirk important service under Article 85).

Another area in which the doctrine of preemption has been applied is that of "misbehavior before the enemy," all forms of which must be charged under Article 99. For example, the accused was charged with misbehaving before the enemy under Article 99. The trial court excepted the words, "cowardly conduct," and found him guilty under Article 134. ***Held:*** It was not an offense under Article 134 because it was preempted by Article 99. However, the specification did allege the offense of "UA" under Article 86, and C.M.A. so affirmed.

C.M.A. has held that offenses sounding in graft, bribery, cheating, and fraudulent misrepresentation may be prosecuted under Article 134. They are not preempted by Article 121 nor by any other specific article of the UCMJ. And a prosecution for unlawfully altering a public record is cognizable under Article 123, forgery.

Fraudulent burning of a building under Article 134 has been held to be an offense and ***not*** preempted by Article 126, arson. These two distinct offenses have a different purpose. Arson is to protect the security of the habitation or other property, whereas the purpose of fraudulent burning is to protect against fraud.

Stealing from the mail has been held to be an offense under Article 134 and is not preempted by Article 121. Distinct purposes are involved. Article 121 is designed to protect possession of personal property, whereas the mail theft offense is designed to protect the sanctity of the mail (i.e., to protect our mail system). "Value" is an element in the former, but not the latter. A self-inflicted injury, without the intent to avoid service was held not to be preempted by Article 115 (malingering).

It has been held that the existence of Articles 83 (fraudulent enlistment) and 107 (false official statement) do not preempt prosecution of an individual servicemember for the offense of "fraudulent extension of an enlistment by means of a false official statement."

The offense of negligent homicide may be prosecuted under Article 134 and has not been preempted by the articles dealing with murder or manslaughter. There, the court said that "special reasons" existed for "not mentioning or treating negligent homicide in conjunction with murder or manslaughter. . . ." Among the reasons cited were that, under prior military law, negligent homicide had been considered a lesser included offense of murder and manslaughter and was prosecuted as a "general neglect or disorder."

CR 22.6.2. *A capital offense may not be tried under Article 134*.

In *United States v. French*, the court was confronted with a specification under Article 134 alleging that the accused,

having reason to believe it would be used to the advantage of a foreign nation, to wit: . . . [Russia] did, in . . . [Washington, D.C.] and . . . [New York City] during and about the period 5 April 1957 to 6 April 1957, wrongfully and unlawfully attempt to communicate information relating to national defense of the United States contained in six . . . [described] documents, to a foreign nation, to wit: . . . [Russia].

The foregoing specification in fact alleged an offense made capital by Congress by the 1954 Espionage Act. It followed the wording of the Espionage Act and alleged every element of that offense. However, the government, on appeal, took the position that the specification could be supported under clause 2 (SD) and there is an indication in the C.M.A. opinion that the case was tried under that approach.

C.M.A. found that the specification ". . . [s]tates an offense which is rooted in criminal misconduct of a nature to bring discredit upon the Air Force . . .", but ***held*** that a court-martial had no jurisdiction over the offense. The historical background of Article 134 compels "a holding that Congress intended not to permit the prosecution of any capital offense in a military court under any guise except when specifically authorized by statutory enactments. . . ." Therefore, no capital offense can be tried under any part of Article 134. It is suggested that, for these same reasons, no capital offense can be tried under Article 133 (conduct unbecoming an officer and a gentleman).

CR 22.7. *ARTICLE 133 AND ITS LIMITATIONS*

CR 22.7.1. *Serious Dereliction.*

A prosecution under Article 133, conduct unbecoming an officer and a gentleman, should be reserved for those offenses seriously compromising an individual's character as a gentleman and standing as an officer. In one case, the accused's failure to meet a suspense date in performing a required duty, as well as a three-day period of unauthorized absence, were minor offenses not coming under the ambit of conduct unbecoming an officer and should not have been separately charged pursuant to Article 133, UCMJ. His intentional deception of his superior, however, could legitimately be so charged. In another example, the court held that two minor derelictions of failure to go and failure to repair should not have been separately charged under Article 133 since this article is reserved for more serious violations.

CR 22.7.2. *Vagueness.*

A charge under Article 133 for charging a fellow officer $2,000.00 for tutoring in leadership skills was held not to be constitutionally vague. An Article 133 specification alleging an unprofessional close personal relationship, including sexual intercourse, with an enlisted person not under accused's supervision, was not void for vagueness where accused had received training that such conduct violated service custom and had been counseled by superiors against fraternizing.

CR 22.7.3. *Preemption*.

Article 133 offenses are ***not*** preempted by the existence of a specific article prohibiting the misconduct of the officer, cadet, or midshipman. Accordingly, an officer who forges travel vouchers may be prosecuted under Article 133 for conduct unbecoming an officer, even though the conduct would be a violation of Article 123. Similarly, an officer guilty of drug offenses punishable under Article 134 may be prosecuted instead under Article 133. These results are consistent with the language of MCM, pt. IV, § 59c(2), which states: "This article includes acts made punishable by any other article, provided these acts amount to conduct unbecoming an officer and gentleman."

CR 22.7.4. *Multiplicity*.

Although prosecution under Article 133 is not preempted by the existence of a specific article prohibiting the officer's conduct, the rules of multiplicity prohibit charging both articles as separate offenses.

CR 22.7.5. *Punishment*.

The maximum punishment for an offense under Article 133 not listed in the Table of Maximum Punishments is the punishment for the most closely related offense in the Table. For example, in one case, the court found that the charged offense of masturbating in the presence of two children under Article 133 was more similar to indecent liberties than indecent exposure. This raised the maximum permissible punishment from six-months and a BCD to seven years' confinement and a DD.

1. *Examples:*

(a) An unmarried O-5 sexual exploitation of an unmarried civilian waitress, who was supervised by the accused, was conduct unbecoming, particularly because the affair was well-known. However, the accused's actions in taking nude photographs of the waitress were not conduct unbecoming since the photo session was consensual.

(b) An O-1 married a women with three children from prior relationships. The accused was aware that his new wife had prior convictions for child abuse and that one child had been removed from her care. The accused's wife intentionally caused 2nd and 3rd degree burns to one of the children on multiple occasions. The accused did not seek medical treatment for the injured child or take any steps to protect his step-children from continued abuse by his wife. Guilty of conduct unbecoming.

(c) An O-3 became friends with and openly associated with a man he know to be drug smuggler. The accused also provided, for a fee, flight schedules, surveillance techniques information, and other flight information regarding United States Customs drug interdiction flights.

(d) An O-3 stationed overseas during the Gulf War received a “Dear Soldier” letter written by a fourteen year old girl. The accused responded with a letter full of sexual overtones, including a request that her next letter include a naked photograph.

(e) An O-6 engaging in sodomy, mutual masturbation, indecent touching of another male, cross-dressing in public, performing as female impersonator in a gay night club, and imitating fellatio with two other man was conduct unbecoming.

(f) An O-5 placing a condom over his head and blowing it up like a balloon at two different command functions when subordinates and family members present was conduct that was “morally unfitting and unworthy” and was therefore conduct unbecoming.

(g) Possession of sexually explicit material showing the male and female genitalia of naked children and adolescents.

(h) An O-5 squadron commander engaged in a very open personal and non-professional relationship with an female O-2 assigned to his command during an overseas deployment. Several officers within the command made repeated attempts to save the O-5 from himself, but failed to prevent the escalation of the relationship or the deterioration of command morale. Held to be conduct unbecoming.

CHAPTER 23

CHAPTER 23

CR 23. DRUG OFFENSES

CR 23.1. *THEORIES OF PROSECUTION*

CR 23.1.1. *Article 112a, UCMJ*.

1. *Text.* Article 112a, UCMJ:

Any person subject to this chapter who wrongfully uses, possesses, manufactures, distributes, imports into the customs territory of the United States, exports from the United States, or introduces into an installation, vessel, vehicle, or aircraft used by or under the control of the armed forces a substance described in subsection (b) shall be punished as a court-martial may direct.

2. *Substances referred to in Article 112a*:

a. opium, heroin, cocaine, amphetamine, lysergic acid diethylamide, methamphetamine, phencyclidine, barbituric acid, and marijuana, and any compound or derivative of any such substance;

b. any substance not specified in (a) that is listed on a schedule of controlled substances prescribed by the President for the purposes of this Article; and

c. Any other substance not specified in (a) or contained on a list prescribed by the President that is listed in Schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. § 812).

3. *Elements of the offenses.* MCM, pt. IV, § 37b, implements Article 112a and provides a list of the elements of each of the seven offenses prohibited by the statute. In addition to the listed elements, the Court of Military Appeals stated that two types of knowledge are necessary to establish the offenses of use and possession: first, knowledge of the presence of the substance; and second, knowledge of its contraband nature.

4. *Wrongfulness.* A common element to all Article 112a offenses is that the accused's acts must be wrongful as defined in MCM, pt. IV, § 37c(5). To be punishable under Article 112a, possession, use, distribution, introduction, or manufacture of a controlled substance must be wrongful.

a. *Wrongful if.* Possession, use, distribution, introduction, or manufacture of a controlled substance is wrongful if it is without legal justification or authorization.

b. *Not wrongful if.* Possession, use, distribution, introduction, or manufacture of a controlled substance is not wrongful if such act or acts are:

(1) done pursuant to legitimate law enforcement activities (for example, an informant who receives drugs as part of an undercover operation is not in wrongful possession);

(2) done by authorized personnel in the performance of medical duties; or

(3) done without knowledge of the contraband nature of the substance (for example, a person who possesses cocaine, but actually believes it to be sugar, is not guilty of wrongful possession of cocaine).

c. *May be inferred.* Possession, use, distribution, introduction, or manufacture of a controlled substance may be inferred to be wrongful in the absence of evidence to the contrary. The burden of going forward with evidence with respect to any such exception in any court-martial or other proceeding under the code shall be upon the person claiming its benefit. If such an issue is raised by the evidence presented, then the burden of proof is upon the United States to establish that the use, possession, distribution, manufacture, or introduction was wrongful.

The Air Force Court of Military Review held the use of leftover prescription drugs for a different ailment does not necessarily constitute wrongful use as a matter of law and that it was not harmless error to give an instruction that necessarily implied such use was wrongful as a matter of law. This inference does not operate to deprive an accused of the defense of lack of knowledge of the physical presence of the drugs.

(1) *Burdon of proof.* The government has the burden to prove beyond a reasonable doubt that the accused wrongfully used the contraband substance. The permissible inference of wrongfulness in a urinalysis case is typically raised after the prosecution proved use of a contraband drug. The inference can be relied upon even if the accused testified that he or she has no knowledge of why their urine sample tested positive. Whether or not to draw the permissive inference of wrongfulness is for the trier-of-fact to decide, based upon the available evidence. Consider the case in which experts testified that the drug element "BZE" could be produced either by metabolic processes within the body, or by hydrolysis outside the body by "spiking" the sample with cocaine, although the sample tested negative for raw cocaine. The accused argued that the government did not prove ingestion, vice "spiking," so the inference of wrongfulness could not lawfully be drawn. The court held that there was sufficient proof of the predicate fact of ingestion from which a properly instructed court could find ingestion and *infer* wrongfulness. Alternatively, C.M.A. held the record not legally sufficient to sustain the accused's conviction for wrongful use of cocaine. One government lab tested the urine sample and found the presence of the metabolite indicating use of cocaine. A different government lab tested the urine sample and did not find the metabolite for cocaine, therefore indicating the absence of cocaine in the urine sample.

(2) *Quantum of proof required.* The prosecution must introduce a certain quantum of evidence before the court can allow any inference of wrongfulness by the trier of fact. Exactly what type of evidence is required has been the subject of considerable litigation.

(3) *Presence in the body.* Where the prosecution relies only on the presence of a drug in the body, through urinalysis or some other test, there must be expert testimony interpreting the test or "some other lawful substitute … to provide a rational basis upon which the factfinder may draw an inference" of wrongfulness.

As part of the court's "gatekeeper" function, a military judge has broad discretion in ruling whether expert evidence is relevant, and whether it is "reliable."

In ruling on whether expert testimony explaining drug testing results warrants consideration of a permissive inference of wrongfulness, the military judge "may consider factors such as whether the evidence reasonably discounts the likelihood of unknowing ingestion, or that a human being at some time would have experienced the physical and psychological effects of the drug, *but these factors are not mandatory*." The court can consider the following three part approach (although it is not exclusive): (1) whether the component tested for is produced by the body naturally or by some other substance, (2) the test's cutoff level and the accused's reported concentration, or (3) whether the testing methodology is reliable in detecting and quantifying the drug.

At one time, it seemed that the prosecution was bound by a strict three part test, including evidence that an accused experienced the effects of the substance at issue. In discussing controlling case law for urinalysis cases in general CAAF stated:

The prosecution's expert testimony must show: (1) that the "metabolite" is "not naturally produced by the body" or any substance other than the drug in question … ; (2) that the cutoff level and reported concentration are high enough to reasonably discount the possibility of unknowing ingestion and to indicate a reasonable likelihood that the user at some time would have "experienced the physical and psychological effects of the drug" … ; and (3) that the testing methodology reliably detected the presence and reliably quantified the concentration of the drug or metabolite in the sample. … Once this showing is made, the prosecution is not required to disprove the possibility of unknowing ingestion in order to sustain a conviction.

CAAF clarified that the government may use evidence other than this three part test if such evidence "can explain, with equivalent persuasiveness, the underlying scientific methodology and the significance of the test results, so as to provide a rational basis for inferring knowing, wrongful use."

CAAF links use of the permissive inference more closely to the general issue of admissibility of scientific evidence:

[I]f the military judge determines that the scientific evidence- whether novel or established- is admissible, the prosecution may rely on the permissive inference during its case on the merits." Such admissible evidence, when accompanied by expert testimony interpreting the results pursuant to U.S. v. Murphy, 23 M.J. 310 (CMA 1987), is legally sufficient "without testimony on the merits concerning physiological effects.

5. *Prohibited substances.*

a. *Marijuana.* Marijuana is one of several substances specifically prohibited by Article 112a. Marijuana is defined at 21 U.S.C. § 802(15). Although it is argued that there is more than one species of marijuana (e.g., Cannabis indica Lam.), and that not all marijuana is therefore prohibited, this "species argument" has been almost universally rejected.

b. *Other specific statutory prohibitions.* Article 112a also specifically prohibits opium, heroin, cocaine, amphetamine, lysergic acid diethylamide, methamphetamine, phencyclidine, barbituric acid, and any compound or derivative of such substances. This allows these named substances to be pled without mention of the Federal Schedule upon which each is listed.

c. *Substances incorporated by reference.* Article 112a also prohibits any substance that is included in Schedules I through V established by the Comprehensive Drug Abuse Prevention and Control Act of 1970, as amended. 21 U.S.C. § 812 establishes five schedules of controlled substances, designated I, II, III, IV, and V. Under the Comprehensive Drug Abuse Prevention and Control Act, the significance of these five schedules is that the act provides different regulations and penalties based upon the schedule in which a certain substance is listed. The most dangerous, and most strictly regulated, drugs are in Schedule I; the least dangerous in Schedule V. In addition to the schedules included in the text of the act, the Attorney General may delete or add substances, or may transfer a substance from one schedule to another. Anabolic steroids were added to Schedule III in 1990. Updated schedules are published in the *Federal Register* and in the *Code of Federal Regulations* at 21 C.F.R. § 1308 *et seq.* Particular care should be exercised when using materials outside the actual schedules.

The Court of Military Appeals has taken up the issue of prosecution of offenses for drugs not yet listed on the schedules. The case involved an airman convicted in a general courts-martial for drug charges involving "Ectasy." The court held that, before Ectasy was listed on Schedule I as a controlled substance rather than as a controlled substance analogue, a servicemember could be prosecuted under the general article for violations of sections of the Controlled Substances Act governing substance analogues. Also of note, A.F.C.M.R. held it was not error to admit extracts of Drug Enforcement Administration pamphlets to assist the court in identifying substances; the court noted that such materials must be carefully edited to eliminate prejudicial materials.

For the characteristics of substances in each schedule, refer to the applicable U.S. Code section.

d. Article 112a(b)(2) contemplates that the president may publish a list of controlled substances specifically for the purpose of Article 112a. The president has not used this power, but obviously may do so in the future in the form of an Executive Order.

e. *Desiger drugs.* Designer drugs such as "Ecstacy" and "China White" are synthetic substitutes for existing drugs. The concept has been called "diabolically simple":

[T]he underground chemist makes a simple molecular alteration to an existing drug. The original is a controlled substance, but because illegal drugs are defined and classified in the United States by their precise molecular structure, the new chemical cousin, or analog . . . is, in effect, as legal as powdered milk.

As soon as one version is discovered and added to the controlled substances list, the chemist goes back to the lab, makes a few changes, and stays one step ahead of the law. To combat this problem, Congress passed the Controlled Substance Analogue Act of 1986, 21 U.S.C. § 813, which prohibits all permutations of existing illegal drugs—whether known or unknown. A.F.C.M.R.suggested an approach practitioners should take when faced with offenses involving designer drugs. First, check to see if the substance appears on Schedules I through V. If so, charge it under 112a. If the substance is not listed in any of the five schedules, charge it under Article 134, clause 3.

6. *Prohibited acts.*

a. *Possession.*

(1) *Definition.* "Possess" means to exercise control of something. Possession may be direct physical custody like holding an item in one's hand, or it may be constructive, as in the case of a person who hides an item in a locker or car to which that person may return to retrieve it. Possession must be knowing and conscious. Possession inherently includes the power or authority to preclude control by others. It is possible, however, for more than one person to possess an item simultaneously, as when several people share control of an item. An accused may not be convicted of possession of a controlled substance if the accused did not know that the substance was present under the accused's control. Awareness of the presence of a controlled substance may be inferred from circumstantial evidence.

Thus, two or more persons may have "exclusive" possession where one holds the property for another. So, for example, there is sufficient evidence to find possession of marijuana stored in accused's roommate's locker where evidence showed accused had access to the locker and the container in which the marijuana was found was like the one the accused had possessed earlier; Also consider the case that where a person is in nonexclusive possession of premises, it cannot be inferred that he knows of presence of drugs or had control of them unless there are other incriminating statements or circumstances; however, presence, proximity, or association may establish a prima facie case of drug possession when colored by evidence linking accused to an ongoing criminal operation of which that possession is a part); But, keep in mind that possession of contraband may be established by circumstantial evidence. It is completely unnecessary for an accused to have actual possession of a drug to be found in wrongful possession of it. The theory of constructive possession is not based on ownership or actual physical control of the contraband. Instead, the government must show that the accused was knowingly in a position or had the right to exercise dominion and control over an item either directly or through others.

(2) *Lack of knowledge.*

(a) *Context.* Lack of knowledge can become an issue in all types of drug offenses, although it most frequently is raised in possession cases. The accused's lack of knowledge may arise in one of three contexts:

(i) The accused doesn't know that possession of the substance is unlawful. This is simply ignorance of law. This is not a defense.

(ii) The accused doesn't know that he or she possesses the substance. This is a defense.

(iii) The accused is aware that he or she possesses the substance, but is unaware of its composition. This is also a defense.

(b) *Raising the issue.* The Court of Military Appeals determined that two types of knowledge were necessary to establish the offenses of use and possession: first, knowledge of the presence of the substance; and second, knowledge of its contraband nature. This requirement was extended to drug distribution cases.

Knowledge includes awareness only of the presence of a substance and the nature of that substance as a controlled substance. Knowledge of the specific harmacological identity of the drug is not required. It is not necessary that the accused be aware of the precise identity of the controlled substance, so long as he or she is aware that it is a controlled substance. A defense theory that the accused was not guilty of cocaine use because he believed that he was smoking marijuana is flawed. An accused is properly convicted of possessing cocaine if he was aware that he possessed a contraband substance and the substance possessed in fact contained cocaine, even if the accused purchased methamphetamine and denied any knowing use of cocaine. The court indicated that, in order to prove the wrongful possession of cocaine, the government merely had to show that the accused knowingly possessed a controlled substance.

(c) *Inference of knowing use or possession.* Knowledge is an element of the offenses of use and possession.

(d) *Proving knowledge.* The accused's knowledge is usually proven, despite his or her assertions of ignorance, by circumstantial evidence. Note that, while the accused's own assertions about the composition of the substance may be sufficient to establish knowledge, such assertions, standing alone, may be insufficient proof of the actual nature of the substance.

(e) *Instructions at trial.* As to instructions at trial, the jury be specifically instructed with regard to the "two types of knowledge" (presence and nature) which are "required to establish criminal liability."

(f) *Resolution of the issue.* Lack of knowledge of either the presence of the drug or of the composition of the substance gives rise to a failure of proof on an essential element of the offense. Such a lack of knowledge need only be honest (i.e., not feigned) for purposes of evading criminal liability. It need not be honest and reasonable. To require that such a lack of knowledge also be reasonable would permit conviction based on negligence rather than knowledge.

Mere suspicion that a controlled substance may be present is insufficient to prove knowledge of the presence of a drug by an accused. While "should have known" will not be sufficient in courts, proof of knowledge by circumstantial evidence is nothing more than piecing together enough "should have known" factors until knowledge in fact, beyond a reasonable doubt, is found. The decision of exactly where "should have known" ends and "knew" turns on the facts presented in each case.

As with ignorance of a controlled substance's presence, when the accused honestly does not know of the substance's composition, such ignorance or mistake of fact is a defense. Knowledge of the name of a substance will not necessarily defeat this defense. To be guilty, the accused must know the illicit or "narcotic quality" of the substance. There is an intricate relationship between the issue of knowledge and the inference of wrongfulness relating to a defense of lack of mens rea. The inference of wrongfulness which flows from possession of a controlled substance does not operate to deprive the accused of the defense of lack of knowledge. However, once the issue of lack of knowledge is raised, especially when raised by the accused's testimony, the court may properly decide to disregard the accused's explanation and find knowledge based on all the circumstances—including the accused's physical possession.

(3) *Lack of mens rea.* Prohibited drug acts include possession, use, manufacture, distribution, introduction, and possession, manufacture, and introduction with intent to distribute controlled substances. Therefore, wrongfulness, while it must be pled, is not an essential element which the prosecution must establish in order to make a prima facie case. A lack of wrongful intent, or mens rea, however, may be an affirmative defense. This defense most commonly arises in possession cases. Once lack of mens rea is raised, the prosecution must prove beyond a reasonable doubt that the accused's acts were wrongful. Examples of the defense of lack of mens rea fall into two categories: innocent possession and other.

(a) *Innocent possession.* As for innocent possession, when an individual possesses a controlled substance with the intent of turning that substance over to the authorities, or with the intent of destroying the substance, that individual may have the affirmative defense of innocent possession. These cases result from an involuntary possession followed by an apprehension prior to turning over or destroying the controlled substance. The government must establish beyond a reasonable doubt that the accused's possession was wrongful. This is achieved by showing that the accused's intent was other than to turn over or destroy the substance. The length of time between initial possession and discovery is circumstantial evidence of intent; longer elapsed periods are more indicative of an intent to do something other than turn over or destroy the controlled substance. An intent to return the substance to its "true owner" is not innocent possession. The key to an innocent possession defense is an intent to take action that removes the controlled substance from the drug market.

(b) *Examples*:

(i) Following a party, accused found controlled substance in his apartment. Knowing the substance to be controlled, the accused put it in his pocket with the intent to return it to its "owner." The accused was found in possession of the controlled substance 90 minutes later. The Court of Military Appeals determined these facts did not raise an innocent possession issue during the providency inquiry because of the lapse of time and intent to reintroduce the substance into the drug market.

(ii) Accused's assertion that someone else had stored drugs in his diving gear, and that he was unaware of their location until the day before they were discovered in a search, did not raise the defense of "innocent possession" where he made no attempt to turn the drugs in to authorities or to dispose of the drugs.

(iii) Accused who seized marijuana cigarette, claimed not to belong to him, and concealed it from military escorts out of fear, could not claim innocent ingestion.

(c) *Voluntary possession for lawful purpose.* In addition to the defense of innocent possession, a defense based on lack of mens rea can be established on the idea of voluntary possession of a controlled substance for a lawful purpose.

(c) *Example:*

(i) An enlisted pharmacy specialist, pursuant to his understanding of local practice, maintained an overstock of narcotics in order to supply sudden pharmacy needs or fill an inventory shortfall. Note that "local practice" was contrary to published regulations. The court held it was error to fail to instruct the members on innocent possession. The conviction for possession was overturned.

(ii) Accused acted on his commander's suggestion and bought drugs in order to further a drug investigation. The military judge failed to inquire or resolve the possibility of lawful possession and the accused's plea was held improvident.

b. *Use.* Neither the U.S. Code nor case law defines "use." In the context of drug offenses, "use" means the voluntary introduction of the drug into the body for the purpose of obtaining the substance's chemical or pharmacological effects. "Use," therefore, would include ingestion, injection, and inhalation.

The Court of Military Appeals held in one case that it was reversible error to deny accused's request for employment of an expert witness who would have testified that the government had not followed proper testing procedures in analyzing accused's urine specimen for cocaine metabolites that formed basis of charge of wrongful use of cocaine. The same court determined that the government's proof to be legally defective in that it did not present the actual scientific test on, nor nexus to, the appellant's urine.

c. *Distribution.* Distribution embraces the concepts of transfer and sale. MCM, pt. IV, § 37c(3), defines distribution: "Distribute means to deliver to the possession of another. Deliver means the actual, constructive, or attempted transfer of an item, whether or not there exists an agency relationship."

Distribution, therefore, encompasses both transfer and sale. Transfer was defined as the transfer of ownership for consideration. Actual possession need not be transferred, nor must the accused have possession of the substance in order to sell it. Additionally, the Court of Military Appeals has stated that the term "distribution" includes the transfer of drugs between conspirators as part of the conspiracy to distribute the same drugs. Therefore, it is possible to distribute to someone who already constructively possesses the same drugs. The term "distribution" also includes the transfer of drugs between simultaneous users of the drug. C.M.A. had determined in one instance that the evidence was sufficient to establish that accused aided and abetted the distribution of LSD where: accused informed undercover agent of availability of LSD; accused boasted of getting a good price if he could find a certain seller; accused sought the seller out; accused initiated conversation with the seller and vouched for his reliability; and accused acted as a lookout, warning of a surveillance car's presence. Likewise, the Court determined in a different case that the facts showed that the accused accompanied a friend while the friend retrieved a can containing hashish which the friend took to his room. There the accused took the can, opened it, and handed the hash inside to his friend. Both then smoked the hash. The accused pled guilty to drug distribution but, on review, maintained that the facts showed joint possession—not distribution. The court held that there can be no distribution between those in joint possession) that, when the accused handed the drug to his friend, there was a distribution. All it took was the passing of the drug. In addition, an accused who dispatches a controlled substance in the mail or via Federal Express can be found guilty of distribution of the drug within the meaning of the *Manual for Courts-Martial*. It is not necessary that the person to whom the accused distributed drugs know that he or she has received the contraband.

(1) *Agency defense.* Please note that the "agency defense" is no longer relevant in view of the use of the general term "distribution."

(2) *Entrapment.* The affirmative defense of entrapment (Key Number 847, 848) is also discussed in Chapter X of this study guide. When the unlawful inducement by a government agent causes an accused (who had no unlawful predisposition) to distribute drugs, entrapment will be a defense. There must be government overreaching amounting almost to coercion.

(a) *Examples:*

(i) The accused was a recovering cocaine addict enrolled in the Army's Drug Abuse Prevention and Control Program (ADAPCP). A CID informant contacted the accused and talked the accused into obtaining cocaine for another CID agent. The court rejected the accused's argument that he was denied due process because the government's agents solicited him to obtain cocaine while he was in ADAPCP and that he was entrapped into committing his offenses.

(ii) Entrapment found when government agents had no reasonable suspicion that the accused was selling LSD or was about to do so. Nonetheless, they approached the accused on five occasions in one month to urge him to sell drugs to them. The accused finally relented, due to one agent's claim that he "was in a bad way" and "needed" the LSD.

(iii) Government agent feigned withdrawal symptoms in order to induce the accused to sell him heroin on several occasions. A.C.M.R. held that, not only was there unlawful inducement at the first sale, but that the influence of the initial unlawful inducement would be presumed to continue into subsequent sales, absent prosecution proof beyond reasonable doubt to the contrary.

(b) *Accused's predisposition.* Entrapment will not apply where the accused had a predisposition or intent to commit the crime. Both prior and subsequent acts of misconduct are admissible to show such a predisposition. The government is entitled to great latitude in showing predisposition, but the military judge must use sound discretion in admitting evidence of uncharged misconduct. It must be probative, and its probative value must outweigh the risk of undue prejudice. Possession or use of a controlled substance does not establish predisposition to distribute. The court should not admit evidence on why the police suspected the accused. The military judge should instruct on the limited purpose of such evidence. Finally, the misconduct must be reasonably contemporaneous with the charged offense. An excellent discussion of the law of entrapment as applied to military practice is found in *United States v. Vanzandt*, 14 M.J. 332 (C.M.A. 1982).

(i) *Subjective test.* In military law, the entrapment defense is concerned with the subjective intent of the accused rather than the tactics employed by government agents. If an accused has a predisposition to engage in a crime, then he cannot successfully claim that he was entrapped into committing it.

When the military judge is alerted to the possibility that an entrapment defense might be available, he is required to discover the accused's attitude concerning the defense.

Defense counsel must scrutinize all alleged offenses for the possibility of entrapment. (The fact that second sale of drugs occurred almost a month after the first did not preclude invocation of the entrapment defense. The defense applies not only to the original crime induced by the government agent, but also to subsequent acts which are part of a course of conduct which was a product of the inducement.) This is the concept of "continuing entrapment."

(3) *Good military defense.* The defense of good military character is also discussed in Chapter X of this study guide. It is clear that good military character is admissible in all drug cases. The test to determine prejudice when the military judge fails to admit or instruct on character evidence is the strength of the government's case as opposed to the quality, strength, and relevance of the defense's evidence. What standard of harm the court will use (harmless beyond reasonable doubt or a lesser one) has not been announced. Courts have resolved the issue based on the overwhelming strength of the government's case. Defense counsel should be alert to the government's ability to present acts of bad character to rebut the defense. Defense should also ensure the record is well preserved on any objections to the form of government's attack on a good military character defense.

(4) *Addiction.* The fact that an accused is addicted to a drug is not a viable defense.

d. *Intent to distribute.* MCM, pt. IV, § 37c(6), provides clarification with respect to intent to distribute as follows: Intent to distribute may be inferred from circumstantial evidence. Examples of evidence which may tend to support an inference of intent to distribute are: possession of a quantity of substance in excess of that which one would be likely to have for personal use; market value of the substance; the manner in which the substance is packaged; and that the accused is not a user of the substance. On the other hand, evidence that the accused is addicted to or is a heavy user of the substance may tend to negate an inference of intent to distribute.

e. *Manufacture.* MCM, pt. IV, § 37c(4), proscribes the manufacture of a controlled substance. This is a new offense, and manufacture is defined as follows: "Manufacture" means the production, preparation, propagation, compounding, or processing of a drug or other substance, either directly or indirectly or by extraction from substances of natural origin, or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of such substance or labeling or relabeling of its container. "Production," as used in this subparagraph, includes the planting, cultivating, growing, or harvesting of a drug or other substance.

f. *Introduction.* Introduction is bringing a controlled substance aboard a military installation, vessel, or aircraft. This definition also includes "causing" the drug to be introduced.

7. *Sentencing.* MCM, pt. IV, § 37e, lists the maximum authorized punishments under Article 112a. The maximum period of confinement is increased by five years when an offense proscribed is committed while the accused is on duty as a sentinel or lookout; on board a vessel or aircraft used by or under control of the armed forces; in or at a missile launch facility used by or under the control of the armed forces; in a hostile fire pay zone; or in time of war.

8. *Pleading.*

a. *General consideration.* By pleading and proving possession of thirty or more grams of marijuana, the government will be able to increase the maximum confinement from two to five years. Except in "use" specifications, it is always proper to allege the approximate amounts of drugs. Metric amounts are preferable because most laboratory reports indicate weight in grams. With the exception of marijuana possession, the quantity of drugs will not affect the maximum authorized punishment. The amount can, however, be an important consideration in determining an appropriate sentence. Accordingly, MCM, pt. IV, § 37c(7), provides the following guidance:

Certain amount. When a specific amount of a controlled substance is believed to have been possessed, distributed, introduced, or manufactured by an accused, the specific amount should ordinarily be alleged in the specification. It is not necessary to allege a specific amount, however, and a specification is sufficient if it alleges that an accused possessed, distributed, introduced, or manufactured "some," "traces of," or "an unknown quantity of" a controlled substance.

If the offense involves distribution, the specification should identify the other persons involved. In cases involving more than one distribution, this will make it easier for all parties to the trial to relate a witness' testimony to a particular specification. The sample specifications require that all drug abuse specifications be alleged as "wrongful." Failure to allege "wrongful" had been held a fatal defect; yet, some cases can be salvaged. N.M.C.M. determined that the word wrongful was stated in the charge but not the actual specification. The court elected to read the charge and specification together and upheld the specification. Though it is not required that drugs named in Article 112a, clause 1, be named as listed on a schedule, it is advisable for ease in referencing the maximum sentencing provisions.

b. *Sample pleadings.*

CR 23.1.2. *Articles 92 and 134, UCMJ*.

Although the great majority of military drug offenses will be prosecuted under Article 112a, prosecutors must be alert to the fact that there are instances when Article 92 or Article 134 should be charged.

1. *Examples:*

a. The accused is apprehended after selling what he purports to be cocaine to an undercover agent. The substance sold is chemically analyzed and turns out to be ephedrine. The distribution takes place on a Federal reservation in the state of Washington. The drug ephedrine is not listed in Article 112a, nor is it included in the schedules of the Drug Abuse Prevention and Control Act of 1970. Ephedrine is, however, a prohibited substance under the laws of the state of Washington.

b. A.C.M.R. dealt with another example involving ephedrine. In the case, the astute prosecutor charged the offense of delivery of ephedrine as a crime and offense not capital under clause 3 of Article 134. Here, it was necessary to use the Federal Assimilative Crimes Act, to properly charge the misconduct of the accused. This may be useful in the prosecution of "designer" drugs.

c. Any substance abuse offense which involves otherwise legal substances, such as glue, paint or aerosol propellants, may be charged as a "simple disorder" under clause 1 of Article 134. The prosecution of such cases is twofold. First, any substance abuse offense not covered by Article 112a may be charged as a violation of clause 1, Article 134. Secondly, the specification does not have to allege that the substance was intoxicating or that the accused's intent was to become intoxicated. However, the prosecution must present evidence beyond a reasonable doubt that the accused's conduct was in fact prejudicial to good order and discipline. As a practical matter, trial counsel prosecuting charges alleging use of unlisted substances must not lost focus on the need to prove the identity and effects of the substance.

d. Although glue, paint or aerosol propellants may still be charged under Article 134, SECNAVINST 5300.28C (24 March 1999) is a punitive comprehensive instruction on substance abuse:

The unlawful use . . . of controlled substance analogues (designer drugs), natural substances (e.g., fungi, excretions), chemicals (e.g., chemicals wrongfully used as inhalants), propellants, and/or a prescribed or over-the-counter drug or pharmaceutical compound, with the intent to induce intoxication or excitement, or stupefaction of the central nervous system, is prohibited . . .

e. Alternative charging for contingencies of proof under both Article 80 (attempted distribution of cocaine) and under Article 121 (larceny by trick of the purchase price) would also have been possible and indeed necessary if the distribution had taken place off-base (outside the reach of 18 U.S.C. § 13).

CR 23.1.3. ***Possession of Drug Paraphernalia***.

Possession of drug paraphernalia is not prohibited by Article 112a, and it may not be charged under either clause 1 or 2 of Article 134. Article 1138, *U.S. Navy Regulations, 1990*, does not prohibit possession of paraphernalia. In the past, possession of drug paraphernalia had to be prosecuted either under Article 92, UCMJ, as a violation of a locally promulgated lawful order regulating paraphernalia, or under clause 3 of Article 134, UCMJ, as a violation of a state paraphernalia statute adopted through the Federal Assimilative Crimes Act.

However, a Navy department-wide regulation prohibiting paraphernalia was promulgated in 1990 and revised in 1999. The instruction provides: "Except for authorized medicinal purposes, the use, possession, or distribution of drug abuse paraphernalia by persons in the DON is prohibited." Enclosure (3) of the instruction further defines drug abuse paraphernalia and provides numerous examples of items that constitute drug abuse paraphernalia. The criminal intent of the person in possession or control of an object that may constitute paraphernalia is a key element of the definition. The instruction further lists several evidentiary factors to consider in making a determination as to intent. Such factors include statements by the person in possession or anyone in control concerning use; proximity of the object to controlled substances; existence of any residue of controlled substances on the object; instructions provided with the object concerning its use; and descriptive materials with the object explaining its use.

Note that there are several reported opinions that address prosecution under the 1990 regulation. These cases highlight the limited definition of "drug abuse paraphernalia" evident in the 1990 regulation. However, the revised instruction (SECNAVINST 5300.28C) provides a much broader definition for drug abuse paraphernalia: "All equipment, products, and materials of any kind that are used, intended for use, or designed for use, in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzaing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body . . ." Therefore, prosecution for possession of the items

discussed above based on the new instruction should now be successful.

CR 23.2. *REFERENCES*

CR 23.2.1. *Related issues.*

Other areas and issues related to drug offenses include:

1. Establishing a proper chain of custody and identifying the substance in court.

2. Failure to report personal use of drugs excused by privilege against self-incrimination.

3. Determining multiplicity and lesser included offenses is very fact specific in the drug offenses area. For a discussion on charging drug offenses and determining lesser included offenses see Chapter II of this study guide.

CHAPTER 24

CHAPTER 24

CR 24. MISCELLANEOUS GROUPS OF OFFENSES

CR 24.1. *INTRODUCTION*

This chapter considers several groups of common, related offenses. Each group is composed of violations of independent articles of the UCMJ, and at least one offense under the general article.

CR 24.1.1. *Resistance, flight, escape, and breach of restraint.*

Resisting apprehension; flight; escape from custody, confinement, and correctional custody; and breaking arrest, restriction, and correctional restraint. These offenses are violations of Article 95 or Article 134, UCMJ.

CR 24.1.2. *Drunkenness offenses.*

Drunkenness in camp, aboard ship, in public, and incapacitation for duty as a result of prior drinking are violations of Article 134; drunk and reckless driving and drunk on duty are violations of Articles 111 and 112, respectively.

CR 24.1.3. *Sentinel, lookout, and watch misbehavior.*

Offenses by sentinels, lookouts, and watchstanders are violations of Articles 92, 113, and 134.

CR 24.1.4. *Falsification.*

False official statements are violations of Article 107, while false swearing is a violation of Article 134.

SECTION A: RESISTANCE, FLIGHT, ESCAPE, AND BREACH OF RESTRAINT OFFENSES

CR 24.2. *INTRODUCTION*

This section discusses offenses involving resistance to, escape from, and breach of restraint. Such offenses are prosecuted under Articles 95 and 134 of the Uniform Code of Military Justice.

CR 24.2.1. *Article 95.*

This article punishes five separate but related offenses:

1. Resisting apprehension;
2. Fleeing from apprehension;
3. escape from custody;
4. escape from confinement; and
5. breaking arrest.

CR 24.2.2. *Article 134 is the General Article*.

It includes within its prohibitions breaches of correctional custody, escape from correctional custody, and the more common offense of breaking restriction. Thus, it punishes three separate but related offenses:

1. Breaking restriction;
2. escape from correctional custody; and
3. breach of restraint during correctional custody.

CR 24.3. *DEFINITIONS*

CR 24.3.1. *Apprehension*.

The taking of a person into custody. "Apprehensions" in the military are synonymous to "arrests" in the civilian world. An apprehension may take place in a variety of ways, as shown by the following examples:

1. *Examples.*

a. An MP approaches Seaman Wiley and says to him, "I'm taking you into custody." Wiley does not resist and complies with the MP's orders. The apprehension is complete even though the word "apprehend" was not used and Wiley was not subjected to physical restraint.

b. An MP grabs Seaman Nogood's arm and says, "Come with me you turkey, I'm taking you in." Seaman Nogood is reluctant, but submits and allows himself to be directed physically by the MP. The apprehension is complete.

c. An MP steps in front of Seaman Dasher and announces, "You're under arrest." Seaman Dasher bolts for the door. The apprehension, as we shall see, is not complete. If, however, the MP gives chase and subdues Dasher, it will be complete.

CR 24.3.2. *Arrest*.

1. *General discussion.* In military law, there are two types of "arrest." One is nonpunitive in nature. The other, called "arrest in quarters," is punitive and may be imposed as nonjudicial punishment (NJP) only upon commissioned and warrant officers by general court-martial authorities, or flag and general officers.

2. *Nonpunitive "arrest."* Nonpunitive arrest is the moral restraint of a servicemember that is imposed by an order, but is not punishment for a particular offense. The order directs the individual to remain within the limits of a certain area during the term of the "arrest." Nonpunitive arrest is similar to pretrial restriction. The major difference between the two types of restraint are:

The person ordered into arrest cannot be required to perform regular military duties, while one who is restricted may be expected to perform all regular military duties.

a. *Example:* If Seaman Wiley has been ordered into arrest by his commanding officer, he cannot be required to bear arms, stand watch, etc. On the other hand, a person ordered into arrest may be required to perform routine cleaning and training duties.

If assigned duties inconsistent with the status of arrest by the authority that imposed it, the arrest status is thereby terminated.

3. *"Arrest in quarters."* Arrest in quarters is imposed as an NJP upon officers. It is a moral type of restraint which requires the officer upon whom the punishment is imposed to remain within the limits of his quarters. It is seldom imposed, but is authorized by Article 15, UCMJ, and Part V, para. 5c(3).

CR 24.3.3. *"Restriction in Lieu of Arrest."*

This type of restraint is similar to "arrest," as discussed above. Unlike "arrest," however, an individual ordered into "restriction in lieu of arrest" shall, unless otherwise directed, perform his full military duties.

CR 24.3.4. *Confinement*.

The physical restraint of a person.

CR 24.3.5. *Custody*.

The restraint of free movement imposed by lawful apprehension. The restraint may be corporeal and forcible (e.g., handcuffs or an armlock). After submission to apprehension or a forcible taking into custody, the restraint may

consist of control exercised over the prisoner by official acts or orders while the ordering authority remains in the prisoner's presence (e.g., Rollo peacefully submits to the MP and accompanies him as directed; he's now in the MP's custody). (***Caveat***: As discussed below, a prisoner is deemed to be in confinement vice custody in some circumstances.)

CR 24.4. *RESISTING OR FLIGHT FROM APPREHENSION.*

CR 24.4.1. *Essential Elements.*

1. That a certain person attempted to apprehend the accused;

2. that said person was authorized to apprehend the accused; and that the accused actively resisted the apprehension or fled from the apprehension.

CR 24.4.2. *First Element.*

The first element requires that an overt act with the intent to take the accused into custody be made. The type of act can be as basic as an oral or written declaration of an intent to place one under arrest. More likely, however, the finder of fact is going to be forced to determine whether the totality of circumstances reasonably indicate that both the accused and those possessing the power to apprehend are aware that the accused's personal liberty is being restrained. One court has suggested that this determination should be made using a "reasonable man" approach.

1. *Example*: Military policemen inform the accused that they would like to talk to him outside of the bar. The police hover over the accused while he finishes his beer. The police do not allow the accused to move while he is sitting at the bar. ***Held:*** The facts supported a determination that the policemen attempted to apprehend the accused. The accused did not have any freedom at that point in time.

CR 24.4.3. *Second Element.*

1. *Generally.* The following persons are authorized to apprehend upon reasonable belief that an offense has been committed and that the person apprehended committed it: Officer, warrant officer (WO), petty officer (PO), noncommissioned officer (NCO); and when in the execution of their guard or police duties: (one) air police (AP), military police (MP), shore patrol (SP), master at arms (MAA); and (two) personnel designated by proper authority to perform guard or police duties, including duties as criminal investigators. This includes Naval Criminal Investigative Service (NCIS) agents under certain circumstances (JAGMAN, § 0147) and other civilian police or investigators designated by proper authority.

Additionally, Article 7(c), UCMJ, authorizes commissioned officers, WO's, NCO's, and PO's to apprehend anyone subject to the Code who takes part in "quarrels, frays, and disorders."

2. *Deserters.* Any civil officer having authority to apprehend under the laws of the United States, or of a state, may apprehend summarily a deserter and deliver him/her into the custody of the armed forces. Other civilians may apprehend deserters only if specifically requested by a military officer. A DD Form 553 (Absentee Wanted by the Armed Forces) is sufficient.

3. *Policy regarding apprehending officers and WO's.* NCO's and PO's not performing police duties ***should*** apprehend officers and WO's only pursuant to specific orders of a commissioned officer; to prevent disgrace to the service; or to prevent escape of one who has committed a serious offense.

Resisting apprehension by ***foreign*** police officers who are not agents of the United States is not a violation of Article 95 because the second element is lacking. The offense may be charged under Article 134.

4. *Illegal apprehension.* The accused cannot be found guilty in the event that the apprehension is illegal. The *Manual for Courts-Martial* provides that a person may not be convicted of resisting apprehension if the attempted apprehension is illegal. The *Manual* discussion of this point emphasizes that the existence of probable cause to apprehend is an affirmative defense which may be raised by the accused.

5. *Alternative offenses.* It is important to note that the *Manual* provision clearly suggests that the accused who resists apprehension ***forcibly*** can probably be convicted of assault, regardless of whether probable cause to apprehend existed or not. And, indeed, several cases have so held.

CR 24.4.4. *Third Element.*

1. *Resisting apprehension.* In order for the accused to be guilty of resisting apprehension, the resistance "must be active, such as assaulting the person attempting to apprehend." Mere words are insufficient to qualify as resistance under Article 95, UCMJ. Resistance must consist of a physical, overt act—such as an assault upon the apprehending officer. The Court of Military Appeals has concluded that mere flight from the scene of an attempted apprehension is insufficient to sustain a conviction for resisting apprehension. Instead, the evidence must indicate that the accused confronted the pursuers or endangered others.

a. *Examples:*

(1) Government agents interrupt undercover drug purchase and attempt to arrest the accused. Accused flees the scene, forcing the officers into a multiple vehicle chase with sirens blaring and lights flashing. ***Held:*** Not Guilty of resisting apprehension. The evidence proved only that the accused fled the scene. The evidence failed to show any type of active resistance.

(2) Police signal for accused to pull over in his automobile. The accused accelerates, drives around a police barricade, swerves to avoid another police vehicle set up to block the car of the accused. ***Held:*** Guilty of resisting apprehension. Accused's conduct endangered the lives of the police/sentries who attempted to apprehend him.

(3) Accused attempts to leave area in lieu of turning over his military ID card. When he begins to walk away, a struggle ensues. The accused is wrestled to the ground, and is eventually brought into custody. ***Held:*** Guilty of resisting apprehension. Accused's efforts of fighting away were sufficient to qualify as "active resistance."

2. *Flight from apprehension.* In 1995, Congress added a new violation under Article 95. The offense of "Flight From Apprehension" is designed to cover cases of active flight to avoid apprehension. In order for the accused to be guilty of flight from apprehension, the resistance "must be active, such as running or driving away."

CR 24.4.5. *Mistake of Fact Defense*.

There are two types of mistakes which could be considered by the accused. One entails a reasonable belief that the arresting officer is not empowered to apprehend. The second type of mistake is when the accused believes that there is no valid basis for the apprehension. Only the first of these mistakes would constitute a valid defense.

1. *Mistake regarding the status of the person attempting to apprehend the accused.* "It is a defense that the accused held a reasonable belief that the person attempting to apprehend did not have authority to do so." Further guidance is provided within the *Military Judges' Benchbook*, DA Pam 27-9 (2001), Inst. 3-19-2. Although it is incorrectly listed as a fourth element to a resisting apprehension offense, the *Benchbook* states: "That the accused had reason to believe that the person attempting to apprehend him was empowered to do so." It indicates further that this element must be instructed upon "if there is any evidence from which it may justifiably be inferred that the accused may have had no reason to believe that the person attempting to apprehend him was empowered to do so."

2. *Mistake regarding the basis for apprehension.* ". . . [T]e accused's belief at the time that no basis exists for the apprehension is not a defense." Therefore, an accused who honestly and reasonably believes that the person apprehending him has no probable cause to do so is in much the same position as one who is confronted by an order he believes to be unlawful—he resists the apprehension at his peril. If, at his trial, the court agrees that no probable cause existed, the accused will be acquitted on the affirmative defense of lack of probable cause. If, however, the court disagrees and finds that probable cause existed, the accused will be found guilty despite his good-faith belief.

CR 24.4.6. *Pleading*.

1. Identify the apprehending person by rank, name, and status.

2. Allege the acts which constituted the resistance. Even though the sample specification for this offense found in MCM, pt. IV, § 19f(1), does not indicate the method by which the accused resisted the apprehension, it should be alleged. While not required, omission of this particular may invite a bill of particulars to be filed by the defense and, at worst, might result in a defective specification. Consequently, it is recommended that the method of the resistance be alleged in the specification.

3. *Sample specifications:*

a. *Resisting apprehension.*

Charge. Violation of the Uniform Code of Military Justice, Article 95

Specification. In that Seaman Patty B. Noodle, U.S. Navy, USS RANGER, on active duty, did, on board USS RANGER, then located at Newport, Rhode Island, on or about 18 December 20CY, resist being apprehended by Chief Boatswain's Mate William I. Nail, U.S. Navy, a person authorized to apprehend the accused.

b. *Flight from apprehension.*

Charge. Violation of the Uniform Code of Military Justice, Article 95

Specification. In that Seaman Larry L. Cooljay, U.S. Navy, USS CONSTELLATION, on active duty, did, aboard USS CONSTELLATION, then located at San Diego, California, on or about 19 December 20CY, flee apprehension by Electrician's Mate First Class Douglas D. Snoop, U.S. Navy, a person authorized to apprehend the accused.

CR 24.5. *ESCAPE FROM CUSTODY.*

CR 24.5.1. *Essential Elements*.

1. That a certain person apprehended the accused;

2. that said person was authorized to apprehend the accused; and

3. that the accused freed himself or herself from custody before being released by proper authority.

The primary distinction between this offense and the offense of resisting apprehension is whether the apprehension has been completed. If the apprehension is completed at the time of the accused's escape, the crime is an escape from custody. If, however, the accused flees prior to being placed under control, the offense is resisting apprehension.

CR 24.5.2. *First Element*.

The gravamen of this offense is that the accused had been taken into custody. Therefore, the government must first prove that the accused's freedom of movement has been infringed. Merely informing an individual that he/she is being apprehended is insufficient. There must be a physical or moral restraint upon his freedom of movement imposed by physical means or by submission to the apprehending official. The moral restraint is effective as long as an apprehending official is capable of imposing physical restraint should it become necessary. There is no requirement that the restraint exist for a significant period of time; a minimal period of restraint has been deemed sufficient. For example, the accused was driving an automobile on base. MP's order him to stop the vehicle. Accused stops vehicle for 20 to 30 minutes; then drives away. ***Held:*** Guilty of escape from custody. The apprehension was completed when the vehicle was pulled over. ***Note:*** Accused could not be convicted of resisting apprehension because the apprehension was complete.

CR 24.5.3. *Second Element*.

The authority to apprehend for purposes of this offense is exactly the same as for the offense of resisting apprehension.

The basis for the apprehension must be lawful. The totality of the circumstances test will be applied to determine whether the accused was aware that he was in a custody situation. Mistake concerning the existence of custody is a valid defense. Note, however, that the *Benchbook* provides that a fourth element to this offense is: "That the accused had reason to believe that the person from whose custody the accused allegedly escaped was empowered to hold him in his custody . . . ." This is not an element to the offense; however, the members should be instructed upon this information if evidence exists upon which it may be inferred that an accused may have had no reason to believe that the person from whose custody he allegedly escaped was empowered to hold him in custody.

The absence of probable cause is an affirmative defense which may be raised by the accused. It should be noted, however, that the *Manual* discussion of this offense does not include the discussion relating to mistake found under the discussion of resisting apprehension at MCM, pt. IV, § 19c(1)(d). It is at least arguable, therefore, that an honest and reasonable (though mistaken) belief by the accused that the person apprehending him/her had no probable cause to do so may be a viable defense to the charge of escape from custody.

CR 24.5.4. *Third Element.*

The "custody" status continues as long as long as the accused is in the "presence" of the apprehending officer. "Presence" for purposes of this offense includes being within the sight or call of the custodian. The definition of "presence" has even been extended to cover an accused who is given permission to go to the head while the custodian remains outside of the door.

If the accused procures his own release from custody through some fraud or deceit on his part, the fraud or deceit will vitiate his release. For example, the accused obtained his release from custody by a ruse when he told the chaser that a magistrate had ordered his release from confinement when, in actuality, the magistrate had ordered that confinement be continued. In that case, the accused was guilty of escape from confinement vice escape from custody.

CR 24.5.5. *Pleading*.

Review the pleading requirements for a resisting apprehension offense and apply them to these specification. If the specification alleges that the accused perpetrated an assault or battery in escaping from the custody of the custodian, allege the assault or battery as a separate offense.

1. *Sample specification:*

Charge. Violation of the Uniform Code of Military Justice, Article 95

Specification. In that Seaman Patty B. Noodle, U.S. Navy, USS RANGER, on active duty, did, aboard USS RANGER, then located at Newport, Rhode Island, on or about 18 December 20CY, escape from the custody of Lieutenant Leonard M. Gable, U.S. Navy, a person authorized to apprehend the accused.

CR 24.6. *ESCAPE FROM CONFINEMENT.*

CR 24.6.1. *Essential Elements*.

1. That a certain person ordered the accused into confinement;

2. that said person was authorized to order the accused into confinement; and

3. that the accused freed herself from the restraint of confinement before being released from confinement by proper authority.

CR 24.6.2. *First Element.*

Confinement is the continual physical restraint depriving the person of freedom. The Air Force Court of Military Review has indicated that physical restraint can include a temporary level of moral restraint when it is used as a substitute for physical restraint.

Confinement may be ordered in two situations: (one) as pretrial confinement to assure the presence of the accused for trial or prevent serious misconduct; or (two) as punishment imposed by court-martial or three days' confinement on bread and water imposed at court-martial or at NJP.

CR 24.6.3. *Second Element.*

1. *WO or civilian.* An officer, WO, or civilian may be confined only by a commanding officer (CO) who has authority over the individual.

2. *Enlisted person.* An enlisted person may be confined by any commissioned officer or by WO's, PO's, or NCO's if the CO has delegated that authority to them, but only if the person to be confined is attached to that CO's command or temporarily within his/her jurisdiction.

3. *Punitive confinement.* Punitive confinement may be imposed by the CO of the accused who may, in the case of confinement awarded by court-martial, delegate confinement authority to the trial counsel. Note that only CO's of vessels may impose confinement at NJP, and this confinement is limited to three days' bread and water or diminished rations.

CR 24.6.4. *Third Element.*

The third element requires that the accused cast himself "off of the restraint of confinement." When the accused violates the limitations of the confinement order, he does not automatically "cast" off the restraint. For example, the accused convinced his escort to take him home to see his wife. When the escort left the accused at the residence, the court concluded that the accused did not escape from confinement. Instead, the court found that the escort abandoned his prisoner.

CR 24.6.5. *Custody vice Confinement.*

The Court of Military Appeals has held that escape from confinement and escape from custody are entirely different in nature and, if one is pleaded and the other proven, a fatal variance results. The Court held that escape from custody, not confinement, was involved where the accused escaped from a guard after he had been properly ordered into confinement, but before he had been delivered to the confinement facility. However, regarding this offense, court has bleared the distinction between custody and confinement.

1. *Examples:*

a. The Court addressed the case of an accused placed in pretrial confinement upon return from an extended unauthorized absence. The accused was transported to different location for his magistrate hearing a day or two later. The magistrate ordered his continued pretrial confinement. After leaving the hearing, the accused walked away from his brig chaser while making a lunch stop. At trial the accused plead guilty to escape from custody, even though he was really never released from confinement. While finding a "technical variance' in the plea, the court was willing to except the guilty plea to escape from custody. In dicta, the court noted that the accused could not have been convicted of the same offense in a contested trial.

b. In a case from the U.S. Army, the court went further in blearing the distinction. In the case, the accused was lawfully order in pretrial confinement. Pending his transfer to the regional confinement facility, he was placed in leg irons and held under guard in his units training room. None-the-less, the accused managed to escape the leg irons, the room, and the unit, before being apprehended the following day. Despite never making it to a confinement facility before escaping, the Army court upheld the conviction for escape from confinement. Holding that the "nature of the facility in which the prisoner is held is not material." In this case, the accused was lawfully order into confinement and was under physical restraint when he escaped.

2. *Background.* One critical factor, then, is to accurately determine the accused's status. With regard to custody, the court said:

[W]hile custody may of necessity be maintained by physical restraint, it also suffices to utilize no more than moral suasion. Hence, far from being identical to confinement, it is an altogether different condition . . . . What was intended by custody was the temporary form of restraint imposed on an individual subject to the Code by his lawful apprehension. . . . It was to continue until "proper authority may be notified" [citing MCM] . . . 'Such status [custody] thereafter may be altered by the arrest, confinement, restriction, or release of the individual.

With regard to confinement, the court said:

. . . [Confinement's] execution before and after trial is subjected to strict control . . . . [After apprehension and custody] "a screening out process will occur here in reference to a more permanent status. . . ." After confinement has been effected in a lawful manner . . . . such confinement is not a continuation of custody but a new and different form of restraint. Nor does confinement include custody in this sense, because confinement may be imposed in cases where there has been no apprehension and resultant custody.

3. *Confinement through physical restraint.* A prisoner who has been duly placed in confinement, and who is thereafter removed from the confinement facility while under guard, continues to remain in a status of confinement as long as he is under ***physical*** restraint. In this regard, both the guard's ***duty*** to use physical restraint and ***possession of means*** to exercise it were considered critical factors.

a. *Duty.* The escort must have a duty to restrain the accused. Consider the case where the accused was sent on a work detail outside of the brig. His chaser was not armed and had been instructed not to attempt, physically, to stop an escaping prisoner. The guard's instructions were to shout "Halt," to blow his whistle, and to get help from nonprisoner personnel. The accused took advantage of this policy and escaped. ***Held***: There was no duty upon the escort to create a restraint and, therefore, accused did not escape from confinement. Where a guard is instructed to try to "talk" the prisoner out of leaving, but is not to physically restrain him, the prisoner's status is not one of confinement. When the escort is under a duty to continue the accused's restraint, however, the accused will remain in confinement regardless of whether the escort is armed.

b. *Confinement is confinement until released by proper authority.* Confinement is confinement until released by proper authority. So, for example, consider where an accused named Maslanich had been placed in pretrial confinement for aggravated assault. While still in a confinement status, he was turned over to his first sergeant who was assigned the duty of escorting the accused to his defense counsel's office. The accused was to confer with his defense counsel concerning an upcoming hearing on his pretrial confinement. While the accused was meeting with his counsel, the first sergeant left for lunch. Subsequently, the accused left his defense counsel's office—ostensibly to get a drink of water—at which time he proceeded to leave the building and the base. It was held that the accused escaped from confinement when he left the building, in spite of the lack of effectiveness of his restraint. The departure of the first sergeant for lunch could not be construed as setting the accused at liberty. The court of review focused not on the "duty" and "means" test, but rather on the feeling that an accused once placed in confinement remains in that status until released by proper authority. The court pointed to the difficulty in reconciling precedent which followed the "duty" and "means" analysis, and specifically overruled Air Force cases which found no confinement due to a strict application of the "duty" and "means" tests.

c. *Is "duty" and "means" still the test?* Despite the attractive logic of *Maslanich*, the "duty" and "means" test still seems viable. The conviction in *Maslanich* could have been upheld using the "duty" and "means" analysis. *Maslanich*'s guard arguably had both the duty and means to prevent the accused's escape; he merely failed to properly execute them. Thus, where the guard allowed the accused to go free because the accused falsely informed the guard that the magistrate had ordered his release, the Court of Military Appeals cited with approval cases which applied the "duty" and "means" test and found that the guard's negligence did not negate his duty or means to prevent escape.

CR 24.6.6. *Defenses*.

A person may not be convicted of escape from confinement if the confinement is illegal. The section provides that confinement ordered by one authorized to do so is presumed lawful and that legality of confinement is ordinarily a question of law. The legality of confinement is a question of law. Accordingly, most issues related to the legality of confinement will be litigated by a motion to dismiss rather than as a defense on the merits. The one issue related to

the legality of confinement which can clearly be presented to the fact-finder is whether the person ordering the confinement was legally empowered to do so. This is an element of the offense and is therefore clearly a proper matter of defense.

CR 24.6.7. *Pleading*.

1. *Sample specification:*

Charge. Violation of the Uniform Code of Military Justice, Article 95

Specification. In that Seaman Robert Thomas, U.S. Navy, USS PILE, on active duty, having been placed in confinement in the Navy Brig, Naval Education and Training Center, Newport, Rhode Island, by a person authorized to order the accused into confinement, did, at Naval Education and Training Center, Newport, Rhode Island, on or about 25 December 20CY, escape from confinement.

CR 24.7. *BREAKING ARREST.*

CR 24.7.1. *Essential Elements*.

1. That a certain person ordered the accused into arrest;

2. that said person was authorized to order the accused into arrest; and

3. that the accused went beyond the limits of arrest before being released from that arrest by proper authority.

CR 24.7.2. *First Element*.

That a certain person ordered the accused into arrest. *See* §0702 for the definition of "arrest" in the military setting. Ordering a person into arrest must be accomplished in accordance with the *Manual for Courts-Martial* and any local directives.

1. *Procedure.* Arrest is imposed by notifying the person to be placed in arrest that they are under arrest and by informing them of the limits of the arrest. Such notification may be oral or written.

2. *Pretrial arrest.* When pretrial arrest is imposed, immediate steps shall be taken to inform an accused of the offense suspected and to try him or dismiss the charges against him.

CR 24.7.3. *Second Element*.

That said person was authorized to order the accused into arrest.

A flag or general officer exercising general court-martial jurisdiction may impose as NJP upon commissioned or warrant officers only "arrest in quarters" for not more than 30 consecutive days.

CR 24.7.4. *Defenses*.

Although the *Military Judges' Benchbook*, Inst. 3-19-3, indicates that a fourth element exists—"That the accused knew of his arrest and its limits"—it is not evident from the President's analysis that such a requirement is necessary. The *Benchbook* continues to state that this instruction must be provided to the members "if there is any evidence from which it may justifiably be inferred that the accused may not have known of his arrest and its limits."

CR 24.7.5. *Pleading*.

1. *Sample specification*:

Charge. Violation of the Uniform Code of Military Justice, Article 95

Specification. In that Ensign John B. Smith, U.S. Navy, USS NEVERSAIL, on active duty, having been placed in arrest in quarters by a person authorized to order the accused into arrest, did, at Naval Education and Training Center, Newport, Rhode Island, on or about 31 December 20CY, break said arrest.

CR 24.8. *BREAKING RESTRICTION.*

CR 24.8.1. *General discussion.*

Breaking restriction is a violation of Article 134, UCMJ. It is a common offense—since various forms of restriction are imposed for a variety of reasons including punishment, administrative requirements, medical needs, etc. (***Note***: Breaking medical quarantine is a separate offense under Article 134.)

CR 24.8.2. *Essential Elements*.

1. That a certain person ordered the accused to be restricted to certain limits;

2. that said person was authorized to order said restriction;

3. that the accused knew of the restriction and the limits thereof;

4. that the accused went beyond the limits of the restriction before being released by proper authority; and

5. that, under the circumstances, the conduct of the accused was conduct to the prejudice of good order and discipline ("C to P") or service-discrediting ("SD").

Notice that the knowledge element is clearly a listed element of the offense. Consequently, it must be proved by the government beyond a reasonable doubt.

CR 24.8.3. *First Element*.

Restriction is the moral restraint of a person imposed by an order directing him to remain within certain specified limits. There are two types: administrative and punitive.

1. *Administrative.* Administrative is called restriction in lieu of arrest. It is used pending investigation and disposition of charges, or both, or pending review.

2. *Punitive.* Punitive may be awarded by NJP or court-martial sentence. The sentence should specify limits. Unlike confinement, however, restriction is not effective until actually ordered executed by the convening authority (CA) after review and action.

CR 24.8.4. *Second Element*.

Who may lawfully restrict? This depends upon the type of restriction.

1. *Restriction in lieu of arrest.* Restriction in lieu of arrest may be ordered by same authority as for "arrest." Generally, any commissioned officer can order an enlisted member into restriction; however, enlisted personnel cannot order other enlisted members into restriction unless they have been authorized to do so by the CO. This authority cannot extend to enlisted members not subject to the CO's command. However, an NCO's order to the accused to remain overnight in a specified room was not unlawful as a matter of law, given the presumption that all orders are lawful and the facts that the sergeant who issued the order had a valid reason for doing so and that the accused did not contest the lawfulness of the order at trial. The court's decision was based upon the relative shortness of the order's intended effect (one night) and the immediate need to preserve order within the unit (which the order was intended to enforce). The authority need not be specific.

Hence, the restriction order of a senior NCO was upheld where the CO testified that, while he had not specifically authorized the NCO to place personnel in restriction, he had left the NCO in charge and intended to "grant him all authority necessary to act in his behalf."

2. *Punitive restriction.*

a. *NJP.* Authority to impose punitive restriction as a result of NJP derives from Article 15, UCMJ, and is exercised by the officer who imposes the NJP.

b. *Court-martial.* Restriction may be imposed as a court-martial sentence (or part of it). The convening authority exercises this authority by ordering the sentence executed.

CR 24.8.5. *Third Element.*

The accused must have actual knowledge of the restriction and of its geographical limits. While no cases have decided the issue directly, it is safe to assume that actual vice constructive knowledge is required. Actual knowledge may be proved by circumstantial evidence, however. The accused is usually informed of restricted status in writing by use of a document called "restriction orders." This need not be in writing, however, as long as the accused has actual knowledge of his status and of the geographical limits of the restriction.

CR 24.8.6. *Fourth Element.*

Before the accused was set at liberty by proper authority, he went beyond the limits of the restriction. The actual "breaking" consists of the going beyond the geographical limits. Failing to comply with another provision of the order establishing the restriction, such as muster, ***does not*** constitute breaking restriction; it could, however, be prosecuted as a violation of Articles 92 or 86.

CR 24.8.7. *Fifth Element.*

Conduct to the prejudice of good order and discipline or service-discrediting. Not every departure from the limits of the area of restriction constitutes a "breach" of restriction.

CR 24.8.8. *Pleading*.

Refer to MCM, pt. IV, § 102f for a sample pleading.

CR 24.9. *ESCAPE FROM CORRECTIONAL CUSTODY.*

CR 24.9.1. *Essential Elements.*

1. That the accused was placed in correctional custody by a person authorized to do so;

2. that, while in such correctional custody, the accused was under physical restraint;

3. that the accused freed him/herself from the physical restraint of this correctional custody before being released by proper authority; and

4. that such conduct was to the prejudice of good order and discipline or service-discrediting.

The *Military Judges' Benchbook*, Inst. 3-70-1, adds knowledge as an additional element. Specifically, the *Benchbook* requires: That the accused knew of this correctional custody, and the limits of the physical restraint imposed upon him.

CR 24.9.2. *Pleading*.

Refer to MCM, pt. IV, § 70f(1) for a sample pleading.

CR 24.9.3. *Related offenses*.

Note the similarity to "Escape from Confinement" under Article 95 (discussed above) and "Breach of Restraint During Correctional Custody" under Article 134, which is discussed in the next section.

CR 24.10. *BREACH OF RESTRAINT DURING CORRECTIONAL CUSTODY.*

CR 24.10.1. *Essential Elements*.

1. That the accused was placed in correctional custody by a person authorized to do so;

2. that, while in such correctional custody, a certain restraint was imposed upon the accused;

3. that the accused knew of this correctional custody and the limits of the restraint thereby;

4. that the accused went beyond the limits of the restraint before having been released (or relieved of the restraint) by proper authority; and

5. that the conduct was to the prejudice of good order and discipline.

CR 24.10.2. *Distinction between this offense and "escape from correctional custody."*

The primary distinction between the offense of breach of restraint during correctional custody and the offense of escape from correctional custody discussed in the preceding paragraph is that the restraint involved in this offense is a moral offense only. Thus, it is similar to a breach of restriction. The restraint involved in the escape offense is physical and, hence, it is more like escape from confinement. In most circumstances, breach of restraint during correctional custody is not an LIO of escape from correctional custody.

CR 24.10.3. *Pleading*.

Refer to MCM, pt. IV, § 70f(2) for a sample pleading.

CR 24.11. *RELATIONSHIP BETWEEN RESISTANCE, ESCAPE, AND BREACH*

CR 24.11.1. *Resistance Offenses:*

1. *Resisting apprehension (Article 95).*

2. *Flight from apprehension (Article 95).*

3. The resisting apprehension and flight from apprehension offenses are different from all others in this group. Both occur prior to the achievement of control over the accused; and both consist of a physical overt act in opposition to the attempt to take the individual into custody. The act may be:

   a. An assault (resistance);

   b. an assault or battery, coupled with flight (resistance); or

   c. mere flight (flight).

4. Once custody has been effected, any further resistance is not a resisting apprehension. It may be:

   a. An attempt to escape from custody;

   b. an attempt to escape from confinement;

   c. an escape from custody or an escape from confinement, if the accused was successful in casting off the physical restraint and pursuit, if any; or

   d. an assault or a battery, which would generally be an Article 128 offense, if there is no intent to escape.

It is important to understand these distinctions precisely and to analyze the facts carefully prior to pleading these offenses, particularly in a resisting apprehension or escape from custody situation.

If there is any doubt as to whether or not the apprehension was completed, provide for any reasonable alternative.

5. *Example:* ***A*** sat in a bar making a loud noise. ***B,*** an MP, walked up to ***A*** and said, "Come with me. You're under arrest." A stood up, looked at ***B,*** then dashed out the door with ***B*** in hot pursuit. ***A*** ran through several alleys, was out of ***B's*** sight for five minutes; but, after fifteen minutes of chasing, ***B*** caught ***A,*** put handcuffs on him, and turned him in at the base.

CR 24.11.2. ***Escape Offenses:***

1. *Escape from custody (Article 95).*

2. *Escape from confinement (Article 95).*

3. *Escape from physical restraint of correctional custody (Article 134).*

a. *Escape.* The escapes all involve an element of physical restraint.

b. *Custody.* Custody involves the personal, bodily control by the apprehending official. It may consist of forcible and corporeal restraint or simply peaceable submission.

c. *Confinement and correctional custody.* Confinement (Article 95) and correctional custody with physical restraint (Article 134) both involve a control by means of a physical enclosure or the presence of physical force to prevent escape.

(1) *Completed escape.* The escapes are complete upon the casting-off of the physical restraint before being set at liberty by proper authority.

CR 24.11.3. ***Breach Offenses:***

1. *Breach of arrest (Article 95).*

2. *Breach of restriction (Article 134).*

3. *Breach of restraint during correctional custody (Article 134).*

a. *Moral restraint required.* The breaches all involve a mere moral restraint (i.e., restraint imposed by a moral obligation to obey the order directing the accused to remain within a certain area).

(1) Arrest (Article 95) is nonpunitive in nature.

(2) Arrest-in-quarters is punitive (NJP).

(3) Restriction may be nonpunitive (i.e., restriction in lieu of arrest or administrative restriction e.g., quarantine). However, it may also be punitive (i.e., imposed by NJP or court-martial).

b. *Breach completed.* The breaches are complete upon unauthorized departure from the limited area within which the individual is morally obligated to remain.

CR 24.11.4. ***Pleading:***

1. *Query:* What should be pleaded?

2. *Answer:* Provide for the contingencies of proof and allege both flight from apprehension and escape from custody. In that manner, the court will be able to resolve the factual question and convict on the proper allegation.

SECTION B: DRUNKENNESS OFFENSES

CR 24.12. *INTRODUCTION*

CR 24.12.1. *Introduction.*

This section discusses offenses pertaining to drunkenness. It is not a crime in the military to be drunk. It is a crime to be drunk in certain places, while in a certain duty status, or to do certain things while intoxicated. While the standard by which drunkenness is determined does not change from offense-to-offense, the maximum punishment which may be awarded varies considerably.

CR 24.13. *DRUNK ON DUTY.*

CR 24.13.1. *Elements.*

1. That the accused was on duty as alleged (other than as a sentinel or lookout); and

2. that the accused was found drunk while on duty.

CR 24.13.2. *First Element.*

1. *Duty includes:*

a. Duties of routine or detail, in garrison, at station, or in the field;

b. duties which are of an anticipatory nature, such as a standby for a flight crew or guard duty; and

c. every duty which an officer or enlisted member may legally be required by superior authority to execute.

2. *On duty.* "On duty" does not relate to periods when no duty is required, such as when a person is on liberty or on leave.

a. A CO of a ship is constantly on duty when on board ship.

b. When exercising command, a CO of a post, command, or of a detachment in the field is on constant duty.

c. "In a region of active hostilities," the circumstances may be such that all members of a command may properly be considered as being continuously on duty within the meaning of this article.

3. *To commit offense requires entry upon duty.* To commit this offense, the accused must have undertaken the responsibility or entered upon the duty. "[T]he fact the accused became drunk before going on duty . . . does not affect the question of guilt." If, however, the accused is known by superior authorities to be intoxicated at the time the duty is assigned, a defense may exist if the authorities allow her to assume that duty.

a. *Commencement of the duty status*. Commencement of the duty status requires an affirmative act, such as relieving someone of the duty, performing the duties required even though there has not been an identifiable act of relieving, or mustering with the duty section to which assigned, signing the log book, reporting to a senior, etc.

b. *Duty status terminated.* The duty status may be terminated by being relieved, dismissal, expiration of the period of duty, or abandonment of the duty. However, in once case, in which the OOD left the post in an official car, got drunk in a civilian club and then returned to his post before the time at which he was to be relieved, the court held his conviction of being under the influence of alcohol while acting as duty officer, in violation of Article 134, was appropriate.

CR 24.13.3. *Second Element.*

1. *Drunk defined:*

a. "[A]ny intoxication which is sufficient sensibly to impair the rational and full exercise of the mental or physical faculties."

(1) "Intoxication" may be caused by liquor ("drunk") or drugs ("impaired").

(2) This definition applies to drunk on duty (Article 112), drunk driving (Article 111), and drunk in camp, aboard ship, and in public (Article 134).

b. ". . . [A] sensible impairment of the faculties is an impairment capable of being perceived by the senses. If the accused's conduct is not such as to create the impression within the minds of observers that he is unable to 'act like a normal rational person,' there can be no sensible impairment of his faculties. If, because of intoxicating liquors [or drugs], there was a perceptible lessening of accused's ability to act like a normal rational person, then it may be said that accused's faculties were sensibly impaired."

c. Compare the approach of the *Military Judges' Benchbook*, Inst. 3-36-1, in defining drunkenness:

A person is drunk who is under the influence of an intoxicant so that the use of his faculties is materially impaired. Such impairment did not exist unless the accused's conduct . . . was such as to create the impression within the minds of observers that he was unable to act like a normal rational person.

2. *Must be on duty.* It must appear that the person was drunk while on duty. Drunkenness before or after duty is not sufficient. A hangover is also insufficient to constitute a violation of Article 112, but may satisfy the elements of incapacitation in violation of Article 134.

3. Drunkenness can be the result of alcohol or drugs consumed before or while on duty.

4. *Proof of drunkenness.*

a. *By law witness.* The military rules of evidence provide: If the witness is not testifying as an expert, the testimony of the witness in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue.

(1) One commentary has said that the first requirement is really composed of two qualifications:

The first is that the witness has perceived that which the witness testifies about. This may mean that the witness has seen something; it may mean that the witness has heard something; or in some cases it may mean that the witness has felt or touched something. All of these would qualify as perceptions of the witness. The second requirement is that the perceptions be rationally based.

(2) Thus, it would appear that any witness who has observed the accused could testify as to their observations; and, if these observations were sufficient to form an opinion, the witness could also testify as to the opinions concerning the accused's drunkenness. The underlying observations could include such things as the manner in which the accused walked, talked, appeared, smelled, etc.

b. *By expert witness.*

(1) Rule 702 of the Military Rules of Evidence concerns testimony by an expert witness. It is generally considered broader than the previous rules. An expert should have no difficulty testifying about his opinion of the accused's state of drunkenness under its terms. Rule 703 indicates that the expert may base said opinion on facts which are not themselves admissible in evidence if "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."

(2) Experts may also testify about the results of tests which they performed in order to form their opinion. Thus, blood and other medical tests can be utilized to aid in resolving the drunkenness question.

c. *General intent crime.* Drunk on duty is a general intent offense. The trial counsel need not prove that the accused's drunkenness was intentional or resulted from culpable or ordinary negligence. However, it must be the result of a voluntary act. Involuntary intoxication, coercion, and duress are viable defenses. Furthermore, involuntary intoxication as a result of an accidental overdose administered for medicinal purposes is a valid defense.

d. *Punishment.* Although MCM, pt. IV, § 36e, prescribes a maximum punishment of a Bad Conduct Discharge and Confinement for 9 months for this offense, there is authority for the proposition that this is not a minor offense. In one case, the accused was an officer of the deck aboard an aircraft carrier. After assuming the duty, he was found drunk in uniform, "lying unconscious in a passageway." The court held that trial was not precluded by the previous administration of NJP for the same offense because, under the circumstances, the offense could not be considered a minor one. Whether a less egregious set of facts would yield the same result is a question that has not yet been decided.

CR 24.13.4. *Pleading*.

A sample specification is provided in MCM, pt. IV, § 36f. The specification should allege the specific duty of the accused.

CR 24.14. *DRUNK ON BOARD SHIP OR IN SOME OTHER PLACE*

These offenses are violations of Article 134, UCMJ.

CR 24.14.1. *Essential Elements*.

1. That the accused, at the time and place alleged, was drunk on board ship or in some other place; and

2. that, under the circumstances, the conduct was conduct to the prejudice of good order or service-discrediting.

CR 24.14.2. *"Drunk" has the same definition previously discussed.*

"Drunk" has the same definition previously discussed. "Any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental or physical faculties is drunkenness. . . ."

CR 24.14.3. *Aggravating factor.*

Disorderly conduct, drunkenness, and drunk and disorderly conduct can be aggravated if the behavior is under service-discrediting conditions. This aggravating element authorizes enhanced punishment and must be both pled and proven.

CR 24.14.4. *Related Offenses.*

1. Disorderly conduct under Article 134.

2. Drunk and disorderly conduct, Article 134.

CR 24.14.5. *Special Defense*.

If the accused was involuntarily brought to the camp, station, etc. after already being intoxicated, he has a defense to this charge. However, the court may still find the accused guilty of being disorderly on station, etc., if he has been charged with being drunk ***and*** disorderly. The fact that the drunkenness occurs under semi-private conditions does not preclude findings that such conduct is service-discrediting.

CR 24.14.6. *Proof*.

Proof of uncharged misconduct is inadmissible to support a conviction of this offense. However, if the conduct consists of acts of erratic behavior committed immediately prior to the time that the accused is alleged to have been drunk on station, etc., it will be admissible as circumstantial evidence of intoxication.

CR 24.14.7. *Pleading*.

A sample specification is provided in MCM, pt. IV, § 73f. This sample specification covers a wide range of drunkenness offenses under Article 134. Care must be exercised to select the desired allegation.

CR 24.15. *INCAPACITATION FOR DUTY THROUGH PRIOR INDULGENCE IN LIQUOR OR ANY DRUG*

This is a violation of Article 134, UCMJ.

CR 24.15.1. *Essential Elements*.

1. That the accused had certain assigned duties to perform;

2. that the accused was incapacitated for the proper performance of such duties;

3. that such incapacitation was the result of previous wrongful indulgence in intoxicating liquor or any drug; and

4. that conduct was to the prejudice of good order and discipline or service-discrediting.

CR 24.15.2. *Additional element.*

The *Military Judges' Benchbook* states that the government must also prove that the accused knew he would have duties to perform. The *Benchbook* notes that this element must be instructed upon "if there is any evidence from which it may justifiably be inferred that the accused did not have knowledge, prior to the time of his incapacitation, that he had duties to perform." There is no law supporting this extra evidentiary requirement.

CR 24.15.3. *"Duty."*

See the discussion at CR 7.13.

CR 24.15.4. *"Incapacitated."*

Incapacitated means rendered unfit or unable to perform the required duties properly. Incapacitation can be the result of the accused's drunkenness at the time he is required to perform. Thus, if the accused cannot perform military duties properly because of drunkenness, he is "incapacitated."

However, incapacitation can also be the result of a hangover, even if the accused was no longer intoxicated at the time he was required to perform. For example, if Private Sluggo is assigned duty as a sentinel at 0800 tomorrow morning and gets drunk, he is guilty of being incapacitated for duty if, tomorrow, he does not or cannot assume his duties because he is too drunk ***or*** because he is hung over.

Suppose the accused is incapacitated at the time he arrives to perform his duties. If he then assumes his duties, is he guilty or not guilty of incapacitation? Neither the *Manual* nor the case law speaks to this issue. The aggressive defense counsel might argue that the act of assuming the duty in question negates any criminal liability for incapacitation. The better view, however, would appear to be that assumption of the duty is ***not*** a defense to an incapacitation charge. After all, the accused was clearly guilty of incapacitation when he first arrived at his duty. It would seem anomalous to permit an accused to acquire a defense to his incapacitation offense because he took the additional step of assuming the duty he was unfit to perform. This is a circumstance which would appears to aggravate the offense, not mitigate it.

CR 24.15.5. ***Pleading***.

A sample specification is provided in MCM, pt. IV, § 76f. The sample specification does not provide for the specific duty of the accused to be alleged; but, in light of the instructions usually given, it is suggested that drafted specifications include an allegation of the accused's specific duty.

CR 24.16. ***DRUNKEN, RECKLESS, OR WANTON DRIVING.***

Essential Elements.

CR 24.16.1. ***Essential elements.***

1. That the accused was operating a vehicle, aircraft, or vessel;

2. that the accused was operating it in a reckless or wanton manner; or while drunk or impaired; or when their alcohol concentration is greater than the applicable legal limit; and, ***in aggravated cases***

3. that the accused thereby caused the vehicle, aircraft, or vessel to injure a person.

The last element is a factor in aggravation and authorizes an increased punishment if pled and proved by the prosecution, but it is not an essential element. Note that there are three distinct offenses under Article 111.

CR 24.16.2. ***The Aggravated Offense***.

Drunken/impaired or reckless or wanton driving that results in an injury is an aggravated form of the basic offense. Thus, the maximum punishment that may be imposed increases from a bad conduct discharge and 6 months confinement to a dishonorable discharge and 18 months confinement. A court composed of members must be instructed on this element if a conviction is to be affirmed.

The injury alleged must have been the proximate result of the accused's drunken or reckless driving in order to constitute an aggravating factor.

What if the accused alone is injured? Because the effect on the military service (i.e., loss of the accused's services) may be the same or even worse than if another individual were injured, it would appear that injury to the accused alone would permit the enhanced punishment to be imposed.

CR 24.16.3. ***Proof***.

1. *Drunkenness. See* the discussion in CR 7.13. The manner in which the accused operated the vehicle, his appearance, his ability to speak with clarity, or lack thereof, etc. may all be considered on the question. In one case, it was held that evidence that the accused's vehicle weaved from curb to center line while being operated at an estimated speed of 15 miles per hour, and two witnesses expressed the opinion that the accused was intoxicated, based on the way he looked—his "bloodshot" eyes, unstable gait, and slurred speech—was sufficient to uphold a conviction of the accused even though three other witnesses testified to the contrary.

2. *Recklessness.* "Recklessness is not determined solely by reason of the happening of an injury, or the invasion of the rights of another, nor by proof alone of excessive speed or erratic operation, but all these factors may be admissible and relevant. . . ."

CR 24.16.4. ***Pleading***.

A sample specification is provided in MCM, pt. IV, § 35f.

CR 24.16.5. ***Relationship Between "Reckless or Wanton Driving", "Drunken or Impaired Driving", and "Driving With a BAC in Excess of the Applicable Limit"***.

Article 111 creates three separate violations. Each are distinct offenses and none are lesser included offenses of the others. Therefore, under the right circumstances it may be appropriate to charge all three types of Article 111 violations.

It is violation of Article 111 to drive with a blood alcohol content (BAC) in excess of the applicable legal limit, as shown by chemical analysis. Commonly, the government possesses the results of a BAC examination of the accused with results in excess of this limit. Assuming the government is able to admit this result at trial, the government need not show that the accused's driving was impaired in any fashion. However, the government may also posses evidence of drunkenness or impairment in addition to the BAC. In that case, it may be prudent to charge both "drunk or impaired" **and** driving with a BAC in excess of the legal limit. By charging in the alternative, the government protects itself in the event the BAC becomes inadmissible at trial. In the "drunk or impaired" Article 111 offense, the government may establish that the accused was drunk or impaired by eye witness testimony.

"While the same course of conduct may constitute both drunken and reckless driving, this Article proscribes these as separate offenses, and both offenses may be charged." In other words, the accused may be charged and convicted of both drunken or impaired driving *and* reckless or wanton driving, so long as the facts support the charges. At very least they should be charged in the alternative to cover contingencies of proof. It may be that the government is successful in convincing a fact finder that the accused was operating in a reckless or wonton fashion, but fail to convince the same fact finders that the accused was drunk or impaired. As one is not the lesser-included-offense of the other, a failure to charge both could work to the detriment of the government. For example, C.M.A. held that where members were instructed on both reckless and drunken driving where only drunken driving was charged was prejudicial error.

It is common for these offenses to occur simultaneously. "Thus, on a charge of reckless driving, . . . evidence of drunkenness might be admissible as establishing one aspect of the recklessness, and evidence that the vehicle exceeded a safe speed, at a relevant prior point and time, might be admissible . . . of the specific recklessness charged"

Indeed, evidence of one tends to establish the other. Evidence of drunkenness tends to show a disregard for the safety of others. Likewise, evidence of the reckless or wanton method of operation may, together with other evidence, tend to indicate a lack of sobriety.

CR 24.16.6. *Relationship Between Drunk Driving and Involuntary Manslaughter*.

Consider the case where the accused was charged under Article 111 (drunk driving resulting in injury) and under Article 119 (involuntary manslaughter). The Court of Military Appeals held that the accused could be punished for both since the crimes were separately punishable even though the same victim was the subject of both charges and the injuries alleged in the former caused the death of the victim alleged in the latter. Several Court of Military Appeals opinions concerning multiplicity place the continued vitality of this holding in some doubt.

CR 24.16.7. *Relationship Between Drunk Driving and Negligent Destruction of Government Property*.

Consider the case where the accused was found guilty of both drunk driving and negligently destroying the Army ambulance he was driving while drunk. The court found the two offenses to be multiplicious for findings and amended the drunk driving specification to include the negligent destruction of government property charge. This opinion is unusual for two reasons. First, the two offenses are rarely considered multiplicious for findings, making this ruling an exception to the rule.

CR 24.17. *RELATIONSHIP BETWEEN DRUNKENNESS OFFENSES*

Just about every situation in which public intoxication occurs is prohibited by the code. The primary difficulty is in determining precisely what the facts are and then selecting the most appropriate Article with which to charge the accused.

With two exceptions, all of the offenses in this group have a common element of drunkenness on the part of the accused.

Reckless and wanton driving is one exception. It is frequently accompanied by drunkenness on the part of the accused, but the accused need ***not*** be drunk in order to be convicted.

Incapacitation for duty by prior indulgence in intoxicating liquor is the other exception. It is not necessary to prove that the accused was drunk at the time duty was to commence, nor even that he was drunk previous to that time. It is sufficient to show that accused was in fact unfit for or unable to perform duty properly, and that this unfitness or inability was due to previous indulgence in intoxicating liquor or drugs. Of course, if accused is incapacitated, he may still be drunk, but this circumstance is not essential to constitute this offense.

With the exceptions of drunken, reckless, or wanton driving and drunk on duty, all of the drunkenness offenses are chargeable under Article 134 and, hence, have an essential terminal element of conduct to the prejudice of good order and discipline or service-discrediting.

Drunkenness offenses frequently overlap. For example: The accused was the NJS duty driver. Before reporting for duty, accused drank a fifth of whiskey. Accused staggered to NJS and ***assumed*** the duty by crawling into the vehicle after falling down three times and breaking the window while trying to enter the car. Then, pursuant to an order received the previous day, accused meandered to Newport, drove down Thames Street at high noon at 65 mph, went through two red lights, and narrowly missed twelve pedestrians and six cars. This conduct clearly constitutes a violation of Article 111 (i.e., drunken and reckless driving). It likely also amount to reckless or wanton driving. It is also a violation of Article 112, drunk on duty. The accused was clearly incapacitated for duty by previous indulgence, which was conduct prejudicial to good order and discipline or service-discrediting. Additionally, accused's conduct was "service-discrediting" in that he was "drunk in uniform in a public place," to wit: Thames Street, Newport. The accused was also "drunk and disorderly on station," which was conduct prejudicial to good order and discipline.

With what should the accused be charged? While it is largely a matter of judgment, a reasonable solution would be to charge the accused with:

1. *Reckless driving (Article 111).* Maximum punishment—BCD and six months confinement.

2. *Drunken driving (Article 111).* Maximum punishment—BCD and six months confinement.

3. *Drunk on duty (Article 112).* Maximum punishment—BCD and nine months confinement.

These cover the most serious aspects of the accused's misconduct while allowing for the contingencies of proof. *See* section CR 7.15., *supra*.

Examples:

1. Accused, a flight crewman, was scheduled to fly at 0800. Pursuant to an order received the previous day, accused reported to his superior NCO at 0730, but, immediately upon reporting, requested release from the assignment. Accused stated that he was "in no condition" to make the flight. The request was granted. Accused was later tried for being drunk on duty under Article 112. The NCO testified to all of the above and added that the accused was definitely drunk. Is the conviction valid? No. Accused was drunk, but not on duty. Appearing at the aircraft and requesting relief from the assignment was not an assumption of duty. With what should accused have been charged? Incapacitation for duty by prior indulgence in intoxicating liquor (Article 134).

2. Accused, a flight crewman, was scheduled to fly at 0800. The night before, accused becomes intoxicated and—upon arrival to fly the next morning—is suffering from a ferocious hangover. Accused goes ahead and starts to fly at 0800 as scheduled, but is unable to complete the mission and has to return because his head is pounding so badly from the hangover. With what should the accused be charged? Incapacitation for duty by prior indulgence in intoxicating liquor (Article 134).

SECTION C: MISBEHAVIOR BY SENTINEL, LOOKOUT, AND WATCHSTANDER

CR 24.18. *SENTINEL AND LOOKOUT OFFENSES UNDER ARTICLE 113, UCMJ.*

CR 24.18.1. *Scope.*

This Article proscribes three types of misbehavior by sentinels and lookouts:

1. Being found drunk on post;

2. sleeping on post; and

3. leaving post before being regularly relieved.

CR 24.18.2. *Essential Elements.*

1. That the accused was posted or on post as a sentinel or lookout;

2. that the accused was found drunk or sleeping while on post, or that the accused left post before being regularly relieved; and, if applicable

3. that the offense was committed in time of war or while the accused was receiving special pay under 37 U.S.C § 310.

CR 24.18.3. *First Element.*

1. *"Post" defined.* "Post" is defined as the area where the sentinel or lookout is required to be for the performance of duties. A post is not limited by an imaginary line, but includes, according to orders or circumstances, such surrounding area as may be necessary for proper performance of the duties for which the sentinel or lookout was posted.

2. "*Sentinel" and "lookout" defined.* The terms "sentinel" and "lookout" are used interchangeably and are defined as an observer whose duties include the requirement that he maintain constant alertness. Exactly what is to be observed is often a difficult question to answer. C.M.A. has spoken of the accused's duties to "be vigilant, remain awake, observe for possible approach of the enemy, and sound an alert, if necessary."

Article 113 does not include a person whose duties as a watchman or attendant do not require being constantly alert. Some examples of persons who are sentinels or lookouts are as follows:

3. *Examples:*

a. Soldier in front lines who has been stationed in observation against approach of the enemy. This case is informative because it demonstrates that, in some instances, an accused can be considered a sentinel or lookout even though his entire unit is "100% on alert." This fact alone was not deemed controlling, but it was considered by the court. Together with the accused's duty to observe and warn of the approach of the enemy, it was sufficient to show that he was a sentinel within the meaning of Article 113.

b. Persons detailed to use any equipment designed to locate friend, foe, or possible danger (e.g., radar, sonar, and radio operators, when required to perform the duty in order to detect possible danger).

c. Persons stationed to preserve internal security or discipline (e.g., warehouse sentry, restricted area sentry, brig guards, and chasers).

d. Underway lookouts.

4. *Not sentinels or lookouts examples:* By comparison, some examples of persons who are not sentinels or lookouts are as follows:

a. A command telephone watch, not posted as an observer. (But, if the accused was acting as a telephone operator with the duty of watching and reporting hostile planes, he is a sentinel.

b. A person who is merely in a standby status (e.g., supernumerary of the guard). Reason: Not required to stay alert; not yet an observer; not yet on post.

c. Captain's orderly. Reason: Not an observer.

3. "*On post" defined.* A sentinel or lookout gets "on post" by

a. being given a lawful order to go "on post" as a sentinel or lookout; and

b. being formally or informally posted. The fact that the sentinel or lookout is not posted in the regular way is not a defense. It is sufficient if the sentinel or lookout has taken his/her post in accordance with proper instructions whether or not formally given.

CR 24.18.4. *Second Element.*

The accused was found drunk while on post, sleeping while on post, or left his/her post before being regularly relieved. Although the *Manual* does not define the term "found," the one court to address the issue has concluded that the "manner in which a sentinel is discovered" is not an element of Article 113.

1. *First offense - sleeping while on post.*

a. *Sleeping defined.* "Sleeping" is defined as that "condition of insentience which is sufficient sensibly to impair the full exercise of the mental and physical faculties of the sentinel. . . . [T]his requirement is not met by a mere dulling of the perceptions through, say, physical exhaustion not amounting to slumber."

b. *Proving the accused was sleeping.* Proving the accused was sleeping requires "fact" testimony of a person who directly witnessed the accused's condition with his own eyes and ears is admissible to prove sleep. "Opinion" testimony of a person who directly witnessed the accused's condition with his own eyes and ears may also be utilized.

c. *General intent crime.* Sleeping on post is a general intent offense. The prosecution need not prove that the accused's sleeping was intentional nor that it resulted from culpable or ordinary negligence. The fact that the accused's sleeping resulted from a physical incapacity caused by disease or accident, however, is an affirmative defense. The question in such a case is not one of reasonableness. The case, however, is different when one's physical condition is such as actually to prevent compliance with the orders or, as here, to cause the commission of the offense. Upon such a showing, the question is not one of reasonableness vis-a-vis willfulness, but whether the accused's illness was the proximate cause of his crime. Another possible affirmative defense is that the accused's superiors knew that he was in no condition to assume the duty as a sentinel at the time that they posted him.

2. *Second offense - being drunk while on post.* "Drunk" is defined as any intoxication, by liquor ***or*** drugs, which impairs sensibly the rational and full exercise of the mental or physical faculties.

3. *Third offense - leaving post before being regularly relieved.* When has the sentinel or lookout left his post? When his ability fully to perform the duty for which he was posted is impaired. The exact distance required for leaving post depends upon the nature of the post and other circumstances of the case.

a. *Examples:*

(1) He was manning a machine-gun post which commanded an avenue of approach. During his tour his telephone went out of order, so he moved his gun to a point near another machine-gun post some 100 feet away. However, he could not guard the particular draw assigned to him with machine-gun fire from that new point. ***Held:*** Left his post.

(2) A radar operator might move only a few inches and have left his post because he would no longer be able properly to observe the scope.

(3) A roving sentinel or lookout, such as a security guard at a brig, may move hundreds of feet throughout his patrol area and remain on post.

The sentinel or lookout has not left his post when he has gone beyond the defined area for the purpose of carrying out some duty for which he was posted.

b. *Regularly relieved.* When is the sentinel "regularly relieved"? When relieved by another sentinel or lookout authorized to relieve him; when the tour of duty has expired and orders permit the sentinel to leave without relief (e.g., if told to stand guard until sunrise, then the sentinel may lawfully leave the post when the sun rises); or when relieved by competent superior authority (e.g., if accused is a bow lookout, becomes ill, and asks OOD by telephone for permission to go to sick bay at once and receives that permission, the lookout will be considered relieved).

CR 24.18.5. Element in Aggravation.

If it is alleged and proved that the offense was committed while the accused was serving in a capacity authorizing entitlement to special pay for duty subject to hostile file, a higher scale of punishment (ten years' confinement vice one year) is authorized.

The text of the Article indicates that, if the misbehavior occurs during time of war, it is a capital offense. Determining whether capital punishment applies to a particular offense is not difficult if Congress has formally declared war; however, such a declaration seldom occurs. In considering the question in the context of Article 113, the Court of Military Appeals has held that a formal declaration of war is not necessary to make an accused liable to the increased punishment. Although all of these cases dealt with the Korean War, the court has also reached the same result when dealing with a similar question in the context of the Vietnam War.

CR 24.18.6. *Lesser Included Offenses (LIO's)*.

1. *As to drunk on post.* Drunk on board ship or other place (depending on the allegations and proof of the particular case Article 134, UCMJ). Drunk and disorderly (depending on the allegations and proof of the particular case - Article 134, UCMJ).

2. *As to sleeping on post.* Loitering or wrongfully sitting down on post while a sentinel or lookout in violation of Article 134, UCMJ.

3. *As to leaving post before regularly relieved.* Going from appointed place of duty. It is not proper, however, to allege failure to assume a security watch on a ship (or other place) as a failure to go to (or going from) an appointed place of duty where the security watch is a roving watch and there is no proof of any particular place, smaller than the whole ship, where the accused was to stand the watch.

4. *Absence from unit, organization, or other place of duty.* It is improper, however, to find an accused guilty of lying down on post when charged with leaving the post as a sentinel because the former is not an LIO of the latter. Depending upon the allegations and facts of a case, dereliction of duty under Article 92 might be an LIO of any of the misbehavior offenses.

CR 24.18.7. *Pleading*.

A sample specification is provided in MCM, pt. IV, § 38f.

CR 24.19. *SENTINEL AND LOOKOUT OFFENSES UNDER ARTICLE 134. LOITERING AND WRONGFULLY SITTING DOWN.*

CR 24.19.1. *Essential Elements*.

1. That the accused was posted as a sentinel or lookout;

2. that, while posted, the accused loitered or wrongfully sat down on post; and

3. that the conduct was prejudicial to good order and discipline or service-discrediting.

CR 24.19.2. *"Loiter" defined.*

"Loiter" means to stand around, to move about slowly, to spend time idly, to saunter, to linger, or to lag behind when such conduct is in violation of known instructions or accompanied by a failure to give complete attention to duty. For example, consider the case where the accused was a gate guard. He was observed standing with his back to incoming traffic and his eyes closed for a "count of 10." ***Held:*** Loitering on post.

CR 24.19.3. *Defense*.

If the accused was physically incapable of standing on his feet when he sat down, he has a defense.

CR 24.19.4. *Pleading*.

A sample specification is provided in MCM, pt. IV, § 104f(2). When alleging and instructing on "sitting on post" offenses, be sure to include expressly the word "wrongfully" before the words "sat down." Note that omission of "wrongfully" results in a failure to state an offense because some sentinels may properly sit on post (e.g., in a foxhole in combat). Also note that, similar to Article 113, these offenses are aggravated if they occur in time of war or in a hostile pay environment. These aggravating elements must be pled and proved.

CR 24.20. *RELATIONSHIP BETWEEN THE SENTINEL AND LOOKOUT OFFENSES.*

CR 24.20.1. *In general.*

There are five recognized "sentinel and lookout" offenses. Three are proscribed by Article 113, ***drunk*** on post, ***sleeping*** on post, and ***leaving*** post; two are charged under Article 134, ***loitering*** on post and ***wrongfully sitting on post***.

CR 24.20.2. *Common factors.*

There are ***two factors common*** to all of these offenses.

1. The first is that the accused must be a sentinel or lookout (One who is expected to remain alert, whose primary duty is to observe the possible approach of the enemy or for any other danger, and to sound a warning is a sentinel or lookout.

2. The second is that the accused must have assumed his post. One exception applies. It is not enough that the accused was a sentinel or lookout, and that he assumed his post, but he must also have actually been on post at the time of the commission of the offense.

3. *Example*:

a. A sentinel, assumed his post but 15 minutes later, he departed without authority, sat down, loitered, got drunk, and finally fell asleep in his rack (not in his post area). With what offense(s) could he properly be charged? The answer is: Leaving his post, under Article 113. All of the other offenses require the accused to be on post. (Article 86, UA with intent to abandon guard or watch may also be a possibility).

b. Suppose, in the preceding example, that the accused was assigned as a sentinel to patrol continuously the outside and inside of the tent where his rack was located. With what offense(s) could he properly be charged? The answer is: Drunk and sleeping on the post, under Article 113; and loitering and sitting on post, under Article 134. But, he has not left his post.

c. Suppose, in the preceding example, the accused was simply assigned to patrol outside the tent. Did he leave his post if he entered the tent? This is a difficult question. Look at all the circumstances, including the purpose of the patrol, any specific instructions on limits and duties of the post, the size of the tent and relative location of the rack within the tent, plus the purpose and circumstance of his initial entry. Weigh all factors carefully; then, if in doubt, provide for contingencies of proof by pleading both alternatives (i.e., he left the post, and he was drunk, sleeping, sitting, and loitering on post). In the preceding example, could he properly be charged with drunk on duty under Article 112? ***Answer***. No. Article 112 expressly excepts sentinels and lookouts from its scope.

CR 24.21. *MISBEHAVIOR BY WATCHSTANDERS*

CR 24.21.1. *General discussion.*

The term "watchstander" is used here in the sense of one who is on watch, but does not qualify as a sentinel or lookout. There are two reasons that could disqualify one who is on a watch from the category of sentinel or lookout: first, one is not required to remain constantly alert; or two, one is not posted primarily as an observer.

Some watchstanders may not be required to observe or remain alert (e.g., personnel in a standby status, such as the next relief of the guard, who are permitted to sleep but are nevertheless considered "on watch" for the entire 24 hours that they are in such a status).

CR 24.21.2. *Many Possible Offenses by Watchstanders*.

Articles to consider: 86, 92, 112, 133, and 134. Suppose a watchstander has a duty to be alert (e.g., a telephone switchboard operator falls asleep). What offense has been committed? Answer: Dereliction of duty, Article 92(3). Or, suppose a watchstander has no duty to be alert (e.g., the supernumerary of the guard, but he gets drunk while on watch). What offense has been committed? Answer: Drunk on duty, Article 112. Further consider and suppose the admiral's orderly, without permission, leaves his post and sneaks down to the "gedunk" where he is seen by the admiral's chief yeoman. What offense? Answer: Going from appointed place of duty without authority, Article 86(2).

Suppose an officer of the deck drinks while on duty, but does not get drunk. Any offense? Answer: Violation of a lawful general regulation, Article 1162, *U.S. Navy Regulations*, possessing and using alcoholic beverages on board ship. Articles 133 and 134 could possibly be employed, but Navy Regulations via Article 92 would cover this situation.

CR 24.21.3. *Special problem*.

Accused is charged under Article 92 as follows:

Charge. Violation of the Uniform Code of Military Justice, Article 92

Specification. In that Seaman Recruit James Arnold McCall, U.S. Navy, USS BUTNER, on board USS BUTNER, on or about 0145, 19 May 20CY, was derelict in the performance of his duties, in that he was found lying down and asleep while on watch in the aft steering compartment.

Does this state an offense? Yes. The allegation that he was derelict fairly implies that he had a duty to be alert. Furthermore, the allegation of his particular assignment (i.e., watch in the aft steering compartment) clearly implies a duty to be alert in the event an emergency arose requiring immediate action. If the watch requires alertness, and the accused was derelict in that respect, it is safer and better to allege this requirement expressly. ADD - "and thereby failed to remain alert, as it was his duty to do."

SECTION D: FALSIFYING OFFENSES

CR 24.22. *INTRODUCTION*

There are several offenses in the military that involve falsification: False official statements (Article 107); false swearing (Article 134); fraudulent enlistment or appointment (Articles 83 and 84); malingering (Article 115); forgery (Article 123); making, etc. worthless checks with intent to deceive or defraud (Article 123a); perjury (Article 131); false claims (Article 132), etc. Only the first two, false official statements and false swearing, will be discussed in this section.

CR 24.23. *FALSE OFFICIAL STATEMENT.*

CR 24.23.1. *Essential elements*.

1. That the accused signed a certain official document or made a certain official statement;

2. that the document or statement was false in certain particulars;

3. that the accused knew it to be false at the time of signing it or making it; and

4. that the accused signed the document or made the statement with an intent to deceive.

CR 24.23.2. *Discussion.*

1. *Official document or statement.* **"**Official documents and official statements include all documents and statements made in the line of duty." Even such matters as one's personal history may constitute official statements. For example, A.C.M.R. held that a false statement in the accused's Statement of Personal History (DD Form 398) was an official document for purposes of Article 107 since the accused was under a duty to make the statement. However, "official" as used in Article 107 is the substantial equivalent of the phrase "any matter within the jurisdiction of any department or agency of the United States" as found in 18 U.S.C. § 1001 (the Federal statute dealing with false or fraudulent statements).

2. *Statement to a criminal investigator*. The *Manual for Courts-Martial* provides that, in order to decide whether a statement made to criminal investigators is "official," one must first determine whether the accused had a duty to speak to the investigators. While a suspect has no obligation to speak to investigators; if they chose to provide information they are obligated to tell the truth. The false statement does not necessarily have to be given to the government in order for the statement to be official.

3. *Examples:*

a. A false official statement charge upheld against servicemember who prepared false military orders circumventing base obligations and civilian landlord. Another example relates to the violation of Article 107 by the accused when, in his capacity as a commissary official, he gave false invoices to a bakery which overstated the amount of bread delivered to the commissary. The fact that the false invoices enabled the bakery to bill the government for bread it never received made the false statements official, in the sense that they constituted matters within the jurisdiction of a department or agency of the United States.

b. In another case, the accused's statement concerning his duties as a worker for the Coast Guard's equivalent of Navy Relief was held to be official. And in yet another, the accused violated Article 107 by forging Commanding Officer's signature on paperwork submitted to Army Emergency Relief. And in one additional example, the accused violated Article 107 by submitting an altered LES, Military Identification Card, and employment verification letter to a lender in an effort to obtain credit. Because the documents submitted were altered federal documents the accused's actions clearly placed his conduct in the scope of Article 107.

CR 24.23.3. *Exculpatory no doctrine.*

Formerly, the "exculpatory no" doctrine provide a defense to a charge of making a false official statement. The doctrine provided that when a person merely gave a negative response to a law enforcement agent's question,

without expanding on the no, he should not be prosecuted under 18 U.S.C. § 1001. The rationale was that a simple negative response, without more, falls outside the type of statement contemplated by the statute; that is, statements that subvert or frustrate government administrative programs. Given the general analogy between 18 U.S.C. § 1001 and Article 107, UCMJ, the "exculpatory no" doctrine was accepted by our courts as a defense in false official statement prosecutions. However, the exculpatory no doctrine is now clearly been rejected by our courts and no longer provides a safe harbor for an accused.

CR 24.23.4. ***Knowledge that the Document or Statement was False.***

To be guilty of the offense, the accused must know that the statement or document was false. Actual knowledge may be established by circumstantial evidence. An honest, albeit erroneous, belief that a statement made was true is a defense. Extreme caution must be used in framing instructions in this area.

CR 24.23.5. ***Intent to deceive.***

"Intent to deceive" means an intent to mislead, to cheat, to trick another, or to cause to believe as true that which is false. The government must prove that the accused signed the document or made the statement with an intent to deceive. Evidence that the accused actually knew an official document or statement signed or made by him was false is circumstantial evidence that the accused had an intent to deceive. A court can also consider whether the act violated any law, regulation, or code which establishes standards of conduct reasonably related to the specific issues in the case.

It is not necessary, however, that the "victim" be, in fact, deceived. Moreover, the "victim" can be either junior or senior to the accused. It is not necessary that the false statement be material to the issue under inquiry. If, however, the falsity is in respect to a material matter, it may be considered as some evidence of the necessary intent to deceive, while immateriality may tend to show an absence of this intent.

Whether the accused had any expectation of material gain from his false document or statement is also immaterial. "The expectation of material gain is not an element of this offense." However, such expectation or lack of it is circumstantial evidence bearing on the element of "intent to deceive."

The fact that the accused signed the name of another to a document does not remove the offense from the ambit of Article 107.

CR 24.23.6. ***Pleading.***

A sample specification is provided in MCM, pt. IV, § 31f. If the act can be charged as a violation of Article 107, it is improper to charge an accused with a violation of a statute assimilated under the provisions of the Federal Assimilative Crimes Control Act, 18 U.S.C. § 13, under Article 134. For example, the accused was convicted under Article 134 for a violation of a Texas statute assimilated under the Federal Assimilative Crimes Control Act. His specific misconduct was to make false reports of robberies. The court held that, since such conduct was chargeable as making false official statements, use of the Federal Assimilative Crimes Control Act was prohibited.

It is not erroneous if the specification fails to indicate that the statement was made to a particular person. The specification must, however, allege that the statement was false. Although the accused's knowledge of the statement's falsity is an essential element of the offense, failure to allege it may not be fatal (at least where the issue is first raised by the accused on appeal). The Army court was able to find the necessary knowledge fairly implied in the allegation that the false document was made with intent to deceive.

CR 24.24. ***FALSE SWEARING.***

CR 24.24.1. ***In general.***

False swearing is "the making under a lawful oath or equivalent of any false statement, oral or written, not believing the statement to be true. It does not include such statements made in a judicial proceeding . . ."

CR 24.24.2. ***Essential Elements.***

1. That the accused took an oath or its equivalent;

2. that the oath, or its equivalent, which was administered to the accused was required or authorized by law;

3. that the oath, or its equivalent, was administered by a person having authority to do so;

4. that, upon this oath or equivalent, the accused made or subscribed a certain statement;

5. that the statement was false;

6. that the accused did not then believe the statement to be true; and

7. that the conduct was prejudicial to good order and discipline or service-discrediting.

CR 24.24.3. *Discussion.*

1. *Oath or its equivalen.* This offense cannot be committed in a judicial proceeding or course of justice. Article 131, perjury, covers the offense of making a false statement under oath in a judicial proceeding. Article 131, therefore, preempts the use of Article 134 to prosecute false swearing offenses in such settings. Judicial proceedings include Article 32 Investigations. Article 131 not only requires that the false statement be made in a judicial proceeding, but it must be material to the issue as well. There are no such requirements for the offense of false swearing.

An "oath" includes an affirmation where authorized.

2. *Administered in a manner required or authorized by law.* "The following persons on active duty or performing inactive-duty training may administer oaths necessary in the performance of their duties: . . . (4) all persons detailed to conduct an investigation."

The Court of Military Appeals has interpreted the word "necessary" in the above quoted section to mean "essential to a desirable end." Therefore, it held that an oath administered by an investigator to a suspect making a statement was authorized since it is clearly desirable for a criminal investigator to obtain a sworn statement from persons being questioned. For example, the accused was the chief suspect in a crime of attempted housebreaking. He was placed under oath by an MP investigator prior to asking him if he had attempted to break into the building. He replied, falsely, that he did not. This would constitute the offense of false swearing. Since it did not occur in a "judicial proceeding," it did not constitute perjury.

Evidence of authority to administer oaths should come in the form of testimony or through the use of judicial notice.

Proof of falsity involves special rules regarding proof. Even though a statement may be misleading, if it is literally, technically, or legally true, it cannot serve as the basis for a conviction of false swearing. In a previously cited case, the court held that the evidence was insufficient to support a conviction when the accused made a statement under oath that the seat covers in his car "came from a German concern," even though they had been stolen from government stock, since the government had in fact purchased them from a German company.

The "exculpatory no" defense, formerly available in false official statement cases, is not available in false swearing cases.

CR 24.24.4. *Pleading*.

A sample specification is provided in MCM, pt. IV, § 79f. If the specification fails to allege that the statement made under oath was false, it is fatally defective.

CR 24.25. ***MAJOR DISTINCTIONS BETWEEN FALSE OFFICIAL STATEMENTS (ARTICLE 107) AND FALSE SWEARING (ARTICLE 134).***

False official statements, Article 107, must be made with the intent to deceive; whereas false swearing, Article 134, need not be made with such intent. A false official statement must be official; whereas false swearing, need not be. And a false official statement need not be under oath; whereas false swearing must be under oath.

CHAPTER 25

CHAPTER 25

CR 25. OFFENSES AGAINST THE PERSON

CR 25.1. *INTRODUCTION*

This chapter discusses offenses against the person. The chapter's primary emphasis is on the four basic types of assault offenses encountered in military practice: simple assault, assault consummated by a battery, assault with a deadly weapon or means likely to produce grievous bodily injury, and assault with the intentional infliction of grievous bodily harm. These four offenses are the foundation upon which all other types of assaults are built and are all chargeable under Article 128, UCMJ.

CR 25.2. *ARTICLE 128, UCMJ.*

CR 25.2.1. *Definitions.*

1. *Assault.* An "assault" is an attempt or offer with unlawful force or violence to do bodily harm to another, whether or not the attempt or offer is consummated. MCM, pt. IV, § 54c(1)(a). Thus, an assault can be committed in any one of three separate ways: attempt, offer, or battery.

2. *Battery.* A "battery" is an unlawful and intentional or bculpably negligent application of force to the person of another by a material agency used directly or indirectly. A "battery" is an assault in which the attempt or offer to do bodily harm is consummated.

CR 25.2.2. *Offenses Under Article 128.*

There are four separate offenses specifically defined by Article 128, UCMJ:

1. Simple assault - subsection (a);

2. assault consummated by a battery - subsection (a);

3. assault with a dangerous weapon **or** other means or force likely to produce death or grievous bodily harm - subsection (b); and

4. intentional infliction of grievous bodily harm - subsection (b).

In addition to these four offenses, MCM, pt. IV, § 54c(3), lists three types of assault under Article 128 which allow increased punishment because of the status of the victim:

1. Assault upon a commissioned officer, warrant officer (WO), noncommissioned officer (NCO), or petty officer (PO);

2. assault upon a sentinel or lookout in the execution of his duty or upon a person in the execution of law enforcement duties; and

3. assault consummated by a battery upon a child under 16 years of age.

CR 25.3. *SIMPLE ASSAULT*

CR 25.3.1. *Elements.*

1. That the accused attempted or offered to do bodily harm to a certain person; and

2. that the attempt or offer was done with unlawful force or violence.

CR 25.3.2. *First Element.*

1. *Distinction between "offer" and "attempt".* Attempt-type assault looks to the mind of the accused. If the assailant actually intends to do bodily harm to the victim, the assault is of the attempt-type. By comparison, offer-type assault looks at the mind of the victim. If the act puts the victim in reasonable fear that force will at once be applied to her person, it is an offer-type assault, even though the accused did not intend to inflict bodily harm.

Note: "Fear" does not mean only "afraid" or "frightened," it includes "apprehension" or "expectation of danger."

2. *Examples.*

a. If the accused swings his fist in the vicinity of another's head, intending to hit it but misses, the accused is guilty of an attempt-type assault whether or not the victim is aware of the attempt. The victim's lack of awareness is not determinative.

b. If the accused should do the same thing for the purpose of frightening the victim rather than hitting him, and the victim sees the blow coming and is thus placed in fear, the accused is guilty of an offer-type assault.

c. If the accused swings at the victim intending to hit him, and the victim sees the blow coming and is thus put in fear of being struck, the accused has committed a single assault that may be characterized as ***both*** an offer and an attempt.

d. If the accused does an act simply to frighten the victim intending not to hit him, and the victim does not see what was done and so is not placed in fear, then no assault has been committed. The accused's intent is determinative.

3. *Discussion of attempt-type assault.* If an accused intentionally performs an overt act which amounts to more than mere preparation and it is done with the apparent ability to inflict bodily harm, an attempt-type assault has been committed.

The overt act must apparently tend to effect the intended bodily harm; that is, the accused must have the apparent ability to inflict bodily harm. However, the accused does not have to be within actual striking distance of the victim. It is not necessary for the victim to be aware of the accused's actions. An attempt-type assault requires a specific intent to inflict bodily harm.

The overt act necessary to constitute an attempt-type assault, as in the case of an attempt to commit any other offense, must amount to more than mere preparation. "Preparation not amounting to an overt act, such as picking up a stone without any attempt or offer to throw it, does not constitute an assault. . . ."

4. *Discussion of the offer-type assault.* If an accused makes an intentional or culpably negligent and unlawful demonstration of violence which creates in the mind of another a reasonable apprehension of receiving immediate bodily harm, he has committed an offer-type assault.

Under this theory of assault, a specific intent to do bodily harm is not required. This is not a specific-intent offense. The act or omission may be intentional or the result of culpable negligence.

"It is a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others of that act or omission." It is a gross, reckless, deliberate, or wanton disregard for the safety of others. Simple negligence is the absence of due care. It is an act or omission of a person who is under a duty to use due care. The act or omission must lack the degree of care for the safety of others which a reasonably prudent person would have exercised under the circumstances. Culpable negligence thus exhibits a greater lack of care than simple negligence. Chapter I of this text provides further discussion of negligence.

a. *Example.* C.M.A. dealt with a case where the accused argued that his conduct when driving a 2 1/2-ton truck did not constitute culpable negligence. The court found culpable negligence when the accused did not inspect his truck as required, failed to follow the safety instructions when his brakes failed, and continued to drive without his brakes in a congested area, rather than pull over when he had several opportunities to

do so. In another case, the accused pled guilty to involuntary manslaughter, then sought reversal. While the accused admitted during the providency inquiry that turning over the keys to his car to an intoxicated person was culpable negligence, he argued on appeal that he did not actually know of the risk he caused. The court rejected the appeal, noting that negligence involves conduct a reasonable person would be aware of under the circumstances. In one further example, the accused cut a petty officer with an open knife, but denied any ill will or intent to harm. Both the accused and the petty officer testified that they engaged in friendly bantering and both described the incident as an accident. The court disagreed, holding that waving an open knife in the direction of another while in close quarters was culpable negligence.

The victim must reasonably apprehend immediate bodily harm. That is, the victim must apprehend upon reasonable grounds that force will at once be applied to his person. The victim need not be "afraid." It is sufficient if he realizes that unlawful force is about to be applied to his person. A "reasonable person" limitation is applied here. If a reasonable person under the same conditions would have been put in fear, then it is an offer-type assault.

Although actual present ability is not required, it must reasonably appear to the victim that the accused has the ***apparent*** present ability to inflict the injury. This does not require that the accused be within actual striking distance of the victim. A demonstration of violence which reasonably causes one to retreat to secure his safety from impending danger is an assault, even though the accused never reached actual striking distance of the victim.

b. *Mere preparation does not constitute an offer assault.*

(1) *Examples.*

(a) Picking up a stone without any attempt or offer to throw it is not an assault. By contrast, consider the following: ***X*** entered a room, created a disturbance and was told by Cpl ***Z*** to leave. ***X*** refused, and ***Z*** got out of bed to enforce the order and was cut by ***X's*** knife. ***X*** testified that he merely drew the knife, opened it and held it in his hand, and ***Z*** impaled himself during the scuffle. ***Held:*** An assault. ". . . [M]ere preparation for an assault does not complete the offense, but holding an open knife in the hand, at the time of an impending affray, within reasonable striking distance, amounts to more than preparation. . . . It is an act in partial execution of the use of the knife, and completes the offense."

(2) C.M.A. held in a case that working the bolt of a loaded weapon so that it was ready for instant firing, coupled with a statement indicating a present intent to use the weapon, was more than mere preparation and hence constituted an assault.

c. *Conditional offer of violence.* An offer to inflict bodily injury upon another instantly, if he does not comply with a demand which the assailant has no right to make, is an assault. For example, ***A*** draws a pistol and says to ***B,*** "If you don't give me your watch, I will shoot you."

However, if the known circumstances clearly negate an intent to do bodily harm, there is no assault. Again, for example, ***A,*** holding a whip within striking distance of ***B*** - an old man - says, "If you weren't an old man, I would knock you down." No assault. This is a conditional offer of violence. It is not an attempt because there clearly is no intent to injure. Nor is it an offer because, without some physical action along with the words, there is no reasonable ground to apprehend harm.

d. *Words alone do not constitute an assault.* The mere use of threatening words does not constitute an assault.

(1) *Example*. Bully shouts through a window of his barracks to Meek who is in the adjoining barracks, "You weakling, I'm going to punch you in the nose." No assault, without some physical action accompanying the spoken words. Threats are not sufficient to constitute an assault; there must be evidence of violence actually offered. A threat of future violence is insufficient for an assault because it is neither an attempt to commit a battery nor should it place the victim in reasonable apprehension of receiving an immediate battery.

If, however, the threatening words are accompanied by a menacing act or gesture, there is an assault since the combination constitutes a demonstration of violence. So, for example, accused's CO was notified that there was a disturbance in the accused's quarters. CO and others went there and as they approached the house, a light flashed on and they saw a man inside with a carbine. The light went off. The CO went up to the door and as he reached for the

door handle, he heard the bolt action of a rifle and a statement, "Don't move." ***Held:*** An assault. Although the overt act must be more than mere preparation and though words alone are insufficient, "Working the bolt of a loaded weapon so that it is ready for instant firing, coupled with a statement indicating a present intent to use the weapon, certainly is more than mere preparation. It is a part of the use of the weapon itself, and such behavior constituted the overt act of the assault."

e. "*Bodily harm" to another person.* Any "attempt" or "offer" to touch, however slightly, another person or something closely associated with his person (e.g., briefcase, cane, hat, coat) is the "bodily harm" required for this offense. Touching another for an innocent purpose, however, such as gaining his or her attention, does not constitute assault.

CR 25.3.3. ***Second Element.***

The terms "force" and "violence" include ***any*** application of force, even though it entails no physical pain and leaves no mark. Generally, any force applied to another person will be unlawful, if without legal justification (e.g., lawful apprehension of another, shooting an enemy); or legal excuse (e.g., acts done in self-defense); or legal consent (actual or implied) (e.g., football game).

Note: *See* the discussion of these concepts as defenses at the end of this chapter.

CR 25.3.4. ***Pleading Simple Assault.***

The specification does not indicate whether the assault was of the offer or attempt variety. It should merely allege that the accused did "assault" the victim. It is important that counsel understand which theory of assault is supported by the evidence and prepare the case accordingly. In a guilty plea case the military judge will need to know which theory the accused is pleading guilty under.

Under this allegation, the prosecution can prove either or both varieties. The word "assault" is a word of art importing criminality. The specific act constituting the assault must be alleged. For example: "By striking at him with his fist" or "By throwing a knife at him."

1. *Sample specification:*

Charge. Violation of the Uniform Code of Military Justice, Article 128

Specification. In that [Name, etc. and personal jurisdiction data], did, [at/on board (location)], on or about [date], assault Seaman Thomas P. Smith, U.S. Navy, by throwing a bottle at him.

CR 25.4. ***ASSAULT CONSUMMATED BY A BATTERY***

CR 25.4.1. ***Elements.***

1. The accused did bodily harm to a certain person; and

2. the bodily harm was done with unlawful force or violence.

CR 25.4.2. ***First element.***

The slightest unlawful touching of another person will constitute the "bodily harm" required. In fact, "bodily harm" can be accomplished without actually touching the body. If the victim's clothes or anything closely attached to his body is touched, the offense is completed.

1. *Example:* Cutting the clothing which the victim is wearing; spitting on the tie which the victim is wearing; and knocking a box out of the victim's hand, or a pipe out of his mouth. Again, touching another for an innocent purpose, such as to gain another's attention, does not constitute a battery.

2. *Means of perpetration.* The force may be applied to another person by a material agency, either directly (e.g., by the aggressor's hands, feet, or other part of his body, including spitting on another); or indirectly (e.g., by some action/agency which the aggressor puts in motion such as by throwing a stone, shooting a

gun, sending a dog to attack another, or by causing the victim to take poison or drugs).

3. *Required state of mind.* Assault consummated by a battery is a general intent crime which is committed if bodily harm is inflicted either intentionally or through culpable negligence. "Intentionally" means a specific intent to inflict bodily harm upon another. It is not necessary that the intent be to inflict any particular type of bodily harm. "Through culpable negligence" means a culpable disregard for the foreseeable consequences to others.

Note: The distinction between attempt and offer which is made in a simple assault is not necessary in a battery because of the actual infliction of bodily harm.

CR 25.4.3. ***Second Element.***

With unlawful force or violence. *See* CR 8.3. above for discussion.

CR 25.4.4. ***Pleading.***

The word "***unlawfully***" must be alleged. The striking of another is a battery ***only*** if it is unlawful. Merely alleging that the accused did "strike" another is not sufficient, as that word alone does not import criminality. An allegation that he did "strike" another does not exclude the reasonable hypothesis of innocence that the striking was legally justified or legally excused. The addition of the word "unlawfully" before "strike" does exclude these and all other reasonable hypotheses of innocence.

The victim should be identified by first and surname (if known). If the victim is military, she should also be identified by grade and armed force. The specific act constituting the battery must be alleged, including the specific part of the victim touched.

1. *Sample specification:*

Charge. Violation of the Uniform Code of Military Justice, Article 128

Specification. In that [Name, etc. and personal jurisdiction data], did, [at / on board (location)], on or about [date], unlawfully strike Seaman John D. Smith, U.S. Navy, in the face with his fist.

CR 25.5. *ASSAULT WITH A DANGEROUS WEAPON OR OTHER MEANS OR FORCE LIKELY TO PRODUCE DEATH OR GRIEVOUS BODILY HARM*

CR 25.5.1. ***Elements.***

1. That the accused attempted to do, offered to do, or did bodily harm to a certain person;

2. that the accused did so with a certain weapon, means, or force;

3. that the attempt, offer, or bodily harm was done with unlawful force or violence; and

4. that the weapon, means, or force was used in a manner likely to produce death or grievous bodily harm.

CR 25.5.2. ***General discussion of the elements.***

All of the definitions and rules discussed with respect to simple assault or battery are applicable to the first and third elements of this offense which is an aggravated assault or an aggravated battery. The second element describes with specificity the weapon, means, or force alleged. The fourth element describes how the weapon was used. The aggravating circumstances are presented in the second and third elements.

CR 25.5.3. ***Dangerous weapon or other means of force likely to produce death or grievous bodily harm.***

This aggravated form of assault includes not only those assaults accomplished by means or instrumentalities normally considered to be weapons but also by any other means which, according to their use, are potentially dangerous. "A bottle, a beer glass, a rock, a bunk adaptor, a piece of pipe, a piece of wood, boiling water, drugs " could all serve as means likely. Almost anything can serve as a "means." The key is whether the "means" were used in a matter "likely" to produce death or grievous bodily injury. See discussion below regarding what likely means in regards an aggravated assault.

If the instrumentality used is a weapon, it must, to constitute this offense, be a dangerous weapon ***in fact***. A weapon is dangerous when used in such a manner that it is likely to produce death or grievous bodily harm. A gun is a dangerous weapon only when loaded.

Under this definition, an unloaded pistol, when presented as a firearm, would not be a dangerous weapon; but, if presented as a bludgeon, it might be an other means or force likely to produce death or grievous bodily harm. The weapon need not have a round in its chamber, if it is loaded, in order to be considered dangerous. A weapon using a clip need only have a round in the clip, not chambered to be loaded. This definition of a dangerous weapon may be broadened for ***other*** offenses, such as carrying a concealed dangerous weapon in violation of Article 134. Also consider a C.M.A. holding that although a "firearm" must be operable and loaded for purposes of the substantive definition of the offense of aggravated assault, a "firearm," for purposes of sentencing enhancement when used in commission of a robbery, need only satisfy the definition in MCM, R.C.M. 103(12): "any weapon which is designed to or may be readily converted to expel any projectile by the action of an explosive."

1. *Grievous bodily harm.* The weapon or other means or force must have been used in a specific manner likely to produce death or grievous bodily harm. This means a serious bodily injury, such as fractured or dislocated bones, deep cuts, torn members of the body, or serious damage to internal organs. It does ***not*** include minor injuries such as a black eye or a bloody nose. "Light pain, minor wounds, and temporary impairment of some organ of the body do not ordinarily, (individually) (or) (collectively) establish 'grievous bodily harm.' The results are common to most ordinary assault and battery cases. In making the determination of whether grievous bodily harm resulted, the absence or presence and extent of (the injury and its adverse effects) (degree of pain or suffering) (time of hospitalization or confinement to bed or room) (length and degree of unconsciousness) (amount of force or violence used) (interference with normal activities), may be taken into consideration."

a. *Example.* In *United States v. Spearman*, the court provides a full discussion of the element relating to grievous bodily harm, including the facts that the knife used had a pointed, 4-inch blade; that the victim was stabbed four times; and that there were three wounds in the area of vital organs which required stitches.

2. *Used in a manner likely to produce.* "When the natural and probable consequence of a particular use of any means or force would be death or grievous bodily harm, it may be inferred that the means or force is 'likely' to produce that result." The use to which the particular instrumentality is usually put is immaterial.

The question of when something is likely, vice just possible, to cause death or grievous bodily harm is one that is sometimes difficult to answer. The Court of Appeals for the Armed Forces has given an excellent discussion regarding what "likely" means in regards to Article 128. The court describes likely has having two prongs: (1) the risk of harm and (2) the magnitude of the harm. Thus, the likelihood of harm is not simply a statistical risk of harm occurring, but also includes the magnitude of the harm, if harm were to occur. "Where the magnitude of the harm is great, there may be an aggravated assault, even though the risk of harm is statistically low." Regarding the first prong, the risk of harm only need be "more then merely a fanciful, speculative, or remote possibility." The test for the second prong is "whether death or grievous bodily harm was the natural and probable consequence" of the alleged action by the accused. *See* examples below.

It makes no difference in this aggravated form of Article 128 whether or not the victim actually received any harm; a battery is not required. An assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm is sufficient. Indeed, this offense may be committed even if the victim remains completely unaware of his "close shave" (i.e., an attempt-type assault with the aggravated means). C.M.A. said in one case: The crucial question is whether its use, under the circumstances of the case, is likely to result in death or grievous bodily harm . . . . Persuasive evidence upon this question is found in the nature of the means or force itself, the

manner of its use, the parts of the body toward which it is directed, and, where applicable, the extent of the injuries actually inflicted.

In the situation in which bodily harm does not result, the accused's action must at least amount to an assault, either of the offer (mind of the victim in fear) or the attempt (intended by the accused) type.

3. *State of mind required.* Offense of assault with a means likely to produce grievous bodily harm does not require specific intent and may be committed through culpable negligence. In other words, the minimum state of mind is the same as that required for a battery and, where injury is actually inflicted, the existence of the attempt or offer situation required in simple assault is not a prerequisite to the commission of the aggravated crime of assault with a dangerous weapon or means or force likely to produce death or grievous bodily harm.

4. *Examples of means or force likely:*

a. Consider an accused who, though aware that he was HIV+, engaged in consensual sexual intercourse. He used a condom, but did not tell his partner about his HIV status. The accused was convicted of assault with a means likely to cause death or grievous bodily harm. Focusing on testimony regarding the potential failure rate of improperly stored, lubricated, or worn condoms, as well as the potential for breakage or other failure, the court found the *chance* of harm more then a remote possibility. It was uncontested that death was the natural and probably consequence if infection occurred. Given the magnitude of the harm, and the finding that harm was more then a remote possibility, court affirmed the conviction for aggravated assault.

b. An accused grabbed his wife by the neck, dragged her across the room by the neck, kicked her in the face and eye, and hit her repeatedly in the face and neck with his fists. The attack lasted for several minutes, during which the victim did nothing to defend herself. The risk of harm was not an issue, as "intentional, unlawful, and physical contact" had occurred. The issue was the magnitude of the harm. Here, the court focused on the second prong. That is, whether the *natural and probable* consequence of the choking, kicking, and hitting was death and grievous bodily injury. The court affirmed the conviction.

c. An accused was convicted of a "means likely" aggravated assault for hitting a cab driver in the head and knocking him down, then "repeatedly" hitting the victim in the face and head with a closed fist. While actual injuries were minor, that was not a controlling issue for the court. The number of blows with a closed fist to the face and head of a defenseless victim were a means or force likely to cause death or grievous bodily harm.

d. An accused was convicted of a "means or force likely" aggravated assault. To teach his victim a lesson, the accused went to the sleeping victim's bunk and hit him repeatedly in the face with his hands. The beating left the victim with a broken nose, cheekbone, and jaw; as well as blood in both eyes, a swollen face, split lips, and eleven missing teeth. Conviction affirmed.

e. See the footnote for additional examples.

CR 25.5.4. *LIO's of assault with a dangerous weapon, etc*.

1. *Attempted assault with a dangerous weapon, etc.*

2. *Simple assault of either the offer or attempt-type.*

3. *Assault consummated by a battery if a touching is alleged and proved.*

4. *Current case law should be reviewed prior to relying on LIO's.*

CR 25.5.5. *Multiplicity With Other Offenses*.

The question of whether any given offense is multiplicious with another is basically one of fact given the particulars of a fact pattern.

CR 25.5.6. *Pleading an Assault With a Dangerous Weapon, etc*.

The MCM provides for alleging the word "assault" in every case, whether or not the assault is consummated (i.e., whether it be an assault or a battery).

The manner in which the victim was assaulted must be alleged. If injury was inflicted, allege the specific location of the injury. Try to communicate precisely what accused is alleged to have done.

If the instrumentality used is commonly thought of as a "dangerous weapon," use that allegation; otherwise, use the allegation "(means) or (force) likely to produce grievous bodily harm." The failure to plead either one or the other of these allegations will obviously result in a failure to state this type of assault offense.

1. *Sample specification:*

Charge. Violation of the Uniform Code of Military Justice, Article 128

Specification. In that [Name, etc. and personal jurisdiction data], did, [at/on board (location)], on or about [date], commit an assault upon Seaman Apprentice Abner Peabody, U.S. Navy, by striking at him with a dangerous weapon, to wit: a knife.

CR 25.6. *INTENTIONAL INFLICTION OF GRIEVOUS BODILY HARM*

CR 25.6.1. *Elements*.

1. That the accused assaulted a certain person;

2. that grievous bodily harm was thereby inflicted upon such person;

3. that the grievous bodily harm was done with unlawful force or violence; and

4. that the accused, at the time, had the *specific intent* to inflict grievous bodily harm.

This offense consists of an aggravated ***battery***. Review the rules on battery and add to them the requirement that the bodily harm inflicted was "grievous" (as discussed in CR 8.5., *supra*) and that will constitute the first three elements of this offense.

CR 25.6.2. *Intentionally Inflicted.*

1. *This is a specific-intent offense.* Culpable negligence will not suffice. In addition to proving that the accused inflicted grievous bodily harm, it must be proved that the accused's action causing such harm was done with the specific intent of accomplishing that result.

2. *Proving intent.* The intent can be proved by either direct or circumstantial evidence. Direct evidence of the specific intent will usually consist of statements or admissions by the accused. Circumstantial evidence of the specific intent is usually provided by the facts surrounding the assault. When grievous bodily harm has been inflicted by intentionally using force in a manner likely to achieve that result, it may be inferred that grievous bodily harm was intended. Specific intent may not be inferred merely because harm was foreseeable from the action. To warrant an inference of intent, it must appear that such harm was a natural and probable consequence of the intentional action.

3. *Examples:*

a. ***A*** intentionally knocks ***B*** from the roof of a two-story building to the pavement below, causing several broken bones. Grievous bodily harm is certainly a natural and probable consequence of such an act. Such an injury is likely to result from such action. Hence, it may be inferred that ***A*** specifically intended that result.

b. ***A*** and ***B*** engage in a fist fight and ***A*** lands a solid punch to ***B's*** face, causing a brain concussion. ***Query***: May it be inferred from this that ***A*** specifically intended to inflict grievous bodily harm?

Answer: No. A brain concussion is not likely to result from an ordinary fist fight. Although such an injury may be foreseeable, it is not likely or probable.

c. ***C*** and ***D*** hold ***B,*** while ***A*** delivers a series of punches to ***B's*** head with his fist and causes a concussion. ***Query:*** May the specific intent be inferred in this situation? ***Answer:*** Yes. Repeatedly striking another under these circumstances could be found to be likely to result in "grievous bodily harm." Such an injury is a "natural and probable" result.

CR 25.6.3. ***LIO's.***

1. *Assault with a dangerous weapon or other means or force likely to produce grievous bodily harm*. For example, while ***B*** is asleep in bed, ***A*** punches ***B*** in the head and face with gloved fists. ***B*** loses 11 teeth, both eyes are completely shut, both cheekbones and both his upper and lower jaws are fractured. ***A*** was charged with assault by intentionally inflicting grievous bodily harm. The court-martial found him not guilty of that, but guilty of assault with a means likely to produce grievous bodily harm, to wit: his fists. ***Held:*** Affirmed. It was an LIO.

2. *Assault consummated by a battery.*

3. *Simple assault.*

CR 25.6.4. ***Sample Specification.***

Charge. Violation of the Uniform Code of Military Justice, Article 128

Specification. In that [Name, etc. and personal jurisdiction data], did, [at / on board (location)], on or about [date], commit an assault upon Seaman Abner N. Peabody, U.S. Navy, by repeatedly striking him in the face with his fists and did thereby intentionally inflict grievous bodily harm upon him, to wit: a broken jaw.

CR 25.7. ***ARTICLE 128 OFFENSES AGGRAVATED BY THE STATUS OF THE VICTIM***

CR 25.7.1. ***Assaults Upon Commissioned Officers, Warrant Officers, Noncommissioned Officers, or Petty Officers.***

1. *Elements.*

a. That the accused assaulted the victim as alleged;

b. that the victim of the assault was a commissioned officer, WO, NCO, or PO; and

c. that the accused had actual knowledge that the victim was a commissioned officer, WO, NCO, or PO.

It is ***not*** necessary that the victim be superior to the accused, in the same armed force as the accused, or in the execution of her office. It **is** necessary that the accused was aware of the status of his victim.

This offense provides greater punishment for non-aggravated assaults based upon the enhanced status of the victim. If the victim is in the execution of her office at the time of the assault, the greater offense of violating Article 90 (assault upon a superior commissioned officer in execution of office) or Article 91 (assault upon a WO, NCO, or PO in the execution of office) has occurred. These offenses are discussed below.

2. *Sample specification.*

Charge. Violation of the Uniform Code of Military Justice, Article 128

Specification. In that [Name, etc. and personal jurisdiction data], did, [at/on board (location)], on or about [date], assault Colonel I. M. Arouge, U.S. Army, who then was, and was then known by the accused to be, a commissioned officer of the U.S. Army, by striking the said Colonel Arouge in the face with his fist.

CR 25.7.2. ***Assaults Upon Sentinels or Lookouts in the Execution of Their Duty or Upon Persons in the Execution of Law Enforcement Duties.***

1. *Elements.*

a. That the accused assaulted the victim as alleged;

b. that the victim of the assault 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, master at arms, or other military or civilian law enforcement duties; and

c. that the accused knew of the law enforcement duties or status of the victim.

Note: Mistreatment by a person executing police duties may divest such person of his cloak of authority.

2. *Sample specification.*

Charge. Violation of the Uniform Code of Military Justice, Article 128

Specification. In that [Name, etc. and personal jurisdiction data], did, [at on/on board (location)], on or about [date], assault Patrolman W. E. Earp, Newport Police Department, who then was, and was then known by the accused to be, a person then having and in the execution of civilian law enforcement duties, by kicking the said Patrolman Earp in the shins with his foot.

CR 25.7.3. ***Assault, Consummated by a Battery, Upon a Child Under 16 Years of Age.***

1. *Elements.*

a. That the accused, with unlawful force or violence, did bodily harm to the victim as alleged; and

b. that the victim was under 16 years of age.

2. *Knowledge of the age of the victim is not an element of this offense.* This is a battery only. Offer or attempt assaults do not constitute this form of aggravated assault.

3. *Sample specification:*

Charge. Violation of the Uniform Code of Military Justice, Article 128

Specification. In that [Name, etc, and personal jurisdiction data], did, [at/on board (location)], on or about [date], unlawfully strike Thomas R. Sade, a child under the age of sixteen years, on the back with a whip.

This offense most often arises in cases of excessive corporal punishment administered by parents. When the abuse of a child consists solely of assaults, Article 128 preempts the field and precludes the use of a state child abuse statute through the Federal Assimilative Crimes Act.

CR 25.8. ***ASSAULTS UPON SUPERIOR COMMISSIONED OFFICERS AND WO'S, NCO'S, AND PO'S IN THE EXECUTION OF THEIR OFFICE***

CR 25.8.1. ***Article 90(1).***

This article describes three varieties of assault: striking a superior commissioned officer in the execution of his office (a battery); drawing or lifting up a weapon against a superior commissioned officer in the execution of his office (an assault with a weapon); and offering violence against a superior commissioned officer in the execution of his office (an assault).

CR 25.8.2. *Article 91(1).*

This article describes two varieties of assault: striking a WO, NCO, or PO in the execution of his office (a battery); and assaulting a WO, NCO, or PO in the execution of his office (an assault).

In effect, the Article 90(1) and 91(1) offenses are simply assaults aggravated by the status of the victim and the relationship between the accused and the victim. Unlike the offenses set out under Article 128, superiority is an essential element under Article 90(1) and execution of office is an element under both Article 90(1) and 91(1).

CR 25.8.3. *Elements*.

1. *Assault Upon a Superior Commissioned Officer (Article 90, UCMJ; MCM, pt. IV, § 14b(1).)*

a. That the accused struck, drew, or lifted up a weapon against, or offered violence against, a certain commissioned officer;

b. that the officer was the superior commissioned officer of the accused;

c. that the accused then knew that the officer was the accused's superior commissioned officer; and

d. that the superior commissioned officer was then in the execution of office.

2. *Assault upon a WO, NCO, or PO. Article 91, UCMJ; MCM, pt. IV, § 15b(1).*

a. That the accused was a warrant officer or enlisted member;

b. that the accused struck or assaulted a certain warrant, noncommissioned, or petty officer;

c. that the striking or assault was committed while the victim was in the execution of office; and

d. that the accused then knew that the person struck or assaulted was a warrant, noncommissioned, or petty officer.

Note: If the victim was the superior NCO or PO of the accused, add the following elements in order to increase the maximum punishment:

e. That the victim was the superior noncommissioned or petty officer of the accused; and

f. that the accused then knew that the person struck or assaulted was the accused's superior noncommissioned or petty officer.

CR 25.8.4. *Superior*.

The meanings of the terms superior commissioned officer and WO, NCO, or PO are the same as have been previously discussed in connection with the offenses of disobedience and disrespect. *See* Chapter IV of this study guide. ***Acting*** noncommissioned officers cannot be victims of an Article 91 assault.

CR 25.8.5. *Knowledge of the Status of the Victim*.

As in the offenses of disrespect to and disobedience of a superior commissioned officer, WO, NCO or PO, the accused must have had ***actual*** knowledge at the time of the offense that the victim was his superior. Thus, knowledge is an element.

CR 25.8.6. ***Analysis of the Several "Types" of "Assault" Covered in Articles 90(1) and 91(1)***.

1. *Against a superior commissioned officer—Article 90(1).* "'Strikes' means an intentional blow, and includes any offensive touching of the person of an officer, however slight." "The drawing of any weapon in an aggressive manner or the raising or brandishing of the same in a threatening manner in the presence of the superior is the sort of act proscribed. The raising in a threatening manner of a firearm, whether or not loaded, or of a club, or of anything by which a serious blow or injury could be given is included in 'lifts up.'"

Offers any violence against him—this term includes "any form of battery or of mere assault not embraced in the preceding more specific terms 'strikes' and 'draws or lifts up.'" Mere threatening words do not constitute this offense.

2. *Against a WO, NCO, or PO—Article 91(1).* Strikes—a battery. Assaults—this term refers to either the offer or attempt proscribed by Article 128.

CR 25.8.7. ***In the Execution of Office.***

These offenses can be committed only if the victim was in the execution of office at the time of the assault. A person "is in the execution of office when engaged in any act or service required or authorized by treaty, statute, regulation, the order of a superior, or military usage." A person may be in the execution of office, even though not "on duty." "The commanding officer on board a ship or the commanding officer of a unit in the field is generally considered to be on duty at all times." 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 his office.

1. *Example:* An Ensign walking down Thames Street sees two sailors about to get into a fight. He steps between them, identifies himself, and orders them to break it up. One of them punches the Ensign in the nose. The Ensign was in the execution of his office at the time.

A person acting outside the scope of his/her authority or who is engaged in the commission of an offense is not in the execution of office.

Example: A petty officer on guard duty in a brig entered a cell to have a drink of whiskey with the prisoners. While drinking with them, he was assaulted by the accused. ***Held:*** He was not in the execution of his office at the time.

CR 25.8.8. ***LIO's***.

If it cannot be proved that the victim was "in the execution of office" or was a "superior" commissioned officer, the accused may still be guilty of the LIO of assault or battery upon a commissioned officer, NCO, or PO in violation of Article 128. If knowledge of the status of the victim is not proved, the accused may still be guilty of a simple assault or battery in violation of Article 128.

If the accused is found guilty of a lesser included Article 128 violation, it will be necessary for the court to include by exceptions and substitutions the word "unlawfully" in its findings. This is permissible since an allegation of striking a superior while in the execution of his office fairly implies that it was unlawful.

CR 25.8.9. ***Pleading***.

1. *Sample specification of an Article 90(1) offense.*

Charge. Violation of the Uniform Code of Military Justice, Article 90

Specification. In that [Name, etc. and personal jurisdiction data], did, [at/on board (location)], on or about [date], lift up a weapon, to wit: a crowbar, against Ensign Thomas G. Flubber, U.S. Naval Reserve, on active duty, his superior commissioned officer, and then known by the said Seaman Jones to be his superior commissioned officer, who was then in the execution of his office.

2. *Sample specification for an Article 91(1) offense.*

Charge. Violation of the Uniform Code of Military Justice, Article 91

Specification. In that Seaman Willie N. Jones, U.S. Navy, USS TUBBS, did, on board USS TUBBS, at sea, on or about [date], strike Yeoman Third Class John M. Clump, U.S. Navy, a petty officer, and known by the said Seaman Jones to be a superior petty officer, who was then in the execution of his office, by striking him on the face with a shoe.

a. *Note*: this sample alleges the aggravating factor of superiority of the victim. While superiority is one essential element of an Article 90 assault, it is an optional element under Article 91 which, if pled and proved, will increase the maximum available punishment.

b. *Note also:* in the above specification, there is no necessity to modify the word "strike" by any words importing criminality (e.g., "unlawfully" or "wrongfully"). The distinction between a specification under Article 91 and Article 128 is that the mere striking of a WO, NCO, or PO while in the execution of office, coupled with an allegation describing the manner of striking, fairly implies an unlawful act. However, it is not fatal to allege the words of criminality (i.e., "unlawfully" or "wrongfully").

CR 25.9. ***MAIMING***

CR 25.9.1. ***Elements***.

1. That the accused inflicted a certain injury upon a certain person;

2. that this injury seriously disfigured the person's body, destroyed or disabled an organ or member, or seriously diminished this person's physical vigor by the injury to an organ or member; and

3. that the accused inflicted this injury with an intent to cause some injury to a person.

CR 25.9.2. ***Discussion.***

This offense requires only a specific intent to injure, not a specific intent to maim. Therefore, it is not a defense to a charge of maiming that the accused intended only a slight injury if in fact he did inflict serious harm. Based on the language of the current MCM, pt. IV, § 50c(3), it can now be concluded that maiming does require a specific intent to cause some general injury. Accordingly, it would appear that voluntary intoxication could serve as a defense to negate the required specific intent. *See* the discussion of voluntary intoxication as a defense in section 1015, *infra*.

The offense is complete if a serious injury is inflicted, even though there is a possibility that the victim may eventually recover the use of the member or organ or the disfigurement may be corrected by surgery.

CR 25.9.3. ***LIO's***.

Among the offenses which may be included in a particular charge of maiming are aggravated assault, assault and battery, and assault.

CR 25.9.4. ***Sample Specification***.

A sample specification is provided in MCM, pt. IV, § 50f.

CR 25.10. ***ARTICLE 134 ASSAULTS***

CR 25.10.1. ***Article 134, UCMJ, makes punishable two types of assaults.***

1. Indecent assaults; and

2. assaults with the intent to commit certain serious offenses, i.e., Murder, voluntary manslaughter, rape, robbery, sodomy, arson, burglary, and housebreaking.

Indecent assaults are discussed below. Assaults with intent to commit other offenses are discussed in the MCM.

Closely related to all of these varieties of assault are the attempt offenses. In any given case, there may be little difference between the assault with the intent to commit the underlying offense and an attempt to commit that offense. One significant difference is that the assault offense may be made out even though the attempt would not. The latter would result if the overt act involved did not amount to ***more*** than mere preparation.

Example: An assault with the intent to commit arson may occur if the accused assaults a guard posted to protect the target of the intended arson; however, if the accused is apprehended at that point, he might not be convicted of attempted arson since the assault could be viewed as only preparation.

Care must be taken to plead, prove, and instruct on the specific intent aspect of these offenses.

Example: C.M.A. held that the military judge erred in his instructions on assault with intent to commit voluntary manslaughter by defining voluntary manslaughter in a manner which permitted the court to find the accused guilty if he intended either to kill the victim or to inflict great bodily harm. Only an intent to kill will suffice to sustain a conviction for assault with intent to commit voluntary manslaughter.

Whether the assault aspect of the accused's crimes will merge with any other consummated offenses for punishment purposes is a factual question.

Example: A.C.M.R. held that in a case in which the accused was charged with assault with intent to commit murder, but convicted of aggravated assault in addition to attempted robbery of the same victim, an offense separate from the assault included in the attempted robbery was properly found and used by the panel in reaching its sentence, despite the defense's contention that the attempted robbery and the assault were multiplicious for sentencing purposes.

CR 25.11. *AFFIRMATIVE DEFENSES TO ALL FORMS OF ASSAULT*

CR 25.11.1. *Scope of Discussion.*

Defenses to be discussed apply generally to:

1. All of the Article 128 offenses;

2. all assaults in violation of Article 90(1) and 91(1); and

3. the Article 134 assault offenses.

CR 25.11.2. *Affirmative defenses basis.*

In general, the affirmative defenses to assault are based upon the following concepts:

1. legal justification;

2. legal excuse; or

3. legal consent.

CR 25.11.3. *Legal Justification.*

An act of force or violence committed in the proper performance of a legal duty is justified. A duty may be imposed by statute, regulation, or lawful order. However, legal justification is a defense only to that degree of force necessary to carry out the legal duty. If any force is used in excess of that required, the excessive force may constitute a battery.

The acts of a subordinate, done in good faith in compliance with his supposed duty or orders, are justifiable except: when the acts are clearly beyond the scope of his authority; when the order is such that a man of ordinary sense and understanding would know it to be illegal; or where the subordinate willfully or through culpable negligence

endangers the lives of innocent parties in discharging his duty.

Examples of acts of force or violence that would be legally justified: shooting an enemy in battle; physical contact during a lawful apprehension; physical contact while a guard is subduing an unruly prisoner; and resisting an unlawful apprehension which is executed in such a manner that self-defense is required or which divests the apprehending officials of their authority.

CR 25.11.4. ***Legal Excuse.***

1. *Acts of force or violence are legally excused if done:*

   a. through accident or misadventure;

   b. in lawful self-defense;

   c. in the lawful defense of another;

   d. where a special privilege exists; or under coercion or duress.

2. *Accident or misadventure.* The defense of accident is not raised by showing that the ultimate consequence of an act is unintended or unforeseen if the act was specifically intended and directed at another. Accident is an unexpected act, not the unexpected consequences of a deliberate act. (A detailed description of this defense can be found in Chapter X of this text.)

3. *Self-defense.*

   a. *General rule.* 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.

   b. *Free from fault.* 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. Moreover, when the accused is a trespasser, the right of self-defense is limited. In one instance, C.M.A. ruled that the accused could only defend himself against excessive force because the lawful occupant was entitled to use reasonable force to eject him as a trespasser.

If one who provokes a fight withdraws in good faith, however, and his adversary follows and renews the fight, the latter becomes the aggressor and the one who originally started the altercation may resort to self-defense. In addition, even a person who starts an affray is entitled to use self-defense when the opposing party escalates the conflict using a greater level of force.

Where an issue of fact exists as to whether the accused or the injured party was the aggressor, the issue is for the finder of fact to decide after receiving proper instructions.

One is not per se deprived of the right to act in self-defense by the fact that he has armed himself with a gun and sought out his eventual victim following a prior violent encounter with such person. The existence of the defense of self-defense depends upon the factual question of the intent of the accused in returning and the provocation he offers the victim upon again contacting him. It is well settled that, where the accused armed himself for possible self-protection and his purpose in seeking out the victim was conciliatory, he does not become an aggressor and such testimony places self-defense in issue.

   c. *Reasonable force.* The force to which one may resort in self-defense is that which he believes on reasonable grounds to be necessary, in view of all the circumstances of the case, 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. This principle, however, does not restrict one to the precise force threatened by the assailant. The degree of force permitted the defender need not be identical with the means employed by the assailant. The phrase a person may "meet force with like degree of force" has been condemned in several cases as being an unsatisfactory statement of the principle of self-defense.

d. *MCM test.* MCM, R.C.M. 916(e), sets forth three separate tests to be applied in determining the reasonableness of the accused's resort to self-defense when he anticipates impending harm.

(1) *Self-defense when accused intends to kill or to inflict grievous bodily harm upon the aggressor.* If the accused resorts to such force as is likely to kill or inflict grievous bodily harm upon the aggressor, he must meet two conditions before the defense of self-defense will be available to him. They are:

(a) The circumstances must be such that a reasonably prudent person would believe that death or grievous bodily harm was to be inflicted upon himself by the aggressor. This is an objective test. The intoxication or emotional instability of the accused is not a relevant consideration. Detached reflection under pressure or in a fast-moving situation is not, however, demanded;

(b) The accused must believe that the force which he used was necessary to protect himself from death or grievous bodily harm. This is a subjective test. The state of the sobriety or emotional stability of the accused is therefore a relevant factor to be examined. Thus, the resort to excessive force is justified if the accused believed that such force was necessary to repel the attack;

(c) MCM, R.C.M. 916(e)(1) allows the use of deadly force in cases of "homicide, assault involving deadly force, or battery involving deadly force." Therefore, the defense of self-defense is available whenever the factual circumstances involve deadly force, regardless of the specific assault offense with which the accused is charged.

(2) *Self-defense when the accused offers to utilize a dangerous weapon or other means likely to produce death or grievous bodily harm.* If the accused is charged with an offer-type assault with a dangerous weapon, means, or force, he/she may still claim self-defense even though not in fear of death or grievous bodily harm. Two conditions must be met:

(a) The accused, on reasonable grounds, must believe that bodily harm is about to be wrongfully inflicted (this is an objective reasonable fear of a simple battery);

(b) The accused, in order to deter the assailant, offered but did not actually apply or attempt to apply a means, force, or weapon which, if applied, would be likely to cause death or grievous bodily harm. This is an objective evaluation of the conduct of the accused. This then is an example of a situation in which the accused is not strictly required to meet force with like force. An accused who is facing a nondeadly battery may ***offer*** deadly force to repel the attacker.

(c) *Example*:

(i) ***A*** is confronted by ***B,*** an assailant. ***B*** raises his fist in order to strike ***A.*** ***A,*** in reasonable fear that he may be struck, picks up a tire iron and holds it over his head telling ***B*** that he'd better not come one step closer. ***B*** retreats. ***A*** has a valid claim of self-defense to a charge of assault with the dangerous tire iron.

(ii) Assume the same facts, but this time ***A*** swings at ***B,*** trying to hit him in the head with the tire iron. ***A*** cannot claim self-defense because this assault with a dangerous weapon in response to nondeadly force was of the attempt-type.

(iii) Assume the same facts as in -2- above, but this time also assume that ***A*** reasonably believes ***B*** to be a 7th degree black belt who can kill with one blow. ***A***'s actual application of deadly force is now justified.

(3) *Self-defense when the accused uses less than deadly force.* If the accused resorts to the use of force to protect himself against harm from an aggressor, he may use such force as is reasonably necessary to accomplish that result. To determine what is reasonable, the following tests must be applied:

(a) The circumstances must be such that a "reasonably prudent man" would believe that bodily harm was about to be inflicted upon himself (this is an objective test);

(b) The accused must believe that the force he resorts to using is necessary to repel the attacker (this is a subjective test);

(c) The force used must be less than that which could reasonably be thought likely to produce grievous bodily harm or death (this is an objective test). The "reasonably prudent person" standard would be used.

In order to raise self-defense, "there must be some evidence from which a reasonable inference can be drawn that . . . self-defense was in issue. That evidence need not be compelling" nor must it support only that theory. The defense may be raised even if an innocent bystander is injured. If more than one of the tests are reasonably raised, each must be instructed upon.

(4) *Retreat.* On the issue of retreat, "The doctrine of 'retreat to the wall' has no place in self-defense. . . . There is no categorical requirement of retreat. Rather, the opportunity to do so safely is only a single factor, to be considered by the triers of fact together with all the circumstances in evaluating the issue of self-defense." ". . . [T]he opportunity to . . . [retreat] in safety is but one item to be considered with all other circumstances in determining whether the action taken was reasonably necessary." Lack of retreat is still a factor to be considered in determining self-defense. The *Manual for Courts-Martial* provides that available avenues of retreat is one factor to be considered in evaluating the reasonableness of the accused's apprehension and the necessity of the accused's actions.

4. *Defense of others.*

a. *General rule.* A person may do in defense of another whatever the other could properly do in his own defense. Stated otherwise, a person may lawfully use force to protect another if the person protected would have been excused had he used such force to protect himself. If the person aided was in fact the aggressor, the person aiding him is likewise an aggressor. This puts the "protector" on the same footing as the "protected." The latter can only use force if he believes on reasonable grounds that it is necessary to protect himself from impending bodily injury.

b. *Exception to general rule.* The rule of common law is that, if a third party commits an assault in coming to the aid of another who is not entitled to commit an assault, then the third party may yet have a defense if he acted honestly and reasonably. In discussing defense of another, however, MCM, R.C.M. 916(e)(5), merely states, ". . . the accused may not use more force than the person defended was lawfully entitled to use under the circumstances." In fact, the discussion following the MCM rule indicates that the accused, in coming to the aid of another, acts strictly at the accused's peril if the facts develop that the person aided had no lawful right to self-defense.

5. *Special privilege.* There are certain situations where a special privilege exists to apply force to the person of another even though this is highly objectionable to the person to whom the force is applied.

a. *Parent.* A parent has the right to discipline his minor child by means of moderate chastisement. This authority will ***not*** excuse immoderate punishment and, if excessive force is used, it will constitute a battery. A standard of reasonableness is the "majority rule," although it has been argued that the "minority" standard of malice has been adopted in the military. Consider the decision by C.M.A. where it determined that the force used by the accused violated both the "improper motive" standard as well as the "reasonableness" standard. The distinction was held to be "academic" under the facts of the this case since the accused therein knew that his acts went beyond the scope of permissible physical discipline and were done with the knowledge that he was inflicting serious injury on his child.

b. *Custodian.* Any person entrusted with the care of small children or other incompetent persons may lawfully use reasonable force to accomplish acts necessary and incident to the exercise of their duty to care for such persons.

(1) *Example*: The accused was charged with committing a lewd act upon a 7-year-old girl. He testified that, while serving as baby-sitter, the child was injured by striking the lower part of her body against the arm of a couch. He lowered her pants and saw a spot of blood on her privates. Then, in order to see where the blood was coming from, he inserted his index finger, to approximately the second knuckle, into the private parts of the child, and blood started coming down. The Board of Review set aside a finding of guilty of

commission of a lewd act because the child had not been sworn prior to testifying against the accused. The board did consider the accused's testimony, as above-stated, as a judicial confession of assault and battery and affirmed a finding of guilty of that LIO of a lewd act. ***Issue:*** Was this a judicial confession of assault and battery? ***Held:*** No. C.M.A. stated: ". . . [A]ssault and assault consummated by a battery involve a general criminal intent, actual or apparent, to inflict violence or harm upon another. . . . [A]ccused admitted the act of touching, but he also declared that he did such acts only for the purpose of examining an apparent injury to the child in order to determine its extent. Accused's stated purpose was beneficent and intended to aid the child rather than to offer it harm." There was no other evidence before the court to show that the touching was unlawful.

c. *Rightful occupant of premises.* On the issue of rightful occupant of premises, the rightful occupant of any premises, including the owner of a store as well as a home or other building, has a legal right to control it and to expel forcibly from the premises anyone who abuses the privilege by which he was initially allowed to enter and who fails to depart after being requested to do so and allowed a reasonable time to depart. When one with the right to do so has ordered another person from the premises, the latter has no right to refuse or resist. The invitee has no right of self-defense to a lawful expulsion. If he refuses to leave and resists ejection, he is guilty of battery. If, however, the rightful occupant of the premises, in ejecting another, uses more force than is reasonably necessary under the circumstances, then he is guilty of a battery and the person being ejected can legally use force to protect himself from such violence.

d. *Coercion or duress.* An accused may be legally excused from assaultive conduct if accused was acting under circumstances giving rise to the defense of coercion or duress. Such circumstances are usually equivalent to circumstances giving rise to self-defense or defenses of another. See chapter 10 for a discussion of the duress defense.

CR 25.11.5. *Lawful Consent.*

1. *General rule.* The lawful consent of the victim of an alleged battery is a defense. To be an assault, the act must be done without the lawful consent of the person affected.

a. *Consent obtained by duress.* Submission obtained by threat of death or great bodily harm by one apparently able and willing to enforce his threat is ***not*** consent.

b. *Consent obtained by fraud.* Submission obtained by misrepresentation is not lawful and, hence, it is not a defense.

c. *Capacity to consent.* The consent will not be lawful if the person giving it is not legally capable of doing so. Some individuals cannot consent to certain acts because the law surrounds them with a protective status (e.g., infants, insane persons, etc.). There are some acts to which no one can lawfully consent. No one can lawfully consent to a battery that is likely to produce death or serious bodily injury. Exception: Where the act, though dangerous, is necessary to protect the health or to save the life of the victim (e.g., a person with a defective heart could consent to a dangerous operation that might well result in death). No one can lawfully consent to an act that constitutes a breach of the peace. For example, Sally ran out of her house chased by Rollo, who caught her in the street, knocked her down, kicked her, and bruised her mouth and lips with his fist. At Rollo's trial, she testified that she had consented to the beating, saying she "wouldn't even go with a man unless he slapped me around" and that she desired and required physical abuse before engaging in sexual intercourse. ***Held:*** Sally could not lawfully consent to the beating since it was a breach of the peace.

d. *Scope of consent.* If the scope of the consent given is exceeded, then the force or violence will be unlawful. For example, a football player, by entering the contest, consents to such physical contact as is customarily incident to the game. If one player intentionally kicks another in the face, however, this would constitute a battery.

2. *Implied consent to certain touchings.* Certain touchings, which normally occur in the course of everyday living, are considered to be lawful because consent is implied from necessity. Examples include grabbing another to prevent his falling, bumping another while in a crowd, or slapping a friend on the back as a greeting.

CR 25.11.6. *Voluntary abandonment.*

The affirmative defense of voluntary abandonment, as adopted in *United States v. Byrd*, may apply to attempt-type assaults. Although the *Byrd* case dealt with an attempted drug distribution, the rationale should apply to all attempt offenses regardless of which UCMJ article they are pled under.

Attempt-type assaults are nothing more than attempted batteries; that is, overt acts beyond mere preparation in furtherance of a specific intent to commit battery. An accused who commits an attempt-type assault that does not result in a battery may be entitled to this defense if the failure to complete the battery was a result of a voluntary abandonment of the criminal activity. For example, the accused commits an attempt-type assault by swinging a stick at the victim's head with the specific intent of striking the victim. In mid-swing, the accused has a change of heart and diverts the stick away from contact with the victim. Although this is a completed attempt-type assault, the accused voluntarily abandoned the target offense (battery) and is entitled to the voluntary abandonment affirmative defense. The result differs if the victim sees the accused swing the stick. Here, we have both an attempt-type and an offer-type assault. Voluntary abandonment pertains only to the attempt-type assault. The accused can be found guilty of an offer-type assault even though he abandoned the intent to commit battery. The prosecution may be able to prevent a defense-requested voluntary abandonment instruction by clearly asserting the government's theory as an offer-type assault vice an attempt-type assault.

CR 25.11.7. *Character.*

The accused may offer evidence of a pertinent trait of character to prove that he acted in conformity with his character on the occasion at hand. In the area of assaults, the pertinent trait would be peaceableness.

CR 25.12. *SEX OFFENSES*

What follows is a brief outline of the more commonly encountered sex offenses. This discussion is included here because many, if not most, of these offenses involve assaults against the person of the victim.

CR 25.12.1. *Rape*.

"[A]ny person subject to this chapter who commits an act of sexual intercourse . . . by force and without . . . consent, is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct."

1. *Intent required.* No specific intent is required by article 120. Any penetration is sufficient to constitute the offense. And "Without her consent" is equivalent to "against her will."

2. *Force required.* The force required to commit the offense of rape is more than that which is incidental to the commission of the act of sexual intercourse ***unless*** resistance is futile or the victim fears death or grievous bodily harm. The element of force contemplates an application of force to overcome the victim's will and capacity to resist. C.M.A. adopted a "constructive force" theory that a parent or other authority figure can exert a moral, psychological, or intellectual force over a child which is the compulsory equivalent of a threat or intimidation. In a different case, C.M.A. held that ". . . more than the incidental force involved in penetration is required for conviction." In that holding, C.M.A. found such force where the accused brought an intoxicated female soldier to his office under compulsion of military order, she pushed him away and told him to stop, and there was credible evidence that she passed out and was unconscious when penetrated.

3. *Iincapable of consent.* No consent exists where the victim is incompetent, unconscious, or sleeping. And with respect to children, a child of tender years is incapable of consent.

4. *Consent is not retroactive.* Rape victim consented to sexual intercourse with Specialist Sly. Unknown to the victim, Specialist Sly stepped aside and the accused engaged in sexual intercourse with the victim. The victim eventually realized that it was the accused and briefly tried to pull away. However, she never told him to stop. At trial she testified she had never consented to sexual intercourse with the accused. The court affirmed the conviction, rejected the defense claim that the victim had retroactively consented by failing to stop him once she realized it was the accused.

5. *Degree of resistance.* Because both force and lack of consent must be shown to prove rape, the question of the degree of resistance may become a central issue. The amount of resistance required is that

degree appropriate to the circumstances. This does not require the victim to risk her life to fend off her attacker. In some circumstances, no resistance at all is required. When a victim fails to take measures required under the circumstances, however, it opens the door for a permissible inference that she did consent. For example, a failure to communicate lack of consent may raise an inference that the victim consented; however, this is a permissive inference only.

6. *Vicitm's cooperation.* A victim's cooperation with her assailant after her resistance is overcome by numbers, threats, or fear of great bodily harm is not consent.

7. *Sexual intercourse resulting from fraud in the factum is rape* because there is no legally recognizable consent. In a case of first impression, the Court of Military Appeals addressed the issue of "What is fraud in the *factum* in the context of consensual intercourse?" The court held that "the better view is that the '*factum*' involves both the nature of the act and some knowledge of the identity of the participant." That is, "for there to be actual consent, a woman must be agreeable to the penetration of her body by a particular '*membrum virile*'." In this case, the victim, while in a state of alcohol intoxication and extreme fatigue, consented to and engaged in sexual intercourse with the accused's friend. Subsequently, the accused engaged in sexual intercourse with the victim while the victim believed she was still with her original partner. Applying the court's definition of fraud in the *factum* to these facts, the court upheld the rape conviction holding that, while the victim had consented to sexual intercourse with a particular person, the accused took advantage of the victim's mistaken belief that he was that particular person—resulting in fraud in the *factum*.

Consider another case where the accused entered the barracks room of a sleeping soldier and engaged in sexual foreplay with one of the female occupants. The victim responded to his touchings and called out her boyfriend's name several times during the sexual intercourse that followed. The victim did not realize it was the accused until after the intercourse was complete. Holding that consent must be to both the act and the person, the conviction affirmed.

8. *Consensual intercourse resulting from fraud in the inducement is not rape.* Fraud in the inducement "includes such general ***knavery*** as: 'No, I'm not married'; 'Of course I'll respect you in the morning'; 'We'll get married as soon as . . .'; 'I'll pay you ___ dollars'; and so on." Here, the victim consents to penetration by a particular *membrum virile*.

9. *An honest and reasonable mistake of fact as to the victim's consent **is** an affirmative defense to rape.* Whether the mistake of fact is reasonable hinges on how the consent was communicated (either "implied" or "express" consent). "Implied" consent is communicated through the victim's conduct; "express" consent is communicated through "words or affirmative acts manifesting agreement." Both "implied" and "express" consent can be actual consent. *Id.* Mistake of fact will arise most often in "implied" consent cases. Here, the accused mistakenly infers consent from the victim's conduct when the victim did not actually consent. Although the accused's mistaken belief was honest, the real issue is whether a reasonable man under the circumstances have inferred consent from the victim's behavior? If the answer is yes, then the accused's mistake of fact was both honest and reasonable, and the affirmative defense should prevail. C.M.A. held, in an assault with intent to commit rape case, that at some point during the assault the accused must have had the specific intent to commit each element of rape. In such a case, an accused's claimed mistake of fact as to the victim's consent need only be honest.

Whether accused should be convicted of rape and other related offenses arising out of same event is largely a question of fact.

The *Manual* seems to authorize the death penalty for rape. The Supreme Court, however, ruled that death was an excessive penalty for the crime of rape. The court agreed that the death penalty was cruel and unusual in most rape cases since the victim was still alive. The *Manual* may avoid these constitutional limitations by imposing a separate hearing procedure in capital cases and precluding the death penalty in rape cases, except when the victim is under 12 or the victim is maimed or also the victim of attempted murder. Note, however, that N.M.C.M.R. held that rape charges against the accused were "capital" in nature and could not be referred to a special court-martial without the consent of the general court-martial convening authority, regardless of whether the death penalty could actually be imposed on the accused for his alleged rape of an adult woman.

CR 25.12.2. *Carnal Knowledge.*

Article 120(b) now reads: "any person subject to this chapter who, under circumstances not amounting to rape, commits an act of sexual intercourse with a person... who is not that person's spouse..., and who has not attained the age of sixteen years" is guilty of carnal knowledge.

1. *A reasonable belief that the victim had attained the age of sixteen years is an affirmative defense,* provided that the victim had actually attained the age of twelve years. The accused has the burden of proving mistake of fact as to age by a preponderance of the evidence.

The victim is not an "accomplice" for purposes of witness credibility instruction.

The MCM (2000 Edition) specifically deleted carnal knowledge as an LIO of rape and advised that there be separate pleadings in proper cases.

CR 25.12.3. *Sodomy*.

The engaging in unnatural carnal copulation, either with another person of the same or opposite sex or with an animal, constitutes the offense of sodomy. The validity of Article 125 with respect to consenual adult sodomy is in question in light of the U.S. Supreme Court's ruling in Lawrence v. Texas. The Court of Appeals for the Armed Forces has addressed the constitutional challenges to Article 125 under *Lawrence* on a case-by-case basis. In *United States v. Marcum*, and *United States v. Stirewalt*, the court found that three questions are to be considered:

1. Was the conduct that the accused was found guilty of committing of a nature to bring it within the liberty interest identified by the Supreme Court?

2. Did the conduct encompass any behavior or factors identified by the Supreme Court as outside the analysis in *Lawrence*?

3. Are there additional factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest.

If these three factors are properly identified by the court then the Sodomy allegation does withstand constitutional scrutiny.

The prohibition of "unnatural and carnal copulation" is not unconstitutionally vague.

The Supreme Court rejected the notion that consensual homosexual sodomy is protected under the Constitution. In upholding a Georgia sodomy statute, the Court ruled that the Bill of Rights did not protect this form of sexual activity. The Court refused to apply the right of privacy to homosexual acts of sodomy since they lack the ties to family, marriage, or procreation. The Court declined to address consensual acts within the marital relationship.

"Unnatural carnal copulation" includes both fellatio and cunnilingus.

The defense is entitled to an accomplice instruction when the victim participates voluntarily in the offense.

Attempted rape and forcible sodomy arising out of the same transaction are separately punishable.

CR 25.12.4. *Indecent Assault.*

The taking of indecent, lewd, or lascivious liberties with a person of a female not the spouse of the accused, without consent and against will, with intent to gratify lust or sexual desires, constitutes the offense of indecent assault. The offense is not limited to male accused or to female victims. It is a nonconsensual offense requiring assault or battery. It requires accused's specific intent to gratify lust or sexual desires. Indecent assault is an LIO of rape.

CR 25.12.5. *Assault with Intent to Commit Rape, Sodomy, or other Specified Felony. Article 134, UCMJ*.

These are specific intent offenses. *See* discussion on Article 134 assaults, CR 8.10., *supra*.

CR 25.12.6. *Adultery*.

Adultery is still an offense under military law, regardless of whether or not it is an offense under the law of the state where the act occurred.

CR 25.12.7. *Indecent Acts With Another*.

Indecent acts are defined as that form of immorality relating to sexual impurity which is not only grossly vulgar, obscene, and repugnant to common propriety, but which tends to excite lust and deprave the morals with respect to sexual relations. It can be difficult to determine exactly what acts meet the above standards. For example, consider that C.M.A. held in one case that oral foreplay, not amounting to sodomy, between consenting heterosexual adults in private, is not a criminal offense under the UCMJ. But in another, found dancing naked in front of minor children constitutes indecent acts with another.

No specific intent is required for the crime, but the victim's participation is required. The offense requires that the victim participate in the act.

1. *Lesser included offenses.* These are indecent assault and attempted rape.

CR 25.12.8. *Indecent Acts or Liberties With a Child Under 16.*

Consent is no defense. There must be evidence of a specific intent to gratify the lust or sexual desires of the accused ***or*** victim.

Two theories of misconduct are described in the MCM. These are (a) Indecent acts involve physical contact. The physical contact need not be directly on the victim's genitals. Touching an area in close proximity or the immediate area around the genitals is sufficient to allege this offense. Indecent liberties involve no physical contact, but act must be taken within the physical presence of the child.

There must be some evidence of victim's age and marital status.

CR 25.12.9. *Indecent Exposure*.

1. *Negligent exposure is insufficient.* The offense requires a willful exposure to public view. Charges of indecent exposure were filed against the accused when two air policemen observed him naked and drying himself in the upstairs rear bedroom window of his quarters. His court-martial conviction of negligent exposure was overturned. ***Held***: Negligent exposure not punishable under UCMJ.

The evidence was insufficient to sustain the accused's conviction of three specifications of indecent exposure where it appeared that, in each instance, the accused was observed nude in his own apartment by passers-by in the hallway looking in the partly open door of the apartment, but in none of the incidents did it appear that the accused made any motions, gestures, spoke, or otherwise indicated he was aware of the presence of persons in the hallway, or sought in any manner to attract their attention. Such evidence is as consistent with negligence as with purposeful action, and negligence is an insufficient basis for a conviction of indecent exposure.

A plea of guilty to indecent exposure was not rendered improvident by stipulated evidence that the accused did nothing to attract attention to himself and may not even have been aware of the presence of the young females who saw him where it was admitted the accused had exposed himself in the children's section of the base library, a place so public an intent to be seen must be presumed.

2. *"Public" exposure.* To be criminal, the exposure need not occur in a public place—but only be in public view. Further, nudity per se is not indecent; there is nothing lewd or morally offensive about an unclothed male among others of the same sex.

CR 25.12.10. *Wrongful Cohabitation*.

It is not necessary to prove sexual intercourse. The evidence must show that accused was openly and publicly dwelling or living with another as man and wife, but not that one was married to a third party.

CR 25.12.11. ***Fornication.***

Not a per se UCMJ violation. However, the context in which the sex act is committed may constitute an offense (e.g., indecent acts, fraternization, etc.). For example, C.M.A. upheld a conviction under Article 134 of two soldiers who took two German girls to a Berlin hotel room where each soldier had intercourse with each of the girls in open view. The court found such "open and notorious" conduct to be service-discrediting. Clearly, simple fornication, without more, is not a military offense. Although there could be such "conditions of publicity or scandal" as might bring a particular case of fornication within the area of conduct given over to the police responsibility of the military establishment, "such circumstances ***must be alleged and proved***."

CR 25.12.12. ***Voyeurism.***

Although not really a sex crime, it is an aggravated form of disorderly conduct punishable under Article 134.

CR 25.12.13. ***AIDS-related Cases.***

1. *Aggravated assault.* It is now clearly accepted by military courts that a service member who "willfully or deliberately exposes an unsuspecting victim to a deadly or debilitating disease or infection, such as HIV, Polio, Hepatitis B, or certain venereal diseases" is liable for aggravated assault – or worse." It is sufficient that the accused (1) knew he had tested positive for HIV (2) had sexual intercourse (with or without a condom) (3) knew that HIV could be transmitted through sexual intercourse and that a condom was not a guarantee against transmission; and (4) had sexual intercourse without revealing to her that he was HIV-positive.

"One cannot consent to an act which is likely to produce grievous bodily harm or death." Thus, consent is not a valid defense to the charge of aggravated assault (Where the accused informed BM3 C that he was HIV-positive. Despite this, she entered into a relationship with the accused that included both protected and unprotected sexual intercourse. Eighteen months later, BM3 C was found to be HIV-positive. Six months later she and the accused were married. The accused subsequently was charged with aggravated assault on BM3 C and a second petty officer, whom he had not informed about his HIV-positive status. The court upheld his conviction for aggravated assault on his wife, despite her knowing consent to sexual intercourse. The court was careful to note that the accused was prosecuted for having "*unprotected sexual intercourse*" and that the decision did not reach the question of whether knowing consent to *protected* sexual intercourse would be a valid defense.

2. *Violation of a safe sex order*. See the footnoted cases.

CR 25.13. ***DISTURBANCE OFFENSES***

This section considers offenses that constitute disturbances of the peace. Not only are traditional breach of the peace offenses included, but offenses that do not have a readily identifiable counterpart in civilian law are also encompassed (e.g., provoking words and gestures). All of these offenses have a certain propensity for disruption of the peace of the community. The offenses are: Provoking words and gestures, a violation of Article 117; communication of a threat, a violation of Article 134; breach of the peace, a violation of Article 116; disorderly conduct, a violation of Article 134; and riot, a violation of Article 116.

CR 25.14. ***PROVOKING SPEECHES AND GESTURES.***

CR 25.14.1. ***Essential Elements.***

1. That the accused wrongfully used words or gestures toward a certain person;

2. that the words or gestures were provoking or reproachful; and

3. that the person toward whom the words or gestures were used was a person subject to the code.

Note: that knowledge that the victim is a person subject to the code is ***not*** an element.

CR 25.14.2. ***Scope of Article 117***.

It applies only if the conduct is towards another person subject to the code. It prohibits ***four types*** of ***conduct***: provoking words, provoking gestures, reproachful words, and reproachful gestures.

"This Article (117) is designed to prevent the use of violence by the person to whom such speeches and gestures are directed, and to forestall the commission of an offense by an otherwise innocent party."

CR 25.14.3. ***Constitutionality of Article 117***.

The text of Article 117 is very similar to that of a Georgia statute struck down by a Federal court on grounds of vagueness. Nonetheless, the Coast Guard Court of Review held that ". . . Article 117 of the Code is distinguishable from the outlawed Georgia statute despite the *Manual*'s utilization of the standard of tending to induce breaches of the peace. The UCMJ offense has roots going back 800 years. . . . As a result of its long history and the large number of cases, the military offense has acquired content and meaning and limitations; it does not 'leave wide open the standard of responsibility.'"

CR 25.14.4. ***Sufficiency and the Evidence.***

"Incitement of the victim to immediate action is the evil to be prevented and the crucial inquiry into the sufficiency of the evidence is the extent to which the words or gestures tend to do this." Thus, if the words appear to be provoking on their face, they may nonetheless fail to amount to a violation of the article because of the circumstances under which they were used. For example, in the case from which the quote is taken, the accused said, "Don't yell at me or I'll wring your ____ neck." At the time he spoke, however, he was behind bars and was speaking to a guard on the outside of the cell. The court said that "there was no reasonable tendency that the accused's words would provoke a breach of the peace," primarily because it did not believe that a reasonable guard would unlock and enter the cell in order to respond to the accused's words.

Whether conditional provoking words fail to amount to an offense has not yet been decided. However, C.M.R. discussed this question in a case where the accused said to the victim, "If we have to go to court . . . [and] if you say I physically held you back ... I'll rip your head off." The court noted that the accused had not, in fact, physically held the victim back and, consequently, if the victim had so testified, he would have perjured himself. "Thus, it may be argued that the 'words uttered expressed a contingency that neutralized the declaration, since there was not a reasonable possibility that the uncertain even would happen.'"

There is no requirement that the victim be senior or junior to, or in the same armed force as, the accused. The *Manual for Courts-Martial* anticipates one potentially awkward situation by providing that this offense does not include "reprimands, censures, reproofs, and the like which may properly be administered in the interests of training, efficiency, or discipline in the armed forces."

CR 25.14.5. ***Defenses***.

Since this is a general intent offense voluntary intoxication would not appear to be a defense. If, however, lack of knowledge is an affirmative defense or an element, then intoxication could be a defense under some circumstances. For example, in one case, the accused was intoxicated at the time of the offense. The court intimated that intoxication of the degree which would have "sufficiently dulled" the accused's mental faculties so as to "interfere with his capacity to identify the persons involved" would have been a defense. Remember, however, that the knowledge element appears to have been eliminated by MCM, pt. IV, § 42c(2). Thus, if the accused were so intoxicated that he did not know that his words or actions were provoking, it would appear that he would have a defense.

If the circumstances under which the provoking words are uttered reveal that there was no reasonable tendency that the accused's words would provoke a breach of the peace, then the accused will have a defense to the charge. Therefore, if the accused can show that the circumstances under which he said the words alleged would not have given rise to a likely breach of the peace, he may escape conviction of the offense (e.g., if the accused said the provoking words in the course of a long-distance telephone call, it would be debatable whether the words would have the required "reasonable tendency").

CR 25.14.6. *Related Offenses*.

Communication of a threat is a related offense and disrespect can also be related to this offense.

CR 25.14.7. *Pleading*.

1. *Sample specification:*

Charge. Violation of the Uniform Code of Military Justice, Article 117

Specification. In that [Name, etc, and personal jurisdiction data], did, [at/on board (location)], on or about [date], wrongfully use provoking words, to wit: "You are too much of a coward to step across the line," or words to that effect, towards Seaman Henry P. Howards, U.S. Navy.

Other possible allegations include wrongfully use reproachful words, wrongfully use provoking gestures and wrongfully use reproachful gestures.

CR 25.15. *COMMUNICATING A THREAT.*

CR 25.15.1. *Essential Elements.*

1. That the accused communicated certain language expressing a present determination or intent to wrongfully injure the person, property, or reputation of another person, presently or in the future;

2. that the communication was made known to that person or to a third person;

3. that the communication was wrongful; and

4. prejudicial to good order and discipline or service discrediting

CR 25.15.2. *Threat Defined.*

A threat is an avowed present determination or intent to injure the person, property, or reputation of another presently or in the future. Even though the threat is conditional, it is nevertheless an offense unless the condition negated a present determination to injure (presently or in the future) or unless the condition was one the accused had a right to impose.

C.M.A. held that the words, "if you take this restraining gear off, I'll show you what I will do to you," were insufficient to state a threat because the threat was conditioned on a variable that would not reasonably occur. In addition, A.F.C.M.R. held that the words "if this were the civilian world . . . he (accused) would take his .357 magnum and shoot him (victim) six times between the eyes" did not constitute communicating a threat. The conditional words neutralized the threat, particularly in a setting which could never be the "civilian world." (However, an LIO of using provoking words was affirmed.) For a contrary example, consider the case where the threat was couched in the following terms, "[You'd] better take another cop with you, because I would try to kick the ___ out of you." The accused had just been arrested for a traffic offense by the policeman to whom the words were addressed and the accused had just learned that the same policeman might escort him alone back to the base. The court held that the words evidenced an intent to injure rather than a desire to avoid an altercation since the contingency expressed by the accused would very likely occur.

A threat to injure property or reputation, as well as a threat of personal injury, constitutes this offense. The threat must constitute a threat to injure as connoted from the word's ordinary meaning or proof of some particular meaning in the environment in which it is made. Hence, if the accused told his victim that "I'm going to pass the word on you," the offense will not be consummated unless the prosecution can offer some evidence of a special meaning in the military environment. The mere statement of intent to commit an unlawful act not involving injury to the person, property, or reputation of another does not constitute this offense. Additionally, it has been held that a mere invitation to fight is not a threat. On the other hand, disclaimers of involvement such as "I am not personally going to do anything to you, but in two days you are going to be in a world of pain. I would suggest you damn well better sleep light," will be looked at in light of the totality of the circumstances, and C.A.A.F. is not prone to react favorably to such disclaimers.

CR 25.15.3. *Required Intent*.

1. *This is a general intent offense.* The prosecution need not prove that the accused actually entertained the stated intention. The offense is complete when an avowed determination to injure another is announced or otherwise communicated. The intent which establishes the offense is that expressed in the language of the declaration, not the intent locked in the mind of the declarant. The presence or absence of an actual intention to effectuate the injury set out in the declaration does not change the elements of the offense. This is not to say the declarant's actual intention has no significance as to his guilt or innocence. A statement may declare an intention to injure and thereby ostensibly establish this element of the offense, but the declarant's true intention, the understanding of the persons to whom the statement is communicated, and the surrounding circumstances may so belie or contradict the language of the declaration as to reveal that it was made as a mere jest or in idle banter.

2. *A statement made in jest or idle banter is not a threat.* If such an issue is reasonably raised, it must be instructed upon. One of the factors to consider is the understanding of the persons to whom the statement is made.

CR 25.15.4. *Communication*.

The threat can be communicated to the person threatened or to a third person. It is not necessary that the threat be communicated to the person threatened. ***A*** has committed this offense if he tells ***B*** that he intends to injure ***C***. "The offense . . . is not rendered more or less serious as a result of the threat being made directly or to a third person." The communication must be wrongful and without justification or excuse. If the issue of legal justification or excuse is reasonably raised, it must be instructed upon.

CR 25.15.5. *Preemption*.

This offense is not preempted by Articles 89, 91, 117, 127, or 128 (disrespect to officers, WO's, NCO's, and PO's; provoking words and gestures; extortion; and assaults, respectively).

CR 25.15.6. *Protected Expression*.

In a protected expression case, C.M.A. reversed the conviction of an accused under a standard of "fairness, integrity, and public reputation of judicial proceedings" where it appeared that the accused informed his CO that he was going to write to newspapers telling of conditions within the unit if proposed disciplinary action was taken against him. The court was cautious and noted the decision was based on the particular facts of the case.

CR 25.15.7. *Pleading*.

1. *Sample specifications.*

a. *To injure the person of another*

. . . did wrongfully communicate to Airman Bronius Satkunas a threat to injure the aforesaid Airman Bronius Satkunas, U.S. Navy, by saying to him, "I'll knock your teeth down your throat," or words to that effect.

b. *To injure the reputation of another*

. . . did wrongfully communicate to Corporal John M. Smith, U.S. Marine Corps, a threat to accuse falsely Sergeant Lill E. White, U.S. Marine Corps, of having committed the offense of pandering.

2. *Variance.*

A fatal variance between the pleadings and the proof will result if it is alleged that a threat was communicated to a named person but the evidence shows that the words set out in the specification were communicated to someone else.

If a threat of a lesser degree of violence is proved than the one charged, a fatal variance will not result.

CR 25.15.8. ***Lesser Included Offenses***.

The offense of provoking words can be an LIO of communicating a threat.

1. *Example:* ***H,*** a prisoner, while on work detail outside the stockade, gave a guard, ***R,*** some difficulty. ***R*** reported the incident to the NCO in charge of the detail. Later, as the work party mounted a truck to return to the stockade, ***H*** said to ***R,*** "I'd better not catch you outside." ***H*** was charged with wrongfully communicating to Private ***R*** a threat to injure Private ***R*** by saying to him, "I'd better not catch you outside." This information was introduced into evidence by the prosecution. DC requested that the court-martial be instructed that it could consider the LIO of using provoking speech in violation of Article 117. The MJ denied the request. ***Query:*** Error? ***Answer:*** Yes. "The words used by the accused could easily evoke from the guard an invitation to assume that the parties were already 'outside' and that the accused should proceed with the avowed declaration. Clearly then the words had at least a tendency 'to induce . . . [a breach] of the peace. . . .' The lesser offense, therefore, was in issue and should have been submitted to the courtmartial for its consideration."

Note: Whereas Article 117 provoking speech requires the victim to be subject to the code, the Article 134 threat offense does not.

Also note: That C.M.A. determined that, although an aggravated assault and communication of a threat occurred on the same occasion, the two offenses could be charged separately, and the communication of the threat was not, as a matter of law, an LIO of the aggravated assault.

CR 25.16. ***BREACH OF THE PEACE.***

Article 116 prohibits the causation of, or participation in, either a riot or a breach of the peace. Riot is discussed in section 0817, *infra*. Breach of the peace has been an LIO of riot and is based on the common law offense.

CR 25.16.1. ***Essential Elements***.

1. That the accused caused or participated in a certain act of a violent or turbulent nature; and

2. the peace was thereby unlawfully disturbed.

CR 25.16.2. ***Examples of prohibited acts:***

1. "A 'breach of the peace' is an unlawful disturbance of the peace by an outward demonstration of a violent or turbulent nature. . . . The acts or conduct contemplated by this article are those which disturb the public tranquility or impinge upon the peace and good order to which the community is entitled."

2. In addition to the street brawl example, the following examples of misconduct have been held to be breaches of the peace:

a. Resisting apprehension in a violent manner.

b. Shouting, striking the bars of a cell, shaking the cell door, and starting a fire in a cell within a brig. Hammering on a cell door with a wooden bunk, smashing 38 windows with an iron pipe, ripping the shower head from the shower, and twisting out of place two iron bars in a cell within disciplinary barracks.

c. MCM, pt. IV, § 41c(2), states: "Engaging in an affray, unlawful discharge of firearms in a public street are examples of conduct which may constitute a breach of the peace. Loud speech and unruly conduct may also constitute a breach of the peace by the speaker."

d. Specifications alleging that accused painted a bull's-eye on his torso and wrongfully entered the flight deck of an aircraft carrier, disrupting flight operations and then later wrongfully boarded a plane on the flight deck and pulled the ejection system safety pins while threatening to kill himself, sufficiently alleged a breach of the peace.

CR 25.16.3. ***Meaning of Community.***

"The ***peace of the community***" means the public tranquility; the peace and good order to which the community is entitled. The words "'community' and 'public' include a military organization, post, camp, ship, aircraft, or station." The Navy Board of Review noted, however, that "the crew's quarters of a United States man-of-war is not a public place." This Board of Review result notwithstanding, it would appear that the meaning of community in a physical sense is not controlling.

The commission of a breach of the peace, then, does not depend upon whether an accused's acts occur in surroundings to which members of the public have a right to resort or generally repair. Rather, it depends upon whether his behavior, not otherwise protected or privileged, tends to invade the right of the public or its individual members to enjoy a tranquil existence, secure in the knowledge that they are guarded by law from undue tumult or disturbance. In short, the important consideration is the disturbance of tranquility and not whether the misconduct occurs in a "public place" or one of such limited access as to be deemed unavailable to the citizenry in general.

CR 25.16.4. ***"Unlawfully" Means Without Justification or Excuse.***

"The fact that the words are true or used under provocation is not a defense, nor is tumultuous conduct excusable because incited by others."_ the accused acts in self-defense, however, his conduct is excused.

1. *Example:* ***A*** is attacked and fights back in self-defense. This disturbs the peace. Is ***A*** guilty of breach of peace? No. ***A*** did not unlawfully disturb the peace.

CR 25.16.5. ***Pleading.***

1. *Sample specification:*

Charge. Violation of the Uniform Code of Military Justice, Article 116

Specification. In that [Name, etc. and personal jurisdiction data], did, [at/on board (location)], on or about [date], cause a breach of the peace by wrongfully engaging in a fistfight in the dayroom with Seaman Recruit John J. Doe, U.S. Navy.

A specification alleging that the accused assembled with others in order to disrupt the operation of a stockade is insufficient to charge a breach of the peace since it fails to allege any conduct constituting an outward demonstration resulting in a disturbance of the peace.

CR 25.16.6. ***Lesser Included Offense.***

1. *Disorderly conduct, Article 134, UCMJ.*

CR 25.17. ***DISORDERLY CONDUCT.***

CR 25.17.1. ***In general.***

There is no specific article of the UCMJ which punishes simple disorders; consequently, they are charged under Article 134 as conduct which is prejudicial to good order and discipline or which is service discrediting. Disorderly conduct is discussed in MCM, pt. IV, § 73, MCM (2000 Edition), which lists two variations.

1. Disorderly conduct under such circumstances as to bring discredit upon the military service.

2. Other cases. (These "other cases" are those which constitute conduct prejudicial to good order and discipline.)

CR 25.17.2. ***Essential Elements.***

1. That the accused was disorderly onboard ship or in some other place; and

2. Prejudicial to good order and discipline or service discrediting

CR 25.17.3. *"Disorderly" Defined*.

Disorderly conduct is conduct 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. An act such as window peeping, which endangers public morals or outrages public decency, is punishable as disorderly conduct. "Disorderly" also refers to any disturbance of a contentious or turbulent character.

1. *Examples of disorderly conduct*:

a. Discharging a grenade simulator.

b. Window peeping.

c. Unlawfully assembling for the purpose of resisting apprehension by police officers.

CR 25.17.4. *Disorderly Conduct and Breach of Peace*.

It would appear that breach of the peace contemplates conduct of a more violent nature than that which would support a disorderly conduct specification.

CR 25.17.5. *Special Defense*.

As with breach of the peace, an accused charged with disorderly conduct can assert self-defense and, if the triers of fact are convinced of the proper use of self-defense, the accused should be acquitted.

CR 25.17.6. *Pleading*.

The allegation simply states that the accused was "disorderly"; no further details need be pled. If this offense is committed by a servicemember who is drunk, the phrase "drunk and disorderly" is then alleged. If the conduct involved is not described as being disorderly, an offense may not be alleged.

1. *Example*: In *United States v. Regan,* the accused was charged with "throwing butter on the ceiling . . ." of the mess hall. The court held that the specification failed to allege an offense because such activity could have been innocent and noted that, if the accused had been charged with "being disorderly on station by throwing butter on the ceiling . . .," an Article 134 violation would have been alleged.

Since disorderly conduct under service-discrediting circumstances is an aggravated form of the offense (four months' vice one month confinement), this is the one Article 134 offense where the service-discrediting element ***must*** be pled. If it is not included in the specification, the maximum punishment will be limited to one month confinement.

CR 25.18. *RIOT*

CR 25.18.1. *Essential Elements*.

1. That the accused was a member of an assembly of three or more persons;

2. that the accused, and at least two other members of this group, mutually intended to assist one another against anyone who might oppose them in doing an act for some private purpose;

3. that the group or some of its members, in furtherance of such purpose, unlawfully committed a tumultuous disturbance of the peace in a violent or turbulent manner; and

4. that these acts terrorized the public in general in that they caused or were intended to cause public alarm or terror.

CR 25.18.2. *Interpretation*.

Riot is defined as: ". . . a tumultuous disturbance of the peace by three or more persons assembled together in furtherance of a common purpose to execute some enterprises of a private nature by concerted action against any who might oppose them, committed in such a violent and turbulent manner as to cause or be calculated to cause public terror."

CR 25.18.3. *"Three or more persons."*

No fewer than three can commit a riot; therefore, if fewer than ***three*** are involved, a breach of the peace, assault, or disorderly conduct may have been committed instead. Numbers alone, however, are insufficient to prove the offense.

1. *Example:* The accused was one of four assailants who attacked two couples without provocation at a naval base. The court held this assault was not a riot even though more than three individuals had perpetrated it. The Court said:

The underlying element essential to constitute the statutory crime of riot, and distinguishing it from other crimes involving a breach of the peace, is the disturbance of the *public* peace, and that implies the idea of a lawless mob accomplishing or bent on accomplishing some object in such violent and turbulent manner as to create public alarm or consternation or as terrifies or is calculated to terrify people. It is not commonly applied to a brief disturbance even if violence and malicious mischief are involved in the commotion. (Emphasis added.)

CR 25.18.4. *"Common purpose"*

"Common purpose means an end, intention, object, plan, or project shared by all. The purpose of plan need not have been made prior to the assembly. It is sufficient if the assemblage actually begins to execute the common purpose formed after it assembled.

In one case, C.M.R. held that a specification was fatally defective because it failed to allege this element. Although it may be possible to plead facts which imply "public alarm or terror," a literal pleading of the element is necessary.

CR 25.18.5. *Pleading*.

1. *Sample specification.*

Charge: Violation of the Uniform Code of Military Justice, Article 116

Specification. In that [Name, etc, and personal jurisdiction data], did, on or about [date], [at/on board (location)], participate in a riot by unlawfully assembling with Fireman Ignatius Provoker, U.S. Navy, and Seaman Recruit Jimmy Follower, U.S. Navy, for the purpose of resisting all naval brig authorities and in furtherance of said purpose, did wrongfully break and remain out of his own area of confinement in the naval brig, tear down the cell block fence, destroy and damage military property of the United States Government, and brandish weapons to the terror and disturbance of the naval brig.

CR 25.18.6. *Lesser Included Offenses (LIO)*.

1. *Breach of the peace, Article 116*; and

2. *Disorderly conduct, Article 134.*

CR 25.19. *RELATIONSHIP BETWEEN DISTURBANCE OFFENSES*

CR 25.19.1. *Generally.*

This group of offenses does not encompass all disturbance offenses (e.g., most of the assaults would come within this category; however, most of these offenses can be committed by mere words alone).

CR 25.19.2. *"Provoking" vis-à-vis "threat."*

Provoking speech, under Article 117, is not necessarily a threat; however, a threat is most often provoking (i.e., "threat" may include "provoke" as an LIO).

The purpose of Article 117, prohibiting provoking speech and gesture offenses, is to inhibit one from inciting another to breach the peace.

The purpose of the Article 134 threat offense is not merely to protect persons from such wrongful communication, but also to protect them from the greater harm thereby forecasted.

The victim in a "provoking" must be a person subject to the code. The victim of a "threat" can be anyone.

Both offenses may be committed by mere words alone. "Provoking" offenses may be committed by gestures alone; however, if gestures are involved in the communication of a threat, it would also be proper to charge an offer-type assault.

CR 25.19.3. *"Breach of Peace" vis-a-vis "Riot."*

A riot involves a breach of peace. It takes only one to breach the peace, but at least ***three*** to riot. Breach of peace is a general intent offense. Riot requires a specific intent.

CR 25.19.4. *"Threat" vis-a-vis "Breach of Peace."*

A threat does not necessarily constitute a breach of the peace, but it may—and commonly does. The threat, which carries a maximum punishment of a DD and three years confinement, is by far the more serious offense. Both are general intent offenses. Both may be committed by mere words, but breach of peace may and commonly is committed by boisterous conduct.

CR 25.19.5. *"Assault" vis-a-vis "Disturbance" Offenses*.

An assault may involve a provoking gesture, a breach of the peace, a riot, or the communication of a threat. An oral threat alone falls short of an assault. A threat is simply an announcement of an avowed present determination to injure presently or in the future. Mere words cannot constitute an assault. Furthermore, an assault requires an attempt or an offer to do bodily harm immediately.

An assault may immediately follow or be contemporaneous with a threat. A threat ***may*** be communicated to someone other than the victim, whereas an assault ***must*** be directed at the victim. A threat includes an avowed determination to injure property or reputation as well as the person, whereas an assault is confined solely to bodily harm.

CHAPTER 26

CHAPTER 26

CR 26. OFFENSES AGAINST PROPERTY

CR 26.1. *LARCENY AND WRONGFUL APPROPRIATION*

CR 26.1.1. *Generally.*

Article 121 describes two separate crimes - ***Larceny*** and ***Wrongful Appropriation***. The only difference in the elements of the two offenses is the intent required in each. Both are specific intent offenses. To be guilty of larceny, the accused must specifically intend to ***permanently deprive*** the owner of the property of the use and benefit of that property. Whereas, to be guilty of wrongful appropriation, the accused need only specifically intend to ***temporarily deprive*** the owner of the use and benefit of the property. Since temporary deprivation is less serious than permanent deprivation, wrongful appropriation is not punished as severely as larceny and is considered a lesser included offense (LIO). This is the only difference between the two offenses.

CR 26.1.2. *Elements of Larceny and Wrongful Appropriation.*

1. That the accused wrongfully took, obtained, or withheld certain property from the possession of the owner or of any other person;

2. that the property belonged to a certain person;

3. that the property was of a certain value, or of some value; and

4. that the taking, obtaining, or withholding by the accused was with the intent permanently (larceny) or temporarily (wrongful appropriation) to deprive or defraud another person of the use and benefit of the property or permanently (larceny) or temporarily (wrongful appropriation) to appropriate the property for the use and benefit of the accused or for any person other than the owner.

CR 26.1.3. *Wrongful Taking*.

The most common form of larceny (or wrongful appropriation) is the wrongful-taking type. It is essentially an offense of ***wrongful*** dispossession (e.g., a customer takes a suit off a rack at the exchange with the intent to keep it, and walks out without paying for it).

1. *Requirements of a taking.* Generally, "taking" is accomplished by removing something from the place it was (asportation) and exercising control (dominion) over the item. As such, in order to be guilty of committing a "taking," the evidence must show that the accused took control of the item ***and*** removed it from its original position. If the facts show that the accused took control over certain property, yet did not move the item, he/she cannot be guilty of a "taking" type of larceny.

2. *Examples.*

a. Accused removed a suit from a rack at the exchange and concealed it under his own clothes. The required asportation and dominion have occurred at this point, and, assuming the requisite intent, larceny has been committed.

b. Accused removed a suit from a rack and started for the door but, after three steps, he is brought to a halt the suit is chained to the rack. No taking occurred even though there was a removal because no dominion had been exercised over the article.

c. Accused breaks into the exchange in order to steal property. He removes various items from the shelves and places them in a laundry bag. Fearing that he may be detected, accused gets cold feet and runs from the exchange, leaving the items behind. Although he changed his mind, the asportation and dominion have already occurred—a larceny has been committed.

d. Accused took a typewriter from an office on an Air Force base and took it to his own office, also located on the base. He intended to use it for his own and for government use, and he also permitted others to use it. He told other persons that he had purchased it. ***Held:*** Guilty of larceny.

e. Withdrawing excess funds from an accused's own account with an automatic teller card held to be a wrongful taking.

3. *Larceny as a continuing offense.* Assuming that the perpetrator has taken control over the property, the crime of larceny is perfected once the asportation begins. In short, the original asportation of the property does not have to end before a larceny may be found; however, the crime of larceny continues as long as the original asportation, removal, or "carrying away" of the property continues.

The original asportation of the stolen property is not complete until the perpetrator is satisfied with the new location of that property. Many factors may be considered in determining whether the movement of the property is complete. However, as long as the perpetrator appears dissatisfied with the location of the property, and the movement continues with minimal interruption, the original asportation is continuing and the larceny is still occurring. As a result, anyone who ***knowingly*** assists in the movement of the stolen property before the original asportation is complete could be a principal to the larceny. If the original asportation was complete at the time of the assistance, the person would be guilty of being an accessory after the fact in violation of Article 78, UCMJ, and not guilty of the offense of larceny.

A person who participated in an ongoing larceny could still be considered an accessory after the fact, as opposed to a principal, if their motive was to assist the perpetrator to escape detection and punishment rather than to secure the fruits of the crime.

An accused may instead be guilty of the separate offense of receiving stolen property. For example, consider the case where A.C.M.R. held that the larceny of some field jackets and silverware was complete when a soldier having custody over them moved them, with the required intent, to another part of the central issue facility in which he worked. Consequently, when the accused received the property, his actions did not make him a principal to larceny, but rather a recipient of stolen property in violation of Article 134. Since receiving stolen property is not an LIO of larceny, the facts must be carefully considered when drafting charges.

4. *Taking must be wrongful.* The victim need not realize that a theft has occurred in order for the crime to be completed. Further, the taking must be ***wrongful*** to constitute an offense. Generally, a taking is wrongful if it is done by one who is not entitled to the immediate possession of the property, and it is done without the consent of the person from whose possession the property is taken. The wrongfulness of a taking, obtaining, or withholding, however, may also depend upon the intent of the accused at the time of his action. The significant factor is that not all takings are wrongful.

a. *Taking pursuant to consent.* If consent for the taking is obtained from a person authorized to give it, the taking is not wrongful. Thus, a drill sergeant who solicited and obtained money from trainees under his command to pay for his personal expenses could not be convicted of larceny under Article 121 where such money was obtained with the trainee's consent. Note, however, that an accused may be guilty of a taking-type larceny of government property, even though the property was released to him by competent authority, if that authority could not consent to the taking.

b. *Taking pursuant to lawful order.* If a taking occurs pursuant to a lawful order or regulation, it is not wrongful. MCM, pt. IV § 46c(1)(d). For example, the following actions would not be wrongful if performed pursuant to a lawful order:

(1) Seizure of a camera in a restricted area;

(2) seizure of contraband found in a locker; or

(3) seizure of contraband as part of a gate search.

It is important to note, however, that the order must be lawful in order to insure that the taking is not wrongful. Accordingly, if an accused is given what is clearly an order to steal, and he chooses to execute the order, he would be guilty of larceny. This is because such an order would clearly be illegal.

c. *Example:* Accused was told by his company commander to try to make up certain shortages in the inventory by performing "normal scrounging." In order to "scrounge," the accused then broke into various government buildings and made up the shortages. ***Held:*** Guilty of larceny. Even though the accused was acting in accordance with the terms of an order from his company commander, he was nonetheless guilty of larceny since he knew the order was illegal.

CR 26.1.4. *Wrongful Obtaining*.

A wrongful ***obtaining*** type of larceny (or wrongful appropriation) involves acquiring possession of property by false pretenses. Similiar to a taking type of larceny, the accused must take control over property (dominion) and remove it from its original position (asportation). In a wrongful obtaining type of larceny, however, possession is usually transferred to the thief voluntarily by the lawful owner or possessor as the result of a false representation made by the thief. Accordingly, the dominion and asportation of the property need to occur after the misrepresentation.

1. *Requirements of a wrongful obtaining.* There are three requirements which must be met in order to establish a wrongful obtaining larceny. First, the representation must be false when made; second, the accused must know it is false; and, finally, the representation must be an effective and intentional cause in inducing the victim to deliver possession of the property.

2. *Form of representation.* A representation may be made in any form. The most common type of representation is where an individual, through the spoken word, misrepresents a particular matter. However, a false representation may be made by actions, symbols, tokens, or even by silence.

a. *Representation by silence.* Generally, an individual's silence is insufficient to constitute a misrepresentation. However, if the accused precedes this silence by any act or statement, this would override the general rule.

b. *Examples*:

(1) Accused enters NEX and discovers video camera on sale for $1,199.00. In the pile of boxes, he sees a box with an identical camera and a $270.00 price tag. Knowing that the camera is priced incorrectly, accused takes it to the Women's Department in order to purchase the item. His intent is to come back to the NEX in a few days and return the item for the $1,199.00 price. He presents the box to the cashier, makes no statement concerning the price, and then pays the $270.00. ***Held:*** No false representation has been made. The court concluded that the misrepresentation of fact "apparently was created by the inattentiveness or carelessness of Exchange employees. . . ."

(2) Accused told the victim that he could get him a car at a cheap price. The victim—on more than one occasion—gave the accused money to apply to the purchase price of the car. Finally, the victim gave the accused a $20.00 gratuity for "services rendered." Surprisingly, the victim never sees a car. ***Held:*** In light of his previous conduct, the accused's silence when he received the "gratuity" amounted to false pretense. A false representation may be made implicitly as well as expressly, even though a mere failure to disclose the truth is not generally regarded as a criminally actionable misrepresentation.

c. *Representation by actions alone.* An individual may make a false representation simply by the way he/she acts without any spoken words. In these cases, the individual's conduct is considered misrepresentation for purposes of a wrongful-obtaining larceny.

d. *Example:* Accused enters NEX, goes to item, changes the price, and presents the merchandise to the cashier. He says nothing to the cashier about the price. In short, he makes no verbal representations to the cashier about the price of the item. The cashier rings up the merchandise, accepts the cash, and the accused leaves the store with the item at a reduced price. ***Held:*** In this scenario, the accused would be guilty of a larceny by false pretense. His actions prior to his silence (i.e., changing the price on the merchandise) were sufficient to create the misrepresentation.

3. *Element 1.* The representation must be false when made.

a. *The false representation must relate to a present or past fact.* For example, if an accused misrepresents his name, unit, and financial credit rating in obtaining a loan, his representations would relate to a present fact. Accordingly, the false representations would result in a larceny. Similarly, if the accused falsely stated that he had never gone through a bankruptcy proceeding, it would be a representation as to a past fact and would also result in a larceny.

b. *False statements as to future events may be false representations.* Generally, a false statement about a future event is merely an opinion by the individual. Accordingly, no larceny can occur because there has been no representation of fact. For example, when a real estate agent says a particular piece of property is "nicely located," or a car dealer refers to his/her vehicle as a "beautiful car," he is expressing an opinion and not stating a fact. If, however, the person is referring to his state of mind and how he will respond in the future, that can be considered an existing fact.

c. *Example:* While applying for a loan, accused represents that he has a check coming in and would repay the loan in two weeks. In fact, he was due to be transferred in two weeks. At trial, accused conceded that he made a false promise to repay. He argues, however, that he cannot be convicted of wrongful obtaining because he had not made a false representation of an existing fact. ***Held:*** Guilty. Accused's false statement as to his present intention was a false representation of an existing fact.

4. *Element 2.* The accused knew the representation was false. "[t]he pretense must be in fact false when made and when the property is obtained, and it must be knowingly false in the sense that it is made without a belief in its truth." If an accused makes a representation knowing that it is false or without an honest belief that it is true, he has the knowledge necessary for larceny by false pretense.

a. *Relevant factors.* There are four relevant states of mind with respect to any given representation:

(1) Maker knows it to be false;

(2) maker believes it to be false;

(3) maker does not know whether it is false or not, ***and*** makes no effort to determine its accuracy; and

(4) maker believes the representation is true.

The first three of these is criminal if the representation is in fact false. Even if the maker believes a statement to be true when made, he may be guilty of a larceny by false representation if he finds out otherwise before he receives the property and fails to disclose the real facts when he takes possession of the property. His silence with full knowledge of the falsehood is equivalent to a repetition of the former statement at the moment of acquisition.

5. *Element 3.* The false representation was an effective and intentional cause in inducing the victim to deliver possession of the property.

a. *General requirements.* "Although the pretense need not be the sole cause inducing the owner to part with his property, it must be an effective and intentional cause of the obtaining." More explicitly, it must be evident from all of the facts that a causal relationship exists between the representation made and the delivery of the property.

b. *Examples:*

(1) The accused, an Army personnel clerk, told the victim that, for a fee of $25.00, he could get him $175.00 in advance travel pay. He also said that he kept only $5.00 of the $25.00, and the rest went to his superiors. Since he actually pocketed the entire amount, this was false. ***Held:*** The false representation concerning who received the $25.00 did not induce the victim to part with his money and did not constitute larceny by false pretense.

(2) The accused purchased whiskey for black market resale. He advised the seller that he was purchasing for an American base club in Japan, of which he was the manager. Accused's false representation was an effective cause of seller's parting with the liquor. ***Held:*** Larceny existed even though the accused had paid for the liquor. The seller would not have made the sale—if he had known the true facts—because he could have lost his license for making bulk sales to individual personnel. Pecuniary loss was not essential because the seller was wrongfully deprived of his property by a false pretense.

c. *Representations made after receipt of property.* Since a false representation must induce or influence the victim's decision to deliver the property, a false representation made after the property was obtained will not result in larceny.

6. *Other considerations regarding wrongful obtaining.*

a. *Consent.* Although the consent of the "victim" has been obtained in a wrongful obtaining type of larceny, it occurs only because the perpetrator used fraud or a false representation to procure it. Accordingly, the law does not recognize this form of "consent" as a defense to a wrongful obtaining type larceny.

b. *Not an instantaneous offense.* The nature of this offense is the taking of property. As such, the offense of larceny by wrongful obtaining is not complete when the victim relies and acts upon the misrepresentation. Instead, the offense is perfected after the accused has taken possession of the property. For example, in one case the accused filed a false claim. The claim was processed, approved, and a check was subsequently forwarded to the accused. The court held that the larceny was not complete until the accused received, endorsed, and negotiated the refund check—thus taking possession of the proceeds.

CR 26.1.5. *Wrongful Withholding*.

The third type of larceny (or wrongful appropriation) is a wrongful withholding. In this type of larceny, the property has been obtained through what appears to be a lawful means; yet, its continual possession amounts to larceny. In short, in a withholding larceny, the crime is committed by failing to return the property.

1. *Taking possession of the property.* The general rule is that the accused in a withholding larceny lawfully acquires possession of the property. This is contrary to a taking or obtaining larceny in which the perpetrator obtains the item through an unlawful means. This general rule, however, appears to have at least two exceptions. MCM, pt. IV § 46c(1)(b) indicates that a larcenous withholding may arise "whether the person withholding the property acquired it lawfully or unlawfully." Case law appears to identify two times during a wrongful withholding offense in which the accused may not have lawfully obtained the property. First, when the perpetrator takes the property in order to "teach the person a lesson." While case law effectively eliminates the use of the teaching-a-lesson defense, it does make light of the fact that property may be obtained in this fashion yet still be subject to prosecution as a wrongful withholding. Second, possession of what may appear to have been lost or mislaid property has also been used as an exception to the general rule. This is done in part to avoid an analysis as to whether the property was actually lost or mislaid and focus the inquiry upon the ultimate issue: whether the accused wrongfully withheld the property after its owner became known.

2. *Requirements for wrongful withholding.* A wrongful withholding arises in either of two circumstances. In short, a wrongful withholding larceny occurs when an accused fails to "return, account for, or deliver property to its owner" when such is due; or devotes property to a use which was not authorized by its owner.

3. *Failure to return, account for, or deliver property which becomes due.* When property is due to be returned, accounted for, or delivered to its owner, and one wrongfully chooses not to do so, said conduct amounts to a wrongful withholding. Many of these factors are self-explanatory; however, some areas require special emphasis.

a. *Failure to "account for."* Many of the embezzlement-type offenses fall within this category. The law provides that, when an individual who has a responsibility to continually account for property wrongfully fails to do so, he can be held criminally liable. Military courts have held that an individual having custody of funds, for example, is held to a higher degree of care in the way they handle those funds. Due to the importance of the proper handling of money, society has chosen to make such a custodian criminally liable when he cannot fully account for any loss at the time an accounting is due.

b. *Inference of misconduct.* Under certain conditions, the law has created an inference that a larceny has occurred when a failure or inability to account for the funds occurs. The mere failure on the part of a custodian to account for entrusted funds does not, in and of itself, constitute larceny. It is when a demand has been made and the custodian refuses to account for the funds, or when the accounting is due yet nothing has been done. In these circumstances, the law will permit an inference that the custodian has wrongfully converted the property to her own use. This inference, however, is not mandatory and may be accepted or rejected by the court.

c. *Examples.*

(1) An accused was in charge of the prisoners' deposit fund at the stockade. The fund consisted of money taken from prisoners for safekeeping. An audit discovered that false entries existed in the books. Additionally, the audit found a substantial shortage of funds. ***Held:*** Guilty of larceny. The accused was found guilty because he failed to account for the property when the accounting was due.

(2) An accused was in charge of the Air Force Aid Society office. In this job, it was his responsibility to process loans and receive payments. Accused wrongfully withheld available funds from the society by pocketing all of the proceeds. ***Held:*** Guilty of larceny. The trial court accepted the inference of larceny based upon the accused's position. The appellate court affirmed because the accused offered no explanation to rebut this inference of misconduct.

d. *No demand is necessary.* Larceny by wrongful withholding may occur even though the owner makes no demand for his property. Consider the case where the accused had been given money to purchase particular items. He failed to make the purchases, yet there was never a specific demand made upon him to turn over the property or the money. The court held that the accused's failure to refund the money or deliver the items at the logical time, together with his false story as to the whereabouts of the items, provided convincing proof of a wrongful withholding/conversion. It is important to note, however, that lack of a specific demand may affect the strength of the evidence in proving the element of wrongfulness.

e. *A debtor's failure to pay amounts to a wrongful withholding type of larceny.* When an individual has no other duty to the "victim" than that of a simple "creditor-debtor" relationship, the law will not find him guilty of larceny for failing to pay his debts. For example, the accused ordered a ring through a mail order company, but failed to pay for it upon arrival or return it upon demand. Calling it a debtor/creditor issue, the court found no criminal action under these facts. However, our military courts have created an exception to this general rule in the area of housing allowance overpayment. Thus, it now appears that a service member who knowingly receives a housing allowance to which they are not entitled and fails to take affirmative steps to return the money has violated Article 121.

f. *Must have a duty to return the property.* Larceny by wrongful withholding requires a fiduciary or custodial relationship between the accused and the owner of the property.

4. *Diverting property to an unauthorized use.* The other form of wrongful withholding is when the property of another is diverted to a use not authorized by its owner. This is specifically designed to address all other situations of conversion whether or not there is embezzlement. For example, the accused was issued a government vehicle to use off base during patrol duties. He used the car to take two of his friends to another town for their own personal business. ***Held:*** Guilty of a wrongful appropriation by unauthorized use of a vehicle.

CR 26.1.6. *Property*.

Regardless of the type of larceny alleged, the subject of that larceny must be "any money, personal property, or article of value of any kind."

1. *Property generally.* In order to be the subject of larceny, the "property" must be a tangible item. The court in one case concluded that the object must have some form of "corporeal existence." Accordingly, the court indicated that the object must be something with a physical presence, quantity, and quality which can be measured and detected.

2. *Real estate.* Real property (land and things attached to land) cannot be the subject of larceny; however, if an item has been severed from the land (e.g., fruit which is removed off of a tree), that object can be the subject of a larceny.

3. *The "use" or "services" of property.* Generally, services do not have a "corporeal existence" and cannot be measured. Accordingly, the *Manual* specifically prohibits the taking of a service from being charged as property under Article 121. Individuals who, one way or another, make unauthorized telephone calls are not subject to prosecution for larceny based upon the illegal calls. This misconduct, however, can be charged as obtaining services under false pretenses in violation of Article 134. When an individual takes someone's car for a joy ride, they can be charged with wrongfully appropriating the vehicle ***but not*** with larceny of the "use" of the vehicle.

4. *Examples:*

a. An accused taped into the electric power lines and connects them to his home. Not intending to pay the power company, he uses the electrical currents to run his home. ***Held:*** Guilty of larceny. In distinguishing electric and gas services from telephone services, the court stated, "[b]oth electricity and gas, although intangible, have a physical presence which may be measured by some mechanical contrivance, both are valuable commodities bought and sold like other pieces of personal property, susceptible of being severed from a mass or larger quantity and of being transported from place to place."

b. An accused purchased items from the Navy Exchange on a deferred payment plan. Later, he unsuccessfully tries to deceive the NEX into believing that he has already paid back the money. ***Held:*** Not guilty of an attempted larceny. A debt, or the amount thereof, is not the proper subject of a larceny.

c. An accused takes a ride in a taxicab and subsequently refused to pay the fare. At courts-martial, he is charged with the larceny of the taxicab services. ***Held***: Not guilty of larceny. The court held that taxicab services cannot be stolen in violation of Article 121.

CR 26.1.7. *Pleading Requirements.*

1. *Pleading ownership.* It must be established that the property was taken, obtained, or withheld from someone with an immediate possessory right superior to the thief's at the time of the theft. Wrongful acquisition often dispossesses several persons, each of whom has an immediate possessory right superior to the accused's.

a. *Example:* ***A*** borrows ***B's*** car. ***C*** steals ***B's*** car from ***A***. ***B*** is the general owner and has a superior right to possession over ***C***. ***A*** is special owner and also has a superior right over ***C***. Who should be alleged as the "owner" in a larceny specification? Answer: Either ***A*** or ***B*** may be alleged as owner; however, in order to establish that a theft occurred, it will be necessary to prove that ***C*** acquired it from ***A***. Therefore, by pleading ***A*** as the owner, there will ordinarily be no need to establish ***B's*** interest in the car. This will usually be better for both sides since it:

(1) Simplifies the government's case;

(2) pleads the situation as it actually existed and as it was most likely understood by the accused; and

(3) tends to promote simplicity and clarity.

In drafting a larceny or wrongful appropriation specification, the property should, ordinarily, be alleged as having been stolen or wrongfully appropriated from the person who was last in immediate possession before the theft.

b. *Example:* Willy is issued an M-16 rifle by the Marine Corps. Rollo takes Willy's rifle without his consent and sells it. The specification alleged that Rollo did steal the (described) M-16 of some value, "property of the U.S. Government." Is the specification defective? No. There is sufficient allegation of larceny. The government did have a superior right to possession than Rollo, and a taking from Willy was also a taking from the government since Willy was merely custodian of the M-16 for the government. In view of the nature of the item, Rollo could not have been misled by the allegation of "stealing from the government." Generally speaking, however, the best and safest method is simply to allege the person last in possession as the "owner." The indiscriminate practice of alleging the general owner instead of the person last in possession may cause the pleader to overlook the fact that a larceny was not committed.

c. *Example: **A*** stole a government rifle, told ***B*** that he had done so and that he had hidden the rifle and ***B*** could have it. ***B*** got the rifle. ***B*** was apprehended and charged with larceny from the government (the general owner). Held: No larceny. Had trial counsel followed the rule of determining whether there was a taking, obtaining, or withholding from the person last in possession ***(A),*** he would have realized that there wasn't a larceny. ***B,*** however, was guilty of receiving stolen property.

2. *Variance between pleading and proof as to ownership.* Variance between pleading and proof of ownership can arise in surprisingly subtle ways. Careful thought must be given to this issue in order to avoid difficulty at trial.

a. *Example:* M stole property from another Army unit for his own Army unit. It was alleged that he stole "property of the U.S. Government." He pleaded guilty. ***Query:*** Plea improvident? ***Answer:*** No. But ownership should have been alleged as "property of Company _____," the custodian-unit. ***Reason:*** Accused obviously did not intend to deprive the U.S. Government of the property, but he did intend to deprive the other Army unit. However, in view of all the circumstances in the case, the variance was not fatal and the plea was not improvident.

b. *Example:* Accused received deposits as Savings and Insurance Officer; he was required to deposit the money with the disbursing officer to be placed in the soldiers' savings accounts. He did not do so, and was charged with stealing from the individual depositors. Defense counsel contended larceny should have been alleged as from the U.S. Government. ***Held:*** Assuming the funds were government funds and not individual depositors' funds after deposit with the accused (who was the government custodian of such funds), this fact, under these circumstances, was simply an immaterial variance (i.e., the accused was not misled).

CR 26.1.8. *The Property Was of Some Value.*

Value is an element of larceny and must be proved. If property has no value, it cannot be the subject of larceny. The fact that the property is of some value must also be alleged expressly, or by clear implication, or the specification will fail to allege an offense. Note, however, that the value need not be monetary; it is sufficient if the property has value to someone.

The specific value of the property should be alleged whenever possible. The actual value of the property is a matter in aggravation for punishment purposes. If several different kinds of articles are the subject of the larceny, the value of each should be stated—followed by a statement of the aggregate value. Larcenies of property from different locations on different dates cannot be combined into a single specification as a single larceny to aggregate value and thereby reach the maximum possible punishment. Failure to allege a specific value precludes punishment greater than the least permissible, irrespective of the proven value. The accused need not know that the specific property intended to be stolen is of a particular value.

1. *Proving value.*

a. *Items issued by or procured from government sources.* Official publications which contain price lists of items of government property are competent evidence of the value of such items at the time of theft, and, if the property is shown to have been in substantially the same condition at the time it was stolen, such evidence may be sufficient proof of value.

The price list is not conclusive evidence of value. It is entitled to consideration, but it is not binding upon the court-martial. Many other matters may be considered by the court-martial in determining value (e.g., the condition of the property at the time of the theft).

b. *Example*: Accused was charged with unlawful purchase of an Army pistol. The weapon was stolen several months before the purchase. This pistol was shown to be defective and missing parts when purchased by the accused. Defense introduced evidence that such pistols were readily obtainable in the local market at a price less than the $53.00 shown in the official Army price list. ***Held:*** Evidence insufficient to prove that the pistol had a value of $53.00. Where there is a conflict between the ***official*** price list and market value, the market value will prevail.

c. *Property other than that obtained from government source.* "As a general rule, the value of other stolen property is its legitimate market value at the time and place of the theft." If the property, because of

its character or the place where it was stolen, has no legitimate value at the time and place of the theft, or if that value cannot readily be ascertained, its value may be determined by its legitimate market value in the United States as of the time of the theft, or by its replacement cost at the time—whichever is less.

(1) *Negotiable instruments.* Writings representing value may be considered to have the value which they represented at the time of the theft. Evidence of market value may be established by proof of recent purchase price; testimony of any person familiar with market value as a result of training or experience (e.g., appraiser or dealer); the owner or other layman may testify as to value if familiar with its quality and condition; or a stipulation of value between the parties.

CR 26.1.9. *Intent.*

The taking, obtaining, or withholding by the accused must be with the intent to deprive or defraud permanently (larceny) or temporarily (wrongful appropriation) another person of the use and benefit of the property. This intent is more than that the accused had it in his mind to remove or withhold the property from the possession of another at the time of the taking, obtaining, or withholding; it means that the accused had the specific intent to dispossess another wrongfully. It is in this sense that his intent becomes criminal.

1. *Example:* An accused obtains property from another under the honest though mistaken belief that it is his. Although he specifically intends to remove the property from the other person, he is not guilty of larceny because he did not intend to take the property wrongfully. The specific intent required does ***not*** involve knowledge that the specific property to be stolen is of a particular value.

2. *Friendly borrowing.* In situations where the accused borrows property from a friend or acquaintance without the friend's express consent, the Court of Appeals for the Armed Forces has found no criminal intent and, hence, no larceny or wrongful appropriation.

3. *Example:* ***A*** borrowed a uniform from ***B*** without ***B's*** consent; ***A*** testified that he thought, if ***B*** had been there, ***B*** would have given consent. ***A*** further testified he had left ***B*** a note regarding the whereabouts of his uniform. Held: ***A*** plea of guilty was improvident since, if ***A's*** story were believed, he did not possess the requisite criminal intent.

It is worthy of note that, in these "borrowing" cases, the taking has been from a friend or acquaintance. It appears that this relationship between the parties is significant in determining whether or not criminal intent exists. It may well be that the touchstone underlying the court's decision is that, because of the relationship, the acts of the accused have not impaired the interest of society to the extent that criminal liability should be assessed. Borrowing from strangers might well cause criminal liability to attach. Moreover, one cannot borrow from the U.S. Government. For example, the accused used his advance travel and transportation allowance to purchase a car, intending to refund the amount when loans came through. As the money was advanced to the accused for the purpose of the trip, the court held it was wrongfully appropriated when used to buy an automobile.

It is the accused's intent to permanently or temporarily deprive which determines his criminality and not his motive in teaching the victim a lesson. A further discussion of this objective/subjective test is found in *United States v. Johnson*, 17 M.J. 140 (C.M.A. 1984).

Intent to deprive permanently or temporarily will, in most cases, have to be inferred from circumstantial evidence. In determining whether the intent was to deprive permanently or temporarily, examine all the circumstances surrounding the taking and the accused's conduct thereafter—particularly the manner in which the accused dealt with the property (i.e., whether he dealt with it in such a way as to be likely to cause a permanent or merely a temporary loss to the owner). Willful consumption of property clearly establishes intent permanently to deprive. Concealing property may establish intent to deprive permanently. Willful destruction of property shows intent to deprive permanently. Abandoning the property where the victim is likely to recover it may evidence only an intent to deprive temporarily; however, where accused abandons it under such circumstances that it is likely that the victim will not find it, then an intent to deprive permanently may be established. Pawning the property, depending on the facts, may indicate either a permanent or temporary intent to deprive. Factors bearing on the determination of intent would include: (a) Accused still has pawn ticket; (b) accused no longer has pawn ticket; (c) accused pawned in his own name; or (d) accused pawned in false name.

Sale of property indicates an intent to deprive permanently. If the evidence shows the intent is to deprive only temporarily instead of permanently, the accused cannot be convicted of larceny but only of wrongful appropriation. Thus, it is the intent element which makes wrongful appropriation an LIO of larceny.

An intent to appropriate the same to his own use or the use of any person other than the person last in lawful possession, or the true owner, can also be sufficient to make out the offense. Some civilian jurisdictions require that, in order to commit larceny, there must be an expectation of gain or benefit to the thief. Article 121 does not follow this view and makes it just as much the crime of larceny to steal for the benefit of another as for one's self. Remember, it is still larceny even though the accused has no intention of benefiting anyone (i.e., it is larceny if he intends simply to deprive the owner of it permanently). For example, Rollo wrongfully takes Will's watch and deliberately throws it in the ocean. A larceny results even though no one benefits.

CR 26.1.10. *Lost, Mislaid, and Abandoned Property as the Subject of Larceny*.

Whether property is lost, mislaid, or abandoned is significant in determining the criminal liability of the one who finds it.

1. *Lost property*. Property with which the owner has involuntarily parted and does not know where to find or recover it is lost property. The term does ***not*** include property which has been intentionally concealed or deposited in a secret place for safekeeping. When there is a clue to ownership, a finder who takes possession of lost property acquires lawful possession if his purpose is to restore it to the owner. But, he commits larceny or wrongful appropriation if his intent is to appropriate it to his own use. When there is no clue to ownership, a finder may lawfully take possession even if he intends to appropriate the property to his own use. If the finder later discovers a clue to ownership, he has a duty to take steps to restore the property to the owner if he still has it, or run the risk of being found guilty of a withholding-type larceny or wrongful appropriation. What is a "clue" to ownership? If, under all the facts and circumstances of the particular case, the finder would have reason to believe the owner and his property could be brought together again, there is a clue to ownership. Such clues may be furnished by the character, location, marketing of the property, or by other circumstances. Identifying marks, initials, serial number, etc. may provide clues to ownership. The nature of the property and the locality of the loss may be determining factors (e.g., a bos'n's pipe, a pilot's helmet, a wallet with no identification in it, found in a sleeping compartment for four men). Value itself may be controlling (e.g., a dime found on the sidewalk in downtown Newport would offer no clue to ownership; a thousand dollar bill found in the Justice School would be property with a clue to ownership i.e., there would probably be little difficulty in discovering the true owner).

To determine the finder's intent where there is a clue, examine his conduct with respect to the property. If he has made a reasonable effort under the circumstances to have the property restored to its owner, it could be determined that his purpose was to restore the property to its owner. However, if he made no reasonable attempt to restore it, a court could find that he wrongfully took the item (i.e., without intent to restore it and with intent to deprive) and, hence, find him guilty of larceny.

2. *Mislaid property*. An article that is intentionally put in a certain place for a temporary purpose, and then inadvertently left there when the owner goes away (e.g., a package left at a table in a bank lobby by a depositor who had written a check), is mislaid property. Mislaid property by definition ***always*** has a clue as to its ownership (i.e., there is always a strong probability that the owner could find it). Therefore, anyone who takes possession of mislaid property with the intent to appropriate it to his own use commits larceny or wrongful appropriation.

3. *Abandoned property*. Property to which the owner has relinquished all title, possession, or claim without vesting it in any other person (throwing property away) is abandoned property. Abandoned property can never be the subject of larceny since the owner has relinquished all claim to it (e.g., owner throws a broken radio into the trash). Anyone can take it without committing larceny. When a thief "abandons" property, however, possession is deemed to revert to the person wrongfully dispossessed.

CR 26.1.11. *Possession of Recently Stolen Property as Evidence of Theft*.

The ***conscious***, ***exclusive***, and ***unexplained possession*** of ***recently stolen*** property permits the ***inference*** that the person shown to have it in his custody was the individual who stole it. The strength of the inference depends upon the nature of the property and the degree of recentness of the offense. Such possession does not require the court to find the accused guilty; it merely permits them to do so. Before the inference may be drawn and guilt found, the

theft must have been recent and the possession must be conscious, exclusive, and unexplained.

1. *Conscious possession.* Conscious possession means that the accused must be aware that he has the property. It need not be established that he knew it was stolen property. All of the property need not be in his possession. "Even possession of part of recently stolen property may reasonably create the inference that the possessor has, or had, the remainder." Exclusive possession means that the accused must be shown to have dominion over the property to the exclusion of everyone else.

a. *Example:* Recently stolen fatigues were found hanging on the wall in accused's room. Accused had a roommate. ***Held***: Not exclusive possession. His roommate also had free access to the room and, hence, to the clothing.

2. *Unexplained possession.* The purpose of the unexplained possession requirement is "to direct the attention of the triers of fact to the circumstances of the accused's possession and to the fact that they must determine whether the possession is explained or unexplained." If there is no explanation for the accused's possession of the property in evidence, the basis for the inference is complete and the triers of fact are justified in finding that the possessor stole it if all the other elements are proved. "The accused, of course, has an absolute right to remain silent. However, if the prosecution's case contains no evidence of an explanation for his possession which is 'consistent with innocence,' the accused runs the risk of the jury drawing the inference of guilty possession against him." The drawing of this inference by the jury neither shifts the burden of proof to the accused nor denies him the right against self-incrimination. "To avoid the consequences of the absence in the evidence of an explanation, the accused 'naturally carries the duty of explaining' his possession. . . . In other words, he has the burden of going forward with the evidence."

3. *Inability to explain.* The accused's mental condition at the time he came into possession may prohibit his explaining the circumstances of his possession, as where he was drunk or had amnesia. Such a circumstance would go to the weight to be given to the inference of guilt. To establish the permissive inference of guilt then, the government must establish that the accused was in conscious, exclusive, and recent possession of the stolen property in question. Then, unless the possession is explained by the accused or by other evidence and the explanation is consistent with innocence, the court may find the accused guilty.

In determining whether there is possession of recently stolen property, all the circumstances must be considered. The character of the goods, their salability, and whether they are cumbersome or portable, are among the factors to be considered. In one case, C.M.R. dealt with an accused who returned a government pistol two months after a theft. It is questionable whether the accused was in possession of recently stolen property. In any event, the weight of such an inference is diminished by the passage of time.

a. *Example:* The accused was discovered in possession of stolen trousers one year after they were reported missing. ***Held:*** Not in possession of recently stolen property. Thus, it would appear that an accused may be held to be in possession of recently stolen property if the time span between the theft and his possession is, under the circumstances, not so long as to create the reasonable possibility of the goods having been disposed of by the thief and subsequently acquired innocently by the accused. An accused may be found in possession of "hot" goods (e.g., the Hope diamond) a considerable period after the theft and still be in possession of recently stolen property. On the other hand, in the case of readily negotiable items, possession may be "recent" only for a short period after the theft.

CR 26.1.12. *Common Defenses to Larceny*.

1. *Absence of intent.* Voluntary intoxication is a defense where it is sufficient to raise a reasonable doubt concerning the accused's mental capacity to entertain the requisite specific intent. Honest mistake is a defense where a person takes, obtains, or withholds the property of another, believing honestly, although mistakenly and negligently, that he has a legal right to acquire or retain the property. When the defense of mistake is reasonably raised by the evidence, it is incumbent upon the military judge to instruct thereon. There is, however, no necessity for such an instruction when the evidence at trial does not raise the issue.

2. *Impossibility.* Accused, with the intent to steal, takes a coat off the coat rack, thinking that it belongs to someone else it turns out to be his own peacoat. He has not committed larceny because it is impossible to steal one's own property, but he is guilty of attempted larceny.

3. *Negligent loss.* Cases involving withholding-type larcenies have indicated that, where the evidence suggests the possibility that the accused's failure to account for the property in his custody was due to mere negligence, the court must be instructed that negligent loss constitutes a defense to both larceny and wrongful appropriation. Negligent loss which occurs after the formulation of an intent to deprive permanently would not be a defense to larceny. Negligent loss which occurs after the formulation of an intent to deprive only temporarily would be a defense to larceny, but would not be a defense to wrongful appropriation.

4. *Duress.* In one case, the accused pleaded guilty to three specifications of larceny. In examining the accused, the defense counsel alluded to matters that might arise in mitigation and extenuation indicating a possible defense, particularly that the accused ". . . felt he was unable to withdraw because of his fear of harm to his fiancée and his child." Defense counsel indicated that the defense of duress would not be asserted. ***Held***: The defense of duress is available to an accused who was acting under a well-grounded apprehension of immediate death or serious bodily harm. The legal officer erred in failing to recognize the potential defense to the charges, and further inquiry should have been made regarding the providency of accused's plea.

5. *An intention to pay for the property stolen, or to replace it with an equivalent.* Even though such an intention existed at the time of the theft, it is ***not*** a defense. Furthermore, the absence of a pecuniary loss to the owner is not a defense. The focus is on the accused's intent as to the original property taken, not that (s)he intends to get similar items to replace the goods taken. For example, the accused, Company CO, took food from a mess because his wife needed it immediately and he did not have the time to go out and buy it. He intended to replace it. ***Held***: No defense. This is larceny. In another example, the manager of a PX unlawfully sold cigarettes to unauthorized personnel, pocketed the price difference, but paid the exchange for the cigarettes. ***Held***: Larceny despite no material loss.

6. *Exceptions.* Some exceptions to consider in this category are money and endorsed checks. Take money, for example. Apart from circumstances which may impart special value to a coin or bill as a numismatic item, one dollar bill is the same as another. It is not larceny, for example, to take two five-dollar bills in exchange for a ten-dollar bill without the knowledge or consent of the owner. Or, consider endorsed checks. They may be replaced with an equivalent amount of cash and ***not*** be larceny, though it would still be wrongful appropriation.

7. *Intent to return.* An intent to return the same item taken is a defense to larceny, but no defense to wrongful appropriation.

8. *Repentance is no defense.* If the accused wrongfully took, obtained, or withheld property with the intent to deprive permanently, the offense of larceny is complete and a subsequent repentant return is no defense to larceny, but is mitigating for sentencing purposes.

CR 26.1.13. *Lesser Included Offenses (LIO's).*

Wrongful appropriation is an LIO of larceny. Wrongful appropriation has all the elements of larceny, except that the intent in wrongful appropriation is less serious than the intent in larceny; hence, the offense of wrongful appropriation is lesser and included within larceny.

In one example, the accused took an $800.00 stereo as "security" for a $100.00 debt owed him by the victim. The court held that, even if the accused's "self-help" was condoned, there was a wrongful appropriation of the $700.00 difference.

The offenses of receiving stolen goods and accessory after the fact are ***not*** LIO's of larceny.

Wrongful taking, without intent, is ***not*** an LIO; in fact, it is not an offense under the UCMJ. Nor is wrongful withholding, without intent, an offense under the code.

Hence, larceny has only three LIO's: wrongful appropriation, attempted larceny, and attempted wrongful appropriation. Similarly, wrongful appropriation has only attempted wrongful appropriation as an LIO.

The *Manual for Courts-Martial* contains certain ***aggravated*** forms of larceny that deal with the theft of military property. It is worthy of note that the *Manual for Courts-Martial* does ***not*** contain parallel changes to the LIO of wrongful appropriation.

With respect to determining whether LIO is reasonably raised by the evidence, the general rule is that the lesser crime must be submitted to the fact-finder along with the greater, unless the evidence positively excludes any inference that the lesser crime was committed. Ordinarily, any doubt should be resolved in favor of giving an instruction on the LIO. There are certain circumstances in which it is unnecessary and even improper to instruct on LIO's.

1. *Examples:*

a. In the first example, a taking was admitted, and the only question was intent. The evidence showed that the accused was very drunk, but it also permitted the finding that he had the mental capacity to form an intent to deprive, and the facts could be interpreted reasonably as showing that the accused's intent was to retain the money only temporarily. The court held that failure to instruct on the LIO was prejudicial error. C.M.A. cautioned, however, that "in some instances intoxication might pose an all-or-nothing charge."

b. In the next example, the victim discovered that his money was missing. Accused's room was searched and the money was found. Accused was charged with larceny and testified that he found the money and that, since it was Sunday, he was going to turn it in the next day to his company commander. The law officer instructed the court members that no LIO was possible. ***Held:*** Instructions correct. Accused's testimony constituted a complete disclaimer of any criminal intent. As the issue was presented by the accused, acquittal was the only alternative to conviction for the offense charged. In short, the evidence presented an "all-or-nothing" theory.

c. In the third example, the accused was charged with larceny of clothing belonging to ***A***. The accused testified that he had loaned ***B*** some money, and ***B*** said that ***A*** could take ***B's*** clothing if ***B*** did not repay. The accused further testified that he took ***A's*** clothing in the belief that it belonged to ***B***. Held: LIO was not fairly raised by this evidence for, if believed, it would constitute a total defense and the accused would be guilty neither of larceny nor wrongful appropriation.

d. In the final example, the accused and another wrongfully took a car, used it to escape from confinement at Quantico, Virginia, and drove to Washington, DC, where they abandoned it upon running out of gas. Among other things, the accused was charged with larceny of the vehicle. ***Held:*** LIO not raised. "It is stating the obvious . . . that neither the accused nor any of his companions intended personally to return it to the owner."

CR 26.1.14. *Pleading*.

Describe property in generic terms and omit detailed descriptions (e.g., "automobile," not "20CY purple Chevrolet").

Never plead in the disjunctive. An allegation that the accused wrongfully appropriated "lawful money and/or property" of a specified value is not sufficient.
Larceny or wrongful appropriation of a value in excess of $100.00 increases the quantum of punishment available, as does larceny of military property.

An allegation that the accused attempted to steal "personal property of some value," while it might meet minimum requirements, is subject to a motion for further particularity and the motion will usually be granted.

The findings must conform to the specification, or a fatal variance may result. For example, in one case, the accused was found not guilty of stealing the items alleged in the specification, but guilty of stealing some "medical equipment." The court held that, since it could not be determined of what the "medical equipment" consisted, the identity of the offense had been changed and the resulting variance was fatal.

Thefts which take place on different occasions are separate crimes and should be alleged separately, not under a single specification. Thefts occurring at substantially the same time and place, however, or which evidence a single course of conduct, amount to a single larceny and should be alleged as such, even if the property was taken from different persons. ***Caveat***: When in doubt, plead multiple thefts under separate specifications to avoid duplicity. Should there be a single course of conduct, the specifications can be treated as multiplicious for sentencing.

Although the government must prove that the accused took, obtained, or withheld the property in question, it is only necessary to plead the word "steal."

1. *Sample specification.*

Charge. Violation of the Uniform Code of Military Justice, Article 121

Specification. In that [Name, etc. and personal jurisdiction data], did, [at/on board (location], on or about [date], (steal) (wrongfully appropriate) a wristwatch, of a value of about $27.00, the property of Seaman Penurious P. Gullible, U.S. Navy.

CR 26.1.15. *Multiplicity*.

As noted above, multiplicity considerations may affect how the offenses are pled. More often than not, however, the question is one which manifests itself only in sentencing.

CR 26.1.16. *Instructions*.

Even though the government need only allege that the accused did "steal," the government must prove that the accused wrongfully took, obtained, or withheld the property in question and the military judge should instruct on the basis of the theory under which the government has proceeded. An instruction in the alternative (e.g., took, obtained, or withheld), however, will not be objectionable unless it operates to permit the court to convict on an improper theory.

1. *Example:* Accused was tried for larceny of meat. He worked in a mess hall which had received a large delivery of packaged meat. Subsequently, his car was searched off base, and the meat was found in his car. Defense introduced evidence that denied the taking by the accused and "explained" his possession of the recently stolen meat, asserting that he got it off base from a civilian, although he did realize it was probably stolen. In short, he defended against the larceny charge by asserting he received stolen goods. The legal officer gave a shotgun instruction, "took, obtained, or withheld." ***Held:*** Inclusion of the alternative theory of withholding in the instruction was prejudicial error as the court might then convict of larceny because the accused had received the stolen goods and thereafter withheld them, which is not larceny.

CR 26.1.17. *Related Offenses*.

Larceny may be committed in connection with several other offenses. For example: robbery (violation of Article 122); presenting a false claim (violation of Article 132); obtaining services under false pretenses (violation of Article 134); receiving stolen property (violation of Article 134) (an actual thief is not guilty of receiving stolen property); issuing worthless checks (violation of Article 123a); forgery (violation of Article 123); theft from the mails (value not an element) (violation of Article 134); wrongful disposition or destruction of military property of the United States (violation of Article 108); wrongful destruction of nonmilitary property (violation of Article 109); burglary (violation of Article 129); housebreaking (violation of Article 130); and conspiracy to commit larceny. *United States v. Washington*, 1 M.J. 473 (C.M.A. 1976).

CR 26.2. *ROBBERY*

CR 26.2.1. *Elements of the Offense*.

The elements which describe the offense of robbery show that robbery is essentially a combination of a larceny of the taking type and an assault or threat. The elements are:

1. That the accused wrongfully took certain property from the person or from the possession and in the presence of a person named or described;

2. that the taking was against the will of that person;

3. that the taking was by means of force, violence, or force and violence, or putting the person in fear of immediate or future injury to that person, a relative, a member of the person's family, anyone accompanying the person at the time of the robbery, the person's property, or the property of a relative, family member, or anyone accompanying the person at the time of the robbery;

4. that the property belonged to a person named or described;

5. that the property was of a certain or some value; and

6. that the taking of the property was with the intent permanently to deprive the person robbed of the use and benefit of the property.

CR 26.2.2. ***The First Element.***

The accused committed a ***taking***-type larceny of property of some value from the possession and in the presence of a person. Since robbery includes "taking with intent to steal," a larceny by ***taking*** is an integral part of the charge of robbery and must be proved at trial. Larceny by false pretenses or an obtaining-type larceny is not sufficient to satisfy this element of the offense.

To constitute the offense of robbery, it is not essential that the subject of the taking-type larceny be of any specific value. However, the court must be satisfied that the property taken was of some value, however small or indefinite as to amount, in order to convict the accused of larceny by taking, hence, robbery.

To be in the victim's ***presence***, it is not necessary that the property taken be located within any certain distance of the victim. If persons enter a house and force the owner by threats to disclose the hiding place of valuables in an adjoining room and, leaving the owner tied, go into that room and steal the valuables, they have committed robbery. "Presence" means possession or control so immediate that violence or intimidation is essential to remove the property.

1. *Examples:*

a. Victim and her "sleeping companion" drove to a beach area for a picnic. On arriving there, the accused and his friends were occupying the area and the victim started to back up her car to leave. The accused approached the car, snatched the keys from the ignition, dragged the victim from the car, and attempted to undress her. The victim evaded the accused, dropped her purse containing $24.00 on the ground next to the car, and went to the aid of her companion. The accused again accosted her and pushed her against the car. The accused and his friends then drove off leaving the victim and her companion, but taking the $24.00 from victim's purse. ***Held:*** It is not necessary in robbery that the taking be directly from the person of another, that is, actually severed from the person. It is enough if it is taken from the ***immediate control of the person,*** provided the property is taken by or through the use of force or violence.

b. Accused held a knife to the throat of a winner in a pool game and forced him to admit where his friend's IOU was located. The friend (the loser) then went to another barracks, obtained the IOU, returned and destroyed it in the presence of the winner. During the entire episode, the accused held a knife to the winner's throat. ***Held:*** The taking of the IOU was "from the person in the presence" of the victim.

c. Accused obtained the victim's room key from the victim while they were at the victim's work area. The accused then went to the victim's barracks room, opened the door using the key, and took the victim's stereo. ***Held:*** Not taken from the "presence" of the victim despite the government's contention that the room key symbolized ownership.

CR 26.2.3. ***Second and Third Elements***.

The taking was against the will of the victim and was ***by force or violence***, or putting the victim in ***fear***.

1. *By force or violence.* For robbery to be committed by force or violence, there must be actual force or violence to the person, preceding or accompanying the taking against his will. It is immaterial that there is no

fear engendered in the victim. Any amount of force is enough to constitute robbery if the force overcomes the actual resistance of the person robbed, or puts him in such a position that he makes no resistance, or is sufficient to overcome the resistance offered by a chain or other fastening by which the article is attached to the person.

Where the evidence established that accused struck the victim in the face and took property from victim, who did not resist because he feared further violence, the findings of guilty of robbery by force or violence were supported by the evidence. The assault and battery was sufficient violence to constitute this element of the offense of robbery.

a. *Degree of force required.* The degree of force required is such as is actually sufficient to overcome the victim's resistance. It is not necessary to show a personal injury, or a blow, or force sufficient to overcome any resistance that the victim was capable of offering. In fact, robbery may exist although the victim ***makes no resistance***.

b. *Time of application of force.* Actual force or violence to the person of the victim must precede or accompany the taking. If an accused takes possession of the property without the use of force or violence, but subsequently employs force in order to retain money or to escape, he is guilty only of larceny and not robbery.

If the accused, before the effect of the force and violence has been dissipated, steals from the victim, it is robbery; the rationale being that the intent is formed while the effects of the force are still operative and the taking is, for all practical purposes, made possible by the violence employed.

In one case of interest, the accused came upon an already unconscious victim (drunk) and transported him to another location, where he took money from the victim's person without the victim's knowledge. The court indicated that such acts did not constitute robbery, but only larceny, because no force was employed.

2. *By putting victim in fear.* For robbery to be committed by putting the victim in fear, there need be no actual force or violence, but there must be demonstrations of force or menaces by which the victim is placed in such fear that he is warranted in making no resistance. The fear must be reasonably well-founded apprehension of present or future injury, and the taking must occur while the apprehension exists. The injury feared may be death or bodily injury to the person himself or to the person of a relative or member of his family or to anyone in his company at the time, or it may be the destruction of his habitation or other injury to his property or that of a relative or member of his family or of anyone in his company at the time of sufficient gravity to warrant his giving up the property demanded by the assailant.

CR 26.2.4. *Sixth Element.*

The taking was with the intent to permanently deprive. A person is not guilty of robbery in forcibly taking property from the person of another if he does so under an honest belief that he is the owner, or is assisting an owner.

One who forcibly recaptures money lost in a crooked gambling game may not be guilty of robbery because title to money lost in a crooked gambling game does not pass to the winner, and one does not ***steal*** when he effects recapture of such money but he may be guilty of assault and battery. It is no defense to robbery, however, for an accused to take money from a victim to recover the value of hashish which he believed the victim had stolen from him because the accused had no right to reassert possession of contraband hashish.

Robbery is a specific intent crime and mental impairment short of legal insanity is relevant in determining the accused's ability to form requisite intent.

CR 26.2.5. *Possible LIO's of Robbery.*

1. Larceny - Article 121.

2. Wrongful appropriation - Article 121.

3. Attempted larceny or attempted wrongful appropriation.

4. Assault and battery - Article 128.

5. Assault with a dangerous weapon - Article 128.

6. Assault intentionally inflicting grievous bodily harm - Article 128.

7. Assault with intent to rob—Article 134.

8. Extortion—Article 127.

CR 26.2.6. *Pleading*.

A specification that only says "rob," or that fails to aver that the taking was from the person or presence of the victim or was accomplished by force, violence, or fear, does not allege robbery. The same is true for attempted robbery.

1. *Sample specification.*

Charge: Violation of the Uniform Code of Military Justice, Article 122

Specification; In that [Name, etc. and personal jurisdiction data], did, [at/on board (location], on or about [date], by means of force, steal from the person of Seaman Harry W. Marble, U.S. Navy, against his will, a watch, of a value of about $25.00, the property of said Seaman Marble.

CR 26.2.7. *Multiplicity Considerations*.

Robberies of different victims at the same time and place are separately punishable offenses. Where intent to inflict grievous bodily harm is shown to have been formulated after robbery was perfected, subsequent beating of same victim is separately punishable. Separate charges of robbing victim of his car and of German currency were not unreasonably multiplicious when intent to rob money was formulated after intent to take car.

CR 26.3. *RECEIVING, BUYING, CONCEALING STOLEN PROPERTY*

The UCMJ contains no specific punitive article prohibiting the receiving of stolen property. The offense is charged under Article 134 as conduct prejudicial to good order and discipline or service discrediting.

CR 26.3.1. *Elements*.

1. That the accused wrongfully received, bought, or concealed certain property of some value;

2. that the property belonged to another person;

3. that the property had been stolen;

4. that the accused then knew the property had been stolen; and

5. that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces, or was of a nature to bring discredit upon the armed forces.

CR 26.3.2. *Accused Wrongfully Received, Bought, or Concealed Property*.

1. *Wrongfully.* This means that the property was received, bought, or concealed without the consent of the true owner or without justification or excuse.

2. *Received.* The term "receive" means to acquire possession, care, custody, management, or control of property. Thus, even merely transporting stolen goods may constitute the offense of receipt of stolen goods. Accused's actions in carrying stolen office machines into pawnshop demonstrated sufficient "possession" for acceptance of guilty plea. Mere constructive possession ***without*** knowledge that what is received is stolen cannot constitute "receipt" so as to confer criminal liability. One who comes into constructive possession of property "without knowledge of its character commits no wrong, and there appears to be no sound reason for converting an innocent act into a criminal offense on the basis of after-acquired information which reaches the accused when it is

too late for him to act on it by declining to become involved in the transaction."

It is not necessary for the receiver to touch the goods with his own hands. If they are delivered into his control, it is sufficient. Thus, possession may be taken for him by his servant or agent acting under his directions; or he may direct the thief to deposit the goods at a certain place and then lead an innocent "purchaser" to that place, or have the goods sent to him, and complete a "sale" without himself touching them.

Sale or transfer for consideration is not necessary for receipt. Therefore, this offense encompasses mere concealing or receiving, as well as buying stolen property. Any exercise of control or dominion over property is probably sufficient.

3. *Example:* Rollo steals a watch from the local base exchange and, after bragging about how he stole it, gives it to his girlfriend as a gift. If she accepts it, she has received stolen property.

The receiving must be with the thief's consent. The offense of receiving stolen goods is not committed by one who takes the goods from a thief without consent. This, as we have seen, is larceny. Perhaps more common is the situation where one thief "stiffs" another.

4. *Example:* ***A*** pays for stolen goods he receives from ***B*** with a rubber check. A is not guilty of receiving stolen property because there is no valid "consent" by ***B*** in relinquishing the goods to ***A***. (But, ***A*** is guilty of larceny by trick in addition to a bad check offense.)

5. *Concealed. See United States v. Banworth*, for a discussion of concealment.

6. *Personalty*. As in the crime of larceny, the stolen property must be personal property.

CR 26.3.3. *That the Property Had Been Stolen and Belonged to the Person Alleged as the Owner*.

1. *The property must be stolen in fact.* Can an accused be found guilty of this offense when he has received wrongfully appropriated property? While MCM, pt. IV § 106, discusses only "stolen property," receiving misappropriated property would in any event seem to be an LIO, an offense under Article 134.

2. *The property must have been stolen by someone other than the accused.* The actual thief (perpetrator) cannot be held criminally liable for receiving property which he has stolen, for he cannot logically receive property from himself. In certain cases, however, the same facts may seem to support a charge of larceny or receiving stolen property. This will occur when accused is liable as a ***statutory*** principal vice ***actual*** thief (i.e., an aider and abettor, or co-conspirator, or accessory before the fact). While earlier cases had held that the accused in such situations could be found guilty of both offenses, C.A.A.F. disavowed such practice and now requires that the accused be found guilty of either larceny ***or*** receipt.

Further, receipt of stolen property has been held ***not*** to be an LIO of larceny. Thus, whenever there is doubt about whether the accused was the thief, or merely a receiver of stolen property, the savvy prosecutor should charge both offenses to allow for the contingencies of proof.

3. *Proving that the property was stolen in fact.* The government cannot introduce the conviction of the thief as evidence against the receiver. Therefore, the government must in effect prove two crimes at the trial of the receiver: the larceny and the receiving. (Suppose the thief is acquitted: Can the receiver be convicted? Yes. *See* Chapter I of this study guide.)

CR 26.3.4. *That Accused Then Knew the Property Had Been Stolen*.

Actual knowledge that the property was stolen is required. There is some conflict in the case law as to just what sort and amount of evidence is required to find the requisite knowledge and whether any inferences are permissible. Whether an inference of knowledge will be permitted will depend upon the totality of the facts and circumstances brought out at trial.

Mere negligence in not realizing that the property is stolen will not be sufficient for conviction. Such knowledge must exist at the time the accused received, bought, or concealed the property. Note that an Article 121, UCMJ, wrongful withholding-type larceny does ***not*** preempt the buying, receiving, or concealing offenses. Where the accused receives, buys, or conceals the property knowing it to be stolen and with no intent to return the property to the true owner, the subsequent withholding of the property from the true owner cannot amount to larceny. Because there has been no taking or obtaining by the accused, his offense is simply receiving stolen property, unless, of course, the accused is a principal but not the perpetrator in the initial taking.

CR 26.3.5. ***Value***.

The same rules apply here as for larceny (i.e., the government must allege and prove some value). Specific value is a matter in aggravation.

CR 26.3.6. ***Pleading***.

1. *Sample specification.*

Charge. Violation of the Uniform Code of Military Justice, Article 134

Specification. In that Seaman Ima A. Fence, U.S. Navy, USS STING, on active duty, did, at Naval Education and Training Center, Newport, Rhode Island, on or about 15 March 20CY, unlawfully buy a wristwatch, of a value of about $130.00, the property of Yeoman Third Class Ibe N. Robbed, U.S. Navy, which property as he, the said Seaman Fence, then knew had been stolen.

CR 26.4. ***BAD CHECK LAW***

CR 26.4.1. ***Elements***.

1. That the accused made, drew, uttered, or delivered a check, draft, or order for the payment of money;

2. that, at the time of the making, etc., the accused knew that the maker or drawer did not ***or*** would not have sufficient funds or credit to pay the instrument in full upon presentment; and

3. that the making, etc., was for the procurement of an article or thing of value with intent to ***defraud, or*** for the payment of a past-due obligation or for any purpose with intent to ***deceive***.

CR 26.4.2. ***First Element.***

That the accused made, drew, uttered, ***or*** delivered a check, draft, or order for the payment of money. Making and drawing are synonymous and refer to the acts of writing and signing or simply signing the instrument. Preparing a worthless check, but not signing it, apparently may not make one a "maker or drawer." The MCM is misleading when it says "writing and signing." If both were required, then a maker or drawer who merely signs an otherwise completed instrument prepared by another would be excluded from liability. Delivering and uttering both mean transferring the instrument to another. Uttering also means offering to transfer (i.e., uttering includes an attempted delivery).

Frequently, an accused will have made, uttered, and delivered the same check; in which case, he/she should be alleged as the maker. The accused need not do all three; any one of them will suffice. Consideration, however, should be given to the contingencies of proof (e.g., by pleading in the alternative where there is doubt about the facts or the law).

Check, draft, or order for the payment of money upon any bank or other depository—this is intended to include all negotiable instruments ordering the payments of money by any business regularly, but not necessarily exclusively, engaged in public banking activities. The bank may be real or nonexistent. Checks have been drawn on such fictitious institutions as "The East Bank of the Mississippi." A post-dated check is a "check" within the meaning of Article 123a.

A specification that the accused did "wrongfully make a certain savings withdrawal slip for payment of money" with the intent to defraud, in violation of Article 123a, did not state an offense because "the instrument is clearly not a 'check' or 'draft' . . . and operated only as a receipt and not as an order to pay."

CR 26.4.3. ***Second Element.***

Knowing at the time he makes, draws, utters, or delivers the check (etc.) that the maker or drawer does not or will not have sufficient funds (etc.) for payment . . . in full upon presentment. "Will not have" covers the situation where the accused, at the time he/she makes, etc., knows that sufficient funds currently are on deposit, but also knows because of outstanding checks there will not be sufficient funds at the time of presentment.

Actual knowledge is required. This may be established by circumstantial evidence that the check was drawn on a nonexistent bank, or on a bank at which the accused did not have an account, or the accused signed a fictitious name. Knowledge also may be established by utilizing the statutory rule of evidence provided in Article 123a, that knowledge and intent are established prima facie if payment was refused and the maker did not make good on the check.

However, the statutory rule of evidence establishing knowledge and intent applies ***only*** to makers and drawers. It does ***not*** cover the knowledge and intent element in case of an utterer and deliverer. If the accused makes good six days after notice, the prima facie evidence of knowledge and intent would not be nullified; however, reasonable doubt might exist. The statutory inference is discussed in detail in CR 9.5.

CR 26.4.4. ***Third Element (Intent)***.

There are two mutually exclusive intents covered in Article 123a: to defraud and to deceive. Which intent is applicable depends on what the accused received or attempted to procure.

1. *Intent to defraud.* If the check is made, etc. for the procurement of an article or thing of value, it is with the intent to ***defraud***. ***Intent to defraud*** is an intent to obtain a thing of value by misrepresentation for one's own use ***or*** for use of ***another***, either permanently or temporarily.

2. *Article or thing of value.* MCM, pt. IV § 49c(8), interprets this to include every kind of right or interest in property or derived from contract, including intangible rights, contingent rights, or those which mature in the future. The government must allege at a minimum "for procurement of currency or other thing of value." An allegation of intent to defraud for the procurement of money was held insufficient because money could have been a past-due obligation and, hence, intent to deceive—not an intent to do fraud. Automobile insurance and payment for rental of quarters were held to be things of value within the meaning of Article 123a(1). Value of the article is an essential element. A specification that the accused fraudulently made checks to the PX for procurement of an article fairly implies that the article at least had ***some*** value.

3. *Procurement.* The government need not establish ***what*** the accused received; in fact, it need not establish that he received anything at all, so long as it proves the requisite ***intent*** or purpose to procure. "For the procurement of" some article or thing of value must be alleged, however, and proved.

4. *Intent to deceive.* If the check is made, etc. for payment of a past-due obligation or for any other purpose, it is with the intent to ***deceive***. ***Past-due obligation*** is an obligation to pay money which has legally matured prior to the making, uttering, etc. ***For any other purpose*** is intended as a catch-all for anything that does not fulfill the requirement of "article or thing of value" or "past- due obligation."

a. *Example:* A bad check in payment for laundry services was held to be properly pleaded under Article 123a(2), in that, if past due, then it is expressly covered by Article 123a(2), and if not yet due, then it is covered by "for any other purpose."

b. In one case, C.M.A. dealt with the issue of gambling debts. The Court said that the issuance of a worthless check in a gambling game or as a means of facilitating a gaming transaction cannot be made the basis of a criminal prosecution for allegedly "dishonorable" conduct. Thus, it is questionable, notwithstanding the provision in the *Manual*, if Article 123a covers the issuance of bad checks written to facilitate gambling or in apparent satisfaction of gambling debts. One should carefully review the fact specific holdings in the relevant case law when involved in bad check case involving gambling.

c. ***Intent to deceive*** is an intent to gain an advantage for one's self ***or*** a third person by a misrepresentation; ***or*** an intent to bring about a disadvantage, by misrepresentation, to the one to whom the misrepresentation is made.

5. *Distinction between Articles 123a(1) (defraud) and 123a(2) (deceive).* Defraud connotes obtaining a ***thing*** and, hence, is used in the procurement offense. Deceive does not connote obtaining a thing, but more aptly describes the ***state of mind*** present when one seeks to gain any advantage by a misrepresentation. Deceive is an interest of a lesser degree of seriousness than an intent to defraud. The different degrees of seriousness are reflected in the maximum permissible punishments available.

a. Article 123a(1) covers those situations where the use of a worthless check is with the intent to defraud; and in order to obtain something of value.

b. Article 123a(2) covers those situations where a worthless check is used with the intent to deceive to satisfy a past-due indebtedness; or for any purpose other than obtaining something of value.

c. Hence, these two intents are separate and distinct and neither is included in the other.

(1) *Example:* A specification which alleges the use of a worthless check with the intent to deceive in order to obtain a thing of value does not allege an offense.

6. *Proof of intent.* In most instances, the intent to deceive or defraud will have to be established by circumstantial evidence. Article 123a specifically includes a statutory rule of evidence. It provides that prima facie evidence of (1) the maker's or drawer's intent to defraud or deceive and (2) knowledge of insufficient funds or credit, is established by the drawee's refusal of payment for insufficient funds unless the maker or drawer pays the holder the amount due within five days after notice of nonpayment.

The Military Rules of Evidence contain certain evidentiary procedures to facilitate the prosecution of bad check cases [e.g., exceptions to the best evidence rule. Note that, as in the question of knowledge of insufficient funds, a failure to make a check good within 5 days after notice of nonpayment is prima facie evidence of the maker's or drawer's intent to deceive or defraud. It is ***not*** evidence of the ***deliverer's*** or ***utterer's*** knowledge or intent, however. Note also, however, that this inference may be rebutted.

a. *Example:* An accused cashed worthless checks. On 18 June 20CY, the accused was notified of nonpayment. On that same day he drew $22.00 in pay, but was ordered to pay a mess bill and consequently didn't make good the checks within 5 days. ***Held:*** Reasonable doubt as to intent since the accused could have paid the checks if he hadn't been ordered to pay the mess bill.

Remember that, in order to utilize the five-day presumption, it is necessary to show that the accused received ***notice*** of the drawer's refusal to honor the instrument. Since such notices are commonly mailed, the government may often utilize the general presumption that proof of mailing a properly stamped letter raises the presumption of receipt by the addressee. However, mailing the notice to the Commanding Officer, without further proof that the accused was notified is insufficient to raise the statutory presumption.

CR 26.4.5. *Lesser Included Offenses*.

Neither Article 123a(1) nor Article 123a(2) are LIO's of each other. Both Article 123a(1) and (2), do include as an LIO the offense of "Dishonorable failure to maintain funds for payment of checks," in violation of Article 134.

"Dishonorable failure" differs from Article 123a in that no intent to deceive or defraud is required at the time of the making, drawing, uttering, or delivery of the check. Also, it is limited to a failure to place or maintain funds, whereas Article 123a punishes knowledge at the time of the making, etc., that there is not or will not be funds available.

Note: The word "dishonorably" in the lesser offense under Article 134 does not appear in the greater Article 123a offenses. However, the 123a offenses have been held to include a deliberate design or purpose which is equated to "dishonor." An Article 123a(1) specification alleging "knew he did not have sufficient funds" was held not to include the LIO of dishonorable failure to maintain because there was no direct or clearly implied allegation that the

accused knew he would not have sufficient funds at the time of presentment.

1. *Example.* In one case, the evidence was insufficient to sustain a conviction either under Article 123a or the LIO of Article 134 in light of evidence that the bank previously had honored checks on the accused's overdrawn account, and cashed the checks in question without hesitation, even though accused's name was on an overdrawn list. Though intent is not required to prove the LIO under Article 134, more than simple negligence in failing to maintain sufficient funds in one's account is necessary. The offense requires proof that the accused's nonfeasance was characterized by deceit, evasion, or false promises indicating that he acted in bad faith or gross indifference to the state of his account. Evidence which showed only that accused was totally baffled by the mysteries of checking account management was insufficient to show guilt of making and uttering worthless checks or the LIO of dishonorably failing to maintain sufficient funds.

CR 26.4.6. *Affirmative Defense*.

An honest mistake is an affirmative defense to all Article 123a offenses and, when raised by the evidence, it must be instructed upon.

1. *Example:* Where an accused maintained a joint checking account with his wife, a statement of mitigation and extenuation that he made and uttered checks in the honest belief that he had sufficient funds to cover them, and was only aware of a deficiency when the checks returned, was inconsistent with a plea of guilty to dishonorable failure to maintain sufficient funds.

An intent to redeem, at a future time, checks written on an insufficient account is ***not*** a defense to a bad check charge. Consider the case where the accused admitted that he knew when he wrote the checks in issue that his account was insufficient, but he said he intended to redeem the checks "in a five-day period." He was convicted under both Articles 123a(1) and 123a(2) (different checks).

CR 26.4.7. *Pleading*.

1. *Worthless check with intent to defraud.*

Charge: Violation of the Uniform Code of Military Justice, Article 123a

Specification: In that Corporal Claude D. Paperhanger, U.S. Marine Corps, Headquarters and Service Battalion, Marine Corps Base, Camp Pendleton, California, on active duty, did, at Marine Corps Base, Camp Pendleton, California, on or about 30 March 20CY, with intent to defraud and for the procurement of lawful currency, wrongfully and unlawfully make a certain check for the payment of money upon the Bank of America in words and figures as follows, to wit:

Bank of America No. 67
San Diego, California 30 March 20CY

Pay to the Order of John Jones $25.00

Twenty-five Dollars————————————-Dollars

/s/ Claude D. Paperhanger

then knowing that he, the maker thereof, did not or would not have sufficient funds in or credit with such bank for the payment of the said check in full upon its presentment.

Note that the words and figures on the check should be set forth verbatim in the specification. The best method to do this is simply to insert a photographic copy of the check. Further note that this sample specification is drawn to cover a case where a worthless check has been given to procure an article or thing of value (i.e., currency).

2. *Worthless check with intent to deceive.* The same language as in paragraph 1 above would be used, except the words "deceive and for the payment of a past-due obligation" would replace the words "defraud and for the procurement of lawful currency," unless, of course, the check was to pay for any "other purpose."

3. *Dishonorable failure to maintain funds.* Article 134, UCMJ. *See* MCM, pt. IV § 68f.

CR 26.5. *MILITARY PROPERTY OF THE UNITED STATES (Damage, Destruction, and Loss)*

CR 26.5.1. *General discussion.*

Article 108 attaches criminal liability to conduct which may amount to only simple negligence. Moreover, the penalties which may be imposed are quite severe. This article reflects an essential military requirement: that equipment be available and in working order.

1. *Article 108 is divided into three subsections:*

a. Selling or otherwise disposing of military property of the United States;

b. damaging, destroying, or losing such military property; and

c. suffering such military property to be lost, damaged, destroyed, sold, or wrongfully disposed of.

2. *Concepts common to all three offenses.*

a. *Military property.* There are concepts common to all three offenses. The first commonality is that the property made the subject of criminal allegations must be military property. This means that it is either the uniquely military nature of the property itself, or the function to which it is put, that determines whether it is 'military property' within the meaning of Article 108. The second concept is that there was no property authority to sell or dispose of the property. This simply means that it must be alleged and proved that the accused was not authorized to damage, sell, or otherwise dispose of the property. Although the phrase "without proper authority" should be alleged, a failure to do so will not result in a fatal defect if the specification fairly implies a lack of authority. The element "without proper authority" may be alleged by clear implication in the specification and, furthermore, that the proof that the property was damaged, lost, or disposed of without authority may be established by evidence that the conduct of the accused is generally recognized as not permissible. The better practice, of course, is to allege "without proper authority" in the specification. The last commonality deals with the concept of value. As in larceny and receiving stolen property, the military property which is lost, damaged, or destroyed must be alleged and proven to be of some value. The amount of value is a matter in aggravation. Value may be established in the same manner as in the case of larceny.

CR 26.5.2. *The Offense of Wrongfully Selling or Otherwise Disposing*.

How the accused came into possession of the property is immaterial. It is only of interest what he did with it. In this connection, the limits of the offense are found in the phrase "otherwise dispose of." "Otherwise dispose of" is not limited, by association, to "sell." It includes the unauthorized surrender of the use or control over, or the ostensible title to, military property. It covers a surrender which is permanent or temporary. In one case, it was held that abandonment is a form of disposition. In another case example, C.M.A. held that the pawning of a government parka to cover the costs of a "lady of pleasure" constituted "disposition." In one other example, the co-accused husband and wife were found guilty of wrongful disposal for laying their weapons down at the feet of their command master sergeant and walking away. The events occurred in a forward combat area during Operation Desert Storm. The court held that despite the quick recovery of the weapons, they were none-the-less disposed of by the accused. The manner of disposition should be alleged. If the accused lacked knowledge that the property in issue was "military property of the United States" she has an affirmative defense, provided such lack of knowledge was based on an honest ***and*** reasonable mistake (i.e., this is a general intent offense).

CR 26.5.3. *The Offenses of Damaging, Destroying, Losing, and Suffering to be Lost, Damaged, Destroyed, Sold, or Otherwise Disposed of*.

1. *Mental element.* Willfully means with specific intent. Through neglect means simple negligence (i.e., that the actions of the accused were of such a character that a reasonably prudent person endowed with any special knowledge which the accused might possess would have foreseen that damage or destruction or loss might well result from such action). This element is distinctive when compared to the willful destruction required when nonmilitary personal property is the subject under Article 109. Consider the following examples.

2. *Examples:*

a. Operating a vehicle at a high rate of speed on the wrong side of the road at night is negligence.

b. Accused driving struck gatepost. ***Held:*** No evidence of negligence.

c. Guilty plea to negligent destruction of military property by entrusting a military truck to an unlicensed 16-year-old military dependent who subsequently rolled it was held to be provident. The negligence was the proximate cause of the damage.

d. Under certain limited situations, a justifiable inference of negligence arises (i.e., if the property damaged, destroyed, or lost was an item of individual issue to the accused, and there is no explanation for the loss, damage, or destruction that creates a reasonable doubt as to the accused's negligence, an inference of negligence exists).

3. *Loss, damage.* Lost property is that which has been unintentionally parted with and cannot be found. Damaged property is that made less valuable, useful, or desirable.

4. *"Suffering" means permitting or allowing.* Before permitting becomes criminal, however, it must be shown: That the accused had a duty to protect the property; that there was a failure to perform the duty; and that the failure to perform the duty was the proximate cause of the loss, destruction, etc.

a. *Example:* If the accused, a member of the crew, had inspected the mooring lines as he was required to do, the admiral's barge would not have floated away. The accused suffered the loss of the admiral's barge.

5. *Value.* In the case of loss, destruction, sale, or disposition, the value of the property so lost, etc., controls the limit of punishment. In the case of damage, however, the amount of damage sets the limit.

CR 26.5.4. *LIO's*.

For all the Article 108 offenses, the negligence offense is an LIO of the willful offense.

CR 26.5.5. *Pleading - Sample Specifications*.

1. *Article 108(1) - selling or disposing.*

Charge: Violation of the Uniform Code of Military Justice, Article 108.

Specification: In that Private Randy R. Parts, U.S. Marine Corps, Weapons Company, 2d Battalion, 3d Marines, 1st Marine Brigade, Fleet Marine Force, Pacific, on active duty, did, at Honolulu, Hawaii, on or about 20 April 20CY, without proper authority, sell to Wilbur R. Weakeyes one pair of binoculars, of a value of about $45.00, military property of the United States.

Note. "Disposing of, etc., should be substituted where appropriate.

2. *Article 108(2) - damaging, destroying, or losing.*

a. *Damaged property.*

Charge: Violation of the Uniform Code of Military Justice, Article 108

Specification: In that Seaman Clumse E. Jerk, U.S. Navy, USS BUTTERFINGERS, on active duty, did, on board USS BUTTERFINGERS, located at San Diego, California, on or about 5 June 20CY, without proper authority, through neglect, damage by dropping on the deck one electric typewriter, of a value of about $300.00, military property of the United States, the amount of said damage being in the sum of about $75.00.

Both the specific property damaged and the manner in which it was damaged should be alleged. Both the value of the property and the amount of the damage are alleged. The amount of the ***damage*** fixes the authorized punishment. *See* MCM, pt. IV § 32e.

b. *Destroyed property.*

Charge: Violation of the Uniform Code of Military Justice, Article 108

Specification: In that Seaman Clumse E. Jerk, U.S. Navy, USS BUTTERFINGERS, on active duty, did, on board USS BUTTERFINGERS, located at San Diego, California, on or about 5 June 20CY, without proper authority, willfully destroy by burning, one mattress, of a value of about $63.00, military property of the United States.

The sample specification requires that the manner in which the property was destroyed be alleged. "Through neglect" should be substituted, when appropriate.

c *Lost property.*

Charge: Violation of the Uniform Code of Military Justice, Article 108

Specification: In that Seaman Clumse E. Jerk, U.S. Navy, USS BUTTERFINGERS, on active duty, did, on board USS BUTTERFINGERS, located at San Diego, California, without proper authority, through neglect, lose one compass, of a value of about $25.00, military property of the United States.

d. *Article 108(3) - suffering.*

Charge: Violation of the Uniform Code of Military Justice, Article 108

Specification: In that Quartermaster Third Class Bone E. Elbows, U.S. Navy, USS OOPS, on active duty, did, on board USS OOPS, at sea, on or about 10 March 20CY, without proper authority, through neglect, suffer one sextant, of a value of about $75.00, military property of the United States, to be lost by being knocked over the side of the ship into the sea.

Note: If only damaged, the amount of damage determined by cost of repair or cost of replacement, whichever is lesser, should be alleged.

CR 26.6. *WASTING, SPOILING, DAMAGING AND DESTROYING NONMILITARY PROPERTY*

CR 26.6.1. *Distinction Between Article 108 and Article 109.*

1. *Distinction between Article 108 and Article 109.* Article 109 is concerned with all real and personal property ***other than*** military property of the United States, including nonmilitary government property (U.S. mail truck or Exchange property) and private property. Article 108 deals solely with military property of the United States.

Whereas Article 108 provides that loss, sale, damage, destruction, or disposition of military property may be accomplished either willfully or through neglect, under Article 109, wasting or spoiling (i.e., destroying or damaging) real property must be either **willful or reckless** (a disregard for the probable destructive results of a voluntary act) and damage or destruction of personal property must be **willful** before a criminal liability will attach. Put another way, in order to be criminally liable for destruction of or damage to nonmilitary property, the accused must be more than merely negligent.

As to nonmilitary ***personal*** property, the accused's state of mind must be willful and wrongful. As to nonmilitary ***real*** property, it must be willful or reckless. But, as to military property of the United States, mere negligence will suffice.

Finally, unlike Article 108, Article 109 does not provide any criminal liability for sale, loss, or other disposition (other than damage or destruction) of the nonmilitary property.

CR 26.6.2. *Pleading*.

1. *Sample specification.*

Charge: Violation of the Uniform Code of Military Justice, Article 109

Specification: In that Seaman Recruit Juvenile D. Lenquint, U.S. Navy, USS HOOD, on active duty, did, at Naval Base, Norfolk, Virginia, on or about 20 February 20CY, willfully and wrongfully damage, by breaking the windshield, an automobile, the amount of said damage being in the sum of about $145.00, the property of Yeoman Second Class Ima A. Victim, U.S. Navy.

C.M.A. has determined that the language of Article 109 can reasonably be construed to express a purpose to permit all damage inflicted in a single transaction to be combined into a single offense and, as a result, a difference in the ownership of the several articles damaged would make no difference to the prosecution. Therefore, all articles of property damaged in violation of Article 109, under circumstances indicating only a single incident or transaction, should be alleged as a single offense—regardless of the ownership of the articles.

In an accused damges or destroys	**And the damage or destruction was done**		**Then the Accused is**
Military Property	Willfully Recklessly Negligently		Guilty of Violation Article 108
	Real Property	Willfully Recklessly Negligently	Guilty of Violation 109 Not Guilty
Non-Military Property	Personal Property	Willfully Recklessly Negligently	Guilty of Violating Article 109

PERTINENT DEFINITIONS

1. "Military property" is all property owned, held, or used by one of the armed forces of the United States.

2. "Nonmilitary property" means any property not embraced in definition 1 above.

3. "Realty" means land, buildings, and any fixtures attached thereto such as piers, fences, trees.

4. "Personal" property means any property not embraced in definition 3 above.

5. "Willfully" means intentionally, i.e., the accused actually intended to cause the damage or destruction which resulted.

6. "Recklessly" means that the accused damaged or destroyed the property through a culpable disregard for the foreseeable consequences of his acts.

7. "Negligently" means that the accused failed to exercise the due care which a reasonably prudent man would have exercised under the circumstances.

CR 26.7. ***UNLAWFUL ENTRY - Article 134, UCMJ;HOUSEBREAKING - Article 130, UCMJ; BURGLARY - Article 129, UCMJ***

CR 26.7.1. ***Unlawful Entry***.

Unlawful entry is an "established offense" under Article 134 and is specifically discussed in MCM, pt. IV § 111.

1. *Elements of the offense.*

a. That the accused entered the real property of another or certain personal property of another which amounts to a structure usually used for habitation or storage;

b. that such entry was unlawful; and

c. the conduct was prejudicial to good order or was service discrediting.

CR 26.7.2. ***Housebreaking***.

1. *Elements of the offense.*

a. That the accused unlawfully entered a certain building or structure of a certain other person; and

b. that the unlawful entry was made with the intent to commit a criminal offense therein.

CR 26.7.3. ***Burglary.***

1. *Elements of the offense.*

a. That the accused unlawfully broke and entered the dwelling house of another;

b. that both the breaking and entering were done in the nighttime; and

c. that the breaking and entering were done with the intent to commit therein the offense of (one of the offenses punishable under Articles 118-128, except Article 123a).

CR 26.7.4. ***Comments on the Offense of Housebreaking and the Distinction Between it and the Offense of Unlawful Entry***.

These two offenses are closely related to each other, but there ***are*** distinctions, including the types of structures or enclosures that are protected by each. These distinctions will be discussed below in detail in the section defining "building or structure." Other comments below apply to both offenses, except where specifically noted.

1. *"Unlawfully" enter.* The legality of the entry in housebreaking must be determined solely from the accused's authorization, express or implied. For the purpose of determining the authority to enter, buildings or structures may be classified into three principal groups:

a. those which are ***wholly private*** in character, such as ones' home; every penetration must be regarded as unlawful in the absence of invitation, express or implied;

b. those which are ***public***; all unobstructed incursions must be regarded as authorized in the absence of a clear direction to the contrary; and

c. those which are ***semiprivate***; the following factors, none of which will necessarily control, may be considered:

(1) The nature and function of the building involved;

(2) the character, status, and duties of the entrant;

(3) the conditions of the entry, including time, method, and ostensible purpose;

(4) the presence or absence of a directive of whatever nature seeking to limit or regulate free ingress;

(5) the presence or absence of an explicit invitation to the visitor;

(6) the invitational authority of any purported host; and

(7) the presence or absence of a prior course of dealing, if any, by the entrant with the structure, or its inmates, and its nature.

It is not the criminal intent (i.e., the intent to commit a crime once inside the structure) that makes the entry unlawful, but absence of authorization. When the authority to enter is gained by trick or false pretense, such as falsely representing oneself as a policeman or tendering a bogus identification, the entry is nonetheless unlawful.

See the footnotes for examples where the lawfulness of the entry was questioned.

2. *"Entered"*. The entry of any part of the body, even a finger, is sufficient. Thus, if a wrongdoer puts his hand inside a window that he is raising, this will constitute an entry. An insertion into the structure of an instrument or object may be sufficient to constitute an entry if the insertion is for the purpose of completing the intended offense.

a. *Example:* There is an entry where a hook is inserted through a window to commit larceny or a pistol to commit murder, even though the hand never enters the window. If the only entry is by an instrument that is merely being used to gain admittance (e.g., if, while jimmying open a window, the crowbar extends through the window opening into the structure), then there has ***not*** been sufficient entry to constitute the offense.

3. *A certain "building or structure"*. The word "building" includes a room, shop, store, or apartment in a building. The word "structure," for the offense of ***housebreaking***, refers only to those structures that are in the nature of a building or dwelling.

a. *Examples of things held to be a building or structure include a stateroom, hold, or other compartment of a vessel, an inhabitable trailer, a tent, and a houseboat.* In one case, it was held that a vending machine enclosure consisting of a permanent 40-by-16 foot concrete patio with a corrugated aluminum room attached by steel poles and beams imbedded in concrete, and enclosed by strong plywood and plastic panels which are attached to the concrete base by metal beams, and which can be locked, is a building or structure which can be the subject of housebreaking. It has also been determined that a meat freezer outside an SNCO club was held to be a "building or structure" for housebreaking purposes.

b. *Examples of things held **not** to be a building or structure include a movable footlocker.* An aircraft. A private automobile. A military "track" vehicle. A locker used for storage of personal items and clothing.

It is not necessary to the offense of housebreaking that the building or structure be in use at the time of the entry.

For the offense of unlawful entry, much less of a building or structure is necessary than for the offense of housebreaking. While the restrictions that objects such as aircraft and automobiles are ***not*** buildings or structures for purposes of unlawful entry, as they are not for purposes of housebreaking, some question remains as to the status of certain types of restricted ***enclosures***. As discussed in the footnotes, these fixed enclosures are definitely ***not*** buildings or structures as discussed above regarding housebreaking, but yet have been held to be the proper subject of an unlawful entry offense. This matter has been resolved in part by C.M.A. where they upheld the conviction of an accused for unlawful entry into a government storage area that was simply an open area surrounded by a chain-link fence. It appears then that "building or structure of another" is clearly not the required object of the unlawful entry prohibited by Article 134.

4. *"Of a certain other person"*. When a specification does not allege the element of ownership in another ***directly*** or by ***implication***, the offense of housebreaking is not made out. In one case example the specification alleged that the accused, did, "at Holding and Reconsignment Point, Montgomery, Alabama, on or about 21 November 1951, unlawfully enter Warehouse Number 2, with intent to commit a criminal offense, to wit: larceny, therein." ***Held***: The specification is fatally defective since it contains no averment that the warehouse was the property of another.

A specification charging the offense of housebreaking and alleging that the structure entered was the "Unit Supply Room of the 1268th Air Transport Squadron" sufficiently alleges ownership of the supply room in another. The phrase "Unit Supply Room 1268th Air Transport Squadron" is a sufficient averment of fact to allege ***by implication*** that the supply room is the property of the named squadron.

5. *". . . the intent to commit a criminal offense therein"*. The intent to commit some criminal offense therein is an essential element of housebreaking and must be alleged and proved in order to support a conviction. Housebreaking, therefore, ***is a specific intent offense***. The elements "unlawful entry" and "concurrent intent to commit a criminal offense therein" are distinctly separate and proof of one does not also constitute proof of the other. Any act or omission which is punishable by court-martial, except an act or omission constituting a ***purely military offense***, is a "criminal offense." Therefore, if an accused unlawfully enters a building with the intent to be disrespectful to one of his superiors or with the intent to go UA or with the intent to disobey a lawful order, he has not committed a housebreaking. Has he committed any offense? Yes, unlawful entry under Article 134.

The intent to commit such criminal offense "therein" may be inferred from the accused's conduct once inside the building (e.g., where the accused does commit a larceny inside the building).

CR 26.7.5. *Comments on the offense of burglary.*

1. *Burglary is more limited than housebreaking in that:*

   a. the place entered must be a dwelling house;

   b. it must be a place that is occupied;

   c. it is essential that there be a breaking;

   d. the entry must be in the nighttime; and

   e. the intent must be to commit one of the offenses made punishable under Articles 118 through 128, except Article 123a.

2. *"Dwelling house"*. The term "dwelling house" implies a place of habitation for human beings (i.e., the place burglarized must be lived in). The dwelling house must be occupied at the time of the offense, though it is ***not*** necessary that anyone actually be in the dwelling. The fact that the occupant of the dwelling is temporarily absent on leave, vacation, TAD, etc., or even that the dwelling is closed up for the summer, does not deprive the dwelling of its status of being occupied. The dwelling house includes outstructures attached to or within the common enclosure used as a residence (e.g., a garage). While it is not fatally defective for the word "dwelling" not to appear in the specification, it must, at least affirmatively, appear in the specification that the building entered was in fact a dwelling.

An individual room in a barracks can be the subject of a burglary, as can individual apartments in a building, etc. Even entry into the barracks building itself, without entry into a particular room, may be sufficient to complete the offense.

3. *"Breaking"*. The term "breaking" is a term of art, meaning that the accused must use some degree of force, however slight, to gain entry. It is not required that there be any damage to or destruction of property, yet there must be more than crossing of some imaginary line. If the accused merely walks into the dwelling through an open door, there has been no breaking; but, if he must turn the door knob and open a shut door to gain admittance, a breaking has occurred. Merely opening further a partly open door is sufficient force to constitute breaking. Even where ***no*** force is used, an entry gained by fraud, duress, threats, or trick will constitute a constructive breaking. MCM, pt. IV § 55c(2), contains some examples of constructive breaking.

4. *"In the nighttime."* ***Both*** the breaking and the entering must be in the nighttime. Nighttime is defined by MCM, pt. IV § 55c(4), following the common law rule, as that period between sunset and sunrise when there is not sufficient light to discern a person's face. The presence or absence of any artificial lighting is not relevant.

5. *Intent.* The breaking and entering must be with the intent to commit one of the following offenses: murder, manslaughter, rape and carnal knowledge, larceny and wrongful appropriation, robbery, forgery, maiming, sodomy, arson, extortion, and assault. To make out the offense, it is essential that the specific intent alleged exist at the time of the breaking and entering. An accused's intent may be proved by circumstantial evidence. It is not necessary that the offense actually be committed. If, after the breaking and entering, the accused does commit one of these offenses though, it may be inferred that he intended to commit it at the time of the breaking and entering.

CR 26.7.6. ***Multiplicity***.

Even though they are likely to be a single or integrated transaction or chain of events, housebreaking and burglary are probably ***not*** multiplicious with the commission of their intended crime. The rationale made for this lack of multiplicity is that the offenses deal with different societal norms.

CR 26.7.7. ***Pleading - sample specifications.***

1. *Unlawful entry.*

Charge: Violation of the Uniform Code of Military Justice, Article 134

Specification: In that Seaman Sneak E. Thief, U.S. Navy, USS SLINKY, on active duty, did, at Naval Education and Training Center, Newport, Rhode Island, on or about 1 April 20CY, unlawfully enter Warehouse Building 503, the property of the U.S. Government.

2. *Housebreaking.*

Charge: Violation of the Uniform Code of Military Justice, Article 130

Specification: In that Seaman Sneak E. Thief, U.S. Navy, USS SLINKY, on active duty, did, at Naval Education and Training Center, Newport, Rhode Island, on or about 1 April 20CY, unlawfully enter Warehouse Building 503, the property of the U.S. Government, with the intent to commit a criminal offense, to wit: larceny, therein.

3. *Burglary.*

Charge: Violation of the Uniform Code of Military Justice, Article 129

Specification: In that Seaman Sneak E. Thief, U.S. Navy, on active duty, did, at Naval Education and Training Center, Newport, Rhode Island, on or about 1 April 20CY, in the nighttime, unlawfully break and enter the dwelling house of Yeoman Second Class Ima A. Victim, U.S. Navy, with intent to commit larceny therein.

Omission of the words "break and enter" is fatal to a specification alleging the offense of burglary.

CR 26.8. ***SPECIFIC POINTS OF SIMILARITY AND DISTINCTION BETWEEN OFFENSES AGAINST PROPERTY***

CR 26.8.1. ***Larceny and Wrongful Appropriation.***

Both offenses require a wrongful taking, obtaining, or withholding of personal property of some value from the possession of one with a superior right to possession. Larceny requires a specific intent to deprive permanently. Wrongful appropriation requires only a specific intent to deprive temporarily.

CR 26.8.2. *Larceny and Bad Checks*.

Article 123a (bad checks) prohibits fraud by worthless checks (i.e., the obtaining of a thing of value by a check which cannot successfully be presented for payment). This offense can still be charged as a violation of Article 121.

1. *Distinctions.* Article 123a, however, can also punish the payment of past due obligations by worthless check. This offense is not cognizable as larceny since no tangible property is received when the check is given. Larceny requires an intent to deprive permanently, whereas the bad check offense requires merely an intent to defraud [Article 123a(1)] which may involve permanent or temporary deprivation, or an intent to deceive [Article 123a(2)] which may involve no deprivation at all. Larceny requires a purpose of the accused to possess tangible personal property. The bad check offense (Article 123a) makes punishable the issuance of a worthless check for any purpose. If the purpose was to obtain a thing of value, Article 123a(1) is applicable. If the purpose was anything except a purpose to obtain a thing of value, Article 123a(2) is applicable. Thus, a theft of services, which cannot constitute larceny, can be punished under Article 123a if the theft was by means of a worthless check. Whether the violation is laid under Article 123a(1) or Article 123a(2) depends on whether the services qualify as a thing of value. In the larceny offense, a failure to acquire the property would simply be an attempt; but, under the bad check offense, the crime is complete even though nothing was gained.

2. *Gravamen of Article 121.* It is apparent, therefore, that the gravamen of Article 121 is deprivation of property. However, "deprivation of property" may or may not be involved in Article 123a.

3. *Gravamen of Article 123a.* The gravamen of the bad check offense is the making or uttering of a worthless check with the intent to defraud (obtain something) or deceive (gain an advantage) whether or not anything is in fact obtained or gained thereby.

CR 26.8.3. *Larceny and Receiving, Buying, Concealing, Stolen Property*.

In both larceny and receiving, buying, or concealing stolen property, the accused comes into possession of property of some value which is not his.

1. *Distinctions.* In the latter offenses, the accused may or may not come into possession unlawfully. In the withholding-type larceny, original possession of the property is lawful. Further, in larceny, there must be a wrongful taking or obtaining or withholding from the person in possession. In receiving, buying, or concealing stolen property, the receiver, purchaser, or concealer must acquire possession without the consent of the owner. So, consider the case where the accused was convicted of larceny of $2.00. A close friend of the accused had taken $12.00 from the victim and, the following day, had given $2.00 to the accused, telling him that the money had belonged to the victim. ***Held***: The accused did not commit larceny. C.M.A. stated that, although the accused might have been charged as a receiver of stolen property, there was no wrongful taking, obtaining, or withholding so as to warrant the larceny charge. There was no evidence of taking or obtaining, and a withholding-type larceny required a conversion by a person having lawful possession in the first instance.

In another case, the accused pleaded guilty to larceny of an M-1 rifle. A stipulation of facts constituting the offense was admitted in evidence. The stipulation stated that the accused was advised by a friend that he (the friend) had found an M-1 rifle leaning against a tree while on maneuvers and had hidden it in a lake, then told the accused that he wanted nothing to do with the rifle and that the accused could have it. The accused got the rifle and took it home with the intent to keep it. ***Held***: His plea of guilty was inconsistent with the stipulation of facts, which indicated that he had merely received stolen property, an offense not charged. The Court of Military Appeals reversed his conviction of larceny because the plea of guilty was improvident. The distinguishing principle revealed in the case is between withholding-type larceny and receiving. A larceny by withholding requires initial lawful possession, whereas receiving involves an unlawful possession acquired with consent of the thief.

Quite obviously, in receiving, buying, or concealing stolen property, the property must have, in fact, first been stolen. This is not necessary for larceny, although it is possible to steal stolen property (thief #2 takes from thief #1). Receiving, buying, or concealing stolen property has a requirement that the accused know the property to have been stolen. Quite obviously, this is not a requirement in larceny.

CR 26.8.4. ***Larceny and Misuse of Property***.

In both types of offenses, the accused takes some improper action with respect to another's property. In the case of a wrongful sale or disposition of military property under Article 108, the same act may also constitute a larceny.

1. *Distinctions.* Articles 108 and 109 deal with offenses against real and personal property. Article 121 is concerned only with personal property. Larceny deals essentially with wrongful deprivation, while Articles 108 and 109 also prohibit wrongful damage, waste, etc. Larceny requires a specific intent to deprive. Articles 108 and 109 require no intent to deprive, and the accused's state of mind can be negligent (Article 108) or reckless (Article 109 - real property).

CR 26.8.5. ***Illustrative Fact Situation***.

1. Seaman ***A*** has always wanted to "own" a .45 automatic. One night, while on liberty, he decides to steal one. He drives to the base, takes a pair of bolt cutters from his car, and snaps off the lock of the door to the small arms cabinet. He places his hand on a .45 automatic U.S. Army pistol. What offense, if any, has ***A*** committed? Attempted larceny; willful destruction of military property (lock on small arms cabinet).

2. The accused takes a .45, goes to his barracks and conceals it in his locker. The next day he becomes anxious that he might be caught and decides to get rid of the pistol. He takes it out to the woods in back of the barracks and throws it under a bush. Considering all the facts given, what offenses has ***A*** committed in this hypothetical problem? Larceny of pistol; willful destruction of military property (lock on arms cabinet); wrongful disposition of military property (abandoned pistol).

3. The following day, Seaman ***B*** is in the woods looking for a practice golf ball he has lost and, in thrashing about, he discovers the pistol. He picks it up. He doesn't want anything to do with weapons and puts it back where he found it. Later Seaman ***C*** comes along, sees the pistol and takes it to his barracks intending to take it home as a trophy if no one claims it. What offense, if any, has ***B*** committed? Not larceny no taking with intent to deprive. But, how about wrongful disposition of military property? Was it in his possession? Yes. Was it military property? Yes. Did he abandon it? Yes. Could it be argued in defense that he had no duty with respect to the property? No, not if it's obviously military property. All military personnel have a duty to safeguard military property which comes into their possession. What offense, if any, has ***C*** committed? Larceny, if, under the circumstances, there was a clue as to ownership, he should have taken steps to return the property. But, suppose ***A*** told ***C*** about stealing the pistol, where he hid it, and that ***C*** could have it. ***C*** goes and gets it with the intent to keep it. Is ***C*** guilty of larceny now? No, only of receiving stolen property. There has been no wrongful taking, obtaining, or withholding from the person last in possession.

4. Suppose ***A*** tells ***C*** simply that he stole it, decided to get rid of it, and where he put it. ***C*** goes and gets it with the intent to keep it. Has ***C*** committed larceny or been guilty of merely receiving stolen property? Has ***A*** in effect given it to ***C*** or merely announced his abandonment of it? If the former ***C*** receives stolen property. If the latter ***C*** commits larceny. It would be well to charge both to provide for contingencies of proof. Is ***C*** an A.A.F.? No. There is no showing that he assisted the thief in order to prevent his apprehension, trial, or punishment.

5. Suppose ***C*** now decides to sell the pistol. He takes it to Seaman ***D***, tells him it is stolen military property, and ***D*** gives ***C*** a check for $30.00 in payment for the pistol. The check is drawn on a nonexistent bank. What new offense or offenses are involved? (1) Wrongful sale of military property by ***C***; (2) Making a bad check to defraud in violation of Article 123a(1) by ***D***; (3) Is ***D*** guilty of receiving or buying stolen property? No, his possession was a result of a false pretense and, hence, was not with the consent of ***C***; (4) ***D*** would also be guilty of larceny by trick (false pretense).

CHAPTER 27

CHAPTER 27

CR 27. DEFENSES

CR 27.1. *OVERVIEW OF CRIMINAL DEFENSES*

For purposes of analysis, criminal defenses may be divided into two categories: (1) defenses in bar of trial, and (2) defenses on the merits. Defenses on the merits can be further subdivided into general and affirmative (sometimes called special) categories. Some defenses belong exclusively in one category, while others may be properly placed in either (e.g., the defense of insanity may be raised as a bar to trial if it is alleged that the accused lacks the requisite mental capacity to stand trial; or it may be raised as a defense on the merits if it is alleged that the accused was not mentally responsible at the time of the offense).

CR 27.2. *DEFENSES IN BAR OF TRIAL*

Defenses in bar of trial include those that do not directly relate to the accused's guilt or innocence. They are usually raised prior to the entry of pleas by the accused and, if established, bar further proceedings. Defenses in bar of trial are usually framed as motions to dismiss and litigated as interlocutory issues before the military judge alone. The military judge rules finally on all such issues and these rulings are not subject to reversal although either side may request reconsideration of the military judge's ruling. The ability of the government to request reconsideration is limited by Article 62(a) of the UCMJ. This article states in pertinent part, ". . . if a specification before a court-martial has been dismissed on motion and the ruling does not amount to a finding of not guilty, the convening authority may return the record to the court for reconsideration of the ruling and any appropriate action."

Defenses in bar of trial are not defenses in the strict sense of the word, but may be considered as such because their effect on the outcome of the trial is the same when successfully argued. Some examples of the more common defenses in bar of trial include the following: (1) Former jeopardy (commonly known as double jeopardy); (2) former punishment; (3) res judicata; (4) lack of mental capacity to stand trial; (5) lack of jurisdiction over the person or over the offense; (6) statute of limitations expiration; (7) lack of speedy trial; (8) pardon; (9) immunity; (10) constructive condonation of desertion; and (11) failure to allege an offense.

Defenses in bar of trial and their equivalents are usually raised either prior to trial (addressed to the convening authority) or by motion to dismiss or for appropriate relief (addressed to the military judge) prior to the entry of pleas. Failure to assert them prior to pleas, however, does not constitute waiver. Failure to assert them prior to the conclusion of trial will generally constitute a waiver except with regard to the defenses of lack of jurisdiction over the person or over the offense, failure to state an offense, insanity (lack of mental capacity to stand trial), and speedy trial where there is a delay equivalent to a denial of due process.

CR 27.3. *DEFENSES ON THE MERITS*

Defenses on the merits are those that relate directly to the accused's guilt or innocence of the offenses with which he/she is charged. They are presented during the trial on the merits and are decided by the finder of fact. A successful defense on the merits will usually result in a finding of not guilty to the charges and specifications to which the defense relates. As previously mentioned, defenses on the merits may be divided into two subcategories for purposes of analysis: (1) general and (2) affirmative (or special).

CR 27.3.1. *General Defenses.*

A general defense denies that the accused committed any or all of the acts that constitute the elements of the offense(s) charged, or it may claim that the accused did not possess the requisite intent or other required state of mind. Such a defense may arise through the inability of the prosecution to prove the accused's guilt beyond a reasonable doubt. It may also be raised by defense evidence which raises reasonable doubt about one or more of the elements of the offense charged. Throughout this study guide, issues which may give rise to general defenses have been discussed during the analysis of each separate offense. The following is a discussion of additional examples of general defenses:

1. *Lack of requisite criminal intent.* This defense is raised by evidence (or the lack thereof) that the accused did not possess a required specific intent or other necessary state of mind. Two examples are: (1) the prosecution may fail to prove that the accused had a premeditated design to kill in a murder case; or (2) the

defense may show that the accused did not have the intent to permanently deprive the true owner of the use and possession of his property in a larceny case. In both instances, the defense rests upon the lack of requisite intent—an element which the government is required to prove beyond a reasonable doubt.

2. *Alibi.* Proof of alibi is not a defense in the sense that it absolves one of criminal liability for committing certain acts; rather, it is rebuttal evidence which challenges the prosecution's evidence identifying the accused as the person who committed the crime alleged. The essence of the alibi defense is a showing that it would have been physically impossible for the accused to have committed the crime because he was elsewhere at the time the offense was committed. Once an alibi defense is presented, it becomes incumbent upon the prosecution to rebut the defense and prove the accused's presence at the scene of the offense beyond a reasonable doubt if the accused is to be convicted. R.C.M. 701(b)(1) requires the defense to put the government on notice of this defense disclosing the specific details in advance of trial.

3. *Character*. The Military Rules of Evidence provides that evidence of a person's character or a trait of his character is ***not*** admissible for the purpose of proving that person acted in conformity therewith on a particular occasion, with three exceptions: (1) Evidence of a pertinent trait of the character of the accused offered by the accused or by the prosecution to rebut the same (e.g., evidence of accused's reputation for honesty to rebut larceny charge); (2) evidence of a pertinent trait of character of the victim offered by the accused or by the prosecution to rebut the same (e.g., evidence of the trait of peacefulness offered by the prosecution to rebut the defense's portrayal of the victim in a homicide or assault case as the aggressor); and (3) impeachment evidence. It would appear then that evidence of the accused's general good character will not be accepted into evidence in order to raise a general defense. The *Analysis* to the rules of evidence suggests that evidence of the accused's general good ***military*** character may still be introduced, particularly if the accused is charged with a uniquely military offense. The admissibility of evidence suggesting the good military character of the accused is one of the more frequently litigated appellate issues. It appears that the Court of Appeals for the Armed Forces is taking a more expansive approach toward allowing the use of good military character evidence and has said firmly that good military character ***is*** admissible despite the wording of the rule.

4. *Affirmative defenses.* Affirmative defenses, sometimes called special defenses, are in the nature of the traditional "confession and avoidance." Generally, the accused admits all of the elements of the offense charged, but contends that the conduct was not criminal under the circumstances because of the presence of one or more of these affirmative defenses.

a. *Examples:* Some examples of affirmative defenses include:

(1) *Impossibility.* The inability of an accused, through no fault of his own, to comply with the terms of an order to perform a military duty constitutes a defense. Most often seen in connection with unauthorized absence and orders violation cases, this defense is usually divided into two subcategories: physical inability and financial inability.

(2) *ignorance or mistake of fact;*

(3) *entrapment;*

(4) *self-defense;*

(5) *coercion or duress;*

(6) *accident or misadventure;*

(7) *justification and obedience to lawful orders;* and

(8) *lack of mental responsibility.*

b. *Inconsistent defenses.* There is no proscription in military law against asserting inconsistent defenses.

c. *Procedure.* By their very nature, affirmative defenses are usually raised during the presentation of the defense case, or, if possible, during cross-examination of the prosecution's witnesses. The

burden is generally on the defense to present evidence which raises the defense. Once presented, the burden shifts to the prosecution to prove, beyond a reasonable doubt, that the defense asserted does not exculpate the accused. Of course, the prosecution's own evidence may raise the defense in some cases.

d. *Instructions.* When the evidence whether it be the prosecution's, the defense's, or the court's reasonably raises an affirmative defense, the military judge must sua sponte instruct the members as to the defense and that they may not find the accused guilty of the offense affected thereby unless they are convinced beyond a reasonable doubt that the basis of the special defense does not exist.

CR 27.4. *FORMER JEOPARDY*

CR 27.4.1. *Basis.*

The fifth amendment states, in pertinent part, ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . ." Article 44(a), UCMJ, similarly provides: "No person shall, without his consent, be tried for a second time for the same offense." The double jeopardy provisions of the fifth amendment apply to the military.

CR 27.4.2. *Waiver/Consent.*

There is substantial authority for the proposition that the defense of former jeopardy is waived if it is not raised before pleas or before the conclusion of trial. There are two principal cases on point; they were, however, decided by the Court of Military Appeals in the 1950's, and are therefore relatively aged. In a published decision, however, the Army Court of Military Review decided to depart from this precedent and held that jeopardy is not subject to such waiver, but could be raised for the first time on appeal.

CR 27.4.3. *Analysis.*

Former jeopardy issues can best be analyzed in terms of two questions: First, was the former proceeding a "trial" for purposes of the rule against former jeopardy; and, second, if it was a "trial," did jeopardy attach?

1. *Was the former (first) proceeding a trial?* There are two requirements which must be met in order for this question to be answered properly. First, it must be a criminal judicial proceeding. Second, it must be a proceeding involving the same sovereign.

a. *Criminal proceeding.* The former proceeding must have been a criminal or penal proceeding.

b. *Sovereignty.* In order to constitute a defense, former jeopardy must involve the same sovereign (i.e., the first trial must have been conducted by the same sovereign if it is to be a bar to the second proceeding). This rule may be expanded by agreement or treaty as we shall see in the discussion of foreign court proceedings below.

(1) *State court proceedings.* With respect to state court proceedings, the Supreme Court held that every citizen of the United States is also a citizen of a state or territory and may therefore be said to owe allegiance to two sovereigns and is liable for an infraction of the laws of either or both. The Court concluded that, if both the state and Federal governments punish the offender for the same act, he cannot claim that he has been doubly punished for the same offense since he has committed the offenses by his single act, both of which are punishable.

(2) *Foreign court proceedings.* With respect to foreign court proceedings, in the absence of a treaty to the contrary, an accused can be tried by a foreign country and the United States if his offense violates the laws of both. In most situations involving military offenders, however, there will be a treaty to the contrary since most U.S. military personnel stationed in foreign countries are covered by a Status of Forces Agreement (SOFA). Most U.S. SOFA's contain a provision prohibiting dual trials within the country concerned if the accused was acquitted or is serving or has served his sentence from the first trial, although they do permit the United States to try the military offender for disciplinary violations arising from the event. There is, however, no prohibition for a second trial by the other sovereign if the accused received only a suspended sentence (*but see* discussion below), if the foreign appellate court dismissed the charges voiding the entire proceeding, or if the

foreign jurisdiction "merely took into consideration" the facts of offenses which were later brought to court-martial. In any event, careful perusal of the pertinent SOFA is required in all such cases.

(3) *Limitations.* Regardless of the "dual sovereignty" concepts discussed above, it is the policy of the Navy that:

When a person in the naval service has been tried in a State or foreign court, whether convicted or acquitted, or when a member's case has been "diverted" out of the regular criminal process for a probationary period, or has been adjudicated by juvenile court authorities, military charges shall not be referred to a court-martial or be the subject of nonjudicial punishment proceedings for the same act or acts, except in those unusual cases where trial by court-martial or the imposition of nonjudicial punishment is considered essential in the interests of justice, discipline, and proper administration within the naval service. Such unusual cases shall not be referred to trial by court-martial or be the subject of nonjudicial punishment proceedings without specific permission as provided below.

Those "unusual cases" require the ***prior*** approval by the general court-martial convening authority for trial by summary court-martial or nonjudicial punishment (NJP) or by the Judge Advocate General for special or general courts-martial.

2. *Has jeopardy attached?* Even if the former proceeding was a trial for purposes of former jeopardy, jeopardy may or may not have attached. The former jeopardy defense precludes trial of an accused by the same sovereign only if the trial is for the ***same*** offense for which he/she has been previously tried. It is sometimes difficult to determine whether the second trial involves the same offense since different offenses may arise from one transaction.

a. *Example:* A servicemember may be prosecuted in a Federal court for interstate transportation of a stolen car, given a suspended sentence, and then returned to military control. The military may then choose to prosecute the servicemember at a court-martial for an unauthorized absence incurred while he was in jail awaiting trial by civilian Federal authorities. The same sovereign may thus prosecute twice if the offenses tried are different.

b. *Brown v. Ohio test.* The Supreme Court set forth the test to be applied in determining how many offenses are involved for double jeopardy purposes. The Court said that there are two offenses "if the underlying statute requires proof of a fact which the other does not." Using this test, the Court held in *Brown* that the accused's prior conviction for the lesser included offense of joyriding prohibited his subsequent prosecution for the offense of auto theft.

(1) *Acquittal of greater offense.* Acquittal of the greater offense will bar a subsequent trial for a lesser offense; and conviction of the lesser offense may bar trial of a greater offense. It may also be concluded that acquittal of an LIO bars a subsequent trial for the greater offense if the greater offense differs from the former in degree only (e.g., if the accused is acquitted of manslaughter, he may not be retried for murder of the same victim). Finally, it is apparent that, if the accused is charged with the greater offense but found guilty only of an LIO, he may not be retried for the greater offense since the finding of guilt of the LIO results in a finding of not guilty of the greater offense. (*See* the comments on mistrial below).

Sometimes careful analysis is needed to determine whether the same offense is involved..

(c) *When does jeopardy attach.* The Manual for Courts-Martial indicates that jeopardy attaches when presentation of evidence on the issue of the guilt or innocence has begun. In the military, there is no "jury" trial, and the concept of court-martial "members", though similar, presents significant differences to their civilian jury counterparts. A court-martial composed of members is therefore not a trial by jury. Application of this decision to the military justice system would indicate that jeopardy attaches in a court-martial composed of members when the court is assembled since the members are sworn prior to this time. In trials conducted before military judge alone, the court is assembled when the military judge announces that it is, which generally occurs after the military judge has approved the written request for trial before military judge alone. It would stand to reason, as well, that in nonjury trials (i.e., courts without members or trials before military judge alone), jeopardy does not attach until the first witness is sworn.

d. *Acquittal with jurisdiction.* In the military justice system, an acquittal is final as soon as the findings are announced. The automatic review of courts-martial required by the UCMJ is limited to a

determination of whether the court-martial possessed jurisdiction if the accused is acquitted. If a rehearing is ordered, the accused ". . . may not be tried for any offense of which he was found not guilty by the first court-martial. . . ." This is true even if the legal rulings underlying the acquittal were erroneous. Consider the example where the military judge granted a defense motion for a finding of not guilty to some of the offenses charged; however, he "reversed" himself when the trial counsel called to his attention during a subsequent recess three cases contrary to the defense's position. If a finding of not guilty is made, re-prosecution will be barred whether or not evidence has been presented. Thus, in one case, jeopardy attached during an Article 39a session which resulted in a "not guilty" determination even though no evidence had been produced at the session.

e. *Acquittal without jurisdiction.* The *Manual for Courts-Martial* states that a court-martial proceeding which lacks jurisdiction is not a trial within the meaning of the former jeopardy rule.

f. *Conviction.* Military courts operate under a system of "continuing jeopardy," whereby the accused is considered to have been placed in jeopardy only once throughout the course of the entire review and appellate process.

(1) *Rehearing.* If the findings or sentence are set aside on review, a rehearing may be ordered pursuant to Articles 63, 66, and 67 of the code. If a rehearing is ordered, the trial is not considered complete for jeopardy purposes until the rehearing has been completed and reviewed. The accused is protected during this period of "continuing jeopardy" by provisions prohibiting a rehearing if the conviction is set aside for lack of evidence. Any punishment that may be imposed as a result of the rehearing is limited to that awarded at the original proceeding, as reduced by reviewing authorities. As noted above, a rehearing may not consider any offense of which the accused was previously acquitted. If the reviewing authorities have reversed the conviction for legal insufficiency of the evidence, the accused may not be retried. The usual rule that the accused "waives" his double jeopardy protection by appealing a decision was held inapplicable by the Supreme Court to the situation where the reviewing courts overturned the lower decision because of legally insufficient evidence. The Court held that it mattered not who originated the appeal. This principle would seem to have equal force if the charges were withdrawn after the trial had begun because of insufficient evidence. *See* the discussion on withdrawal of charges, below.

(2) *Sentence deadlock.* If the first court-martial cannot agree upon the sentence to be awarded, the case can be referred to a second court-martial for a rehearing on the sentence, and former jeopardy will not be available as a defense at that rehearing. However, do not confuse this deadlock situation with the situation in which a court-martial imposes "no punishment" as the sentence; former jeopardy considerations would preclude a rehearing in the latter instance since "no punishment" is not a deadlock, but a valid sentence.

g. *Withdrawal of charges.* As noted above, the Supreme Court determined that the Double Jeopardy Clause precludes a second trial once the reviewing authority has found the evidence legally insufficient. The same logic probably prevents the retrial of an accused whose case was interrupted by the withdrawal of his charges due to insufficient evidence. Withdrawal of charges due to other reasons may, however, be held not to bar retrial.

(1) *MCM guidance.* Article 44 (c), UCMJ, provides that "[a] proceeding which, after the introduction of evidence but before a finding, is dismissed or terminated by the convening authority or on motion of the prosecution for failure of available evidence or witnesses without any fault of the accused is a trial . . ." for purposes of former jeopardy. The *Manual for Courts-Martial*, gives more guidance. Charges which are withdrawn after the introduction of evidence on the merits may not be reinstituted unless the withdrawal was ". . . necessitated by urgent and unforeseen military necessity." Charges withdrawn prior to the introduction of evidence may be reinstituted ". . . unless the withdrawal was for an improper reason."

(2) *Case law guidance.* Case law is to the same effect (i.e., if the charges are withdrawn because of lack of evidence or poor trial preparation on the part of the government, the accused may not be retried for the same offense). Note that, where the charges have been ordered dismissed by the military judge due to their failure to state an offense, neither Article 44, UCMJ, nor the Constitution bars a second trial upon properly drafted specifications.

h. *Mistrials.* The general rule is that the declaration of a mistrial will not bar further proceedings unless the declaration was an abuse of discretion and not consented to by the defense, or unless the declaration was the direct result of intentional prosecutorial misconduct.

(1) *Requested by the defense.* If a mistrial is requested by the defense, and granted by the military judge, jeopardy does not attach or is waived, and the accused may be retried for the same offense. This will not hold true for the defense-requested mistrial which is caused by prosecutorial misconduct. If the military judge properly declares a mistrial "in the interest of justice" or due to "manifest necessity," jeopardy does not attach.

(2) *Declared by the military judge in the "interests of justice."* If the military judge abuses his discretion in declaring the mistrial, jeopardy will attach and prevent retrial of the accused. It now appears well settled that the burden of proving that "manifest necessity" existed requiring that a mistrial be declared rests upon the government (i.e. that the trial court did not abuse its discretion in granting a mistrial over defense objection).

(3) *Action by the prosecution.* Where trial counsel's action is held to constitute intentional action designed to provoke the accused's mistrial, re-prosecution is barred by the double jeopardy clause.

(4) *Functional mistrial.* A defense motion for relief which, if granted, terminates the proceedings without a finding with regard to guilt, can be considered the functional equivalent of a mistrial and will have the same effect with respect to former jeopardy. That is, a subsequent trial will not be barred since the termination of the proceedings was at the request of the defense. This is true even though the trial court may somehow indicate its belief in the guilt or innocence of the accused. Thus, the Supreme Court held that where the trial court had merely "expressed its opinion" of the accused's guilt after hearing the evidence of the prosecution and did not make findings, but granted a motion to dismiss for failure of the indictment to allege the requisite intent, reprosecution did not violate the double jeopardy clause of the Constitution. Such a result was said to be "functionally indistinguishable from a mistrial." This same result would occur in the military setting when the defense moves to dismiss a specification for failure to state an offense (i.e., reprosecution is not barred). But, dismissal is not always the functional equivalent of mistrial.

i. *Multiplicity.* In addition to protecting an accused against multiple prosecutions for the same offense by the same sovereign, the fifth amendment also shields an accused from multiple punishment for the same offense. This protection is embodied in R.C.M. 307(c)(4) and 907(b)(3)(B), and is discussed in different chapters of this study guide (e.g., *Pleadings*, chapter II).

CR 27.5. *FORMER PUNISHMENT*

Former punishment is a defense altogether separate and apart from that of former jeopardy. Punishment imposed under the authority of Articles 13 or 15 has not been awarded as the result of a trial; consequently, former jeopardy will not bar a subsequent court-martial in these cases. However, the accused who has already been punished for a minor offense may, nonetheless, have a valid defense under the "former punishment" provisions of the *Manual*.

CR 27.5.1. *Minor Offenses.*

The defense of former punishment is ***limited*** to minor offenses. A minor offense usually does not involve moral turpitude and carries a maximum permissible punishment of less than a dishonorable discharge and / or confinement for one year at a general court-martial. There is, however, no universal standard by which to determine whether an offense is minor. Each case must be evaluated on its own facts (e.g., in determining the issue, the courts have considered such things as the nature of the offense committed, the age and rank of the accused, the time and place of its commission, whether a victim was involved, and the potential for harm to the maintenance of good order and discipline). See the footnotes for case illustrations both of circumstances which the military courts have determined to involve more than "minor" offenses and those that have not.

CR 27.5.2. *Punishment Imposed During Pretrial Restraint of the Accused.*

As noted above, R.C.M. 907(b)(2)(D)(iv), prohibits a subsequent court-martial for minor offenses previously punished under Articles 13 or 15 of the code. Article 13, UCMJ, permits an accused to be punished "for infractions of discipline" while he is being held in pretrial or post-trial restraint. If the accused is punished for such misconduct, he may not be court-martialed for the same offense if the offense in question was minor, as defined above. Cases dealing with this aspect of the former punishment defense may be divided into two categories for purposes of analysis: (1) Those cases in which the punishment was imposed lawfully; and (2) those cases in which the

punishment was imposed unlawfully.

1. *Lawful punishment.* If the accused is subjected to disciplinary punishment for minor infractions of discipline during a period of pretrial restraint, he may not be subsequently prosecuted at a court-martial for the same offense.

2. *Illegal pretrial punishment.* Cases involving illegal pretrial punishment require somewhat more analysis than those noted above. The first issue usually to be resolved is whether the accused has been punished. This is so because at times the "punishment" will be imposed unintentionally by confinement facility officials or command authorities, and because it may or may not be imposed as a result of a disciplinary infraction committed after the accused has been placed in pretrial restraint. Remember that the former punishment defense prevents a court-martial only for the same, minor offense. Hence, if the accused has been punished for some offense other than that for which he is being tried by court-martial, or if the offense for which he is being tried and was previously punished is not minor, then the accused cannot rely on the former punishment defense. The accused, however, may be entitled to other relief. In all of these cases, the illegal nature of the pretrial confinement caused the courts to dismiss the charges or to grant other relief because of the peculiar nature of the charges, the severity of the confinement, or its effect upon the accused's ability to defend himself; however, none were decided on the basis of, or even involved, the former punishment defense.

The MCM indicates that punishment imposed under Article 15 (NJP) or Article 13 (punishment for disciplinary infractions arising while the accused is in pretrial confinement), UCMJ, for ***minor*** offenses will bar a subsequent court-martial for ***those*** offenses. This concept is known as the "former punishment" bar to trial. A ***serious*** offense can be the subject of a subsequent court-martial even if punishment has been previously awarded to the accused under either article.

CR 27.6. *RES JUDICATA*

CR 27.6.1. *Defined.*

The MCM defines res judicata as:

any matter put in issue and finally determined by a court-martial, reviewing authority, or appellate court which had jurisdiction to determine the matter may not be disputed by the United States in any other court-martial of the same accused, except that, when the offenses charged at one court-martial did not arise out of the same transaction as those charged at the court-martial at which the determination was made, a determination of law and the application of law to the facts may be disputed by the United States. This rule also shall apply to matters which were put in issue and finally determined in any other judicial proceeding in which the accused and the United States or a Federal governmental unit were parties.

CR 27.6.2. *Who may assert it?*

Res judicata may be asserted only by the defense.

1. *Same parties.* In order for the defense to assert res judicata, it must be shown that the same parties were involved in both proceedings. Consider the case where the appellant was charged with assaulting a military policeman by assaulting him with an automobile, claimed that he was entitled to the defense of res judicata because the matter of whom the driver of the automobile was at the time of the assault had been previously decided in proceedings held by a U.S. magistrate. The magistrate had decided beyond a reasonable doubt that the driver was an individual other than the appellant. The Army Court of Military Review, however, rejected the appellant's claim by finding that the appellant was not a party to the magistrate proceeding.

2. *Privity of necessary parties.* When a crime is one that, by definition, cannot be committed by only one person, but requires a concert of action or intent by two or more, a determination of an issue in a trial of one of the parties may be pleaded in defense by another person who, although not a party to the former proceeding, was nonetheless a necessary party to the alleged crime.

3. *Principals and accessories.* Except when they are necessary parties, perpetrators, aiders and abettors, and accessories before and after the fact lack privity for res judicata purposes. This is so because the code permits conviction of all principals and accessories, regardless of the conviction or acquittal of the actual

perpetrator.

CR 27.6.3. *What Are Previously Determined Matters?*

See R.C.M. 905(g) discussion, for an excellent compilation of examples. Note that previously determined ***matters of law*** may be contested by the government at a second trial on unrelated charges.

CR 27.6.4. *Prior Acquittal as Res Judicata.*

A finding of not guilty raises the possibility that the accused was acquitted because of a failure of proof of any one or all of the elements of the charged offense. Thus, it is often difficult to determine what factual matters were determined when the accused was acquitted. Military courts will not presume, for purposes of res judicata, that all necessary elements of the offense were decided in favor of the accused by a prior acquittal. Instead, the record of the prior proceeding will be scrutinized, with particular attention paid to the pleadings, the evidence, and argument of counsel. Parol evidence outside the record of the prior proceedings, such as the testimony of court members at the first trial, will not generally be permitted to establish the factual determinations inherent in the acquittal. Instead, the court will examine the evidence and the logical conclusions to be drawn from it, including matters such as which witnesses were apparently believed and which ones apparently were found untrustworthy. The test, ultimately, is whether, after examining all available evidence, a rational jury could have grounded its verdict upon an issue other than that which the accused seeks to foreclose from relitigation.

CR 27.6.5. *Finally Determined.*

For res judicata to prevent relitigation of an issue, that issue must have been finally determined at the prior proceeding. Except for a ruling which is, or amounts to, a finding of not guilty, a ruling ordinarily is not final until action on the court-martial is completed. .

CR 27.6.6. *Parties and Courts.*

As noted above, in order for the defense of res judicata to be successfully asserted, a court of competent jurisdiction must have finally determined the matter in issue between the same parties. R.C.M. 905(g), indicates that any court may have determined the issue in question, including a previous court-martial. As a practical matter, only Federal courts may be looked to since the United States seldom appears in any other type of court as a party. And there is some indication that state court proceedings may not be sufficient to meet the requirements of res judicata. Also recall that, if the convening authority in a given case makes a factual determination, that factual determination may be res judicata if the same matter is put into issue at a subsequent trial involving the same parties (not necessarily the same convening authority). As we have already seen, the accused is usually one party, although, in certain instances, a co-actor will do just as well. The United States must be the other party. This requirement is satisfied if the United States, or any governmental unit deriving its authority therefrom, was a party to the previous proceeding. If a state was the party in the first proceeding, res judicata will not bar the subsequent prosecution.

CR 27.6.7. *Inconsistent Findings Within the Same Trial.*

The doctrine of factual res judicata "through" inconsistent findings at the same trial was rejected by the Supreme Court. The Court there said quite plainly, "consistency in the verdict is not necessary." Thus, within one trial, an acquittal of all or part of a specification has no effect on the remainder of the specification or other specification unless, of course, the remainder of the specification fails to state an offense.

CR 27.6.8. *Relationship Between Res Judicata and Former Jeopardy.*

Res judicata is "an integral part of the protection against former jeopardy." Because of the important distinctions between the concepts of res judicata and former jeopardy, however, the doctrine of res judicata may be applied when the former jeopardy defense cannot. The two most salient distinctions are discussed below. It should be noted that the Supreme Court held that the Federal rule of "collateral estoppel" in criminal cases, which is analogous to res judicata for the military justice system is embodied in the fifth amendment guarantee against double jeopardy. Thus, res judicata may have constitutional underpinnings just as former jeopardy does.

1. *Same offense/same matter.* Former jeopardy may be claimed as a defense only when the accused was formerly tried on the same offense. Res judicata may be claimed in a second trial for a different offense, so long as the "matter" previously determined was the same and the other necessary require-ments are met.

2. *Assembly/final determination.* Jeopardy attaches upon introduction of evidence. There need be no final determination of guilt or innocence at the first trial in order for the accused to claim former jeopardy. Res judicata requires final determination of the particular matter as to which it is invoked. It applies whether the previous trial resulted in conviction, acquittal, or something in between. Note that, where it relates to an evidentiary matter or some other collateral issue, a final determination is possible even though jeopardy has not attached.

a. *Example:* Before assembly of the court, if the military judge dismisses the charges against the accused because of a lack of personal jurisdiction over him due to a void enlistment, that determination will be res judicata at a subsequent court-martial of the same accused. Jeopardy would not attach to the dismissed charges, however, because the motion was granted before the assembly of the court.

CR 27.7. *INSANITY*

CR 27.7.1. *The present standard.*

In 1986, Congress enacted Article 50a of the UCMJ, which provides the insanity standard under military law and applies to all offenses committed on or after 14 November 1986.

CR 27.7.2. *Analysis*.

As will be seen below, Article 50a marks a radical departure from the *Frederick* standard in several significant respects. But, at least one key term from the *Frederick* standard has been left intact (i.e. the term "mental disease or defect"). Thus, the pre-Article 50a case law discussing this term arguably retains its validity. In virtually all other respects, however, Article 50a marks a radical departure from *Frederick*.

1. *Definition of "mental disease or defect."* The procedure that trial judges must continue to follow involves the receipt of testimony on the particular disorder of the accused with submission to the trier of fact of the issue of whether such a disorder falls within the parameters of the standard.

a. *Alcoholism and voluntary intoxication.* Voluntary intoxication by alcohol or drug, even when combined with an existing mental condition, does not raise the issue of insanity if the mental condition alone is insufficient to raise such an issue; however, this is subject to the proviso that consistent use of an intoxicant may itself cause a mental disease. Voluntary intoxication, which does not in itself constitute a mental disease, can negate a requisite specific intent and thereby preclude convictions for specific intent offenses, but it will not absolve one of criminal responsibility where the crime requires no specific intent or other specific state of mind. However, the degree of voluntary intoxication must be such that the mental faculties of the accused are so impaired that the formation of specific intent is not possible. Nor is alcoholic-induced amnesia a defense to a crime. The Model Penal Code recognized "pathological intoxication" as a defense when the intoxication is "grossly excessive in degree, given the amount of the intoxicant, to which the actor does not know he is susceptible." The Court of Military Appeals has not ruled whether this "pathological intoxication" defense is applicable to military law. The Navy-Marine Corps Court of Military Review, however, has specifically refused to recognize a defense of "pathological intoxication."

b. *Drug use.* Drugs are treated the same as alcohol for purposes of mental responsibility. Intoxication, which is the result of voluntary drug ingestion, is not a defense to offenses which are general intent crimes; however, the intoxication may negate the formulation of such an intent and, hence, constitute a defense to offenses requiring a specific state of mind.

c. *Substance within a substance.* The fact that a substance, itself legally consumable such as coffee or beer was adulterated with a dangerous drug may be a defense to criminal liability even for a general intent offense. Where the substance consumed is itself a contraband drug, however, the mental disease or defect will not be held to be "nonculpably incurred" and the accused can be found guilty.

d. *Caveat.* Note that Article 50a says specifically that the "mental disease or defect" must be a ***severe*** mental disease or defect. R.C.M. 706(c)(2)(A) indicates that the term "severe mental disease or defect" does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct, or minor disorders such as nonpsychotic behavior disorders and personality defects.

2. *The cognitive test.* Whereas the *Frederick* test focused its inquiry on whether the accused lacked substantial capacity to appreciate the criminality of his conduct, Article 50a focuses the inquiry on whether the accused was "unable to appreciate the nature and quality or the wrongfulness of the acts." This change appears to be nothing less than an attempt to abolish the ALI standard in *Frederick* altogether and return the insanity standard to the old *M'Naghten* test.

3. *The volitional test abolished.* The *Frederick* standard contained not only a cognitive test (i.e. "lacks substantial capacity to appreciate the criminality of his conduct"), but also a volitional test (i.e. "lacks substantial capacity to conform his conduct to the requirements of law"). Satisfying ***either*** test provided the accused with a viable insanity defense. Article 50a abolishes the volitional test and leaves only a cognitive test. It therefore no longer matters whether the accused had the capacity to conform his conduct to the requirements of law.

4. *Partial mental responsibility ("diminished capacity") eliminated.* The concept of "partial mental responsibility" (sometimes called "diminished capacity") has been abolished by Article 50a which explicitly provides that "[m]ental disease or defect does not otherwise constitute a defense." An identical provision exists in 18 U.S.C. § 17, and the legislative history to that provision makes it quite clear that Congress intended to eliminate any such concept as "diminished capacity." However, an accused can, without raising the affirmative defense of lack of mental responsibility under Article 50a, present evidence that a mental disease or defect rendered him unable to entertain a required specific intent or possess a required actual knowledge. Both military and civilian courts have held that such evidence does not raise an affirmative defense, but merely goes to the issue of reasonable doubt on an essential element.

5. *Burden of proof now on accused.* The most radical aspect of Article 50a is its reversal of the burden of proof. No longer is the government required to prove beyond a reasonable doubt that the accused was sane. Article 50a places the burden of proving the defense of lack of mental responsibility on the ***accused***. The standard is ***clear*** and ***convincing*** evidence.

CR 27.7.3. ***Lack of Mental Capacity to Stand Trial***.

1. *Basis.* Lack of mental capacity is a defense in bar of trial. By asserting it, the defense seeks to postpone trial until the accused is mentally competent to stand trial—if ever. The law recognizes lack of mental capacity as a bar to trial because it would be fundamentally unfair to try an accused who could not understand the nature of the proceedings or who was incapable of cooperating intelligently in his/her own defense.

2. *Standard.* The standard is enunciated in R.C.M. 909. C.M.A. has determined that the accused must be able to comprehend rightly his own status and condition in reference to such proceedings; that he must have such coherency of ideas, such control of his mental faculties, and such power of memory as will enable him to identify witnesses, testify in his own behalf, if he so desires, and otherwise properly and intelligently aid his counsel in making a rational defense.

The Supreme Court held that a trial court must not base its determination that the accused is mentally competent to stand trial upon a mere finding that he is oriented to time and place and has some recollection of events. The test must be "whether [the accused] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him."

a. *Amnesia*. The question of amnesia as it affects the mental capacity to stand trial is an interesting one. As noted above with regard to mental responsibility, amnesia alone, usually of an alcoholic origin, is not a defense on the merits. Similarly, the contention that loss of memory alone constitutes lack of mental capacity has generally been rejected by the courts. C.M.A. has ruled that "The accused may well be characterized by a genuine amnesia as to certain events, yet be able to deal rationally with them, to cooperate with his counsel, and to remember the events taking place at the trial." This general rule may vary, however, if it is shown that the amnesia is accompanied by, or is caused by, a mental defect or disease. It should be noted that amnesia does not prevent the accused from testifying in his own behalf, even if he can't recall the events surrounding the alleged

crime. This is because, other things being equal, the accused still has the ability to testify that he just "doesn't remember." This is not as unusual as it may sound, for many witnesses often cannot remember specific events and testify accordingly. If the accused possesses the ability to deal rationally with his inability to remember, his inability to recall may be a tactical handicap, but it is not a bar to trial.

It is significant to note that the second part of the test is posed in the disjunctive: "to conduct ***or*** cooperate intelligently in his own defense." Thus, if an accused has such a disorder that he is unable to get along with or accept the advice of any lawyer—that is, to cooperate—he is not immune from trial if he does have the substantial ability to intelligently conduct his own defense ***and*** understand the nature of the proceedings. A higher standard of competence must exist for an accused to waive counsel and proceed pro se. An accused may be sufficiently competent to cooperate in his own defense, but may lack capacity to stand trial without the assistance of counsel. In such cases, it must be determined that the accused is competent to understand the disadvantages of self-representation and, in fact, understands such disadvantages.

b. *Raised as motion for continuance.* The defense of lack of capacity is raised as a motion for a continuance and not as a motion to dismiss. In addition, it is an interlocutory question upon which the military judge rules finally.

It is important to note that, unlike mental responsibility issues, to assert a mental defense successfully, the accused need not be suffering from a mental defect or disease. Lack of mental capacity may be based on character disorders and other maladies not generally thought to qualify as mental diseases. *Wisener*, *supra*, and *Bruce*, *supra*. Mental capacity is an interlocutory question of fact to be determined by the military judge, and trial may not proceed unless it is established by a preponderance of the evidence that the accused possesses the requisite capacity to understand the proceedings and cooperate in the defense of the case. R.C.M. 909(c)(2).

CR 27.7.4. *Procedural Aspects of Insanity Issues*.

1. *Inquiry.*

a. *Before referral of charges.* If any commanding officer, investigating officer, trial counsel, or defense counsel has reason to believe that an accused may be insane, or may have been insane at the time of the offense, such fact and support for the belief or observations should be reported to the convening authority. If the convening authority determines that a reasonable basis for inquiry exists, a board of one or more persons will be convened to examine the accused and evaluate the accused's present mental capacity to stand trial and his or her mental responsibility at the time of the offense. Each member of the board shall be either a physician or a clinical psychologist. At least one member should be a psychiatrist or a clinical psychologist.

b. *After referral of charges.* Whether or not the accused has petitioned the convening authority to inquire into the sanity of the accused, once the case has been referred to trial, the defense (or any other party) may request the court to do so. The military judge rules finally as to whether further inquiry should be made. The request for inquiry may be made by trial or defense counsel, any court member, or the military judge on his own motion. The convening authority may order such an inquiry after referral, but before the first session of the court-martial, if the military judge is not reasonably available.

c. *Sanity board requirements.* Regardless of whether the inquiry was ordered before, during, or after trial, R.C.M. 706(c)(2), requires the sanity board to answer each of the following questions—together with any others that the authority ordering the inquiry may pose:

(1) At the time of the alleged criminal conduct, did the accused have a severe mental disease or defect?

(2) What is the clinical psychiatric diagnosis?

(3) Was the accused, at the time of the alleged criminal conduct and as a result of such severe mental disease or defect, unable to appreciate the nature and quality or wrongfulness of the accused's conduct?

(4) Does the accused have sufficient mental capacity to understand the nature of the proceedings and to conduct or cooperate intelligently in the defense?

2. *Litigation of the Issues.*

a. *Litigation of mental capacity to stand trial.* Once the issue is raised at trial as to the present mental capacity of the accused, a ruling must be made. Whether the issue is raised as a result of formal inquiry, by motion for continuance, or through introduction of evidence at trial, the issue is always an interlocutory question to be ruled upon finally by the military judge. If it is not established by a preponderance of the evidence that the accused is mentally competent to stand trial, the proceedings shall be suspended. Depending on the severity and/or duration of the problem, the case may be continued or the charges withdrawn or dismissed.

b. *Litigation of mental responsibility.* The issue of mental responsibility is purely an issue on the merits and cannot be litigated as an interlocutory question.

3. *Deliberation and Voting.* R.C.M. 921 implements a special voting procedure for members deliberations when mental responsibility is in issue. The members first vote on whether the government has proved the elements of the offense beyond a reasonable doubt. If at least two-thirds of the members vote for a finding of guilty (or if all members vote for a finding of guilty where the death penalty is mandatory), then the members will proceed to a vote to determine whether the accused has met his burden of proving lack of mental responsibility by clear and convincing evidence. If a majority determine that the accused has met his burden, then a finding of not guilty only by reason of lack of mental responsibility results. But, if an acquittal does not result from this vote, then the defense of lack of mental responsibility has been rejected and the finding of guilty stands. The members determine the issue of lack of mental responsibility on each specification separately when the issue has been raised with regard to more than one specification.

4. *Action by Convening Authority.* A finding by a court, that the accused is not guilty only by reason of lack of mental responsibility at the time of the offense, is a finding of not guilty which, like all acquittals, may not be disturbed by the convening authority. When the trial has been suspended due to a finding of lack of mental capacity to stand trial, the convening authority may request reconsideration of the ruling based either on a belief that the ruling was erroneous or that the accused's condition has changed. The convening authority may decide to withdraw the charges and reinstate them at a later date. If it appears that the incapacity is permanent, the charges may be permanently withdrawn or dismissed.

5. *Guilty Plea Cases.* If there is any indication that the accused is or was insane at the time of the offense, the military judge must inquire into the matter to determine the providency of the plea, even though the defense does not wish to raise insanity as a defense.

6. *Mental Evaluations of an Accused Under the Military Rules of Evidence.*

a. *Mil.R.Evid. 302, Privilege concerning mental examination of an accused.* The protections of Mil.R.Evid. 302 do not apply to mental examinations not ordered under R.C.M. 706. Hence, independently requested examinations are outside the protection of the rule. But *see also* recent developments regarding Military Rule of Evidence 513, the Psychotherapist-patient privilege, which gives patients the privilege to refuse to disclose and to prevent any other from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist if the communication is made for the purpose of facilitating diagnosis or treatment.

(1) *Waiver.* Failure to move for suppression, or failure to object, constitutes waiver.

b. *Operation of Mil.R.Evid. 302.* It creates a limited testimonial immunity which prohibits the use of any statement made by the accused during any mental examination ordered under R.C.M. 706 of the *Manual*. This immunity is effective even if appropriate warnings have been given to the accused. It purports to extend to ***any*** statement made by the accused and any derivative evidence obtained through the use of such a statement. It applies during trial on the merits and during sentencing proceedings. In conjunction with R.C.M. 706, it creates three different levels of disclosure: (a) The results of the examination; (b) the full report of the board less any statements of the accused; and (c) the specific statements of the accused.

The results of the sanity board (i.e., the ultimate conclusions as to the accused's sanity of the board members—number 1, above) are furnished to all interested parties in R.C.M. 706(c)(3)(A). The full investigative report (numbers 2 and 3, which usually appear in one document) is provided immediately to the defense, but to no one else

outside medical channels. Disclosure (release) of the entire sanity board report to the commanding officer of the accused will be made upon request. *Id.*

If the defense raises the insanity defense by offering expert testimony concerning the accused's mental condition, then the military judge, upon request (motion), ***shall*** order the disclosure (release) of the full report to the prosecution less any specific statements of the accused. If the defense offers specific statements of the accused, the military judge ***may*** upon motion of the prosecution order the disclosure of the statements "as may be necessary in the interests of justice."

c. *Nonmilitary experts used by the defense.* If the defense uses civilian experts, the prosecution could seek a continuance and an order from the military judge that the accused submit to an R.C.M. 706 sanity board. The full report, less any specific statements of the accused, would then be releasable to the prosecution.

If the accused is examined by a sanity board, but the defense does not present any expert witnesses, then the prosecution would not get the full report and is barred from even interviewing the members of the board.

7. *Potential problem areas.*

a. *Neutral statements.* Mil.R.Evid. 302 protects ***any*** statement of the accused, but *United States v. Babbidge*, 18 C.M.A. 327, 40 C.M.R. 39 (1969), sought to protect only incriminating statements as do its progeny. Consequently, the rule's breadth is overbroad. Most psychiatric opinions are based upon what the accused tells the psychiatrist as well as how he tells it. So, if the accused lies, the possibility of an inaccurate assessment is great, yet the prosecution may be prohibited from finding out what the accused told the psychiatrists to gauge the validity of their opinions.

b. *Time of disclosure.* Mil.R.Evid. 302(c) states that the defense offer of expert testimony triggers disclosure to the prosecution of the full report. Does this mean that the prosecution must wait until the defense expert is on the stand, mentions the accused's mental condition, or finishes his direct testimony before it is entitled to disclosure? Or, does it mean that the prosecution is entitled to disclosure as soon as the defense puts in a witness request which is granted?

c. *Civilian experts.* Can the prosecution discover reports written by the defense's civilian experts, including the statements of the accused? "Discovery in a criminal trial is not a one-way street. Appellant sought to turn the proceedings into a jurisprudential game of hide-and-seek instead of a search for the truth. To this he was not entitled."

d. *Defense use of lay testimony.* The plain language of Mil.R.Evid. 302 indicates that the government is entitled to call expert witnesses in rebuttal only if the defense utilizes the testimony of psychiatric experts in presenting the insanity issue to the court. This could occasion the successful assertion of such a defense, even though all experts concur that the accused was sane.

See the footnotes below for reference to further discussion on the impact of the Military Rules of Evidence on mental evaluations.

8. *Post-trial Incarceration of the Criminally Insane.* The Secretaries of several armed forces have been empowered to commit insane service persons and to retain them in medical custody so long as mental disorders persist. There are no mandatory requirements regarding the criminally insane, however, and an accused who is found not guilty because of insanity may be treated, adminis-tratively discharged, or simply sent back to duty. In fact, the military has no medical facilities designed for the long-term treatment of the insane, although the Department of Veteran Affairs (VA) does.

9. *Post-trial Execution of the Criminally Insane.* The U.S. Supreme Court has held that it is unconstitutionally cruel and unusual punishment to execute someone who is insane, regardless of his sanity at the time of trial or at the time of the offense. Whether the standard for insanity under the eighth amendment is necessarily the same as that set forth in Article 50a seems unlikely. And it should be noted that the accused's insanity does ***not*** mean that the adjudged death sentence may never be executed. It only means that the execution is postponed until such time as the accused recovers sufficiently that he may be deemed competent for execution.

CR 27.8. *ENTRAPMENT*

CR 27.8.1. *General concept.*

The defense of entrapment exists when a person acting for, or on behalf of, the government deliberately instills in the mind of the accused a disposition to commit a criminal offense which the accused had no predisposition to commit.

CR 27.8.2. *Subjective analysis.*

Originally, the sole purpose of the entrapment defense was to prohibit unlawful or otherwise objectionable conduct by law enforcement officials. This objective test has given way to a subjective approach that examines the accused's predisposition to commit the charged offense. The defense is "rooted in the concept that Government officers cannot instigate the commission of a crime by one who would otherwise remain law abiding."

CR 27.8.3. *Conduct not constituting entrapment.*

Entrapment is more than merely setting the stage to discover the guilt of one who has conceived his or her own wrongful plan. Nor is it merely setting out marked money, planting decoys, and engaging in other stratagems and trickery. Merely affording the opportunity or facilities for the commission of a crime conceived by another is not entrapment. Targeting an accused for a drug sting operation who is in voluntary treatment for alcoholism in not entrapment. Proof of a profit motive does not by itself negate entrapment. It is merely one factor to consider in deciding whether the accused was predisposed to commit the offense.

CR 27.8.4. *Inducement by an individual acting in a purely private voluntary capacity.*

Inducement by one acting in a purely private capacity is not entrapment. For example, consider the case where after an enlisted men's club had been burglarized, Sergeant ***H,*** the mess treasurer and member of the Board of Governors of the club, became suspicious of the accused. He befriended the accused, who then admitted the crime. Sergeant ***H*** later proposed a second burglary to the accused, who then agreed to participate. Sergeant ***H*** notified his superiors of the planned crime. The accused subsequently was apprehended, tried, and convicted of the second burglary. C.M.A. held this was not entrapment. "Not every person in uniform is an agent of the Government." The evidence showed that Sergeant ***H*** was acting in an entirely private capacity as a volunteer when he and the accused planned the burglary.

CR 27.8.5. *Litigation of entrapment.*

1. *Burden of proof on government.* Once the issue of entrapment is reasonably raised by the evidence, the prosecution assumes the burden of proving beyond reasonable doubt that the accused was not entrapped. For example, the defense of entrapment was held to have been raised by the accused's unsworn statement, following a guilty plea, that he had been approached by a government informant "relentlessly, 25 times at least, day after day." In meeting its burden of proof, the government may utilize any competent, admissible evidence, whether acquired prior to or subsequent to the commission of the offense charged, to rebut the defense.

2. *Evidence of predisposition.* The defense of entrapment will not prevail when there is evidence that the accused was predisposed to commit the crime in the absence of inducement by law-enforcement agents. Thus, the prosecution will generally have wide latitude to show other acts of misconduct by the accused which manifest a predisposition to commit the offense charged and are "reasonably contemporaneous" therewith. Such evidence may still be admissible under Rules 105, 404, and 405 of the Military Rules of Evidence. If its probative value is substantially outweighed by the danger of "unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence," it will be excluded under Mil.R.Evid. 403. With regard to what constitutes "predisposition" or lack thereof, see *United States v. Clark*.

3. *Presumption.* There is a presumption that, once an accused is entrapped, all related criminal acts are tainted. The government must prove that any particular subsequent criminal act is not the result of the entrapment if it is to secure a conviction of that subsequent offense. "The question of whether the Government has met its burden in overcoming the presumptive taint of the first transaction is one of fact for determination by the fact-finder, . . ."

4. *Entrapment as an inconsistent defense.* Entrapment can be raised as an inconsistent defense. It appears from case law that when two or more inconsistent defenses are reasonably raised by the evidence, and that disbelief of one of the defenses does not necessarily disprove the inconsistent defense, even inconsistent defenses must be considered by the trier of fact.

5. *The due process defense.* A rebirth of the objective approach to the entrapment defense has recently occurred, based upon the position that government conduct may be so outrageous as to violate fundamental fairness. For example, in one case, even though the accused was predisposed to committing the offense (thus making the defense of entrapment unavailable), he contended that the conduct of the government agent in supplying him with contraband (marijuana) was so egregious as to violate due process. While he was unsuccessful, the appellate decision left open the possibility that certain government misconduct could indeed require an accused's acquittal separate from subjective entrapment considerations.

6. *Instructions on entrapment.* It is clear from case law that the existence of reasonable suspicion of criminal activity is immaterial. Therefore, there is never a need to offer or receive evidence establishing whether or why any suspicion existed.

CR 27.9. *IMPOSSIBILITY (INABILITY)*

CR 27.9.1. *Defined.*

When it is impossible for the accused to perform a legally required act, the accused will not be criminally liable for a failure to perform. The impossibility may be either physical or financial. It may be caused by natural phenomena, the accused's own physical disability, or acts of third parties. The inability must not arise through any fault of the accused. Impossibility of performance is an affirmative defense in orders violation cases.

CR 27.9.2. *Litigation.*

When the evidence reasonably raises a defense of impossibility / inability, the burden is on the prosecution to prove, beyond a reasonable doubt, that it was not impossible for the accused to perform as required. Whether that burden is met by the government depends upon the test to be used. The test is one of reasonableness, but a reasonableness with three prongs. First, was the defense reasonably raised? Second, was the order given reasonable? Third, was the accused reasonably justified in doing what he did? However, it is important to note that the question of impossibility of performance, unlike the giving of the order itself, is ***not*** one of reasonableness: "[W]hen one's physical condition is such as actually to prevent compliance with the orders or . . . to cause the commission of the offense . . . the question is not one of reasonableness . . . but whether the accused's illness was the proximate cause of his crime." The first prong of the reasonableness test arises in determining whether the defense has been raised by the facts presented. For instance, in one case, the accused claimed that he had been kidnapped and drugged during his absence. The court held that this tale of woe was so "inherently improbable and uncertain" as not to raise reasonably the defense, and that the military judge did not err in failing to instruct the court on the affirmative defense of physical inability to return. The second prong of the reasonableness test has been previously discussed. Chapters III and IV. The third prong of the test, however, cannot be answered until a distinction is made between physical impossibility and physical inability because reasonableness is not an issue in the former, but is in the latter.

The Court of Military Appeals made the following comments on the differences between physical impossibility and physical inability: "The question to be determined [is] simply one of reasonable justification for the refusal [to obey], which would augur against the existence of the necessary element of willfulness. . . . The case, however, is different when one's physical condition is such as actually to prevent compliance with the orders or, as here, to cause the commission of the offense. Upon such a showing, the question is not one of reasonableness vis a vis willfulness, but whether the accused's illness was the proximate cause of his crime. That is the situation here. The case is not one of balancing refusal and reason, but one of physical impossibility to maintain the strict standards required under military law. In such a situation, the accused is excused from the offense if its commission was directly caused by his condition, and the question whether he acted reasonably does not enter into the matter."

Accordingly, the defense, when confronted with a physical disability factual situation, must be able to determine whether the facts constitute an impossibility or an inability because, in the former, the defense must be able to show that the physical disability caused the offense with which the accused is charged; whereas, in the latter, it must be able to show that the accused had reasonable justification for what he did. On the other hand, once the defense bears

its burden of raising the issue, the prosecution must rebut it beyond a reasonable doubt. Furthermore, it is important to realize that the two concepts can be raised and argued in the same case.

An example would be when the defense theory, supported by evidence, is that it was ***physically impossible*** to obey an order, but that even if the court resolved this issue adversely to the accused, the accused's conduct was excusable because of ***reasonable justification due to physical inability*** to comply with the order alleged.

CR 27.10. *IGNORANCE OR MISTAKE*

CR 27.10.1. *Mistake of fact.*

Ignorance or mistake of fact is an affirmative defense when knowledge of a certain fact is necessary to establish the offense charged. Although ignorance of a fact and a mistaken belief about a fact are distinct phenomena, the legal consequences of each state of mind are generally identical.

CR 27.10.2. *Application to Specific Intent Offenses.*

An honest ignorance or mistake of fact, even though unreasonable, is a complete defense to a specific intent offense (i.e. one which requires a specific intent or state of mind). Honest mistake is also a defense to offenses requiring premeditation or willfulness. R.C.M. 916(j). The defense of mistake of fact often arises in sexual assault cases with regard to the consent element. A thorough discussion of this issue appears in a C.M.A. opinion (*United States v. Langley)*. Whether a defense of mistake of fact must be reasonable in a charge of attempted rape is somewhat unclear. . An honest ignorance or mistake is one which is in good faith and not feigned, it is a subjective factor. Some offenses require that the accused possess a certain specific knowledge. An honest ignorance or mistake of fact will be a complete defense to such offenses, even though the ignorance or mistake was unreasonable.

1. *Examples:*

a. *Larceny*. Larceny requires that the accused specifically intended to deprive the owner of the property permanently. If the accused honestly but mistakenly believed that he or she owned the property or had permission to take it, such a belief negates the requisite criminal intent, no matter how unreasonable that belief was.

b. *Desertion*. Desertion requires that the accused specifically intend to remain away without authority from the unit permanently. Thus, one who honestly but mistakenly believed that he or she had been discharged from the service could not possibly have a criminal intent to remain away without authority permanently, even though the mistaken belief was unreasonable.

c. *Fraudulent enlistment*. The offense of fraudulent enlistment requires a specific intent to conceal disqualifying facts. Hence, an honest ignorance or mistake concerning the undisclosed facts is a complete defense. One cannot fraudulently conceal what one doesn't know.

d. *Possession of controlled substances.* Possession of a controlled substance, such as marijuana, must be knowing and conscious. Therefore, if an accused honestly didn't know he or she possessed a controlled substance, such an honest ignorance is a complete defense, no matter how unreasonable.

CR 27.10.3. *Application to General Intent Offenses*.

To be a defense to a general intent offense, the accused's ignorance or mistake of fact must be both honest ***and*** reasonable.

1. *Examples*:

a. The accused is charged with UA. One fact which must be proven is that the accused's absence was without authority. If the accused can show that he genuinely believed, on reasonable grounds, that he/she had authority to be absent, the mistake will be a defense.

b. The accused is charged with bigamy, a general intent offense. Accused's mistaken belief that he was not married (i.e. mistaken as to the existence and validity of a divorce) at the time of the bigamous marriage is a defense only if he had taken such steps as would have been taken by a reasonable man under the circumstances to determine the validity of the belief.

c. The accused is charged with rape, a general intent offense. Accused's mistaken belief that the victim consented because the victim "would consent to intercourse with anyone" is not reasonable.

CR 27.10.4. ***Application to Negligence Offenses***.

1. *Simple negligence.* Ignorance or mistake of fact is a defense to an offense requiring only simple negligence only if the ignorance or mistake is both honest and reasonable.

2. *Higher degree of negligence.* When an offense requires a greater degree of negligence than simple negligence, ignorance or mistake of fact will be a defense only if it was honest and not the result of a degree of negligence required for conviction. Consider the following example. The Article 134 offense of dishonorable failure to maintain sufficient funds in a checking account requires either an intentional failure or a grossly (culpably) negligent failure by the accused to maintain sufficient funds to cover checks drawn against the accused. Thus, if the accused honestly but mistakenly believed that there were sufficient funds in the account, the accused has a complete defense, provided that the mistake was not the result of gross indifference or culpable negligence in handling the account. In other words, the accused's mistake may be honest and unreasonable, but it cannot be culpably negligent.

CR 27.10.5. ***Not Applicable to Strict Liability Offenses***.

Some offenses impose criminal liability notwithstanding the accused's knowledge or belief. Ignorance or mistake of fact, no matter how honest and reasonable, is not a defense to such offenses. For example, consider assault with a dangerous weapon. The accused brandishes a loaded pistol in the face of the victim. The accused's honest and reasonable belief that the pistol is merely a toy is no defense because the accused's knowledge or belief concerning the character of the weapon is irrelevant. The accused is guilty of assault with a dangerous weapon, a serious aggravated form of assault under Article 128. Consider another example, that of the offense of carnal knowledge. The military counterpart to statutory rape is the offense of carnal knowledge with a person, not one's spouse, under age 16. If the victim is under 12 years of age, the accused's knowledge or belief concerning the victim's age, no matter how honest or reasonable, is irrelevant. But if the victim is at least 12 years of age, but younger than 16, an honest and reasonable belief that the victim had attained the age of 16 is an affirmative defense. The accused has the burden of proving mistake of fact as to age in a carnal knowledge prosecution by a preponderance of the evidence.

CR 27.10.6. ***Litigation***.

Once evidence raises the affirmative defense of ignorance or mistake of fact, the prosecution assumes the burden of proving beyond reasonable doubt that the accused was not laboring under a misapprehension sufficient to constitute a defense to the charge. The military judge has a sua sponte obligation to instruct.

CR 27.10.7. ***Ignorance or Mistake of Law***.

1. *Rule.* In military law, as at common law, ignorance or mistake of law is generally no defense. In the military, "law" includes not only statutes, but also general orders and regulations which have the force of law. *See* Chapter IV of this study guide for a detailed analysis of the legal effect of orders.

2. *Exception.* Notwithstanding the provisions of R.C.M. 916(l), ignorance or mistake of law may become extremely relevant and ultimately result in a defense if the effect of the accused's misapprehension was to negate a required mental element, such as actual knowledge of law or the legal effect of known facts. For example, an accused is charged with larceny from the government by obtaining money through a false representation on a travel claim. The accused testifies that he honestly believed he was entitled to reimbursement of dependents' travel before it was actually performed. Although this is clearly a mistake of law rather than fact, it negates the mental element required for a larceny through wrongful obtaining by false pretenses.

CR 27.10.8. *Mistaken Belief*.

In order for the defense of mistaken belief to be a successful defense, the mistaken belief must be such that would exculpate the accused if the facts upon which that belief was based were true.

CR 27.11. *DURESS*

CR 27.11.1. *General concept.*

The defense of duress is available to any crime less serious than murder, and is founded on the lack of voluntariness necessary for an act to be categorized as criminal. For duress to provide a defense to a crime such as larceny, 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 or she did not perform the action, that person, or some other innocent person, would be immediately killed or would immediately suffer serious bodily injury.

CR 27.11.2. *Duress or necessity?*

1. *Duress and necessity distinguished.* An accused has available the defense of duress or coercion when another's unlawful threat causes him to commit a proscribed act. Necessity, on the other hand, is available as a defense where either physical forces of nature or the press of circumstances threaten the accused and cause him to take unlawful action to avoid harm. Under such a definition, necessity has been recognized and applied to the offenses of UA and escape from confinement, but always under the name of duress.

2. *What constitutes "reasonable "fear?* As to the issue of what constitutes "reasonable" fear, it has been determined by military courts to be fear sufficient to cause a person of ordinary fortitude and courage to yield.

3. *The requirement of immediate death or great bodily harm.* On the requirement for immediate death or great bodily harm, there is some uncertainty resulting from the case law as to whether the "immediacy" element of means the fear of harm can include future harm. And as to the question of who must be endangered, the old rule confined the danger to the accused personally. But the expanding rule broadens the coverage beyond just the individual.

CR 27.11.3. *Raising the Issue.*

The defense was raised where the accused stated that he had been "jumped" by 3 to 6 men while on board the base, had suffered a broken bone in his neck, and feared to return to the base because he thought he would be killed.

The defense, however, was held not to have been raised where the accused had been cut over his eye, received stitches and a "light duty chit," but was ordered to work in the mess kitchen washing pots and pans where the temperature exceeded 100°F. He did not report, and the court held the evidence failed to show a fear of immediate death or bodily harm. The defense was also not raised where the accused absented himself from his ship after being told that his whereabouts would be reported to another who had previously threatened to kill him. The court said that the accused could have reported the incident to his superiors who had been responsive and cooperative in assisting the accused in similar situations. And in one last case, the accused stated that he always felt "scared and worried." The court held that this did not raise the defense.

An accused's use of the duress defense creates an opportunity for the prosecution to introduce evidence of the defendant's other voluntary crimes in order to rebut the defense.

CR 27.12. *JUSTIFICATION*

CR 27.12.1. *Protection of Property*.

1. *Use of nondeadly force.* Reasonable, nondeadly force may be used to protect personal property from trespass or theft.

2. *Use of deadly force.* Deadly force may be employed to protect property only if (1) the crime is of a forceful, serious or aggravated nature, (2) the accused honestly believes use of deadly force is necessary to prevent loss of the property, and (3) less severe methods for preventing the loss are not available.

CR 27.12.2. ***Prevention of Crime.***

Under military law, a private person may use force essential to prevent commission of a felony in his presence, although the degree of force should not exceed that demanded by the circumstances.

CR 27.12.3. ***Obedience to Orders.***

Orders of military superiors are inferred to be legal. While it is a good defense that the accused committed the act pursuant to an order which (a) appeared legal and which (b) the accused did not know to be illegal, the defense is unavailable if a person of ordinary sense and understanding would know the order to be unlawful.

CR 27.12.4. ***The Right to Resist Restraint.***

All restraint must be legally imposed by one having authority to do so. There can be no "escape" from confinement if the confinement itself was illegal. An individual is not guilty of having resisted apprehension if that apprehension was without authority.

CR 27.12.5. ***Execution of Parental Duties.***

For an attempted justification defense based on execution of parental duties, *see United States v. Robertson.*

CR 27.13. ***EXCUSE: ACCIDENT OR MISADVENTURE***

CR 27.13.1. ***Accident defense requirements.***

There are two requirements for the defense of accident. They are that the accused must be performing a lawful act and it must be performed in a lawful manner. For example, in one case it was determined that carrying a weapon in violation of local regulation constitutes an unlawful act so as to prevent accused charged with murder from successfully arguing defense of accident. By comparison, it was held that where the violation of the general regulation prohibiting carrying a firearm was not the proximate cause of the victim being shot, the accused was entitled to have the court instructed on the defense of accident. In an assault case, the accused pushed the victim away while holding a razor. Since the injury resulted from an unlawful act intentionally directed at the victim, the fact that the ultimate consequence was unintended does not raise the defense of accident. Performing an act in a lawful manner requires doing so with due care and without simple negligence.

CR 27.14. ***SELF-DEFENSE***

See Chapter VIII, OFFENSES AGAINST THE PERSON

CR 27.15. ***VOLUNTARY INTOXICATION***

See Insanity, *supra*

CR 27.16. ***VOLUNTARY ABANDONMENT***

See Chapter I, BASIC CONCEPTS OF CRIMINAL LIABILITY

CR 27.17. ***GENERAL DENIAL DEFENSES (EXAMPLE: ALIBI)***

CR 27.17.1. ***Alibi is not an affirmative or special defense.***

Alibi is not an affirmative or special defense. It is, like misidentification, evidence which tends to deny the commission by the accused of the objective acts charged. Alibi is rebuttal evidence; it is a "showing that it would have been physically impossible for the accused to have committed the crime. . . ."

CR 27.17.2. ***Raised by evidence.***

Alibi is raised when some evidence shows that the accused was elsewhere at the time of the commission of a crime. It is, therefore, essential that the time and date of the commission of the offense charged be established with exactitude.

Once raised, the government has the burden to disprove the defendants alibi beyond a reasonable doubt.

CHAPTER 28

CHAPTER 28

CR 28. FRATERNIZATION, HAZING AND SEXUAL HARASSMENT

CR 28.1. *FRATERNIZATION*

CR 28.1.1. *Introduction.*

All military personnel are taught mission accomplishment is the primary goal. Fraternization interferes with mission accomplishment. Unduly familiar personal relationships between seniors and subordinates call into question the ability of the senior to lead and to make impartial decisions. More importantly, unduly familiar relationships between seniors and subordinates are contrary to naval custom because they do not respect the roles each party is required to play. It is necessary to uphold the policy against fraternization. It can be properly charged in a variety of ways. This chapter will illustrate these different charging theories.

Historically, the prohibition against fraternization applied only to relations between officers and enlisted and was based on social distinctions. Presently, it is the negative effect fraternization has on discipline and morale that has allowed the proscription to withstand all manners of legal attacks. The courts have held that fraternization compromises the chain of command, undermines a leader's integrity, and, at the very least, creates the appearance of partiality and favoritism.

CR 28.1.2. *Definition of Fraternization.*

Because fraternization has traditionally been a breach of custom, it is more describable than definable. Frequently it is not the acts alone that are wrongful per se, but rather the circumstances under which they are performed.

Every interaction between officers and enlisted is not wrongful. "Fraternization... in plain civilian usage means associating in a brotherly manner; being on friendly terms. The military usage of the term is very similar. . . fraternization refers to a military superior-subordinate relationship in which mutual respect of grade is ignored."

CR 28.1.3 *References.*

The following references apply to the services indicated, and will each be discussed in turn.

1. Article 134; Fraternization
2. U.S. Navy Regulations, Article 1165 (Applies to both USN & USMC)
3. OPNAVINST 5370.2B (Applies only to USN)
4. Marine Corps Manual 1100.4 (Applies only to USMC)
5. Coast Guard Personnel Manual Chapter 8.H.

CR 28.1.4. *Article 134 (83), Fraternization*.

Fraternization may be charged under Article 134, paragraph 83.

1. *Elements of the Offense:* MCM, pt. IV, § 83(b) lists the elements of the offense of fraternization under Article 134. They are:

   a. the accused was a commissioned officer or warrant officer;

   b. the accused fraternized with an enlisted member;

   c. the accused knew the person was an enlisted member;

   d. the fraternization violated the custom of the accused's service; and

e. the conduct was to the prejudice of good order and discipline or was of a nature to bring discredit upon the armed services.

Cases prosecuted as violations of Article 134 must have as their essence conduct which is prejudicial to good order and discipline or which is service discrediting.

Fraternization under Article 134 remains a valid charge, yet has been largely supplanted by various instructions. Charging fraternization under Article 134 requires that the accused be a commissioned or warrant officer, and that the fraternization occurred with an enlisted member. While of course not all contact between officers and enlisted personnel constitutes fraternization, contacts which "lead a reasonable person experienced in the problems of military leadership to conclude that the good order and discipline of the armed forces has been prejudiced by their tendency to compromise the respect of enlisted persons for the professionalism, integrity, and obligations of an officer" are prohibited.

Fraternization under Article 134 includes as required elements of proof elements which are presumed under the above-mentioned instructions. For example, under Article 134 the government is required to prove, beyond a reasonable doubt, that the fraternization violated the custom of the accused's service, and that the conduct was to the prejudice of good order and discipline or was of a nature to bring discredit upon the armed services. Under the instructions, however, if the government is able to prove that an inappropriate relationship existed, these elements are presumed. The government need not offer any evidence concerning them. The relevant instructions greatly ease the government's burden. For this reason, fraternization is typically charged under the instructions, rather than under Article 134.

CR 28.1.5. *U.S. Navy Regulations, Article 1165.*

The provisions contained in the U.S. Navy Regulations are considered to be lawful general orders and are punitive in nature. Violations may be punishable under Article 92, UCMJ as an orders violation. The U.S. Navy Regulations apply to both the Navy and Marine Corps.

Fraternization under the Navy Regulations is defined in nearly identical terms as fraternization under the OPNAV instruction discussed below. The OPNAV instruction post-dates the Navy Regulations, and also provides more information and definitions than Article 1165, and is thus more often used as the basis of a charge. The Navy Regulations are, however, a punitive lawful general order, and suspected fraternization cases may be charged as violations of Article 1165 under Article 92, UCMJ.

CR 28.1.6. *OPNAVINST 5370.2B (May 1999).*

OPNAVINST 5370.2B is a lawful general order, and is punitive in nature. Violations may be punishable under Article 92, UCMJ as an orders violation. This instruction applies to the U.S. Navy only and requires annual command training.

1. *Officer-enlisted relationships.* The instruction states that "personal relationships between officer and enlisted members that are unduly familiar and that do not respect differences in grade or rank are prohibited." Unlike Article 134, wherein the accused must be a commissioned or warrant officer, both officers and enlisted personnel may be charged pursuant to this instruction. In an officer-enlisted situation, the "one step test" is used. If the relationship is found to be unduly familiar, by definition fraternization exists. Such a relationship is *presumed* to be prejudicial to good order and discipline. An unduly familiar relationship is one in which differences in grade or rank are not properly respected. Examples include dating, shared living accommodations, intimate or sexual relations, commercial solicitations, private business partnerships, gambling, or borrowing money. This list is merely illustrative; it is not exhaustive. One common misconception is that a sexual relationship is a prerequisite to fraternization. The law is well established that this is not the case.

2. *Officer-officer/enlisted-enlisted relationships.* When prejudicial to good order and discipline or of a nature to bring discredit on the naval service, personal relationships between officer members or between enlisted members that are unduly familiar and that do not respect differences in grade or rank are prohibited. Fraternization exists if the relationship is unduly familiar, AND is prejudicial to good order and discipline or is service discrediting. Unlike in the officer-enlisted situation, here the presumption mentioned above does not exist, and fraternization will exist only if the unduly familiar relationship is proven to be either prejudicial to good order and discipline or service discrediting. Examples are conduct which calls into question a senior's objectivity, results in

actual or *apparent* preferential treatment, undermines the authority of a senior, or compromises the chain of command.

3. *Chief Petty Officer-junior enlisted.* Chief petty officers occupy a unique leadership position within the Navy, and as such there are some special fraternization rules which apply to these types of relationships. If the relationship between a chief petty officer and an enlisted member in the pay-grade of E-6 or below is unduly familiar, fraternization is presumed to exist, as long as the chief and the junior enlisted are attached to the same command. If the individuals are not attached to the same command, however, the two-step test mentioned above should be utilized.

4. *Staff/Instructor-Student Relationships.* Unduly familiar relationships which do not respect differences in grade, rank, or the staff-student relationship within Navy training commands are presumed to be prejudicial to good order and discipline and are prohibited.

5. *Recruiters-Recruits/Applicants.* Unduly familiar relationships which do not respect differences in grade, rank or the staff-student relationship are presumed to be prejudicial to good order and discipline and are prohibited.

6. *Proper Interaction.* Events which build unit morale, esprit de corps or camaraderie are encouraged. Examples are command sports teams and command sponsored events.

7. *General Concepts.* The OPNAV instruction is gender-neutral, and does not require a direct senior-subordinate supervisory relationship. A subsequent marriage does not excuse or mitigate any illegal conduct. While both parties are accountable for their actions, and both parties may be properly charged with violations of the UCMJ, seniors have the primary responsibility for ensuring that fraternization does not take place, and that inappropriate relationships are avoided.

CR 28.1.7. *USMC Manual.*

U. S. Navy Regulation 1165 prohibits fraternization in the same way as the OPNAV instruction. The reference uses the same one-step and two-step tests described *supra*.

1. *Officer-enlisted relationships.* The Manual states that "personal relationships between officer and enlisted members that are unduly familiar and that do not respect differences in grade or rank constitute fraternization and are prohibited." This language is similar to that found in the OPNAV instruction, and the resulting one-step test is identical as well.

2. *Officer-officer/enlisted-enlisted relationships.* Similarly, "when prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces, personal relationships between officer members and between enlisted members that are unduly familiar and do not respect differences in grade or rank constitute fraternization and are prohibited." Again, as in the OPNAV instruction, in these types of relationships the Marines use a two-step test to determine whether fraternization has occurred.

CR 28.1.8. *USCG Manual, Chapter 8.H.*

Personal, non-romantic relationships (such as occasional movies, dinners, or other like social contacts) are acceptable unless: a senior's impartiality is jeopardized; the respect inherent in a member's rank or position is undermined; or the relationship results in a member improperly using the relationship for personal gain.

Romantic relationships are improper when: a supervisor-subordinate relationship exists; both members are assigned to the same small shore unit or cutter; the relationship exists between senior enlisted (E-7 & above) and junior enlisted (E-4 & below); or the relationship is noticeable in the work environment and disrupts the daily business.

Such romantic relationships are prohibited, but violations are generally handled through administrative, rather than punitive, means.

1. *Punitive personal relationships.* The following relationships are expressly prohibited and violations may be addresses through punitive measures:

a. sexual relations or intimate behavior aboard any Coast Guard vessel or work place;

b. romantic relations between commissioned officers and enlisted members (these situations are charged under Article 134, UCMJ);

c. personal or romantic relationships between instructors at training commands and students.

CR 28.1.9. *Constitutionality.*

The United States has largely recognized the military's unique need for discipline, against which certain personal liberties may pale.

1. *Freedom of association.* This right is accorded less weight because of the negative impact fraternization has on discipline. The prohibition is "valid and necessary" to preserve good order and discipline while at the same time discouraging inappropriate conduct between seniors and subordinates.

2. *Vagueness.* The existence of a long-acknowledged custom, and the circumstances surrounding the misconduct, make the prohibition against fraternization specific.

3. *Equal protection.* Officers have always been held to a higher standard of conduct, so it is reasonable to single them out. Some regulations governing fraternization apply to instructor-student relationships, even when the instructors are also enlisted. Singling out this group of enlisted personnel has also been held to be reasonable because of their temporary special status as teachers.

4. *Privacy*. There is no right to privacy when it compromises discipline. The need for discipline has been called a compelling state interest when weighed against an individual service member's need for sexual privacy.

CR 28.1.10. *Possible Actions.*

There are several means by which fraternization can be resolved within the command, from the least serious to the most serious, including:

1. counseling (formal or informal);

2. Letter of Instruction;

3. Non Punitive Letter of Caution;

4. comment on FITREP/EVAL;

5. reassignment;

6. administrative separation;

7. NJP; and

8. court-martial.

CR 28.2. *HAZING*

CR 28.2.1. *Introduction.*

Hazing, as explained below, has become a "hot topic" in the national press, due to several video-taped hazing episodes. Commanders and judge advocates have an obligation to ensure that hazing does not occur, and, if it does occur, to take adequate and prompt disciplinary or administrative action against those involved.

CR 28.2.2. ***References.***

The following references apply to the services indicated, and will be discussed in turn.

1. DoD Memo of 28 Aug 97 (Gives authority to services to implement punitive orders);

2. SECNAVINST 1610.2 (Punitive order applicable to USN & USMC);

3. MCO 1700.28 (Punitive order applicable to USMC);

4. OPNAVINST 3120.32C ;

5. Coast Guard: COMDTINST M1000.6A, CG PERS.MAN. CH. 8-J, 8-K.

CR 28.2.3. ***SECNAVINST 1610.2 (1 Oct 1997).***

1. *Hazing Definition.* Hazing is defined as any conduct where one military member, without authority, causes another military member to suffer or be exposed to any activity which is cruel, abusive, humiliating, oppressive, demeaning, or harmful. Soliciting or coercing another to participate is also a form of hazing.

2. *Hazing includes* (but is not limited to) the following:

a. playing abusive or ridiculous tricks;

b. threatening, offering, or doing bodily harm;

c. striking, branding, taping, tattooing, shaving, greasing, or painting (including "Pinning", "tacking on", and "blood wings");

d. physical training beyond that required to meet standards;

e. and forced consumption of food, alcohol, drugs, or any other substance.

3. *Prohibited actions.* The following actions are expressly prohibited:

a. engaging in hazing or consenting to acts of hazing being committed on them;

b. failing to report known incidents of hazing; and

c. reprisal action against any victim or witness;

4. *Command responsibilities.* Due to the heightened awareness of hazing issues, including the possibility of servicemembers being hurt or perhaps even killed, much responsibility is placed upon the command. Supervisors at all levels may not condone or ignore hazing if they reasonably should have known it was occurring; and supervisors must also ensure that members participating in command ceremonies are treated with dignity and respect. This rule places direct responsibility upon members of the chain of command to take a personal, hands-on role in regards to hazing issues. Commands must:

a. provide annual training to all hands;

b. ensure all ceremonies comply with rules;

c. investigate all incidents and determine if they are substantiated;

d. ensure victims are not re-victimized;

e. report all substantiated incidents to Chief of Naval Operations or Commandant of the Marine Corps via OPREP; and

f. provide witnesses & victims with their rights under VWAP (Victim Witness Assistance Program).

CR 28.2.4. *OPNAVINST 3120.32C.*

1. *Naval customs, ceremonies, and traditions.* The Commanding Officer or his/her personal representative shall be personally involved in the planning and execution of each and every ceremony. These ceremonies may not contain any sexually suggestive activities, props, costumes, skits, gags, or gifts. Commands are responsible for respecting personal and religious beliefs; there must be no coercion to participate, and of course each ceremony, etc., must comply with all health, safety, and environmental regulations.

Naval customs, ceremonies, and traditions are an important part of Navy life. Commands must ensure, however, that when held, these events should enhance unit morale, pride, professionalism, and esprit de corps. Due again to the heightened public awareness of these events, commands MUST ensure that each ceremony could withstand close public scrutiny, and must ensure that no criminal actions (such as Equal Opportunity violations, fraternization, or sexual harassment) are taking place.

CR 28.2.5. *Possible actions.*

Upon receipt of a valid hazing allegation, commands may choose to prosecute those responsible, and may do so under any or all of the following:

1. Article 92, UCMJ, Failure to Obey Order or Regulation (SECNAV or MCO);

2. Article 128, UCMJ, Assault;

3. Article 93, UCMJ, Cruelty or Maltreatment; and

4. Article 81, UCMJ, Conspiracy

CR 28.3. *SEXUAL HARASSMENT*

CR 28.3.1. *References.*

The following references apply to the services indicated, and will be discussed in turn.

1. SECNAVINST 5300.26C, Subj: Department of the Navy (DON) Policy on Sexual Harassment;

2. OPNAVINST 5354.1E, Subj: Navy Equal Opportunity (EO) Policy;

3. MCO 1000.9;

4. MCO 5354.1C, Marine Corps Equal Opportunity Manual;

5. NAVADMIN 080/98, Subj: Changes to OPNAVINST 5354.1 DH;

6. ALMAR 130/98, Subj: Changes to Timelines and Procedures for Processing and Reporting Sexual Harassment Complaints;

7. DOD Dir. 7050.6, Subj: Military Whistleblower Protection

CR 28.3.2. *Background.*

From the earliest days of the U.S. Navy and U.S. Marine Corps, regulations, statutes, and customs of the Naval service prohibited the improper or unlawful conduct of superior commissioned and non-commissioned officers toward their subordinates. American military jurisprudence has long recognized that military and operational effectiveness is undermined when persons subject to military orders are maltreated by commanders or other servicemembers in positions of authority. Similarly, cruelty or illegal conduct by one shipmate toward another

shipmate also threatens unit cohesion and preparedness for combat and has long been prohibited. The Department of the Navy's policies promoting equal opportunity and prohibiting racial, ethnic, or sexual discrimination are an evolution of these long standing Naval customs protecting individual servicemembers and promoting combat readiness and efficiency.

Commanders will turn to their staff judge advocate in all phases of implementing this policy from training, education and prevention programs to investigating reported violations and filing appropriate reports with higher command authorities. In order to discharge their duties as Naval officers, judge advocates must be knowledgeable about sexual harassment policies as well as the procedural requirements for implementing this policy at the ship or unit level.

CR 28.3.3. *Constitutionality.*

There have been a few unsuccessful constitutional challenges against the sexual harassment policy.

1. *Due Process.* The court determined the Navy's sexual harassment instruction, SECNAVINST 5300.26C, did not violate the Due Process Clause of the Fifth Amendment to the U.S. Constitution because it provides an objective, three-prong test for determining what constitutes sexual harassment.

2. *Vagueness.* The sexual harassment policy defined what constituted sexual harassment and the consequences of violating the policy.

3. *Freedom of expression.* This right is accorded less weight because of the negative impact of sexual harassment. The clear purpose of the instruction is legitimate: to promote good order, discipline, and military effectiveness. The remote possibility that the appellant may have experienced an unconstitutional "chilling" of his free-speech right does not overcome the principle, that if the effect of the service member's conduct "directly and palpably" prejudices good order and discipline, undermines the mission, or discredits the service, the military may constitutionally prosecute such conduct.

CR 28.3.4. *Sexual Harassment Defined.*

Sexual harassment is a form of sex discrimination that involves <u>*unwelcome*</u> sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature when: submission to such conduct is made either explicitly or implicitly a term or condition of a person's job, pay or career; submission to or rejection of such conduct is used as a basis for career employment decisions affecting that person; or such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile, or offensive work environment.

CR 28.3.5. *Elements of Sexual Harassment.*

In order for a Sailor or Marine's behavior to be considered sexual harassment the following essential elements must be present:

1. the behavior is unwelcome;

2. sexual in nature; and

3. it must occur in, or impact on, the work environment.

Simply put, unwelcome behavior is defined as behavior that a person does not ask for and which the complainant considers undesirable or offensive. The initiation of the complaint, therefore, is subjective to the extent that the recipient of the behavior determines if the behavior is undesirable or offensive. Once the complaint is alleged, it is subject to review by the commander using an objective "reasonable person standard." Under this objective test, the behavior in question is measured by hypothetically exposing a "reasonable person" to the same facts and circumstances. The DON sexual harassment policy is gender neutral; and, there are a growing number of cases of same gender sexual harassment being reported.

DON policy specifically calls for common sense in determining whether a behavior is sexual in nature. Some behaviors are easily recognizable as sexual in nature. When the behavior includes references to sexual acts or sexually explicit jokes or stories, it is clear that the conduct, speech, or communicative gesture refers to matters relating to sexuality. In the case of physical contact between servicemembers, a careful review of all the surrounding facts and circumstances may be required to determine whether the physical contact or touching is sexual in nature.

The nexus between the unwelcome behavior and the work environment must be considered in the context of the unique nature of Naval service. Sailors and Marines are subject to the Uniform Code of Military Justice (UCMJ) even during periods of authorized leave or liberty. Therefore, the work connection definition is expansive and not simply limited to behaviors that occur in the strict spatial confines of the place where military work is routinely performed. Inappropriate behavior occurring at any location, if it has the ability to negatively impact the complainant's work environment, from recreational or sporting events to shopping at the local commissary, may be sufficient to initiate a complaint under the DON prohibitions against sexual harassment. If a complaint alleges conduct that, after investigation, a commander determines was inappropriate but not substantiated as sexual harassment, the commander may consider any appropriate administrative or judicial remedy to hold the accused responsible the inappropriate conduct.

Sexual harassment may arise from workplace conduct that is intimidating, hostile, or abusive. This does not require, however, actual psychological harm to the victim.

CR 28.3.6. ***The Complainant's Actions.***

Victims of sexual harassment are "encouraged" to address their concerns directly to the person engaging in the offensive behavior as the first line of defense. Resolution at the lowest possible level, between the complainant and the offending person, is generally referred to as the "Informal Resolution System." However, in light of the superior-to-subordinate relationships inherent in naval service, the direct approach is not always practical. If the complainant feels too threatened to confront the offending party or feels that an attempt to confront the offender would be futile, the complainant should report the behavior to his or her chain of command as soon as possible. If the complainant approaches the offender using the Informal Resolution System but the offensive conduct continues, the complainant's chain of command must be *promptly* notified. The complainant should notify his or her chain of command any time: (1) the behavior does not stop; (2) the situation is not resolved; (3) addressing the offender directly is not reasonable; or (4) the behavior is clearly criminal.

CR 28.3.7. ***Sexual Harassment Complaints.***

Complainants of sexual harassment may use any, or a combination of, the following procedural methods to notify their commander of offensive conduct: (1) request mast; (2) Article 138, UCMJ, complaint; (3) Article 1150, U.S. Navy Regulations, redress of wrong committed by a superior; (3) Inspector General complaint; or (4) communications with U.S. Congress. Complaints should be made within 60 days of the last offensive behavior. Commanders receiving complaints over 60 days old should evaluate them and determine the reason for the delayed report and whether an adequate investigation could still be conducted considering availability of witnesses or evidence. Careful and objective reasoning must be used when evaluating complaints filed late. Attach a written evaluation and explanation of any decision to not investigate a report of sexual harassment because the complaint was received over 60 days from the latest incident. Keep the file with the other sexual harassment case files.

Complainants making false or malicious accusations are subject to administrative or criminal punishment. Staff Judge Advocates, with an objective eye to the proper administration of justice, should be involved in the decision to proceed with investigations into false or malicious complaints.

CR 28.3.8. ***The Commander's Actions.***

Responsibility for implementing the sexual harassment policy has been placed squarely on the shoulders of Navy and Marine Corps commanders. Commanders must *actively* prevent sexual harassment in their workplace by conducting annual training to ensure everyone understands how to report and to whom to report offensive conduct. In addition to a moral obligation to prevent discrimination, DON policy subjects commanders who condone sexual harassment to administrative and criminal punishment. Commanders must exercise well-reasoned and proper judgment when implementing the sexual harassment policy and investigating complaints. Leaders at any level who condone offensive behavior are risking their career.

Commanders must be keenly aware of their obligations to investigate complaints of sexual harassment. Although a commander is personally responsible to execute DON policy and procedures, he or she may rely on the staff judge advocate to guide them through the process from investigation to resolution and final reporting. Commands must adopt sexual harassment complaint procedures that govern reporting, investigation, and resolution in a manner that is consistent with applicable Marine Corps Orders or OPNAV Instructions. It is simply too late to develop sexual harassment complaint procedures after a problem or deficiency has been identified.

Sexual harassment complaints must be handled in the following manner:

1. *Within 24 Hours:*

a. The complaint must be presented to the Commanding Officer within 24 hours (NOT one (1) business day) of initial receipt within the command.

2. *Within 72 Hours:*

b. After the Commanding Officer gets 'eyes on' the complaint, he or she must initiate an investigation. For:

c. NAVY: send a sitrep in accordance with OPNAVINST 5354.1E to the General Court-Martial Convening Authority;

d. USMC: forward the complaint or a detailed description of the allegation in writing through the chain of command to the General Court-Martial Convening Authority.

e. Inform the parties to the complaint that the complaint has been received and is being investigated.

f. Assign personal advocates to all parties to the complaint.

3. *Within 14 Days:*

a. Complete the investigation.

4. *Within 20 Days:*

a. Submit a final report in writing to the General Court-Martial Convening Authority on the results of the investigation, including any actions taken. If the investigation or final actions are not complete, submit a written progress report containing the cause of the delay on day 20 and every 14 days thereafter until the investigation is complete. The final report must include the Commander's determination whether the complaint is substantiated or unsubstantiated and any corrective action taken (administrative or punitive). Please note, it may be enough to say "NJP was administered, the offender was found to have committed the offense and appropriate non-judicial punishment was awarded."

b. Notify complainant and accused of the outcome and have them acknowledge the notification in writing.

c. Notify the complainant that he or she has the right to have the investigative findings and command action reviewed by a higher authority, usually the General Court-Martial Convening Authority. The request for review must be submitted within seven (7) calendar days of this acknowledgement.

CR 28.3.9. ***After the Final Report.***

Notify the complainant in writing of the results of the investigation including the date the investigation commenced and was completed as well as findings, determination whether substantiated or unsubstantiated, and to the extent practical, the corrective action to be taken. The complainant, however, has the right to appeal this finding to the next officer in the chain of command.

CR 28.3.10. *Corrective Action.*

Commanders who determine that sexual harassment has occurred have a wide array of leadership tools, administrative actions, or military criminal law to redress unacceptable behavior. Commanders must review all available evidence including the investigation findings and recommendations in order to select the corrective action that is appropriate in light of the facts and circumstances. Corrective action may include: (1) non-punitive measures (e.g., non-punitive letter of caution); (2) formal counseling documented in official military personnel files; (3) non-judicial punishment; (4) courts-martial; or (5) administrative separation.

CR 28.3.11. *Implications of the DON Zero Tolerance Policy.*

Commanders are required to initiate administrative separation proceedings for substantiated cases of sexual harassment involving: (1) actions, threats, or attempts to influence another's career or job in exchange for sexual favors; (2) rewards in exchange for sexual favors; or (3) physical contact of a sexual nature which, if charged under the UCMJ, could result in a punitive discharge. The fact that an administrative separation proceeding has been initiated does not automatically mean the servicemember will be discharged from the Naval service. The zero tolerance policy simply refers to the commander's lack of discretion on initiating separation proceedings. By DON policy, the commander must initiate separation proceedings when there are substantiated findings in any of the three categories previously described.

CR 28.3.12. *Reprisals.*

Commanders must be on guard against reprisals or intimidation against servicemembers who complain of sexual harassment discrimination. Reprisals are also punishable under applicable orders.

CHAPTER 29

CHAPTER 29

AD 29. ADMINISTRATIVE INVESTIGATIONS

AD 29.1. *REFERENCES:*

JAGMAN, Chapter II

JAGINST 5830.1

PART A: GENERAL DISCUSSION

AD 29.2. *PURPOSE AND FUNCTION*

The primary purpose of an administrative investigation is to provide adequate information regarding a specific incident, which occurs within the Department of the Navy. This allows for appropriate and responsive decisions and action based upon the information developed. As the name denotes, these investigations are purely administrative in nature - not judicial. As such, the investigation is advisory only.

The primary function of an administrative investigation is to search out, develop, assemble, analyze, and record all available information relative to the incident under investigation. This information, organized as findings of fact, opinions and recommendations and developed through the investigatory process, may provide the basis for various actions designed to improve command management and administration, resolve claims for or against the government, publish "lessons learned" to the fleet (particularly pertaining to safety), and allow for fully informed administrative determinations concerning personnel.

AD 29.3 *PRELIMINARY CONSIDERATIONS AND TYPES OF INVESTIGATIONS*

Preliminary Inquiry. While not required, a preliminary inquiry serves as an analytical tool to determine whether additional investigation is warranted into an incident and, if so, how that investigations should be conducted. Generally, an officer in command (including an officer-in-charge) is responsible for initiating preliminary inquiries into incidents occurring within, or involving personnel of, the command. In the event of a major incident however, the issue will be forwarded immediately to the officer exercising general court-martial convening authority over the command involved. That individual will then act at the Convening Authority (CA).

Principal Characteristics:

Generally the preliminary inquiry will be completed within three working days of thee commander’s learning of the incident.
The CA will normally appoint an officer immediately to conduct a preliminary inquiry. This officer will begin to locate and preserve evidence and identify and interview witnesses.
A CA may direct the investigating officer to submit oral reports which would then allow the CA to make a timely decision as to how to proceed with the investigation.
A preliminary inquiry is concluded when the commander who initiated the inquiry has sufficient information to determine that no further action is necessary, or alternatively, that a more formal investigation is required.

Should a commander determine that further investigation is warranted, they may choose from one of four types of administrative investigations described in Chapter II of the JAGMAN. Those investigations are: command investigations, litigation-report investigations, courts of inquiry, and boards of inquiry. Each is described below in detail.

Command Investigations. By far the most common administrative fact finding body is the command investigation. Its purpose is to gather, analyze, and record relevant information about an incident or even of primary interest to command authorities. Examples of appropriate command investigations are: significant property losses, incidents in which a member of the naval service, as a result of possible misconduct, incurs a disease or injury that may result in permanent disability or inability to perform duty for a period exceeding 24 hours, deaths of military personnel or civilian personnel occurring aboard an activity under military control when apparently caused by suicide or under other unusual circumstances, and aircraft incidents.

Principal Characteristics:

Such an investigation may be convened by any officer in command (including an officer-in-charge).

The investigation is conducted by one or more persons assigned from within the Department of the Navy. Most command investigations will be conducted by a commissioned officer, although warrant officers, senior enlisted personnel, or civilian employees may also be used when considered appropriate.

Legal counsel is not normally assigned to assist in the investigation, although legal assistance or other forms of administrative and / or technical support may be assigned in the discretion of the convening authority and as resources allow.

The investigation is convened by written appointing order (oral or message orders initiating command investigations must be followed up with written and signed confirmation).

The investigation does not involve formal hearings. The investigating officer collects evidence by personal interview, written correspondence, telephone inquiry, or other means deemed appropriate, and may, but is not required to; obtain sworn statements signed by witnesses.

The investigative report is documented in writing in the manner prescribed by the convening authority in the convening order.

The investigation is normally due 30 days from the date of the convening order.

Litigation Report Investigations. A litigation report investigation is appropriate whenever the primary purpose of the investigation is to prepare and defend the legal interests of the Navy and the United States in claims proceedings or civil litigation. While closely resembling the command investigation in method of evidence collection and report preparation, there are special rules for the litigation-report investigation, the most important being that a judge advocate must be personally involved in directing and supervising the investigatory effort.

Principal Characteristics:

The investigation may be convened by an officer in command but only after the officer in command has consulted with the cognizant judge advocate. The cognizant judge advocate is that individual who is responsible for providing legal advice to the convening authority. This will often be a station or staff judge advocate, but may also include a command services or claims officer at the servicing Naval Legal Services Office.

The investigation is conducted by one or more persons assigned from within the Department of the Navy, under the direction and supervision of the cognizant judge advocate. While responsible for supervising the investigation, this does not mean the cognizant judge advocate necessarily becomes the investigating officer. Most litigation report investigations will be conducted by a commissioned officer, however, when considered appropriate, warrant officers, senior enlisted personnel, or civilian employees may also be used.

The investigation is convened by written appointing order that is specifically tailored to ensure appropriate procedure.

The investigation does not involve formal hearings, but instead collects evidence by personal interview, written correspondence, telephone inquiry, or other means deemed appropriate.

The investigative report is documented in writing in the manner prescribed by the cognizant judge advocate.

Courts of Inquiry. The court of inquiry is the traditional means by which the most serious military incidents are investigated. A court of inquiry is not a court in the sense the term is used today; rather, it is a board of senior officers charged with searching out, developing, assembling, analyzing, and recording all available information concerning the incident under investigation. When directed by the convening authority, the court will offer opinions and recommendations about an incident.

Principal characteristics:

The court is convened by any person authorized to convene a general court-martial or by any person designated by the Secretary of the Navy.

It consists of three or more commissioned officers. When practicable, the senior member, who is the president of the court, should be at least an 0-4. All members should also be senior to any person whose conduct is subject to inquiry.

Legal counsel, certified under article 27(b) and sworn under article 42(a), UCMJ, is appointed for the court and such counsel acts under the direct supervision of the president of the court, assisting in all matters of law, presenting evidence, and in keeping and preparing the record. Counsel does not perform as a prosecutor, but must ensure that all the evidence is presented to the court.

The court is convened by written appointing order. The required contents, along with an example, can be found in JAGINST 5830.1, encl. (1), par. 4, and encl. (3).

The court must designate as a "party" to the investigation any person(s) subject to the UCMJ whose conduct is "subject to inquiry" and / or any other Department of Defense employee(s) who has a "direct interest" in the subject under inquiry where such an employee has requested to be so designated. Designation as a "party" affords that individual an opportunity to participate in the hearing as to possible adverse information concerning him or her.

A person's conduct or performance is "subject to inquiry" when that person is involved in the incident under investigation in such a way that disciplinary action may follow, that rights or privileges may be adversely affected, or that personal reputation or professional standing may be jeopardized.

A person has a "direct interest" in the subject of inquiry when: (1) the findings, opinions, or recommendations may, in view of the person's relation to the incident or circumstances under investigation, reflect questionable or unsatisfactory conduct or performance of duty; or (2) the findings, opinions, or recommendations may relate to a matter over which the person has a duty or right to exercise control.

All testimony is under oath (except for a person designated as a party who may make an unsworn statement) and transcribed verbatim (except arguments of counsel). Witnesses and evidence are presented in the following order after opening statements are made: counsel for the court; a party; counsel for the court in rebuttal; and, subsequently, as requested by the court. After testimony and statements by the parties, if any, counsel for the court and counsel for the parties may present argument.

Rights of a Party: A person designated as a party has the following rights:

to be given due notice of such designation;
to be present during the proceedings, except when the investigation is cleared for deliberations;
to be represented by counsel;
to be informed of the purpose of the investigation and be provided with a copy of the appointing order.
to examine and object to the introduction of physical and documentary evidence and written statements;
to object to the testimony of witnesses and to cross examine adverse witnesses;
to request that the court of inquiry or investigation obtain documents and testimony of witnesses, or pursue additional areas of inquiry.
to introduce evidence;
to testify at his/her own request, but not be called as a witness.
to refuse to incriminate oneself and, if accused or suspected of an offense, to be informed of the nature of the accusation and advised that no statement regarding the offense of which he is accused or suspected is required, and that any statement made by him may be used as evidence against him in a trial by court-martial;
to make a voluntary statement, oral or written, sworn or unsworn, to be included in the record of proceedings.
to make an argument at the conclusion of presentation of evidence;
to be properly advised concerning the Privacy Act of 1974; and
to challenge members.

Although a court of inquiry uses a formal hearing procedure, it is administrative not judicial. Therefore, as in any other administrative investigation, the Military Rules of Evidence (MRE) need not be followed, **except for**:

MRE 301, self-incrimination;
MRE 302, mental examination;
MRE 303, degrading-questions;
MRE 301-501, dealing with privileges;
MRE 505, classified information;
MRE 506, government information other than classified information;
MRE 507, informants.

A court of inquiry has the power to subpoena civilian witnesses, who may be summoned to appear and testify before the court the same as at trial by court-martial.

Use of the Record of the Court of Inquiry.

Nonjudicial punishment (NJP). If an individual is accorded the rights of a party withrespect to the act or omission under investigation, punishment may be imposed without further proceedings. The individual may, however, submit any matter in defense, extenuation, or mitigation.

General court-martial (GCM). In cases where a GCM is contemplated, it is sometimes possible to use the record of a court of inquiry in lieu of a formal pretrial investigation of the offenses. As a practical matter, it is difficult to substitute a court of inquiry for an article 32 pretrial investigation because of article 32(c) of the UCMJ. Normally, the convening of a separate article 32 investigation is the most efficient method for bringing an accused before a GCM.

Use of testimony. Sworn testimony contained in the record of proceedings of a court of inquiry before which the accused was not designated as a party may not be received in evidence against the accused unless that testimony is admissible independently of the provisions of Art. 50, UCMJ, and MRE 804.

Right to copy of the record. A party is entitled to a copy of the record of an article 32 pretrial investigation where trial by GCM has been ordered, subject to the regulations applicable to classified material. R.C.M. 405(p)(3). The same right may presume to exist as to a Court of Inquiry record where so used in place of the article 32 investigation. If a letter of censure or other NJP is imposed, the party upon whom it was imposed has a right to have access to a copy of the record in order to appeal.

Board of Inquiry. A board of inquiry is intended to be an intermediate step between a court of inquiry and a command investigation. Such investigations are used, for example, when a hearing with sworn testimony is desired or designation of parties may be required, but only a single investigating officer is necessary to conduct the hearing.

Principal Characteristics:

The board is convened by any person authorized to convene a general court-martial.

It consists of one or more commissioned officers. The board should normally be composed of a single officer; however, if multiple members are considered desirable, a court of inquiry should be considered.

Legal counsel should be appointed for the proceedings, with duties and requirements identical to those for a court of inquiry.

The investigation is convened by written appointing order.

The convening authority may designate any persons whose conduct is subject to inquiry, or who has a direct interest in the subject of inquiry a "party" in the convening order. The convening authority may also authorize the board to designate parties during the proceedings.

The definitions and rights afforded a "party" at a board of inquiry are identical to those applied to a court of inquiry. A formal hearing procedure, similar to the court of inquiry, is used. Unless convened to investigate a claim under Art. 139, UCMJ, and JAGMAN, Chapter IV, the board does not possess the power to subpoena civilian witnesses.

PART B: DECIDING WHEN ADMINISTRATIVE INVESTIGATIONS ARE REQUIRED

AD 29.4. *INVESTIGATIONS REQUIRED BY THE JAGMAN*

Whenever an officer in command desires to obtain additional information regarding any incident occurring within, or involving personnel of his / her command, an administrative investigation may be convened. However, as a matter of practice, administrative investigations are typically reserved for only those incidents that are required to be formally investigated, as directed by the JAGMAN or other Navy or Marine Corps instructions. This approach is due, in most part, to the significant amount of time and effort required of both the investigation officer and the command in ensuring the administrative investigation is properly conducted, formatted, and endorsed.

Required instances:

Aircraft accidents**.** Serious aircraft mishaps, those resulting in death or serious injury, extensive damage to government property, or where the possibility of a claim exists for or against the Government, require a JAGMAN investigation.

Motor vehicle accidents**.** Except for the most minor of accidents ($5,000.00 or less of property damage, and / or involving only minor personal injury, in which case completion of a SF 91 may be satisfactory), all accidents involving government motor vehicles must be investigated with a JAGMAN administrative investigation.

Explosions.

Ship stranding.

Collisions and Allisions**.** All collisions and allisions are admiralty incidents. Be aware of the claims aspect in any such cases. Consult Chapter XII of the JAGMAN regarding "admiralty claims" and the OJAG notification requirement.

Flooding of a ship. Whether intentional or accidental, "significant" flooding incidents require an administrative investigation.

Fires. Where "significant," a JAGMAN investigation is required.

Loss of excess of government funds or property. Except for minor losses, which can be adequately investigated and documented through use of supply reporting procedures, JAGMAN investigations are required for losses of public funds and public property.

Claims for or against the government.

Health care incidents. Where claims are filed as a result of a health care incident, or when there is a death or potentially compensable event potentially attributable to inadequate health care rendered by Government employees or provided in a military treatment facility, a JAGMAN investigation is required.

Reservists. An investigation is required if a reservist is injured or killed while performing active duty or training for a period of 30 days or less, or while performing inactive-duty training (drill), or while traveling directly to or from such duty.

Firearm accidents. Incidents involving accidental or apparently self-inflicted gunshot wounds must be documented in an administrative investigation.

Pollution incidents. Significant incidents of pollution, such as oil or hazardous material / waste spills, may require the convening of an administrative investigation, particularly where assessment of a fine or penalty from a regulatory agency may be anticipated.

Security violations. Where there has been a compromise of classified information and either: (1) the probability of harm to national security cannot be discounted; (2) significant command security weaknesses have been revealed; or (3) punitive disciplinary action is contemplated, a JAGMAN investigation must be convened.

Postal violations**.**

Injuries or diseases incurred by servicemembers**.** Administrative investigations will normally be convened whenever there is evidence to suggest that an injury or disease sustained by a servicemember may have been incurred while "not in the line of duty."

Death Cases. JAGMAN investigations are not normally conducted where the death of a servicemember was the result of a previously known medical condition or the result of enemy action. However, a JAGMAN investigation is required where a servicemember dies under the following circumstances:

Civilian or other non-naval personnel are found dead on a naval installation under peculiar or doubtful circumstances;
The circumstance surrounding the death places the adequacy of military medical care reasonably at issue;
A probable nexus between the naval service and the circumstances of the death of a servicemember exists (other than as a result of enemy action); or
The death resulted from a possible "friendly-fire" incident.

Where the death of a servicemember occurred at a location within the U.S. and not under military control, while the member was off-duty, and there is no discernable nexus between the circumstances of the death and the naval service, the command need only obtain a copy of the police investigation and retain it as an internal report.

Additional rules and considerations in death cases are discussed in Chapter II, Part C, infra.

PART C: SELECTING THE APPROPRIATE TYPE OF ADMINISTRATIVE INVESTIGATION

AD 29.5. *PRELIMINARY INQUIRIES*

Background. The type of fact-finding body to be convened is determined by the purposes of the investigation, the seriousness of the issues involved, the resources available and time allotted for completion of the investigation, and the nature and extent of the powers required to conduct a thorough investigation. The most common administrative investigation will be the command investigation; however, depending upon the seriousness and the nature of the incident, one of the other types may be appropriate. A useful tool to determine whether administrative investigation is warranted and if so, the type and how the investigation should be conducted, is the preliminary inquiry (PI). While not required, it is “advised” for all incidents that potential warrant administrative investigation.

A commander may conduct a PI personally or appoint a member of their command to do so. The PI is strictly informal and may be conducted in any manner considered sufficient. Generally, the PI should not take any longer than three (3) working days. If more time is required, it means that the inquiry officer is attempting to do too much or has not been sufficiently instructed as to what issues are to be addressed. Upon completion of the PI, a report is tendered to the commander who convened the inquiry. The PI report need not be in writing, but some form of limited documentation is advisable.

Command Options**.** Upon reviewing the results of the PI, a convening authority may take one of the following actions:

Take no further action. Where further investigation would serve no useful purpose, a decision may be made not to convene a JAGMAN investigation. This is especially appropriate where the PI reveals that the incident is likely to be of little interest to anyone outside the immediate command or that the event will be adequately investigated under some other procedure. As a matter of practice, documentation of the PI and command decision is advisable.
Conduct a command investigation.
Convene a litigation-report investigation.
Convene a Court or Board of Inquiry.

It is always appropriate for a convening authority to consult with a cognizant judge advocate before deciding on how to proceed.

Reporting the Results**.** After deciding which of the command options to exercise, the commander convening the PI is to report that decision to his immediate superior in the chain-of-command. This does not require a special, stand-alone report; command decisions on PIs are relayed in the context of existing situational reporting systems.

While the initial determination of which option to exercise is a matter of command discretion, superiors in the chain-of-command may direct that an option be reconsidered or that a particular course of action be taken.

AD 29.6. *MAJOR INCIDENTS*

For those situations determined to be "major incidents," a court of inquiry shall be convened unless the convening authority determines such type of administrative investigation is otherwise unwarranted and the next superior in the chain-of-command concurs in the decision not to convene a court.

A major incident is an “extraordinary incident occurring during the course of official duties where the circumstances suggest a significant departure from the expected level of professionalism, leadership, judgment, communication, state of material readiness, or other relevant standard" resulting in:

Multiple deaths
Substantial property loss
Substantial property loss is that which greatly exceeds what is normally encountered in the course of day-to-day operations.
Substantial harm to the environment
Substantial harm is that which greatly exceeds what is normally encountered in the course of day-to-day operations.

The first Flag or General Officer exercising general court-martial convening authority over the command involved, or the first flag or general officer in the chain-of-command, or any superior flag or general officer, will take immediate control over the case as the convening authority.

Normally, it is advisable for the Flag or General officer to appoint an officer to immediately conduct a PI. The information developed and evidence prepared through the PI can then be used by the Flag or General officer to decide the appropriate type of administrative investigation and assist the court of inquiry, if one is convened.

Conclusions must be reported to the next superior in the chain-of-command before any other type of investigation is convened.

Death Cases**.** If at any time during the course of a court or board of inquiry, it appears to the investigation that the intentional acts of a deceased servicemember were a contributing cause to the incident, it will notify the Convening Authority. In turn, the Judge Advocate General will be notified and the appropriate safeguards will be implemented to ensure a fair hearing regarding the deceased member's actions.

Notwithstanding the fact that a death case may not be a major incident as defined, the circumstances surrounding the death or resulting media attention may warrant the convening of a court or board of inquiry as the appropriate means of investigating the incident.

CHAPTER 30

CHAPTER 30

AD 30. CONDUCTING COMMAND INVESTIGATIONS OR LITIGATION REPORT INVESTIGATIONS

AD 30.1. *REFERENCES*

JAGMAN, Chapter II

PART A: COMMAND INVESTIGATIONS

AD 30.2. *CHOOSING THE INVESTIGATOR*

A command investigation is most frequently conducted by a single investigator. The investigating officer should normally be a commissioned officer, but may be a warrant officer, senior enlisted, or a civilian employee, when appropriate. Investigating officers must be those who are best qualified for the duty by reason of age, education, training, experience, length of service, and temperament. Whenever practicable, the investigating officer should be senior to any person whose conduct or performance of duty will be subject to inquiry.

Experts, reporters, interpreters, or other assistants may be appointed to assist the investigating officer in timely completion of the report. Additionally, though counsel is not appointed ordinarily for a command investigation, a judge advocate is often available to assist the investigating officer with any legal problems or questions that may arise.

AD 30.3. *CONVENING ORDER*

A command investigation is initiated by a written order called a convening order. The officer in command responsible for convening the investigation issues this order. As appropriate, the convening order will direct the investigating officer to consult a judge advocate, when the report is due, whether or not to provide opinions or recommendations, and should identify potential witnesses and sources of information, and where applicable, that coordination with criminal investigators is necessary.

A convening order must be in official letter form, addressed to the investigating officer. See JAGMAN, Appendix A-2-c for a sample convening order. When circumstances warrant, an investigation may be convened on oral or message orders. The investigating officer must include a signed, written confirmation of oral or message orders in the investigative report.

Privacy Act Warnings**.** The convening order directs the investigating officer to comply with the Privacy Act, Article 31(b) of the UCMJ, and injury / disease warning. It also directs the investigating officer to other applicable JAGMAN sections. Additionally, the convening order may direct that testimony or statements of some or all witnesses be taken under oath, and may direct that testimony of some or all witnesses be recorded verbatim. When a fact-finding body takes testimony or statements of witnesses under oath, it should use the oaths prescribed in JAGMAN, § 0213b(3).

The Privacy Act of 1974 (5 U.S.C. § 552a) requires that a Privacy Act statement be given to anyone who is requested to supply "personal information" (as defined in JAGMAN, appendix A-2-a) in the course of a command investigation when that information will be included in a "system of records" (as defined in JAGMAN, appendix A-2-a). Note that witnesses will rarely provide personal information that will be retrievable by the witness' name or other personal identifier. Since such "retrievability" is the cornerstone of the definition of "system of records," in most cases, the Privacy Act will not require warning anyone unless the investigation may eventually be filed under that individual's name. JAGMAN, § 0215a.

Social security numbers should not be included in command investigation reports unless they are necessary to precisely identify the individuals involved, such as in death or serious injury cases. If a service-member or civilian employee is asked to voluntarily provide social security numbers for the investigation, a Privacy Act statement must be provided. If the number is obtained from other sources (such as alpha rosters and the like), the individual does not need to be provided with a Privacy Act statement. The fact that social security numbers were obtained from other sources should be noted in the preliminary statement of the investigation. JAGMAN, § 0215b.

Other Necessary Warnings. A service-member suspected of an offense must first be warned under Article 31(b), UCMJ, before a statement is taken. If prosecution for the suspected offense appears likely, refer to JAGMAN, § 0214d(2) and appendix A-i-m of the JAGMAN. Ordinarily, the investigating *officer* should collect all relevant information from all available sources-other than from those persons suspected of offenses, misconduct, or improper performance of duty-before interviewing the suspect.

A member of the armed forces, prior to being asked to sign any statement relating to the origin, incidence, or aggravation of any disease or injury suffered, shall be advised of his/her statutory right (10 U.S.C. § 1219) not to sign such a statement and, therefore, the member is not required to do so. The spirit of this section is violated if, in the course of a command investigation, an investigating *officer* obtains the injured member's oral statements and reduces them to writing without the above advice having first been given. JAGMAN, § 0220b. Compliance with the injury-disease warning notification requirement must be documented. Appendix A-2-g of the JAGMAN contains a proper warning form.

AD 30.4. *CONDUCTING THE INVESTIGATION*

Upon first appointment as an investigating officer, the universal question is, "Where do I begin?" The officer should examine the convening order to determine the specific purpose and scope of the inquiry, remembering that the general goal is to find out who, what, when, where, how, and why an incident occurred. The officer should decide exactly which procedures to follow and become fully acquainted with the specific sections of the JAGMAN listed in the convening order. Most importantly, however, the investigating officer should begin work on the investigation immediately upon notification of appointment, whether or not a formal convening order has been received. The investigation should commence as soon as possible after the incident has occurred.

The circumstances surrounding the particular incident under investigation will dictate the most effective method to conduct the investigation. For example, an investigation into an automobile accident, in which injuries were incurred, may involve interviews at the hospital with the injured persons, collection of hospital records and police records, eyewitness accounts, vehicle damage estimates, mechanical evaluation, inspection of the scene, and other matters required by JAGMAN §§ 0220-0227, 0232, & 0242. On the other hand, an investigation of a shipboard casualty or the loss of a piece of equipment may merely involve the calling and examination of material witnesses. Checklists of possible sources of information, depending on the nature of the incident, are contained in the appendix to this chapter.

The officer appointed to conduct the investigation may use any method of investigation he finds most efficient and effective. Relevant information may be obtained from witnesses by personal interview, correspondence, telephone inquiry, or other means. One of the principal advantages of the command investigation is that witnesses may be interviewed at different times and places, rather than at a formal hearing.

Rules of Evidence. The investigating officer is not bound by formal rules of evidence and may collect, consider, and include in the record any matter relevant to the inquiry that a person of average caution would consider to be believable or authentic. Authenticate real and documentary items and enclose legible reproductions in the investigative report, with certification of correctness of copies or statements of authenticity. The investigating officer may not speculate on the causes of an incident; however, inferences may be drawn from the evidence gathered to determine the likely course of conduct or chain of events that occurred. In most cases, it is inappropriate for the investigating officer to speculate on the thought processes of an individual that resulted in a certain course of conduct.

Limitations on evidence gathered. The following investigations cannot be combined with a JAGMAN investigation:

NCIS investigations**.** However, the enclosures, which frequently comprise the bulk of an NCIS investigation, can be used.

Aircraft mishap investigation reports (AMIR). Much of the AMIR, including statements provided to the Aircraft Mishap Board, is privileged information and may only be used for safety purposes.

Other mishap investigation reports**.** For the reasons enumerated above, these mishap investigation reports also cannot be included in JAGMAN investigations. See OPNAVINST 5102.1C.

Inspector General reports

Polygraph examinations. Results may not be included, however, if essential for a complete understanding of the incident, the fact that a polygraph occurred may be noted in the report.

Medical quality assurance investigations. A Naval Hospital will conduct its own investigation of incidents where the sufficiency of medical service is called into question (much the same as the AMIR).

Types of Appropriate Evidence to Gather**.** Photographs, records, operating logs, pertinent directives, watch lists, and pieces of damaged equipment are examples of evidence which the investigating officer may have to identify, accumulate, and evaluate. To the extent consistent with mission requirements, the convening authority must ensure that all evidence is properly preserved and safeguarded until the investigation is complete and all relevant actions have been taken.

Witnesses**.** The best method for examining a witness depends on the witness and the complexity of the incident. The most common method used by investigating officers is the informal interview. Whatever method is employed, however, the witness' statement should be reduced to writing and signed by the witness or certified by the investigator to be an accurate summary. Sworn statements may be taken, unless the convening order directs otherwise. The statement should be dated and should properly identify the person making the statement: a servicemember by full name, grade, service, and duty station; a civilian by full name, title, business or profession, and residence. If necessary, the investigating officer can certify that the statement is an accurate summary, or verbatim transcript, of oral statements made by the witness.

To ensure all relevant information is obtained when examining a witness, the investigating officer should use the convening order and the requirements in the JAGMAN, Chapter II, Part G, Investigations of Specific Types of Incidents, as a checklist. In addition to covering the full scope of the investigative requirements, witness statements should be as factual in content as possible. Vague opinions are of little value to the reviewing authority who is trying to evaluate the record. The investigating officer should be able to separate conclusions from observations; therefore, when a witness makes a vague statement, try to pin down the actual facts.

In many instances, limitations on availability of witnesses will prevent the investigating officer from obtaining a written, signed statement in the above manner. When this happens, an investigating officer may take testimony or collect evidence in any fair manner he chooses. Unavailable witnesses may be examined by mail, email or by telephone. If the telephone inquiry method is used, the investigating officer should prepare a written memorandum of the call, identifying the person by name, rank, armed force, and duty station, or by name, address, and occupation for civilians. The memorandum should set forth the substance of the conversation, the time and date it took place, and any rights or warnings provided.

Witnesses suspected of an offense, misconduct or improper performance of duty should be interviewed after the investigating officer has collected all relevant evidence. The investigating officer should consult the appropriate staff judge advocate to insure that the liaison with law enforcement officials.

Communications with the Convening Authority. If at any time during the investigation it should appear, from the evidence adduced or otherwise, that the convening authority might consider it advisable to enlarge, restrict, or otherwise modify the scope of the inquiry or to change in any respect any instruction provided in the convening order, an oral or written report should be made to the convening authority. The convening authority may take any action on this report deemed appropriate.

AD 30.5. *INVESTIGATIVE REPORT*

The investigative report, submitted in letter form, typically consists of:

A list of enclosures;

a preliminary statement;

findings of fact;

opinions;

recommendations; and

enclosures.

The first enclosure is the signed, written appointing order and any modifications, or the signed, written confirmation of an oral or message appointing order.

The investigating officer must properly identify all persons involved in the incident under investigation (complete name, grade or title, service or occupation, and station or residence). The list of enclosures is a suggested place for ensuring compliance with that section.

Enclosures should be listed in the order in which they are cited in the investigation.

Separately number and completely identify each enclosure (make each statement, affidavit, transcript of testimony, photograph, map, chart, document, or other exhibit a separate enclosure).

If the investigating officer's personal observations provide the basis for any finding of fact, a signed memorandum detailing those observations must be attached as an enclosure.

Enclose a Privacy Act statement for each party or witness from whom personal information was obtained as an attachment to the individual's statement.

The signature of the investigating officer on the investigative report letter serves to authenticate all of the enclosures.

Preliminary Statement. The purpose of the preliminary statement is to inform the convening and reviewing authorities that all reasonably available evidence was collected and that the directives of the convening authority have been met.

The preliminary statement should refer to the convening order and set forth:

The nature of the investigation;

any limited participation by a member and / or the name of any individual who assisted
and the name and organization of any judge advocate consulted;

any difficulties encountered in the investigation;

any requests and authorizations for extensions;

if the evidence in the enclosures is in any way contradictory, notation of such in the preliminary statement and a factual determination in the findings-of-fact section (notation and explanation should be reserved for material conflicts);

any failure to advise individuals of their rights;

the fact that all social security numbers were obtained from official sources;

any other information necessary for a complete understanding of the case.

Do not include a synopsis of facts, recommendations, or opinions in the preliminary statement. These should appear in the pertinent sections of the investigative report.

It is not necessary for the investigating officer to provide an outline of the method used to obtain the evidence contained in the report.

A preliminary statement does not eliminate the necessity for making findings of fact. Even though the subject line and preliminary statement may talk about the death of a person in an aircraft mishap, findings of fact must describe the aircraft, time, place of accident, identity of the person, and other relevant information.

Findings of Fact. The investigating officer must be able to distinguish the difference between the terms "fact," "opinion," and "recommendation." The following may be helpful in making that distinction:

A "fact" is something that is or happens (e.g., "the truck's brakes were nonfunctional at the time of the accident"); an "opinion" is a value judgment on a fact (e.g., "the nonfunctioning of the truck's brakes was the primary cause of the accident"); and

a "recommendation" is a proposal made on the basis of an opinion (e.g., "the command should issue an instruction to ensure that no truck be allowed to operate without functional brakes").

Findings of fact must be as specific as possible as to times, places, persons, and events. Each fact shall be made a separate finding**.** Each fact must be supported by testimony of a witness, statement of the investigating officer, documentary evidence, or real evidence attached to the investigative report as an enclosure and each enclosure on which it is based must be referenced. When read together, the findings of fact should tell the whole story of the incident without requiring reference back to the enclosures. Thus, organization of the findings of fact is imperative if the story is to be readable. Telling the story chronologically is often the best method.

The investigating officer may only make findings of fact that are supported by a preponderance of the evidence. A preponderance is created when the evidence as a whole shows that the fact sought to be proved is more probable than not. Weight of evidence in establishing a particular fact is not to be determined by the sheer number of witnesses or volume of evidence, but depends upon the effect of the evidence in inducing belief that a particular fact is true.

In certain instances, findings of fact may only be based upon a showing of clear and convincing evidence. Where line of duty / misconduct determinations must be made, the service-member is entitled to several presumptions: that the injury or disease was incurred while in the line of duty; that the service-member is mentally responsible for his actions, and if the injury or disease was incurred while the service-member was in a period of unauthorized absence which is less than 24 hours, it is presumed that such absence did not materially interfere with the member's military duty. These presumptions may be rebutted. To make findings of fact contrary to the initial presumption, clear and convincing proof is required.

In order to find that the acts of a deceased member may have caused harm and / or loss of life, including his / her own life, through intentional acts, findings of fact relating to those issues must be established by clear and convincing evidence. JAGMAN, § 0214b(2)(d).

"Clear and convincing" means a degree of proof which should leave no serious or substantial doubt as to the correctness of the conclusion in the mind of objective persons after considering all the facts. It is a degree of proof that is intermediate, being more than a preponderance, but not reaching the extent of certainty as beyond any reasonable doubt.

To ensure complete findings of fact, the investigating officer should use the convening order and the specific requirements set out in the JAGMAN as checklists. If the investigation covers more than one area, the investigation must satisfy the requirements for each separate area.

If the evidence is in any way contradictory, the investigating officer still must make a factual determination in the findings of fact section.

In some situations, it may not be necessary to reflect a discrepancy in the preliminary statement. In other situations, it may be impossible to ascertain a particular fact. If, in the opinion of the investigating officer, the evidence does not support any particular fact, this difficulty should be properly noted in the preliminary statement: "The evidence gathered in the forms on encls. (4) and (7) does not support a finding of fact as to the ..., and, hence, none is expressed."

Only rarely will the conflict in evidence or the absence of it prevent the investigating officer from making a finding of fact in a particular area. Thus, this should not be used as a way for the investigating officer-who is either unwilling to evaluate the facts or too lazy to gather the necessary evidence-to avoid making the required findings of fact.

Opinions. Opinions are reasonable evaluations, inferences, or conclusions based on the facts. Each opinion must reference the findings of fact supporting it**.** In certain types of investigations, the convening authority will require the investigating officer to make certain opinions. Opinion 4 in example 8 is an illustration of a specific opinion required to be made in investigations concerning injuries to service-members. This line of duty / misconduct opinion will be discussed in Chapter III of this study guide.

Recommendations. Recommendations are proposals derived from the opinions expressed, made when directed by the convening authority, and may be specific or general in nature. If corrective action is recommended, the recommendation should be as specific as possible.

Disciplinary action is an area commonly addressed by the recommendations. However, unless specifically directed by proper authority, an investigating officer should not prefer or notify an accused of recommended charges. If a punitive letter of reprimand or admonition is recommended, prepare a draft of the recommended letter and submit it as an endorsement to the investigative report. And if a non-punitive letter is recommended, a draft is not included in the investigation, but should be forwarded to the appropriate commander for issuance.

AD 30.6. *ENDORSEMENT ACTION BY CONVENING AND REVIEWING AUTHORITIES*

Review and forwarding**.** JAGMAN, §§ 0208, 0218. Upon completing the investigative report, the investigating officer submits the report to the convening authority, who reviews it and takes one of the following actions:

Returns the report for further inquiry or corrective action, noting any incomplete, ambiguous, or erroneous action of the investigating officer;

Determines that the investigation is of no interest to anyone outside the command and chooses to file the investigation, without further forwarding, as an internal report; or

Transmits the report by endorsement to the next appropriate superior officer, typically to the officer exercising general court-martial convening authority (GCMCA) over the convening authority. The convening authority's endorsement will set forth appropriate comments, recording approval or disapproval in whole or in part, of the investigation's proceedings, findings, opinions, and recommendations. In line of duty / misconduct investigations, the convening authority is required to specifically approve or disapprove the line of duty / misconduct opinion.

Corrective Action. The convening authority's endorsement must specifically indicate what corrective action, if any, is warranted and has been or will be taken. Whenever punitive or nonpunitive disciplinary action is contemplated or taken as the result of the incident under inquiry, such action should be noted in the endorsement. Convening authorities can expect superior commanders to require subsequent reports on how lessons learned have been implemented. If administrative investigations are to be effective tools, "tenacious follow-up action is required."

Routing the Investigation. Upon completion of the endorsement, the convening authority forwards the original investigative report through the chain-of-command, to the GCMCA over the convening authority. Command investigations are not routinely forwarded to the Judge Advocate General as the ultimate addressee**.** The subject matter and facts found will dictate the exact routing of the report.

One complete copy of the investigation should be forwarded with the original for each intermediate reviewing authority (additional copies are required in death cases). Advance copies of the report of investigation shall be forwarded by the convening authority in the following cases:

For command investigations involving injuries and deaths of naval personnel, or material damage to a ship, submarine, or Government property (excluding aircraft), advance copies are sent to Commander, Naval Safety Center. In aircraft mishap cases, copies of investigations are sent to the Naval Safety Center only upon request.

Where the adequacy of medical care is reasonably in issue and which involve significant potential claims, permanent disability, or death, advance copies are sent to the Naval Inspector General, Chief, Bureau of Medicine and Surgery (two copies); and the local NLSO.

Advance copies are to be provided to servicing NLSOs in cases involving potential claims or civil lawsuits.

Review of Command Investigations. Any command investigation that is forwarded must ultimately be reviewed by at least one GCMCA superior to the convening authority. There may be situations where the first reviewer in the chain-of-command is not a GCMCA (i.e., where a command investigation is convened by an officer in charge, then forwarded to the unit commanding officer). Such intermediate reviewing authorities endorse the report similar to the original convening authority, including any information known-or reasonably ascertainable-at the time of the review concerning action taken or being taken in the case, but not already contained in the record or previous endorsement. Upon the GCMCA's receipt of the investigation, the report and endorsements will be reviewed and either retained at that level or endorsed and for-warded up the chain-of-command if higher review is deemed necessary (thus, even though a Carrier Group Commander may be a GCMCA, he / she may elect to forward a command investigation to the Fleet Commander where the report is thought to be of particular interest). The command investigation is deemed "final" when the last reviewing authority determines that further endorsement is not necessary.

Retention/Release of Command Investigations. The original convening authority is required to maintain a copy of all command investigations for a minimum of two years. Further, the GCMCA or the last commander to whom a command investigation is routed for review must retain such records for a period of two years from the time they area received. After two years, the records should be archived in accordance with SECNAVINST 5212.5 series.

Persons outside of the Department of the Navy may seek release of command investigations, typically under the Freedom of Information Act or the Privacy Act. Release may only be made by the proper releasing authority.

As a general rule, no command investigation may be released until it is deemed final meaning all endorsements and reviews are complete. CNO (N09N) retains release authority for command investigations involving actual or possible loss or compromise of classified information. On all other command investigations, the GCMCA to whom the report is ultimately forwarded is the proper release authority.

PART B: LITIGATION-REPORT INVESTIGATIONS

AD 30.7. *THE INVESTIGATORY BODY*

Like a command investigation, a litigation-report investigation is most frequently composed of a single investigator (officer, senior enlisted, or civilian employee) who is best qualified for the assignment and, where practical, senior to any individual whose conduct is subject to inquiry. JAGMAN, § 0212. Litigation-report investigations are unique in one significant aspect: the investigating officer must conduct his / her investigation under the direction and supervision of a judge advocate. JAGMAN, § 0209c(1).

AD 30.8 *CONVENING ORDER*

A litigation-report investigation may be convened only after the convening authority has consulted with the "cognizant judge advocate." The cognizant judge advocate is that individual who is responsible for providing legal advice to the convening authority. This will often be a station or staff judge advocate, but may also include a command services or claims officer at the servicing Naval Legal Service Office. A litigation-report investigation must be convened in writing.

While resembling the convening order used for command investigations, a litigation-report investigation convening order differs as follows:

The convening order must specifically identify by name the judge advocate under whose direction and supervision the investigation is to be conducted;

opinions and recommendations will not normally be requested;

the convening order must include an attorney work product statement;

the investigating officer will be cautioned to discuss the conduct and results of the investigation only with those personnel who have an official need to know.

See JAGMAN, § 0211 and appendix A-2-d for assistance with convening orders for litigation-report investigations.

AD 30.9. *THE INVESTIGATION*

In conducting the investigation, the rules and considerations set forth for investigations above apply generally to litigation-report investigations.

While free to collect, consider and include any relevant evidence regarding the incident under investigation, the investigating officer must ensure that the supervising judge advocate is kept informed, and approves, of the method and nature of evidence collected.

When deemed necessary to obtain evidence such as expert analyses, outside consultant reports, and so forth, the supervisory judge advocate should sign the necessary requests.

With regard to witnesses, in most cases the investigating officer will summarize the results of interviews rather than take written or signed statements from the witness. If there is reason why a witness should be asked to sign a statement (i.e., a witness with adverse interests to the Government is willing to provide a statement clearly beneficial to the Government's interest), the supervisory judge advocate should be consulted first.

AD 30.10. *INVESTIGATIVE REPORT*

In writing the investigation report, the rules and considerations set forth for command investigations apply generally to litigation-report investigations.

The appointing order and preliminary statement must contain an attorney work product statement. Opinions and recommendations will not be made by the investigating officer unless directed by the supervisory judge advocate. The supervisory judge advocate may choose to write the opinions and / or recommendations. The report should be signed by both the investigating officer and the supervisory judge advocate. The report shall be marked "FOR OFFICIAL USE ONLY: LITIGATION / ATTORNEY WORK PRODUCT."

AD 30.11. *ACTION BY CONVENING AND REVIEWING AUTHORITIES*

Review and Forwarding. Upon receiving the litigation-report investigation, the convening authority reviews the document and takes one of the following actions:

Return the investigation to the supervisory judge advocate for further inquiry; or

Endorse and forward the report in writing.

First Endorsement on a Litigation-Report Investigation. Unlike the endorsement of a command investigation, the convening authority may only make limited comments in endorsing litigation-report investigations. The convening authority may comment on those aspects of the report which bear on the administration or management of the command, including any corrective action taken. The convening authority shall not normally approve or disapprove of the findings of fact. The convening authorities endorsement must be marked "FOR OFFICIAL USE ONLY: LITIGATION / ATTORNEY WORK PRODUCT."

Routing. Upon completion of the endorsement, the convening authority forwards the original investigative report to the Judge Advocate General (Code 15), via the Staff Judge Advocate of the GCMCA in the chain of command. One complete copy of the investigation should be forwarded with the original for the GCMCA. Copies of the report are to be provided to superiors in the chain of command and to other commands which have a direct need to know, including the servicing Naval Legal Service Office. Dissemination of the report shall not otherwise be made without first consulting a judge advocate.

Review. Superiors in the chain of command who receive a copy of the litigation-report may, but are not required to, comment on the investigation. They will not normally approve or disapprove findings of fact. The Staff Judge Advocate to whom the litigation-report investigation is sent is to review the investigation for accuracy and thoroughness. The report is then forwarded to JAG.

Retention. The original convening authority is required to retain a copy of the litigation-report investigation, kept in a file marked "FOR OFFICIAL USE ONLY: LITIGATION / ATTORNEY WORK PRODUCT" and safeguarded against improper disclosure. Any copies of litigation-report investigations maintained by superiors, including the

reviewing GCMCA, must be filed in specially marked files and safeguarded against improper disclosure. The JAGMAN does not prescribe a time period for retention; in all cases, before ordering the destruction of a litigation-report investigation, consult with a judge advocate or OJAG (Code 15).

Release of Litigation-Report Investigation. For all litigation-report investigations, the Judge Advocate General retains release authority. Convening and reviewing authorities are not authorized to release litigation-report investigations or their contents. JAGMAN, § 0219c.

PART C: DEATH CASES

AD 30.12. *SPECIAL NATURE OF DEATH CASES*

Release of Death Investigations to Family Members**.** By law, reports pertaining to the death of military members are released to family members. Since the deceased cannot contribute to the investigative process, special considerations and sensitivity must prevail.

Status Reports. To ensure proper and timely investigation, Navy commands must submit investigation progress reports every 14 days. The requirement for this status report ceases once the investigation has been forwarded to the next higher level of review.

NCIS Notification. NCIS must be notified of any death occurring on a Navy vessel or Navy / Marine Corps aircraft or installation (except when the cause of death is medically attributable to disease or natural causes).

Time Limitations. The period for completing the administrative investigation report / record into a death shall not normally exceed 20 days from the date of the death or its discovery. For good cause, however, the CA may extend the period.

Line of Duty/Misconduct determinations. JAGMAN § 0236 requires that the line of duty/misconduct determination must be made when an active duty servicemember dies. This determination is required because the amount of Survivor Benefit Plan (SBP) annuity payments to qualified survivors is at an increased level if the servicemember is determined to have died in the line of duty/not due to own misconduct. The GCMCA, with an assigned SJA, is the cognizant official for making formal LOD determinations/ subject to a limited review in adverse cases. If the command completing the inquiry/investigation that includes a LOD/Misconduct determination for a death case is not a GCMCA, the command shall forward the inquiry or investigation to the first GCMCA in its chain of command with an assigned SJA.

Adverse Cases. Before making an adverse determination that an active duty death was not in the line of duty, the GCMCA or its SJA shall afford a known potential SBP beneficiary the opportunity to review the report of investigation and provide relevant information for the GCMCA's consideration. This review should take no longer than 30 calendar days from receipt of the report. If there is no known beneficiary, the GCMCA shall make the LOD determination following a review of the investigation by the SJA.

Independent Reviews. Even though prohibited from rendering the ultimate line of duty / misconduct opinion, an investigation may uncover evidence which calls into question the propriety of a deceased individual's conduct. In a fair and impartial manner, such facts must be documented in the investigation. To find that the acts of a deceased service-member may have caused harm or loss of life, including the member's own, through intentional acts, findings of fact must be established through clear and convincing evidence. Prior to endorsement of an investigation which calls into question the deceased's conduct, the convening authority may wish the report to be reviewed to ensure thoroughness, accuracy of the findings, and fairness to the deceased member. The individual selected to conduct this review shall have no previous connection to the investigative process and must be outside the convening authority’s immediate chain of command. To the extent possible, the reviewer should possess training, experience, and background sufficient to allow critical analysis of the factual circumstances. If the reviewer believes comments are warranted, such comments shall be completed and provided to the convening authority within 10 working days of the report's delivery to the reviewer. The convening authority is to consider any comments submitted by the reviewer and take any action deemed appropriate. The comments shall be appended to the investigative report.

Routing instructions. The GCMCA shall provide the Echelon II Commander with an advance copy of all death investigations (excepting limited investigations). Such action is to be noted in any forwarding endorsement. Graphic photographs should only be included in investigative reports where necessary. Special handling for such materials is required.

CHAPTER 31

CHAPTER 31

AD 31. LINE OF DUTY/MISCONDUCT DETERMINATIONS

AD 31.1. *REFERENCES*

JAGMAN, Chapter 2

AD 31.2. *BACKGROUND ON LINE OF DUTY/MISCONDUCT DETERMINATIONS*

To assist in the administration of naval personnel issues, the commanding officer is required to inquire into certain cases of injury, disease, or death incurred by members of his or her command. When these inquiries are conducted, the commanding officer is required to make what are referred to as line of duty (LOD) / misconduct determinations. As in most matters, the type of inquiry and the degree of formality of the report will depend upon the circumstances of each case.

LOD / misconduct determinations are important because they control several personnel actions. The most important are SBP benefits, disability retirement pay, and severance pay.

When Required. Findings concerning LOD / misconduct must be made in every case in which a member of the naval service incurs *a* disease or injury that: (1) might result in permanent disability; or (2) that results in the physical inability to perform duty for a period exceeding 24 hours (as distinguished from a period of hospitalization for evaluation or observation).

Death. A LOD determination is required whenever an active duty servicemember of the naval service dies, in order to make decisions concerning eligibility and annuity calculations under the Uniformed Services Survivor Benefit Program.

Reservists. Incidents involving an incapacitating injury or illness occurring during a period of annual training or inactive duty training (drill), or those occurring while traveling directly to or from places where members are performing or have performed such duty, require an interim line of duty determination within seven days. After such interim determination is made, a final determination must still be accomplished for completeness of the record.

AD 31.3. *GENERAL TERMS*

Active Service. This term, as it is used in the general rules concerning LOD / misconduct below, includes "full-time duty in the naval service, extended active duty, active duty for training, leave or liberty from any of the foregoing, and inactive duty training."

Burden of Proof

Preponderance. Findings of fact must be supported by a preponderance of the evidence which is created when there is more credible and convincing evidence offered in support of a proposition than opposed to it.

Clear and convincing. To rebut either the presumption that an injury or disease was incurred LOD or the presumption of mental responsibility, clear and convincing evidence is must be presented. Clear and convincing means a degree of proof beyond the preponderance of evidence, such that the evidence leaves no serious or substantial doubt in the mind of an objective person considering the facts. It is an intermediate degree of proof, being more than a preponderance, but not reaching the extent of certainty as beyond any reasonable doubt.

AD 31.4. *WHAT CONSTITUTES LINE OF DUTY*

Presumption. Sections 0220a and 0222a of the JAGMAN state that an injury or disease incurred by naval personnel while in active service is presumed to have been incurred "in line of duty" unless there is clear and convincing evidence that it was incurred:

as a result of the member's own misconduct, as defined in JAGMAN, § 0223;

while avoiding duty by deserting the service;

while absent without leave, and such absence materially interfered with the performance of required military duties;

while confined under sentence of a court-martial that included an unremitted dishonorable discharge; or

while confined under sentence of a civil court following conviction of an offense that is defined as a felony by the law of the jurisdiction where convicted.

Unauthorized Absence Considerations. Whether absence without leave materially interferes with the performance of required military duties necessarily depends upon the facts of each situation applying a standard of reality and common sense. No definite rule can be formulated as to what constitutes material interference.

Generally speaking, absence in excess of twenty-four (24) hours constitutes a material interference unless there is evidence to establish the contrary. An absence less than twenty-four (24) hours will not be considered a material interference without clear and convincing evidence to establish the contrary. A statement of the individual's commanding officer, division officer, or other responsible official, and any other available evidence to indicate whether the absence constituted a material interference with the performance of required military duties, should be included in the record whenever appropriate.

AD 31.5. *WHAT CONSTITUTES MISCONDUCT*

Presumption. Sections 0220a and 0223b of the JAGMAN state that an injury or disease suffered by a member of the naval service is presumed not to be the result of misconduct unless there is clear and convincing evidence that (1) the injury was intentionally incurred; or (2) the injury was the result of willful neglect which demonstrates a reckless disregard for the foreseeable and likely consequences.

Foreseeability. A person of ordinary intelligence and prudence should reasonably have anticipated the danger created by the negligent act. Injury or disease from a course of conduct is foreseeable if, according to ordinary and usual experience, injury or disease is the probable result of that conduct.

Willful Neglect. A conscious and voluntary act, or omission, which is likely to result in grave injury of which the member is aware. It involves a willful, wanton, or reckless disregard for the life, safety, and well-being of self or others. Simple or ordinary negligence, or carelessness, standing alone, does not constitute misconduct.

The fact that the conduct violated a law, regulation, or order, or was engaged in while intoxicated, does not, of itself, constitute a basis for a determination of misconduct.

Military Duty and Misconduct. "Misconduct" can never be "in line of duty." Thus, a finding that an injury was the result of the member's own "misconduct" must be accompanied by a finding that the injury was incurred "not in line of duty." Accordingly, if a servicemember is properly performing his military duty and is injured as a result of that duty, a "misconduct" finding would be erroneous since no military duty can require a servicemember to commit an act which would constitute "misconduct."

AD 31.6. *SPECIAL RULES*

Intoxication. Intoxication (impairment) is a factor in many of the injuries in which misconduct is found and is often coupled with evidence of recklessness or disorderly conduct. Intoxication may be produced by alcohol, drugs, or inhalation of fumes, gas, or vapor.

In order for intoxication alone to be the basis for a misconduct finding, there must be a showing, by clear and convincing evidence, that:

The member’s physical or mental faculties were impaired due to intoxication at the time of the injury; and

The impairment was the proximate cause of the injury (Proximate cause is that conduct which, in a natural and continuous sequence unbroken by any efficient intervening cause, produces injury, and without which the result would not have occurred).

Presumption**.** Where a member has a blood-alcohol content (BAC) of .10 percent by volume or greater, it is presumed that mental or physical faculties are impaired. This presumption is rebuttable; even where not rebutted, the proximate cause issue must be addressed. Intoxication may also be found where no BAC is available or it measures less than .10. In such cases, the investigation should include a description of the servicemember's general appearance, along with information regarding whether the member staggered or otherwise displayed a lack of coordination, was belligerent or incoherent, or displayed slow reflexes or slurred speech.

Alcohol and drug-induced disease. Inability to perform duty resulting from a disease that is directly attributable to a specific, prior, proximate, and related intemperate use of alcohol or habit-forming drugs is the result of misconduct and, therefore, not in the line of duty.

Refusal of medical or dental treatment. If a member unreasonably refuses to submit to medical, surgical, or dental treatment, any disability that proximately results from such refusal shall be deemed to have been incurred as a result of the member's own misconduct.

Mental Responsibility. A member may not be held responsible for acts and their foreseeable consequences if, as the result of a mental defect, disease, or derangement, the member was unable to comprehend the nature of such acts or to control his or her actions. In the absence of evidence to the contrary, it is presumed that all persons are mentally responsible for their acts.

Because of this presumption, it is not necessary to present evidence of mental responsibility unless the question is raised by the facts developed by the investigation or the question is raised by the nature of the incident itself. If the question of mental responsibility is raised for either reason, the presumption of mental responsibility ceases to exist and the investigation must clearly and convincingly establish the member's mental responsibility before an adverse determination can be made.

Where an act resulting in injury or disease is committed by a mentally incompetent person, that person is not responsible for that act and the injury or disease incurred as the result of such an act is "not due to misconduct."

Suicide Attempts. Because of the strong instinct for self-preservation, an unsuccessful, but bona fide, attempt to kill oneself creates a strong inference of lack of mental responsibility. In all cases of attempted suicide, evidence bearing on the mental condition of the injured person shall be obtained. This includes all available evidence as to social back-ground, actions, and moods immediately prior to the attempt, any troubles that might have motivated the incident, as well as any pertinent examination or counseling session.

Suicidal Gestures and Malingering. Self-inflicted injury not prompted by a serious intent to die is, at most, a suicidal gesture and such injury, unless lack of mental responsibility is otherwise shown, is deemed to be incurred as a result of the member's own misconduct. The mere act alone does not raise a question of mental responsibility because there is no intent to take one's own life, the intent was to achieve some secondary gain (e.g., a servicemember lightly cutting their wrists with a butter knife).

AD 31.7. *RELATIONSHIP BETWEEN MISCONDUCT AND LINE OF DUTY*

Determinations. There are only three possible determinations.

In line of duty, not due to member's own misconduct (LOD / NDOM).

Not in line of duty, not due to member's own misconduct (NLOD / NDOM).

This determination would occur when misconduct is not involved, but an injury or disease is contracted by a servicemember which falls within one of four other exceptions to the LOD presumption (desertion; UA; confinement as a result of a civilian conviction; or confinement pursuant to sentence by a general court-martial that included an unremitted dishonorable discharge).

Example: A servicemember has been UA for 8 months and is hit by a drunk driver while lawfully crossing a street. The injuries were not the result of the servicemember’s own misconduct, however due to the UA status, the servicemember is not in the line of duty at the time of the accident.

Not in line of duty, due to member's own misconduct (NLOD/DOM). **A** determination of "misconduct" always requires a determination of "not in the line of duty."

Disciplinary Action. An adverse determination as to misconduct or line of duty is not a punitive measure. Disciplinary action, if warranted, shall be taken independently of any such determination. A favorable determination as to LOD / misconduct does not preclude separate disciplinary action, nor is such a finding binding on any issue of guilt or innocence in any disciplinary proceeding. The loss of rights or benefits resulting from an adverse determination may be relevant and, at the request of the accused, admissible as a matter in extenuation and mitigation in a disciplinary proceeding.

AD 31.8. *RECORDING LOD / MISCONDUCT DETERMINATIONS*

Each injury or disease requiring LOD / Misconduct determinations must be reviewed through use of a preliminary inquiry. Upon completion of the preliminary inquiry, the command is to report the results to the GCMCA through use of the Personnel Casualty Report system. JAGMAN, § 0229b, MILPERSMAN 1770. A copy of the preliminary inquiry report is delivered to the appropriate medical department for inclusion in the health or dental record.

If the medical officer and the commanding officer are of the opinion that the injury or disease was incurred "in line of duty" and "not as a result of the member's own misconduct," then appropriate entries stating such are entered in the health record. No further investigation is required, unless directed by the GCMCA.

Command Investigations. As noted above, use of the preliminary inquiry and health record entries will provide sufficient documentation where injuries or disease are found to have occurred while in the line of duty, not due to misconduct. Command investigations are however required when:

the injury or disease was incurred in such a way that suggests a finding of "misconduct" or "not in line of duty" might result;

there is a reasonable chance of permanent disability and the convening authority considers an investigation essential to ensuring an adequate official record; or

the injury involves a Naval or Marine Reservist and the convening authority considers an investigation essential to ensuring an adequate official record.

In endorsing a command investigation, the convening authority must specifically comment on the LOD / misconduct opinion and take one of the following actions:

If the convening authority concludes that the injury or disease was incurred "in line of duty" and "not due to member's own misconduct", that shall be expressed (regardless of whether it differs from or concurs with the investigating officer's opinion).

If, upon review of the report or record, the convening authority—or higher—believes the injury or disease was incurred not "in line of duty" or due to the member's own misconduct, the member must be informed of the preliminary determination and afforded an opportunity, not to exceed 10 days, to submit any desired information. The member shall be advised that no statement relating to the origin, occurrence, or aggravation of any disease or injury suffered need be made; and if the member is suspected of having committed an offense, the member shall be so advised, as required by Art 31(b), UCMJ and JAGMAN § 0230a(2)(b). The member may be permitted to review the investigation report before providing any desired information. If the member decides to present information, it shall be considered by the convening authority and appended to the record. If the member elects not to provide information, or the 10 day period lapses without submission, then such shall be noted in the endorsement. The command investigation is forwarded to a GCMCA with an assigned judge advocate. The GCMCA may take any action that could have been taken by the convening authority.

The GCMCA shall indicate approval, disapproval or modification of conclusions concerning misconduct and line of duty. A copy of such action will be returned to the convening authority so that appropriate entries may be made in the member's service and medical records. JAGMAN, § 0230b(1).

The original convening authority must ensure that appropriate service and medical record entries are made.

AD 31.9. ***INVESTIGATIVE REQUIREMENTS FOR SPECIFIC INCIDENTS***

The investigating officer should be aware of particular problem areas in LOD/ misconduct investigations. Examples of situations commonly encountered are listed below, along with a listing of various factors that should be included in investigative reports. The examples are not intended to be comprehensive, nor do the listed factors purport to cover every fact situation that may arise.

Speeding. It is impossible to state categorically when excessive speed becomes willful neglect and requires a finding of misconduct. The investigative report should contain information concerning the type and condition of the road; the number and width of the lanes; the type of area (densely populated or rural); any hills or curves that played a part in the accident; the traffic conditions; the time of day and weather conditions; the posted speed limit in the area; the mechanical condition of the car (particularly the brakes and tires); and the prior driving experience of the member. The speed of the vehicle is also important; however, estimates of speed based solely upon physical evidence at the scene of the crash, such as skid marks and damage to the vehicle, are somewhat speculative unless corroborated by other evidence. Therefore, attempts should be made to secure estimates of speed from witnesses, passengers, and drivers. In this way, the post-accident estimates of the police may be corroborated.

Falling Asleep at the Wheel. Falling asleep at the wheel is one of the most common causes of accidents, but is one of the most difficult situations in which to establish misconduct. The act of falling asleep, in itself, does not constitute willful neglect; however, the act of driving while in a condition of such extreme fatigue or drowsiness that the driver must have been aware of the danger of falling asleep at the wheel may amount to such a reckless disregard of the con-sequences as to warrant a finding of misconduct. Useful information should include how long the servicemember had been driving and how many miles the member had driven prior to the accident; the amount of sleep had by the member before commencing the trip; the member's activities for the 24 hours prior to the injury; whether any momentary periods of drowsiness were experienced before finally falling asleep; and any evidence of drinking or intoxication.

Passenger Misconduct. If a passenger knows or should know that the driver is unlikely to drive safely because of negligence, lack of sleep, recklessness, or intoxication, the passenger may be guilty of misconduct upon voluntarily exposing himself or herself to the danger. The investigation should contain information showing whether the servicemember had an opportunity to leave the vehicle after the driver's condition became apparent; whether the driver and passenger had been drinking together and how much each had to drink; and what action, if any, was taken by the passenger to have the driver drive more carefully. Also determine the operator's driving experience; any signs of intoxication; whether the passenger noticed the driver was tired or exhibited any other symptoms; whether the passenger took any action to have the driver rest or to personally assume the driving responsibilities.

Disorderly Conduct and Fighting. Injuries incurred by a servicemember while voluntarily and wrongfully engaged in a fight or similar encounter, whether or not weapons were involved, may be due to misconduct where they might reasonably have been expected to result directly from the affray and the servicemember is at least equally culpable with the adversary in starting or continuing the affair. In investigating such incidents, determine: who instigated or provoked the fight and/or struck the first blow; any history of prior altercations between the participants; whether either participant was armed; whether either participant attempted to terminate the affray; the relative sizes and capabilities of the participants; and the part that drinking, if any, played in the altercation.

Intentionally Self-inflicted Injuries. Include any medical reports and opinions in the investigation report when the investigation concerns an intentionally self-inflicted injury. In these cases, the investigating officer should primarily look for evidence, or lack thereof, of a bona fide suicide intent. The investigative report should contain information concerning: whether the methods used to cause injury were likely to cause death under the circumstances; the servicemember's expressed reasons for attempting suicide; whether the servicemember took action to avoid being found prior to the injury as opposed to being certain he would be discovered and treated quickly; whether the servicemember had threatened suicide prior to the incident under investigation; and statements of shipmates and friends concerning the member's apparent state of mind on the date of the act.

Accidentally Self-inflicted Injuries; Gunshot Wounds. A health record entry should not be used when an injury results from an accidental self-inflicted gunshot wound because of the strict, high standard of care required in the use of firearms or other dangerous weapons. In cases of this kind, mere failure to take proper precautions to prevent a casualty normally constitutes simple negligence or carelessness and, therefore, does not justify a finding of misconduct. However, in the event the record clearly and convincingly shows that the servicemember has displayed a lack of care that amounts to willful neglect, taking into account the higher standard of care required of persons

using and handling dangerous weapons, a finding of misconduct is appropriate. The investigating officer's report should include information concerning: date, time of day, and names and addresses of witnesses; description of physical location of incident and light and weather conditions; description of the firearm and its mechanical condition, especially safety mechanisms, and whether the safety mechanisms were used by the firearm handler; authorization for possession of the firearm, including how, when and where it was obtained; description of firearm handler's formal training, experience, and familiarity with the firearm's condition, safety procedures, and proper use; and discussion of any psychological problems, mental impairment due to drug or alcohol use, and mental responsibility of the firearm handler.

AD 31.10. *CHECKLIST FOR LINE OF DUTY/MISCONDUCT DETERMINATIONS*

The following is a checklist of important information that should be included, as applicable, in any investigation convened to inquire into misconduct and line of duty. JAGMAN §0232.

1.	Identifying Information	JAGMAN §0232a.
2.	Facts	JAGMAN §0232b.
3.	Records	JAGMAN §0232c.
4.	Site of Incident	JAGMAN §0232d.
5.	Duty Status	JAGMAN §0232e.
6.	Reserve Status	JAGMAN §0232f.
7.	Injuries	JAGMAN §0232g.
8.	Impairment	JAGMAN §0232h.
9.	Mental Competence	JAGMAN §0232i.
10.	Privacy Act	JAGMAN §0232j.
11.	Warnings About Injury/Disease.	JAGMAN §0232k.

CHAPTER 32

CHAPTER 32

AD 32. CLAIMS

PART A - CLAIMS AGAINST THE GOVERNMENT

AD 32.1. *REFERENCES*

JAGINST 5890.1 (ADMINISTRATIVE PROCESSING AND CONSIDERATION OF CLAIMS ON BEHALF OF AND AGAINST THE UNITED STATES).

JAGMAN, CHAPTER IV (ARTICLE 139 CLAIMS)

JAGMAN, CHAPTER VIII (GENERAL CLAIMS PROVISIONS)

JAGMAN, CHAPTER XII (ADMIRALTY CLAIMS)

AD 32.2. *FEDERAL TORT CLAIMS ACT (FTCA)*

The FTCA provides for compensation for personal injury, death, and property damage caused by the negligent or wrongful act or omission of Federal employees acting within the scope of Federal employment. It also covers certain intentional, wrongful acts. There are, however, three general types of exceptions from government liability under FTCA. First, the government is protected from liability arising out of certain types of governmental actions. Second, FTCA will not provide compensation when one of the specialized claims statutes (discussed in part B of this chapter) covers the claim. Third, certain classes of claimants, such as active-duty military personnel, are precluded from recovering under FTCA, although they may be compensated under other statutes.

The scope of the government's liability under FTCA is limited to money damages for injury, death, or property damage caused by the negligent or wrongful act or omission of any government employee while acting within the scope of his office or employment.

Scope of Liability. The law defines "negligence" as the failure to exercise the degree of care, skill, or diligence that a reasonable person would exercise under the same circumstances. Negligent conduct can arise either from an act or a failure to act. It can be either acting in a careless manner or failing to do those things that a reasonable person would do in the same situation. Jurisdiction over claims that have as their basis a theory of liability other than negligence (implied warranty or strict liability) does not lie under the FTCA.

Applicable Law. Whether certain conduct was negligent- and, therefore, whether the government is liable- will be determined by the tort law of the place where the conduct occurred. Questions such as whether the violation of a local law, by itself, constitutes negligence will be answered by applying local tort law.

Limited Range of Intentional Torts. The FTCA will compensate for intentional wrongful acts under very limited circumstances. On or after 16 March 1974, FTCA applies to any claim arising out of the following intentional torts committed by Federal law enforcement officers: assault, battery, false imprisonment, false arrest, abuse of process, and malicious prosecution. A Federal law enforcement officer, for purposes of the FTCA, is any officer of the United States empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law. Since Article 7, UCMJ, extends the authority to apprehend to commissioned officers and petty officers, these officers would be considered law enforcement officers for FTCA purposes when they are actually engaged in law enforcement duties. No other intentional tort claims are payable under FTCA.

Government Employees. Under the FTCA, the government is liable only for the wrongful acts of its employees. The term "government employee" is defined to include the following:

Officers or employees of any Federal agency; or members of the military or naval forces of the United States; or persons acting on behalf of a Federal agency in an official capacity, either temporarily or permanently, and either with or without compensation.

The term "Federal agency" includes not only the departments and agencies of the executive, legislative, and judicial branches of the Federal Government, but also independent entities that function primarily as Federal agencies (e.g., U.S. Postal Service, Commodity Credit Corporation).

Government Contractors. A government contractor and its employees are not usually considered government employees under the FTCA. When, however, the government exercises a high degree of control over the details of the contractor's activities, the courts may find that the government contractor is, in fact, a government employee. The standard personnel qualification and safety standards provisions in government contracts are not enough to turn a government contractor into a government employee. However, where the contract requires the contractor to follow extensive, detailed instructions in performing the work, the contractor will usually be considered a government employee and the contractor's employees who work on the Federal job will likewise be treated as government employees for FTCA purposes.

Nonappropriated Fund Activities. A nonappropriated fund activity is one that, while operating as part of a military installation, does not depend upon, and is not supported by, funds appropriated by Congress. Examples of nonappropriated fund activities include the Navy Exchange and officers' clubs. A claim arising out of the act or omission of an employee of a nonappropriated fund activity not located in a foreign country acting within the scope of employment is an act or omission committed by a federal employee and will be handled in accordance with the FTCA.

Scope of Employment. The government is liable under the FTCA for its employees' conduct only when the employees are acting within the scope of their employment. The scope-of-employment requirement is viewed by the courts as "the very heart and substance" of the Act. While scope-of-employment rules vary from state to state, the issue usually turns on the following factors:

The degree of control the government exercises over the employee's activities on the job; and the degree to which the government's interests were being served by the employee at the time of the incident.

Whether or not a government employee's acts were within the scope of employment will be determined by the law, including principles of *respondeat superior*, of the state where the incident occurred. This has led to many different results on the question of applicability of the FTCA involving permanent change of station (PCS) moves and temporary duty (TDY). One must look to state law to determine the proper test or criteria for determining scope of employment based upon the principles of *respondeat superior*.

Territorial Limitations. FTCA applies only to claims arising in the United States or in its territories or possessions (i.e., where a U.S. district court has jurisdiction). Any lawsuit under the FTCA must be brought in the U.S. district court in the district where the claimant resides or where the incident giving rise to the claim occurred.

Exclusions From Liability**.** Statutes and case law have established three general categories of exclusions from FTCA liability. The following specific exclusions are encountered frequently in claims practice in the military. [A complete list of FTCA exclusions is set forth in JAGINST 5890.1.] In each of the following situations, the government will not be liable under FTCA, although it may be liable under some other claims statute.

Performance of ministerial duty. The FTCA does not apply to any claim based on an act or omission of a Federal employee who exercises due care while in the performance of a duty or function required by statute or regulation.

Discretionary governmental function. The FTCA does not apply to any claim based upon the exercise or performance of, or the failure to exercise or perform, a discretionary governmental function.

Postal claims. The FTCA does not apply to claims for the loss, miscarriage, or negligent transmission of letters or postal matters. Such claims, under limited circumstances, may be payable under the Military Claims Act.

Detention of goods. The FTCA does not apply to claims arising out of the detention of any goods or merchandise by a Federal law enforcement officer, including customs officials. This exception is commonly applied in situations where the claimant seeks compensation for property seized during a search for evidence. This exclusion also prevents compensation under the FTCA for alleged contraband seized by law enforcement officers.

Combatant activities in time of war. The "combatant activities" exclusion requires that: 1) the claim must arise from activities directly involving engagement with the enemy; 2) conducted by the armed forces; and 3) during time of war (declared and undeclared).

Intentional Torts. The government is not liable under the FTCA for the following intentional torts: assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. 28 U.S.C. § 2680(h) (1982). This exclusion will not protect the government from liability for assaults, batteries, false imprisonments, false arrests, abuse of process, or malicious prosecution committed by Federal law enforcement officers.

Claims Cognizable Under Other Claims Statutes. Certain claims cannot be paid under the FTCA because they are cognizable under some other claims statute. Although the claimant may still recover under another statute, the amount may be significantly less than under the FTCA. Also, the claimant may not have the right under the other claims statute to sue the government if the claim is denied.

Excluded Claimants. In Feres v. United States, the U.S. Supreme Court held that military personnel cannot sue the Federal Government for personal injury or death occurring incident to military service. This is known as the Feres Doctrine. The Supreme Court reasoned that Congress did not intend the FTCA to apply to military personnel because it had already provided medical care, rehabilitation, and disability benefits for them. Since 1950, the Feres Doctrine has been applied consistently by Federal courts at all levels and was reaffirmed by the Supreme Court in United States v. Johnson, 481 U.S. 681 (1987). A major exception to the Feres Doctrine exists when the injury, death, or loss of the military member did not occur incident to military service. As a general rule, however, all of the following factors must be present for an injury, death, or loss of a military member to be held as not incident to military service:

The member must have been off duty;

the member must not have been aboard a military installation;

the member must not have been engaged in any military duty or mission; and

the member must not have been directly subject to military orders or discipline.

If any of the above four factors are absent, the claim usually will be held by the courts to be incident to military service. Claims by service members on behalf of others, particularly dependents, are not bared by Feres.

Civilian Federal employees are usually excluded claimants under the FTCA for injury or death that occurs on the job because of Federal Employment Compensation Act (5 USC 8101 et seq.) compensation benefits.

Finally, one Federal agency usually may not assert an FTCA claim against another Federal agency. Government property is not owned, for FTCA purposes, by any specific agency of the government. The Federal Government will not normally reimburse itself for the loss of its own property.

Measure of Damages. The phrase "measure of damages" refers to the method by which the amount of a claimant's recovery is determined. In FTCA cases, the measure of damages will be determined by the law of the jurisdiction where the incident occurred. For example, the measure of damages for a claim arising out of a tort that occurred in Maryland will be determined by Maryland law. When the local law conflicts with applicable Federal law, however, the Federal statute will govern.

Exclusion from Claimant's Recovery. The following amounts will be excluded from a claimant's recovery under the FTCA:

Punitive damages. Many states permit the plaintiff in a tort action to recover additional money from the defendant beyond the amount required to compensate the plaintiff for his or her loss. Such damages are known as "punitive damages" because they are awarded to punish a defendant who has engaged in conduct that is wanton, malicious, outrageous, or shocking to the court's conscience. Under the FTCA, the government is not liable for any punitive damages which might otherwise be permitted by state law.

Interest prior to judgment

Value of government benefits. When the government is liable to pay an FTCA claim by a military member, and the claim is not barred by the Feres Doctrine, the value of government benefits (such as medical care, rehabilitation, and disability benefits) will be deducted from the military member's recovery.

Dollar Limit on recovery under the FTCA. While there is no maximum to the amount of recovery permitted under the FTCA, any FTCA payment in excess of $25,000 requires the prior written approval of the Attorney General of the United States or his or her designee.

Statute of Limitations.

Two-year statute of limitations. The claimant has two years from the date the claim against the government accrued in which to present a written claim. If the claimant fails to present his or her claim within two years, it will be barred forever. A claim accrues when the act or incident giving rise to the claim occurs, or when the claimant learns or reasonably should have learned about the wrongful nature of the government employee's conduct.

Six-month waiting period. When a claimant presents an FTCA claim to a Federal agency, the agency has six months in which to act on the claim. During this waiting period, unless the agency has made a final denial, the claimant may not file suit on the claim in Federal court. If, after six months, the agency has not taken final action on the claim, the claimant may then file suit under the FTCA in Federal district court. 28 U.S.C. § 2401(b) (1982).

Six-month time limit for filing suit. After the Federal agency mails written notice of its final denial of the claim, the claimant has six months in which to file suit on the claim in Federal district court. If suit is not filed within six months, the claim will be barred forever. However, before this six-month time limit expires, the claimant may request reconsideration of the denial of his or her claim. The agency then has six months in which to reconsider the claim. If the claim is again denied, the claimant has another six months in which to file suit.

Submission of FTCA Claims**.** The Navy is consolidated all claims processing in Naval Legal Service Officer, Mid-Atlantic. However, a claim is considered filed, or “presented,” to the Federal Agency when any Federal Agency received a written claim for money damages. The claim should be submitted to the agency whose activities gave rise to the claim. If the claim is submitted to the wrong Federal agency, that agency must promptly transfer it to the appropriate one. Although submission to any Federal agency will stop the running of the statute of limitations, the six-month waiting period does not begin until the claim is received by the appropriate agency. That the United States is aware of the potential claim or has actual notice does not relieve the claimant of the requirement of presenting the claim to a Federal agency; failure to formally present the claim can result in the dismissal of an action in court. Once a claim is filed or is anticipated as likely, investigation and adjudication is required.

A claim may be presented by: 1) The injured party for personal injury; 2) the owner of damaged or lost property; 3) the claimant's personal or legal representative (e.g., parents or guardians of minors; executors or administrators of a deceased person's estate; authorized agents or attorneys-in-fact, such as officers of corporations and persons holding a power of attorney from the claimant); or 4) a subrogee who assumed the legal rights of another person. (e.g., an insurance company that compensates its policyholder for damages caused by a government employee becomes subrogated to-or assumes-the policyholder's claim against the government.

The claim must be in writing and signed by a proper claimant. Standard Form 95, Claim for Damage or Injury, should be used whenever practicable.

Claims must be for money damages "in a sum certain." Courts have consistently held that a claim is not presented until it states "a sum certain." If the claimant fails to state a "sum certain," the claim does not constitute a claim for purposes of complying with the jurisdictional prerequisites of the FTCA. Observance of the "sum certain" requirement does not prevent the claimant from recovering more than the amount originally claimed. The claimant may amend the claim at any time prior to final agency action on the claim. However, once an action is initiated under the FTCA, the plaintiff is limited to the damage amount specified in the claim presented "except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the agency, or upon allegation and proof of intervening facts, relating to the amount of the claim." The plaintiff has the burden of proving the existence of the "newly discovered evidence" or "intervening facts."

The claim is not properly presented until it is submitted to a Federal agency.

Information and Supporting Documentation. Although the FTCA itself does not specify what information and supporting documentation are required for validating the claim, administrative regulations promulgated by the Attorney General of the United States and the Judge Advocate General of the Navy require that the claim include information such as:

A reasonably detailed description of the incident on which the claim is based;

the identity of the Federal agencies, employees, or property involved;

a description of the nature and extent of personal injury or property damage; and

documentation of the loss (such as physicians' reports, repair estimates, and receipts).

In some instances, failure to provide the required information may result in a court ruling that the claim was never properly presented.

Command Responsibility When Claim Presented. Prompt action is necessary when a command receives a claim. The following steps must be taken:

Record date of receipt on the claim;

determine which military activity is most directly involved;

when the receiving command is the activity most directly involved, immediately convene an investigation in accordance with chapter II of the JAG Manual and, when the investigation is complete, promptly forward the report and the claim to the appropriate claims adjudicating authority;

when the receiving command is not the activity most directly involved, immediately forward the claim to the activity that is most directly involved; and

report to the Judge Advocate General of the Navy if required by the JAG Manual or JAGINST 5890.1.

A JAG Manual investigation is required whenever a claim against the Navy is filed or is likely to be filed. Generally, the appropriate type of investigation is a litigation-report investigation. Responsibility for convening and conducting the investigation usually lies with the command most directly involved in the incident upon which the claim is based. When circumstances make it impractical for the most directly involved command to conduct the investigation, responsibility may be assigned to some other command.

Scope and Contents of the Investigation. The general duties of the claims investigating officer include the following:

Consider all information and evidence already compiled about the incident;

conduct a thorough investigation of all aspects of the incident in a fair, impartial manner (the investigation must not be merely a whitewash job intended to protect the government from paying a just claim.);

interview all witnesses as soon as possible; inspect property damage and interview injured persons; and determine the nature, extent, and amount of property damage or personal injury and obtain supporting documentation.

In addition to these general duties, the investigating officer also must make specific findings of fact. Great care must be used to ensure that all relevant, required findings of fact are made. A major purpose of the claims investigation is to preserve evidence for use months, and even years, in the future.

Action On the Report. The commanding officer or officer in charge will take action upon completion of the report of investigation. Depending on the circumstances, either the original report or a complete copy, together with all claims received, must be promptly forwarded to the appropriate claims adjudicating authority.

Adjudication. An adjudicating authority is an officer designated by the Judge Advocate General to take administrative action (i.e., pay or deny) on a claim. In the Navy and Marine Corps, adjudicating authorities include

certain senior officers in the Office of the Judge Advocate General and commanding officers of naval legal service offices.

The adjudicating authority can take the following actions:

Approve the claim, if within the payment limits; deny the claim; compromise the claim for an amount within payment limits; or refer the claim to the Office of the Judge Advocate General if payment is recommended in an amount above the adjudicating authority's payment limits.

Geographic Responsibility. Naval legal service offices and certain other commands have been assigned responsibility for adjudicating claims in their respective geographic areas. Claims usually will be forwarded by the command to the adjudicating authority serving the territory in which the claim arose.

Dollar Limits on Adjudicating Authority. There is no maximum limit on the amount that can be paid under an FTCA claim. Payments in excess of certain amounts may require prior written approval by the Attorney General or his or her designee.

Effect of Accepting Payment. When a claimant accepts a payment in settlement of an FTCA claim, the acceptance releases the Federal Government from all further liability to the claimant arising out of the incident on which the claim is based. Any Federal employees who were involved must also be released from any further liability to the claimant. Therefore, if a claimant is not satisfied with the amount the adjudicating authority is willing to pay on an FTCA claim, the entire claim will be denied. The claimant then will have to bring suit in Federal district court to recover on the claim.

Reconsideration. Within six months of a final denial of an FTCA claim by an adjudicating authority, the claimant may request reconsideration of the denial.

Claimant's Right to Sue. Within six months after final denial of an FTCA claim by the adjudicating authority, the claimant may bring suit in Federal district court. There is no right to a jury trial in an FTCA case.

Removal. Actions under the FTCA may be brought only in Federal district courts and not state courts. If suits are brought personally against a Federal employee in state court, consideration should be given to removing the action to Federal district court. Removal is controlled by statute and is a matter of Federal law.

The Federal Employees Liability Reform and Tort Compensation Act. The Federal Employees Liability Reform and Tort Compensation Act of 1988, amending 28 U.S.C. sections 2679(b) & (d), provides that the exclusive remedy against a federal employee based on a claim arising out of the employee's negligent or wrongful acts or omissions within the scope of employment is an action against the United States under the FTCA.

Medical Personnel. The exclusive remedy for personal injury, including death, caused by the negligent or wrongful act or omission of any physician, dentist, nurse, pharmacist, paramedic, or other assisting personnel of the armed forces, acting within the scope of employment is against the United States under the FTCA.

Legal Personnel. The exclusive remedy for injury or loss of property caused by the negligent or wrongful act or omission of any attorney, paralegal, or other member of a legal staff within the armed forces, acting within the scope of employment is against the United States under the FTCA.

Venue. An action may be brought only in the "judicial district where the plaintiff resides or wherein the act or omission complained of occurred."

AD 32.3. *MILITARY CLAIMS ACT*

Like the FTCA, the Military Claims Act (MCA) compensates for personal injury, death, or property damage caused by activities of the Federal Government. MCA claims are limited to two general types:

Injury, death, or property damage caused by military personnel or civilian employees acting within the scope of their employment; and injury, death, or property damage caused by non-combat activities of a peculiarly military nature.

The MCA differs from the FTCA in many important respects. First, its application is worldwide. Second, the claimant has no right to sue the government if his or her MCA claim is denied by the adjudicating authority. Finally, unlike the FTCA, which creates statutory rights for claimants, the MCA is operative only "under such regulations as the Secretary of a military department may prescribe."

Range of Coverage. The MCA provides for coverage for the following situations:

Damage to or loss of real property, including damage or loss incident to use and occupancy;

Damage to or loss of personal property, including property mailed to the United States and including registered or insured mail damaged, lost or destroyed even if by a criminal act while in the possession of the Army, Navy, Air Force, Marine Corps or Coast Guard, as the case may be; or

Personal injury or death; either caused by a civilian official or employee of that department, or the Coast Guard or a member of the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be, acting within the scope of his employment, or otherwise incident to noncombat activities of that department, or the Coast Guard.

Exclusions From Liability**.** As with FTCA claims, there are three general categories of exclusions from liability under the MCA: certain government activities (e.g., combat activities); claims cognizable under other claims statutes (e.g., FTCA); and certain excluded classes of claimants (e.g., naval personnel).

Measure of Damages. The rules for determining the amount of a claimant's recovery under the MCA are similar to those governing other claims.

Property damage. The amount of compensation for property damage is based on the estimated cost of restoring the property to its condition before the incident. If the property cannot be repaired economically, the measure of damage will be the replacement cost of the property minus any salvage value. The claimant also may recover compensation for loss of use of the property (e.g., cost of a rental car while the damaged vehicle is being repaired).

Personal injury or death. Compensation under the MCA for personal injury or death will include items such as medical expenses, lost earnings, diminished earning capacity, pain and suffering, and permanent disability. Usually, local standards are applied.

Amount of Recovery. The Department of the Navy may pay MCA claims up to $100,000. If the Secretary of the Navy considers that a claim in excess of $100,000 is meritorious, a partial payment of $100,000 may be made with the balance referred to the Comptroller General for payment from appropriations provided therefore.

Statute of Limitations**.** A claim under the MCA may not be paid unless it is presented in writing within two years after it accrues. The statute of limitations may be suspended during time of armed conflict. The rules governing presentment of the claim are substantially similar to those under the FTCA.

Procedures**.** The investigation and adjudication procedures for MCA claims are substantially similar to those for FTCA claims. In fact, many claims paid under the MCA are initially presented as FTCA claims.

AD 32.4. *MILITARY PERSONNEL AND CIVILIAN EMPLOYEES' CLAIMS ACT*

The Military Personnel and Civilian Employees' Claims Act of 1964, [hereinafter Personnel Claims Act (PCA)], is intended to maintain morale by compensating service members and other Federal employees for personal property which is lost, damaged, or destroyed incident to service. The Personnel Claims Act applies worldwide.

The Personnel Claims Act is limited to recovery for personal property damage-including loss, destruction, capture, or abandonment of personal property. Damage to real property (e.g., land, buildings, and permanent fixtures) is not covered, but may be compensable under the Military Claims Act. Only military personnel and civilian employees of the Department of Defense may recover compensation. Military personnel include commissioned officers, warrant officers, enlisted personnel, and other appointed or enrolled military members. Civilian employees include those paid by the Department of the Navy on a contract basis. To be payable under the Personnel Claims Act, the claimant's loss must have occurred incident to military service or employment. Eleven general categories of losses incident to service exist:

Property losses in quarters or other authorized places designated by superior authority for storage of the claimant's personal property;

transportation losses, such as damage to household goods shipped pursuant to PCS orders;

losses caused by marine or aircraft disasters;

losses incident to combat or other enemy action;

property damaged by being subjected to extraordinary risks;

property used for the benefit of the U.S. Government;

losses caused by the negligence of a Federal employee acting within the scope of employment;

money deposited with authorized personnel for safekeeping, deposit, transmittal, or other authorized disposition;

certain noncollision damage to motor vehicles (limited to $2,000, not including the contents of the vehicles);

damage to house trailers and contents while on Federal property or while shipped under government contract; and

certain thefts aboard military installations from the possession of the claimant.

Not only must the property damage or loss occur incident to service, the claimant's possession and use of the damaged property must have been reasonable, useful, or proper under the circumstances. While the Personnel Claims Act provides broad protection for the military member's personal property, the government has not undertaken to insure all property against any risk. A personnel claim will usually be denied if the claimant's possession or use of damaged property was unreasonable under the circumstances. Factors that are considered include: the claimant's living conditions, reasons for possessing or using the property, efforts to safeguard the property, and the foreseeability of the loss or damage that occurred.

Other Meritorious Claims. The Secretary of the Navy and Judge Advocate General may approve meritorious claims within the scope of the Personnel Claims Act that are not specifically designated as payable.

Exclusions From Liability**.** Exclusions from personnel claims liability fall into two basic categories: circumstances of loss and property type.

Circumstances of loss. The two most common examples are:

Caused by claimant's negligence. If the property damage was
caused, either in whole or in part, by the claimant's negligence or wrongful acts-or by such conduct by the claimant's agent or employee acting in the scope of employment-the personnel claim will be denied. Such contributory negligence is a complete bar to recovery.

Collision damage to motor vehicles. Damage to motor vehicles are not payable as a personnel claim when it was caused by collision with another motor vehicle. "Motor vehicle" includes automobiles, motorcycles, trucks, recreational vehicles, and any other self-propelled military, industrial, construction, or agricultural equipment. Collision claims may be paid under other claims statutes-most frequently the Federal Tort Claims Act or Military Claims Act-depending on the circumstances.

Excluded types of property. The most common examples are:

Currency or jewelry shipped or stored in baggage;

losses in unassigned quarters in the United States;

enemy property or war trophies;

unserviceable or worn-out property;

inconvenience or loss of use expenses;

items of speculative value;

business property;

sales tax;

appraisal fees;

quantities of property not reasonable or useful under the circumstances;

intangible property representing ownership or interest in other property (such as bank books, checks, stock certificates, and insurance policies);

government property; and

contraband (i.e., property acquired, possessed, or transported in violation of law or regulations).

Measure of Damages. The rules for calculating the amount the claimant can recover on a personnel claim are set forth in JAGINST 5890.1, encl. (5). If the property can be repaired, the claimant will receive reasonable repair costs established either by a paid bill or an estimate from a person in the business of repairing that type of property. Estimate fees may also be recovered under certain circumstances. Deductions may be made for any preexisting damage (i.e., damage or defects which existed prior to the incident which gave rise to the personnel claim) that also would be repaired. If the cost of repairing the property exceeds its depreciated replacement cost, however, the property will be considered not economically repairable.

Depreciation. A used item that has been lost or destroyed is worth less than a new item of the same type. The price of a new replacement item must be depreciated to award the claimant the FMV of the lost or destroyed item.

Dollar Limits on Recovery. The maximum amount payable for most claims under the Personnel Claims Act is $40,000 (payment up to $100,000 is authorized if the claim arose from an emergency evacuation or from extraordinary circumstances).

"Per Item, Per Claim" Recovery Limitations. In addition to the overall payment cap of $40,000 / $100,000, the Personnel Claims Act further limits the amounts awarded for certain types of property. These limits are published in the AL-DG and will either be a maximum amount per item, and / or a maximum amount per claim, depending on the type of property.

Statute of Limitations. The statute of limitations for personnel claims is two years, although it can be suspended during time of armed conflict. In household goods claims, however, the claimant must act relatively promptly. Failure to take exceptions when the goods are delivered by the carrier, or within 70 days, may result in reduced payment. Also, failure to file the claim in time for the Federal Government to recover compensation from the carrier under the carrier's contract with the government may also result in reduced payment.

Procedures. Personnel claims procedures follow the same general pattern of presentment, investigation, and adjudication discussed with respect to FTCA claims. There are, however, some significant differences. Procedures in household goods shipment claims, which constitute the largest portion of personnel claims, can be complicated. The most notable differences and distinctions are as follows:

Claim forms. Personnel claims are presented on DD Form 1842 (Claim for Personal Property Against the United States).

Supporting documentation. Supporting documentation in personnel claims can be rather extensive. DD Form 1844 (List of Property) usually is required. Failure to furnish it means the military member will not recover anything for lost or damaged articles (because the government must file with the carrier by 75 days).

Investigation. The commanding officer of the military organization responsible for processing the claim will refer the claim to a claims investigating officer. The claims investigating officer's duties include reviewing the claim and its supporting documentation for completeness and, if necessary, examining the property damage. The claims investigating officer will also prepare and present a concurrent claim on behalf of the Federal Government against any carriers liable for the damage under their government contract.

Adjudication. Personnel claims adjudicating authorities and their respective payment limits are listed in paragraph 7 of JAGINST 5890.1, encl. (5). For Marine Corps personnel, personnel claims are adjudicated at Headquarters, Marine Corps.

When the claimant's loss is so great that the claimant immediately needs funds to provide fundamental necessities of life, the adjudicating authority may make an advance partial payment-normally one-half of the estimated total payment. The claimant may request reconsideration of the claim, even though he or she has accepted payment, if the claim was not paid in full. If the adjudicating authority does not resolve the claim to the claimant's satisfaction, the request for reconsideration is forwarded to the next higher adjudicating authority.

There is no right under the Personnel Claims Act to sue the government.

Effect of Claimant's Insurance. If the claimant's property is insured in whole or in part, the claimant must file a claim with the insurer as a precondition to recovery under the Personnel Claims Act. The Personnel Claims Act is intended to supplement any insurance the claimant has; it is not intended to be an alternative to that insurance or to allow double recovery. If the claimant receives payment under his insurance policy for the claimed property damage, the amount of such payment will be deducted from any payment authorized on the Personnel Claims Act claim. Likewise, if the claimant receives payment on his personnel claim, and then is paid for the same loss by an insurance company, the claimant must refund the amount of the insurance payment to the Federal government.

AD 32.5. *FOREIGN CLAIMS ACT*

The Foreign Claims Act (FCA), provides compensation to inhabitants of foreign countries for personal injury, death, or property damage caused by, or incident to noncombat activities of military personnel overseas. Although the U.S. Government's scope of liability under FCA is broad, certain classes of claimants and certain types of claims are excluded from the statute's coverage. Procedures for adjudicating an FCA claim are substantially different from the general procedural pattern for other types of claims against the government. Usually, one or more officers or employees are designated by a commanding officer to act as a "claims commission" in writing. A claims commission can settle and pay claims in an amount not more than $100,000.00 by statute. However, as a matter of internal regulation, many theater commanders limit the claims commission to much lower numbers, and designate different levels of the chain of command as approval authorities for increasing claim amounts.

The government's liability under the FCA is somewhat parallel to that under the MCA. Liability is based on two general theories: loss caused by military personnel, and loss incident to noncombat military activities. The government's liability under the FCA is generally greater than under the MCA. On the other hand, the FCA is more limited than the MCA in terms of eligible claimants and territorial application.

Loss Caused by Military Personnel. Under the FCA, the government is liable for personal injury, death, and property damage, including both real and personal property, caused by military members or civilian military employees. Unlike the FTCA and the MCA, the scope-of-employment doctrine does not apply except when the civilian employee is a native foreign national. Also, unlike FTCA claims, the acts that caused the loss need not be wrongful or negligent. The government assumes liability for virtually all acts ranging from mere errors in judgment to malicious criminal acts.

Loss Incident to Noncombat Military Activities. The second theory of FCA liability is virtually identical to the second basis for liability under the MCA. The government assumes liability for personal injury, death, or property damage, both real and personal property, caused by, or incident to, noncombat military activities. Such activities are peculiarly military, having little parallel in civilian life, and involve situations in which the Federal Government historically has assumed liability. If such a loss incident to noncombat military activities is payable both under the FCA and also under the MCA, it will be paid under the FCA.

Effect of Claimant's Negligence. A claimant whose negligent or wrongful conduct partially or entirely caused the loss might be precluded from recovery under the FCA. The effect, if any, of the claimant's contributory or

comparative negligence will be determined by applying the law of the country where the claim arose. Under such circumstances, the claimant will recover under the FCA only to the extent that his or her own courts would have permitted compensation.

Territorial Application. The FCA applies to claims arising outside the United States, its territories, commonwealths, and possessions. The fact that the claim arises in a foreign country, but in an area that is under the temporary or permanent jurisdiction of the United States, such as an overseas military installation, does not prevent recovery under the FCA.

Relationship to Claims Under Treaty or Executive Agreement. Certain treaties and executive agreements, such as Article VIII of the NATO Status of Forces Agreement, contain claims provisions that may be inconsistent with the FCA principles and procedures. When such treaty or executive agreement claims provisions conflict with FCA, the treaty or the executive agreement usually governs. In countries where such treaty or executive agreement provisions are in effect, directives of the cognizant area coordinator should be consulted before processing any claims by foreign nationals.

Exclusions From Liability. There are two general categories of exclusions from FCA liability: excluded types of claims and excluded classes of claimants.

Excluded types of claims. The following types of claims are not payable under FCA:

Claims that are based solely on contract rights or breach of contract; private contractual and domestic obligations of individual military personnel or civilian employees (e.g., private debt owed to foreign merchant); claims based solely on compassionate grounds; claims for support of children born out of wedlock where paternity is alleged against a service member; claims for patent infringements; claims arising directly or indirectly from combat activities; and admiralty claims unless otherwise authorized by the Judge Advocate General.

Excluded classes of claimants. The following types of classes of claimants are excluded from recovering under FCA:

Inhabitants of the United States, including military members and dependents stationed in a foreign country and U.S. citizens and resident aliens temporarily visiting the foreign country; enemy aliens, unless the claimant is determined to be friendly to the United States; and insurers and subrogees.

Measure of Damages. Damages under the FCA are determined by applying the law and local standards of recovery of the country where the incident occurred. The maximum amount payable under the FCA is $100,000. In the case of a meritorious claim above that amount, the Secretary of Defense may pay up to $100,000 and certify the excess to the Comptroller General for payment or the Secretary of Homeland Security for payment of claims against the United States Coast Guard arising while it is operating as a service of the Department of Homeland Security.

Statute of Limitations**.** The claim must be presented within two years after the claim accrues. If the claim is presented to a foreign government within this period, pursuant to treaty or executive agreement provisions, the statute-of-limitations requirement will be satisfied.

Procedures**.** Under the FCA, the investigation and adjudication functions are merged in a foreign claims commission, which the commanding officer appoints. The foreign claims commission not only conducts an investigation similar to JAG Manual a command investigation, but also is empowered to settle the claim within certain dollar limits.

AD 32.6. *ADMIRALTY CLAIMS*

Admiralty is a vast, highly specialized area of law. The purpose of this section is merely to provide a brief introduction to admiralty claims, with specific focus on the command's responsibilities. Admiralty law involves liability arising out of maritime incidents such as collisions, groundings, and spills. Admiralty claims may be asserted either against, or in favor of, the Federal Government. The Navy's admiralty claims are handled by attorneys in the Admiralty Division of the Office of the Judge Advocate General (Code 31). Other judge advocates with specialized admiralty training are located in larger naval legal service offices and at certain overseas commands. When admiralty claims result in litigation, attorneys with the Department of Justice, in cooperation with the Admiralty Division, represent the Navy in court. Thus, while the command has little involvement in the

adjudication or litigation of admiralty claims, it often has critical investigative responsibilities.

Scope of Liability**.** The Federal Government has assumed extensive liability for personal injuries, death, and property damage caused by naval or other government owned or controlled vessels incident to governmental maritime activities. Examples of the specific types of losses that give rise to admiralty claims include incidents such as collisions; swell wash and wake damage; damage to commercial fishing equipment, beds, or vessels; damage resulting from oil spills, paint spray, or blowing tubes; damages or injuries to third parties resulting from a fire or explosion aboard a naval vessel; damage to commercial cargo carried in a Navy bottom; damage caused by improperly lighted, marked, or placed buoys or navigational aids for which the federal government is responsible; property damage, personal injury or death of civilians caused by naval or other government owned or controlled vessels; property damage, personal injury or death of federal government employees not in the performance of duties caused by naval or other government owned or controlled vessels; and property damage, personal injury or death of military personnel not incident to service while aboard a privately owned vessel caused by naval or other government owned or controlled vessels.

Exclusions from Liability**.** Certain categories of persons are precluded from recovering under an admiralty claim for personal injury or death incurred incident to maritime activities, particularly when the potential claimant may be compensated under another statutes.

Measure of Damages**.** A survey of damaged property is required in all collisions and any other maritime incidents involving potential liability for property damage. Surveys have been customary in admiralty law and are intended to eliminate burdensome and difficult questions concerning proof of damages.

In personal injury cases, medical examinations are required for all injured persons. The function of the medical examination is similar to that of the property damage survey.

There is no limit to liability. The Deputy Assistant Judge Advocate General of the Navy (Admiralty) has been delegated settlement authority up to $100,000. The Secretary will certify amounts in excess of $100,000 to the Department of Treasury.

Statute of Limitations**.** Suits in admiralty must be filed within two years after the incident on which the suit is based. Unlike the statute-of-limitations rule under the FTCA, filing an admiralty claim with the Department of the Navy does not toll the running of this two-year period. Nor can the government administratively waive the statute of limitations in admiralty cases. If the admiralty claim cannot be administratively settled within two years after the incident, the claimant must file suit against the government in order to prevent the statute of limitations from running.

Procedures**.** The most critical command responsibility in admiralty cases is to immediately notify the Judge Advocate General and an appropriate local judge advocate of any maritime incident which might result in an admiralty claim for or against the government. Because of the highly technical factual and legal issues that may be involved in an admiralty case, it is absolutely vital that the Admiralty Division of the Office of the Judge Advocate General be involved in the case from the earliest possible moment.

After initially notifying the Judge Advocate General, the command must promptly begin an investigation of the incident. A JAG Manual investigation will usually be required although, in some circumstances, a letter report will be appropriate.

AD 32.7. *NONSCOPE CLAIMS*

"Nonscope claims" represent claims for damages that are not cognizable under any other provisions of law. They arise out of either the use of a government vehicle anywhere or the use of government property aboard a Federal installation. The personal injury, death, or property damage must be caused by a Federal military employee, but there is no requirement that the acts be negligent or in the scope of Federal employment (hence the term "nonscope claim").

As a precondition to payment under the nonscope claims provisions, the claim must not be cognizable under some other claims statute. The resulting personal injury, death, or property damage must be caused by a Federal military employee (either military member or civilian employee of the armed forces or Coast Guard). Acts by employees of nonappropriated fund activities are not covered by the nonscope claims statute.

Neither the nonscope claims statute nor the Navy's regulations require that the Federal military employee's conduct causing the loss be negligent or otherwise wrongful.

Nonscope claims are limited to injury, death, or property damage arising out of either of the following circumstances:

Incident to the use of a government vehicle anywhere; or incident to use of government property aboard a government installation. ("Government installation" means any Federal Government facility having fixed boundaries and owned or controlled by the Federal Government. It includes both military bases and nonmilitary installations.) There are no territorial limitations on nonscope claims.

Exclusions From Liability. If the loss was caused, in whole or in part, by the claimant's negligence or wrongful acts, or by negligence or wrongful acts by the claimant's agent or employee, the claimant is barred from any recovery under the nonscope claims statute. Subrogees and insurers may not recover subrogated nonscope claims.

Measure of Damages. For personal injury or death, the claimant may recover no more than actual medical, hospital, or burial expenses not paid or furnished by the Federal Government. The claimant may not recover any amount that he or she can recover under an indemnifying law or indemnity contract. The maximum payable as a nonscope claim is $1,000.

Statute of Limitations**.** A nonscope claim must be presented within two years after the claim accrues or it will be forever barred.

Procedures**.** Notable procedural aspects of nonscope claims include the following:

Automatic consideration of other claims. Claims submitted pursuant to the FTCA or MCA, but which are not payable under those Acts because of scope-of-employment requirements, automatically will be considered for payment as a nonscope claim.

Adjudicating authority. All adjudicating authorities listed in JAGINST 5890.1 are authorized to adjudicate nonscope claims.

Claimant's rights after denial. If a claim submitted solely as a nonscope claim is denied, the claimant may appeal to the Secretary of the Navy (Judge Advocate General) within 30 days of the notice of denial. There is no right to sue under the nonscope claims statute.

AD 32.8. *ARTICLE 139, UCMJ, CLAIMS*

Article 139 of the Uniform Code of Military Justice provides compensation for private property damage caused by riotous, willful, or wanton acts of members of the naval service not within the scope of their employment or the wrongful taking of property by a member of the naval service. Article 139 claims are unique in that they allow for a claimed amount of loss to be charged against the military pay of the offender. Overseas, these types of damages may also be paid for under the Foreign Claims Act. Although the individual member, not the Federal Government, is liable for the damage claimed under Article 139, the member's command has significant procedural responsibilities that can be found in Chapter IV of the JAG Manual.

Article 139 claims are limited to damage, loss, or destruction of real or personal property. The property damage, loss, or destruction must be caused by acts of military members which involve riotous or willful conduct, or demonstrate such a reckless and wanton disregard for the property rights of other persons that willful damage or destruction is implied. Only damage that is directly caused by the conduct will be compensated.

A wrongful taking is essentially theft. Claims for property that was taken through larceny, forgery, embezzlement, misappropriation, fraud, or similar theft offenses will normally be payable. Loss of property that involves a dispute over the terms of a contract, or over ownership of property, are not normally payable unless the dispute is merely a cover for an intent to steal. Article 139 is not a way in which an individual can have his debts collected, nor is it to be used to mediate business disputes.

Exclusions From Liability**.** The following types of claims are not payable under Article 139:

Claims resulting from conduct that involves only simple negligence (i.e., failure to act with the same care that a reasonable person would use under the circumstances); subrogated claims (e.g., by insurers); claims for personal injury or death; claims arising from conduct occurring within the scope of employment; and claims for reimbursement for damage, loss, or destruction of government property;

Proper Claimants**.** Any individual (including both civilians and service members), business entity, state or local government, or charity may submit a claim.

Measure of Damages. The amount of recovery is limited to only the direct physical damage caused by the service member. Service members will not be assessed for damage or property loss due to the acts or omissions of the property owner, his lessee, or agent that were a proximate contributing factor to the loss or damage of said property. In these cases, the standard for determining responsibility will be one of comparative responsibility.

The maximum amount that may be approved by an officer exercising general court-martial jurisdiction (OEGCMJ) under Article 139 is $5,000 per offender, per incident. Where there is a valid claim for over $5,000, the claim, investigation into the claim, and the commanding officer's recommendation shall be forwarded to the Judge Advocate General (Code 35) or to Headquarters, U.S. Marine Corps (Code JAR), as appropriate, before checkage against the offender can begin. The amount that can be charged against an offender in any single month cannot exceed one-half of the member's basic pay.

Statute of Limitations**.** The claim must be submitted within 90 days of the incident upon which the claim is based.

Procedures**.** The claimant may make an oral claim, but it must be reduced to a personally signed writing that sets forth the specific amount of the claim, the facts and circumstances surrounding the claim, and any other matters that will assist in the investigation. If there is more than one complainant from a single incident, each claimant must submit a separate and individual claim.

Investigation. Claims cognizable under Article 139 must be investigated by the alleged offender's command. There is no requirement that the alleged offender be designated as a party to the investigation and afforded the rights of a party. The investigation inquires into the circumstances surrounding the claim, gathering all relevant information about the claim. Under no circumstances should the investigation of a claim be delayed because criminal charges are pending.

The investigation will make findings of fact and opinions on whether:

The claim is by a proper claimant (in writing and for a definite sum);

the claim is made within 90 days of the incident that gave rise to it;

the claim is for property belonging to the claimant that was the subject of damage, loss, or destruction by a member or members of the naval service;

the claim specifies the amount of damage suffered by the claimant; and

the claim is meritorious.

The investigation shall also make recommendations about the amount to be assessed against the responsible parties. If more than one service member is responsible, the investigation must make recommendations concerning the amount to be assessed against each individual.

Standard of Proof. A preponderance of the evidence is necessary for pecuniary liability. Normally, the measure of a loss is either the repair cost or the depreciated replacement cost for the same or similar item. Depreciation for most items depends on the age and condition of the item. The Military Allowance List-Depreciation Guide should be used in determining depreciated replacement cost.

Subsequent Action. If all known offenders are attached to same command, then the commanding officer shall ensure that the offenders have an opportunity to see the investigative report and are advised that they have 20 days in which to submit a statement or additional information. If the member declines to submit further information, he shall so state, in writing, during the 20-day period.

The commanding officer reviews the investigation and determines whether the claim is in proper form, conforms to Article 139, and whether the facts indicate responsibility for the damage by members of the command. If the commanding officer finds that the claim is payable, he shall fix the amount to be assessed against the offender(s).

Finally, the commanding officer's action on the investigation is forwarded to the OEGCMJ over the command for review and action on the claim. The OEGCMJ will then notify the commanding officer of his determinations, and the commanding officer will take action consistent with that determination.

If the offenders are members of different commands, the investigation will be forwarded to the OEGCMJ over the commands to which the alleged offenders are assigned. The OEGCMJ will ensure that the alleged offenders are shown the investigative report and are permitted to comment on it before action is taken on the claim. The OEGCMJ will review the investigation to determine whether the claim is properly within Article 139 and whether the facts indicate responsibility for the damage on members of his command. If the OEGCMJ determines that the claim is payable, he will fix the amount to be assessed against the offenders and direct their commanding officers to take action accordingly.

Reconsideration. The OEGCMJ may, upon request by either the claimant or the member assessed for the damage, reopen the investigation or take other action he believes is in the interest of justice. If the OEGCMJ anticipates acting favorably on the request, he will give all interested parties notice and an opportunity to respond.

Appeal. If the claim is for $5,000 or less, the claimant or the member against whom pecuniary responsibility has been assessed may appeal the decision to the OEGCMJ within 5 days of receipt of the OEGCMJ's decision. If good cause is shown, the OEGCMJ may extend the appeal time. The appeal is submitted via the OEGCMJ to the Judge Advocate General for review and final action. Imposition of the OEGCMJ's decision will be held in abeyance pending final action by the Judge Advocate General.

Relationship to Court-Martial Proceedings. Article 139 claims procedures are entirely independent of any court-martial or nonjudicial punishment proceedings based on the same incident. Acquittal or conviction at a court-martial may be considered by an Article 139 investigation, but it is not controlling on determining whether a member should be assessed for damages. The Article 139 investigation is required to make its own independent findings.

PART B: CLAIMS ON BEHALF OF THE GOVERNMENT

AD 32.9. *FEDERAL CLAIMS COLLECTION ACT*

Under the Federal Claims Collection Act, the Federal Government may recover compensation for claims on behalf of the United States for damage to or loss or destruction of government property through negligence or wrongful acts. The FCCA provides in pertinent part that the head of an executive or legislative agency:

shall try to collect a claim of the United States Government for money or property arising out of the activities of, or referred to, the agency;

may compromise a claim of the Government of not more than $20,000 (excluding interest) that has not been referred to another executive or legislative agency for further collection action; and

may suspend or end collection action on a claim referred to in clause (2) of this subsection when it appears that no person liable on the claim has the present or prospective ability to pay a significant amount of the claim or the cost of collecting the claim is likely to be more than the amount recovered.

The extent of any FCCA recovery by the Federal Government is determined by the law where the damage occurred. As a general rule, if a private person would be entitled to compensation under the same circumstances, the Federal Government may recover under the FCCA.

FCCA claims may be pursued against private persons, corporations, associations, and nonfederal governmental entities. An FCCA claim also can be asserted against any Federal employee responsible for the damage and, if the responsible party is insured, the claim may be presented to the insurer. Generally, the government does not seek payment from service members and government employees for damages caused by their simple negligence.

Measure of Damages**.** The amount of the government's recovery for an FCCA claim is determined by the measure-of-damages rules of the law where the damage occurred. There is no maximum limit to recovery.

Statute of Limitations**.** The government has three years after the damage occurs in which to make a written demand on the responsible party.

Procedures**.** Notable features of FCCA procedures are set forth in JAGINST 5890.1

Referral to Department of Justice. Unsettled claims may be referred to the Department of Justice for litigation. The referral is made by the Office of the Judge Advocate General and not by the local authority directly.

AD 32.10. *MEDICAL CARE RECOVERY ACT*

The Medical Care Recovery Act (MCRA) provides that, when the government treats or pays for the treatment of a military member, retiree, or dependent, it may recover its expenses from any third party legally liable for the injury or disease. The key to understanding the complexities of the MCRA is to realize that the Federal Government operates one of the largest health-care systems in the world.

MCRA, provides, in part, that in any case in which the United States is authorized or required by law to furnish hospital, medical, surgical, or dental care and treatment (including prostheses and medical appliances) to a person who is injured or suffers a disease, after the effective date of this Act, under circumstances creating a tort liability upon some third person (other than or in addition to the United States and except employers of seamen treated under the provisions of section 249 of this title) to pay damages therefore, the United States shall have a right to recover from said third person the reasonable value of the care and treatment so furnished or to be furnished and shall, as to this right be subrogated to any right or claim that the injured or diseased person, his guardian, personal representative, estate, dependents, or survivors has against such third person to the extent of the reasonable value of the care and treatment so furnished or to be furnished. The head of the department or agency of the United States furnishing such care or treatment may also require the injured or diseased person, his guardian, personal representative, estate, dependents, or survivors, as appropriate, to assign his claim or cause of action against the third person to the extent of that right or claim.

The MCRA created an independent cause of action for the United States. Its right of recovery is not dependent upon a third party. The requirement that the United States furnish care to an injured party is merely a condition precedent to the government's independent right of recovery. If the tortfeasor has a procedural attack or defense against the injured party, it will not serve as a bar to a possible recovery by the government.

The extent of any MCRA recovery by the Federal Government is determined by the law where the injury occurred. The Federal Government enjoys no greater legal rights or remedies than the injured person would under the same circumstances. Thus, the Federal Government may recover its expenses in treating an injured person if, under the law, the injured person would be legally entitled to compensation for injuries suffered at the hands of the responsible party.

MCRA claims may be asserted against private individuals, corporations, associations, and nonfederal governmental agencies. They also may be asserted against a Federal employee responsible for the injuries, except that no such claim may be asserted against a service member injured as a result of his own willful or negligent acts for two reasons. First, the wording of the MCRA is explicit in providing a right of action against third parties. The injured member does not qualify as a third party. Second, to allow such a claim would violate the provisions and spirit of 10 U.S.C. § 1074 (1982), which provides the entitlement of active-duty service members to medical care free of charge (save for certain subsistence costs chargeable to officers). However, the United States can subrogate against any insurance coverage which the member may have that might cover medical care and treatment as a result of the self-injury.

Claims Against Insurers. If the party responsible for the injuries is insured, an MCRA claim may be asserted against the insurer. Since a large portion of injuries resulting in MCRA claims involve automobile accidents, assertions

against insurance companies are commonplace.

Measure of Damages**.** The Federal Government may recover the reasonable value of medical services it provided, either directly at a U.S. Government hospital or indirectly through the TRICARE program. The value of treatment at Federal Government facilities is computed on a flat-rate per diem basis for in-patient care and a per-visit charge for out-patient treatment, rather than the itemized charges used by most civilian hospitals. These rates are promulgated by the Office of Management and Budget (OMB). The Federal Government may recover the amount actually paid to, or on behalf of, a military dependent under the TRICARE program. The Federal Government may recover amounts it paid to civilian facilities for emergency medical treatment provided active-duty personnel.

Statute of limitations**.** MCRA claims must be asserted within three years after the injury occurs.

Procedures**.** Primary responsibility for assertion and collection of MCRA claims rests with "JAG designees" (i.e., officers delegated MCRA responsibilities by the Judge Advocate General). JAG designees include certain officers in the Office of the Judge Advocate General and commanding officers of most Naval Legal Service Offices. Designees outside of the Office of the Judge Advocate General have been assigned geographic responsibility. JAG designees may assert and receive full payment of MCRA claims in any amount, but they may compromise, settle, or waive claims up to $40,000. Claims in excess of $40,000 may be compromised, settled, or waived only with the approval of the Department of Justice.

JAG designees learn of potential MCRA claims from investigations and reports of care and treatment.

Investigations. When a military member, retiree, or dependent receives,
either directly or indirectly, Federal medical care for injuries or disease for which another party may be legally responsible, an investigation will be required. One exception to this requirement is when the in-patient care does not exceed three days or out-patient care does not exceed ten visits.

The responsibility for conducting the investigation of a possible MCRA claim normally lies with the commanding officer of the local naval activity most directly concerned, usually the commanding officer of the personnel involved in the incident or of the activity where the incident took place.

An investigation into a possible MCRA claim will be conducted in accordance with the JAG Manual and JAGINST 5890.1. An investigation of the same incident that was convened for some other purpose may be used to determine MCRA liability.

If any investigation (regardless of its origin or initial purpose) involves a potential MCRA claim, a copy should be forwarded to the cognizant JAG designee.

Reports of Care and Treatment. The second major way in which the JAG designee learns of a possible MCRA claim is by a report from the facility providing medical care.

Military health-care facilities are required to report medical treatment they provide when it appears that a third party is legally responsible for the injuries or disease. In the Navy, this reporting requirement is satisfied by submission of NAVJAG Form 5890/12 (Hospital and Medical Care - Third Party Liability Case) to the cognizant JAG designee. A NAVJAG 5890/12 is submitted when it appears that the patient will require more than three days' in-patient care or more than ten out-patient visits. Preliminary, interim, and final reports are prepared as the patient progresses through the treatment. This report is, in essence, a hospital bill because it will reflect the value of the medical care provided to date, computed in accordance with OMB rates. Military health-care facilities in other services use forms similar to NAVJAG 5890/12.

Statements of TRICARE payments on behalf of the injured person are available from the local TRICARE carrier (usually a civilian health-care insurance company that administers the TRICARE program under a government contract). Statements are to be forwarded to JAG designees in cases involving potential third-party liability.

District medical officers are required to submit reports to cognizant JAG designees whenever they pay emergency medical expenses incurred by active-duty personnel at a civilian facility and the circumstances indicate possible MCRA liability.

Injured Person's Responsibilities. The JAG designee will advise the injured person of his / her legal obligations under MCRA. These responsibilities are to:

Furnish the JAG designee with any pertinent information concerning the incident;

notify the JAG designee of any settlement offer from the liable party or that party's insurers;

cooperate in the prosecution of the government's claim against the liable party;

give the JAG designee the name and address of any civilian attorney representing the injured party since the civilian attorney may represent the government as well as the injured person if the claim is litigated in court;

refuse to execute a release or settle any claim concerning the injury without the prior approval of the JAG designee; and

refuse to provide any information to the liable party, that party's insurer, or their attorney without prior approval of the JAG designee.

These restrictions and obligations are necessary because the government's rights under the MCRA are largely derivative from the injured person's legal rights. If the injured person makes an independent settlement with the liable party, the government's rights could be prejudiced. Also, if the injured person settles the claim independently and receives compensation for medical expenses, the government is entitled to recover its MCRA claim from the injured person directly out of the proceeds of the settlement.

JAG Designee Action. The JAG designee formally asserts the government's MCRA claim by mailing a "notice of claim" to the liable party or insurer with the following information:

Reference to the statutory right to collect;

a demand for payment or restoration;

a description of damage;

the date and place of the incident; and

the name, phone number, and office address of the claims personnel to contact.

The JAG designee may accept full payment of the claim or may establish an installment payment plan with the liable party. Under appropriate circumstances, the JAG designee may waive or compromise the claim. Waivers or compromises of claims in excess of $40,000 require prior Department of Justice approval. If the claim cannot be collected locally, referral to the Department of Justice for litigation is possible, but this must be done by the Judge Advocate General.

Medical Payments Insurance Coverage**.** Government claims for medical care normally are directed against the tortfeasor, and recovery is obtained either directly from him or his insurance carrier. There are, however, other potential sources for recovery of medical care expenditures, depending upon the circumstances involved. One such potential source is "medical payments" insurance coverage. Under the provisions of certain automobile insurance policies, an insurer may be obligated to pay the cost of medical care for injuries incurred by the policyholder, his passengers who are riding in the insured vehicle, or a pedestrian who is struck by the insured vehicle. Assuming such coverage exists (and it is the claims officer's responsibility to determine if it does), medical payments clauses apply regardless of who was at fault and the United States may be entitled to recover as the provider of medical care.

Uninsured Motorist Coverage**.** Another potential source of recovery of medical care costs is the "uninsured motorist" coverage provisions of the typical automobile insurance policy. If an injured service member has obtained such coverage, and the tortfeasor is uninsured, the typical uninsured motorist coverage clause provides for payment to the policyholder of these sums which he would have been able to recover from the tortfeasor, but for the fact that the tortfeasor was uninsured.

No-fault Statutes**.** The recovery of the United States under the MCRA in states that have enacted no-fault statutes will be determined by the language of the statute. It is necessary to determine if the United States is within the terms of the statute so as to be entitled to recover for medical care provided.

AD 32.11. *AFFIRMATIVE CLAIMS AGAINST SERVICEMEMBER TORTFEASORS*

The United States may not assert an affirmative claim against a service member / employee who, while in the scope of employment, damages government property or causes damage or injury for which the United States must pay. Consideration, in the case of gross negligence or willful and wanton acts, should be given to whether such actions took the service member / employee outside the scope of employment.

CHAPTER 33

CHAPTER 33

AD 33. RELATIONS WITH CIVIL AUTHORITIES.

This chapter provides direction and guidance for various situations where a military commander is asked to provide or, at a minimum, permit the taking of personnel, property, or records from a military installation by civilian authorities. In addition, this chapter will discuss requests connected with State or Federal criminal prosecutions, provide procedures for responding to the initiation and processing of civil litigation, whether or not the Department of the Navy is a party, guidance for dealing with the Department of Justice in criminal and civil prosecutions, and guidance on State attempts to tax or regulate activities or personnel aboard military installations. Responding to such requests by a State for delivery of members or civilian employees involves balancing the Federal interest in preserving sovereign immunity and the productivity, peace, good order, and discipline of the installation against the right of the State to exercise its jurisdiction. Additionally, by regulation, Navy and Marine authorities are limited in the extent to which they can directly assist such an act.

AD 33.1. *REFERENCES*

Manual of the Judge Advocate General (JAGMAN), Chapter 6

DOD Directive 5525.9 (Compliance of DoD Members, Employees, and Family Members Outside the United States With Court Orders)

SECNAV INSTRUCTION 5820.9 (series) (Compliance With Court Orders By Department Of The Navy Members, Employees, And Family Members Outside The United States)

SECNAV INSTRUCTION 5820.8 (series) (Release Of Official Information For Litigation Purposes And Testimony By Department Of The Navy (Don)Personnel)

SECNAV INSTRUCTION 5820.7 (series) (Cooperation With Civilian Law Enforcement Officials)

U.S. Coast Guard Military Justice Manual, Chapter 7

14 U.S.C. §§ 141-151 (Coast Guard Cooperation with Other Agencies)

AD 33.2. *CRIMINAL JURISDICTION OVER SERVICEMEMBERS IN THE U.S.*

Delivery of Personnel to Federal Authorities. A military commander may be asked to permit the taking of military personnel from a military installation by civilian authorities. This may be accomplished by the execution of an arrest warrant issued in connection with a criminal prosecution.

Members of the armed forces will be released to the custody of U.S. Federal law enforcement authorities upon request by a Federal agent. The only requirements that must be met by the requesting agent are that the agent display both proper credentials and a Federal warrant issued for the arrest of the service member. A judge advocate of the Navy or Marine Corps should be consulted before delivery is executed, if reasonably practicable. Coast Guard commanding officers are authorized to deliver personnel if the approval of the COMDT (G-L), if applicable, has been obtained.

Requests to interrogate suspected military personnel by the FBI or other Federal civilian investigative agencies should be promptly honored. Any refusal and the reasons therefor must be reported immediately to the Judge Advocate General.

Delivery of Personnel to State Authorities- Member Located within the Territorial Limits of Requesting State.

Navy/Marine Corps. Much like Federal law enforcement requests, the requesting agent must identify himself through proper credentials. In addition, the state agent must also display the actual warrant for the service member's arrest. Some jurisdictions do permit law enforcement officers to detain and arrest individuals without a warrant. In these jurisdictions, judge advocates should consult with the Office of the Judge Advocate General (General Litigation). In contrast to the requirements established when delivery is effected to Federal authorities, state, local, and U.S. territory officials must sign a delivery agreement providing for the no-cost return of the service member

after civilian proceedings have terminated. The state official completing the agreement must show that he is authorized to bind the state to the terms of the agreement.

Coast Guard. When delivery of any person in the Coast Guard is requested by a state's civil authorities and such person is within the requesting authorities territorial limits (including waters), commanding officers are authorized to deliver such persons when a proper warrant is presented and the approval of Chief Counsel (COMDT (G-L)), if necessary, has been obtained. Coast Guard deliveries require the advance approval of COMDT (G-L) when:

Disciplinary/judicial proceedings involving offenses of the UCMJ are pending against the member;

The member is undergoing a court-martial sentence;

In the opinion of the CO, it is in the best interest of the CO to refuse delivery; or

In the opinion of the CO, certain requirements established by this section should be waived in a particular case. CG MJM 7.B.8.

Delivery of Personnel to State Authorities When the Person is Located Beyond the Territorial Limits of Requesting State.

Navy/Marine Corps. When State authorities request delivery of any member of the Navy or Marine Corps for an alleged crime or offense punishable under the law of the jurisdiction making the request, and such member is not attached to a Navy or Marine Corps activity within the requesting State or a ship within the territorial waters thereof, any officer exercising general court-martial jurisdiction, or officer designated by him, or any commanding officer, after consultation with a judge advocate of the Navy or Marine Corps, is authorized to deliver such member to make the member amenable to prosecution. The member may be delivered upon formal or informal waiver of extradition, or upon presentation of a fugitive warrant. This rule applies equally to civilian employees and civilian contractors and their employees when located on a Department of the Navy installation not within the requesting State. Any member may waive formal extradition. A waiver must be in writing and be witnessed. It must include a statement that the member signing it has received counsel of either a military or civilian attorney prior to executing the waiver, and it must further set forth the name and address of the attorney consulted. When a member declines to waive extradition, the nearest Naval Legal Service Office or Marine Corps Staff Judge Advocate shall be informed and shall confer with the civil authorities as appropriate. The member concerned shall not be transferred or ordered out of the State in which he is then located without the permission of the Judge Advocate General, unless a fugitive warrant is obtained as set forth above.

Coast Guard. When delivery of any member of the Coast Guard is requested by civil authorities of a state for the alleged commission of an offense punishable under the laws of that jurisdiction and the person is not within the requesting state's territorial limits (including territorial waters) the OEGCMJ or staff officer designated by him or her, over the command of the person may authorize the individual's delivery when all of the following conditions are met:

(1) A proper warrant is presented or there has been a valid waiver of formal extradition;

(2) A Delivery Agreement has been signed; and,

(3) the approval of the Chief Counsel (Commandant (G-L)), as described above, has been obtained.

The member will be returned to the place of delivery or such place as is mutually agreeable to the Chief Counsel (COMDT (G-L)) and the requesting state, upon disposition of the case, provided the CG shall then desire the member's return. Only the Governor or authorized agent of the requesting state is required to complete the agreement, CG MJM 7.B.6. A sample agreement appears in enclosure 22(a) of the MJM.

Restraint of Military Offenders for Civilian Authorities. A service member may be placed in restraint by military authorities for civilian offenses:

(1) Upon receipt of a duly-issued warrant for the apprehension of the service member; or

(2) Upon receipt of information establishing probable cause that the service member committed an offense; and

(3) Upon reasonable belief that such restraint is necessary under the circumstances.

Such restraint may continue only for such time as is reasonably necessary to effect the delivery. There is little guidance as to what constitutes a reasonable time of restraint. Often, this determination will be driven by the nature of the offense alleged and the identity of the law enforcement officials asking for the arrest of the member. The provision does not allow the military to restrain a service member on behalf of civilian authorities pending trial or other disposition. The nature and extent of restraint imposed is strictly limited to that reasonably necessary to effect the delivery. Thus, if the civilian authorities are slow in taking custody, and there are no other factors necessitating continued restraint, then the restraint must cease. For delivery of a service member to foreign authorities, the applicable treaty or Status of Forces Agreement (SOFA) must be consulted as it may give the military commander significantly more discretion in the type of restraint imposed and the duration that such restraint may continue.

Circumstances in Which Delivery is Refused. There may be various situations in which the military commander may decide to refuse delivery of the service member to Federal, state, or local authorities. For example, if a service member is being investigated for or is charged with alleged offenses of the UCMJ, or where the military commander determines that extraordinary circumstances exist which indicate that delivery should be refused. Refusal of delivery must be reported immediately to the Judge Advocate General and the cognizant General Court-Martial Convening Authority. Where a service member is serving the sentence of a court-martial, the delivery of the service member to civil law enforcement authorities is governed by the §603 of the JAGMAN. If a request for delivery from civil authorities properly invokes the Interstate Agreement on Detainers Act, the Department of the Navy, as an agency of the Federal Government, shall comply with the Act.

If a commanding officer considers that extraordinary circumstances exist which indicate that delivery should be denied, then such denial is authorized by the JAGMAN.

Coast Guard reporting requirements (MJM 7.B.9): The Commanding Officer concerned shall upon delivery or refusal, forward a letter report setting forth the full statement of the facts to COMDT (G-LMJ), via the chain of command, in the following areas:

(1) when delivery is refused;

(2) when personnel are delivered from beyond the territorial limits of the requesting state; or,

(3) when the advance approval of Chief Counsel is necessary.

Recovery of Military Personnel From Civil Authorities. For the most part, civil authorities will be able to arrest and detain service members for criminal misconduct committed within their territorial jurisdiction and proceed to a final disposition of the case without interference from the military. Military authorities have no legal right or power to interfere with the civil proceedings.

The one exception to the general rule is that no state authority may arrest or detain for trial a member of the armed forces for a violation of state law done necessarily in the performance of official duties. Whenever an accused is in the custody of civil authorities charged with a violation of local or state criminal laws as a result of the performance of official duties, the commanding officer should contact the Office of the Judge Advocate General (General Litigation) as soon as practical, who will assist the command in making a request to the nearest U.S. attorney for legal representation.

Local Agreements. In many areas where major naval installations are located, arrangements have been made between naval commands and the local civilian officials regarding the release of service members to the military before trial. These agreements are local and informal. There is no established Navy-wide procedure and their success depends solely upon the practical relationships in the particular area. All commands within the area must comply with the local procedures and make such reports as may be required. Normally, details of the local - procedures can be obtained from the area shore patrol headquarters, base legal officer, staff judge advocate, or similar official.

Command Representatives. The command does not owe a service member who is held by civilian authorities in the United States legal advice and should not take any action which could be construed as providing legal counsel to the service member. The command, however, may send a representative to contact the civilian authorities for the purpose of obtaining information for the command, and the command should visit the member regularly to ensure

that the member's basic needs are being satisfied. This representative may provide information to the court, prosecutor, or defense counsel concerning the service member's military status, the quality of his/her service, and any special circumstances that may aid the civil authorities in reaching a just and proper result. However, care must be taken not to violate the Privacy Act. As a general rule, it is improper to release any personal information from the service member's record (such as NJP results or enlisted performance marks) without either the service member's voluntary written consent or an order from the court trying the case. More complete guidance is given in chapter 7 of this Study Guide.

Conditions On Release of Accused to Military Authorities. If the service member is released on his personal recognizance or on bail to guarantee his return for trial, the command may receive the service member. The commanding officer, upon verification of the attending facts, date of trial, and approximate length of time that should be covered by leave of absence, should normally grant liberty or leave to permit appearance for trial. The service member is personally responsible for ensuring that the conditions of their release from custody are satisfied. Service in the armed forces does not release an accused of the duty to conform to the requirements of release on bond or personal recognizance.

There is no authority for accepting an accused subject to any conditions whatsoever, nor may commands accept the member from civil authorities on the condition that disciplinary action will be taken against him. Commands may inform civilian authorities of the Navy's customary policy of granting leave or liberty to permit attendance at civilian trials, but the JAG Manual states only that Navy policy is to **permit** service members to attend their trials, not to force such attendance. Further, military authorities are without power to place an accused in any sort of pretrial restraint based on the civilian charges.

Writs of Habeas Corpus or Temporary Restraining Orders. Upon receipt of a writ of habeas corpus, temporary restraining order or similar process, or notification of a hearing on such, the nearest U.S. Attorney should be immediately notified and assistance requested. A message or telephone report of the delivery of the process or notification of the hearing must be made to OJAG (General Litigation) or COMDT (G-L) and confirmed by letter.

Consular Notification. Within the territory of the United States, whenever a foreign national who is a member of the U.S. armed forces is apprehended under circumstances likely to result in confinement or trial by court-martial, or is ordered into arrest or confinement, or is held for trial by court-martial with or without any form of restraint, or when court-martial charges against him/her are referred for trial, notification to his/her nearest consular office may be required. When any of the above circumstances occur, the foreign national shall be advised that notification will be given to his/her consul unless he/she objects and, in case he/she does object, the Judge Advocate General will determine whether an applicable international agreement requires notification irrespective of his/her wishes.

AD 33.3. *FOREIGN CRIMINAL JURISDICTION OVER U.S. SERVICE MEMBERS*

Aboard U.S. Warships. A warship is considered an instrumentality of a nation in the exercise of its sovereign power. Consequently, a U.S. warship is considered to be an extension of U.S. territory under the exclusive jurisdiction of the United States. It is therefore immune from any other nation's jurisdiction during its entry and stay in foreign ports and territorial waters, as well as on the high seas. Attachment or libel in admiralty may not be taken or effected against a warship for recovery of possession, for collision damage, or for salvage charges. The commanding officer of a ship shall not permit his ship to be searched by foreign authorities nor shall he allow personnel to be removed from the ship by foreign authorities. If the foreign authorities use force to compel submission, the commanding officer should resist with the utmost of his power. The rules are the same for shore - activities except as otherwise provided by international agreement.

Overseas Ashore. Military personnel and Civilian employees visiting or stationed ashore overseas are subject to the civil and criminal laws of the particular foreign state ("territorial jurisdiction"). The United States has negotiated agreements, generally known as Status of Forces Agreements (SOFA's), with most countries where its forces are stationed or operate. Under most SOFA's, the question of whether the U.S. service member or civilian employee will be tried by U.S. authorities or by foreign authorities for crimes committed depends on which country has "exclusive" or "primary" jurisdiction. Exclusive jurisdiction exists when the act constitutes an offense against only one of the two states (e.g., unauthorized absence is a uniquely military offense). Those areas constituting violations under both the U.S. and foreign law are normally subject to concurrent jurisdiction. A command that has a service member who is facing criminal charges in a host nation should contact the nearest staff judge advocate office or regional coordinator as soon as possible. The office contact information can be obtained from the theater service component commander or the embassy or consulate.

Reporting. Whenever a service member is involved in a serious or unusual incident outside of the United States, it will be reported to the Judge Advocate General (Navy), or the Chief Counsel (G-L) (Coast Guard). Serious or unusual incidents will include any case in which one or more of the following circumstances exist:

pretrial confinement by foreign authorities;

actual or alleged mistreatment by foreign authorities;

actual or probable publicity adverse to the United States;

congressional, domestic, or foreign public interest is likely to be aroused;

a jurisdictional question has arisen;

the death of a foreign national is involved; or

capital punishment might be imposed.

Authority to Deliver. Except when provided by agreement between the United States and the foreign nation concerned, there is no authority to deliver persons in the Department of the Navy to foreign authorities. Where a U.S. service member is in the hands of foreign authorities and is charged with the commission of a crime, regardless of where it took place, the commanding officer should report the matter to the Judge Advocate General, and other higher authorities for guidance. Since expeditious release from foreign incarceration is a matter of utmost interest, delay should be avoided at all cost. To secure the release of U.S. military personnel held by foreign authorities, U.S. military authorities may give assurances that the service member will not be removed from the host country except on due notice and adequate opportunity by the foreign authorities to object to that action. In appropriate cases, military authorities may order pretrial restraint of the service member in a U.S. facility to ensure his or her presence at trial on foreign charges.

AD 33.4. *ASYLUM AND TEMPORARY REFUGE*

References.

U.S. Navy Regulations, Article 0939

SECNAVINST 5710.22 (PROCEDURES FOR HANDLING REQUESTS FOR POLITICAL ASYLUM AND TEMPORARY REFUGE)

NWP 1-14M / MCWP 5-2.1 / COMDTPUB P5800.1, paragraph 3.3

Asylum. Asylum is the granting of protection and sanctuary to a foreign national who applies for such protection because of persecution or fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. Normally, if the request is made to a military unit located either in U.S. territory (the 50 states, Puerto Rico, territories or possessions) or on the high seas, the applicant will be received aboard the naval installation, aircraft, or vessel where he seeks asylum. If a request for asylum or refuge is made in territory or territorial seas under foreign jurisdiction, the applicant normally will not be received aboard and should be advised to apply in person at the nearest American consulate or Embassy.

Temporary refuge. Temporary refuge is protection afforded for humanitarian reasons to a foreign national under conditions of urgency to secure the life or safety of that person against imminent danger. An applicant may be received aboard and given temporary refuge when under extreme or exceptional circumstances exist where his life or safety is in imminent danger (e.g., where he is being pursued by a mob).

Reporting. Regardless of the location of the unit involved, any action taken upon a request for asylum or temporary refuge must be reported to CNO, CMC, or COMDT as appropriate, by the most expeditious means available. Telephone or other voice communication is preferred but, in any case, an immediate precedence message (info: SECSTATE) must be sent confirming the telephone or voice radio report. All requests from foreign governments for release of the applicant will be referred to CNO / CMC / COMDT, and the requesting authorities shall be advised of the referral.

Release of the Applicant. Once an applicant has been received aboard an installation, aircraft, or vessel, he/she will not be turned over to foreign officials without personal permission from the Secretary of the service concerned or higher authority, regardless of where the accepting unit is located.

Personnel of the Department of the Navy are prohibited from directly or indirectly inviting persons to seek asylum or temporary refuge. No information concerning a request for political asylum or temporary refuge will be released to the public or media without the prior approval of the Assistant Secretary of Defense for Public Affairs.

AD 33.5. *SERVICE OF PROCESS*

Service of Process. Service of process establishes a court's jurisdiction over a person by the delivery of a court order to that person. This order advises the recipient of the subject of the litigation and orders them to appear in court or otherwise answer the plaintiff's allegations within a specified period of time. Failure to respond to the service of process will normally result in the entering of a default judgment against the individual. Properly served, the process makes the person subject to the jurisdiction of a civil court. The discussion below explains what a command should do if service of process is attempted on military property (ship, aircraft, shore installation). State law governs the service of process that occurs outside of areas of federal control.

Overseas. A service member's amenability to service of process issued by a foreign court depends on international agreements (such as a SOFA). Where there is no agreement, guidance should be sought from the Judge Advocate General.

Within the United States. If within the jurisdiction of the civil court where the case is filed, the commanding officer shall normally permit the service to occur except in unusual cases where he/she concludes that compliance with the mandate of the process would seriously prejudice the public interest or the command's mission. Personnel serving on a vessel within the territorial waters of a state are considered within the jurisdiction of that state for the purpose of service of process. Process should not be allowed within the confines of the command until permission of the commanding officer has been obtained. Where practicable, the commanding officer shall require that process be served in his or her presence or in the presence of an officer designated by the commanding officer. Commanding officers are required to ensure that the nature of the process is explained to the member. This can be accomplished by a legal assistance officer.

If outside the jurisdiction of the court, the member on whom service is attempted need not accept service. Therefore, the commanding officer will ensure that the member is advised that they need not accept service. Furthermore, in most cases, the commanding officer should advise the person concerned to seek legal counsel. When a commanding officer has been forwarded process from a court outside the jurisdiction where the command is located (usually by mail), with the request that it be delivered to a person within the command, it may be delivered if the service member voluntarily agrees to accept it. When the service member does not voluntarily accept the service, it should be returned with a notation that the named person has refused to accept the service.

Arising From Official Duties. Whenever a service member or civilian employee is served with Federal or state court civil or criminal process arising from activities performed in the course of official duties, the commanding officer should be notified and provided copies of the process and pleadings. The command shall ascertain the pertinent facts, coordinate with the local Regional Legal Service Office (RLSO), Trial Service Office (TSO), or Staff Judge Advocate to notify Office of the Judge Advocate General (General Litigation) immediately by telephone, and forward the pleadings and process to that office.

Service Not Allowed. In any case where the commanding officer refuses to allow service of process, a report shall be made to Office of the Judge Advocate General (General Litigation) as expeditiously as the circumstances allow or warrant.

Leave / Liberty. In those cases where personnel either are served with process or voluntarily accept service of process, leave or liberty should be granted in order to comply with the process, unless it will prejudice the best interests of the naval service.

AD 33.6. *SUBPOENAS*

A subpoena is a court order requiring a person to testify in either a civil or criminal case as a witness. The same considerations exist in this instance as apply in the case of service of process, except for special rules where

testimony is required **on behalf of the United States** in criminal and civil actions, or where the witness is a prisoner.

Witness on Behalf of the Federal Government. Where Department of the Navy interests are involved and departmental personnel are required to testify for the Navy, Navy Personnel Command (NPC) or CMC will direct the activity to which the witness is attached to issue TAD orders. Costs of such orders shall normally be borne by that same command. In the event that the Federal interests involved are not that of the Department of Navy, the member's command will normally issue travel orders and the Navy will be reimbursed by the Federal agency concerned.

Witness on Behalf of Non-Federal Entity in Federal Court. When naval personnel are served with a subpoena and the appropriate fees and mileage are tendered, commanding officers should issue no-cost permissive orders unless the public interest would be seriously prejudiced by the member's absence from the command. In those cases where fees and mileage are not tendered as required by the Federal Rules of Criminal Procedure, but the person subpoenaed still desires to attend, the commanding officer is authorized to issue permissive orders at no cost to the - government. The individual should be advised that an agreement as to reimbursement for any expenses should be effected with the party desiring their attendance and that no reimbursement should be expected from the government.

No Federal Government Interest. The commanding officer normally will grant leave or liberty to the person, provided such absence will not prejudice the best interests of the naval service. If the member is being called as a witness for a nongovernmental party only because of performance of official duties, the commanding officer is authorized to issue the member permissive orders at no expense to the government.

Witness is a Prisoner. In criminal cases, SECNAV (JAG) must be contacted for permission which normally will be granted. Failure to produce the prisoner as a witness may result in a court order requiring such production. In civil cases, the member will not be released to appear regardless of whether it is a Federal or state court making the request. A deposition may be taken at the place of confinement subject to reasonable conditions and limitations imposed by the prisoner's command.

Pretrial Interviews Concerning Matters Arising Out of Official Duties. Requests for interviews and/or statements by parties to private litigation must be forwarded to the command concerned, who will coordinate with their chain of command to determine if the federal employee will be permitted to testify about their official duties. These interviews will be conducted in the presence of an officer designated by the commanding officer/officer in charge who will ensure that no line of inquiry is permitted which may disclose or compromise classified information or otherwise prejudice the security interests of the United States. These requests will not be granted where the United States is a party to any related litigation or where its interests are involved, including cases where U.S. interests are represented by private counsel by reason of insurance or subrogation arrangements. Where U.S. interests are involved, records and witnesses shall be made available only to Federal Government agencies.

Release of Official Information for Litigation Purposes/Testimony by Department of Navy personnel. SECNAVINST 5820.8(series) prescribes what information, testimony and documents, is releasable to courts and other government proceedings and the means of obtaining approval for the release of such information.

*Jury duty***.** Active-duty service members are exempted from service on Federal juries. Congress passed a similar exemption for state jury duty in the Defense Authorization Act of 1986. Service members may be excused from state jury duty if mission readiness is affected by the absence, or if the absence unreasonably interferes with military job performance. SECNAVINST 5822.2 (SERVICE ON STATE AND LOCAL JURIES BY MEMBERS OF THE NAVAL SERVICE) gives all commanders the authority to invoke the exemption for their personnel. If members do serve on a jury, they shall not be charged leave or lose pay. All fees, with the exception of actual expenses, collected for jury duty will be turned over to the U.S. Treasury.

AD 33.7. *JURISDICTION*

Relations between the United States and foreign governments are governed by the concept of "sovereignty." Sovereignty is the exercise of governmental power over all persons and things within a defined area. A sovereign nation has the capacity to conduct its relations with other sovereign nations independent of external control (subject to certain rules imposed by international law). In this regard, all sovereign nations are considered to be equals.

The exercise of this sovereign power is usually expressed in the term "jurisdiction." Jurisdiction may be either territorial or personal. Territorial jurisdiction is that governmental control exercised over all persons and things in a specific geographical area, while personal jurisdiction is that governmental control exercised over certain persons (usually citizens) regardless of their physical location.

Within the United States, there is a system of dual sovereignty where both the state and Federal Governments exercise a certain degree of sovereignty. The Federal Government has the greater authority in most areas in the event of conflict between the two sovereigns. In some areas, the Federal Government is granted exclusive jurisdiction (e.g., matters affecting interstate commerce).

As a result of this supremacy of Federal over state law, the armed forces are not subject to many of the restraints imposed by state laws. Likewise, when acting in the performance of official duties, a member of the armed forces may also be free of restraints which would otherwise be imposed by state law. For example, state law has no power to regulate the type of weapons which may be carried by military members while on duty. Military personnel in their private capacity, on the other hand, are generally subject to the laws of the state in which they are located except for legislatively created exceptions such as the Servicemember's Civil Relief Act.

Since relations with foreign countries is one of the areas reserved for the Federal Government, it follows that relations between U.S. military personnel and foreign governments or authorities are regulated completely between the Federal Government in this country and the authorities in the other countries. These relations are usually in the form of customary relationships or written treaties. Regardless of form, these relations are considered binding on the sovereign states and are known as international law. Since the armed forces are part of the Federal Government, they are subject to this international law as well as Federal and state law.

Federal jurisdiction over land in the United States. Areas of land originally acquired by the United States or, if subsequently acquired, to which a state has made a complete cession of sovereignty to the Federal Government are known as exclusive Federal reservations. As to this land, the Federal Government possesses the exclusive right to **legislate** with respect to the particular land area and may enact general municipal laws applying within that area.

*Concurrent, Partial, and Proprietary Jurisdiction***.** There are three forms of jurisdiction, other than exclusive Federal jurisdiction, that the Federal Government may exercise over land area: concurrent legislative jurisdiction, partial legislative jurisdiction, and proprietary interest. The type of jurisdiction the Federal Government maintains determines the legislative authority that is exercised over the land area. Concurrent legislative jurisdiction exists when the state grants to the Federal Government the rights of exclusive jurisdiction over the land area, while reserving to itself the same authority it granted to the Federal Government. Due to the supremacy clause of the Constitution, the Federal Government has the superior right to carry out Federal functions without state interference. Nevertheless, state laws may be applicable within a concurrent jurisdiction area. Partial legislative jurisdiction refers to the situation where the state grants a certain measure of legislative authority over the area to the Federal Government, but reserves to itself the right to exercise-either alone or concurrently with the Federal Government other authority constituting more than the right to serve civil or criminal process in the area. In this instance, each sovereign maintains partial legislative authority. The Federal Government has proprietary interest only in land when it acquires the degree of ownership similar to that of a landowner, but has not attained any portion of the state legislative authority over the area.

State Criminal Laws. State criminal law normally extends throughout land areas in which the United States has only a proprietorial interest, throughout areas under concurrent jurisdiction, and in areas under partial jurisdiction to the extent covered by the retention of state authority under its grant of power.

Federal Criminal Laws. Congress has enacted a comprehensive body of Federal criminal law applicable to lands within the exclusive or concurrent jurisdiction of the United States or the partial jurisdiction of the United States to the extent not precluded by the reservation of state authority. Most major crimes within such areas are covered by individual provisions of title 18, United States Code. (Note, however, that many offenses under title 18 are not

dependent upon "legislative" jurisdiction.) In addition, the Uniform Code of Military Justice is applicable to military personnel wherever they may be.

AD 33.8. *POSSE COMITATUS*

References.

Posse Comitatus Act, 18 U.S.C. § 1385 (1982).

Military Cooperation with Civilian Law Enforcement Officials, 10 U.S.C. §§ 371-380 (1982), as amended.

DOD Dir. 5525.5 of 15 Jan 1986, DOD Cooperation with Civilian Law Enforcement Officials.

SECNAVINST 5820.7(B), Subj: COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS.

Generally. The Posse Comitatus Act, 18 U.S.C. § 1385 (1982), provides that, "Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years or both." Generally, military personnel are prohibited from providing the following forms of direct assistance to civilian law enforcement agencies:

Interdiction of a vehicle, vessel, aircraft, or other similar activity;

a search or seizure;

an arrest, stop and frisk, or similar activity;

use of military personnel for surveillance or pursuit of individuals, or as informants, undercover agents, investigators, or interrogators; and

any other activity which subjects civilians to the exercise of military power that is regulatory, proscriptive, or compulsory in nature.

The prohibitions are applicable to members of the Navy and Marine Corps acting in an official capacity. Accordingly, it does not apply to:

A service member off duty, acting in a private capacity, and not under the direction, control, or suggestion of DON authorities;

a member of a Reserve component not on active duty or active duty for training; or

civilian special agents of the Naval Criminal Investigative Service performing assigned duties under SECNAVINST 5520.3 (series).

Exceptions. All information collected during the normal course of military operations which may be relevant to a violation of Federal or state law shall be forwarded to the local Naval Criminal Investigative Service field office or other authorized activity for dissemination to appropriate civilian law-enforcement officials. The planning and execution of compatible military training and operations may take into account the needs of civilian law-enforcement officials for information when the collection of information is an incidental aspect of training performed for a military purpose. The needs of civilian law-enforcement officials may even be considered in scheduling routine training missions. This does not, however, permit the planning or creation of missions or training for the primary purpose of aiding civilian law-enforcement officials, nor does it permit conducting training or missions for the purpose of routinely collecting information about U.S. citizens.

Navy and Marine Corps activities may make available equipment, base facilities, or research facilities to Federal, state, or local civilian law-enforcement officials for law-enforcement purposes when approved by proper authority under SECNAVINST 5820.7(B). Some examples of the type of support that can be given, and the approval authority for that support, is as follows:

Use of combat equipment, ammo, arms: Assistant Secretary of the Navy (M&RA).
Assignment of 50+ personnel for more than 30 days: SECDEF.
Training or expert advice: SECNAV.
Use of intelligence capabilities: SECDEF
All other requests: CNO, Echelon II CDRs, COs of major shore installations / regional commanders.
Emergent need to save lives: Unit commander.

Use of Department of the Navy personnel. Actions that are taken for the primary purpose of furthering a military or foreign affairs function of the United States (e.g., enforcement of the UCMJ, maintenance of law and order on a military installation, protection of classified military information or equipment) are not restricted by the Posse Comitatus Act regardless of incidental benefits to civilian law-enforcement authorities. Any vehicle or aircraft used for transport of drugs and seized for a legitimate military purpose is subject to forfeiture by the Drug Enforcement Administration.

Laws that permit direct military participation in civilian law enforcement include, suppression of insurrection or - domestic violence, protection of the President, Vice President, and other designated dignitaries, assistance in the case of crimes against members of Congress, and foreign officials and other internationally protected persons.

Where the training of non-DOD personnel is infeasible or impractical, Department of the Navy personnel may operate or maintain, or assist in operating or maintaining, equipment made available to civilian law-enforcement authorities. The request for assistance must come from agencies such as the Drug Enforcement Administration, Customs Service, or Immigration and Naturalization Service. Those agencies, in an emergency situation-determined to exist by the Secretary of Defense and the Attorney General-may use Department of the Navy vessels and aircraft outside the land area of the United States as a base of operations to facilitate the enforcement of laws administered by those agencies, so long as such equipment is not used to interdict or interrupt the passage of vessels or aircraft.

Reimbursement. As a general rule, reimbursement is required when equipment or services are provided to agencies outside DOD. When DON resources are used in support of civilian law-enforcement efforts, the costs shall be limited to the incremental or marginal costs incurred by DON.

CHAPTER 34

CHAPTER 34

AD 34. STANDARDS OF CONDUCT AND GOVERNMENT ETHICS

PART A: INTRODUCTION

AD 34.1. *STANDARDS OF CONDUCT REFERENCES*

18 U.S.C. 201, 203, 205, 208, 209

5 C.F.R. Parts 2634, 2635, 2636, 2639, 2640

DoD 5500.7-R; Joint Ethics Regulation (JER)

AD 34.2. *PURPOSE AND SCOPE*

Why do we need "Standards of Conduct"? The principle purpose of the Standards of Conduct is to ensure that federal employees serve the public good, rather than private or personal interests. The rules result from a recognition that Federal employees must have the full faith and confidence of the American public if we are to best carry out the national defense mission. To maintain public support, the American citizen must believe in our institutional integrity. To maintain the institutional integrity of the Navy and Marine Corps, there must be individual integrity at every level in the chain of command. To this end, the Office of Government Ethics (OGE) promulgates ethics regulations to ensure that federal employees act impartially in the performance of their duties. These regulations are found in 5 C.F.R. Parts 2634, 2635, 2636, 2639, 2640.

In addition to the OGE regulations, the Department of Defense published the ***DOD Joint Ethics Regulation (JER)(DoD 5500.7-R).*** The JER was published on August 30, 1993. It implements and further supplements the OGE regulations for the military services. The JER should be the starting point for any question or issue regarding DoD ethics issues.

Although the OGE regulations are generally only applicable to commissioned officers and civilian employees, the JER has made the Standards of Conduct applicable to enlisted personnel, subject to minor exceptions. Reservists performing official duties, including activities performed while on inactive duty for training, or while engaged in any activity related to the performance of official duties, are also considered "DoD Employees" for purposes of the JER. Post-government employment restrictions may apply to former or retired officers.

General Principles. The General Principles of the Standards of Conduct, are critically important in applying or interpreting the Standards of Conduct. Because of the complex nature of the rules, the General Principles serve as a touchstone for ethical decision-making. Specific ethical rules may be interpreted and applied to permit a wide range of conduct, provided that the activity accords with the intent and spirit of the Standards of Conduct as declared in the General Principles.

The General Principles of the Standards of Conduct (also known as the “Bedrock Standards”) can be summarized as:

Public service is a public trust.

Employees shall not use public office for private gain.

Employees will not permit themselves to develop any personal interests in conflict with their official duties.

Employees must act impartially in the performance of official duties.

Employees must protect and conserve the property and resources entrusted to the federal government by the taxpayers.

Employees must disclose fraud, waste, abuse, and corruption to appropriate authorities.

Employees are also required to “avoid any actions creating the appearance that they are violating the law or the ethical standards.” Such a subjective standard may be extremely difficult to apply; the OGE regulations state that in

judging an appearance problem, one must use "the perspective of a reasonable person with knowledge of the relevant facts." The rules require an employee, when faced with an ethical conflict, even if only one of appearance, to always err on the side of the public interest.

AD 34.3. *ENFORCEMENT*

Supervisors may sanction violations of the Standards of Conduct in a number of ways.

Administrative sanctions. The most common remedy is some form of administrative action such as letters of reprimand, poor evaluation marks, or removal from positions of trust. Those administrative tools provide an immediate means of correcting developing ethics problems.

Criminal sanctions. Although the OGE regulations themselves do not establish criminal sanctions, many of the underlying statutes do.

Uniform Code of Military Justice. Violations of the Standards of Conduct by military personnel may be punishable under the Uniform Code of Military Justice. Many provisions within the JER are punitive general regulations which apply to all military members without further implementation. These provisions are bolded within the JER in order to easily identify the punitive sections.

AD 34.4. *ETHICS COUNSELORS*

Because of the complexity of the rules regarding the Standards of Conduct, the regulations establish Ethics Officials in each agency, known as Designated Agency Ethics Officials (DAEOs). For the Department of the Navy, the DEAO is the Judge Advocate General of the Navy. For the Coast Guard, the DEAO is the senior Department of Homeland Security (DHS) ethics attorney at DHS headquarters. DAEOs have established a number of "Ethics Counselors" throughout each agency to provide advice and assistance to employees regarding Standards of Conduct issues.

Ethics Counselors for the Department of the Navy include: General Counsel for major Navy activities, Commanding Officers of Navy Legal Service Offices (NLSOs) and Trial Service Offices (TSOs), OICs of NLSO and TSO Detachments, if O-4 and above, and Staff Judge Advocates for officers exercising general court-martial authority.

Disclosures made to an ethics official are not protected by the attorney-client privilege. Persons acting as an ethics counselor represent the federal government and not those seeking ethics advice. Attorneys must be particularly careful to ensure that persons seeking advice about the Standards of Conduct understand their relationship with the ethics counselor.

Safe Harbor Provision. The rules provide that no disciplinary action may be taken against a person who engaged in conduct in good faith reliance upon the advice from an ethics counselor, provided the employee made full disclosure of all relevant facts to the counselor. This provision does not insulate a person from liability for violations of Title 18, United States Code, but reliance upon the advice of an ethics official is a factor considered by the Department of Justice in deciding whether to prosecute.

AD 34.5. *TRAINING REQUIREMENTS*

Initial Ethics Orientation (IEO). Within 90 days of entering on duty as an officer or civilian employee, or 180 days for enlisted personnel, all DOD employees shall receive an IEO. JER 11-300. The JER does not mandate annual training for most DoD personnel (but see below for those who do require annual training). Members are to be provided with a copy of the JER, the names, titles, addresses and phone numbers of the DAEO and other agency ethics officials available to answer questions, and a minimum of one (1) hour of official duty time to review the materials. Any verbal training provided (optional) may reduce the time made available for review. If a JER is readily available in the employee's workspaces, she does not have to be provided with one to keep. In the alternative, an employee may be provided with materials that adequately summarize the JER. Official review time is still required and a copy of the JER must be readily available.

Annual Ethics Briefing (AEB). Some employees are required to receive an AEB every calendar year. Generally, they are those who must file public or confidential financial disclosure reports (SF-278s or OGE 450s, respectively), contracting officers, and others so designated because of the nature of their official duties. While we are encouraged

to vary the emphasis and content based on particular needs, such briefing must contain, at a minimum, a reminder of the employee's duties and responsibilities under the JER and under the conflicts of interest statutes and must include the names, titles, addresses and phone numbers for the DAEO and other available ethics officials. A "qualified - individual" (2638.702b) shall present the briefing (if presented in-person), prepare the recorded materials or presentation (if telecommunications, computer based methods or recorded means are used), or prepare the written ethics briefing (if written materials will be utilized). For all except SF-278 filers, in-person briefings are only required every three years. On the off years, written materials may suffice. SF-278 filers require a verbal briefing each year, prepared and conducted by a "qualified individual." The instructor must be "available" during and immediately after the briefing, either live or by some other means such as telecommunications.

PART B: GIFTS

AD 34.6. *GIFTS FROM OUTSIDE SOURCES (5 C.F.R. 2635, PART B)*

General Rule. Federal employees are forbidden from soliciting or coercing gifts, or accepting gifts given because of the employee's official position. Such action would be using public office for private gain. Further, employees may not accept gifts given by a **"prohibited source,"** defined as a person or entity that seeks action or does business with the agency, or is affected by the performance of official duties. This limitation as to "prohibited sources" is most likely to be defense contractors or those who wish to become defense contractors.

*Definition of Gifts***.** In general, a gift is defined as anything of value, such as gratuities, meals, entertainment, hospitality, travel, favors, loans, or meals. Certain items are specifically excluded from the definition of "gift":

Snacks: modest items of food (coffee, donuts, etc.) offered other than as part of a meal.

Trinkets: items with little intrinsic value such as cards, trophies, or plaques.

Widely available benefits: loans, benefits or discounts generally available to public or all military personnel (e.g., military discounts at local stores, restaurants, apartment complexes).

Prizes: awards from contests open to the public, unless entry was part of one's official duty.

Government-provided: items paid for by the government or accepted by the government; see also 41 C.F.R. Part 304-1.

Market value: anything for which the employee paid market value.

Exceptions. Despite the general prohibition against gifts, federal employees may accept a number of gifts in circumstances where the gift would clearly not violate the General Principles of the Standards of Conduct. Some of the exceptions include:

De Minimis Exception: Most employees may accept unsolicited gifts worth $20 or less. Employees may decline any distinct and separate item to bring the aggregate value of a gift within the limitation, but they may not use the exception as a type of discount by paying the value over $20.00. Employees may not accept gifts totaling over $50.00 from the same source in a calendar year.

Personal Relationship Exception: Employees may accept gifts that are in fact based on a personal, unofficial relationship rather than the official position of employee. The exception is very fact-specific; factors such as who paid for the gift and the nature and history of the personal relationship are of particular relevance.

Group Benefits and Discounts: Non-discriminatory benefits that are available to all employees may be accepted if they are: reduced fees for joining a professional organization; offered to a broad segment of population in addition to the government employees, or; offered by a non-prohibited source.

Awards: Awards of $200 or less may be accepted if they are received subject to an established recognition program for meritorious service, and given by a person or entity other than a prohibited source. An agency ethics official may approve a greater award under certain circumstances.

Employee Moonlighting or Working Spouse Exception: Federal employees may accept gifts arising from their outside employment activities, or the business activities of their spouses. The gifts must not be related to the federal employee's official duties, or offered because of one's government status. Any gift must also be of a type customarily provided by employers or prospective employers. With respect to prospective employer gifts, the employee must be disqualified from any future actions involving the outside employer before accepting any gift.

Widely-Attended Gathering Exception: Employees may accept an offer of "free attendance" at a gathering or event from the sponsor of the event, under two circumstances.

Speaking. If the employee is assigned to participate or speak at the event as an agency representative; or

Agency Interest. If the event will be widely attended by persons throughout an industry, or representing a range of interests, the employee's supervisor may permit attendance based on a determination that the attendance will further agency programs or operations.

"Free attendance" includes items such as food, entertainment and instruction, or materials furnished to all attendees as an integral part of the event, but does not include transportation, lodging or collateral entertainment. Employees may also accept such offers from persons other than the event sponsor if: (1) more than 100 persons are expected to attend; and (2) the gift of free attendance has a market value of $250 or less.

Social Exception: Employees may freely attend parties and enjoy food and entertainment provided, so long as the host is not a prohibited source and no fee is charged to others at the affair.

Foreign Meals Exception: An employee may accept food and entertainment in conjunction with a meeting in a foreign area, provided the cost of the meal is within the applicable per diem rate and the attendance is a part of the employee's official duties. In addition, the event must include participation by non-U.S. persons and the gift must be provided by a person other than a foreign government.

Foreign Gifts Exception: Employees may accept and keep (but never solicit) a gift from a foreign government or international organization pursuant to the Foreign Gifts and Decorations Act, 5 U.S.C. 7342, if the gift is of minimal value as defined at 41 C.F.R. 101-49.001-5 ($305 as of 2005). Even if greater than the set monetary limit, gifts may be accepted on behalf of the Department of the Navy. All decorations, awards, and gifts from foreign governments to U.S. naval military and civilian personnel, and their spouses and dependents, must be processed under the procedures outlined in chapter 7 of SECNAVINST 1650.1F, Navy and Marine Corps Awards Manual.

Festival Exception: In addition to the exceptions provided in the Federal Regulations, the JER states that DoD personnel may accept a gift of free attendance at an event sponsored by a state or local government, or a tax-exempt organization, if justified by community relations and approved by one's supervisor.

Notwithstanding the foregoing exceptions, federal employees may not accept any gifts in the following specific circumstances:

In return for being influenced in an official act;

Given because of solicitation or coercion;

Given on a recurring basis; or

In violation of any law, such as the Procurement Integrity Act.

Gifts to the Department of the Navy. The Department of the Navy may accept gifts given to the Department or to certain commands under specific circumstances. All gifts received must be forwarded to an approval authority for decision. The Department will decline any gift that might embarrass the Department or the government, or that may imply an endorsement of commercial enterprise, and will likely decline a gift offered by a prohibited source involved in claims, procurement actions, litigation, or other matters involving the Department. In any event, employees may not solicit gifts, even if for the Navy.

Disposition of gifts received. In some instances, an employee may receive a gift that can't be accepted. In those cases, the employee must either return it, pay for it, or accept it on behalf of the agency (where authorized). If the

gift is perishable, such as food or flowers, the gift may be given to a charity, shared within the office or unit, or destroyed. In any event, reciprocation does not equal reimbursement. An employee can't accept a free meal in violation of the rules, even if the employee will or has paid for a free meal for the other person on some other occasion.

Gifts to Wounded Service Members. Many individuals are offering gifts of all types to personnel wounded in combat. The JER does not have a specific exemption that covers these gifts and the fundamental rules as described above still apply. However, a judge advocate must be cognizant of all Gift exceptions in order to avoid giving incorrect advice that will prevent a wounded service member from accepting an otherwise acceptable gift. Many of the offered items fall into the following categories:

Not gifts are:
Benefits available to the public or all military personnel, whether or not restricted on the basis of geographic considerations." (5 CFR 2635.203(b)(4)). This covers most broad military discount or free attendance offers or "bulk gifts" (like 100,000 pairs of sunglasses).

Anything accepted on behalf of the Government pursuant to statutory authority, including, Agency gift acceptance authority. (10 U.S.C. 2601, 2608) Each Service has an implementing regulation delegating acceptance on behalf of the Government depending on value (e.g., $10,000.00 and below by commanding officer) and type (e.g., cash and real estate have higher levels required). Service or appropriate commander can accept items then re-distribute as part of authorized Morale, Welfare, and Recreation activity or patient support service. Gifts of travel expenses. (31 U.S.C. 1353) Donated travel benefits for deployed service members. (10 U.S.C. 2613)

Excepted from the restriction are:
Gifts of $20 or less. However there is a $50/year limit on gifts from the same source. Benefits offered by non-prohibited sources to any group or class that is not defined in a way to discriminate based on official responsibility or higher rank or pay. (5 CFR 635.204(c)(2)(iii)).

This exception allows most broad offers to injured or deployed service members and their families as long as the donor is not a prohibited source. Awards for meritorious public service or achievement from a person who does not have interests that may be substantially affected by the recipient. (5 CFR 2635.204(d)).

All cash awards and any award over $200 require written ethics counselor (which would include the hospital SJA) determination that the award is regularly made pursuant to written standards. Many gifts to "heroes," "combat-decorated veterans," and similar categories may be accepted under this provision.

Free attendance at social events sponsored by non-prohibited sources in which no fee is charged. (5 CFR 2635.204(h)).

If a gift has not come to the service member or their family via official channels, they should consult with an ethics counselor, directly or via command representative, to confirm the propriety of acceptance. While service members and other Federal employees may not solicit gifts from prohibited sources or by using their official position as discussed above, this prohibition does not prevent service members from advising groups or individuals, who are seeking to assist Service Members, of their needs.

Monetary gifts to DoD personnel, including deployed or wounded service members and their families, should be made directly to private relief organizations that provide assistance to affected personnel. Donations made to charitable organizations with 501(c)(3) tax-exempt status are deductible for those who itemize deductions on their tax returns.

Commanders have discretion to determine whether administrative or disciplinary action is appropriate and, if so, the level of action for a proven violation of the regulations, depending upon the circumstances. For example, someone claiming to be soliciting iPods for his unit and then selling them on eBay may be dealt with more severely than someone who inappropriately solicits a wheelchair from a "prohibited source" for a wounded comrade.

Gifts for deployed personnel are discouraged since they overload the transportation and distribution systems and offer a threat of bio-terrorism to deployed personnel. DoD urges the public not to send unsolicited mail, care packages, or donations to service members unless they are family members or personal friends. On October 30, 2002, DoD suspended "Operation Dear Abby" and "Any Servicemember" mail programs because of the above

concerns. Instead, expressions of gratitude can be sent through the Internet at http://www.defendamerica.mil/support_troops.html; http://www.usocares.org.hom.htm (contribute to the purchase of a care package of items requested by troops such as sunscreen, disposable cameras, prepared calling cards); http://www.army.mil/operations/iraq/faq.htm.; http://anyservicemember.navy.mil (email message to deployed troops of any Service from your home state).

AD 34.7. *GIFTS BETWEEN EMPLOYEES*

General Rule. The Standards of Conduct generally prohibit employees from giving gifts to superiors or their families, and bar superiors from accepting gifts from subordinates, unless specifically permitted under narrowly defined exceptions.

Exceptions. The exceptions to the general prohibition on gifts between employees of different grades are:

Gifts based on a personal relationship. If the two employees have a personal relationship justifying a gift and they are not in a subordinate-superior relationship, one may give a gift to the other. The analysis of whether the exception applies is necessarily fact-specific and may pose additional concerns (i.e., fraternization).

Tokens. On an occasional basis, employees may give token gifts (value of $10.00 or less) to superiors. That exception would permit an employee to bring back a coffee mug or bag of candy from a vacation trip without violating the rules. The exception would not permit such gifts to become routine. Even the giving of token gifts, if made on a frequent, non-occasional basis, would violate the regulations.

Food and refreshments. Employees may share food and refreshments in the office. In addition, they may offer reasonable personal hospitality at a residence, or provide a gift in return for personal hospitality. This exception permits employees to invite the boss to dinner without forcing service of low-cost fare. It also permits employees to bring traditional gifts, such as a bottle of wine, if invited to their supervisor's residence. The meals and guest gift, however, must be reasonable and commensurate to the occasion. Extravagant gifts or meals would be viewed as an attempt to give an illegal gift.

Special Infrequent Occasions. On special infrequent occasions, such as marriage, childbirth, retirement, or transfer, a subordinate may give a gift appropriate to the occasion. It is common practice in the Department of the Navy to present departing superiors with a gift given from a collective group (e.g., the wardroom, the chief's mess). A unique aspect of this exception is the ability of employees to solicit each other for a gift to the senior. Employees may solicit other employees for **voluntary** contributions of **nominal** amounts (not to exceed $10) for an appropriate gift to be presented to an official superior. Notwithstanding the limitation on the amount solicited, an employee may voluntarily choose to give more than $10. The senior generally may not accept any gift from a "donating unit" where the market value of the gift exceeds $300. This dollar limitation applies regardless of the size of the group. Attempts to circumvent the $300 limit by subdividing the command into separate donating groups (i.e., offices, departments, division, etc.) will in all likelihood fail the reasonableness test. The $300 limit may be exceeded only when the event being celebrated terminates the superior-subordinate relationship and the gift itself is uniquely linked to the superior's position or tour of duty. Normally, permission to give such a gift, or for the senior to receive it, must be obtain before the gift is given from the chain of command.

PART C: CONFLICTS OF INTEREST

AD 34.8. *CONFLICTING FINANCIAL INTERESTS*

General Rule. Employees are prohibited by criminal law from personally and substantially participating in official matters in which they have a private financial interest, actual or imputed, if the official action will have a direct and predictable effect on the private interest. Conflicting financial interests are of particular concern to those employees in procurement and contracting functions.

Definitions.

Personal and substantial. Direct and significant involvement is required. It includes active supervision of the participation of a subordinate in the particular matter.

Imputed interests. In addition to the interests of the employee's family, the interests imputed to a federal employee include those of a general partner, an organization in which the employee is an officer, director, trustee, general partner, or employee, and any person with whom the employee is negotiating prospective employment.

Direct and predictable. Actions have a "direct and predictable effect," for purposes of the regulation, when the effect is closely linked, not based on unrelated matters and not speculative. The actual amount of the direct effect is irrelevant.

Disqualification. Employees faced with a conflict of interest must disqualify themselves from further participation in the matter and provide **written notice of their disqualification** to the appropriate supervisor. Superiors may remediate conflicts of interest by issuing waivers, reassigning tasks or placing limitations on duties, or by ordering divestiture of the conflicting private interest.

Financial Disclosure Reports

Public Financial Disclosure Reports. The purpose of the public financial disclosure report system (SF-278) is to uncover actual or potential conflicts of interest involving senior government officials and to ensure public confidence in the integrity of government.

Only senior personnel are required to file the public financial disclosure report, specifically, officers in paygrade O-7 or above (> 60 days of active duty for reserves), civilian presidential appointees, members of the Senior Executive Service, and persons who are GS-15 or above must file a public disclosure report.

The report must be filed within thirty days of assuming the covered position, and on an annual basis. If the report is late, the employee may be required to pay a late filing fee of $200. In the report, the employees must generally list their financial interests and holdings over $1000. The regulations are extremely detailed regarding the specific interests that must be disclosed.

The employee initially submits the report to the supervisor, who reviews it for apparent conflicts of interest. The supervisor then forwards the report to the Ethics Counselor, who reviews the report for completeness and conflicts. If the Ethics Counselor detects conflicts, the employee is notified. The employee may respond by challenging the determination of conflict, or may apply the Ethics Counselor's advice to resolve the conflict of interest. The report is then forwarded to the Agency Ethics Official for review. The report remains on file for six years, although it may be forwarded to the Office of Government Ethics. The reports are available for public inspection upon request.

Confidential Financial Reports. The purpose of the confidential financial disclosure report (OGE-450) is to uncover actual or potential conflicts of interest involving government officials involved in procurement matters or in particular positions of trust, other than those required to file public reports. The procedure for the confidential reports is generally the same as for the public reports. The primary difference is that the report is not normally available to the Office of Government Ethics. Further, the reports are exempt from disclosure to the public and are protected by the Privacy Act. In other words, the reports are reviewed by the command ethics counselor, but are not available for review by others outside of the chain of command. It is common practice for the Flag or General Officer to review the Form 450 of their subordinate commanding officers.

Those who must file the confidential report include commanding officers/executive officers of Navy shore installations with 500 or more military or DoD civilian personnel, and commanding officers/executive officers of all Marine Corps installations, bases, air stations, or activities. In addition, the report must be filed by other employees who participate personally and substantially in contracting or procurement, auditing non-federal entities, and those who are determined by their supervisor to be in a position requiring disclosure to avoid actual or apparent conflicts of interest.

Any DoD employee may be excluded from all or a portion of the reporting requirements when the Component Head or designee determines that the report is unnecessary because of the remoteness of any impairment to the integrity of the Federal Government, because of the degree of supervision and review of the employee's work, or because the use of an alternative procedure is adequate to prevent possible conflicts of interest. Additionally, DoD employees who are not employed in contracting or procurement and who have decision making responsibilities regarding expenditures of less than $2,500 per purchase and less than $20,000 cumulatively may be excluded. 2635.905. In the report, the employees must list their financial interests and holdings over $1000.

A "new entrant" report must be filed within thirty days of assuming the covered position, unless the person was already a filer and had filed an OGE 450 during that fiscal year. An annual report must be filed by November 30 of each year.

Ethics Counselors are required to file a status report with the Agency Ethics Official not later than 15 December every year. The report must provide the number of individuals required to file a confidential financial report and the number of those persons who had not filed as of November 30.

OGE Optional Form 450-A (Confidential Certificate of No New Interests). OGE has determined that the use of this form is adequate to prevent possible conflicts of interests. Generally, the optional form may be used by those who can certify, after examining their most recent previous OGE Form 450, that they (and those imputed) have acquired no new financial interests required to be reported, and that they have not changed jobs at the agency since filing the last report. In each year divisible by four, beginning in the year 2000, all incumbent filers must nonetheless file a complete OGE Form 450.

AD 34.9. *IMPARTIALITY IN OFFICIAL DUTIES*

In order to foster public confidence in the government, the Standards of Conduct prohibit employees from acting in matters where a reasonable person would question the employee's impartiality. Where an employee believes there may be impartiality concerns raised, she must so inform her supervisor and wait until the supervisor has authorized further participation in the matter. Note that this section might prohibit some actions that would not otherwise constitute a "conflict of interest" under for lack of either financial motive or imputed interest.

AD 34.10. *SEEKING OTHER EMPLOYMENT*

General Rule. A federal official is not permitted to take any official action with regard to a prospective employer with whom the federal employee is seeking employment. It is assumed that there will be at the very least an appearance problem over whether a federal employee may maintain impartiality with regard to a prospective civilian employer.

Seeking Employment. An employee becomes subject to this rule where he/she has:

directly or indirectly engaged in employment negotiations;

made an unsolicited communication to any person regarding possible employment, such as sending a resume to a particular employer (as opposed to a mass resume mailing); or,

made a response, *other than an outright rejection*, to an unsolicited communication from any person regarding employment.

An employee is no longer "seeking employment" when either party to the negotiations makes a rejection and discussions have terminated, or when two months after dispatch of a resume there is no sign of interest on the employer's part.

Disqualification. When faced with this potential conflict, the member must give the supervisor a *written notice of disqualification*. As long as the employee provides timely notice and is permitted to remove themselves from the particular matter by their supervisor, the employee may accept the interviews, including associated travel, lodging and meals, even if given from a prohibited source.

Additional Reporting Requirements. Employees who are involved in procurement actions must report any employment contacts with any bidder/offeror in that procurement action. This report must be made in writing to the employee's supervisor, along with disqualification from further personal or substantial participation (unless employment is rejected). Civil penalties for failure to report are expressly provided for.

AD 34.11. *ASSIGNMENT OF RESERVISTS*

Commanding officers must ensure that reservists performing training are not assigned duties which may give rise to actual or apparent conflicts of interest. Reservists have affirmative obligations to disclose any potential conflicts to superiors and assignment personnel.

PART D: MISUSE OF POSITION

AD 34.12. *USE OF OFFICIAL POSITION / USE OF NON-PUBLIC INFORMATION*

Federal employees may not use public office for private gain. Therefore, employees may not use their official positions to endorse products or services, coerce benefits, help friends, or give any appearance of official "approval" of activities. This is an area where the official should be concerned about any action that would lead to the perception of an official endorsement as well.

Employees may not use "non-public information" for personal benefit, or allow its improper use by others. "Non-public information" includes: information exempt from release under FOIA or otherwise protected by statute, Executive Order or regulation; information designated as confidential; and, information not released to the general public nor authorized for release.

AD 34.13. *MISUSE OF GOVERNMENT RESOURCES*

Federal employees shall not misuse government property. Nothing will outrage the taxpayers more than seeing employees utilizing public property for private purposes. Since government property is for government use only, actions such as using government computers for personal profit, mailing personal letters as official mail, or misusing a government vehicle or aircraft are clearly improper.

Among the more recent cases of the American people perceiving an abuse of government resources involves DoD's use of military aircraft (MILAIR) in support of official travel. In general, MILAIR may not be used if commercial airline or aircraft service is reasonably available absent highly unusual circumstances. Additionally, all DOD travelers (including high-ranking officials) must now specifically justify the use of business-class travel when using commercial transportation. The controversy involving MILAIR is not unique -- similar concerns are often raised regarding use of government vehicles and gigs/barges. Anything that can be viewed as a "perk" of federal employment is fair game.

Government communication systems (telephones, FAX's, e-mail, etc.) are for official use and authorized purposes only, although no-cost, no-interference-with-duty use for minor, necessary personal business is authorized. For example, an employee on TAD may make a very brief cell phone call on a Government phone to inform their spouse that travel arrangements have changed. In addition, DoN employees may use their Government computers to “surf” the Internet during off-duty time so long as such activity does not interfere with the command’s mission or otherwise discredits the Navy, such as viewing pornography.

The OGE regulations provide little concrete guidance in what is and what is not misuse of government resources. Much is left to the discretion of command authorities in defining what are the appropriate uses for the resource in question. For example, commanding officers can allow certain property to be used in support of non-Federal entities and in support of employee professional development. Care and sound judgment must be exercised to ensure that public confidence is maintained.

Federal officials must not misuse official time, either their own or that of their subordinates. Hours for which personnel are receiving pay from the government should be dedicated to the government, not personal interests. This rule bars such misuse as ordering junior personnel to trim the lawn of a superior or to provide off-duty taxi - service.

PART E: OUTSIDE ACTIVITIES

AD 34.14. *OUTSIDE EMPLOYMENT*

Personnel are authorized to engage in outside employment, both paid and unpaid, provided the second job does not conflict with the General Principles (AD 6.1). Specifically, personnel may not engage in outside employment that interferes with official time or duties, involves conflicts of interest, violates regulations, or creates an appearance of impropriety. In addition, military members may be required to obtain command approval before undertaking outside employment. Two other staunch prohibitions limit outside employment. First, employees may not receive outside compensation for their official duties. Second, employees may not act as agents for anyone other than family members, in any matter in which the U.S. government has substantial interest or is a party. Certain employees, such as attorneys and physicians, have additional professional restrictions on moonlighting activities.

AD 34.15. *COMMERCIAL DEALINGS BETWEEN DOD PERSONNEL*

Because of the potential for coercion inherent in the military rank system, seniors shall not solicit or make any sales, either on-duty or off-duty, to personnel who are junior to them. This prohibition includes the solicited selling of insurance, stocks, mutual funds, real estate, cosmetics, household supplies, vitamins or other goods or services. The effect of this rule is that officers and senior enlisted involved in selling networks (e.g., AMWAY distributors) have a very limited audience which they can legally solicit or to which they can sell. There are two narrow exceptions to this rule. First, where absent of coercion or intimidation, seniors may engage in a one-time, arms-length transaction with junior personnel, such as selling their car. In addition, this exception includes the senior's ability to sell or lease non-commercial personal or real property to junior personnel. Second, they may make sales in a retail store during off-duty employment. Where the spouse or other household member of a DoD employee engages in commercial solicitation of junior personnel or their families, the employee's supervisor **must** consult an Ethics Counselor and advise the employee to avoid such activity where prejudicial to good order, discipline, or morale.

AD 34.16. *TEACHING, SPEAKING, AND WRITING*

Related to Official Duties. Federal employees may not be compensated by outside entities for teaching, speaking, or writing, if the subject of the effort relates to official duties. The subject "relates to official duties" if the communication of the material is part of the employee's duties, the invitation was based upon the person's official position, the information is derived from non-public information, the subject deals with the employee's official ongoing duties or those within past year, or the subject relates to any ongoing or announced policy, program, or operation of the agency.

The rules provide an exception to the foregoing compensation prohibition for persons who engage in teaching at an approved school. Employees may be paid for teaching, even if it relates to official duties, if the course is part of regular curriculum of an elementary school, secondary school, institute of higher learning or is sponsored by local, state, or Federal government.

Use of Official Title. Employees may generally not use their official title in connection with teaching, speaking, or writing, except that the title may be included in the author's biography, or used in connection with a professional article as long as the article has a disclaimer that the views are not necessarily those of the government. In addition, employees who customarily use their rank as a term of address (in place of titles such as Mr., Mrs., Ms. or Dr.) may use the term in connection with speaking, writing, or teaching.

Honoraria. The JER contains a section regarding the so-called "Honoraria Ban." This ban prevents the collection of any fee for speaking, appearing, or writing articles and applies to high-level employees (GS-15 and above and military personnel of flag/general rank). Also note that an employee may accept travel benefits for teaching, speaking, or writing (related to official duties) on a matter covered under the official duties allowance.

AD 34.17. *EXPERT WITNESSES*

Federal employees are prohibited by regulations from serving as expert witnesses in court, except on behalf of the United States, or as authorized by the employee's agency in consultation with the Department of Justice and the agency most closely involved in the litigation. If subpoenaed, though, employees are permitted to testify as fact witnesses. This topic is more fully discussed in Chapter 7 of this Study Guide.

PART F: FUNDRAISING

AD 34.18. *OFFICIAL SUPPORT & ENDORSEMENT*

Federal regulations specifically restrict the number of charities that receive official support and endorsement from the Federal Government. Specifically, the only permit official support to the Combined Federal Campaign (CFC), and those organizations specifically approved by the service secretaries. The service secretaries have each designated their serve relief societies as organizations that may receive official support and endorsement for fundraising. In addition, the Office of Personnel Management may sanction particular emergency and disaster appeals for official support outside of CFC. The reason behind these prohibitions is to limit the amount of fundraising that occurs at the Federal workplace.

For the Marine Corps, their mission specifically includes support for Toys for Tots.

Where support for such charities is authorized, on-the-job solicitations of employees may be made. Such solicitation *must* be conducted in such a way that contributions are made *voluntarily*. Any actions that do not allow free choices or create the appearance that service members do not have a free choice to give any amount, or not to give at all, are prohibited. Coercive practices specifically prohibited include:

Solicitation by supervisors;

Setting "100 percent participation" goals, mandatory personal dollar goals, or quotas (although establish 100 percent contact lists is acceptable);

Providing or using contributor lists for purposes other than the routine collection and forwarding of contributions and pledges or in the alternative, developing or using non-contributor lists; and

Counseling or grading individual service personnel or civilian employees about their failure to contribute or about the size of their donation.

Unless authorized by the Secretary of the Navy, employees may not solicit contributions for Department of the Navy organizations or augment appropriated funds through outside resources. For example, commands are not permitted to seek donations from local merchants for a command holiday party. Commands cannot circumvent this prohibition by utilizing spouse organizations or other private organizations as a proxy. Finally, command private organizations, such as the wardroom, cannot use DOD logos or command titles in its fundraising activities.

A command may provide official endorsement for fundraising involving organizations composed primarily of DoD personnel or their dependents when fundraising among their own members, by their own members, for the benefit of welfare funds for their own members or their dependents.

AD 34.19. *PERSONAL SUPPORT*

Employees may engage in fundraising in their private, personal capacity provided that there is no solicitation of subordinates or prohibited sources, and no use of official title, position, or authority is made.

AD 34.20. *MWR FUNDRAISERS*

Fundraising events for specific recreational programs may be supported provided that solicitations do not conflict with the Combined Federal Campaign or Navy Relief, are not conducted on the job, and are not performed as an official duty. BUPERSINST 1710.11 series.

AD 34.21. *MILITARY BALLS*

Unless designated by the Secretary of the Navy or CNO, military balls are not official functions but private functions for which the expenditure of appropriated funds is not authorized. (*See* SECNAVINT 5603.2D). The committees that plan, fundraise and execute military balls are made up of persons performing tasks in their personal capacities, not in their official capacities. In this regard, military ball committees are non-Federal entities, and official support and participation in them is strictly governed (see AD 6.21).

Section 5 C.F.R. 2635.808 and JER, Section 3-300 generally permit Federal personnel to voluntarily participate in ball fundraising activities in their personal capacities as long as they act exclusively outside the scope of their official positions and do not personally solicit from organizations that do business with the DoD or solicit from subordinates. DoD employees may not permit the use of their official titles, positions, or organization names to further fundraising efforts, but may be identified by their rank and service, *e.g.*, Lieutenant James Smith, U.S. Navy.

With respect to Navy support to fundraising, JER 3-211(b) allows the head of a DOD component command to authorize a non-Federal entity to conduct fundraising on an installation and to use DOD facilities and equipment, including the personnel to operate such equipment. Per paragraph 0402c(6)(a) of SECNAVINST 5720.44A, this Navy support of fundraising activities must be at no additional cost to the Government. In fundraising, as in any dealings with non-Federal entities, commands must avoid preferential treatment.

PART G: SUPPORT FOR NON-FEDERAL ENTITIES

AD 34.22. *NON-FEDERAL ENTITIES*

Non-federal entities include a wide range of organizations that provide charitable, morale, civic, entertainment, and recreation support to service members or the public. Examples include military spouse clubs, the Red Cross, the American Bar Association, Scouting organizations, the Reserve Officer's Association.

Official Participation. DoD employees may be permitted to attend meetings or other functions of non-federal entities as a part of their official duties, if the supervisor determines that the attendance would serve a legitimate Federal Government purpose. They may also be authorized to participate as speakers or panel members; however, no remuneration is allowed for performance of official duties. In addition, DoD members may be detailed to serve as official liaisons where DoD has a significant and continuing interest that may be served. Liaisons may not serve in a management position with the non-Federal entity and must make clear that any opinions expressed do not bind DoD or DoN to any course of action. Finally, when the non-Federal entity is also a defense contractor, the DoD General Counsel has opined that the regulations do not permit such liaison positions, and as a result, has cautioned against it.

In 1996, the DoD General Counsel opined that service by Government employees in an official capacity on the boards of non-Federal entities (NFE) is not consistent with the obligations imposed by 18 U.S.C. 208 unless such service is expressly authorized by law, or the NFE has made an unambiguous, statutorily permissible repudiation of all claims of a fiduciary duty owed by the official to the NFE. Thus, we have the basic rule: "DoD employees may not participate in their official DoD capacities in the management or control of NFEs without authorization from the DoD DAEO."

However, express statutory authority to agencies to participate in management of non-Federal entities vitiates such a conflict of interest. Furthermore, statutory authority to participate on private standard-setting organizations may imply Congressional authorization to participate in the management of such private organizations.

Private Participation. In off-duty time, a federal employee may freely participate in non-Federal entities, provided that the participation is not within the scope of official duties and the employee does not take official action in any matter which may effect the non-Federal entity (no conflicts of interest or impartiality problems are permitted).

Official Support for NFE's. Commands may support non-Federal organizations for a number of proper and ethical reasons, such as supporting the local community, maintaining good public relations, enhancing morale, or assisting worthy charities. There are restrictions imposed on providing support to outside organizations, which are intended to ensure that support is provided in an impartial, equitable and non-discriminatory manner.

The JER authorizes commanding officers to permit use of some Federal resources in support of non-Federal entities. Commands may support, through assignment of speakers, panel participants or, on a limited basis, through use of government facilities or equipment, the events of a non-Federal entity when the event serves community relations, is of interest to the local civilian or military community as a whole, and the support will not interfere with official duties and readiness. In no event, however, may Federal employees use clerical or staff personnel to support a non-Federal entity, nor may they allow use of copiers. Command support must not involve, or create an appearance of preferential treatment for any non-federal entity. If one organization is afforded support, the command must be prepared to give similar support to similarly situated organizations.

Actual or implied endorsements of non-Federal entities are prohibited. A command may co-sponsor a civic or community event only when the activity is not related to a business function of the co-sponsoring non-Federal entity. Under certain conditions, co-sponsorship of conferences or seminars relevant to the DoN is authorized.

Requests to support fund-raising and membership drives for non-Federal entities must be carefully researched and considered. Generally, DoN cannot officially endorse or appear to endorse membership or fundraising drives for any non-Federal entity. Special exceptions to the above general rule are recognized for the Combined Federal Campaign and Navy-Marine Corps Relief.

A further exception provided for in the JER involves supporting fund-raising drives for organizations composed primarily of employees or their dependents, when such fundraising is conducted among their own members for the benefit of welfare funds (i.e., spouse clubs, MWR programs, etc.). Such fundraising activity must be approved by

the commanding officer, after consultation with the Ethics Counselor (see Fundraising above).

Public affairs manuals also authorize official support for limited fundraising events by local, community-wide programs (e.g., volunteer fire departments, rescue units or youth activity funds).

Change 4 includes one additional change regarding support to NFEs. The change clarifies policy and specifically allows a Commander to provide logistical support for a charitable fundraising event onboard the installation. Note, however, that the basic precepts of 3-211 (a)(1) - (6) still apply.

PART H: MISCELLANEOUS RULES

AD 34.23. *TRAVEL BENEFITS*

Acceptance of Travel From Non-Federal Sources. Personnel may accept official travel from non-Federal sources in connection with their attendance in an official capacity at a meeting or similar event, in accordance with 31 U.S.C. 1353 and the Joint Federal Travel Regulations. Before accepting, an employee is required to receive authorization from the travel approving authority and an Ethics Counselor. Under no circumstances may the employee accept cash payments.

Acceptance of Incidental Benefits. Personnel may use their government frequent flyer miles for their personal use pursuant to the FY 2002 National Defense Authorization Act (NDAA), so long as the promotional items were/are obtained under the same terms as those offered to the general public; and they are obtained at no additional cost to the Government.

Personnel may use their frequent flyer mileage to upgrade to business class or to first class, but should refrain from flying in first class in uniform (presumably because of the appearance of impropriety).

Many airlines provide free tickets to persons "bumped" from overbooked flights or who voluntarily surrender their tickets for later, less crowded flights. When a member on official travel receives free tickets for voluntarily surrendering a seat on an overbooked flight, the member may use the tickets for personal travel. However, the delay incurred is on the member's own time and any delay is paid for by the member (i.e., the time may not be added to the travel claim). If involuntarily delayed, then the tickets become the property of the U.S. government, but the additional time may be added to the employee's final travel claim.

AD 34.24. *GAMBLING*

Gambling is generally defined as: 1) a game of chance; 2) requiring consideration in order to participate; and 3) offering the potential of a prize. The removal of any of these criteria removes the event from the rubric of "gambling." It is often easiest to remove the required consideration portion of the event.

Gambling is prohibited for DoD employees on duty or while on federal property. The rule makes an exception for private wagers made in living quarters, based on personal relationships, provided that the wagers don't violate local law. Remember, gambling with subordinates may violate Articles 133 or 134 of the UCMJ (fraternization). In the Navy, the playing of Bingo is specifically authorized where operated by and for a Navy club or recreation program.

AD 34.25. *POST-GOVERNMENT EMPLOYMENT RESTRICTIONS*

Federal regulations impose a number of restrictions on federal employees after they leave the government service. The regulations seek to avoid the possibility that an employer could appear to make unfair use of an employee's prior government service and affiliations. At the same time, they seek to avoid unduly restricting the ability of persons to move back and forth between government and the private sector.

Restrictions on Post-Government Employment. No former employee may act as an agent for another person or entity and attempt to influence the government with regard to any matter in which the employee participated **personally** and **substantially** as a government employee. This is a lifetime restriction.

For two years, a former employee may not represent another person before the government in an attempt to influence the government in connection with a matter that was pending under the former employee's responsibility.

For one year, a former senior employee, such as an O-7 or above, may not represent another before the former employee's agency in connection with seeking official action.

For certain former personnel previously engaged in procurement functions, restrictions control the accepting of compensation from certain defense contractors.

This is an area fraught with statutory "traps," particularly for high-ranking officers who have participated in procurement and contracting activities. Many of the restrictions are summarized in Chapter 9 of the JER but, as noted above, there have been significant changes in this area. It is strongly encouraged that any DoD employee with questions be referred to the appropriate Ethics Counselor for a formal opinion.

PART I: POLITICAL ACTIVITIES

Limitations on the political activities of Executive Branch employees have been in existence since the time of the Jefferson Administration. It is in the best interest of the country, indeed essential, that federal service should depend upon meritorious performance rather than political service. It has long been deemed improper for federal employees to try and influence the votes of others or to take part in the business of electioneering.

Activities by Civil Servants. The Hatch Act Reform Amendments of 1993 liberalized the extent to which civil servants are permitted to engage in off-duty partisan political activities. Chapter 6 of the JER contains the regulations now in effect, which provide a laundry list of permitted and prohibited activities. Even though the new regulations generally allow employees to take a more active part in political activities, including political management and political campaigns, it is advised that an Ethics Counselor be consulted before undertaking involvement in partisan politics.

Activities by Service Members. While rules regarding civil servant's political activities have been liberalized, the regulations applicable to military members have not. While free to register, vote, make monetary contributions to political organizations, express personal opinions, and attend political meetings as a spectator (not in uniform), military members may not otherwise become involved in partisan politics. Chapter 6 of the JER contains DoD Dir 1344.10, which provides a laundry list of permitted and prohibited activities. As with civil servants, it is advisable that service members consult with their Ethics Counselor before becoming involved in political activity.

Permitted political activities for military members include:

Register, vote and express personal opinions;
Encourage other military members to exercise voting rights;
Join a political club, and attend political meetings and Rallies as a spectator when not in uniform;
Make monetary contributions to a political organization;
Sign petitions for specific legislative action or place candidate's name on the ballot;
Write letters to the editor expressing personal views;
Bumper stickers on private vehicles.

Prohibited political activities by military members include:

Use official authority to influence/interfere;
Be a candidate for civil office,
Participate in partisan political campaigns, speeches, articles, TV/radio discussions;
Serve in official capacity/sponsor a partisan political club;
Conduct political opinion survey;
Use contemptuous words (10 U.S.C. § 888);
March or ride in partisan parades;
Participate in organized effort to transport voters to polls;
Promote political dinners or fundraising events;
Attend partisan events as official representative of Armed Forces;
Display large signs/banners/posters on private vehicles;
Provide campaign contributions to a candidate who is a military member or Federal employee.

Holding Public Office (citations refer to paragraphs in DoDD 1344.10).

	U.S. Government civil office	State or local civil office
Members on active duty generally	Elective (4.3.1.1), appointive (4.3.1.2), or executive schedule (4.3.1.3): may not hold or exercise functions of civil office (4.3.1) All others: permitted, subject to noninterference with military duty (4.3.3)	May not hold or exercise functions of state or local civil office (4.3.4) Minor nonpartisan exceptions (4.3.5.1 and 4.3.5.2) (Civilian law enforcement, fire, or rescue squads are excluded from definitions of "civil offices" (E2.1.3))
Reserve member when ordered to active duty for 270 days or less, and retired regular members	Permitted (4.3.2) subject to noninterference with military duty	Permitted (4.3.5.3) subject to noninterference with military duty
Reserve member when ordered to active duty for more than 270 days, including retired members ordered to active duty. (Prohibitions apply from first day of active duty.)	Elective, appointive (4.3.1.2), or executive schedule (4.3.1.3): not permitted. All others: permitted, subject to noninterference with military duty (4.3.3)	Holding office permitted (4.3.5.4) subject to state and local law (4.3.5.4.1) and Secretarial determination (4.3.5.4.2); may not exercise functions of office while on active duty (4.3.6)

DoD Support for Activities. In general, commanders may not permit use of DoD facilities to support political activities. This prohibition includes: use of installation facilities for political assemblies, media events or fundraisers; community relations support (bands, color guards, personnel) for political meetings or ceremonies; taping of campaign commercials in front of military equipment on military property; and, inclusion of campaign news, partisan discussions, cartoons, editorials or commentaries regarding political campaigns, candidates or issues in DoD newspapers.

CHAPTER 35

CHAPTER 35

AD 35. GOVERNMENT INFORMATION PRACTICES: THE FREEDOM OF INFORMATION AND PRIVACY ACTS AND RELEASE OF OFFICIAL INFORMATION AND TESTIMONY FOR LITIGATION PURPOSES

AD 35.1. *REFERENCES*

Freedom of Information Act (FOIA) References.

Freedom of Information Act, 5 U.S.C. § 552 (1982), as amended.

DOD Directive 5400.7
SECNAVINST 5720.42(series)

JAGMAN, Chapter V, part A

USMC - MCO 5720.56

USCG - COMDTINST M5260.2

SECNAVINST 5720.45A, (INDEXING, PUBLIC INSPECTION, AND FEDERAL REGISTER PUBLICATION OF DEPARTMENT OF THE NAVY DIRECTIVES AND OTHER DOCUMENTS AFFECTING THE PUBLIC)

Federal Personnel Manual, chapters. 293, 294, 297, 335, 339, and 713

U.S. Navy, Manual of the Medical Department, chapter 23-70 through 23-79

OPNAVINST 5510.161
SECNAVINST 5720.44A
http://foia.navy.mil
DOJ FOIA Reference Guide (available at http://www.usdoj.gov/04foia/04_3.html)
Privacy Act References.

Privacy Act of 1975, 5 U.S.C. § 552a (1982).

DOD Directive 5400.11

SECNAVINST 5211.5

JAGMAN, Chapter V, part B

MCO P5211.2

COMDTINST M5260.2

http://privacy.navy.mil
DOJ Privacy Act Overview (available at http://www.usdoj.gov/04foia/04_7_1.html)

PART A: FREEDOM OF INFORMATION ACT

AD 35.2. *PURPOSE*

The Freedom of Information Act, (FOIA) is designed principally to ensure that agencies of the Federal government, including the military departments, provide the public with requested information to the maximum extent possible. The FOIA applies to the Executive Branch of the Federal Government. The objectives of the Act are:

broad disclosure of records in response to requests (the general rule, not the exception);

equality of access (all individuals have equal rights of access to Government information);

withholding must be justified (the burden is on the government to justify the withholding of information and documents from the general public and individuals); and

relief for improper withholding (individuals improperly denied access to documents have the right to seek relief in the judicial system).

AD 35.3. *REQUESTS FOR RECORDS*

General. Upon receipt of a request for information, a command must initially determine if the request is governed by the Freedom of Information Act . A FOIA request is one made by any person or organization for records concerning the operations or activities of a federal governmental agency. A requestor's status is irrelevant and they can be nearly any entity, such as a person, state or foreign government, corporations, partnerships, or organizations. Generally, there is no distinction made between U.S. citizens and foreign nationals. The only entities that are not proper requestors, or whose request is not considered a FOIA request, are other federal agency, a fugitive from the law seeking information about their fugitive status, or requests by foreign governments to intelligence activities of the Federal Government.

Agency Record. FOIA provisions apply only to "records" of a federal agency. Records are information or products of data compilation, regardless of physical form or characteristics, made or received by a naval activity in the transaction of public business or under federal law. Some examples of agency records that are naval records include memos, deck logs, contracts, letters, electronic storage devices, reports, and computer files.

The term "agency records" does not include:

objects or articles (such as structures, furniture, paintings, sculpture, three-dimensional models, vehicles, equipment, and parts of wrecked aircraft), whatever their historical or evidentiary value;

commercially exploitable resources (including, but not limited to, musical arrangements and compositions, formula, designs, drawings, maps and charts, map compilation manuscripts and map research materials, research data, computer programs, and technical data packages that were not created and are not utilized as primary sources of information about organizations, policies, functions, decisions or procedures of the Department of the Navy);

unaltered publications and processed documents (such as regulations, manuals, maps, charts, and related geographical materials) that are available to the public through an established distribution system with or without charges;

information that is not recorded in some record type or records that do not otherwise exist (such as an individual's memory or oral communication);

supervisor's personal notes on his employees, which are not required to be prepared or maintained by any naval instruction or regulation, concerning their performance, etc., and used solely as a memory aid in preparing evaluation reports (Theses notes are not made available to other persons in the agency, are not filed with agency records, and are destroyed after the evaluation period by the individual who prepared them.);

and information stored within a computer for which there is no existing computer program for retrieval of the requested information.

A record must exist and be in the possession and control of the Department of the Navy at the time the search begins in order to be subject to the provisions of SECNAVINST 5720.42F. There is no obligation to create, compile, or obtain a record not already in existence.

Form of Request. To qualify as a perfected request for permission to examine or obtain copies of Department of the Navy records, the request itself must:

be in writing and indicate expressly, or by clear imply, that it is a request under the FOIA. Whether an email satisfies the "writing" requirement is dependent on the agency involved. As a general rule, however, most agencies now accept email as a "writing" in accordance with the regulations; and

contain a reasonable description of the particular record or records requested (fishing expeditions are not authorized, nor are commands required to respond to blanket requests for all documents); and

a statement regarding fees, a check or money order for the anticipated search and duplication fees determined in accordance with enclosure (3) of SECNAVINST 5720.42F, or have satisfactory evidence that the requester is entitled to a waiver of fees.

AD.35.4. *PROCESSING*

Actions on the Request. When an official receives a request for a record, that official is responsible for timely action on the request. If a request meets the minimum requirements for processing as stated above, the command should take the following steps:

date-stamp the request upon receipt;

establish a suspense control record to track the request;
conspicuously stamp or label the request "Freedom of Information Act;"

flag it as requiring priority handling throughout its processing because of the limited time available to respond to the request;

Respond to the requester within 20 working days within receipt of the request unless an extension of time is obtained.

If a request is received that does not meet the minimum requirements set forth above, it should still be answered promptly (within 20 working days of receipt) in writing and in a manner designed to assist the requester in perfecting the request. The command has discretion to waive technical defects in the form of a FOIA request if the requested information is otherwise releasable.

Forwarding Requests. When a command receives a request for information over which another activity has cognizance, the receiving activity shall not release or deny such records without consulting the other activity. The receiving activity shall coordinate with that activity before referring the FOIA request and copies of the requested documents for direct response. The requester shall be notified if the request has been re-addressed and forwarded to the cognizant activity. The request, letter of transmittal, and the envelope or cover should be conspicuously stamped or labeled "FREEDOM OF INFORMATION ACT." Additionally, a record should be kept of the request—including the date and the activity to which it was forwarded.

Requests Requiring Special Handling.

Classified records**.** Release of classified documents is normally exempt under section (b)(1) of the statute. If the very existence or nonexistence of the record is classified, the activity shall refuse to confirm or deny its existence or nonexistence. If a request is received for classified records originated by another naval activity for which the head of the activity is not the classifying authority, the request shall be forwarded to the official having classification authority and the requester notified of such referral, unless the existence or nonexistence of the record is in itself classified.

NCIS reports**.** Requests for reports by the Naval Criminal Investigative Service shall be re-addressed and forwarded to the Commander, Naval Criminal Investigative Service Command. Notify the requester of the referral action.

Naval Inspector General (IG) Reports**.** Requests for investigations and inspections conducted by or at the direction of Naval Inspector General shall be re-addressed and forwarded to the Naval Inspector General.

JAG Manual investigations**.** Requests shall be forwarded to the following release authority depending upon the type of investigation convened:

For a Command Investigation, to the GCMCA over the command that convened the investigation.

For a Litigation-Report Investigation, to the Judge Advocate General (Code 15).

For a Court or Board of Inquiry, to the Echelon II commander over the command convening the court or board of inquiry.

Mishap investigation reports. Requests for mishap investigation reports shall be re-addressed and forwarded to the Commander, Naval Safety Center. Notify the requester of the referral action.

Naval Audit Service reports. Requests for reports by the Naval Audit Service shall be re-addressed and forwarded to the Naval Audit Service Headquarters (Code OPS).

Naval nuclear weapons information (NNWI). Requests for NNWI require special handling. FOIA requests for nuclear related information shall be processed under OPNAVINST 5510.1.

Naval nuclear propulsion information (NNPI). Requests for NNPI shall be forwarded, along with any responsive records, to the Director, Naval Nuclear Propulsion Program.

Mailing lists. Requests for home addresses are not releasable without an individual's consent. It is now recognized that, regardless of their duties, DoD personnel are at increased risk solely by association with on-going military actions. When responding to a FOIA request for lists of DoN personnel, (particularly computer database lists) these lists shall be withheld. This includes military members, civilian personnel, members of the Guard and Reserves, and Coast Guard personnel operating as a service in the Navy. This information should be considered exempt under high (b)(2) because its release would result in circumvention of DoD regulations concerning the security of DoD personnel and operations and under exemption (b)(6) because release would result in a clearly unwarranted invasion of personal property.

Court-martial Records. Requests should be referred to the Office of the Judge Advocate General (Code 20), and the requestor so notified.

Release of Records. Subject to the foregoing, a requested record, or a reasonably segregable portion thereof, will be released to the requester unless it is affirmatively determined that the record contains matters which are exempt from disclosure under the conditions outlined below. Where there is a question concerning the releasability of a record, the local command should coordinate with the official having cognizance of the subject matter and, if denial of a request is deemed appropriate, such denial may be accomplished only by the proper IDA. All officers authorized to convene general courts-martial and the heads of various Navy Department activities listed in paragraph 6(e) of SECNAVINST 5720.42F are designated as IDAs.

Denial of Release. If a local commanding officer receives a request for a copy of, or per-mission to examine, a record in existence and believes that the requested record, or a non-segregable portion thereof, is not releasable under the FOIA, or if he feels denial of a fee waiver is appropriate, he must expeditiously refer the request with all pertinent information and a recommendation directly to the IDA.

If the IDA agrees that the requested record contains information not releasable under FOIA, and any releasable information in the record is not reasonably segregable from the non-releasable information, he shall:

Notify the requester of such determination;
The reasons for that denial; and,
The name and title of the person responsible for the denial.

The notification will also include a specific citation to:
The exemption(s) upon which the denial is based; and,
Advisement of the requester's right to appeal to the designee of the Secretary of the Navy within 60 days.

If the IDA determines that the requested record contains releasable information that is reasonably segregable from non-releasable information, he shall disclose the releasable portion and deny the request as to the non-releasable portion. A complete file of those FOIA requests which have been denied, in full or in part, must be maintained by the IDA.

Time Limits. The official having responsibility for making the initial determination regarding a request shall transmit his determination in writing to the requester within 20 working days after receipt by the appropriate activity. In unusual circumstances, however, denial authorities may extend the time limit for responding to requests. The 20-day time limit does not begin to run until the appropriate authority has received the request. If a request is incorrectly addressed, it should be promptly re-addressed and forwarded to the appropriate activity. As an alternative to the taking of formal extensions of time, the official having responsibility for acting on the request may negotiate an informal extension of time with the requester.

Fees. The FOIA permits Government activities to charge fees for FOIA requests. The fees are tied to the expenses to the agency for responding to the FOIA request. If the total charge is less than $15.00, it will be waived for all requesters. Various noncommercial requesters receive, in addition, varying amounts of credit for search time and copies that are factored in before the waiver amount is applied. For the purposes of fees, the classes of requesters are:

Commercial requesters, who are charged for search, duplication, and review;

Educational and noncommercial scientific institutional or news media representative requesters, which are charged only for duplication costs, with credit for 100 free pages of copies per request; and

Other requesters, who are charged only for search and duplication, subject to credit for 2 free hours of search time and 100 free pages of copies.

In addition to the mandatory credit and fee waiver, there is also discretionary authority to waive fees where disclosure of the information is in the public interest and not in the commercial interest of the requester.

Appeals. Any denial of requested information or fee waiver may be appealed. The requester must be advised of these appeal rights in the letter of denial by the appropriate denial authority. The Judge Advocate General and the General Counsel have been designated by the Secretary of the Navy as appellate authorities. An appeal from an initial denial, in whole or in part, must be in writing and received by the appellate authority not more than 60 days following the date of transmittal of the initial denial. The appeal must state that it is an appeal under FOIA and include a copy of the denial letter. The appellate authority will normally have 20 working days after receipt of the appeal to make a final determination. There is a provision permitting a 10-working-day extension in unusual circumstances. The appellate authority shall provide the appellant with a written notification of the final determination either causing the requested records, or the releasable portions thereof, to be released or, if denied, providing the name(s) and title(s) of the individual(s) responsible for such denial, the basis for the denial, and an advisement of the requester's right to seek judicial review.

Judicial review. Once a requester's administrative remedies have been exhausted, he may seek judicial review of a final denial in U.S. District Court; in which case, the requested document normally will be produced for examination prior to a determination by the court. Exhaustion of administrative remedies consists of either final denial of an appeal or failure of an agency to transmit a determination within the applicable time limit.

Reporting requirements. The FOIA requires each agency to submit annual reports to Congress regarding the costs and time expended to administer the Act. SECNAVINST 5720.42F sets forth detailed instructions and the appropriate format for submitting these reports.

AD 35.5. *EXEMPTIONS*

Matters contained in records may be withheld from public disclosure only if they come within one or more of the exemptions listed below. Even though a document may contain information which qualifies for withholding under one or more FOIA exemptions, FOIA requires that all "reasonably segregable" information be provided to the requestor.

Policy as to Discretionary Disclosure. Department of Justice Policy is the Federal agency charged with all FOIA litigation matters. On 12 Oct. 2001, Attorney General Ashcroft issued a policy memorandum to the heads of all federal departments and agencies in the executive branch that communicated a fundamental shift in the way the Department of Justice will approach contested FOIA cases. Attorney General Ashcroft abolished the Clinton Administration's "Foreseeable Harm" standard for discretionary release in his 12 October 2001 policy memorandum. The new Department of Justice standard governing discretionary releases is known as the "Sound Legal Basis" test:

"Any discretionary decision by your agency to disclose information protected under the FOIA should be made only after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information. . . . [W]hen you carefully consider FOIA requests and decide to withhold records, in whole or in part, you can be assured that the Department of Justice will defend your decisions unless they lack a Sound Legal Basis [emphasis added] or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records."

DoD Regulation 5400.7-R, is being amended to reflect the new "Sound Legal Basis" standard governing discretionary releases. The Department of the Navy has already implemented the new "Sound Legal Basis" standard. The Chief of Naval Operations has issued the following policy changes to the Navy's FOIA Program:

"DoN activities will no longer use the foreseeable harm" standard when adjudicating whether to release / deny information. Rather, DoN activities will adopt the "Sound Legal Basis" standard reflected in the AG [Attorney General Ashcroft's 12 Oct. 2001] memo. DoN activities will be responsible for presenting a rationale for denial that DoJ will be able to defend if the denial is litigated."

FOIA exemptions. The following types of information may be withheld from public disclosure if one of the aforementioned requirements is met:

(b)(1) Classified documents. In order for this exemption to apply, the record must be properly classified under the criteria established by Executive Order No. 12356, 47 Fed. Reg. 14874, and implemented by OPNAVINST 5510.1 (Department of the Navy Information and Personnel Security Program Regulation).

(b)(2) Internal personnel rules and practices. In addition to determining that the document relates to internal personnel rules or practices of the Department of the Navy, it must be determined that releasing the information would substantially hinder the effective performance of a significant command or naval function and that they do not impose requirements directly on the general public (e.g., advancement exams, audit or inspection schedules, emergency base evacuation plans, and negotiating or bargaining techniques or limitations).

(b)(3) Exempt by statute. There are a number statutes which, by their language, permit no discretion on the issue of disclosure. Appendix 7-A to this chapter has a list of statutes applicable to DOD and whose information is exempt under (b)(3)

(b)(4) Trade Secrets. This exemption refers to trade secrets or commercial or financial information obtained from a person or organization outside the government with the understanding that the information will be retained on a privileged or confidential basis. For this exemption to apply, the disclosure of the information must be likely to cause substantial harm to the competitive position of the source, impair the government's ability to obtain necessary information in the future, or impair some other legitimate government interest. Examples include information received in confidence for a contract, bid, proposal, or scientific or manufacturing process.

(b)(5) Inter/intra-agency memorandums or letters. This refers to internal advice, recommendations, and subjective evaluations as contrasted with factual matters. If the record would be available through the discovery process in litigation with the Department of the Navy, the record should not be withheld under this exemption. A directive or order from a superior to a sub-ordinate, though contained in an internal communication, generally cannot be withheld if it constitutes policy guidance or decision as distinguished from a discussion of preliminary matters or advice. The purpose and intent of this examination is to allow frank and uninhibited discussion during the decision making process. Examples of this exemption include, among other things, nonfactual portions of staff papers, after action reports, records prepared for anticipated

administrative proceedings or litigation, attorney-client privilege documents, attorney work-product privilege documents, command disciplinary investigations, and Inspector General reports.

(b)(6) Personnel and medical files and similar files when the disclosure of such information would constitute a clearly unwarranted invasion of personal privacy. This exemption protects personnel and medical files, and other similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. The determination of whether disclosure would constitute a clearly unwarranted invasion is a subjective judgment requiring a weighing of the privacy interest to be protected against the importance of the requester's purpose for seeking the information. This exemption shall not be used to protect the privacy of a deceased person since deceased persons do not have a right to privacy. Nevertheless, information may be withheld to protect the privacy of the next of kin of the deceased person. Personally identifiable information of Federal employees, such as name, grade, date of rank, gross salary, duty status, present and past duty stations, office phone, source of commission, military and civilian educational level, promotional sequence number, combat service and duties, decorations and medals, and date of birth, are to be withheld from release under this exemption unless the agency makes a determination that there are no security or identity theft concerns. Before denying such requests, though, since this area of the law is fraught with legal problems, consultation with a judge advocate is recommended. Information on nonjudicial punishment will not normally be disclosed to the public under FOIA under this exemption. See § 0509 of the JAGMAN for further guidance.

(b)(7) Records and information compiled for civil, criminal or military law enforcement: This exemption applies only to the extent that the production of such records would:

Interfere with enforcement proceedings;

Deprive a person of a right to a fair trial or an impartial adjudication;

Could constitute an unwarranted invasion of personal privacy. This exemption is the law enforcement counterpart to Exemption 6, which is the FOIA's fundamental privacy exemption. (See the discussions of the primary privacy-protection principles that apply to both exemptions under Exemption 6, above.) Exemption 7(C) provides protection for law enforcement information the disclosure of which "***could*** reasonably be expected to constitute an unwarranted invasion of personal privacy", as opposed to exemption 6's requirement for a ***clearly*** unwarranted invasion of personal privacy;

Disclose the identity of a confidential source;

Disclose investigative techniques and procedures; or

Endanger the life or physical safety of law enforcement personnel.

(b)(8) and (9). Exemption 8 of the FOIA protects matters that are "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions." Exemption 9 of the FOIA covers "geological and geophysical information and data, including maps, concerning wells." Neither has much application to military FOIA practice.

PART B: PRIVACY ACT

AD 35.6. *SYNOPSIS OF ACT*

Purposes. The Privacy Act of 1974, 5 U.S.C. § 552a (2000), which has been in effect since September 27, 1975, can generally be characterized as an omnibus "code of fair information practices" that attempts to regulate the collection, maintenance, use, and dissemination of personal information by federal executive branch agencies. However, the Act's imprecise language, limited legislative history, and somewhat outdated regulatory guidelines have rendered it a difficult statute to decipher and apply. Moreover, even after more than twenty-five years of administrative and judicial analysis, numerous Privacy Act issues remain unresolved or unexplored. Adding to these interpretational difficulties is the fact that many Privacy Act cases are unpublished district court decisions.

Federal agencies, with certain exceptions as noted later in this chapter, are required by the Act to:

permit an individual to determine what records pertaining to him or her are collected, maintained, used, or disseminated;

permit an individual to prevent records pertaining to him or her, that were obtained by such agencies for a particular purpose, from being used or made available for another purpose without his or her consent;

permit an individual to gain access to information pertaining to him or her in a Federal agency's records, to have a copy made of all or any portion thereof, and to correct or amend such records;

collect, maintain, use, or disseminate any record of identifiable personal information in a manner that ensures that such action is for a necessary and lawful purpose, that the information is current and accurate for its intended use, and that adequate safeguards are provided to prevent misuse of such information;

permit exemptions from the requirements with respect to records provided in the Act only in those cases where there is an important public policy need for such exemption as has been determined by specific statutory authority; and

be subject to civil suit for any damages which occur as a result of acts or omissions that violate any individual's rights under the Act.

Definitions.

Record. Any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph.

System of records. A group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual.

Personal information. Any information about an individual that is intimate or private to the individual, as distinguished from information related solely to the individual's official functions. This ordinarily includes information pertaining to an individual's financial, family, social, and recreational affairs; medical, educational, employment, or criminal history; or information that identifies, describes, or affords a basis for inferring personal characteristics. It ordinarily does not include such information as time, place, and manner of, or authority for, an individual's execution of, or omission of, acts directly related to the duties of his / her Federal employment or military assignment.

Individual. A living citizen of the United States, an alien lawfully admitted for permanent residence, or a member of the naval service (including a minor). Additionally, the legal guardian of an individual or a parent of a minor has the same rights as the individual and may act on behalf of the individual concerned. Emancipation of a minor occurs upon enlistment in an armed force, marriage, court order, reaching the age of majority in the state in which located, reaching age 18 (if residing overseas), or reaching age 15 (if residing overseas) for medical records compiled under a program of confidentiality which the individual specifically requested.

Routine use. A normal, authorized use made of records within a system of records, but only
if that use is published as a part of the public notification appearing in the Federal Register for the particular system of records.

AD 35.7. *COLLECTION OF INFORMATION*

Policy. It is the policy of the naval service to collect personal information, to the greatest extent practicable, directly from the individual particularly when the information may adversely affect an individual's rights, benefits, and privileges. "Personal information" is distinguished from information related solely to the individual's official functions. Personal information collected by DON for inclusion in a system of records

will be accomplished with a “Privacy Act Statement” (PAS). Within the PAS, the following information must be included:

The authority for solicitation of that information (i.e., the statute or Executive Order);

the principle purposes for which the relevant agency uses the information (e.g., pay entitlement, retirement eligibility, or security clearances);

the routine uses to be made of the information as published in the Federal Register;

whether disclosure is mandatory or voluntary; and

the possible consequences for failing to provide the requested information.

If an individual refuses to sign an original PAS, the refusal should be noted on the original statement (with an indication that he / she was provided with a copy) and the document should then be attached to the collected record of information.

If oral advice concerning the provisions mentioned above is required to be administered for any reason, a note of the fact that information concerning the Privacy Act requirements was furnished to the individual should be made and attached to the collected information and, if at all possible, a copy of the note should be forwarded to the individual involved.

There is no requirement for use of the PAS in any processes relating to the enforcement of criminal laws (including criminal investigations by NCIS, base police, and master at arms), or courts-martial and the personnel thereof (i.e., military judge, trial counsel, defense counsel, Article 32 investigating officer, and government counsel for the Article 32 investigation).

Requesting An Individual's Social Security Number (SSN). Department of the Navy activities may not deny an individual any right, benefit, or privilege provided by law because the individual refuses to disclose his SSN unless such disclosure is required by Federal statute or, in the case of systems of records in existence and operating before 1 January 1975, such disclosure was required under statute or regulation adopted prior to 1 January 1975 to verify the identity of an individual. When an individual is requested to disclose his / her SSN, he / she must be informed whether such disclosure is mandatory or voluntary, by what statutory or other authority the SSN is solicited, and what uses will be made of it.

An activity may request an individual's SSN, even though it is not required by Federal statute or is not for a system of records in existence and operating prior to 1 January 1975. The separate PAS for the SSN alone, or a merged PAS covering both the SSN and other items of personal information, however, must make clear that disclosure of the number is voluntary. If the individual refuses to disclose his SSN, the activity must be prepared to identify the individual by alternate means.

Once a military member or civilian employee of the Department of the Navy has disclosed his/her SSN for purposes of establishing personnel, financial, or medical records upon entry into naval service or employment, the SSN becomes his/her service or employment identification number. Subsequent provision or verification of this identification number in connection with those records does not require an additional PAS.

Administrative Procedures. Appropriate administrative, technical, and physical safe-guards must be established to ensure the security and confidentiality of records in order to protect any individual on whom information is maintained against substantial harm, embarrassment, inconvenience, or unfairness. Such information should be afforded at least the protection required for information designated as "For Official Use Only." All correspondence that contains personally identifiable information should be labeled with the following header, “FOUO- PRIVACY SENSITIVE: ANY MISUSE OR UNAUTHORIZED DISCLOSURE MAY RESULT IN BOTH CIVIL AND CRIMINAL PENALTIES.”

Privacy Act Disclosure Exemptions. The Privacy Act provides exemptions from disclosure. Exemptions are not automatic and must be invoked by the Secretary of the Navy who has delegated CNO (OP-09B30) to make the determination. No system of records within DoN shall be considered exempt until the CNO has approved the exemption and an exemption rule has been published as a final rule in the Federal Register. Exemptions

are either general or specific.

General exemptions. To be eligible for a general exemption, the system of records must be maintained by the CIA or an activity whose principle function involves the enforcement of criminal laws and must consist of:

Data compiled to identify individual criminals and alleged criminals which consists only of identifying data and arrest records, type and disposition of charges, sentencing / confinement / release records, and parole and probation status;

data that supports criminal investigations (including efforts to prevent, reduce, or control crime) and reports of informants and investigators that identify an individual; or

reports on a person, compiled at any stage of the process of law enforcement, from arrest or indictment through release from supervision.

Specific exemptions. The Privacy Act also lists eight specific exemptions:

classified information that is exempt from release under FOIA;

investigatory material compiled for law enforcement purposes, but beyond the scope of the general exemption mentioned above;

records maintained in connection with providing protective service to the President and others under section 3056 of title 18, United States Code;

records required by statute to be maintained and used solely as statistical records;

investigatory material compiled solely to determine suitability, eligibility, or qualification for Federal employment or military service, but only to the extent that disclosure would reveal the identity of a confidential source;

testing and examination material used solely to determine individual qualification for appointment or promotion in the Federal or military service, the disclosure of which would compromise the objectivity or fairness of the testing or examination process; and

evaluation material used to determine potential for promotion in the armed forces, but only to the extent that the disclosure of such material would reveal the identity of a confidential source.

5 U.S.C. § 552a(d)(5) provides that: "Nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding."

AD 35.8. *DISCLOSURE OF PERSONAL INFORMATION TO THIRD PERSONS*

The Privacy Act carefully limits those situations in which the information gathered by a Federal agency may be disclosed to third persons. As a general rule, no personal information from a record or record system shall be disclosed to third parties without the prior written request or consent of the individual about whom the information pertains.

Exceptions. The prior written consent or request of the individual concerned is not required if the disclosure of information is authorized under one of the exceptions discussed below.

Disclosure is authorized without the consent of the individual concerned, provided that the requesting member is within the Department of the Navy or the Department of Defense and has an official need to know the information in the performance of their duties. In addition, the contemplated use of the information is compatible with the purposes for which the record is maintained. No disclosure accounting is required when information is released pursuant to this exception. Under this exception, the name, rate, offense(s), and disposition of an offender at captain's mast/ office hours may be published in the plan of the day or on the command bulletin board within a month of the imposition of nonjudicial punishment, or at daily formations or morning quarters.

If the information is of the type that is required to be released pursuant to the FOIA as implemented by SECNAVINST 5720.42F, it may be released. As discussed above, personal information from personnel, medical, and similar files may be exempt from release under the FOIA when the release would cause a clearly unwarranted invasion of personal privacy under exemption 6. Therefore, the responsible officer must weigh the public's right to know the information against the right to privacy of the individual. Sound, intelligent discretion is obviously necessary in such situations.

Disclosure may be made for a ***routine use*** and declared and published in the system notice in the Federal Register. For example, a routine use for the home address information maintained in the Navy Personnel Records System is the disclosure of such information to the duly appointed command family ombudsman in the performance of their duties.

Civil and criminal law enforcement agencies of governmental units in the United States. The head of the agency making the request must do so in writing to the activity maintaining the record indicating the particular record desired and the law enforcement purpose for which the record is sought. Blanket requests will not be honored. A record may also be disclosed to a law enforcement activity, provided that such disclosure has been established as a "routine use" in the published record-systems notice. Disclosure to foreign law enforcement agencies is not authorized under this section.

Disclosure may be made if the health or safety of a person is imperiled. The individual whose record was disclosed must be notified of such disclosure.

Disclosure is permitted if information is requested by either House of Congress or any committee or subcommittee thereof to the extent of matters within its jurisdiction. This exemption does not include individual members of Congress when the request for information was prompted by an oral or written request for assistance by the individual to whom the record pertains. In these instances, the individual concerned must consent to the release of any Privacy Act information.

When complying with an order from a court of competent jurisdiction signed by a state, Federal, or local court judge to furnish information, if the issuance of the order is made public by the court which issued it, reasonable efforts will be made to notify the individual to whom the record pertains of the disclosure and the nature of the information provided. If the court order itself is not a matter of public record, the concerned activity shall seek to learn when it will be made public. In this situation, an accounting for the disclosure shall be made at the time the activity complies with the order, but neither the identity of the party to whom the disclosure was made nor the purpose of the disclosure shall be made available to the concerned individual unless the court order has become a matter of public record.

Disclosure Accounting. The Privacy Act and implementing instructions require each command to maintain an accounting record of all disclosures, including those requested or consented to by the individual. This allows individuals to discover what disclosures of information concerning them have been made, and to provide a system whereby prior recipients of information may be notified of disputed or corrected information. There is no uniform method for keeping disclosure accountings; the primary criteria are that the selected method be one which will:

enable an individual to ascertain what person or agencies have received disclosures pertaining to him / her;

provide a basis for informing recipients of subsequent amendments or statements of dispute; and

provide a means to prove that the activity has complied with the requirements of the Privacy Act.

Commands should maintain a disclosure accounting of the life of the record to which disclosure pertains or 5 years after the date of disclosure—whichever is longer.

AD 35.9. *PERSONAL NOTIFICATION, ACCESS, AMENDMENT, AND DENIAL*

Personal Notification. Because one of the underlying purposes of the Privacy Act is to allow the individual, upon his / her request, to discover whether records pertaining to him / her are maintained by Federal agencies, the system manager must notify a requesting individual whether or not the system of records under his management contains a record pertaining to that individual. All properly submitted requests for personal

notification will be honored, except in cases where exemption is authorized by law, claimed by the Secretary of the Navy [SECNAVINST 5211.5D, enclosure (11)], and exercised by the denial authority.

Personal Access. Hand-in-hand with the provisions concerning personal notification of records is the Privacy Act's mandate that an individual will be allowed to inspect and have copies of records pertaining to him/her that are maintained by Federal agencies. Upon receiving a request from an individual, the systems manager shall permit that individual to review records pertaining to him/her from the system of records in a form that is comprehensible to the individual. The individual to whom the record pertains may authorize a third party to accompany him / her when seeking access.

Amendment. The Privacy Act permits the individual to ensure that the records maintained about him / her are as accurate as possible by allowing him / her to amend information that is inaccurate, to appeal a refusal to amend, and to file a statement of dispute in the record should an appeal be denied. Exceptions to this rule permitting amendment of personal records may only be exercised in accordance with published notice where authorized by law, claimed by the Federal agency head, and exercised by the denial authority.

Individual request. An individual requesting notification concerning records about him / herself must:

accurately identify him / herself;

identify the system of records from which the information is requested;

provide the information or personal identifiers needed to locate records in that particular system; and

request notification of personal records within the system from the systern manager; or

request access from the system manager; or

request amendment in writing from the system manager; and

state reasons for requesting amendment and provide information to sup-port such request.

Command Action. Denials of initial requests for notification may only be made by denial authorities. If the request is deficient, the command should inform the individual of the correct means, or additional information needed, for obtaining consideration of his / her request for notification. A request may not be rejected based on format deficiency, nor may the individual be required to resubmit the request, unless correction is essential for processing the request.

Requests for personal notification may be granted by officials who have custody of the records, even if they are not the system manager or denial authority.

If it is determined that the individual should be granted access to the entire record requested, the official should inform the individual, in writing, that access is granted and furnish a copy of the record, or advise when and where it is available. Fee schedules for duplication costs are contained in SECNAVINST 5211.5D.

If an available exemption is not exercised, an individual's request for amendment of a record pertaining to him / her shall be granted if it is determined, on the basis of the information presented by the requester and all other reasonably available related records, that the requested amendment is warranted in order to make the record sufficiently accurate, relevant, timely, and complete as to ensure fairness in any determination which may be made about the individual on the basis of record. Other agencies holding copies of the record must be notified of the amendment. If amendment is made, all prior recipients of the record must be notified of the amended information.

A request for notification shall be acknowledged in writing with-in 10 working days after receipt, and the requester must be advised of the decision to grant / deny access within 30 working days.

Denial Authority. Denial Authorities include all officers authorized to convene general courts-martial and the heads of designated Navy Department activities.

Notification. Denial authorities are authorized to deny requests for notification when an exemption is applicable and denial of the notification would serve a significant and legitimate governmental purpose (e.g., avoid interfering with an ongoing law enforcement investigation). The denial letter shall inform the individual of his / her right to request further administrative review of the matter with the Judge Advocate General within 60 days from the date of the denial letter.

Access. To deny the individual access to all or part of the requested record, the denial authority shall send an expurgated copy of the record available, where appropriate. When none of the record is releasable, the denial authority shall inform the individual of the denial of access and the reasons therefor (including citation of any applicable exemptions, a brief discussion of the significant and legitimate governmental purposes served by denial of the access, and an advisement of the right to seek further administrative review within 60 days of the date of the denial).

Amendment. If the request to amend is denied, in whole or in part, the denial authority must notify the individual of the basis for denial and advise him / her that he may request review of the denial within 60 days and the means of exercising that right.

Reviewing authority. Upon receipt of a request for review of a determination denying an individual's initial request for notification, access, or amendment, the Judge Advocate General (or the General Counsel, depending on the subject matter) shall obtain a copy of the case file from the denial authority, review the matter, and make a final determination. Any final denial letter should cite the exemptions exercised and the legitimate governmental purposes served and inform the individual of the right to seek judicial review. If the official who reviews the denial also refuses to amend the record as requested, that official must notify the individual of his / her right to file a statement of dispute annotated to the disputed record, the purpose and effect of a statement of dispute, and the individual's right to request judicial review of the refusal to amend the record.

AD 35.10. *REPORTING.*

SECNAVINST 5211.5D requires the Chief of Naval Operations to annually submit a consolidated Department of the Navy report to the Secretary of Defense. The report involves information on records systems maintained, systems exempted, and other information concerning administration of the Privacy Act. Denial authorities are required to submit similar reports to the Chief of Naval Operations through the appropriate chain of command. All activities subordinate to denial authorities are required to submit feeder reports to the denial authority in their chain of command by 1 March of each year. Units afloat and operational aviation squadrons are exempt from the reporting requirements described above unless they have received Privacy Act requests.

AD 35.11. *CIVIL AND CRIMINAL SANCTIONS FOR VIOLATIONS OF THE PRIVACY ACT*

Civil Sanctions. Civil sanctions apply to the agency (e.g., the Navy) involved in violations as opposed to individuals. Civil actions may be brought by individuals in cases where the Federal agency:

wrongfully refuses to amend the individual's record or wrongfully refused to review the initial denial of a requested amendment;

wrongfully refuses to allow the individual to review or copy his / her record;

fails to maintain any record accurately, relevantly, completely, and currently and an adverse determination is made based on that record; or

fails to comply with any other provision of the Privacy Act or any rule promulgated thereunder in such a way to adversely affect the individual (e.g., unauthorized posting of names on a bulletin board).

Criminal Sanctions. Criminal sanctions apply to any officer or employee within the Federal agency who misuses a system of records in the following ways:

knowingly and willfully discloses information protected by the Privacy Act to a person or agency not entitled to receive it;

willfully maintains a system of records without meeting the public notice requirements of the Privacy Act; or

knowingly and willfully requests, obtains, or discloses any record concerning personal information about another individual from an agency under false pretenses.

AD 35.12. *FREEDOM OF INFORMATION ACT (FOIA) / PRIVACY ACT OVERLAP.*

There is a very narrow area of overlap between FOIA and Privacy Act that may arise when an individual requests documents or records pertaining to him/ herself. As a general rule, the request will be processed under whichever Act is cited in the request. Special cases arise where the requester cite both Acts or where neither Act is cited, but both clearly apply.

Since one's own request for access to agency records concerning oneself is subject to both Acts, the requester who has cited both Acts is entitled to the most beneficial features of each Act. Thus:

Apply Privacy Act exemptions, as they are narrower and generally provide greater access;

Privacy Act fees cover only the cost of duplication and the requester is not charged for search time; accordingly, Privacy Act fees are generally less and should be charged;

In this area, FOIA provides the shortest response time (20 days vice 30 days); and

FOIA appellate procedures will be used.

When an individual's request for access to records concerning him cites neither FOIA nor Privacy Act, materials properly releasable under the Privacy Act (greatest access) should be provided and standard Privacy Act fees (usually cheaper) charged for duplication. All other requirements (time limits, denial authority, appellate rights, judicial review, annual reporting, etc.) may be ignored and the response need not cite either Act.

All Other Requests. FOIA and Privacy Act do not overlap in any area other than as stated the individual's request for access to records and documents concerning him. All other requests for documents or records are subject only to FOIA and the FOIA requirements. Citation of the Privacy Act for such other requests is irrelevant, confers no additional rights upon the requester, and may therefore be ignored.

If such a request does not cite or refer to FOIA (regardless of whether it mentions the Privacy Act), the request is not a true FOIA request and may be handled as a public affairs matter. It may be appropriate to view the request as a potential FOIA request that has not been perfected, and contact the requestor about perfecting the request. In this case, the response should provide all records that are releasable under FOIA and the requester should be charged for costs incurred. However, all other requirements of FOIA (time limits, denial authority, appellate rights, judicial review, annual reporting, etc.) may be ignored.

PART C: RELEASE OF OFFICIAL INFORMATION AND TESTIMONY FOR LITIGATION PURPOSES

AD 35.13. *PURPOSES AND DEFINITIONS.*

The purpose of Chapter V, Part C of the JAG Manual and the pertinent instructions are to make factual official information, both testimonial and documentary, reasonably available for use in federal courts, state courts, foreign courts, and other governmental proceedings unless that information is classified, privileged, or otherwise protected from public disclosure. DoN policy favors disclosure of factual matters and does not favor disclosure on expert or opinion matters.

DoN personnel shall not provide, with or without compensation, opinion or expert testimony concerning official DoD information, subjects, personnel, or activities, except on behalf of the United States or a party represented by the Department of Justice or with the written special authorization required by SECNAVINST 5820.8A (Release of Official Information for Litigation Purposes and Testimony by Department of the Navy (DON) Personnel).

Definitions.

Determining authority**.** The cognizant DoN or DoD official designated to grant or deny a litigation request. In all cases in which the United States is, or might reasonably become, a party or in which expert testimony is requested, the Judge Advocate General or the General Counsel of the Navy will act as the determining authority. In all other cases, the general court-martial convening authorities and those commands and activities with a judge advocate assigned will act as the determining authorities.

DON personnel**.** Active-duty or former military personnel of the naval service (including retirees); civilian personnel of DoN; personnel of other DoD components serving with a DoN component; nonappropriated fund activity employees; non-U.S. nationals performing services overseas for DoN under status of forces agreements (SOFA's); and other specific individuals or entities hired through contractual agreements by, or on behalf of, DoN.

Official information**.** All information of any kind, however stored, in the custody and control of the DoD or its components.

Request or demand (legal process): Subpoena, order, or other request by a federal, state, or foreign court of competent jurisdiction, by any administrative agency thereof, or by any party or other person.

AD 35.14. *AUTHORITY TO DETERMINE AND RESPOND*

Matters proprietary to DoN. For a litigation request or demand made upon DoN personnel for official DoN or DoD information, or for testimony concerning such information, the cognizant DoN official will determine availability and respond to the request or demand.

Matters proprietary to another DoD component. If a DoN activity receives a litigation request or demand for official information originated by another DoD component or for non-DoN personnel, the DoN activity will forward appropriate portions to the originating DoD component and notify the requester of its transfer.

Litigation matters to which the United States is, or might reasonably become, a party. The cognizant DoN official is either the Judge Advocate General or the General Counsel of the Navy.
Litigation matters in which the United States is not, and is reasonably not expected to become, a party.

Fact witnesses: Purely factual matters shall be forwarded to the Navy or Marine Corps officer exercising general court-martial jurisdiction in whose chain of command the prospective witness or requested documents lie.

Visits and views: A request to visit a DON activity, ship, or unit or to inspect material or spaces located there will be forwarded to the officer exercising general court-martial jurisdiction (OEGCMJ).

Documents: The Secretary of the Navy has custody and charge of all DON books, records, and property. The General Counsel of the Navy is the sole delegate for the Secretary of the Navy for service of process. Process not properly served on the General Counsel is insufficient to constitute a legal demand and shall be processed as a request by counsel.

Expert or opinion requests: Any request for expert or opinion consultations, interviews, depositions, or testimony shall be forwarded to the Deputy Assistant Judge Advocate General for General Litigation (Code 14).

Matters not involving issues of Navy policy: Such matters shall be forwarded to the respective counsel of the activities listed in paragraph 4 b.(1) in enclosure (3) of SECNAVINST 5820.8A (depending upon who has cognizance over the information or personnel at issue).

Matters involving issues of Navy policy: Such matters shall be forwarded to the General Counsel of the Navy via the Associate General Counsel (Litigation).

Matters involving asbestos litigation: Such matters shall be forwarded to the Office of Counsel, Naval Sea Systems Command Headquarters, Personnel and Labor Law Section (Code OOLD).

Matters not clearly within the cognizance of any DoN official: Such matters may be sent to the Deputy Assistant Judge Advocate General for General Litigation (Code 14) or the Associate General Counsel (Litigation).

AD 35.15. *CONTENTS OF A PROPER REQUEST OR DEMAND*

If official information is sought, through testimony or otherwise, a detailed written request must be submitted to the appropriate determining authority far enough in advance to assure an informed and timely evaluation of the request. The determining authority shall decide whether sufficient information has been provided by the requester.

The following information is necessary to assess a request:

Identification of parties, their counsel and the nature of the litigation:

caption of case, docket number, court;

name, address, and telephone number of all counsel; and

the date and time on which the information sought must be produced; the requested location for production; and, if applicable, the length of time that attendance of the DON personnel will be required.

Identification of information or documents requested:

Detailed description of information sought;

location of the information sought; and a statement whether factual, opinion, or expert testimony is requested.

Description of why the information is needed, including a brief summary of the facts of the case and the present posture of the case;

a statement of the relevance of the matters sought to the proceedings at issue; and

if expert or opinion testimony is sought, an explanation of why exceptional need or unique circumstances exist justifying such testimony, including why it is not reasonably available from any other source.

The circumstances surrounding the underlying litigation, including whether the United States is a party, and nature and expense of the requests made by a party may require additional information before a determination can be made.

a statement of the requester's willingness to pay in advance all reasonable expenses for searching, producing information, including travel expenses and accommodations;

in cases in which deposition testimony is sought, a statement of whether attendance at trial or later deposition testimony is anticipated and requested;

agreement to notify the determining authority at least 10 working days in advance of all interviews, depositions, or testimony;

an agreement to conduct the deposition at the location of the witness, unless agreed to otherwise;

in the case of former DoN personnel, a brief description of the length and nature of their duties and whether such duties involve directly or indirectly the testimony sought;

an agreement to provide free of charge to any witness a signed copy of any written statement made or, in the case of an oral deposition, a copy of that deposition transcript;

if court procedures allow, an agreement granting the opportunity for the witness to read, sign, and correct the deposition at no cost to the witness or the government;

a statement of understanding that the United States reserves the right to have a representative present at any interview or deposition; and

a statement that counsel for other parties to the case will be provided with a copy of all correspondence originated by the determining authority.

Deficient Requests. A letter request that is deficient in providing necessary information may be returned to the requester by the determining authority with an explanation of the deficiencies and a statement that no further action will be taken until they are corrected. If a subpoena has been received for official information that is deficient, the determining authority must promptly notify the General Litigation Division of the Office of the Judge Advocate General (Code 14) or the Navy Litigation Office of the Office of General Counsel. Timely notice is essential.

Emergency Requests. The determining authority has discretion to waive the requirement that the request be made in writing in the event of a bona fide emergency. An emergency is when factual matters are sought, and compliance with the requirements of a proper written request would result in the effective denial of the request and cause an injustice in the outcome of the litigation for which the information is sought. If the determining authority concludes that a bona fide emergency exists, he / she will require the requester to agree to the conditions set forth above.

AD 35.16. *CONSIDERATIONS IN DETERMINING TO GRANT OR DENY A REQUEST*

In deciding whether to authorize release of official information, or testimony of DoN personnel concerning official information, under a request conforming with the requirements as stated above, the determining authority shall consider the following factors:

the DoN policy concerning factual information or expert or opinion information;

whether the request or demand is unduly burdensome or otherwise inappropriate under applicable court rules;

whether disclosure, including release in camera, is appropriate under procedural rules governing the case or matter in which the request or demand arose;

whether disclosure would violate or conflict with a statute, executive order, regulation, directive, instruction, or notice;

whether disclosure in the absence of a court order or written consent would violate 5 U.S.C. §§ 552, 552a (1988);

whether disclosure, including release in camera, is appropriate or necessary under the relevant substantive law concerning privilege;

whether disclosure, except when in camera and necessary to assert a claim of privilege, would reveal information properly classified under the DoD Information Security Program;

whether disclosure would unduly interfere with ongoing law enforcement proceedings, violate constitutional rights, reveal the identity of an intelligence source or source of confidential information, conflict with U.S. obligations under international agreement, or other-wise be inappropriate under the circumstances;

whether attendance of the requested witness at deposition or trial will unduly interfere with the military mission of the command; and

in a criminal case, whether requiring disclosure by a defendant of detailed information about the relevance of documents or testimony as a condition for release would conflict with the defendant's constitutional rights.

Specific Considerations. Requests for documents, interviews, depositions, testimony, and views where the United States is, or may become, a party shall be forwarded to the Judge Advocate General or the General Counsel.

Requests for unclassified documents where the United States is not, and is reasonably not expected to become, a party will be served upon the General Counsel of the Navy along with the written requests complying with SECNAVINST 5820.8A, enclosure (4). For release of classified information, coordination must be made with the Chief of Naval Operations (OP-09N).

Generally, a record in a Privacy Act "system of records" may not be released under a litigation request except with the written consent of the person to whom the record pertains or in response to a court order signed by a judge.

AD 35.17. *ACTION TO GRANT OR DENY A REQUEST*

A determination to grant or deny a request should be made as expeditiously as possible to provide the requester and the court with the matter at issue or with a statement of the reasons for denial. The decisional period should not exceed 10 working days from receipt of a completed request complying with the requirements set out in SECNAVINST 5820.8A, enclosure (4).

In cases in which a subpoena has been received and the requester refuses to pay fees, or if the determining authority declines to make some or all the material available or has insufficient time to complete the determination as to how to respond to the request, the determining authority must promptly notify OJAG, General Litigation Division (Code 14) or the Litigation Office of the General Counsel.

AD 35.18. *RESPONSE TO REQUESTS OR DEMANDS IN CONFLICT WITH DON POLICY.*

If a court of competent jurisdiction or other appropriate authority reverses a determining authority's refusal to release requested material, DAJAG or the Associate General Counsel (Litigation) must be notified. After consultation with the Department of Justice, DAJAG or the Associate General Counsel will determine whether to comply with the request or demand and will notify the requester, the court, or other authority accordingly. Generally, DoN personnel will be instructed to decline to comply with a court order only if the Department of Justice commits to represent the DoN personnel in question.

AD 35.19. *FEES AND EXPENSES*

Except as otherwise provided, determining authorities shall charge reasonable fees and expenses to parties seeking official DoN information or testimony. See 32 C.F.R. 288.10 for additional guidance.

(b)(3) Statutes [UNITED STATES CODE COMMONLY APPLICABLE TO DOD UNDER THE FOIA AT 5 USC §552 (b)(3).]	Type of Information Covered [INFORMATION SPECIFICALLY EXEMPTED BY A STATUTE ESTABLISHING PARTICULAR CRITERIA FOR WITHHOLDING. THE LANGUAGE OF THE STATUTE MUST CLEARLY STATE THAT THE INFORMATION WILL NOT BE DISCLOSED.]

NOTE:
[*] ASTERISK -- DENOTES VALID BY LITIGATION.
BOLD ENTRIES -- REPRESENT CHANGES IDENTIFIED SINCE THE LAST PRINTING OF THIS LIST.

	5 USC §574(j)	Administrative Dispute Resolution Act - Dispute resolution communication between a neutral and a party to the dispute
*	5 USC App. 4, Sec 207(a)(1)(2)	Ethics in Governments Act of 1978 - Protecting Financial Disclosure Reports of Special Government Employees
*	5 USC §7114(b)(4)	Civil Service Reform Act – Representation Rights and Duties, Labor Unions
	10 USC §128	Authority to Withhold Unclassified Special Nuclear Weapons Information
*	10 USC §130	Authority to Withhold Unclassified Technical Data with Military or Space Application
	10 USC §130b	**Personnel in Overseas, Sensitive or Routinely Deployable Units**
	10 USC §424	Protection of Organizational and Personnel Information for DIA, NRO, and NIMA
	10 USC §455	Maps, Charts, and Geodetic Data; Public Availability
	10 USC §457	**Operational Files Previously Maintained by or Concerning Activities of the National Photographic Interpretation Center**
	10 USC §618(f)	Action on Reports of Selection Boards
	10 USC §1102	Confidentiality of Medical Records
	10 USC §1506(f)	**Debriefing of a Missing Person Returned to U.S. Control During the Period Beginning on July 8, 1959, and Ending on February 10, 1996**
	10 USC §2305(g)	Protection of Contractor Proposals
	10 USC 2371(i)	**Research Projects: Transactions Other Than Contracts and Grants**
	10 USC §2487	Commissary stores: limitations on release of sales information
	10 USC §2640(h)	Authority to Appendix 35-A ted Information Voluntarily Provided by an Air Carrier
	12 USC §3403	Confidentiality of Financial Records
	15 USC §3705(e)(E)	Centers for Industrial Technology - Reports of Technology Innovations

	16 USC §470w-3	National Historic Preservation
*	18 USC §798(a)	Communications Intelligence
	18 USC §1917	Interference with Civil Service Examinations
*	18 USC §2510-2520	Protection of Wiretap Information (specific applicable section(s) must be involved)
	21 USC §1175	Drug Abuse Prevention/Rehabilitation
	22 USC §2778(e) Sec 38(e) of the Arms Export Control Act	Control of Arms Exports
*	26 USC §6103	Confidentiality and Disclosure of Returns and Return Information
	31 USC §3729(d) 31 USC §3730(b)(2)	False Claims Act **Civil Action for False Claims**
*	35 USC §122	Confidential Status of Patent Applications
	35 USC §181-188	Secrecy of Certain Inventions and Withholding of Patents (specific applicable section(s) must be involved)
	35 USC §205	Confidentiality of Inventions Information
	41 USC §423	Procurement Integrity
	42 USC §290dd-2	Confidentiality of Patient Records
*	42 USC §2162(a) (RD) 42 USC §2168(a)(1)(C) (FRD)	Information Regarding Atomic Energy: Restricted and Formerly Restricted Data (A.E. Act of 1954) (specific applicable sections must be invoked)
	50 USC §435 Note Sec 1082, P.L. 102-190	Disclosure of Information Concerning US Personnel Classified as POW/MIA During Vietnam Conflict (McCain "Truth Bill")
*	50 USC §402 Note Sec 6, P.L. 86-36	NSA Functions and Information (NSA Use)
*	50 USC §403-3(c)(6) National Security Act of 1947, Subsection 102(d)(3), as amended	Intelligence Sources and Methods
*	50 USC §403(g) Section 6 of the CIA Act of 1949	CIA Functions and Information
	50 USC §421	Protection of Identities of US Undercover Intelligence Officers, Agents, Informants and Sources
	50 USC §2407	Foreign Boycotts
*	Sec 12(c)(1) of the Export Administration Act	Confidentiality of Information Obtained Under the Export Administration Act of 1979

	of 1979 (50 App 2411(c)(1))	
*	Rule 6(e), Federal Rules of Criminal Procedure	Grand Jury Information but only to the extent that the documents reveal the internal workings or deliberations of the grand jury. Documents extrinsic to the jury's internal working process do not qualify. See Astley v. Lawson, C.A. No. 89-2806 D.C.C. Jan. 11, 1991
*	Rule 32	Federal Rules Disclosure of Presentence Reports of Criminal Procedures
	IG Act of 1978, Sec 7(b), P.L. 95-452	Confidentiality of Employee Complaints to the IG
	P.L. 100-180, Sec 276(a)	Protection of Sematech Information
	Freedom of Information Exemption for Certain Open Skies Treaty Data, P.L. 103-236, Sec 533, codified at 5 USC §552 note	Protection of Certain Open Skies Treaty Information
45.	**Public Law 105-271, 112 Stat. 2386, Sec. 4(f)(3)(A) (reprinted at 15 USC §1 note)**	Year 2000 Readiness and Disclosure Act

CHAPTER 36

CHAPTER 36

AD 36. FAMILY ADVOCACY PROGRAM

AD 36.1. *REFERENCES*

DODINST 1030.2 VICTIM AND WITNESS PROCEDURES

DOD Dir. 6400.1, Subj: FAMILY ADVOCACY PROGRAM

DODINST 6400.2, Subj: CHILD AND SPOUSE ABUSE REPORT

SECNAVINST 1752.3A, Subj: FAMILY ADVOCACY PROGRAM

SECNAVINST 1754.1A, Subj: DEPARTMENT OF THE NAVY FAMILY SERVICE CENTER PROGRAM

SECNAVINST 5800.11A, Subj: VICTIM AND WITNESS ASSISTANCE PROGRAM

OPNAVINST 1752.2A, Subj: FAMILY ADVOCACY PROGRAM

OPNAVINST 1752.1A, Subj: SEXUAL ASSAULT VICTIM INTERVENTION(SAVI) PROGRAM

MCO P1752.3B W/CH 1-2, Subj: MARINE CORPS FAMILY ADVOCACY PROGRAM STANDING OPERATING PROCEDURES (SHORT TITLE: FAP SOP)

MCO P1710.30D, Subj: MARINE CORPS CHILDREN AND YOUTH PROGRAMS

MCO P1700.24B, Subj: MARINE CORPS PERSONAL SERVICES

COMDTINST 1750.7B CH2, Subj: COAST GUARD FAMILY ADVOCACY PROGRAM

BUMEDINST 6320.70, Subj: FAMILY ADVOCACY PROGRAM

AD 36.2. *OVERVIEW OF THE FAMILY ADVOCACY PROGRAM*

DOD Policy and Goals**.** The Department of Defense (DOD) Family Advocacy Program (FAP) has the goal of improving the quality of life for all military families. DOD policy is to develop programs to promote healthy family life; to identify incidents of family violence and neglect so that further injury can be prevented and therapy for dysfunctional families provided; to cooperate with civilian authorities and report cases of child maltreatment as required by state laws; to make specific efforts to fully serve families living on and off installations; and to combine the management of FAP with similar medical and social programs. FAP concerns itself with a broad range of harmful activity that may occur within the family unit, including physical abuse, emotional injury, sexual offenses, and / or neglect. For purposes of FAP, the following definitions pertain:

Physical abuse of children includes any major injury (brain damage, skull or bone fracture, subdural hematoma, sprain, internal injury, poisoning, scalding, severe cut, laceration, bruise, or any combination constituting a substantial risk to the life or well-being of the child) and **minor injuries** (twisting or shaking) intentionally inflicted by the child's parent or caretaker.

Sexual abuse of a child includes the involvement of a child in any sex act or situation that is for the sexual or financial gratification of the perpetrator. All sexual activity between a child and caretaker is considered sexual abuse.

Emotional maltreatment of children is an act of **commission** (intentional berating or disparaging a child) or **omission** (passive / aggressive inattention to a child's emotional needs) by the caretaker which causes injury to the child as evidenced by low self-esteem, undue fear or anxiety, or other damage to the child's emotional well-being.

Child is defined as an unmarried person (whether natural, adopted, foster, stepchild, or ward) who is a dependent of the military member or spouse and is either under the age of 18 or is incapable of self-support due to a mental or physical incapacity for which treatment is authorized in a medical treatment facility (MTF).

Spouse abuse includes physical abuse, sexual abuse, property violence as a means to scare or intimidate, or psychological violence inflicted on a partner in a lawful marriage. (Under the UCMJ and some state laws, nonconsensual coitus with one's spouse is considered rape.)

Neglect is defined as deprivation of necessities when the caretaker is able to provide them (including the failure to provide a spouse or child with support, nourishment, shelter, clothing, health care, education, and supervision). This can occur regardless of whether the family is living together as a unit.

The five primary goals of the DON FAP:

prevention;

victim safety and protection;

offender accountability;

rehabilitative education and counseling; and

community accountability/responsibility for a consistent, appropriate response.

Responsibility for achieving these goals lies throughout the chain of command. The DON established the following directives to achieve these goals Navy wide:

Conduct programs and activities that contribute to a healthy family life, prevent the occurrence of abuse and neglect, and seek to restore affected families to a healthy, non-violent status.

Identify cases of child and spouse abuse promptly and provide early intervention to break patterns of abusive behaviors.

Ensure that all victims and witnesses of child and spouse abuse in DON families have access to appropriate protection, safety, care, support, case management and educational rehabilitation services as needed, to the extent allowable by law and resources.

Ensure victims of abuse are not re-victimized through actions such as unnecessary removal from housing, repeated or coercive interviews, or other negative interventions.

Ensure all commands hold military offenders accountable by applying a range of disciplinary or administrative sanctions, as appropriate, for acts or omissions constituting child or spouse abuse.

Provide rehabilitation and behavioral education and counseling to offenders as appropriate to stop child and spouse abuse in DON families, recognizing that offenders can be both service members and family members.

Ensure community responders (e.g., medical, legal, base security, and law enforcement, educators, counselors, advocates, chaplains, etc) are trained in family violence risk factors and dynamics, basic community information and referral, safety planning, and appropriate responses for their discipline.

Participants in the FAP Program. While supported by the Medical Treatment Facility (MTF), FAP remains a line-managed program. Thus, the commanding officer oversees operation of the program. Reporting to the commanding officer of the installation, there a Family Advocacy Officer (FAO), and Family Advocacy Representative (FAR). Additionally, the final decision making authority on treatment recommendations and disciplinary or administrative action towards suspected offenders is the cognizant commanding officer. Thus, the installation commander and the cognizant unit commanding officer remain the most important individuals in deciding the course and outcome of family advocacy cases. Along with the commanding officer, a Family Advocacy Officer (FAO).

Each installation commander is responsible for establishing a multidisciplinary FAC. The FAC functions as a policy advisory group. FAC membership will usually include the FAO / FAPO (chairman), FAR / FAPM (in the USN, typically the co-chairman) tenant command representatives, medical and / or dental officers, staff or command judge advocate, base security personnel, NCIS, chaplain, drug / alcohol counselors (CAAC / SACC), public affairs officer, housing officer, MWR and ombudsman. Off-base representation may include child protective services, shelters, and other similar entities.

Another participant in FAP is the Case Review Committee (CRC). The CRC is responsible for the review and oversight of individual cases where family maltreatment is alleged. The CRC makes a determination as to whether a particular case is substantiated or unsubstantiated and will make recommendations on whether treatment and rehabilitation is appropriate.

Fleet and Family Support / Family Service Centers (FFSC / FSC). It is incumbent upon every commander to develop programs and activities that contribute to a healthy family life. Providing a reasonable quality of life for military personnel and their families is both ethical and pragmatic-ethical because it is the moral thing to do and pragmatic because the health of Navy families directly impacts job performance, retention, and readiness. It is far preferable to alleviate the stresses of military life through support and educational programs in building healthy families than it is to treat or rebuild families that have experienced maltreatment.

A major function of the (FFSC / FSC) is the prevention of problems and the enhancement of family life. Services that the (FFSC / FSC) typically offer include: (1) informational and educational programs; (2).short-term non-medical counseling for problems such as: adult anti-social behavior; child and adolescent anti-social behavior; academic, occupational, or parent-child problems; marital problems; and non-medical interventions commonly recommended for family violence, e.g., support groups, violence containment groups, and parent education groups; (3) identification, intervention, and referral of families in need of FAP services; and (4) coordination among existing Navy and civilian family support services.

Identification and Intervention. All personnel have a duty to report suspected or known cases of abuse and neglect. Military personnel will report such matters to the FAR / FAPM, who in turn will report the incident to the appropriate civilian agencies-usually child protective services (CPS). If the FAR / FAPM is not available, the report should be made directly to the CPS. Medical Treatment Facilities must also report the abuse to the sponsor's CO within 48 hours. The FAR / FAPM serves as the point of contact between the command and local agencies.

Voluntary self-referral is encouraged since the goal of FAP is to prevent or break the cycle of abuse. An admission of abuse is sufficient to substantiate a FAP case and requires notification of the member's CO and the FAR / FAPM, unless the admission is made as a privileged communication to an attorney or clergyman.

A service member's CO has many intervention options in family violence cases. Since each case is unique, intervention action (if taken) needs to be tailored to each case. Prior to intervention, if time permits, coordination with the legal officer, the FAR / FAPM, and the appropriate subcommittee are encouraged. Some of the options are: (1) military protective orders; (2) a memorandum of understanding with civilian agencies; or (3) base barring letters for a non-military abuser.
The primary goal of FAP is to protect the victim and provide treatment for all involved family members. Treatment is generally subject to a one-year limitation.

Deterrence. It is DON policy that offenders must be held accountable for their actions. The prospect of disciplinary action is often a strong and necessary motivating factor for offenders to complete rehabilitation and counseling. **The decision to proceed with disciplinary action is solely at the discretion of the member's commanding officer.** FAP does not have disciplinary authority over members of other commands and does not make such recommendations. Providing assistance to maltreators under FAP shall not, in and of itself, be the basis for adverse actions-such as punitive action; removal from base housing; revoking or removing security clearances, Personnel Reliability Program (PRP), enlisted classification code, or warfare specialty. Swift intervention and disciplinary action is an effective deterrent to family violence. It is important to remember that treatment and rehabilitation and disciplinary options are not mutually exclusive; often a combination proves most effective.

Only those child sexual abuse offenders retained on active duty at the conclusion of **all appropriate disciplinary/administrative action** shall be eligible for long term rehabilitation, education, and counseling. Child sex abuse is mandatory processing. Coast Guard policy on processing and retention is similar to the Navy and USMC. If the CO wants to retain and place the member into long-term treatment, however, the case must be

forwarded to Commander, (MPC-EPM) or (MPC-OPM) who will review the matter and consider the recommendations of Commandant (CG-WPM). The Coast Guard requires this review in **all** abuse cases.

AD 36.2. *CASE REVIEW COMMITTEE*

All incidents of child and spouse abuse that result in the initiation of a FAP case will be reviewed by a local multi-disciplinary CRC. The CRC will initially make a determination of the status of the case (i.e., substantiated, unsubstantiated) and identify the abuser. If abuse is substantiated, the CRC will develop an intervention plan for the individual offender. Along with the case manager, the CRC will also assist the command with victim safety planning and victim protection. Lastly, the CRC will forward reports on the CRC's findings to the command. The contents and routing of the reports are discussed infra.

The CRC is made up of no more than eight voting members, with special non-voting consultants brought in for particular cases as needed. Permanent members are appointed in writing by the installation Commanding General or Commanding Officer. All CRC members must attend annual training on issues relating to domestic violence and child abuse. Determinations of the committee are decided by a majority vote. During the course of the CRC meeting, the members will review old and pending cases, and seek information in the form of written and live statements, and a review of all available records. After all available and needed information has been considered, the committee members will debate and vote on a particular case.

In order to conduct a Navy CRC meeting, the following members or their alternates must be present: a line officer, 0-4 or above, who is not the FAO or the reporting senior of any other CRC member; a physician; the FAR; a mental health provider; and a judge advocate.

When cases are brought before a CRC, the most important decisions facing the CRC are whether the reported abuse occurred and who the perpetrator was. These findings are determined by a majority vote of the members, based upon a preponderance of the evidence standard. If abuse is determined to have occurred, the case will be "substantiated." A determination of "substantiated" will also trigger the requirement for the committee to formulate an intervention plan for the offender, along with treatment recommendations if appropriate. CRC's do not make recommendations on issues involving disciplinary or administrative actions, which are the sole province of the unit commanding officer. Additional findings that the CRC can make are "unsubstantiated" and "suspected." Unsubstantiated is further broken down to either "did not occur", or "unresolved" which is an indication that there was insufficient evidence for a complete determination. "Suspected" is a temporary determination that can only be used for 60 days.

All findings and recommendations made by the CRC should be made in a timely manner, normally not to exceed 90 days from receipt of the allegation, unless unusual circumstances exist such as complicated child sex abuse allegations, or if a member or victim is deployed.

Alleged offenders are entitled to at least seven days notice before the committee meets to review their case. They are notified in writing and have the right to submit a written statement to the CRC. Alleged offenders and victims do not have the right to speak before the CRC, although they will have been questioned by the FAR when the case was first reported.

AD 36.3. *REVIEW OF CASE REVIEW COMMITTEE DECISIONS*

Except for the appeal process, CRC decisions are final. In order to add integrity to the system, CRC determinations are subject to a formal review process. SECNAVINST 1752.3A directed the Chief of Naval Operations and the Commandant of the Marine Corps to: "Establish a review process for cases of child and spouse abuse that will assure fair treatment and observance of the applicable rights of victims and alleged offender." The Navy has developed two avenues of appeal: review by the local CRC, and review by a Headquarters Review Team (HRT) located at Navy Personnel Command. Marine cases will be solely before the local CRC, and must be based upon one of two grounds: new information available or violation of CRC procedures. Navy Review procedures are outlined below.

The HRT is chaired by a representative from PERS-6, and is made up of representatives of various disciplines using the prescribed membership of a local CRC as a model. At a minimum, a law enforcement officer, legal representative, psychologist or psychiatrist, pediatrician, social worker, and an 0-4 line officer will be present.

When a CRC determines that allegations of incest and / or extra-familial child sexual abuse are unsubstantiated, normally the case will be closed and the temporary flag will be removed from the member's record. If either PERS-8 or PERS-6 believes that the local CRC reached an incorrect decision and the case should be substantiated, then either PERS-8 or PERS-6 may refer the case to the Navy HRT for a clinical opinion. In determining whether the CRC decision was incorrect, the issue is not whether other reviewers may disagree with its conclusions, but whether all relevant information has been considered.

Once the CRC has made a determination as to whether the allegations are substantiated or unsubstantiated, the FAR will forward a report of the CRC's decision to the alleged military offender via his / her commanding officer. In addition, commands will take appropriate steps to ensure the CRC report is forwarded to alleged civilian offenders and victims and military offenders and victims. Upon receipt of the CRC report, the commanding officer, or designee, shall review and discuss the case summary with the alleged offender, victim or sponsor as appropriate. The commanding officer will exercise his / her discretion as to whether the command's intended response to the CRC's recommendations are to be discussed. A signed "rights advisement" will be obtained from all military offenders and victims, and from civilian offenders and victims where possible. The CRC report contains the following information:

the names of the parties involved in the case;

the CRC decision and recommendation;

the positions/disciplines that were present and participated in the decision and recommendations;

a synopsis of the information/documents considered;

a statement of rights letter for the alleged offender or victim, as appropriate.

Review. The following individuals may request review of the CRC determination substantiating or not substantiating the allegations of abuse:

Alleged Offender (military or civilian). The CRC must have found substantiated abuse on the part of the military offender who is requesting review.

Alleged Victim (military or civilian). The CRC must have found unsubstantiated abuse in an incident involving the alleged victim. If the victim is a minor child, his or her non-offending parent may request review.

Commanding Officer. The commanding officer of the alleged offender or victim, or the commanding officer of the sponsor of the alleged offender or victim, may request the local CRC reconsider its decision in an individual case.

Requests for review of CRC decisions must be in writing, although there is no prescribed format for the request. They should normally be forwarded within 30 days of receipt of the CRC decision, absent unusual circumstances. Requests for review can be filed with either the local CRC that made the determination or to the HRT. It is not required that review be requested of the local CRC before a request is made to the HRT. Review can be requested of the local CRC and then of the HRT if a petitioner is dissatisfied with the decision of the local CRC. Requests can be based upon the following grounds: (1) newly discovered information; (2) fraud on the installation; (3) voting member was absent; (4) not guilty/guilty finding after a military or civilian trial on the merits; and (5) plain legal or factual error.

AD 36.4. *REPORTING REQUIREMENTS*

Spouse Abuse. Spouse abuse is the most frequently reported type of family abuse, and frequently co-exists with child abuse.

If a spouse abuse report involving physical injury or the use of a dangerous weapon is received by law enforcement officials, verbal notification must be made to the FAR/FAPM and the member's command immediately. A written report shall be issued within 24 hours to the FAR/FAPM as well as to the member's command.

If a victim of alleged spouse abuse reports to an MTF for treatment of injuries relating to abuse, the case is referred to the FAR/FAPM immediately. If there is major physical injury or the indication of a propensity or intent to inflict

such injury by the alleged offender, the case must be referred to law enforcement officials.

Child Abuse. All DON personnel must report any incident or suspected incident of child abuse occurring on a military installation or involving military persons to the local FAR/FAPM. Depending on the outcome of the initial assessment, the FAR/FAPM will notify the member's command and appropriate civilian agencies. In all cases of major injury or the offender's propensity to inflict such injury, the FAR/FAPM must report the case to law enforcement officials. For overseas locations, notification will be made in accordance with applicable Status of Forces Agreements (SOFA).

Child Sex Abuse. In addition to the above, all incidents or suspected incidents of child sexual abuse must be reported to the Naval Criminal Investigative Service (NCIS). Reports must also be made to BUPERS and CMC.

All cases must have a completed DD 2404 (DOD Child and Spouse Abuse Report) forwarded to the Commanding Officer, Naval Medical Data Services Center (Code 42) within 15 days of the date that CRC makes a status determination or closes, transfers, or reopens the case.

AD 36.5. *FLAGGING OF PERSONNEL RECORDS*

The term "flag" refers to the indicator placed in a member's file letting detailing personnel know that they will have to get clearance before issuing permanent change of station orders for an individual. The flagging process is intended to prevent further stress on the service member and family members, to prevent re-abuse, and to ensure assignment to a geographic location that has adequate services available. Flagging is also used to ensure the availability of the service member or family members for case disposition, rehabilitation, education and counseling.

NPC Assignment Control Flag. (Navy Only) Placed on recommendation of the CRC on spouse abuse and child physical abuse and neglect cases. This is a temporary flag that is normally removed within a year.

NPC Assignment Control Flag. (Navy Only) Placed into the personnel data system by PERS-8 for all suspected child sexual abuse cases. This flag restricts transfers, reenlistments, advancements and/or promotions until case resolution. A member is notified of these restrictions by BUPERS via his/her commanding officer after the case has been reported. It is lifted at case resolution.

AD 36.5. *PROGRAM SPONSORS*

Navy:

Bureau of Naval Personnel (PERS 6)
Commercial (901) 874-4328 / 4325
DSN 882-4328 / 4325
http://www.persnet.navy.mil/pers66/index.htm

Marine Corps:

Headquarters, United States Marine Corps
Prevention and Intervention Section (MRO)
Commercial (703) 784-9546
DSN 278-9546
http://www.usmc-mccs.org/
FAX: 703-784-9825

Coast Guard:

Headquarters Family Advocacy Program Manager
(202) 267-6730
FAX: 202-267-4474
http://www.uscg.mil/hq/g-w/g-wk/wkw/work-life_programs/family_advocacy.htm

CHAPTER 37

CHAPTER 37

AD.37. FREEDOM OF EXPRESSION IN THE MILITARY

AD 37.1 *FIRST AMENDMENT*

The First Amendment to the Constitution states:

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

There are five freedoms explicitly listed: (1) religion, (2) speech, (3) press, (4) assembly, and (5) petition for redress of grievances. In addition to these five freedoms, other provisions of the Bill of Rights (such as the requirement for due process, the privilege against self-incrimination, and the prohibition against unreasonable search and seizures) are significant elements in maintaining a system of freedom of expression. Nevertheless, the First Amendment is considered the main source of constitutional protection in this area.

AD 37.2. *FREEDOM OF EXPRESSION IN THE MILITARY*

Military courts have consistently held service members are entitled to First Amendment protections. T he protection afforded is not absolute. It must accommodate the requirement for an effective military force. This latter requirement creates substantial legitimate government interests that are not present in the civilian context, for as the Supreme Court has stated there are "inherent differences in values and attitudes that separate the military establishment from civilian society. In the military, by necessity, emphasis must be on the security and order of the group rather than on the value and integrity of the individual."

The balance between the service member's right of expression and the needs of national security is the subject of DOD Directive 1325.6 of 01 October 1996. The Directive states that the Service members' right of expression should be preserved to the maximum extent possible, consistent with good order and discipline and the national security. In contrast, no commander should be indifferent to conduct that, if allowed to proceed unchecked, would destroy the effectiveness of his or her unit. The proper balancing of these interests will depend largely upon the calm and prudent judgment of the responsible commander.

This directive provides fairly specific guidance, significant portions of which have withstood judicial scrutiny by the Supreme Court.

With respect to criminal sanctions and First Amendment freedoms, a particular exercise of expression could bring a service member within the prohibition of a criminal statute. Statutory provisions that could apply, for example, would include disrespect toward a superior commissioned officer, or a failure to obey a lawful order or regulation. Other examples abound, to include violations of the federal criminal code.

AD 37.3. *FREEDOM OF SPEECH AND PRESS*

Speech: Prior Restraint and Subsequent Punishment. In general, prior restraint of freedom of speech is impermissible. By contrast, military court decisions are more likely to uphold criminal punishment against military members for the exercise of free speech because, in the context of criminal prosecution, the facts, circumstances, and the effects of the free speech are clearly defined once the speech has been spoken.

Possession of Printed Materials: The simple act of possession of printed materials, other than classified material, cannot be prohibited. That said, possession of materials where there is evidence of impermissible unofficial distribution may be considered unauthorized. Since mere possession of unauthorized material may not be prohibited, an individual may also not be successfully prosecuted for mere possession under Article 134, UCMJ as prejudicial to good order and discipline.

Distribution of Printed Material: DoD Directives 1325.6 provides that, "A Commander is not authorized to prohibit the distribution of a specific issue of a publication distributed through official outlets such as post exchanges and military libraries." This provision is designed to preclude the possibility of a commander becoming embroiled in a controversy over supposed censorship of materials that have been accepted for distribution through official outlets.

In addition, the Supreme Court, in June of 1998, cleared the way for the Military to enforce the 1996 Military Honor and Decency Act which bars the *"sale or renting of sexually explicit magazines, movies and tapes"* at stores or other official outlets aboard military installations. The determination of what material will be prohibited is made at the DoD level. Commanders concerned about the content of material sold or rented through official outlets aboard their command should contact the Resale Activities Board of Review, which operates under the cognizance of the Assistant Secretary of Defense for Force Management Policy.

There are instances where prior restraint of printed materials will be authorized. DoD Directive 1325.6 provides that, "In the case of distribution of publications through other than official outlets, commanders may require that prior approval be obtained for any distribution on a military installation to determine whether there is a clear danger to the loyalty, discipline, or morale of military personnel, or if the distribution of the publication would materially interfere with the accomplishment of a military mission. Distribution of any publication determined to be a anger in any of these areas shall be prohibited."

These guidelines are designed to preclude condemnation of the regulation as being too broad. Local regulations that are promulgated to implement DOD Directive 1325.6 should themselves be carefully drafted, incorporating the above language.

A commanding officer should be prepared to point to facts in support of his determination that a clear danger to the loyalty, discipline, or morale of military personnel would result or that the distribution would materially interfere with the accomplishment of a military mission. In addition, commanding officers should take care to provide procedural safeguards to ensure that persons desiring to distribute material are afforded an opportunity to present their material for review.

If a commander permits distribution of a publication on base, he should advise the person making the distribution, in writing, that he does not in any way condone any material in the publication and that the persons making the distribution could be subject to prosecution for any criminal violations resulting from the distribution.

Writing or Publishing Materials: DoD Directive 1325.6 prohibits the use of duty time or government property for personal vice official writing. The same provision notes that publication of "underground newspapers" by military personnel **off base,** on their own time, and with their own money and equipment, is not in itself prohibited. This does not relieve the service member of any criminal violations that result from the content of the writing. In addition to these limitations, the Joint Ethics Regulation provides for security and policy review of certain materials authored by Navy personnel. Depending on the content of a writing, it could violate any of the criminal statutes listed above, as well as security regulations.

AD 37.4. *RIGHT TO PEACEABLE ASSEMBLY*

Demonstrations.

On base. "The commander of a military installation... shall prohibit any demonstration or activity on the installation... that could result in interference with or prevention of the orderly accomplishment of the mission of the installation... or present a clear danger to loyalty, discipline, or morale of the troops." As with other forms of expression, persons participating in a demonstration on base may violate any number of the criminal statutes set above.

Off base. Participation by service members in off-base demonstrations is prohibited in the five following situations:

On duty. The phrase "on duty" in this context refers to actual working hours as opposed to authorized leave or liberty. A service member attending an off-base demonstration during working hours would therefore most likely be in an unauthorized absence status.

In a foreign country. The justification here is to avoid incidents embarrassing to the U.S. Government that could result from service members becoming embroiled in local disputes in a foreign country. In some instances (such as article II of the NATO Status of Forces Agreement) regulations implementing international agreements forbid service-members from becoming so involved.

Activities constitute a breach of law and order. Effectively, this directs service members not to break the law.

Violence is likely to result. This reflects the traditional responsibility of the commander to preserve the health and welfare of his troops. The commander who invokes his authority should be prepared to cite the factual basis for his determination that violence is likely to result.

In uniform. DOD Directive 1334.1, (WEARING OF THE UNIFORM), prohibits wearing the uniform:

at any subversive-oriented meeting or demonstration;
in connection with political activities;
when service sanction could be implied from such conduct;
when wearing the uniform would tend to bring discredit to the armed forces; or
when specifically prohibited by the regulations of the department concerned.

Although the aforementioned are somewhat broad in scope, the courts are generally inclined to concede that the military can dictate how and when its uniforms shall be worn.

Extremist / Racist Organizations. DoD directives prohibit "active participation" in organizations that espouse supremacist causes; attempt to create illegal discrimination based on race, creed, color, sex, religion, or national origin; advocate the use of force of violence; or otherwise engage in efforts to deprive individuals of their civil rights. "Active participation" is defined as, "publicly demonstrating or rallying, fundraising, recruiting or training members, organizing or leading such organizations, or otherwise engaging in activities in relation to such organizations or in furtherance of the objectives of such organizations that are viewed by the command to be detrimental to good order and discipline, or mission accomplishment of the unit." Such activity is deemed to be incompatible with military service and is therefore prohibited.

Off-base Gathering Places. Commanders have the authority to place establishments "off-limits" in accordance with established procedures when, for example, the activities taking place there include counseling members to refuse to perform military duty or to desert; pose a significant adverse effect on service members' health morale, or welfare; or otherwise present a clear danger to the loyalty, discipline, or morale of a member or military unit. Often, the authority to place a location off limits will reside with an Armed Forces Disciplinary Control Board, or the Flag / General Officer responsible for a region. Service members frequenting an establishment duly declared "off-limits" would be subject to prosecution for violation of a lawful order.

Membership in Organizations. Passive membership in any organization by service members cannot be prohibited. The line between "passive" and "active" membership is sometimes hard to define. The terrorist bombing of a Federal building in Oklahoma City in 1995, caused the Secretary of the Navy via a message (DTG 102300ZMAY95) to reemphasize the policy and enforcement of DOD Directive 1325.6.

Thus, organizational activities (such as distributing materials, recruiting new members, or on-base meetings) may be proscribed by a commanding officer when they present a clear danger to security of the installation, orderly accomplishment of the command's mission, or preservation of morale, discipline, and readiness. Organizations which actively advocate racially discriminatory policies with respect to their membership (such as the Ku Klux Klan) may be restricted by the commanding officer from the formation of affiliations aboard a naval ship or shore facility and the attendant solicitation of members. On 3 September 1997 the Secretary of the Navy amended the U.S. Navy Regulations, 1990 by adding a new Article 1167 which prohibits persons in the naval service from participating in supremacist activities.

Membership in, organizing of, and recognition of military unions are criminally proscribed by section 976 of title 10, United States Code and SECNAVINST 1600.1A . Activities now *prohibited* in the military include:

military members knowingly joining or maintaining member-ship in a military labor organization;

military members and civilian employees of the military negotiating or bargaining *on behalf of the United States* (concerning terms or conditions of military service) with persons representing or purporting to represent military member(s);

anyone enrolling a military member in a military labor organization or soliciting or accepting dues / fees for such organization from any military member;

military members and civilian employees organizing or participating in strikes or similar job-related actions that concern the terms or conditions of military service; and

anyone using military facilities for military labor union activities

Activities *permitted* in the military include:

request mast;

participation in command-sponsored or command-authorized counsels, committees, or organizations;

seeking relief in Federal court;

joining or maintaining in any lawful organization or association not constituting a military labor organization;

filing a complaint of wrongs as discussed below; and

seeking or receiving information or counseling from any source.

AD 37.5. *RIGHT TO PETITION FOR REDRESS OF GRIEVANCES*

Request Mast- Navy. As the commanding officer maintains ultimate responsibility for the welfare of personnel within the command, members of the command may request direct access to the commanding officer.

Request Mast- U.S. Marine Corps. Every Marine has the right to communicate with the commander, normally in person, and requires each commander consider the matter within the complaint and personally respond to the Marine requesting mast up to and including the Commanding General in their chain of command. Anyone who attempts to deprive a Marine of the right to request mast through acts of omission or commission will be subject to punishment under the UCMJ. Request mast does not preclude the informal processes of communication which occur between seniors and subordinates. A request mast should be conducted at the earliest reasonable time, normally within 24 hours but no later than 3 working days after the initial submission whenever practical. A commander may deny a request mast application if there is another specific avenue of redress available to the Marine. Commanders should carefully evaluate each request mast to determine if other peripheral issues should be addressed; accordingly, commanders may wish to hear the Marine's presentation of matters before making a decision to deny. The commanding officer shall explain to the Marine why the request mast application was denied and, if appropriate, what procedure must be followed to resolve the issue. The authority to deny a request mast includes authority to refuse to further process the request mast. Whenever a commander denies a request mast under this authority, he or she shall, within a reasonable time, forward a report of such action and the basis therefore to the immediate commanding general via the chain of command. In cases in which the officer denying a request mast is the immediate commanding general, no such report need be made.

U.S. Coast Guard. Members of the Coast Guard similarly enjoy the right to communicate in a proper time and place with the commanding officer. Commanding officers are responsible to set individual command policy regarding communications with the commanding officer. Therefore, in the Coast Guard specific forwarding and response times are left to the discretion of the commanding officer and should be set out through individual command policy.

Complaint of Wrongs.

Against the Commanding Officer. A complaint filed under Article 138, Uniform Code of Military Justice may be filed by any service member who believes they have been wronged by their commanding officer (the respondent). As a condition to have an actionable 138 complaint, the complainant must inform the commanding officer of the problem before filing a 138, usually by using request mast procedures, and allow the CO the chance to explain, correct or fix the situation. If upon appropriate application redress is refused by the CO, the complainant may then file an Article 138 complaint against the respondent. The 138 complaint is addressed to the officer exercising general court-martial jurisdiction (the GCMCA) over the respondent. The GCMCA will order an investigation into the complaint the investigation may be conducted in any appropriate format but should be written and include the investigating officer's findings of fact, opinions, and recommendations. The GCMCA shall then take appropriate measures as soon as possible for redressing the wrong complained. The GCMCA must also send to the Secretary of the service concerned a copy of the complaint, investigation, and results or action taken. Some complaints are not

actionable under Article 138. Usually, these are areas where there are other avenues available for redress.

Against Another Superior. Article 1150 of US. *Navy Regulations*, 1990, provides that a service member who considers himself / herself wronged by a person superior in rank or command but not his/her commanding officer may report the wrong to the proper authority for redress. When the respondent and complainant do not have the same commanding officer, an article 1150 complaint shall follow the same provisions enumerated for article 138 complaints. When the respondent and complaint have the same commanding officer, that commanding officer shall take final action on the article 1150 complaint.

Guidance for U.S. Coast Guard complaints against another superior may be found at U.S. Coast Guard Regulations, COMDTINST M5000.3B, Chapter 9, Part 2, paragraph 2.

Relief in Federal court. A service member may seek relief from a Federal court if he/she believes his/her constitutional or statutory rights have been infringed by the military. An example would be the service member who petitions for a writ of *habeas corpus* when he feels the military authorities have improperly denied his application for conscientious objector status. Normally, Federal courts are reluctant to become involved in military affairs and will generally do so only after all administrative remedies are exhausted.

Right to petition any Member of Congress or the Inspector General. Pursuant to 10 U.S.C. 1034(a), no one may limit a service member's personal or private communications with a member of Congress or an Inspector General unless the communication is unlawful or violates a regulation necessary to the security of the United States. However, regulations requiring service members to obtain the base commander's approval before circulating on-base petitions addressed to members of Congress have been upheld.

AD 37.6. *CIVILIAN ACCESS TO MILITARY INSTALLATIONS*

Commanding officers have absolute responsibility for their command. Further, access to any naval activity is subject to the authorization and control of the officer or person in command or in charge. It is a Federal offense for any person to enter a military reservation for any purpose prohibited by law or lawful regulations or for any person to enter or reenter an installation after having been barred by order of the commanding officer.

Notwithstanding a commander's responsibility over his command, civilian dependents of active-duty personnel are allowed by statute to receive certain medical care in military facilities. Similarly certain disabled veterans are allowed by statute to use commissaries and exchanges. There may arise a conflict between the CO's need to protect the installation from disruptive persons and their statutory right to benefits found in the installation. Civilian employees have a vested interest in their jobs and cannot be denied access to their jobs without due process of law. The Internal Security Act of 1950 gives the commanding officer broad powers to protect his base. It is nonetheless advisable that an installation commander who bars a dependent or retiree to consult with their superior in the chain of command. Due process in most situations of this type requires only a consideration of the reasons services were refused and a response to the individual.

Absent entitlement by statute or regulation persons have no constitutionally protected interest in entering military installations and are not constitutionally entitled to any procedural due process protections.

AD 37.7. *POLITICAL ACTIVITIES BY SERVICE MEMBERS*

A discussion of this topic can be found in Chapter 6 of this Study Guide.

AD 37.8. *FREEDOM OF RELIGION*

References.

10 U.S.C. § 6031

10 U.S.C. § 774

U.S. Navy Regulations, 1990, Article 0817 and 0820

SECNAVINST 1730.8A (ACCOMMODATION OF RELIGIOUS PRACTICES)

DOD Dir 1300.17 (ACCOMMODATION OF RELIGIOUS PRACTICES WITHIN THE MILITARY SERVICES)

MILPERSMAN 1731-010; 1731-020; 1730-010.

Federal law provides for the existence of a Navy Chaplain's Corps as a means of accommodating the religious needs of service members. However, this is not to be construed as an endorsement of any one religion found within the Chaplain's Corps.

The accommodation of a member's religious practice depends upon military necessity, and that determination of military necessity rests entirely with the commanding officer. Navy Regulations provide for observance of Sunday as a non-work day and, except by "reason of necessity," prohibits the sailing of ships or deployment of air-craft or troops on Sunday. The Regulations also recognize that Sunday is not the only day of worship, and provides for accommodation of Sabbath days other than Sunday.

The Secretary of the Navy provides guidelines to be used by the naval service in the exercise of command discretion concerning the accommodation of religious practices including requests based on religious and dietary observances, requests for immunization waivers, and requests for the wearing of religious items or articles other than religious jewelry (which is subject to the same uniform regulations as nonreligious jewelry) with the uniform.

The issue of religious accommodation and the military uniform has been an area of particular concern in recent years. In that regard, SECNAVINST 1730.8A provides a basis for determining a member's entitlement to wear religious apparel with the uniform (religious apparel does not include "hair and grooming practices."). It provides that religious items or articles not visible or otherwise apparent may be worn with the uniform, provided they do not interfere with the performance of the member's military duties or interfere with the proper wearing of any authorized article of the uniform. Religious items or articles which *are visible* may be authorized for wear with the uniform if:
the item or article is "neat and conservative," meaning that it is discreet and not showy in style, color, design or brightness, that it does not replace or interfere with the proper wearing of any authorized article of the uniform, and that it is not temporarily or permanently affixed or appended to any article of the member's uniform;

the wearing of the item or article will not interfere with the performance of the member's military duties due to the characteristics of the item or article, the circumstances of its intended wear, or the particular nature of the member's duties; and

the item or article is not worn with historical or ceremonial uniforms, or while the member is participating in review formations, honor or color guards and similar ceremonial details and functions, or during basic and initial military skills or specialty training except during off-duty hours designated by the cognizant commander.

The commanding officers shall consider the following factors when examining requests for religious accommodations:

the importance of military requirements including individual readiness, unit cohesion, health, safety, morale, and discipline;

the religious importance of the accommodation to the requester;

the cumulative impact of repeated accommodations of a similar nature;

alternative means available to meet the requested accommodation; and
previous treatment of the same or similar requests made for other than religious reasons.

It is also the case that any visible item or article of religious apparel may not be worn with the uniform until approved and that in any case in which a commanding officer denies a request to wear an item or article of religious apparel with the uniform the member must be advised that he/she has a right to request a review of the refusal by CNO or CMC. That review will normally occur within 30 days following the request for review for cases arising in the United States, and within 60 days for all other cases.

Administrative action including reassignment, reclassification, or separation consistent with SECNAV and service regulations is authorized if:

requests for accommodation are not in the best interests of the unit; and

continued tension is apparent between the unit's requirements and the individual's religious beliefs.

Note that action under the UCMJ is not precluded in appropriate circumstances.

Conscientious Objector. A conscientious objector can take on two forms: 1) A member who, by reason of conscientious objection, sincerely objects to participation of any kind in war in any form; or 2) a member who, by reason of conscientious objection, sincerely objects to participation as a combatant in war in any form, but whose convictions are such as to permit military service in a noncombatant status.

The person seeking conscientious objector status bears the initial responsibility of presenting evidence which demonstrates a sincere opposition to war in any form based upon religious training and belief. Once this responsibility is met, conscientious objector status will be granted unless the Government can establish a rational basis in fact for denying the application. The claimant must request either separation based on conscientious objection, or assignment to noncombatant training and service based on conscientious objection.

The applicant may express the belief that forms the basis for the application on religious, moral, or ethical grounds. However expressed, this belief must be the primary controlling force in the applicant’s life and must be of the same strength and depth as found in traditional religious convictions. The applicant must show that expediency or the avoidance of military service is not the basis of the claim.

Service regulations will establish the proper procedure of investigating and adjudicating claims of conscientious objector.

CHAPTER 38

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AD 38. MENTAL HEALTH EVALUATIONS

AD 38.1 *REFERENCES*

DOD Dir. 6490.1, Subj: MENTAL HEALTH EVALUATIONS OF MEMBERS OF THE ARMED FORCES

DOD Dir. 7050.6, Subj: MILITARY WHISTLEBLOWER PROTECTION

DOD Inst. 6490.4, Subj: REQUIREMENTS OF MENTAL HEALTH EVALUATIONS OF MEMBERS OF THE ARMED FORCES

SECNAVINST 6320.24A, Subj: MENTAL HEALTH EVALUATIONS OF MEMBERS OF THE ARMED FORCES

AD 38.2 *THE MILITARY MENTAL HEALTH EVALUATION PROTECTION ACT*

Current Law. If a commander makes a discretionary mental health evaluation referral, the MMHEPA requires that the commander notify the service member of the referral and of several rights. This process must occur before a MHCP performs the mental health evaluation. The MMHEPA also places additional requirements on commanders making referrals for emergency evaluation, treatment, and involuntary hospitalization of service members. Finally, the MMHEPA makes punitive any mental health referral made against a military whistleblower in reprisal.

The MMHEPA applies to all active duty and reserve service members in the Army, Navy, Air Force, and Marine Corps. The MMHEPA also applies to all active and reserve service members in the Coast Guard when operating under the Navy.

The DoD Directive implementing the MMHEPA exempts all non-discretionary referrals from the procedural requirements of the MMHEPA and only requires commanders to apply its procedural requirements to referrals made as part of their "discretionary authority."

Commanders' Responsibilities involving Non-Emergency Outpatient and Inpatient Evaluations.

Before referring service members to a MHCP for a non-emergency outpatient mental health evaluation or treatment, commanders must consult with a MHCP or equivalent. Although the extent of the consultation requirement is unclear under the MMHEPA, the DoD requires commanders to discuss with the MHCP the service member's actions and behaviors that caused the commander to make the referral. Further, a commander must consider the MHCP's "advice and recommendations" before actually initiating the referral.

After consulting with a MHCP, a commander must provide written notice of the referral to the service member at least two business days before making a non-emergency referral. This written notice must include the date, time, place, and name of the MHCP who will perform the evaluation. The notice must include the commander's reasons for the referral and the name of the MHCP with whom the commander consulted before making the referral. The notice must include, if applicable, an explanation of the reason why the commander was unable to consult with a MHCP prior to making the referral. The notice must also inform the service member of the names and telephone numbers of local sources of assistance (e.g., IG, NLSO, chaplain, etc.) who can assist the service member in understanding or challenging the referral.

A commander must also notify a referred service member of several non-waivable rights. First, a commander must notify the referred service member of the right to speak to an attorney at least two business days before the scheduled evaluation. Second, a commander must notify a referred service member of the right to speak to and file a complaint with the IG if the service member believes that the referral was improper. Third, a commander must notify a referred service member of the right to have, at their expense, an independent MHCP evaluate them. Finally, a commander must notify a referred service member of the right to communicate with Congress or an IG about the referral. After the commander and the service member sign the memorandum, the commander must provide the service member with a copy of the memorandum.

After complying with the consultation and notice requirements, a commander must request the mental health evaluation in writing. The MMHEPA authorizes the inpatient admission and evaluation of a service member only when an outpatient evaluation would be inappropriate pursuant to the least restrictive alternative principle and a qualified professional makes the admission.

After receiving the MHCP's recommendations concerning the service member's evaluation, a commander must document any action taken and the rationale behind it. For example, if a commander elects to retain the service member despite the MHCP's recommendation to separate, the commander must document his or her reasons for retaining the service member and then forward a memorandum to his or her superior explaining the decision to retain within two business days after receiving the MHCP's recommendation.

Commanders' Responsibilities Involving Emergency Evaluations. Commanders must make a clear and reasoned judgment before making an emergency referral. The clear and reasoned judgment standard requires commanders to carefully consider the facts and circumstances of each case before making an emergency referral. In addition, a commander may only make an emergency referral if there is no time to comply with all of the MMHEPA procedural requirements before the referral.

Even if an emergency referral is proper, a commander must still make every effort to consult with a MHCP prior to the referral. When consulting with a MHCP, a commander must explain why he or she believes that an emergency referral is appropriate. The commander must also consider the MHCP's advice and recommendations prior to actually making the emergency referral. If prior consultation with a MHCP is impossible, the commander must consult with a MHCP at the location of the service member's evaluation. After consulting with the MHCP, the commander must document the contents of the consultation, including the reasons for the referral and forward a copy of this memorandum to the MHCP. If the commander is unable to consult with a MHCP prior to or at the location of the evaluation, the commander must document the reasons for the emergency referral and immediately forward a copy to the MHCP. In addition, the commander must, as soon as possible, provide the referred service member with the same referral and rights notice required for non-emergency evaluations outlined above. If a MHCP elects to involuntarily hospitalize a service member, the commander must further inform the service member of the reasons for and the likely consequences of the admission. Finally, the commander must advise the service member of the right to contact a family member, friend, chaplain, attorney, or IG.

Commanders' Affirmative Duty to Refer Sailors. Whenever a commander believes that a service member is likely to harm himself, or others and is suffering from a severe mental disorder, the commander must refer the service member for an emergency evaluation. Despite the affirmative duty to refer, the commander must still comply with the consultation and notice requirements outlined above for emergency referrals.

Mental Health Care Provider Responsibilities. Before MHCPs perform non-emergency mental health evaluations on service members, they must ensure that commanders have complied with the consultation, notice, and formal request requirements outlined above. If, after reviewing the referral, a MHCP suspects that a referral is improper, the MHCP must first confer with the commander and clarify issues about the process and procedures used in referring the service member. If, after conferring with the commander, the MHCP believes that the mental health evaluation referral may have been improper (e.g., done as a reprisal, failed to consult with a MHCP, etc.), the MHCP must report the suspected violation through his or her chain of command to the referring commander's superior. In the event of an emergency referral, a MHCP must ensure that the commander first consulted with a MHCP prior to the referral. In addition, the MHCP must review the commander's documented reasons for the referral.

Once a MHCP determines that a commander has complied with all procedural requirements, he must, prior to the evaluation, inform the service member of the purpose, nature, and likely consequences of the evaluation. In addition, the MHCP must also inform the service member that the evaluation is not confidential. Soon after completing the evaluation, the MHCP must also advise the service member's commander of the results and recommendations.

If a MHCP decides to involuntarily hospitalize a service member, the MHCP must first notify the service member orally and in writing of the reasons for the hospitalization. Within twenty-four hours of admission, the attending privileged psychiatrist must evaluate the service member and assess whether continued hospitalization is necessary.

Whenever a service member intends to, and appears to have the ability to, seriously injure himself or others, the MHCP must take certain precautions. Such precautions may include, but are not limited to, notifying the service

member's commander, military or civilian police or "potential victims." Upon taking these precautions, the MHCP must notify the threatening service member of the precautions taken and document them in the service member's medical records. Finally, prior to discharging the service member, the MHCP must inform the service member's commander and any potential victims of the discharge.

Independent Review of Admission and Continued Hospitalization. Within seventy-two hours of a service member's involuntarily hospitalization, the medical treatment facility commander must appoint an impartial field grade medical officer to review the propriety of the admission. This reviewing officer (RO) must then conduct an informal investigation and interview the service member within seventy-two hours after the admission. Prior to interviewing the service member the RO must inform the service member of the purpose of the interview and his or her right to counsel during the interview. [After completing the investigation, the RO will determine whether the admission was appropriate and whether hospitalization should continue. If the RO believes hospitalization should continue, the RO will notify the service member when the next review will occur.] [If the RO suspects that the service member's admission or continued hospitalization may be in violation of the MMHEPA or DoD procedural requirements, the RO will confer with the responsible party in order to clarify issues about the process or procedures used. The responsible party could be either the commander or a MHCP. If after this consultation the RO still suspects a violation, the RO must then report the suspected violation to the responsible party's next higher commander.]

AD 38.3. *NAVY INVESTIGATIONS OF IMPROPER REFERRALS AND EVALUATIONS*

The DoD IG generally delegates to the Service IGs the investigation of unlawful or improper mental health referrals. If the Sailor alleges that the referral was in reprisal for a protected communication, the IG will investigate the allegations as a reprisal complaint. If the Sailor alleges that the referral or the evaluation was procedurally improper, the Navy IG will review whether the commander complied with the consultation, referral and notice requirements outlined above. The Navy IG will also review whether the MHCP properly performed the evaluation (e.g., did the MHCP advise the Sailor of the "purpose, nature, and consequences" of the evaluation, etc.). The Navy IG will also review whether a MHCP reviewed the propriety of continued hospitalization. If the Navy IG determines that the referral was improper or procedurally incorrect, the Navy IG may recommend appropriate corrective action to make the Sailor "whole" or to punish the responsible official.

AD 38.4 *PRACTICAL GUIDANCE ON IMPLEMENTING THE MMHEPA*

The DoD Directive and Instruction implementing the MMHEPA mandate training for all commanders and MHCPs on the proper referral and evaluation of service members. The DoD also requires training for all service members in identifying and properly reporting imminently or potentially dangerous service members. The purpose of this DoD training requirement is to protect potential victims and ensure imminently or potentially dangerous service members receive prompt treatment. To ensure proper compliance by all DoD personnel, judge advocates must ensure that all service members, especially commanders and MHCPs, receive training on the MMHEPA and DoD procedural requirements. To aid in this training, see attached flow chart diagrams for use by commanders and MHCPs (Appendix A and B). Judge advocates must also ensure that commanders coordinate and schedule training sessions to assist service personnel in identifying and properly reporting imminently or potentially dangerous service members.

MENTAL HEALTH EVALUATION CHECKLIST
(SEE SECNAVINST 6320.24 (series), MILSPERSMAN 1910-122)

Authority to determine if MHE referral is warranted rests with the CO and that authority cannot be delegated.

Non-emergency MHE Referrals

Consult with Mental Health Professional (MHP) to discuss member's actions and behavior. MHP will provide advice and recommendation whether MHE warranted.
If MHP not available, CO should consult with physician.

If MHE will be conducted, CO shall forward formal request to CO of health facility (enclosure 2).

Provide member with written letter (enclosure 3) 2 business days prior to evaluation.
If member refuses to sign, make notation on referral letter.

Member cannot waive right to receive written communications regarding their evaluation.

Emergent MHE Referral

CO makes "clear and reasoned" judgment that member's condition constitutes an emergency, first priority is to protect member and others from harm.

Make every effort to discuss matter with MHP, or other health provider if MHP unavailable, prior to MHE referral.
If CO unable to consult with MHP or health professional prior to emergent referral, *send letter documenting circumstances and observations that lead to MHE referral as soon as practicable (overnight mail, fax, or courier).*

Safely transport member to health facility.

Involuntary Hospitalization for Psychiatric Eval/Treatment

CO shall, as soon as possible considering member's condition, inform member as to reason of involuntary admission.

Afford member right to contact any third party (friend, chaplain, attorney, etc.).

Member who is Imminently or Potentially Dangerous.

CO shall refer member to an emergency MHE as soon as possible when:
Service member, by action or words, shows intent to cause or will likely cause serious injury to self or others; AND
Member has ability to cause such injury; AND
CO believes member suffering from mental disorder. (eval to be conducted within 24hours of referral).

CO shall consult with MHP if possible.

CO shall consider information provided by FAP or DAPA (or Alcohol/Drug Treatment Facility)

Take action necessary to protect member or others.

CO actions on MHP recommendations

When receive recommendation from MHP, CO shall make written record of action taken and reasons why that action was taken.

If recommendation is to separate service member, ensure that recommendation is cosigned by MHP's CO.
If CO declines to follow recommendation for separation, provide letter to ISIC with 2 business days explaining decision for not separating member.

CHAPTER 39

CHAPTER 39

AD 39. ENLISTED ADMINISTRATIVE SEPARATIONS

AD 39.1. *REFERENCES*

MILPERSMAN 1900 and 1910

MARCORSEPMAN, Chapter 1 and 6

CGPERSMAN, Chapter 12-B

AD 39.2. *ADMINISTRATIVE SEPARATIONS*

Administrative separations are a process by which the military service or the member can end their obligated military service before the end of their enlistment period. Administrative separations have no relation to court-martial and are not punitive in nature.

Definitions.

Basis for separation. "Basis" is the reason for which the person is being administratively separated.

Characterization of service. The quality of the individual's military service.

Uncharacterized separations. A separation, such as entry level separation (ELS) or order of release (OOR) from custody and control of the armed forces, that does not qualify for either favorable or unfavorable characterization.

Entry level status. Generally speaking, a member qualifies for entry level status during the first 180 days of continuous active military service or the first 180 days of continuous active service after a break of more than 92 days of active service.

Processing for separation. The initiation of an administrative separation procedure.

Convening authority (CA). The "convening authority" is the official responsible for beginning the appropriate administrative separation processing. Normally, the CA is the commanding officer with power to convene a special court-martial. The CA may not necessarily be the Separation Authority that finally approves the separation.

Separation authority (SA). The official who has the ability to approve a separation.

Respondent. The member who has been notified by his command that an administrative separation action has been initiated to separate him.

Characterized Separations. Separations which are characterized enjoy three different potential characterizations: honorable; general (under honorable conditions); or under other than honorable conditions (OTH).

Honorable. The quality of the member's service generally met the standard of acceptable conduct and performance for naval personnel or is otherwise so meritorious that any other characterization of service would be clearly inappropriate. It is a separation under honorable conditions and entitles the individual to most veterans' benefits. There are specific quantifiable marks that must be obtained by enlisted personnel in order to qualify for an honorable discharge at the end of their enlisted period:

For Marine Corps cases, a Marine pay-grade E-4 and below must have overall conduct marks for the current enlistment averaging 4.0 and proficiency marks averaging 3.0. For pay-grades E-5 and above, an honorable discharge is automatic unless unusual circumstances warrant other characterization and such characterization is approved by the GCM authority or higher.

Coast Guard: Personnel must have a minimum characteristic average of 2.5 in each factor for the period of service. A member whose marks do not otherwise qualify for an honorable separation may nevertheless receive an honorable separation if he/she has received a Coast Guard Commendation or higher personal decoration, been disabled by

enemy action, or if the Commandant otherwise directs.

Navy: The individual must have a summary trait average of 2.5 or higher in order to qualify for an honorable discharge.

General (under honorable conditions). When the member's military service has been honest and faithful; however, significant aspects of the member's conduct or performance of duty outweigh positive aspects of the member's service record. A General (under honorable conditions) characterization of discharge may jeopardize a member's ability to benefit from the Montgomery G.I. Bill if they are otherwise eligible. Moreover, the member will not normally be allowed to reenlist.

Under other than honorable conditions (OTH). This characterization is appropriate when the reason for separation is based upon one or more acts or omissions that constitute a significant departure from the conduct expected from members of the naval service. Persons awarded an OTH characterization of service are not entitled to retain their uniforms or wear them home (although they may be furnished civilian clothing at a cost of not more than $50). They must accept transportation in kind to their homes, they are subject to recoupment of any reenlistment bonus they may have received, they are not eligible for notice of discharge to employers, and they do not receive mileage fees from the place of discharge to their home of record.

As a general rule, in order for a member to be processed for an administrative separation under conditions other than honorable, the member must be afforded the opportunity to present his or her case in person before an administrative board with the advice and assistance of lawyer counsel (see chapter 10 of this Study Guide for a more detailed explanation of Board procedures). Exceptions to the foregoing are as follows:

Uncharacterized Separations.

Entry level separation (ELS). A member in an entry level status will ordinarily be separated with an ELS. A member in an entry level status may also be separated under OTH conditions if warranted by the facts of the case. By the same token, a member in entry level status is not precluded from receiving an honorable discharge when clearly warranted by unusual circumstances and approved on a case-by-case basis by the Secretary of the Navy.

For Coast Guard, Commanding Officer, Recruit Training Center Cape May and Commander (CGPC-epm-1) may authorize an uncharacterized separation for poor performance or conduct during recruit training. The member must have less than 180 days of active service on the date of discharge to qualify. Prior to processing for entry level separation, a member shall be given formal counseling concerning his/her deficiencies and a reasonable opportunity to overcome them.

Void enlistment or induction. A member whose enlistment or induction is void will be separated with an order of release (OOR) from custody and control of the Navy or Marine Corps.

AD 39.3. *COUNSELING*

In many cases, before a member may be processed for separation, the member must first be formally counseled concerning his / her behavior. The formal counseling record involved must be entered into the service record via a page 13 (Navy), page 7 (Coast Guard), or page 11 (USMC). The Division Officer Notebook written counseling sheet will **not** suffice. Formal counseling is intended to give the member an opportunity to improve by identifying specific, undesirable behavior which the member has the ability to correct, alter, or cease. The written counseling warning informs the member that his / her potential for further service is recognized and correction of identified deficiencies will result in continuation on active duty. The member, however, must be **clearly** informed of what is undesirable.

Once counseled, the member may not be processed for separation without first violating the counseling warning unless the basis for separation is a mandatory basis. Counseling must be documented in the service record of the member, and only one entry is required. If more than one entry is made, the last entry applies (i.e., it must be violated prior to initiating administrative separation processing). Administrative separation cases containing an inviolate counseling warning must be rejected by the separation authority.

For Navy personnel, the counseling is documented by a NAVPERS 1070/613 Administrative Remarks (Page 13) entry form. The counseling may be accomplished by any command to which the Sailor was assigned within the

current enlistment.

For Marine Corps personnel, the counseling is documented by a MARCORSEPMAN, para. 6105 letter or (page 11) entry.

For Coast Guard personnel, the counseling is documented by a CG - 3307 (page 7) administrative remarks entry form or by letter notification for unsatisfactory performance.

Required Counseling. Counseling and rehabilitation efforts ***are required*** before the initiation of separation processing for the following:

Convenience of the government due to parenthood and personality disorder.

Entry level performance and conduct.

Unsatisfactory performance.

Misconduct due to minor disciplinary infractions or misconduct due to pattern of misconduct.

Weight control failure.

For Coast Guard - Unsuitability due to inaptitude, apathy, defective attitude, unsanitary habits or financial irresponsibility.

For Coast Guard - Misconduct due to frequent involvement of a discreditable nature with civil or military authorities, abuse of a family member, shirking, failure to pay just debts, failure to contribute adequate support to dependents or failure to comply with valid orders of civil courts regarding support to dependents.

The forms for each service's counseling are found in their respective service regulations. At a minimum, the counseling forms must contain the following:

written notification concerning deficiencies or impairments (the counseling warning given to the member must clearly inform the member of what is undesirable);

specific recommendations for corrective action, indicating any assistance that is available to the member;

comprehensive explanation of the consequences of failure to undertake successfully the recommended corrective action;

signature and date of signing of the member and a witness; and

reasonable opportunity for the member to undertake the recommended corrective action.

The counseling warning must be dated and signed by the member and witnessed. If the member refuses to sign, a notation to that effect should be made on the counseling form, which is then signed and dated by an officer.

AD 39.4. *BASES FOR SEPARATING ENLISTED PERSONNEL*

"Bases" for separating enlisted personnel are the reasons for processing members for separation. A list of basis for separation can be found in MILPERSMAN 1910-100, MARCORSEPMAN, Chapter 6, Table of Contents, and the CG Separation Manual, Chapter 12, Section B Table of Contents.

AD 39.5. *MANDATORY PROCESSING.*

The decision whether or not to process an enlisted member for administrative separation is normally a matter within the discretion of the commanding officer. The following bases, however, **mandate** separation processing:

Deviant Sexual Behavior;
Sexual Harassment;
Misconduct - civil or military offenses that could result in death or serious bodily injury;
Misconduct - civil conviction for offenses that could result in death or serious bodily injury;
Misconduct - drug abuse;
Illicit use of inhalants and excessive use of prescription and/or over-the-counter drugs;
Homosexual Conduct;
Supremacist/Extremist Conduct;
Alcohol Rehabilitation Failure.

Mandatory processing requires only that the case be forwarded to the separation authority for review and final action. In exceptional circumstances, the separation authority may still retain the service-member. For the Navy, this normally requires that the case be forward to Navy Personnel Command. It should be noted that mandatory processing does not equate to mandatory separation.

ELIGIBILITY FOR BENEFITS CHART

THIS CHART SHOWS THE ELIGIBILITY FOR BENEFITS BASED ON THE TYPE OF DISCHARGE A MEMBER IS AWARDED. IT DOES NOT INDICATE ANY OTHER CRITERIA THAT MAY ALSO BE REQUIRED FOR AN INDIVIDUAL TO BE ELIGIBLE FOR THE BENEFITS INDICATED.

DD -- **Dishonorable Discharge**
BCD GCM -- **Bad-Conduct Discharge awarded at a General Court-Martial**
BCD SPCM -- **Bad-Conduct Discharge awarded at a Special Court-Martial**
OTH -- **Other than Honorable**
GEN -- **General (under honorable conditions)**
HON -- **Honorable Discharge**
E -- **Eligible**
NE -- **Not Eligible**
A -- **Eligible only if the administering agency determines that, for its purposes, the discharge was not under dishonorable conditions.**

	DD	BCD GCM	BCD SPCM	OTH	GEN	HON
VA Benefits						
Wartime disability compensation	NE	NE	A	A	E	E
Wartime death compensation	NE	NE	A	A	E	E
Peacetime disability compensation	NE	NE	A	A	E	E
Peacetime death compensation	NE	NE	A	A	E	E
Dependency and indemnity compensation to survivors	NE	NE	A	A	E	E
Education assistance	NE	NE	NE	NE	NE	E
Pensions to widows and children	NE	NE	A	A	E	E
Hospital and domiciliary care	NE	NE	A	A	E	E
Medical and dental care	NE	NE	A	A	E	E
Prosthetic appliances	NE	NE	A	A	E	E
Seeing-eye dogs, mechanical and electronic aids	NE	NE	A	A	E	E
Burial benefits (flag, national cemeteries, expenses)	NE	NE	A	A	E	E
Special housing	NE	NE	A	A	E	E
Vocational rehabilitation	NE	NE	A	A	E	E
Survivor's educational assistance	NE	NE	A	A	E	E
Autos for disabled veterans	NE	NE	A	A	E	E
Inductees reenlistment rights	NE	NE	A	A	E	E

THIS CHART SHOWS THE ELIGIBILITY FOR BENEFITS BASED ON THE TYPE OF DISCHARGE A MEMBER IS AWARDED. IT DOES NOT INDICATE ANY OTHER CRITERIA THAT MAY ALSO BE REQUIRED FOR AN INDIVIDUAL TO BE ELIGIBLE FOR THE BENEFITS INDICATED.

	DD	BCD GCM	BCD SPCM	OTH	GEN	HON
Military Benefits						
Mileage	NE	NE	NE	NE	E	E
Payment for accrued leave	NE	NE	NE	NE	E	E
Transportation for dependents & household goods	NE	NE	NE	NE	E	E
Retain and wear uniform home	NE	NE	NE	NE	E	E
Notice to employer of discharge	NE	NE	NE	NE	E	E
Award of medals, crosses, and bars	NE	NE	NE	NE	E	E
Admission to Naval Home	NE	NE	NE	NE	E	E
Board for Correction of Naval Records	E	E	E	E	E	E
Death gratuity	NE	NE	A	A	E	E
Use of wartime title and wearing of uniform	NE	NE	NE	NE	E	E
Naval Discharge Review Board	NE	NE	E	E	E	E

	DD	BCD GCM	BCD SPCM	OTH	GEN	HON
Other Benefits						
Homestead preference	NE	NE	NE	NE	E	E
Civil Service employment preference	NE	NE	NE	NE	E	E
Credit for retirement benefits	NE	NE	NE	NE	E	E
Naturalization benefits	NE	NE	NE	NE	E	E
Employment as District Court bailiffs	NE	NE	NE	NE	E	E
D.C. police, fireman, & teacher retirement credit	NE	NE	NE	NE	E	E
Housing for distressed families of veterans	NE	NE	A	A	E	E
Farm loans and farm housing loans	NE	NE	A	A	E	E
Jobs counseling, training, placement	NE	NE	A	A	E	E
Social Security wage credits for WW-II service	NE	NE	A	A	E	E
Preference in purchasing defense housing	NE	NE	A	A	E	E

NAVY AND MARINE CORPS
ENLISTED ADMINISTRATIVE SEPARATIONS

REASON FOR SEPARATION	CHARACTERIZATION OF SERVICE	MILPERSMAN/ MARCORSEPMAN	ADMIN BOARD (A)/ NOTIFICATION (N)
1.EXPIRATION OF SERVICE OBLIGATION	HON/GEN/ELS	1910-102 / 1910-104 6403 / 6404 CGPERSMAN 12-B-11	
2.CONVENIENCE OF GOVERNMENT	HON/GEN/ELS	1910-108 to 1910-126 MARCORSEPMAN 6203 CGPERSMAN 12-B-12	(N);(A)
Hardship		1910-110 / 6407 / CG-12-D-3	
Parenthood		1910-124 / 6203.1 / CG-12-D-3	
Pregnancy or Childbirth		1910-112 / 6408 / None	
Personality Disorder		1910-122 / 6203.3 / CG-12-B-16	
		Further Education 1910-108 / 6405 / CG-12-B-8	
Surviving Family		Member 1900-030 / 6410 / CG-4-A-3	
Physical Disability		1910-120 / 6203.2 / CG-12-B-15	
Conscientious Objection		1900-020 / 6409 / CG-12-B-12 [MCO 1306.16 DOD Dir 1300.6] / COMDTINST 1900.8	
Alien		1910-127 / None	
3. DEFECTIVE ENLISTMENTS			
Minority		1910-128 / 6204.1 / CG-12-B-14	
Under 17	OOR		(N)
Age 17	ELS		(N)
Defective Enlistment	HON/ELS/OOR	1910-132 / 6204 / None	(N)
Erroneous Enlistment	HON/ELS/OOR	1910-130 / 6204.2 / CG-12-B-12	(N);(A)
Fraudulent	HON/GEN/ELS	1910-134 / 6204.3 / CG-12-B-14.g	(N); (A)
Enlistment*	OTH/OOR		
New Entrant Drug / Alcohol Testing	OOR	OPNAVINST 5350.4 / 6211 / CG-12-B-18	(N)

REASON FOR SEPARATION	CHARACTERIZATION OF SERVICE	MILPERSMAN/ MARCORSEPMAN	ADMIN BOARD (A)/ NOTIFICATION (N)
4. WEIGHT CONTROL FAILURE	HON/GEN	1910-170 / 6215 / CG-12-B-12-b-(6)	
5. ENTRY LEVEL PERFORMANCE AND CONDUCT	ELS	1910-154 / 6205 / CG-12-B-20	(N);(A)
6. UNSATISFACTORY PERFORMANCE	HON/GEN	1910-156 / 6206 / CG-12-B-9	(N);(A)
7. HOMOSEXUAL CONDUCT*	HON/GEN/OTH	1910-148 / 6207 / CG-12-D-4	(A)
	ELS	if 180 days or less for CG	(N)
8. SECURITY	HON/GEN/OTH	6212 / CG-12-B-17	(N); (A)
ELS			
9. DRUG / ALCOHOL ABUSE REHAB FAILURE	HON/GEN/ELS	1910-150 & 1910-152 6209 (Alcohol Only) CG-20-B-2 for alcohol only	(N);(A)
10. MISCONDUCT	HON/GEN/ELS/OTH		(N); (A)
Minor Disciplinary Infractions		1910-138 / 6210.2 / None	
Pattern of Misconduct		1910-140 / 6210.3 / None	
Frequent Involvement of a Discreditable Nature		CG-12-B-18-b-(5)	
Commission of Serious Offense*		1910-142 / 6210.6 / None	
Civilian Conviction*		1910-144 / 6210.7 / CG 12-B-18-b-(1)	
Misconduct due to Drug Abuse*		1910-146 / 6210.5 / CG-12-B-18-b-(4)	
Supremacist / Extremist Conduct		1910-160 / None	
11. SEPARATION IN LIEU OF COURT-MARTIAL	GEN/ELS/OTH	1910-106 / 6419 / CG-12-B-21	(N);(A)
12. SEPARATION IN BEST INTEREST OF SERVICE (BIOTS)	HON/GEN/ELS	1910-164 / 6214 / None	(N)
13. UNSATISFACTORY PERFORMANCE IN READY RESERVE	HON/GEN/ELS	1910-158 / 6213 / None	(N);(A)
14. DISABILITY	HON/GEN/ELS	1910-168 / 8401-8512 / CGPERSMAN 12-B-15	(N)
15. HIV INFECTION (AIDS): See SECNAVINST 5300.30C			

* MANDATORY PROCESSING IN CERTAIN CASES

NAVY AND MARINES
USE OF DRUG URINALYSIS RESULTS
(That have been confirmed by a DOD lab)

		Basis of Separation	Characterization of Service
1.	Search or Seizure	YES	YES
	- member's consent	YES	YES
	- probable cause	YES	YES
2.	Inspection		
	- random sample	YES	YES
	- unit sweep	YES	YES
3.	Medical - general diagnostic purposes (e.g., emergency room treatment, annual physical exam, etc.)	YES	YES
4.	Fitness for duty		
	- command-directed	YES	NO
	- competence for duty	YES	NO
	- aftercare testing	YES	NO
	- surveillance	YES	NO
	- evaluation	YES	NO
	- mishap / safety investigation	NO	NO
5.	Service-directed		
	- rehab facility staff (military members)	YES	YES
	- drug / alcohol rehab testing	YES	NO
	- PCS overseas, naval brigs, "A" school	YES	YES
	- Accession (entrance test)	YES	NO

CHAPTER 40

CHAPTER 40

AD 40. ENLISTED ADMINISTRATIVE SEPARATION PROCESSING AND REVIEW

AD 40.1. *NOTIFICATION AND ADMINISTRATIVE BOARD PROCEDURES*.

All involuntary enlisted separations require the use of either the notification procedure or administrative board procedure. If a member is processed for separation for more than one reason, the administrative board procedure will be utilized if applicable to any one of the reasons for separation used in the case.

The notification procedure is normally used unless: (a) the member has over 6 years of service (8 years for USCG) and elects an administrative board; (b) the member is being processed for homosexual conduct; or (c) an other than honorable (OTH) discharge is possible. By contrast, under the administrative board procedure, the respondent always has the right to request an administrative board.

AD 40.2. *NOTIFICATION PROCEDURE*

General. Notification procedure is an abbreviated separations process in which the member is served notice that they are being separated from the service. When using notice procedure, the form of the notice and the contents of the notice are dictated in each service's regulations.

Members may request general court-martial convening authority (GCMCA) review when there is no entitlement to an administrative discharge board. If the member elects the right to GCMCA review, the processing activity will forward the member's request and all supporting documents to the GCMCA for review and the GCMCA becomes the separation authority. When the review is complete, the GCMCA will return the case for action as directed.

Counsel. A respondent has the right to consult with qualified Art. 27(b) certified counsel not having any direct responsibility for advising the convening authority or separation authority about the proceedings involving the respondent-at the time the notification procedure is initiated except under the following circumstances:

The respondent is attached to a vessel or unit operating away from or deployed outside the United States, away from its overseas homeport, or to a shore activity remote from judge advocate resources;

no qualified counsel is assigned and present at the vessel, unit, or activity;

the commanding officer does not anticipate having access to qualified counsel from another vessel, unit, or activity for at least the next five days; and

the commanding officer determines that the needs of the naval service require processing before qualified counsel will be available.

A Coast Guard member's right to consult with military counsel only applies in those instances when a general discharge is authorized. A member will be appointed counsel in all cases in which an OTH discharge is possible or the member has 8 or more years of total service. Civilian counsel of choice may be utilized by the individual, but at the individuals own expense. Retention of civilian counsel, however, does not eliminate the command's requirement to furnish counsel as outlined above. Moreover, consultation with civilian counsel shall not delay orderly processing in accordance with this instruction.

Response. The respondent shall be provided a reasonable period of time, but not less than two working days, to respond to the notice. An extension may be granted upon a timely showing of good cause by the respondent. The respondent's election as to each of his rights shall be recorded on the Notice of Notification Procedure (Navy), the Acknowledgement of Rights form (Marine Corps), or in a response letter by the Respondent (Coast Guard) provided by the command. This statement is signed by the respondent and witnessed by respondent's counsel (if available locally).

The member may respond by submitting a statement in rebuttal to the proposed discharge action or may decline to make a statement. For Coast Guard, a member must be "afforded an opportunity" to make a statement in writing. If the member does not desire to make a statement, such fact shall be set forth in writing over the member's signature on the letter of notification. If the member refuses to sign a command's statement, the member's commanding

officer will so state in writing.

If the respondent fails to respond to the notification of separation in a timely manner, this failure constitutes a waiver of rights and an appropriate notation will be made on the retained copy of Notification or Acknowledgement. If the respondent indicates that one or more of the rights will be exercised, but declines to sign the appropriate form, the election of rights will be noted and an appropriate notation as to the failure to sign will be made. Similarly, if notice by mail is authorized, and the respondent fails to acknowledge receipt or submit a timely reply, that failure constitutes a waiver of rights and a notation shall be recorded on a retained copy of the Statement of Awareness.

The respondent's commanding officer shall forward a copy of the Notification and/or the Acknowledgement, along with all relevant supporting documents, to the separation authority.

Additional Notification Requirements. If separation proceedings have been initiated against a respondent confined by civil authorities, the case may be processed in the absence of the respondent. Even if a board is required, there is no requirement that the respondent be present at the board hearing. Rights of the respondent before the board can be exercised on his behalf by counsel.

Notice shall be delivered personally to the respondent or sent by mail or certified mail, return receipt requested (or by an equivalent form of notice if such service is not available for delivery by U.S. mail at an address outside the United States). If the member refuses to acknowledge receipt of notice, the individual mailing the notification shall prepare a sworn affidavit of service by mail which will be inserted in the member's service record-together with PS Form 3800. If delivered personally, receipt shall be acknowledged in writing by the respondent. If the respondent refuses to acknowledge receipt, an appropriate notation will be made on the Notification.

The notice shall state that no action will be taken until a specific date (not less then 30 days from the date of delivery) in order to give the respondent opportunity to exercise the rights set forth in the notice. Failure to respond shall be treated as a waiver of rights, and appropriate action should then be taken.

The name and address of the military counsel appointed for consultation shall be specified in the notice.

A Coast Guard member unable to appear in person before an administrative discharge board by reason of confinement by civil authorities will be advised by registered mail of the proposed discharge action, the type of discharge certificate that may be issued, and the fact that action has been suspended to give the member the opportunity to exercise the following rights:

to request appointment of a military counsel as a representative to present the case before a board in the member's absence;

to submit statements in own behalf; and

to waive the foregoing rights, either in writing or by declining to reply to the letter of notification within 15 days from receipt of the registered letter.

Certain Reservists. Separation proceedings may be initiated against reservist not on active duty and the case may be processed in the absence of the member if the member so requests, if the member does not respond to the notice of proceedings on or before the suspense date, or if the member fails to appear at a hearing without good cause.

AD 40.3. *ADMINISTRATIVE BOARD PROCEDURE*

General. The administrative board procedures must be utilized:

If the proposed reason for separation is homosexual conduct;

If the proposed characterization of service is under OTH conditions (except when the basis of separation is separation in lieu of trial by court-martial); or

If the member has six or more years of total active and Reserve military service (8 years for Coast Guard) who is otherwise being processed under the notification procedure has the right to request an administrative board unless the basis of separation is “BIOTS.”

Form of Notice. When using administrative board procedure, the form of the notice and the contents of the notice are dictated in each service's regulations.

Additional Notice Requirements. If the respondent is in civil confinement or in a Reserve component not on active duty, the same additional notification requirements used for notification procedure apply.

If the respondent is Fleet Reserve / retired list eligible and is being processed for misconduct, security, or homosexual conduct, the respondent must be notified of the following:

The right to request transfer to the Fleet Reserve / retired list within 30 days;

the board may recommend that the respondent be reduced to the next inferior grade to that in which the respondent is currently serving before being transferred to the Fleet Reserve / retired list; and

if the Chief of Naval Personnel approves the recommendation and the respondent is transferred to the Fleet Reserve / retired list, the respondent will be reduced to the next inferior pay-grade immediately prior to transfer.

Counsel. A respondent has the same right to consult with counsel as that prescribed for the notification procedure.

If an administrative board is requested, the respondent shall be represented by qualified counsel appointed by the convening authority, or by individual counsel of the respondent's own choice. For the respondent to be represented by individual military counsel (IMC) of his/her own choice, the counsel must be determined to be reasonably available. The determination as to whether individual counsel is reasonably available shall be made in accordance with the procedures of the JAG Manual for determining the availability of IMC for courts-martial. Upon notice of IMC's availability, the respondent must elect between representation by appointed counsel and representation by IMC unless the convening authority, in his / her sole discretion, approves a written request from the respondent setting forth in detail why representation by both counsel is essential to ensure a fair hearing.

The respondent has the right to consult with civilian counsel, but such consultation or representation will be at his/her own expense and shall not unduly delay the administrative board procedures. Exercise of this right shall not waive any other counsel rights. If exercise of the right to civilian counsel causes undue delay, the convening authority may direct the board to proceed without the desired civilian counsel after properly documenting the facts.

Non-lawyer counsel may represent a respondent before an administrative board if: (1) The respondent expressly declines appointment of qualified counsel and requests a specific non-lawyer counsel; or (2) the separation authority assigns non-lawyer counsel as assistant counsel.

Response. The respondent shall be provided a reasonable period of time-but not less than two working days to respond to the notice. An extension may be granted upon a timely showing of good cause. The election of the respondent as to each of the rights shall be recorded and signed by the respondent and respondent's counsel (if he elects to consult with counsel).

Refusal by the respondent to respond to the notification shall constitute a waiver of rights and an appropriate notation will be made on the command's retained copy of the Statement of Awareness. If the respondent indicates that one or more of the rights will be exercised, but declines to sign, the selection of rights will be noted and an appropriate notation as to the failure to sign will be made on the Statement of Awareness.

Failure to acknowledge receipt of notice by mail when authorized, or to submit a timely reply to that mailed notification, constitutes a waiver of rights and an appropriate notation shall be recorded on a retained copy of the Statement of Awareness.

Waiver. If the right to an administrative board is waived, the case shall be forwarded to the separation authority who will direct retention, separation, or suspended separation.

The regulations allow for a "conditional waiver." This form of waiver is an offer by the Respondent to waive their right to an administrative board in return for a characterization of discharge no worse than a general (under honorable conditions). A conditional waiver cannot be granted for any basis of separation that is mandatory. If a respondent submits a request for a conditional waiver to a Navy Commanding Officer, the CO may favorably endorse the request and forward it to the GCMCA, who will then serve as the Separation Authority. The CO may,

however, return the request to the respondent denying the request and continue with administrative separation processing.

In the Marine Corps, the commanding officer shall forward the copy of the notification, the conditional waiver request, and a recommendation on the waiver to the separation authority unless he/she has been delegated authority by the separation authority to disapprove requests for conditional waivers and so elects. Upon receipt of a conditional waiver, the separation authority may either grant the waiver or deny it, depending upon the circumstances of the case.

AD 40.4. *ADMINISTRATIVE BOARDS*

Convening Authority**.** An administrative board may normally be appointed by a commander with authority to convene special courts-martial (SPCM).

Composition. Administrative boards are composed of three or more experienced Regular or Reserve officers or senior enlisted (E-7 or above), senior to the respondent. For Marine boards, the majority of the board must be commissioned or warrant officers. The senior member must be an officer in the grade of O-4 (not frocked) or higher. For the Navy, the senior member of an administrative board may be either a line or staff corps officer and may be either an officer on the active duty list or a reserve support officer. If the respondent is a member of the navy reserve, at least one member of the board shall be a Reserve commissioned officer, and all members must be commissioned officers.

Challenges to Board Members. For the Navy, if a member is challenged, the convening authority or the legal advisor (if one has been appointed) decides the challenge. The non-challenged members make recommendations on the record before the matter is brought to the CA for final resolution. For the Marine Corps, the board (excluding the challenged member) or the legal advisor, if appointed, determines the propriety of a challenge to any member. A tie vote or a majority vote in favor of sustaining the challenge disqualifies that member from sitting.

Recorder. The Recorder is detailed to an administrative board by the convening authority. The recorder is effectively the Government's representative at the board and assumes overall nonvoting responsibility for ensuring the board is conducted properly and in a timely fashion as recorder. The Navy frequently employs judge advocates in the role of the recorder, although it is fairly common to see non-lawyer recorders. The recorder's duties include clerical and preliminary preparation, as well as presenting to the board in an impartial manner all available information concerning the respondent. The convening authority may detail an assistant to the recorder.

The recorder is responsible for:

conduct a preliminary review of available evidence;

interview prospective witnesses (determining whom to call);

arrange for the attendance of all witnesses for the government and witnesses for the respondent who are government employees (military or civilian);

arrange for the time and place of the hearing after consulting with the president of the board and respondent's counsel;

prepare the report of the board which, together with all allied papers, is forwarded to the separation authority; and

presenting the Government's evidence in support of separation and characterization of service.

Reporter**.** There is no requirement that a reporter be appointed. Often, an audio recording device is sufficient. However, in cases where a verbatim transcript of the board is required, the services of a reporter will be necessary.

Legal Advisor. At the discretion of the convening authority, a nonvoting legal advisor who is a judge advocate certified in accordance with Article 27(b), UCMJ, may be appointed to the administrative board. In the Marine Corps, the legal advisor shall rule finally on all matters of procedure, evidence, and challenges, except challenges to himself. In the Navy, the MILPERSMAN does not clarify whether the appointment of a legal advisor automatically empowers that individual with these same rights. In practice, the Senior Member retains this authority unless

specifically delegated to the legal advisor by the convening authority.

Evidence. An administrative board is an administrative, rather than a judicial body. Consequently, the military rules of evidence applicable at courts-martial do not apply. Other than Article 31, UCMJ limitations, the board may consider any competent evidence relevant and material in the case, subject to its discretion.

Witnesses are sworn and testify under oath or affirmation. All witnesses are subject to cross-examination on their testimony and general credibility.

The respondent may be sworn and testify at his election, or he / she may make an unsworn statement. If **testifying** under oath, he / she may be cross-examined. If presenting an **unsworn statement,** he / she may not be required to be cross-examined. Also, the respondent must be provided a Privacy Act statement whenever personal information is solicited. If witnesses testify to their official duties, there is no need to use a Privacy Act statement.

There are no established discovery procedures similar to criminal trials. As a matter of practice, both the Recorder and Counsel for the Respondent will exchange their respective evidence prior to commencement of the hearing.

Hearing Procedure. The services have created a script for their respective administrative boards in order to ensure uniformity in the hearing procedure, and to ensure that the board inquires whether the Respondent has received all of their administrative rights.

The recorder normally presents the case for the government, normally using documentary matters which support the basis for processing. The recorder may then call any relevant witnesses to further bolster their case. After the recorder has finished, the respondent has the opportunity to present matters in his/her behalf. The board proceedings should be sufficiently formal so as to allow the respondent full opportunity to present his/her case and exercise his/her rights. Following any matter presented by the respondent, the recorder may, if appropriate, present rebuttal evidence. When the recorder introduces rebuttal evidence, the respondent is entitled to do likewise. Finally, prior to closing for deliberation, the board may call any witness or request any other evidence it deems appropriate.

If the presentation by the recorder or the respondent includes the calling of witnesses, the procedure for examination of each witness is similar to that of a criminal trial, to wit: direct examination by the counsel calling the witness; cross-examination by the counsel for the other side; re-direct examination by the side calling the witness; recross-examination by the adversary; and, finally, questions posed by members of the board.

Burden of proof. The burden of proof before administrative boards is on the Government, and the standard of proof "preponderance of the evidence."

Witness Requests. The respondent may request the attendance of witnesses in his behalf at the hearing. The request shall be in writing, dated, signed by the respondent or his counsel, and submitted to the convening authority via the president of the board as soon as practicable after the need for the witness becomes known to the respondent or his counsel.

Failure to submit a request for witnesses in a timely fashion shall not automatically result in denial of the request. However, if it would be necessary to delay the hearing in order to obtain a requested witness, lack of timeliness in submitting the witness request may be considered along with other factors in deciding whether or not to provide the witness.

No authority exists for issuing subpoenas to civilian witnesses in connection with administrative proceedings. Appearances will be arranged on a voluntary basis only.

Military personnel who are not assigned locally, if their presence is deemed necessary, will be issued TAD orders.

If production of a witness will require expenditure of funds by the convening authority, the written request for the attendance of a witness shall also contain the following: (1) a synopsis of the testimony the witness is expected to give; (2) an explanation of the relevance of such testimony to the issues of separation or characterization; and (3) an explanation as to why written or recorded testimony would not be sufficient to provide for a fair determination. The convening authority may authorize expenditure of funds for production of witnesses **only if** the presiding officer (after consultation with a judge advocate or the legal advisor, if appointed) determines that:

the testimony of a witness is not cumulative;

the personal appearance of the witness is essential to a fair determination on the issues of separation or characterization;

written or recorded testimony will not accomplish adequately the same objective;

the need for live testimony is substantial, material, and necessary for a proper disposition of the case; and

the significance of the personal appearance of the witness, when balanced against the practical difficulties in producing the witness, favors production of the witness. (Factors to be considered in relation to the balancing test include, but are not limited to, the cost of producing the witness, the potential delay in the proceeding that may be caused by producing the witness, or the likelihood of significant interference with military operational deployment, mission accomplishment, or essential training.)

Testimonial evidence may be presented through the use of oral or written depositions, unsworn statements, affidavits, testimonial stipulations or any other accurate and reliable means in addition to personal appearance.

Board Decisions. The board shall determine its findings and recommendations in closed session. A report of the board will be prepared and signed by all members and counsel for the respondent. The report will utilize the forms established in the respective service regulations. Any dissent will be noted on the report; the specific reasons will be recorded separately. At a minimum, the report will include:

Findings of fact related to each of the reasons for processing;

recommendations as to retention or separation, and if the board recommends separation, it may recommend that the separation be suspended.

if separation is recommended, the basis therefor, as well as the character of the separation, must be stated;

recommendations as to whether the respondent should be retained in the Ready Reserve as a mobilization asset to fulfill the respondent's total service obligation (except when the board has recommended separation on the basis of homosexual conduct, misconduct, drug trafficking, or defective enlistment and induction, or has recommended an OTH);

in homosexual cases, if the board finds that one or more of the circumstances authorizing separation is supported by the evidence, the board shall recommend separation unless the board finds that retention is warranted under the limited circumstances which allow for retention; in which case, specific findings regarding those circumstances are required.

Note: There are no local separations for homosexual conduct; all cases must be forwarded to the Chief of Naval Personnel or the Commandant of the Marine Corps, with SECNAV acting as separating authority.

if separation is recommended and the member is eligible for transfer to the Fleet Reserve / retired list, a recommendation as to whether the member should be transferred in the current or the next inferior pay-grade must be made.

Record of Proceedings. The record of proceedings shall be prepared in summarized form, unless the convening authority or separation authority directs that a verbatim transcript be kept as noted above. Following authentication of the record (by the president in the Navy; by the president and the recorder in the Marine Corps), the record of proceedings is forwarded to the convening authority.

Contents of the record of proceedings.

For the Navy:

a summary of the facts and circumstances;

supporting documents on which the board's recommendation is based including (at least) a summary of all testimony;

the identity of respondent's counsel and the legal advisor, if any, including their legal qualifications;

the identity of the recorder and members;

a verbatim copy of the board's majority findings and recommendations signed by **all members;**

the **authenticating signature of the president** on the entire record of proceedings or, in his absence, any member of the board;

signed, dissenting opinions of any member, if applicable, regarding findings and recommendations.

Note: It is unnecessary for counsel for respondent (or respondent, if not represented by counsel) to review the record of proceedings and all supporting documentation before the record is forwarded to the separation authority, as long as they are provided a copy prior to submission. A statement of deficiencies can be submitted separately **via the convening authority** to the separation authority. The Report of Administrative Board must still be signed by the board members and counsel for the respondent.

For the Marine Corps:

An authenticated copy of the appointing order and any other communication from the convening authority;

a summary of the testimony of all witnesses including the respondent when he / she testifies under oath or otherwise;

a summary of any sworn or unsworn statements made by absent witnesses if considered by the board;

acknowledgement that the respondent was advised of and fully understands all of the rights of the respondent before the board;

the identity of the counsel for the respondent and the recorder with their legal qualifications, if any;

copies of the letter of notification to the respondent, advisement of rights, and acknowledgement of rights;

a complete statement of facts upon which the board's recommendation for discharge is based, accompanied by appropriate supporting documents;

a summary of any unsworn statement submitted by the respondent or his/her counsel;

the respondent's signed acknowledgement that he / she was advised of, and fully understood, all of his / her rights before the board; and,

a majority board report signed by all concurring voting members.

Actions by the Convening Authority. If the commanding officer determines that the respondent should be retained, the case may be closed except for any case in which processing is mandatory. In mandatory case, the matter must be referred to the appropriate separation authority for disposition. On the other hand, if the commanding officer decides that separation is warranted or separation processing was otherwise mandatory, the report is forwarded in a letter of transmittal to the separation authority for action. At no time may the convening authority recommend a discharge characterization less favorable than the board's recommendation. Determining who the separation authority will be requires that the practitioner review the pertinent regulations as it is not always intuitive. This is

particularly true for the Navy, where the SPCMCA CO may often act as the separation authority. For the Marine Corps, the separation authority will be the GCMCA, unless the MARCORSEPMAN designates a higher authority, such as the Commandant or the Secretary of the Navy.

With respect to the Marine Corps, if the convening authority is not the appropriate separation authority, the convening authority will forward the case with a recommendation in a letter of transmittal to the appropriate separation authority. And if the convening authority is the appropriate separation authority, before taking final action, he/she will refer the case to his staff judge advocate for a written review to determine the sufficiency in fact and law of the processing-including the board's proceedings, record, and report.

Action by The Separation Authority. When the separation authority receives the record of the board's proceedings and report, his/her ability to act will depend on the findings of the board. The separation authority enjoys a range of possible actions. Possible actions include:

must approve the board's recommendation for retention if the board found that the basis is not supported by a preponderance of the evidence;

disagree with the administrative board's recommendation for retention and refer the entire case to the Secretary of the Navy for authority to direct a separation under honorable conditions with an honorable or general discharge or, if appropriate, entry level separation or, if eligible, transfer to the Fleet Reserve / retired list in the current or next inferior paygrade;

approve the board's recommendation for separation and direct execution of the recommended type of separation (including, if applicable, transfer to the Fleet Reserve / retired list in the current or next inferior paygrade);
approve the board's recommendation for separation, but upgrade the type of characterization of service to a more creditable one;

approve the board's recommendation for separation, but change the basis therefore when the record indicates that such action would be appropriate;

disapprove the recommendation for separation and retain the member;

disapprove the board's recommendation concerning transfer to the IRR;

approve the recommendation for separation, but suspend its execution for a specific period of time;

approve the separation, but disapprove the board's recommendation as to suspension of the separation;

(USN only) submit the case to SECNAV recommending separation when the findings of the board are contrary to the substantial weight of the evidence; or

set aside the findings and recommendations of the board and send the case to another board hearing if the separation authority finds legal prejudice to the substantial rights of the respondent, or that findings favorable to the respondent were obtained by fraud or collusion.

Suspension of separation. Except when the bases for separation are fraudulent enlistment or homosexual conduct, a separation may be suspended by the separation authority or higher authority for a specified period of not more than 12 months if the circumstances of the case indicate a reasonable likelihood of rehabilitation. The administrative discharge board and the convening authority may both recommend suspension, and the separation authority may make its own determination of a suspension.

Unless sooner vacated or remitted, execution of the approved separation shall be remitted upon completion of the probationary period, upon termination of the member's enlistment or period of obligated service, or upon decision of the separation authority that the goal of rehabilitation has been achieved.

During the period of suspension, if further grounds for separation arise or if the member fails to meet appropriate standards of conduct and performance, the command may take disciplinary action, initiate new administrative action; or return the case to the separation authority, who may then vacate the suspension and execute the original separation. Prior to vacation of a suspension, the member shall be notified in writing of the basis for the action and

shall be afforded the opportunity to consult with counsel and to submit a statement in writing to the separation authority. The respondent must be afforded at least two days to act on the notice.

AD 40.5. *PROCESSING GOALS.*

Discharges Without Board Action. When board action is not required or is waived, then the member should be separated within 30 working days of notification.

Separations With Board Action. When the member elects an Administrative Board, then the member should be separated within 60 working days of notification.

AD 40.6. *POST-ADMINISTRATIVE BOARD ADVICE.*

During separation processing, information concerning the purpose and authority of the Board for Correction of Naval Records (BCNR) and the Naval Discharge Review Board (NDRB) shall be provided to all members, except when the separation is for an immediate reenlistment. Specific counseling is also required which states that an Under Other Than Honorable Discharge, resulting from a period of continuous, unauthorized absence of 180 days or more, is a conditional bar to benefits administered by the Department of Veterans Affairs, notwithstanding any action by NDRB or BCNR.

This information should be provided in the form of a written fact sheet or similar document. Failure on the part of the member to receive or to understand such explanation is not a bar to separation or characterization.

AD 40.7. *NAVAL DISCHARGE REVIEW BOARD (NDRB)*.

General. The NDRB was established pursuant to 10 U.S.C. § 1553 (1989), and operates in accordance with SECNAVINST 5420.174 (REVIEW AT THE LEVEL OF THE NAVY DEPARTMENT OF DISCHARGES FROM THE NAVAL SERVICE.) The NDRB is composed of five-member panels of active-duty Navy and Marine Corps officers in grades O-4 or higher. The NDRB panels sit regularly in Washington, DC, and also travel periodically to other areas within the continental United States.

Petition. The NDRB may begin its review process based on its own motion, the request of a surviving member, or the request of a surviving spouse, next of kin, legal representative, or guardian (if the former member is deceased or incompetent).

Scope of review. The NDRB is authorized to change, correct, or otherwise modify a discharge except that, by statute, it may not review punitive discharges awarded as a result of general court-martial nor may it review a discharge executed more than 15 years before the application to NDRB. In addition, the NDRB is not authorized to do any of the following:

change any document other than the discharge document;

revoke a discharge;

reinstate a person in the naval service;

recall a former member to active duty;

change reenlistment codes;

cancel reenlistment contracts;

change the reason for discharge from, or to, physical disability;

determine eligibility for veterans' benefits; or

review a release from active duty until a final discharge has been issued.

Modifications. In order to change, correct, or otherwise modify a discharge certificate or issue a new certificate, the NDRB must be convinced that the original certificate was "improperly or inequitably" given. In making its determination, the board is usually confined to evidence in the former member's record during the particular period of naval service for which the discharge in question had been issued-including any information disclosed to, or discovered by, the naval service at the time of enlistment or other entry into the service. This evidence may, and indeed should, include facts "found" by a fact-finding body (such as a court-martial, a court of inquiry, or an investigation in which the former member was a defendant or interested party and which were properly approved either on appeal or during review). Unless this former member can show that coercion was exercised, the foregoing evidence should include charges and specifications to which guilty pleas were appropriately entered in court or which prompted the former member to request separation in lieu of trial by court-martial. A discharge is deemed to be improper when an error of fact, law, procedure, or discretion at the time of issuance prejudiced the applicant's rights or when a change in policy of the applicant's branch of service is made expressly retroactive to the type of discharge he/she was awarded. Like the Board for Correction of Naval Records, which will be discussed next, the NDRB is **not** empowered to change any discharge to one more favorable solely because the applicant has demonstrated exemplary conduct and character since the time of his / her discharge (which is the subject matter of the present application), regardless of the length of time that has elapsed since that discharge.

Secretarial review. Action taken by the NDRB may only be reviewed administratively by the Secretary of the Navy. If newly discovered evidence is presented to the NDRB, it may recommend to the Secretary of the Navy reconsideration of a case formerly heard but may not reconsider a case without the prior approval of the Secretary.

Mailing address. Applications and other information may be obtained from:

Naval Discharge Review Board
Department of the Navy
801 N. Randolph St.
Arlington, VA 22203

Additional information may be obtained at
http://www.ig.navy.mil/Complaints%20%20(NDRB).htm

AD 40.8. *THE BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR)*

General. BCNR was established pursuant to 10 U.S.C. § 1552 (1989). It consists of at least three civilian members and considers all applications properly before it for the purpose of determining the existence of an error or an injustice and making appropriate recommendations to the Secretary of the Navy.

Petition. Application may be made by a former member or any other person considered by the board to be competent to make an application. When a "no change" decision has been rendered by the NDRB, and a request for reconsideration by that board has been denied, a petition may then be filed with the BCNR. The law requires that the application be filed with the BCNR within three years of the date of discovery of the error or injustice. The board is authorized to excuse the fact that the application was filed at a later date if it finds it to be in the interest of justice. The board is empowered to deny an application without a hearing if it determines that there is insufficient evidence to indicate the existence of probable material error or injustice.

Scope of review. Applications to BCNR are subject to several qualifications which should be stressed in the advice given to members being processed for OTH discharges. *In no event will an application be considered before other administrative remedies have been exhausted.* In addition to its power to consider applications concerning discharges adjudged by GCM's-something the NDRB may not do-the BCNR may also review cases involving inter alia:

Requests for physical disability discharge and, in lieu thereof, retirement for disability;

requests to change character of discharge or eliminate discharge and restore to duty;

removal of derogatory materials from official records (such as fitness reports, performance evaluations, nonjudicial punishments, failures of selection, and marks of desertion);

changing dates of rank, effective dates of promotion or acceptance / commission, and position on the active-duty list for officers;

correction of "facts" and "conclusions" in official records (such as lost time entries or line of duty / misconduct findings);

restoration of rank; and

pay and allowances items (such as special pays, incentive pay, readjustment pay, severance pay, and basic allowance for quarters).

In determining whether or not material error or an injustice exists, the board will consider all evidence available-including, among other things:

all information contained in the application;

documentary evidence filed in support of the application;

briefs submitted by, or on behalf of, the applicant; and

all available military records-including, of course, the applicant's service record.

Secretarial action. Cases considered by the board are forwarded to, and reviewed by, the Secretary of the Navy for final action-except that, in the following ten categories, the board is empowered to take final action without referral of the matter to the Secretary of the Navy:

Leave adjustments;

retroactive advancements for enlisted personnel;

enlistment / reenlistment in higher grades;

entitlement to basic allowances for subsistence, family separation allowances, and travel allowances;

Survivor Benefit Plan / Retired Serviceman's Family Protection Plan election;

physical disability retirements / discharges;

service reenlistment / variable reenlistment and proficiency pay entitlements;

changes in home of record;

Reserve participation / retirement credits; and

changes in former members' reenlistment codes.

Mailing address. The mailing address for filing applications or requesting other information is:

The Board for Correction of Naval Records
Department of the Navy
Washington, DC 20370

Additional information may be obtained at http://www.hq.navy.mil/bcnr/bcnr.htm#FAQS.

CHAPTER 41

CHAPTER 41

AD 41. OFFICER PERSONNEL MATTERS

AD 41.1. *REFERENCES.*

MILPERSMAN, Section 1611-020

SECNAVINST 1910.6B

MCO 5800.16 (LEGADMINMAN), Chapter 4

MCO P1000.6G (ACTSMAN)

PART A: DETACHMENT FOR CAUSE

AD 41.2. *GENERAL*.

In the Navy, the detachment of an officer for cause is the administrative removal of an officer from a current assignment before their projected rotation date when officer's performance or conduct detracts from accomplishing mission and continuance in billet can only negatively impact the command. It has a serious effect on the officer's future naval career, particularly with regard to promotions, duty assignments, selections for schools, and special assignments. In fact, it is considered one of the strongest administrative remedies a command can take against an officer. When a decision is made to REQUEST DFC- notify Pers 4834 immediately.

While the Navy has detailed regulations in the MILPERSMAN, the Marine Corps has no comparable regulations other than a brief passing reference to such transfers in the ACTSMAN. This is due in large part to the fact that detachments for cause are normally dealt with by a Marine base commander, as opposed to referring the matter to Headquarters, U.S. Marine Corps.

Basis for Detachment. The following basis permit a command to request an officer's detachment for cause (DFC) from their current command:

Misconduct.
Unsatisfactory performance involving 1 or more significant events resulting from gross negligence or disregard for duty.
Unsatisfactory performance over extended period of time.
Loss of confidence in command.
Normally, a DFC is inappropriate when:
The officer is at their projected rotation date (PRD) and their transfer can be effected through the normal detailing process,
If the officer already has permanent change of station (PCS) orders/or if relief onboard the command
Reasonable alternative exists to resolve within command
When the DFC is sought in lieu of disciplinary action.

Counseling and Documentation. If the officer is being separated for unsatisfactory performance over an extended period of time, they must normally be counseled by the command. If, after a reasonable period of time, the officer has not achieved a satisfactory level of performance, the command should issue a letter of instruction to the officer detailing their deficiencies. If all attempts at counseling and assistance have failed, the command has the option to request a DFC. Before a DFC will be approved, all factual allegations of misconduct or unsatisfactory or marginal performance of duty should be adequately documented (e.g., fitness reports, criminal investigations).

Command Correspondence. The command's request for DFC is sent to Chief of Navy Personnel (Pers 4834) using the format contained in the MILPERSMAN. The request shall contain:

A reasonably detailed statement of the specific incidents of misconduct or performance;
Corrective action taken to improve inadequate performance including counseling; and
Any disciplinary action taken, in progress, or contemplated.

If the DFC is based on misconduct where there was no disciplinary action taken by the command, sufficient justification will have to be provided by the command as to the reason why disciplinary action was not taken for the misconduct. In fact, the MILPERSMAN states, "Only in unusual circumstances will a DFC request by reason of misconduct be approved without disciplinary action having been taken."

The request for DFC must be routed through the command's administrative chain of command, to include at least one Flag officer. Flag officer initiated requests may be sent directly to Navy Personnel Command via the officer concerned.

Due to the sensitivity of the matter, DFC requests should be forward by each level of review within 5 days of receipt.

Officer's Statement. The officer concerned shall be afforded a reasonable period of time, normally 15 working days, in which to prepare a response to the DFC request. Any statement made by the officer must be couched in temperate language, be confined to the pertinent facts, and neither impugn the motives of others, nor make countercharges. It should be thoughtful and to the point.

DFC of Officers in Command. A request for the DFC of an officer in command generally evolves from the same type of circumstances delineated above. An evaluation by a superior in the chain of command of failure on the part of an officer in command to exercise sound judgment in one or more areas and loss of confidence will constitute a sufficient basis to request the DFC of that officer. If the responsible superior is not a flag officer, it is desirable that the concurrence of a flag officer in the chain of command be obtained, when practicable, prior to acting.

Normally, a DFC request is proceeded by a message to Navy Personnel Command. In order to ensure privacy in handling the message, the requesting command should use the special handling designator "Personal for Navy Personnel Command" The officer concerned will be personally informed of the essential facts, which preclude his or her continuation in command prior to or upon transmittal of the message.

Appropriate action will be taken in response to the message, which will normally be to issue the officer temporary duty orders to the staff of a superior in the administrative chain of command pending final resolution of this matter.

PART B: ADMINISTRATIVE SEPARATION OF OFFICERS

AD 41.3. *INTRODUCTION*

Officers who do not maintain required standards of performance or professional or personal conduct may be processed for separation for cause in addition to facing potential disciplinary action. The procedures used in processing an officer for separation are similar to those for enlisted service members (see Chapter 12). Officers may be separated using notification or board procedures, and the separation is normally characterized as honorable, general (under honorable conditions), or other than honorable. However, there are notable differences in the separation processing of officers. The basis is often defined very differently, and there are different criteria that govern the ability to use notice versus board procedures. In addition, the conduct in question should not have occurred more than 5 years prior to the initiation of processing for separation. The analysis that follows is not exhaustive, and any questions that arise should be resolved by utilizing applicable references.

The commanding officer shall forward the case file with the letter of notification and response, supporting documentation, and any tendered resignation via the Chief of Navy Personnel (CNP) or the Commandant of the Marine Corps (DC (M&RA)), as appropriate, to the Assistant Secretary of the Navy for Manpower and Reserve Affairs (ASN (M&RA)) who has been delegated by SECNAV as the separation authority for these cases.

Definitions:

Active commissioned service. Service on active duty as a commissioned officer (including as a commissioned warrant officer).

Convening authority. The official who convenes the officer separation board. The Secretary of the Navy or his/her delegates are empowered to convene boards in conjunction with separation of officers for cause.

Continuous service**.** Military service unbroken by any period in excess of 24 hours.

Drop from the rolls. A complete severance of military status pursuant to specific statutory authority without characterization of service.

Nonprobationary officers**.** Regular commissioned officers (other that commissioned warrant officers or retired officers) with five or more years of active commissioned service, and regular commissioned officers (other than commissioned warrant officers or retired officers) who were on active duty on 14 September 1981 and who have completed more than three years' continuous service since their dates of appointment as Regular officers.

Probationary officers**.** Regular commissioned officers (other than commissioned warrant officers or retired officers) with less than five years of active commissioned service, and Regular commissioned officers (other than commissioned warrant officers or retired officers) who were on active duty on 14 September 1981 and who have completed less than three years' continuous service since their dates of appointment as Regular officers.

Retention on active duty**.** The continuation of an individual in an active-duty status as a commissioned officer in the naval service.

AD 41.4. *CHARACTERIZATION OF SERVICE.*

Separations are characterized as either honorable, general (under honorable conditions), or under other than honorable conditions.

Honorable. An officer whose quality of service has generally met the standards of acceptable conduct and performance of duty for officers of the naval service, or is otherwise so meritorious that any other characterization would be clearly inappropriate. Service must be characterized as honorable when the grounds for separation are based solely on:

Preservice activities;

Substandard performance of duty;

Removal of ecclesiastical endorsement; or

Personal abuse of drugs (the evidence of which was developed as a result of an officer's volunteering for treatment under the self-referral program).

General (under honorable conditions). When significant negative aspects of the officer's conduct or performance of duty outweigh positive aspects of the officer's military record.

Other than honorable. This characterization is appropriate when the officer's conduct or performance of duty, particularly the acts or omissions that give rise to reasons for separation, constitute a significant departure from that required of an officer of the naval service. Examples of such conduct or performance include acts or omissions which under military law are punishable by confinement for six months or more; abuse of a special position of trust; an act or acts which bring discredit upon the armed services; disregard by a superior of customary superior-subordinate relationships; acts or omissions that adversely affect the ability of the military unit or the organization to maintain discipline, good order, and morale, or endanger the security of the United States or the health and welfare of other members of the armed forces; and deliberate acts or omissions that seriously endanger the capability, security, or safety of the military unit or health and safety of other persons.

AD 41.5. *LIMITATIONS ON CHARACTERIZATION OF SERVICE.*

Reserve Component. Conduct in the civilian community of a member of a Reserve component, who is not on active duty or on active duty for training and was not wearing the military uniform at the time of such conduct giving rise to separation, may form the basis for characterization of service as other than honorable *only* if the conduct directly affects the performance of military duties and the conduct has an adverse impact on the overall effectiveness of the service (including military morale and efficiency).

Homosexual Conduct. The criteria for characterization of service for officers being separated by reason of homosexual conduct are identical to those for enlisted personnel. Service must be characterized as honorable or general unless aggravating factors are included in the findings.

Pre-Service Misconduct. Whenever evidence of pre-service misconduct is presented to a board, the board may consider it *only* for the purpose of deciding whether to recommend separation or retention of the respondent. Such evidence shall not be used in determining the recommendation for characterization of service. The board shall affirmatively state in its report that such evidence was considered only for purposes of determining whether it should recommend retention or separation of the officer.

AD 41.6. *BASIS FOR SEPARATION.*

As is the case with enlisted personnel, involuntary separation of officers must be founded upon specific causes or reasons. An officer may be processed for separation for any combination of the reasons listed below. This list is not exhaustive and SECNAVINST 1920.2B must be consulted prior to determining a proper basis of separation.

Substandard performance of duty. This ground for separation refers to an officer's inability to maintain adequate levels of performance or conduct, as evidenced by one or more of the following reasons:

failure to demonstrate acceptable qualities of leadership required of an officer in the member's grade;

failure to achieve or maintain acceptable standards of proficiency required of an officer in the member's grade;

failure to properly discharge duties expected of officers of the member's grade and experience;

failure to satisfactorily complete any course of training, instruction, or indoctrination which the officer has been ordered to undergo;

a record of marginal service over an extended time as reflected in fitness reports covering two or more positions and signed by at least two reporting seniors;

personality disorders, when such disorders interfere with the officer's performance of duty and have been duly diagnosed by a physician or clinical psychologist;

failure, through inability or refusal, to participate in, or successfully complete, a program of rehabilitation for personal abuse of drugs or alcohol to which the officer was formally referred (nothing in this provision precludes separation of an officer, who has been referred to such a program, under any other provision of this instruction in appropriate cases);

failure to conform to prescribed standards of dress, weight, personal appearance, or military deportment; or

unsatisfactory performance of a warrant officer, not amounting to misconduct, or moral or professional dereliction.

Misconduct, or Moral or Professional Dereliction. Performance or personal or professional conduct (including unfitness on the part of a warrant officer) which is unbecoming an officer as evidenced by one or more of the following reasons:

Commission of a military or civilian offense if prosecuted under the UCMJ, could be punished by confinement of six months or more, and any other misconduct which, if prosecuted under the UCMJ, would require specific intent for conviction.

Unlawful drug involvement (mandatory).

Homosexual conduct (mandatory).

Sexual perversion.

Intentional misrepresentation or omission of material fact in obtaining appointment.

Fraudulent entry into an armed force or the fraudulent procurement of commission or warrant as an officer in an armed force.

Intentional misrepresentation or omission of material fact in official written documents or official oral statements.

Failure to complete satisfactorily any course of training, instruction, or indoctrination which the officer has been ordered to undergo when such failure is willful or the result of gross indifference.

Marginal or unsatisfactory performance of duty over an extended period, as reflected in successive periodic or special fitness reports, when such performance is willful or the result of gross indifference.

Intentional mismanagement or discreditable management of personal affairs, including financial affairs.

Misconduct or dereliction resulting in loss of professional status, including withdrawal, suspension, or abandonment of license, endorsement, certification, or clinical medical privileges necessary to perform military duties in the officer's competitive category of Marine Corps Occupational Field.

A pattern of discreditable involvement with military or civilian authorities, notwithstanding the fact that such misconduct has not resulted in judicial or nonjudicial punishment under the UCMJ.

Conviction by civilian authorities (foreign or domestic), or action taken which is tantamount to a finding of guilty, for an incident which would amount to an offense under the UCMJ.

One or more substantiated incidents of serious misconduct resulting from the officer's active participation in extremist or supremacist activities which, in the independent judgment of the convening authority, is more likely than not to undermine unit cohesion or be detrimental to the good order, discipline, or mission accomplishment of the command or unit. Such misconduct must relate to: (1) illegal discrimination based on race, creed, color, sex, religion, or national origin; or (2) advocating the use of force or violence against any Federal, State, or local Government, or any unit or agency thereof, in contravention of Federal, State, or local laws.

An officer who has been referred to a program of rehabilitation, education and counseling for sex offenders may be separated for failure, through inability or refusal, to participate in such a program.

Retention Not Consistent with the Interests of National Security**.** An officer (except a retired officer) may be separated from the naval service when it is determined that the officer's retention is clearly inconsistent with the interests of national security.

Separation in Lieu of Trial by Court-Martial. An officer may be separated in lieu of trial by court-martial upon the officer's request if charges have been preferred with respect to an offense for which a punitive discharge is authorized. If this option is exercised, the request for discharge shall be submitted in writing by the officer, and that officer shall be afforded an opportunity to consult with qualified counsel. The officer must acknowledge that he understands his rights in addition to acknowledging his guilt of one or more of the offenses charged.

Removal of Ecclesiastical Endorsement. Officers on the active-duty list in the Chaplain Corps, who can no longer continue professional service as a chaplain because an ecclesiastical endorsing agency has withdrawn its endorsement of the officer's continuation on active duty as a chaplain, shall be processed for separation.

Parenthood. An officer may be separated by reason of parenthood if it is determined that the officer is unable to perform duties satisfactorily or is unavailable for worldwide assignment or deployment.

Dropping From the Roll. A Regular or Reserve officer, except warrant officer's, may be summarily dropped from the rolls of an armed force without a hearing or a board, if the officer has been absent without authority for at least three months or has been sentenced to confinement in a Federal or state penitentiary after having been found guilty by a civilian court and whose sentence has become final.

Reserves. In addition to the basis listed above, a reserve officer may be separated for the additional basis of: general mobilization or reduction in authorized strength; age-in-grade restrictions; lack of mobilization potential; release from active duty of Naval Reserve officers on the active-duty list by reason of retirement eligibility; and elimination of Reserve officers from an active status in a Reserve component to provide a flow of promotion.

Convenience of the Government. Much like enlisted administrative separations, there are a number of bases that fall under the rubric of Convenience of the Government, such as pregnancy, hardship, conscientious objector, alien status, surviving family member, separation to accept public office, and separation to attend college. Specific guidance should be sought in SECNAVINST 1920.6B.

Interservice Transfer. An officer may be separated from one service in order to transfer into anther pursuant to regulations of both services.

Miscellaneous Bases. There are many other bases of separation, such as resignation, retirement, separation to become a minister, that are authorized in the instruction.

AD 41.7. *PROCESSING.*

The initiation of the separation deliberative process may begin through a number of means. Many times, the officer will request separation from the service administratively for a number of reasons, such as resignation at the completion of their statutory obligation, retirement, or other reasons listed below.

In addition, the process may begin when an officer commits misconduct, or has qualifying substandard performance, and this is reported through the chain of command. In these instances, an official known as the Show Cause Authority will make a determination if the officer should "show cause" to remain on active duty. For the Navy, the Show Cause Authority is the Chief of Navy Personnel (CHNAVPERS or CNP). For the Marine Corps, the Show Cause Authority is the Commandant of the Marine Corps. The Show Cause Authority reviews package and determines that the officer should be required to show cause for retention on active duty and what process must be used. The Show Cause Authority may direct a Board of Inquiry if he deems that the notification procedures are not appropriate because characterization under Other than Honorable Conditions is appropriate in the case.

AD 41.8. *NOTIFICATION PROCEDURE.*

When the Show Cause Authority deems that the officer should be separated, they must then determine the appropriate separation mechanism. Notification procedures may be used when the officer is probationary, or the officer's case does not warrant an Other than Honorable characterization. In all other cases, board procedures normally must be utilized (the administrative separation board for an officer is called a Board of Inquiry). Finally, the Show Cause Authority can determine that separation is inappropriate and close the case.

The notification procedure shall be used when:

A probationary Regular officer or a Reserve officer above CWO-5 with less than five years of commissioned service, or a permanent Regular or Reserve warrant officer with less than three or five years of service, respectively, as a warrant officer, is processed for separation.

A temporary LDO or temporary warrant officer is processed for certain reasons established in paragraph 1 of Enclosure 3 of SECNAVINST 1920.6B.

A Reserve officer is processed for removal from an active status due to age or lack of mobilization potential; or

A Regular or Reserve officer is processed for separation for failure to accept appointment to O-2.

The commanding officer shall notify the officer concerned in writing of the following:

The reason(s) for which the action was initiated (including the specific factual basis supporting the reason);

The recommended characterization of service is honorable or general (under honorable conditions), if such a recommendation originated with the Chief of Navy Personnel or Deputy Commandant (Manpower & Reserve Affairs);

That the officer may submit a rebuttal or decline to make a statement;

That the officer may tender a resignation in lieu of separation processing;

That the officer has the right to confer with appointed counsel;

That the officer, upon request, will be provided copies of the papers to be forwarded to the Secretary to support the proposed separation (Classified documents may be summarized.);

That the officer has the right to waive the rights enumerated above, and that failure to respond shall constitute waiver of these rights; and

That the officer has a specified period of time (normally five working days) to respond to the notification.

Consultation with Counsel. A respondent has the right to consult with counsel that is Article 27(b), UCMJ certified, when the notification procedure is initiated, except when the commanding officer determines that the needs of the naval service require processing and access to qualified counsel is not anticipated for at least the next five days because the vessel, unit, or activity is overseas or remotely located relative to judge advocate resources. Non-lawyer counsel shall be appointed whenever qualified counsel is not available. The respondent may also consult with a civilian counsel at the respondent's own expense.

The respondent shall be provided a reasonable period of time-normally five working days, but more if in the judgment of the commanding officer additional time is necessary-to act on the notice. An extension may be granted by the commanding officer upon a timely showing of good cause by the officer. If the respondent declines to respond as to the selection of rights, even if notice is provided by mail as authorized for the Reserves, such declination shall constitute a waiver of rights and an appropriate notation will be made in the case file. If the respondent indicates that one or more of the rights will be exercised, but declines to sign the appropriate notification statement, the selection of rights will be noted and notation as to the failure to sign will be made.

AD 41.9. *PROCESSING-ADMINISTRATIVE BOARD PROCEDURES (BOARD OF INQUIRY).*

CNP, DC (M&RA), or a GCMCA when so directed may convene a board of inquiry. The purpose of this board is to give the officer a full and impartial hearing for responding to, and rebutting, the allegations which form the basis for separation for cause and / or retirement in a paygrade inferior to that held and to present matters favorable to his / her case on the issues of separation and / or characterization of service.

The following cases mandate the use of board procedures:

Reserve officers (including Reserve warrant officers) and permanent Regular warrant officers being processed for termination of appointment or separation because of misconduct, moral or professional dereliction, or retention inconsistent with the interests of national security; and

Regular or Reserve officers with more than five years of commissioned service (Reserve officers, if commissioned prior to October 1, 1996 and in a probationary status prior to that date then the officer shall be considered a probationary commissioned officer for a period of three years from the date of his or her appointment as a commissioned officer), Reserve warrant officers with more than five years of service as a warrant officer, and permanent Regular warrant officers with three or more years of continuous active service from the date they accepted their original appointment as warrant officers, being processed for separation or termination of appointment for substandard performance of duty or parenthood.

any case not specifically provided for involving discharge under other than honorable conditions; and

any other cases the Secretary considers appropriate (e.g., retired-grade determinations in certain voluntary retirement cases).

Board Composition. Boards of Inquiry, shall consist of not less than three officers in the same armed force as the respondent. The following requirements apply to board compositions:

In the case of Regular commissioned officers (other than temporary LDO's and WO's), members of the board shall be highly qualified and experienced officers on the active-duty list in the grade of O-6 or above and senior in grade to the respondent.

In the case of Reserve commissioned officers other than warrant officers, members shall be highly qualified and experienced officers on the active-duty list or in an active duty status in the grade of O-5 or above, except that at least one member shall be in the grade of 0-6 or above and senior in grade to any officer considered by the board. At least one member of the board shall be a Reserve officer.

At least one member shall be an unrestricted line officer. Such officer will have command experience whenever possible. One member shall be in the same competitive category as the respondent.

When sufficient highly qualified and experienced officers on the active-duty list are not available, the convening authority shall complete board membership with available retired officers who meet the criteria set forth above (other than the active-duty-list requirement) and who have been retired for less than 2 years.

Officers with personal knowledge pertaining to the particular case shall not be appointed to the board considering the case. No officer may be a member of more than one board convened under this instruction to consider the same officer.

The senior member of a board of officers or board of inquiry shall be the presiding officer and rule on all matters of procedure and evidence, but may be overruled by a majority of the board. If appointed, the legal advisor shall rule finally on all matters of procedure and evidence. The convening authority shall rule finally on all challenges for cause against the legal advisor.

For boards of inquiry, the convening authority is not limited to officers under his direct command in selecting qualified board members.

The convening authority shall appoint a nonvoting recorder to perform such duties as appropriate, but the recorder shall not participate in closed sessions of any board. Also, the convening authority may appoint a nonvoting legal advisor to perform such duties as the board desires, but the legal advisor shall not participate in closed sessions of any board.

Board Notification. The respondent shall be notified in writing at least 30 days before the hearing of the case by a board of inquiry of his rights. The rights notification format should be taken from the primary references and it includes all of the substantive rights advisements due to the officer. Some of these rights include notification of the reasons for the board, the least favorable characterization of service, the officer’s right to counsel, the right to be present, to present evidence, and call witnesses, and the right to waive rights.

Counsel. A respondent is entitled to have qualified military counsel appointed; to request military counsel of his / her own choice, provided the requested counsel is reasonably available (as prescribed in the JAG Manual for individual military counsel for court-martial); and to engage civilian counsel at no expense to the government, in addition to, or in lieu of, military counsel.

Witnesses. The respondent may request in a timely manner the attendance of witnesses in his behalf at the hearing. Material witnesses located within the immediate geographic area of the board shall be invited to appear or, in the case of Federal government employees (military or civilian), directed to appear. If production of a witness will require expenditure of funds because the witness is located outside the immediate geographic area of the board, the rules prescribed for submission of the respondent's witness request, the convening authority's action on the request, and the postponement or continuance of the board's proceedings to await the witness' appearance or, absent that, preparation of the witness' written statement, are identical to the guidelines in enlisted administrative separation cases.

Hearing Procedures. Hearings must be conducted in a fair and impartial manner, but the Military Rules of Evidence for courts-martial are applicable. Oral or written matters may, however, be subject to reasonable restrictions as to authenticity, relevance, materiality, and competency as determined by the board of inquiry. If suspected of an offense, the officer should be warned against self-incrimination under Article 31b, UCMJ, before testifying as a witness. Failure to so warn the officer may not preclude consideration of the testimony of the officer by the board of inquiry.

The board shall make the following determinations, by majority vote, based on the evidence presented at the hearing:

A finding on each of the reason(s) for separation specified, based on the preponderance of evidence (unless a reason of separation is based on an approved finding of guilty by a court-martial or civilian criminal conviction because the finding of guilty is binding on the BOI);

if a basis for separation has been specified than the Board must make a recommendation for retention or separation

of the respondent from the naval service for specified reason(s) with a characterization of service (a recommendation for separation is mandatory when a preponderance of the evidence supports a finding of homosexual conduct or unlawful drug involvement);

a finding that none of the reasons specified are supported by sufficient evidence prescribed to warrant separation for cause and the case is, therefore, closed; or

a recommendation, in the case of a retirement-eligible officer, to retire the officer in the grade currently held or, if the officer has not satisfactorily served in that grade, the next junior grade.

The report of the board, signed by all members (including any separate, minority reports), shall include a verbatim transcript of the board's proceedings for Regular commissioned officers when directed by the convening authority, and a summarized transcript for all other officers. The transcript shall be provided to the respondent for examination prior to signature by the board members, and a statement reflecting that fact-plus any deficiencies noted by the respondent-shall be attached to the report.

The respondent shall be provided a copy of the report of proceedings and the findings and recommendations of the board and shall be provided an opportunity to submit written comments for consideration by the board of review.

Review of Board Findings and Final Action. The report of the board shall be submitted via the convening authority to the Show Cause Authority (normally Chief of Navy Personnel or Commandant of the Marine Corps) who will make recommendations based on the Board’s findings. The report will then be forward to the Secretary, who will take final action on the separation. The Secretary may direct retention or discharge with a characterization of service not less favorable than that recommended by the board of inquiry.

An officer being considered for removal from active duty, who is eligible for voluntary retirement, may, upon approval by the Secretary, be retired in the highest grade satisfactorily served-as determined by the Secretary.

An officer who is not eligible for retirement may submit an unqualified resignation (honorable discharge), qualified resignation (general or honorable discharge acceptable), or resignation for the good of the service (any characterization of service acceptable) to the Secretary before being separated.

CHAPTER 42

CHAPTER 42

LA 42. LEGAL ASSISTANCE

LA 42.1. *LEGAL ASSISTANCE PROGRAM*

LA 42.1.1 *GENERAL*.

Few problems are as frustrating for military members as unresolved legal difficulties. Since World War II, the military services have sought to maintain a legal assistance program to assist military personnel, their dependents, and other authorized persons in obtaining adequate legal advice and services regarding personal legal matters from military sources. Assets devoted to legal assistance by Navy, Marine, or Coast Guard law centers necessarily vary with available manpower assets and fleet demand. The legal assistance program is authorized but not mandated by Congress. The *JAG Manual* (Chapter 7) and the *Legal Assistance Manual* (JAGINST 5801.2A) authorize the legal assistance program to provide in-office attorney advice, aid, and referral. Two related programs provide additional services. The preventive law program promotes "legal readiness" and education to help avoid legal problems. The expanded legal assistance program provides in-court representation in certain locations for selected legal issues.

LA 42.1.2 *PERSONS ELIGIBLE FOR LEGAL ASSISTANCE*.

Legal assistance (LA) is a service that is primarily intended to benefit active-duty servicemembers. The scope of LA services is left to individual command discretion as dictated by the workload of the office. The following persons are eligible for LA, listed in order of priority:

Active-duty personnel including reservists on active duty for 30 days or more;

Dependents of active-duty personnel (including dependents of those who died on active duty);

Retired military personnel and their dependents;

Reservists on active duty for single periods of 29 days or less and their dependents as authorized by the legal assistance area coordinator in emergency cases;

Members of Reserve components and their family members following release from active duty under a call or order to active duty for more than 30 days issued under a mobilization authority, for a period of time that begins on the date of the release and is not less than twice the length of the period served on active duty under that call or order to active duty;

Civilians, other than local-hire employees, who are in the employ of, serving with, or accompanying the U.S. forces in overseas areas and their dependents, when assigned to a foreign country or vessel for more than 30 days;

Member of allied forces and their dependents in the United States, serving with the Armed Forces of the United States; and

Other persons authorized by the Judge Advocate General. JAGMAN § 0706.

Also, in order to enhance Reserve Component readiness, Reserve personnel (not their dependents) are eligible to receive limited premobilization LA services even if not under mobilization or active duty orders. This type of assistance normally consists of drafting wills, advance medical directives, and powers of attorney. Other assistance may be provided if it relates to recall or mobilization, such as advice concerning rights under the Servicemembers Civil Relief Act (SCRA) or the Uniformed Services Employment and Reemployment Rights Act (USERRA).

LA 42.1.3. *LEGAL ASSISTANCE PROVIDERS*.

Eligible recipients may seek LA at any legal assistance office, regardless of the branch of service. A helpful tool for locating the nearest LA provider can be found at http://legalassistance.law.af.mil/content/locator.php. In the Navy, LA is generally provided by legal assistance attorneys (LAAs) at Naval Legal Service Offices (NLSOs) and their branch offices and detachments. In the Marine Corps, LA is generally provided at the Law Center. All information and files pertaining to clients are confidential and privileged. These matters may not be discussed with anyone

except with the specific permission of the client or when the responsible attorney determines it is required or authorized. LA offices are prohibited from providing any information regarding the client, including whether the client is, in fact, a client or reported to the office.

LA 42.1.4. *LEGAL ASSISTANCE SERVICES.*

Legal assistance offices provide assistance with personal legal problems including. The services provided typically include:

Powers of Attorney. General, special, health-care, medical, *in loco parentis*, household goods shipment, powers of attorney are commonly prepared and provided to personnel.

Basic wills, trusts, and estate planning. Complex estate planning and drafting is not routinely provided in the legal assistance program.

Domestic Relations. Advice concerning the legal and practical implications of divorce, legal separation, annulment, custody, and paternity will be provided. Assistance in domestic violence cases will be consistent with the service's family advocacy program.

Adoptions and name changes

Nonsupport and indebtedness matters. General advice on service indebtedness and dependent support policies.

Taxes. General advice on personal (not business) Federal, State, and local taxes.

Civil Suits. Advice and appropriate assistance will be given. LAAs cannot represent individuals in court, with the exception of the Expanded Legal Assistance Program (*see* Section 4305). In no case, can LAAs provide advice to anyone seeking to bring or involved in a lawsuit or claim against the government.

Servicemembers Civil Relief Act. Advice on protections and effect of the act on the servicemember or dependent.

Consumer Law problems. Landlord/tenant disputes, lease and contract review, contracts, consumer fraud, identity theft, and other consumer issues.

LA 42.1.5. *CONFLICTS.*

Occasionally, an LA office will be prohibited from providing services to an otherwise eligible person due to an ethical conflict of interest. This usually arises when an attorney in the legal office has already provided assistance to the opposing party or to a party that previously listed the person seeking services as an opposing party. Members conflicted from receiving assistance at the office will normally be referred to an alternate service provider if one is reasonably available. Due to client confidentiality, the LA office is prohibited from telling the conflicted client why he or she cannot be seen.

LA 42.1.6. *EXPANDED LEGAL ASSISTANCE PROGRAM*.

Section 0711 of the JAGMAN provides for the Expanded Legal Assistance Program (ELAP), which allows legal assistance attorneys to represent certain military personnel in civilian court. Clients are nominated for the ELAP program by their LA attorney and their case is then reviewed by a board. Personnel eligible for this program generally include E-3s or below, E-4s with dependents, or any member that cannot afford the services of a civilian attorney without substantial financial hardship. Because of differences in resources and local professional rules, not all LA offices maintain an ELAP.

LA 42.2. *OATHS, NOTARIZATIONS, AND POWERS OF ATTORNEY*

LA 42.2.1. *GENERAL*.

Notarial powers today are governed by both federal and state law. Chapter 9 of the JAGMAN is the main reference source in the Navy and Marine Corps for notarial powers. 10 U.S.C. § 936 (Article 136, UCMJ) governs notarial acts for purposes of military justice and administration. Section 1044a of the same title authorizes judge advocates,

adjutants, and 0-4's and above to perform any notarial act necessary for legal assistance purposes.

LA 42.2.2. *AUTHORITY TO ADMINISTER OATH AND PERFORM NOTARIAL ACTS*

A. **Oaths**. An oath is a pledge whereby the individual taking the oath swears or affirms the truth of the statements made by them. Oaths and affirmations are used when taking affidavits or sworn instruments.

1. **Military Justice Oaths**: Under JAGMAN § 0902, those members authorized to administer oaths under 10 U.S.C. § 936(a) for military administration and military justice are:

Judge Advocates

Summary courts-martial officers

Adjutants, assistant adjutants, acting adjutants,

Commanding officers of the Navy, Marine, and Coast Guard;

Staff judge advocate and ***legal officers***;

Officers of the grades O-4 and above;

Executive and administrative officers;

All limited duty officers (Law), all legalmen E-7 and above, all independent duty legalmen, and all legalmen assigned to Legal Assistance Offices;

Marine Corps officers with a Military Occupational Specialty of 4430, while assigned as legal administrative officer; and

Persons empowered to authorize searches for any purpose relating to search authorization.

2. **Oaths Incident to Performing Military Duties**: 10 U.S.C. § 936(b) authorizes the following persons on active duty or performing inactive duty training to administer oaths necessary in the performance of their duties:

President, military judge, trial counsel, for all general and special courts-martial;

President and counsel for Courts of Inquiry;

Officers designated to take depositions;

Persons designated to conduct investigations;

Recruiting officers;

Officers designated and acting as Casualty Assistance Calls Programs Officers (CACO);

President and recorder of personnel selection boards.

3. **Commissioning and Enlistment Oaths**. Under the authority of 10 U.S.C. §§ 502 and 1031, any U.S. Armed Forces commissioned officer of any Regular or Reserve component may administer an oath of enlistment or oath requirement for enlistment, appointment or commission of any person in the Armed Forces.

4. **How to Administer the Oath**. Persons administering an oath should tell the affiant to raise his/her right hand and say the following:

"Do you swear (or affirm) that the information contained in this document is the truth to the best of your knowledge, so help you God?"

B. **Acknowledgments**. An acknowledgment is a formal declaration to an authorized official that a certain act or deed was the free and knowing act of the declarant. Primarily used in relation to deeds of real property, the acknowledgment affirms the genuineness of the owner's intent to convey title to property and that the execution of the deed is the free and knowing act of the owner. Acknowledgments entitle the instrument to be recorded or authorize its introduction into evidence without further proof of its execution. JAGMAN, § 0906.

C. **Sworn instruments**. Sworn instruments are written declarations signed by a person who declared under oath before a properly authorized official that the facts set forth in the document are true to the best of the affiant's knowledge and belief. Sworn instruments normally include affidavits, sworn statements, and depositions. The purpose of sworn instruments is to make a formal statement under oath of certain facts which are known to the person making the statement. The notary should first administer the oath, then have the affiant sign his or her name, and then sign his/her name, rank, office, title and name of command. JAGMAN § 0907.

D. **Venue**. The location of the place where the document is notarized should be indicated on the document.

1. The notary should cite the state, county or other territorial subdivision in which the document was executed, e.g. ORANGE COUNTY, CALIFORNIA.

2. Notarizations overseas should include the city and country, e.g. NAPLES, ITALY.

3. Notarizations performed onboard naval vessels should state "ONBOARD USS NEVERSAIL AT (PLACE) OR (AT SEA)."

LA 42.2.3. *NOTARY AUTHORITY AND DUTIES*

A. **Notary Public**. A person legally authorized to administer oaths, take depositions, take and certify acknowledgments, and perform other similar services which can expedite the handling of an individual's legal affairs. The notary's signature and seal on a document give assurance to the person examining the document that the person who signed the document really was who he or she claimed to be and that he or she signed the document voluntarily.

B. **Authority to perform**. The authority granted under 10 U.S.C. § 1044a is separate and apart from any authority provided by state law. Persons performing notarial acts under 10 U.S.C. § 1044a derive their authority from Federal law which may be exercised without regard to geographic limitation.

C. **Identity**. Before witnessing or attesting a signature, notaries must determine that the person appearing before them is the person named in the document. This may be done by checking the military identification card or other identification documents.

D. **Effectiveness of the notarial acts**. Notarial acts performed under the authority of 10 U.S.C. § 1044a are ***legally effective for all purposes***. Oaths administered under the authority of 10 U.S.C. § 936 are legally effective for the purposes for which the oath is administered. Federal notarial authority may be exercised without regard to geographic limitations and is not dependent on any state or local law. If the somewhat ritualistic procedure is meticulously followed for each notarial act, the document or oath should be legally effective in the vast majority of cases.

E. **Proof of authority**. The signature of any person administering an oath or acting as a notary under the authority of 10 U.S.C. §§ 936 or 1044a, together with the title of his or her office, is prima facie evidence that the signature is genuine, that the person holds the office designated, and that he or she has the authority to so act. No seal is required. However, the use of a seal often helps ensure the document will be accepted for its intended purpose.

F. **Duties and Responsibilities of the Notary**. Notaries may not engage in the practice of law, and accordingly, may not prepare legal documents such as wills and contracts. Additionally, notaries may ***not***:

Sign their names to blank instruments;

Certify the authenticity of public, register or court records, or issue certified copies of such documents

Take an affidavit or acknowledgment unless the person who signed the instrument is actually in their presence,

Falsely execute certificates such as predating or postdating the document; or

Delegate their notarial authority to another.

LA 42.2.4 *MILITARY POWERS OF ATTORNEY*

A. **General**. 10 U.S.C. § 1044(b) states that a military power of attorney (POA) is any general or special power of attorney that is notarized in accordance with section 1044a of this title or other applicable State or Federal law. Section 574 of the Defense Authorization Act added this provision in order to enhance the acceptability of general and special powers of attorney prepared by a legal assistance attorney or a legal officer on behalf of military personnel or dependents. These powers of attorney are exempt from the formality, substance or recording under the laws of the state wherein the document was prepared and are to be given the same legal effect as powers of attorney prepared and executed in accordance with applicable state law. The Judge Advocate General has promulgated standard power of attorney forms which should be used when creating POAs. These forms are available on Navy Knowledge Online and on the Naval Justice School's Legal Officer/Senior Officer Course CD.

B. **Preamble**. The following preamble should be inserted at the beginning of each power of attorney in CAPITAL letters:

THIS IS A MILITARY POWER OF ATTORNEY PREPARED PURSUANT TO TITLE 10, UNITED STATES CODE, SECTION 1044B AND EXECUTED BY A PERSON AUTHORIZED TO RECEIVE LEGAL ASSISTANCE FROM THE MILITARY SERVICES. FEDERAL LAW EXEMPTS THIS POWER OF ATTORNEY FROM ANY REQUIREMENT OF FORM, SUBSTANCE, FORMALITY OR RECORDING THAT IS PRESCRIBED FOR POWERS OF ATTORNEY UNDER THE LAWS OF A STATE, THE DISTRICT OF COLUMBIA, OR A TERRITORY, COMMONWEALTH, OR POSSESSION OF THE UNITED STATES. FEDERAL LAW SPECIFIES THAT THIS POWER OF ATTORNEY SHALL BE GIVEN THE SAME LEGAL EFFECT AS A POWER OF ATTORNEY PREPARED AND EXECUTED IN ACCORDANCE WITH THE LAWS OF THE JURISDICTION WHERE IT IS PRESENTED.

LA 42.3 *PREDEPLOYMENT LEGAL READINESS*

LA 42.3.1. *OVERVIEW.*

Poor legal readiness can significantly impair the member's ability to focus on mission accomplishment. Unfortunately, members often fail to address their legal problems in a timely fashion, creating larger legal problems for themselves and their families. Members should be encouraged and provided an opportunity to have their individual legal readiness assessed by a legal assistance attorney at least annually and well in advance of deployment.

LA 42.3.2. *REFERENCES*

DoD Dir 1350.4 (Legal Assistance Matters)
OPNAVINST 5801.1A (Legal Checkup Program)
15 U.S. Code 1681 *et seq* (Fair Credit Reporting Act)

LA 42.3.3. *LEGAL READINESS ISSUES.*

At a minimum the following legal readiness issues should be addressed:

• **Powers of Attorney**: Allows an agent to act on the member's behalf. Special POAs authorize the agent to act in a narrow capacity (registering a vehicle, filing taxes, accepting or turning over government housing, etc.) while general POAs authorize the agent to act on the member's behalf in virtually any capacity. Due to the potential for abuse of a general POA, members are encouraged to carefully consider whether a general POA is necessary and whether they can fully trust their agent.

• **Last Will and Testament**: Ensures that the member's wishes are carried out upon the member's death. Members should have a current and up to date will and family members should know where to locate the will. Members should update their wills every time they PCS or experience a significant change in financial or dependency status.

• **Living Wills and Health Care Powers of Attorney**: A Living Will (also known as an Advance Medical Directive) is a document that expresses the member's desires regarding the withdrawal of artificial life sustaining measures when the member is terminally ill or in a persistently vegetative state. A Health Care Power of Attorney is a document in which the member designates a person or persons to make health care decisions for the member in the event that the member becomes incapacitated.

• **SGLI Designations**: Members should ensure that their SGLI designation forms are up to date. SGLI distributions are controlled exclusively by the SGLI designation form. Also, members wishing to designate children under 18 as beneficiaries should seek the assistance of a legal avoid significant delay and expense when it comes time for distribution.

• **Page 2 (record of dependency data):** An out of date Page 2 can cause problems and confusion in contacting dependents and can result in dependents being denied military benefits.

• **Family Matters**: Family care plans, and issues regarding divorce, support, custody, visitation and military ID cards should all be resolved or addressed prior to deployment. Poor planning in this regard can result in significant impairment of member readiness.

• **Pending Court Cases**: Members should take action to address or postpone pending court actions prior to deployment. Failing to appear may result in a default judgment against the member (in civil cases) or the issuing of a bench warrant (in criminal cases).

• **Preventing Identity Theft – Active Duty Alerts and Free Credit Reports**: Deployed and TAD members are highly susceptible to identity theft. To minimize the potential for
identity theft, members should consider filing an Active Duty Alert with one of the three consumer reporting agencies (CRAs), Trans Union (1-800-680-7289), Equifax (1-888-766-0008), or Experian (1-888-397-3742). Once an Active Duty Alert is placed on a member's credit report, potential creditors are required to contact the member at a phone number provided by the member or otherwise positively identify the member before extending new credit, issuing additional cards on existing credit accounts, or extending credit limits on existing accounts. Filing an Active Duty Alert also takes the member's name off of prescreening lists provided by CRAs to creditors and insurance companies seeking to solicit new business. Members may file an Active Duty Alert on the credit report by contacting one of the three CRAs, which must then notify the other two CRAs of the alert. Members should also be encouraged to regularly monitor their credit report by taking advantage of their right to receive a free annual credit report from the major CRAs. Visit www.annualcreditreport.com (a website sponsored by the major three CRAs) for more information.

LA 42.3.4. *ASSISTANCE.*

Legal readiness assistance is available at all Naval Legal Service Offices and Marine Law Centers and may also be available at other legal offices and from Naval and Marine Corps Reserve personnel and units. Many legal offices will send attorneys to commands to conduct will and power of attorney visits, provide predeployment briefs, and conduct legal readiness assessments.

LA 42.4. *SERVICEMEMBERS CIVIL RELIEF ACT (SCRA)*

REFERENCES

50 U.S.C. app. §§ 501-596 (2004)

LA 42.4.1. *BACKGROUND.*

It has long been recognized that a person's entry into the armed services carries with it a potentially burdensome disruption to his/her personal affairs. Service in the armed forces means accepting orders to states other than the member's domicile and, potentially, deploying for several months to geographically isolated regions. Additionally, reservists who are recalled to active duty frequently experience a substantial reduction in income. Without the courts' and Congress's continued support of the Servicemembers Civil Relief Act (formerly known as the Soldiers' and Sailors' Civil Relief Act), servicemembers could be subjected to civil judgments without representation in court and multiple taxation of income and property. Most service members can, if given time and opportunity, attend to their affairs and meet their obligations. The SCRA is an invaluable tool, when understood and used appropriately, to provide service members some relief for these potentially destructive burdens. During the Civil War period, many states enacted "stay" laws that imposed an absolute moratorium on enforcement of legal rights against service members. However, experience soon taught that such arbitrary and rigid prohibitions of suits against service members had a negative effect resulting in service members and military families being denied credit when it was most needed.

The first nationwide legislation designed to protect the service member, the Soldiers' and Sailors' Civil Relief Act of 1918, rejected the absolute prohibition approach of the early states' "stay" laws. The 1918 Act provided protection by ***suspending legal proceedings and transactions which might prejudice the "civil rights"*** of a service member during his military service when, and if, the opportunity and capacity to perform personal obligations were materially impaired by reason of his military service. The Soldiers' and Sailors' Civil Relief Act of 1918 expired six months after the conclusion of World War I. The general approach of suspending proceedings and transactions which are materially impaired by military service was carried forward into the Soldiers' and Sailors' Civil Relief Act of 1940. This act was largely a reenactment of the Soldiers' and Sailors' Civil Relief Act of 1918. Additionally, criminal penalties were added for actions evading or frustrating the relief provisions of the SSCRA. The focus on the 1940 act was relief for those drafted or "called to arms" during World War II. The SSCRA did not consider the "all volunteer force" of today. The SSCRA was amended March 18, 1991, in Pub. L. No. 102-12, §1, 105 Stat. 34 (1991), following the troop buildup for Operation Desert. These amendments addressed the problems encountered by recalled Reservists and National Guard personnel.

Despite guidance from the U.S. Supreme Court that "[t]he Soldiers' and Sailors' Civil Relief Act is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation," the language of a number of SSCRA sections was exploited by businesses, individuals, and states, frustrating the original intent of the act. On December 19, 2003, the President signed into law the Servicemembers Civil Relief Act (SCRA), which addressed most of the interpretations that disadvantaged servicemembers. Although the new Act still has some weaknesses, it closed many of the loopholes of the previous acts and clarified language that had become the subject of significant litigation and debate. The basic organization and outline of the Act has been maintained, although the "Articles" of the SSCRA are now referred to as "Titles" in the SCRA.

LA 42.4.2. *TITLE I: GENERAL PROVISIONS*

A. **Purpose of the Act**. The SCRA is intended to enable persons on active duty and activated reservists to devote their attention exclusively to the defense needs of the nation by providing for the ***temporary*** suspension of **civil** proceedings and transactions that might prejudice the civil rights of such persons. The SCRA ***does not extinguish any liabilities or obligations***, but merely suspends action and enforcement until such time as the ability of the servicemember to answer or comply is no longer materially impaired by reason of military service.

B. **Persons entitled to benefits and protections of the Act**:

1. **Persons in the military service defined**. Members of every branch of the U.S. military, whether officer or enlisted, volunteer or inductee (from the date of receipt of the induction order), who are on active duty or who are in training under the supervision of the United States just prior to induction are entitled to the protections and benefits of the SCRA. The Act does ***not*** provide protections to retired personnel not on active duty or reserve personnel not on active duty. Also, caselaw suggests that servicemembers can lose protections under the Act if they are in an unauthorized absence status, a deserter, in civilian confinement, or serving a court-martial sentence. Service members declared "missing in action" are also afforded certain safeguards under the SCRA.

A "person in military service" includes any member of a reserve component of the Armed Forces who is ordered to report for military service (i.e., called up for active service). Reservists can therefore invoke the protections of Titles I, II, and III of the Act from the date they receive the order to report to the actual date they report. Once they are on active duty they enjoy the full protections of the Act. This does not include reserve component members performing annual duty for training (ADT) or individual training (IT).

National Guard personnel are covered only if ordered to active duty under Title 10 of the U.S. Code, or called up by the President or Secretary of Defense for more than 30 days to respond to a national emergency. Duty ordered by the state will not trigger SCRA protection. However, some states, such as Louisiana and Pennsylvania, have created a statute similar to the SCRA to cover state service.

Public Health Service (PHS) and National Oceanic and Atmospheric Administration officers qualify for SCRA protections if they have been detailed by proper authority for duty with either the Army or the Navy, or if they are serving with an Armed Force during war or a national emergency.

Merchant seamen, civilian employees, contract surgeons, and employees of government contractors have been held **not** to be "persons in the military service" and hence **not** entitled to the benefits of the SCRA. The Act thus excludes, for example, civilians performing duties on a combatant ship.

2. **Persons secondarily liable**. The enforcement of any liability or obligation against any person primarily or secondarily liable with a service member may be subject to the same delays and vacations available to the service member. Courts enjoy considerable discretion in granting stays, postponements, or suspensions of suits or proceedings to sureties, guarantors, endorsers, co-makers, and others depending upon the contractual relationship between the servicemember and the civilian co-party. The SCRA further provides that whenever the military service of a principal on a criminal bail bond prevents the sureties from enforcing the servicemember's attendance, the court shall not enforce the provisions of the bond during the principal's military service and may even, either during or after said service, discharge the sureties and exonerate the bail. However, in the situation of a civilian who is a co-defendant, the SCRA provides that the plaintiff may proceed against the civilian co-defendant with the approval of the court.

3. **Dependents of service members**. Dependents of military personnel may apply to a court for protection under the SCRA in certain limited areas: eviction, installment contracts, mortgages, liens, assignments, and leases of premises and motor vehicles etc., i.e., all the protections of Title III of the Act. Dependents may invoke the protections in their own right by showing that their own ability to comply with the financial obligations covered in Title III has been materially affected by reason of the servicemember's service. Dependents are also expressly granted the right, on behalf of the servicemember, to invoke the Act's protections against self-help eviction and distress actions if they can show the servicemember's ability to pay rent has been materially affected by reason of the member's military service. The term "dependent" includes the member's spouse, child, and an individual dependent on the servicemember for more than 50% of their support for at least 180 days immediately preceding the application for relief.

4. **U.S. citizens serving with allied forces**. Persons serving with an allied force who are U.S. citizens are entitled to the benefits and protections of the SCRA unless dishonorably discharged from the allied force.

C. **Scope and Operation**. The Act applies to civil proceedings within all states and territories subject to U.S. jurisdiction in all civil courts—federal, state, and municipal. One of the most significant changes from the SSCRA, is that the new SCRA also applies to all <u>administrative proceedings</u> as well. This is a crucial change, particularly in the area of family law, as welfare reforms allow paternity, child support, and other related domestic

matters to be settled during administrative hearings. The SCRA does not apply to criminal proceedings.

D. **What is "material effect"?** "Material effect" is a concept that is crucial to many of the provisions of the act. There are two main categories of "material effect" under the Act: one has to do with the inability to appear in proceedings due to military service, the other with the inability to meet financial obligations. The servicemember has to show their ability to appear in the case (or comply with the financial obligations) has been materially affected by reason of their military service; i.e., the military service is the proximate cause of the deficiency. There are no bright line standards to as to what constitutes "material effect."

1. **Ability to appear.** As you will read later in this chapter, when requesting a stay of a civil proceeding or the vacation of a default judgment, the servicemember will need to show the court or agency that her military service materially affects (or affected) her ability to appear in the action. A stay is not mandated just because the person is in military service. Examples of situations that might materially affect a servicemember's ability to appear include deployments, important field exercises, or other military exigencies that legitimately would prevent the servicemember's appearance in court (or at an agency hearing) and where leave is not an option.

It is probably easier to make this case when the geographical disadvantage is of short duration. By contrast, someone who is given orders to another state or overseas for several years may not be recognized by the court as someone who is materially affected by their service, at least not for the entire duration of the tour. Normally, a servicemember should be able to take leave to attend to their civil affairs.

2. **Ability to meet financial obligations.** The Act also recognizes the potential financial constraints that result from a decreased standard of living and income compared to what the servicemember experienced prior to military service. Thus, the Act provides certain protections described later in this chapter such as a 6% interest cap on pre-service obligations; prohibitions against evictions, foreclosures, and repossessions without an order from a court; and the ability of a court to adjust certain obligations to preserve the interests of all parties. To either invoke or maintain these protections, the servicemember may be called upon to demonstrate that his or her military service materially affects his or her ability to keep up with the financial obligation.

3. **Good faith/due diligence.** Material effect is also judged by the servicemember's exercise of "good faith" and "due diligence." In a case where a servicemember has sat on their rights too long or abused the Act in order to obstruct or prevent otherwise valid proceedings, a court may find that the servicemember is not entitled to invoke the protections of the SCRA. These cases also illustrate the need to allege clearly and specifically the facts that constitute the impediment to appearing in the action.

E. **Waiver.** A servicemember can waive his or her rights under the SCRA by signing a written waiver. For the waiver to be effective it has to be executed during or after the person's military service and "specify the legal instrument to which the waiver applies." Pre-service waivers are not enforceable. Unfortunately, the Act does not specify how conspicuous the waiver has to be on the document(s). Civilians who are secondarily liable on an instrument executed by the servicemember can also waive their protections. The waiver has to be in writing and is only effective if it is contained in a document separate from the document giving rise to the liability.

F. **Legal Representatives**. The SCRA added a new provision to the Act relating to legal representatives of the servicemember. A legal representative is defined as an attorney acting on the servicemember's behalf or an individual possessing a power of attorney. For the purposes of the SCRA, the legal representative can exercise the rights provided under the Act on behalf of the servicemember.

G. **Future Financial Transactions**. Retaliatory action against those who invoke the SCRA is prohibited. An application under the provisions of the SCRA for a stay, postponement, or suspension of any tax, fine, penalty, insurance premium, or other civil obligation or liability cannot be the basis for lenders to determine that the servicemember is unable to pay an obligation or liability. With respect to a credit transaction between servicemembers and creditors, creditors cannot deny or revoke credit, change the terms of an existing credit arrangement, refuse to grant credit in the terms requested, submit adverse credit reports to credit reporting agencies, or, if an insurer, refuse to insure a servicemember based on the servicemember's past invocation of the SCRA. This section does not prevent an institution from reporting a legitimate failure to comply with the underlying obligation.

LA 42.4.3. *TITLE II: GENERAL RELIEF*

A. **Stay of proceedings**. Another major change from the previous statute is the general stay provision of the SCRA. Under the SSCRA, once the requirements of the Act were met, the decision to grant a stay was discretionary. Consequently, the decision was driven by the procedures of individual courts and beliefs of individual judges. By contrast, once the requirements of Section 522 of the SCRA are met (discussed below), the judge or agency hearing officer must grant a minimum 90-day stay. Any stay beyond 90 days remains within the discretion of the judge. Note that there is discretion in terms of the court's judgment as to what constitutes "material effect." In other parts of the Act, there are some section-specific stay provisions. The purpose of these stays is to help the servicemember exercise his or her civil rights, not to provide immunity from lawsuits, or shield servicemembers from civil action. The Act will never relieve a member of the obligation to pay his or her just debts.

1. **General stay provision.**

a. **Requesting the stay.** In a case where the servicemember is the defendant and has received notice of the action or proceeding, he or she may request a stay by forwarding a letter or other communication setting forth facts stating the manner in which current military duty requirements affect his or her ability to appear, and stating a date when the servicemember will be available to appear. In addition, the servicemember should forward a letter or other communication from his or her commanding officer stating that the servicemember's current military duty prevents appearance and that military leave is not authorized for the servicemember as that time of the letter. The request should provide details understandable by a civilian explaining why the servicemember's ability to appear and defend in the action is materially affected by his or her military service (e.g., leave denied and why, military duties prevent returning, overseas duty with significant expenses to return to CONUS). The duration of the requested stay should be reasonable in length, particularly if it is beyond 90 days.

b. **Duration of the stay.** The length of stay is a minimum of 90 days. However, the servicemember can request a longer stay or additional stays either in the initial request or later in the proceeding. If the servicemember demonstrates "material effect" the 90-day stay must be granted, anything beyond that is discretionary. The court must appoint counsel to represent the servicemember if the court denies a request for an additional stay. The maximum available stay period under any of the stay provisions of the Act is for the entire period of military service plus 90 days. The actual duration of stays allowed, when less than this permissible maximum, may depend upon the equities of each case. In most cases the stay granted may be only until such time as the servicemember is unhampered by military duties (e.g., conclusion of a deployment or return from field exercises).

c. **Applicability to other stay provisions in the Act.** The general stay provision is not applicable to eviction and distress actions covered by Section 531 of the Act, nor to default actions under Section 521. Although the language of the Act would seem to indicate the stays under some of the other sections of the Act are discretionary, the legal assistance attorney should argue that the plain language of Section 522 makes the mandatory 90-day stay applicable to every stay provision except the two exceptions just discussed. The confusing language in some of the sections listed may be due to a drafting error and is one of the issues being reexamined for the next SCRA amendment.

1. In actions on certain types of obligations (installment contracts, mortgages, trust deeds, and other secured obligations) the grant of a stay is also dependent upon a finding that the servicemember's ability to comply with the terms of the transaction or obligation is materially affected by reason of military service. These provisions are in all in Title III.

2. The execution of judgments or orders against a servicemember may be stayed, and attachments or garnishments against property, money, or debts may be vacated or stayed at the discretion of the court depending upon the judge's opinion as to whether the servicemember's ability to comply with the judgment or order is materially affected by reason of military service.

B. **Default Judgments.** Section 521 of the Act applies to cases where the defendant servicemember makes no appearance in the case. In any action where there is a default by the servicemember, "the court, before entering judgment for the plaintiff, shall require the plaintiff to file with the court an affidavit . . ." stating whether the defendant is in military service, including the factual basis for that belief. If the plaintiff is unable to determine the defendant's status, they must state so in the affidavit. "Appearance" includes special as well as general

appearances. Filing a false affidavit subjects the affiant to misdemeanor prosecution with a maximum punishment of one-year imprisonment, a fine, or both.

1. **Court-appointed counsel.** If the affidavit states the defendant is a military member or that the plaintiff is unable to determine whether or not the defendant is in the military, the court must appoint an attorney to protect the rights of the absent servicemember. The court cannot enter a judgment without doing so. The appointed attorney cannot waive any of the servicemember's rights nor bind the member through the attorney's actions. The attorney is, in effect, appointed to locate and notify the servicemember of the action. This section protects servicemembers from default judgments being entered against them without their knowledge.

2. **Mandatory stay.** Upon a counsel's request or the court's own motion, the judge or hearing officer shall grant a minimum 90-day stay if the court determines either that there may be a defense to the action which cannot be presented without the defendant, or counsel has been unable to locate the servicemember or otherwise determine if a meritorious defense exists.

3. **Reopening judgments.** If a court/agency enters a default judgment, a servicemember must move to reopen that judgment while on active duty or within 90 days after leaving military service. The procedures for opening/vacating a judgment will obviously vary depending on the civil procedure rules of each jurisdiction or agency. Judgments will only be reopened if the servicemember has made no appearance in the case and demonstrates that his military service materially affected the servicemember's ability to make a defense to the action and there is a meritorious defense to part or all of the underlying action. If the servicemember does receive notice then the appropriate course of action would be to inform the plaintiff's attorney that the defendant is a military member and request a stay. Notification forces the plaintiff's attorney to inform the court that the defendant is a military member and request either a court-appointed attorney to represent the defendant or a stay of the proceedings.

4. **Bona fide purchaser.** If the court vacates a default judgment, the right or title acquired by a bona fide purchaser of property that is the subject of the judgment will not be affected.

C. **Statute of Limitations**. Section 526 of the SCRA tolls the statute of limitations while a servicemember is in active military service, whether they are the plaintiff or the defendant. Time spent in active military service shall not be used in computing any period of limitations prescribed for the bringing of any action or proceeding in any court or agency, by or against a servicemember or his heirs, whether the action occurred prior to or during military service. This may be a double-edged sword, as the tolling effect is applicable whether the servicemember is a plaintiff or a defendant. An exception is carved out in the SCRA for the IRS. The Act will not toll IRS statutes of limitation. However, a deferral can be requested under Section 570 of the Act. When tolling the statute of limitations, there is no requirement to demonstrate "material effect."

D. **Maximum Rate of Interest Protection.**

1. **Pre-service obligations.** Individuals entering active duty are entitled to invoke the 6% maximum interest rate per year for debts and obligations incurred prior to military service on individual debts and debts incurred jointly with their spouse. This protection applies to interest on mortgages, car loans, credit cards, etc. It does not apply to federal Guaranteed Student Loans. The 6% cap lasts throughout the period of military service, but only applies to the portion of the debt incurred pre-service.

2. **Making the request.** To get the reduction in interest, the servicemember is required to provide written notice to the creditor with a copy of their orders. In cases where the reduction is not being requested right after entry on active duty, there may not be "orders" *per se*. For example, if a six-month ship deployment will result in significant additional expenses in addition to those of the household back home, the servicemember may want to request the reduction. As there will be no deployment orders for ship's company, a letter from the commanding officer would probably suffice.

3. **Period of protection.** The statute provides that once the creditor receives the written notice, the cap is effective as of the date on which the member was called to military service, i.e., there will be many cases where cap needs to be credited retroactively. Under the SCRA, creditors cannot defer interest over 6% until the member leaves the military. They cannot accelerate payment of the principal if this protection is invoked. Anything over the 6% cap must be forgiven, these amounts cannot be deferred.

4. **Material effect.** The protection under Section 527 of the SCRA ends if the creditor convinces a court that the servicemember's ability to pay has not been materially affected by military service. Reserve component call-ups, such as happened in Operation Desert Shield and Desert Storm and is happening now, would appear to be good cases for requesting the interest rate cap assuming the entry onto active duty is negatively affecting the reservist's finances. A servicemember must exhaust all financial resources before "ability" to pay will be considered to have been materially affected by military service.

5. **Violators.** Creditors who resist granting the interest rate cap should be reported to the member's service legal assistance division. Additionally, the local area Armed Forces Disciplinary Control Board has authority to place the business off-limits to military personnel. The Department of Justice is authorized to represent individuals when such representation is in the interests of the United States.

LA 42.4.4. *SPECIFIC TRANSACTIONS AND OBLIGATIONS*

A. **Generally**. Articles III through V of the Act contain extensive provisions conferring certain benefits, protections, and status for enumerated specific transactions and both private and governmental obligations.

B. **Lease Termination and Rental Eviction (Title III).** There is now a statutory military clause applicable to the leases of premises and motor vehicles. Material effect is not required. Although the lessor is not permitted to charge early termination fees under the Act, the lessor may still recover past due payments, monies for damage caused to the property by the member, and certain other legitimate charges already owed.

1. **Lease termination – real property.** The servicemember can terminate leases on premises rented for a residential, professional, business, or agricultural purpose (provided the premises leased had been occupied or intended to be occupied by the servicemember or his or her dependents) if one of the following conditions are met:

The lease was entered pre-service;

The member receives PCS orders; or

The member receives orders to deploy for 90 days or more.

Written notice must be provided to the landlord, along with a copy of the servicemember's orders. As there will be no paper orders for a ship's six-month deployment or certain other types of deployments, a letter from the commanding officer would probably suffice in place of "orders." For premises on which rent is paid on a monthly basis, once the written notice is delivered, the lease terminates 30 days after the first date on which the next rent payment is due (e.g., notice given 10 August, next payment due 1 September, lease terminates 1 October — 30 days after 1 September). All other premise leases terminate on the last day of the month following the month in which notice is given. The servicemember should be returned any security deposit to which he or she is entitled and a prorated refund of any advanced rent within 30 days of the effective termination of the lease.

2. **Lease termination – motor vehicles.** The lease of a motor vehicle by a servicemember, used by the member and/or his or her dependents for personal or business transportation may be terminated (aside from the contract terms) if:

The lease was entered pre-service and the person receives orders to military service for not less than 180 days;

The member receives PCS orders outside the Continental United States (OCONUS); or

Receives deployment orders for not less than 180 days.

The motor vehicle must be returned within 15 days of delivery of the written notice. A motor vehicle lease is terminated once both the written notice and the car are returned to the lessor.

3. **Prohibition against eviction or distress without court order.** A servicemember and his dependents may not be evicted, without a court order, from premises used primarily as their residence for which the rent does not exceed $2400 per month (in 2003). The Act provides a formula tied to the Consumer Price Index to calculate the rent ceiling for subsequent years. Section 531 essentially prohibits the use of self-help eviction and

distress actions, even in states where nonjudicial evictions are otherwise legal. The general stay provision of Section 522 is not applicable to this section. Instead, the court or agency may stay the proceeding upon request of the servicemember or dependent whose ability to pay rent is materially affected by the member's service. The judge can stay the proceeding for 90 days, unless the judge feels "justice and equity" require either a longer or shorter stay. The judge is also given the authority to adjust the obligations under the lease "to preserve the interests of all parties." If a stay is granted the judge may grant the landlord appropriate relief. Section 535 allows provides for the possibility of an involuntary allotment of military pay upon court order.

C. **Mortgage Foreclosure Protection (Title III).** The SCRA protects servicemembers and dependents against foreclosures of mortgages, trust deeds, or any similar security, if the following four conditions are met.

The relief is sought on financial obligations secured by real or personal property;

The obligation of the servicemember or dependent originated before active duty;

The property is still owned by the servicemember or dependents; and

The member's/dependent's ability to make the loan payment is "materially affected" by the member's military service.

In foreclosure actions where the servicemember's ability to pay is "materially affected," the court shall either stay the foreclosure proceedings or order other equitable relief (i.e., extension of the loan maturity date, decreased payments).

D. **Installment Contracts (Title III).** Section 532 protects servicemembers and dependents from creditors repossessing property, rescinding contracts, or imposing penalties absent a court order if the contract is for the purchase of real or personal property and the following two conditions are met.

The installment contract, lease, or bailment of the property originated prior to active duty; and

The servicemember made a deposit or installment payment prior to service.

Under Section 532, courts have the authority to order repayment to the member of installments already paid as a condition of terminating the contract, or to make other equitable dispositions. On the court's own motion, or upon request of the servicemember (or dependent), the court shall grant a stay in the action if the ability to comply with the contract was materially affected by the member's service.

E. **Settlement of Stayed Cases Relating to Personal Property (Title III)**. If it would not cause undue hardship to the servicemember's dependents, the court may order the foreclosure, repossession, or contract termination to go forward if the servicemember (or dependents) is paid the equity in the personal property.

F. **Other Title III Provisions.** The other provisions of Title III relate to the enforcement of storage liens and assignment of life insurance. As referenced earlier, dependents are provided protections pursuant to Section 538 of the Act.

G. **Life Insurance (Title IV)**. Servicemembers may have certain types of commercial life insurance contracts guaranteed by the Department of Veteran's Affairs (DVA). There is no need to demonstrate that the member's ability to pay is materially affected by service. A servicemember may apply to DVA for a government guarantee of premium and interest payments on life insurance policies for a total not to exceed $250,000 or the current SGLI maximum, whichever is greater, in order to prevent lapse or forfeiture. The limit applies to all polices added together, vice each individual policy.

This protection covers the duration of the servicemember's military service and two years beyond termination of that military service. During the effective period of the protection, unpaid premiums are treated as policy loans. If, at the expiration of the time allowed, the unpaid amount of the policy exceeds the cash surrender value of the policy, then the policy lapses and the government pays the difference to the insurer, collecting in turn from the insured.

H. **Taxes (Title V)**. Military income and personal property owned in the servicemember's name alone can only be taxed by the member's state of domicile. For the purpose of property taxation, personal property will not be deemed to be located, or have a situs for taxation, in the tax jurisdiction in which the servicemember is serving pursuant to military orders. Property located or used within the member's domicile may be taxed by the domiciliary state. A request for a deferral of federal income taxes may be submitted to the IRS if the member's ability to pay such tax is "materially affected" by such service. Additionally, the sale of certain real and personal property owned by the servicemember for the purpose of enforcing the collection of unpaid taxes or assessments is limited by Section 561. Section 561 also creates a right of redemption.

1. **Non-military income.** The above protections do not apply to nonmilitary income earned in the nondomiciliary state. For example, if the servicemember earned extra money by working at a restaurant or selling homemade crafts, that income is subject to taxation by jurisdictions with an appropriate nexus to the income. In addition, personal property used in the business is also not exempt. If the servicemember uses their personal vehicle to drive clients around as part of a side real estate business, they may be subjecting that vehicle to property tax outside of their state of domicile. The protections also do not apply to the income and personal property of family members. Consequently, it may be wise to transfer title of the family's vehicles to the servicemember's name alone.

2. **Kansas Rule abolished.** Under the old SSCRA, several states used the servicemember's military income to increase the tax liability of the nonmilitary spouse. Even though this increased the couple's tax burden and essentially taxed the military income through a back door, the appellate court held it did not violate SSCRA protection. Several other states followed suit. With the passage of the SCRA, that loophole is now closed and the original intent of the protection is effectuated. States are now prohibited from determining the spouse's tax bracket by adding the member's military income to the spouse's income. The same rule applies when the state wants to tax the nonmilitary income earned by the servicemember in the state. The state can only look at the nonmilitary income when determining the member's tax bracket (in addition to the income of the nonmilitary spouse, if any).

I. **Professional Liability Protections (Title VII).** Doctors and other professionals with liability insurance who are ordered to active duty may make a written request to their insurance carriers to suspend insurance coverage during the period of their service. During the suspension period, no premiums will be charged, refunds will be made for prepayments, and members will have 30 days after the completion of active duty to reinstate the policy. The insurance carrier must reinstate the policy and the premiums may not be increased, except on the same terms as applied to nonmilitary insureds. Additionally, malpractice actions arguably covered by the policy are stayed during the period of suspension. The period of suspended insurance coverage is also excluded from statute of limitations calculations for malpractice actions.

J. **Health Insurance (Title VII).** Section 594 protects health insurance in a manner similar to professional liability insurance discussed above. In short, a servicemember's health insurance which (1) was in effect on the day before such service commenced and (2) was terminated effective on a date during the period of such service must be reinstated under the original terms and conditions. An exclusion or a waiting period may not be imposed unless certain exceptions apply. The application for reinstatement must be made no later than 120 days after release from military service.

LA 42.5. *INDEBTEDNESS AND CONSUMER PROTECTION*

LA 42.5.1. *GENERAL*.

In this age of expanded credit opportunities, the servicemember's regular and relatively secure source of increasing income has made him attractive to installment retailers, loan companies, and other consumer credit operations. Unfortunately, the ease with which credit is made available sometimes results in the tendency to overextend and, in some cases, the inability to pay. In cases of default, disappointed creditors frequently correspond with the commanding officer of the member concerned in hopes that official pressure will be exerted to make the debts good.

LA 42.5.2. *POLICY*

A. **References**.

DoD Directive 1344.9 (Indebtedness of Military Personnel)
DoD Instruction 1344.12 (Indebtedness Processing Procedures for Military Personnel)
MILPERSMAN 7000-020
LEGADMINMAN Chapter 16

B. From inception to final settlement, a monetary obligation is regarded as a private matter between the servicemember and his creditor. A member is expected to settle just financial obligations in a proper and timely manner.

C. The failure to pay just debts, or the repeated undertaking of obligations beyond one's ability to pay, is regarded as evidence of irresponsibility which will be considered in retaining security clearances, making advancements in rate or special duty assignments, recommending reenlistments, or authorizing extensions. In aggravated circumstances, indebtedness problems are grounds for disciplinary action or administrative separation. Accordingly, although the service has no authority to require a member to pay any private debt or to divert any portion of his salary in payment thereof, and no commanding officer may adjudicate claims or arbitrate controversies respecting alleged financial defaults, all commanding officers should cooperate with creditors to the limited extent of referring "qualified correspondence" to the member concerned. Particular situations evidencing continued or consistent financial irresponsibility should be dealt with as outlined above and in section 4310 C.1 of this text.

LA 42.5.3. *THE MILITARY AND CONSUMER CREDIT PROTECTION*

A. **Truth in lending**

1. **General**. The Federal Truth in Lending Act (TILA), Title I, 15 U.S.C. §§ 1601-1677 and 12 C.F.R. Part 226, commonly referred to as "Regulation Z," is designed to assure "a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various terms available to him and avoid the uninformed use of credit." To this end, TILA requires that credit terms and costs be explained to the consumer in a uniform manner by revealing "the annual percentage rate of the total finance charge." The Act is broadly construed in favor of consumers, with creditors who fail to comply with its terms, liable to consumers regardless of the nature of the violation of the creditor's intent.

2. **Coverage**. TILA applies to virtually everyone who extends consumer credit -- including loan credit, credit extended by sellers, real estate credit, chattel credit, retail revolving credit, and bank and other credit card arrangements. It affects those individual purchase transactions undertaken "primarily for personal, family, household or agricultural purposes." It is ***not*** applicable to:

Creditors who extend credit for business purposes;

Student loan programs; or

Credit transactions where the amount financed is over $25,000 (except those involving security interests taken in real or personal property).

3. **Disclosure Requirements**. TILA mandates that the creditor make certain disclosures to the consumer depending on the type of credit extended. Nearly all states have applicable disclosure requirements for consumer transactions. At a minimum, creditors must reveal:

Identity of the creditor;

Amount financed (itemized);

Annual percentage rate;

Finance charge;

Total of payments;

Payment schedule;

Late or prepayment penalties;

Any security interest;

Any demand features; and

The total sales price.

4. **Consumer Remedies**. Creditors can be liable for failure to disclose such credit terms. Consumers may recover actual damages, attorney's fees and court costs, and statutory damages (individual actions: $100-$1000; class actions: 1% of creditor's net worth or $500,000 whichever is less). Willful violation may result in criminal penalties and sanctions against the creditor.

B. **DOD Directive 1344.9**. In outlining service policies regarding indebtedness of military personnel, DoD Dir. 1344.9, Indebtedness of Military Personnel, provides that creditors seeking to have indebtedness complaints administratively referred to the allegedly defaulting servicemember must first demonstrate compliance with the disclosure requirements of the Truth in Lending Act and also show that the military "Standards of Fairness" have been applied to the transactions.

C. **Standards of Fairness**. These "Standards of Fairness," include provisions ensuring that the nature and elements of a credit transaction will be fair, equitable, and ethical. For example:

1. **Usury**. No finance charge contracted for, made, or received under any contract shall be in excess of the charge which could be made for such contract under the law of the state in which the contract is signed. In the event a contract is signed with a U.S. company in a foreign country, the lowest interest rate of the state or states in which the company is chartered or does business shall apply.

2. **Attorney's fee**. No contract or loan agreement shall provide for an attorney's fee in the event of default unless suit is filed, in which event the fee provided in the contract shall not exceed 20 percent (20%) of the obligations found due.

3. **Prepayment**. There shall be no "penalty charge" for prepayment of an installment obligation. Moreover, in the event of prepayment, the creditor may collect only a portion of the potential finance charges prorated to the date of prepayment.

4. **Late payments**. No late charge shall be made in excess of 5 percent (5%) of the late payment, or $5.00, whichever amount is the lesser; and only one late charge may be made for any tardy installment. Late charges will not be levied where an allotment has been timely filed, but payment of the allotment has been delayed.

5. **Assignment to escape defenses**. In loan transactions, defenses which the servicemember may have against the original lender may not be "cut off" through the assignment of the lender's obligation to a third party. As an example, consider the case of Rollo having purchased on credit a television set from Department Store ***M***. If ***M*** sells Rollo's agreement to pay for the television to collection agency ***B***, and the television breaks down, ***B*** may not insist upon the fact that the breakdown is ***M***'s responsibility and therefore has nothing to do with Rollo's obligation to pay ***B***.

D. **Fair Debt Collection Practices Act**.

1. **General**. The Federal Fair Debt Collection Practices Act, 15 U.S.C. § 1692, prohibits contact by a ***debt collector*** with third parties (such as commanding officers) for the purpose of aiding debt collection unless there has been prior consent by the debtor, a court order or judgment has been obtained, or the purpose of the contact is solely to locate the debtor. The Act carefully defines a debt collector as those businesses or individuals engaged in the collection of debts for another as their primary purpose; in other words, the original creditor has given up trying to collect and turned it over to a "professional." The Act does ***not prohibit the original creditor*** from contacting the command, although state law may. The Act also allows the consumer to stop collection efforts with

written notice and prohibits debt collectors from engaging in harassing or misleading collection practices and making late night or early morning calls.

2. **State law**. Like the Federal government, many states have enacted laws covering debt collections. Some state statutes impose stricter provisions than the federal counterpart. If there is a conflict between state debt collection regulations and the Fair Debt Collection Practices Act, the law with the more stringent provisions applies and must be complied with by debt collectors.

3. **Action**. If it is determined that the debt collector is in violation of the Fair Debt Collection Practices Act or a state statute regulating debt collection practices, the letter of indebtedness will be returned to the sender, along with a letter similar to the sample letter No. 1 set forth in MILPERSMAN 7000-020 or fig 7-5, LEGADMINMAN. If a letter is in compliance with the appropriate Federal or state law in this regard, the indebtedness complaint will be processed as set forth in section 4316 below.

E. **Door-to-door sales**. The Federal Trade Commission (FTC) promulgated a rule on home solicitations trade practices rule (16 C.F.R. Part 429) because it believed that door-to-door sales were especially prone to fraud and predatory practices. The rule provides a certain period of time during which the consumer can withdraw from contracts resulting from most door-to-door solicitations.

1. **Definition**. A "door-to-door" sale is a sale, lease, or rental of consumer goods or services with a purchase price of $25 or more in which the seller personally solicits the sale, including those in response to an invitation by the buyer, and the contract is made at a place other than the seller's place of business. Door-to-door sales under this section do **not** include phone transactions; transactions in which the buyer has initiated the contact and the goods or services are needed to meet a bona fide immediate personal emergency of the buyer (and the buyer furnishes the seller with a signed statement so stating); buyer requests seller to conduct repair or maintenance work on the buyer's personal property; sales of automobiles at public auctions and tent sales if the seller has at least one permanent place of business; and sales of arts and crafts at fairs, shopping malls, civic centers, community centers, and schools.

2. **Deceptive trade practices**. The FTC has determined that it is a deceptive trade practice if a door-to-door sales representative fails to:

Furnish a contract informing the buyer of the right to cancel the transaction within ***three*** business days ("business day" includes Saturdays, excludes Sundays and most federal holidays);

Furnish two cancellation forms stating the seller's name and address and the date by which the transaction may be canceled (this can be a copy of the contract as long as it contains the cancellation language). The notice of cancellation must be in ***BOLD print,*** and in the same language used during the sales presentation (i.e. if sale done in Spanish, cancellation rights must be in Spanish);

Inform the buyer orally of the right to cancel or misrepresents the buyer's right to cancel; or

Honor a valid notice of cancellation and refund any payments made within 10 days of the cancellation.

3. **Cancellation**. The buyer must deliver to the seller a signed and dated copy of the notice of cancellation, or use any written form that communicates the intent to rescind the contract within 3 business days of the transaction. After rescission the buyer must make any goods delivered by the seller available to the seller at the buyer's residence in substantially as good condition as when received, or comply with the seller's instructions regarding the return of the goods at the seller's risk and expense. If the buyer fails to make the goods available to the seller, the buyer remains liable for performance of all obligations under the contract. If the seller fails to collect any goods delivered to the buyer within 20 days of the date of the notice cancellation, the buyer may retain or dispose of the goods without any further obligation.

LA 42.5.4. *PROCESSING INDEBTEDNESS COMPLAINTS*

A. **References**.

Fair Debt Collection Practices Act. 15 U.S.C. 1692-1692o
Truth in Lending Act, 15 U.S.C. § 1601-1667
DOD Directive 1344.9 (Indebtedness of Military Personnel)
MILPERSMAN 7000-020
LEGADMINMAN Chapter 16

B. **General**. Members are expected to pay their just financial obligations in a proper and timely manner. A just obligation is one in which there is no dispute as to the facts or law, or one reduced to a judgment which conforms with the Servicemembers Civil Relief Act (SCRA). Complaints of indebtedness are referred to the servicemember in the following cases:

1. Debt collectors (a person or entity regularly engaged in the collection of debts). The written complaint must be accompanied by evidence that the debt complained of has been reduced to judgment or that the debt collector has received consent from the debtor to contact the command; or

2. Creditors (a person or entity that extends credit). The complaint must be accompanied by a "Certificate of Compliance," or its equivalent, certifying that the credit transaction was made in accordance with the Truth in Lending Act (or state law in cases in which TILA does not apply: e.g., where the amount financed is greater than $25,000) and the DoD Standards of Fairness.

Correspondence from a creditor not subject to the Truth in Lending Act (e.g., a public utility company) that includes a certification that no interest, finance charge, or other fee is in excess of that permitted by the law of the state involved; and

3. Non-Creditors (an entity that is not a debt collector or creditor but that is owed money: e.g., a landlord attempting to collect rent or a supermarket seeking payment for a bounced check). No special documentation is required other than proof of the transaction and the failure to pay.

4. Correspondence from creditors declared ***exempt*** from certification of compliance with the Standards of Fairness and Full Disclosure by MILPERSMAN 7000-020 does not apply to Marines). Examples include:

Companies furnishing services such as milk, laundry, etc., in which credit is extended solely to facilitate the service, as distinguished from inducing the purchase of the product or service;

Contracts for the purchase, sale, or rental of real estate;

Claims in which the total unpaid amount does not exceed $50;

Claims for the support of dependents;

Purchase money mortgages on real property; and

Claims based on a revolving or open-end credit account, if the account shows the periodic rate and its annual equivalent and the balance to which it is applied to compute the charge (e.g., credit cards, department store charge accounts).

C. **Statement of Full Disclosure**. A nonjudgment creditor must also submit a statement of "Full Disclosure" showing the terms of the transaction were disclosed to the servicemember at the time the contract was executed. Marine Corps procedure for processing of indebtedness complaints, outlined in paragraph 16003 of the LEGADMINMAN, is essentially the same as that detailed in MILPERSMAN 7000-020. Significant variations will be discussed at the end of this section.

D. **Advising the command on qualified complaints**.

1. **Referral to debtor servicemember.** Normally, referral of a qualified indebtedness complaint to the servicemember is accomplished by a division officer or command legal officer, at which time the allegation of default is discussed with the servicemember. If the servicemember acknowledges the debt and the ability to pay, the member should be counseled to make good the debt as soon as possible. The servicemember should be referred to a legal assistance attorney for advice and assistance in resolving the issue. Such referral is particularly important in the case of a servicemember who disputes the debt or is unable to pay or when the judgment debt was apparently obtained in violation of the SCRA. In all cases, the servicemember should be warned of the potential adverse consequences the continued nonpayment of a just debt may have upon service status. Under no circumstances should the command get involved in negotiating with the complainant. Nor may the command issue an order for the servicemember to pay the debt.

2. **Correspondence with the complainant.** In the case of a complaint referred to a servicemember, the command should notify the complainant in writing that the matter has been referred to the servicemember for resolution. Samples of such "referral" letters are found at MILPERSMAN 7000-020 and LEGADMINMAN Chapter 16.

3. **CO's Duties.** The CO is responsible for reviewing the letter of indebtedness (LOI) and the underlying facts to determine if it is a proper complaint. If the LOI does not comply with the applicable regulations, the CO should return the LOI to the complainant using one of the sample letters in the MILPERSMAN or LEGADMINMAN. If the letter is in proper form and is a proper complaint, the CO must respond to the complainant and ensure the member is advised of the complaint and properly counseled concerning the DoD policy on indebtedness and possible adverse consequences of failing to pay just debts. In cases where the failure to pay the debt is dishonorable (for example, repeated refusal to pay), the CO should consider the full range of administrative and disciplinary options available.

E. **Unqualified or questionably qualified indebtedness complaints**

1. **Initial reply.** If the creditor has no judgment, is subject to the Truth in Lending Act, is not exempt under the service-specific indebtedness regulation, and has not met the compliance-disclosure requirements discussed in paragraph (C) above, the command shall return the letter to the creditor enclosing a copy of the Standards of Fairness and forms for Full Disclosure and the Certificate of Compliance. Samples are provided in MILPERSMAN 7000-020 and LEGADMINMAN Chapter 16. The command should take no further action until the creditor submits a qualified complaint.

2. **Action on reply from complainant.** If the complainant resubmits his complaint and includes the completed, required forms, or their equivalent, the complaint will be considered qualified and processed accordingly. If the resubmitted complaint contains neither form, or a set incompletely or insufficiently accomplished, the command shall return the complainant's correspondence with a cover letter. Samples are provided in MILPERSMAN 7000-020 and LEGADMINMAN Chapter 16.

3. **Questionable qualified indebtedness complaints.** Cases of questionable qualification should be referred to a staff judge advocate or legal officer for review and opinion. In such instances, correspondence to the creditor should be tailored appropriately.

4. **Congressional inquiries.** Occasionally, a disgruntled creditor who has failed to qualify his complaint for referral writes to his Congressman. In the event of a congressional inquiry based on such an event, SECNAVINST 5216.5D (Correspondence Manual) and SECNAVINST 5730.5H (Procedures for Handling Legislative Affairs and Congressional Relations).

F. **Marine Corps variations**.

1. In the Marine Corps, complaints of indebtedness are processed under Chapter 16 of the LEGADMINMAN. The Marine Corps considers qualified correspondence to be that which either certifies compliance with TILA and the Fair Debt Collections Practices Act or certifies compliance with DoD Standards of Fairness (in the case of a creditor not subject to TILA).

2. Marine units receiving qualified correspondence should refer the correspondence to the Marine. The Marine should be counseled concerning his/her obligations and rights. If appropriate, referral may also be made to additional financial, legal, or credit counseling on base.

3. *Special procedures for detached Marines*. In cases where a commander receives an indebtedness complaint regarding a Marine no longer a member of the command, the letter is forwarded to the new command and the debtor's new duty station address is sent to the creditor (if available from local records).

LA 42.5.5. *ADMINISTRATIVE OR DISCIPLINARY ACTION BECAUSE OF INDEBTEDNESS*

A. **General**. Actions discussed by this section are usually reserved for aggravated cases of servicemembers who persist in demonstrating no inclination to settle qualified obligations that have been referred to them through their commands. Such cases involve members who continually overextend themselves despite prior difficulties from, and warnings regarding, living beyond their means. Normal indications of these problems are repeated complaints from the same creditor or multiple complaints from different sources.

B. **Administrative separations**. MILPERSMAN, 1910-140; MARCORSEPMAN, para. 6210.3. Servicemembers may be separated for misconduct due to a pattern of misconduct when they exhibit an established pattern of dishonorable failure to pay just debts. Processing for misconduct could result in an other than honorable separation with attendant loss of service benefits. In each case, the member concerned must have received prior counseling and been afforded a reasonable opportunity to overcome his deficiencies. Following such counseling, an appropriate warning entry should be made on page 11 (USMC) / page 13 (USN) of the member's service record.

C. **Disciplinary action**. Article 134, UCMJ, includes the offense of "dishonorable failure to pay a just debt," which carries a maximum punishment of six months' confinement, forfeiture of all pay, and a bad-conduct discharge. Deceit, willful evasion, false promises, or other circumstances indicating gross indifference must be proved to establish the offense. Nonjudicial punishment or court-martial action may be initiated under article 134 at the discretion of the command. It should be remembered, however, that disciplinary action is never an appropriate vehicle for assisting creditors in the collection of debts. Moreover, disciplinary action not resulting in discharge is likely to produce financial hardship in the form of reduction or forfeiture, an end hardly likely to rehabilitate the debtor. Accordingly, in most cases, administrative actions, rather than disciplinary measures, offer more appropriate solutions to aggravated indebtedness situations.

LA 42.5.6. *INVOLUNTARY ALLOTMENT FOR JUDGMENT CREDITORS*

A. **General**. Effective 1 January 1995 the taxable military pay of personnel became subject to involuntary allotment to satisfy court-ordered judgments in favor of creditors.

B. **Procedure**. The creditor initiates an action in court against a servicemember, successfully receives a judgment, and then seeks to satisfy that judgment by applying for an involuntary allotment of the servicemember's pay. The creditor then completes DD Form 2653 (Involuntary Allotment Application) attaching a certified copy of the final court order. The creditor must certify on the application the following:

The judgment has not been modified or set aside (i.e. still a valid judgment);

The judgment was not issued while the servicemember was on active duty, or if the servicemember was on active duty, the SCRA was followed fully.

The debt has not been discharged in bankruptcy;

The creditor will make prompt notification to DFAS when the judgment is satisfied by involuntary allotment;

The creditor agrees to repay servicemember within 30 days if payment to creditor is erroneous.

C. **Amounts Available for Allotment**. DFAS is authorized only to take 25% of a member's disposable earnings by involuntary allotment, or a lesser amount if the applicable state law provides for a lower amount. Disposable earnings means taxable pay, including basic and special duty assignment pay. Retired and retainer pay, separation pay, and allowances (VHA, BAH, BAS) are not subject to allotment. Family support allotments / garnishments take precedence over any judgment creditor involuntary allotments. If there are several involuntary allotment applications against one servicemember, DFAS will process each application on a first come-first served basis.

D. **DFAS Action**. Once DFAS receives the creditor's application, it is reviewed for completeness and accuracy. DFAS then completes the first part of DD Form 2564, Commander's Notification and Member's Response. A copy of the application, DD Form 2653, is mailed to the affected servicemember. Two more copies of the completed application and one copy of DD Form 2564 are mailed to the servicemember's immediate commanding officer.

E. **Commanding Officer's Actions**. Upon receipt of DD Form 2654 from DFAS, the commanding officer will counsel the servicemember on the process and provide him/her a copy of the application. (The member should now have two copies of the involuntary allotment application, one provided directly from DFAS, and the other by the CO). The CO must inform the member that he/she has 15 days to consent or contest the allotment. The CO may extend this period for another 30 days if warranted. Additionally, the commanding officer must inform the servicemember that the following defenses are available:

SCRA right not complied with during the judicial proceeding;

Exigencies of military duties caused member's absence from the judicial proceeding;

Information contained in the application is false or erroneous in material part;

Judgment has been satisfied, superseded, or set aside;

Judgment has been partially satisfied or materially amended;

There is a legal impediment to establishment of involuntary allotment, e.g. judgment debt discharged in bankruptcy.

The servicemember must submit corroborating evidence supporting a defense if he/she contests the involuntary allotment. Commanding officers should also inform members that they may consult a legal assistance attorney or hire a civilian attorney at their own expense. A commanding officer is authorized to grant a member additional time to consult with a legal assistance attorney before deciding to contest the involuntary allotment.

F. **Military Exigencies**. Commanding officers decide whether a member has established the grounds to contest an involuntary allotment on the basis of ***"exigencies"*** of military duty. If the CO decides the member has an exigency defense, this must be noted on DD Form 2654 and mailed to DFAS. Commanding officers may utilize their own experience, service record entries and any other information they deem relevant to decide by a preponderance of the evidence that:

The member's military duties were of such importance that the member was thereby unavailable to attend judicial proceedings; or

The member's military duties rendered him or her unable to timely respond to process, motions, pleadings or orders of the court.

DFAS is bound by the commanding officer's exigency determination. The creditor, however, may appeal to the General Court-Martial Convening Authority who will be identified on DD FORM 2654.

G. **DFAS Ruling is Final**. Other than the military exigency defense, DFAS's rulings on the other defenses are final. Creditors, at this point, have no other recourse within the Department of Defense to get a DFAS ruling overturned.

LA 42.6. *DOMESTIC RELATIONS*

LA 42.6.1. *NONSUPPORT OR INSUFFICIENT SUPPORT OF DEPENDENTS*.

Nonsupport complaints are among the most common problems handled by the Navy and Marine Corps legal assistance program. The typical case involves an accusation by a servicemember's spouse, made either in person or by letter, that the servicemember has neglected legal and/or moral obligations to the spouse and children. Other instances concern an allegation by the member's former spouse of failure to make child support payments as ordered by the divorce decree. In still other circumstances, the servicemember may require assistance to handle a spendthrift spouse or one who insists that family support payments must be increased. The services recognize that every

servicemember has a moral and legal obligation to support dependents and that failure to provide adequate support brings discredit upon the service. Moreover, persistent support difficulties divert a servicemember's attention from military duties thereby decreasing job performance. Support obligations apply to all members, regardless of gender. The obligations discussed here refer only to those expected of a member by the military, which may not necessarily coincide with a member's moral obligations or the legal obligations which may be imposed by the laws of any particular state.

A. **Policy**. The DoD Policy is that the services will not act as a haven for personnel who disregard or evade obligations to their legal family members. All members are expected to provide adequate and continuous support for their lawful family members. Any failure to do so which brings discredit upon the service may be cause for administrative action which may include separation. Each service has taken this general policy and enacted different regulations concerning how nonsupport issues are to be handled. This section focuses on the Navy and Marine Corps Policies.

B. **References**:

MILPERSMAN 1754-030 (Navy)
LEGADMINMAN, Chapter 15 (Marine Corps)

C. **Obligations**.

1. **Spouse.** The member has a continuing obligation to provide adequate and continuous support to a dependent spouse unless:

A court order relieves the member of the obligation;

The dependent spouse relinquishes the support, preferably in writing;

There is mutual agreement of the parties that no support will be paid (e.g., a separation agreement); or

A ***waiver*** is granted by the Director, Defense Finance and Accounting Service-Cleveland Center (DFAS) Code DG for naval personnel, Commandant of the Marine Corps (MPH-20) for Marines. The grounds for this waiver are discussed later.

2. **Waiver of military obligation to support spouse.**

a. **Grounds.** The servicemember's obligation to support a dependent spouse may be waived, at the request of the servicemember, for desertion without cause, infidelity, or physical abuse by the dependent spouse. The Marine Corps regulation does not recognize desertion or adultery as grounds for a spousal waiver, but does permit members to be excused from their support obligations in cases in which the spouse makes more money than the servicemember, cases involving dual military couples with no dependent children, and in cases in which the servicemember has been providing support for 12 consecutive months in accordance with the guidelines.

b. **Procedure.** To obtain a waiver of the spousal support obligations on the grounds of desertion, adultery, or abuse, the servicemember must submit a written request for waiver and include substantiating evidence such as:

Affidavit of disinterested person based on personal knowledge;

Affidavit of the servicemember or relative based on personal knowledge and supported by corroborating evidence;

Written admissions made by the spouse contained in letters written by him / her to the servicemember or other persons; or

Affidavit of physical abuse corroborated by medical or police reports, eyewitness accounts, counselors, chaplain, or social workers.

c. **Effect.** The support obligation does not terminate until the waiver has been granted. Such a waiver does ***not*** relieve the member of any court-ordered obligation to the spouse. As a general rule, the member must always follow a court order. If the amount of support ordered by the court is excessive, the remedy for the member is to seek modification of the court order; ***not*** a waiver.

3. **Children.** The obligation of a parent to support minor children, whether natural or adopted can never be waived by the military finance offices. Child support is unaffected by desertion or other misconduct on the part of the spouse. In the event of divorce, the support obligation continues unless the court decree specifically negates the parent's obligation to provide child support. A decree silent as to child support does relieve the servicemember of the obligation. Only adoption terminates the natural parent's support obligation. Care of the child by someone under a custody agreement is not adoption and does not in itself relieve the natural parent of the duty to support. A court has the authority to release a parent of their child support obligation.

C. **Support Amount.**

1. **State Law.** Aside from the military support policies, the determination of whether to award support and how much support to award is made by state courts. Each state has enacted a different laws governing the establishment and amount of child and spousal support. In general, state law does not generally provide a fixed amount for spousal support, but instead leaves that decision up to the family court judge or magistrate based on factors such as the earning potential of both parties, the length of the marriage, contributions to the marriage, and the lifestyle to which the parties have grown accustomed. In contrast, all states have enacted child support laws setting forth very specific support tables to be used in determining the appropriate amount of child support. A typical child support scheme determines the amount of support by comparing the earnings (or earning potential) of both parties and then allocating the support obligation according to those incomes. In addition, the non-custodial parent will be ordered to pay a proportional share of medical expenses, daycare, and sometimes educational expenses.

2. **Specific support guidelines.** Each of the services has enacted support guidelines or standards to be used in determining what is continuous and adequate support. These guidelines do not apply if there is a court order or agreement specifically setting the amount of support or declaring that no support is owed. If there is a court order setting the amount of support, the amount set forth in the court order is considered continuous and adequate under service guidelines and the member must comply with these orders. Similarly, if there is a mutual agreement between the parties setting forth the amount of support, that is the amount which the member must pay. In the absence of a court order or mutual agreement, each service provides guidelines that may be used until such time as an appropriate order or agreement is obtained. These guidelines are only interim measures and are not a permanent solution to nonsupport or insufficient support problems. The scale amounts are not intended as fixed standards, but may be increased or decreased as the factors of any particular case warrant. There are several significant differences among the services in how the support policy is implemented.

3. **Navy.** The Navy support policy is set forth in MILPERSMAN 1754-030. The MILPERSMAN sets forth general support guidelines to be used to determine an appropriate amount of support in the absence of a court order or mutual agreement. This is not a punitive instruction, which means members may not be lawfully ordered to pay support in the amount set forth in the guidelines. Instead, the guidelines are intended to be used as a counseling tool which may be equitably adjusted by taking into consideration the presence of major factors affecting the ability to provide support. Factors that may come into play to adjust the guideline amount include the pay, private income, and resources of the person and the family members; the cost of necessities and every day living expenses; financial obligations of the family members; and the expenses and financial obligations of the person in relation to their income.

Relationship and Number of Dependents	**Support Guideline**
Spouse only	1/3 gross pay*
Spouse and one minor child	1/2 gross pay*
Spouse and two or more children	3/5 gross pay*
One minor child	1/6 gross pay*
Two minor children	1/4 gross pay*
Three minor children	1/3 gross pay*

4. **Marine Corps.** In contrast to the Navy support policy, the Marine Corps family support policy is very specific and not only permits commanders to issue order to pay a specific amount, it requires them to do so. Upon receipt of a non-support complaint and in the absence of a court order or written agreement, Marine commanders are required to determine the appropriate amount of support according to the table below and issue an order to begin providing that amount of support. Where the Navy regulation provides guidelines, the Marine regulation provides specific amounts.

Total Number of Family Members Entitled to Support	Minimum Amount of Support per Requesting Family Member*	Share of Monthly BAH/OHA per Requesting Family Member*
1	$350	1/2
2	$286	1/3
3	$233	1/4
4	$200	1/5
5	$174	1/6
6 or more	$152	1/7 or etc.
*The amount of support is set at the greater of the amounts in the second and third columns but cannot exceed 1/3 gross military pay ("gross military pay" is all military pay and allowances before taxes or other deductions).		

***5.* Other services:** The Coast Guard, Army, and Air Force have all promulgated regulations establishing family support policies. The Coast Guard regulation (COMDTINST 1000.6A) is similar to the Navy regulation in that it does not empower the commander to issue an order to comply, whereas the Army regulation (AR 608-99) provides Army commanders with the authority to issue a lawful order to comply. The Air Force regulation (AFI 36-2906) is similar to the overall DoD policy in that it provides very little specific guidance.

D. **Complaints of Nonsupport or Insufficient Support**

1. **Interview.** Upon receipt of a complaint alleging nonsupport or insufficient support of dependents, the command must interview the servicemember concerned. Normally, the member's division officer or command legal officer does this interview.

2. **Action.**

a. **Undisputed failure of support.** If the member acknowledges the obligation and admits a support delinquency, he will be informed of the policy concerning support of dependents, including the potentially adverse consequences an unsatisfactory response may have upon his service career. In the absence of a determination by a civil court or mutual agreement of the parties, the support guidelines illustrated above will be applied.

b. **Disputes.** Disputed complaints should be referred to the nearest legal assistance office. In no case, will a service member be allowed to suspend support payments while resolution of a dispute is pending. If satisfactory evidence of an agreement or order substantiating a claim that some amount less than demanded is due cannot be produced, the support guidelines previously mentioned will be applied.

c. **Command response.** The command should notify the complainant that the matter has been referred to the servicemember and inform the complainant of any intended action by the servicemember.

d. **Withholding action for child support.** Commanding officers have discretion to withhold acting on complaints for alleged failure to support to dependents:

1. When the location and welfare of the child(ren) is unknown. For example, the custodial parent removed the child(ren) from the state in violation of a court order; or

2. When it is apparent that the person requesting support does not have physical custody of the children.

In these cases, the service member should continue to pay support into a special bank account established for the benefit of the children, or directly to the state child support enforcement agency.

3. **Repeated complaints**

a. **Possible penalties and other action for noncompliance.** The member who refuses to carry out support obligations, or upon whom numerous justifiable complaints have been received, should be counseled that one or more of the following actions could occur:

Lower evaluations;

Administrative separation for a pattern of misconduct;

Nonjudicial punishment under Art. 134, UCMJ, dishonorable failure to support dependents:

BAH will be withheld and/or recouped;

Loss of tax exemption for the dependent;

Garnishment of pay;

Removal from sensitive duties (e.g., PRP); and

Involuntary allotment.

b. **Administrative separation.** MILPERSMAN 1910-140 and MARCORSEPMAN, paragraph 6210.3, authorize administrative separation processing for misconduct by reason of an established pattern of dishonorable failure to contribute adequate support to dependents or failure to comply with orders, decrees, or judgments of a civil court concerning support of dependents. Before processing, the member concerned must be counseled and given a reasonable opportunity to begin making adequate support payments. At the time such counseling is rendered, an appropriate warning entry should be made in the member's service record book.

E. **Collecting Support**: **Garnishment and Involuntary Allotment**

1. **Garnishment.**

a. **General.** Garnishment is a legal proceeding by which a court orders the employer to withhold a portion of an individual's pay and to pay the withheld amount to the court to satisfy a court-ordered judgment. The wages of Federal employees including those of active duty military personnel, reservists and retired military personnel, are subject to garnishment or wage assignment orders for the purpose of enforcing child support and alimony obligations.

b. **References.**

5 C.F.R. Part 581-- Processing Garnishment Orders for Child Support and/or Alimony
Title 42 United States Code §§ 659-662 (Social Security Act)

c. **Procedures.** The spouse of the servicemember must first obtain a child support or alimony order from a court of competent jurisdiction. This will normally be a decree of divorce, although it does not necessarily need to be. A garnishment order is a separate order directing an employer to withhold an employee’s pay and pay it instead as directed by the court. Although the garnishment order is a separate order from the divorce decree or support order, it is often issued at the same time, even before the payor becomes delinquent. If a garnishment order was not issued at the time of the original support order, the payee must go back to court seeking an order in garnishment to enforce the original order. Upon a showing of an order awarding support or alimony and a failure to comply, the second court will then issue an order garnishing the servicemember's pay.

d. **Service of process.** The garnishment order must be served personally or by registered or certified mail on the Director, Defense Finance and Accounting Service. Once, DFAS receives the garnishment order, it will begin garnishing the member’s pay.

e. **Pay subject to garnishment.** The ceiling on the amount subject to garnishment is the lower of state law or the limits stated in the Federal Consumer Credit Protection Act (CCPA). CCPA's maximum

limit subject to garnishment is 50% of ***disposable earnings*** if the member is supporting other family members and 60% if he/she is not. An additional 5% can be garnished if the support obligation is more than 12 weeks in arrears. Disposable earnings include basic pay and bonus and special pay, but not BAH or BAS. Garnishment writs may supersede voluntary allotments. Attorney fees, interest, and court costs may be recovered by garnishment if the order specifically provides for such recovery.

f. **Command responsibility.** Upon receipt of a writ or order of garnishment (also called a wage assignment, an order to withhold and deliver, or a writ or order of attachment), the command will forward all correspondence to the action officer at DFAS. Simultaneously, the command receiving the request will send a letter to the requester advising of such forwarding action. The commanding officer of the member or employee shall ensure that the member or employee has written notice of the action and is afforded counseling. The command will then receive and comply with instructions from the cognizant finance activity.

g. **Defenses to garnishment.** Unlike involuntary allotments (discussed next), DFAS will not entertain defenses raised by the service member. Any disputes must be litigated in the state court that issued the garnishment order.

2. **Involuntary allotments.** An involuntary allotment is another way in which a person owed support may attempt to receive that support directly from DFAS. In cases in which the person owed support does not have a garnishment order and the member is not paying support, an involuntary allotment may be the best option. There are several significant differences between a garnishment and an involuntary allotment. First, an involuntary allotment does not require a second court order. Second, an involuntary allotment can be initiated against an active duty servicemember to pay for child support or a combination of spousal and child support, ***but not spousal support only***, and can only be obtained after the member is at least two months in arrears on child support payments or child and spousal support payments. Upon notification by the state authorities, DFAS is required to notify the member to begin payments within 30 days or suffer automatic deductions of the payments from his/her pay. Other differences include the amount of pay subject to allotment and the defenses available and are discussed below.

a. **Amount of Allotment.** The allotment shall be established in an amount necessary to comply with the support order, but not more than 60% of disposable earnings. (50% if the service member is supporting others in addition to this court ordered support). For involuntary allotments, disposable earnings ***does*** include BAH for personnel in paygrades E-7 and above and BAS for officers and warrant officers.

b. **Defenses to Involuntary Allotment.** The service member may show that the information in the request itself is incorrect which renders the allotment request invalid. Also, proof of payment, compliance with a court order, documentation showing the order has been amended, superseded or set aside, or evidence establishing the arrearage does not equal or exceed 2 months of support will stop the involuntary allotment process. This evidence must be sent to DFAS within 30 days of receipt of the notice of the allotment request.

c. **Preventing two allotments.** The service member should be counseled not to start a voluntary allotment upon receiving notification of an involuntary allotment action; the result will be two allotments deducted from military pay for the same purpose.

LA 42.6.2. *PATERNITY COMPLAINTS*

A. General

1. **References.**

MILPERSMAN 5800-010
LEGADMINMAN, Chapter 15
32 C.F.R. Part 733.5 (Determination of Paternity and Support of Illegitimate Children)

2. Complaints alleging that a servicemember is the father of an illegitimate child may be received by the command before, as well as after, the birth of the baby. Neither civil law nor naval regulations require a man to marry the mother of his child. Local law, however, generally requires that a father support his illegitimate offspring. Navy and Marine Corps policy make no distinction between legitimate and illegitimate children. In many cases, a proper solution to a paternity problem involves not only the legal assistance officer who will advise

the member as to his legal obligations and liabilities, but also the chaplain who may advise the member concerning the moral aspects of the situation.

B. **Procedures**

1. **Interview and action.** Upon receipt of a paternity complaint, the command concerned should interview the servicemember and take the following action:

a. **Judicial order or decree of paternity or support.** If a judicial order or decree of paternity or support is issued by a state or foreign court of competent jurisdiction, the member shall be advised that he is expected to provide financial assistance to the child regardless of any doubts of paternity he may have. Questions concerning the competency of the court to enter such a decree against the servicemember, particularly where the servicemember was not present in court at the time the order or decree was rendered, should be referred to a legal assistance officer for ensuring compliance with the Soldiers' and Sailors' Civil Relief Act.

b. **Acknowledgment of paternity.** If a member admits paternity or the legal obligation to support the child, the military expects him to furnish support payments for the child and assist in the payment of prenatal expenses. The member should be advised that once support payments have begun the child qualifies for an armed forces dependent’s identification card.

c. **Disputed or questionable cases.** In instances where no legal action has determined the paternity of the child and the servicemember questions paternity, the servcemember is not obligated to provide support until such time as paternity is established or acknowledged. Typically, paternity is established through a DNA test ordered by a court or child support agency. Although these test can cost several hundred dollars, the cost of the court-ordered test is typically borne by the state and the member is charged only if he is determined to be the father. Once the member is determined to be the father, the court or child support agency will issue a support order, which may include an order for retroactive child support (the extent of retroactivity is determined by state law and varies widely).

d. **Correspondence.** Replies to individuals concerning paternity cases should be as kind and sympathetic as circumstances permit. MILPERSMAN 5800-010 provides a sample reply which may be appropriate in some cases.

2. **Amount of support.**

a. **Court decree.** The servicemember will be expected to comply with all valid court orders.

b. **Reasonable agreement with mother or legal guardian of child.** If mutual agreement can be reached by the natural mother and father, that amount should be paid. Servicemembers should beware of agreeing to provide support below established state guidelines because the mother could always seek additional support by going to court, irrespective of what the parties agreed on.

c. **Military Support guidelines.** See previous discussion on military support guidelines.

d. **Lump-sum settlements.** In many states, "paying off" the mother of the child -- even where she agrees in writing to forego pursuing any claims of paternity or child support -- is ineffective as being against public policy.

e. **Basic allowance for housing (BAH).** Note that support of an illegitimate child may entitle a member to BAH at the "with dependents" rate. A single member living in bachelor quarters will only rate the difference between single BAH and BAH "with dependents."