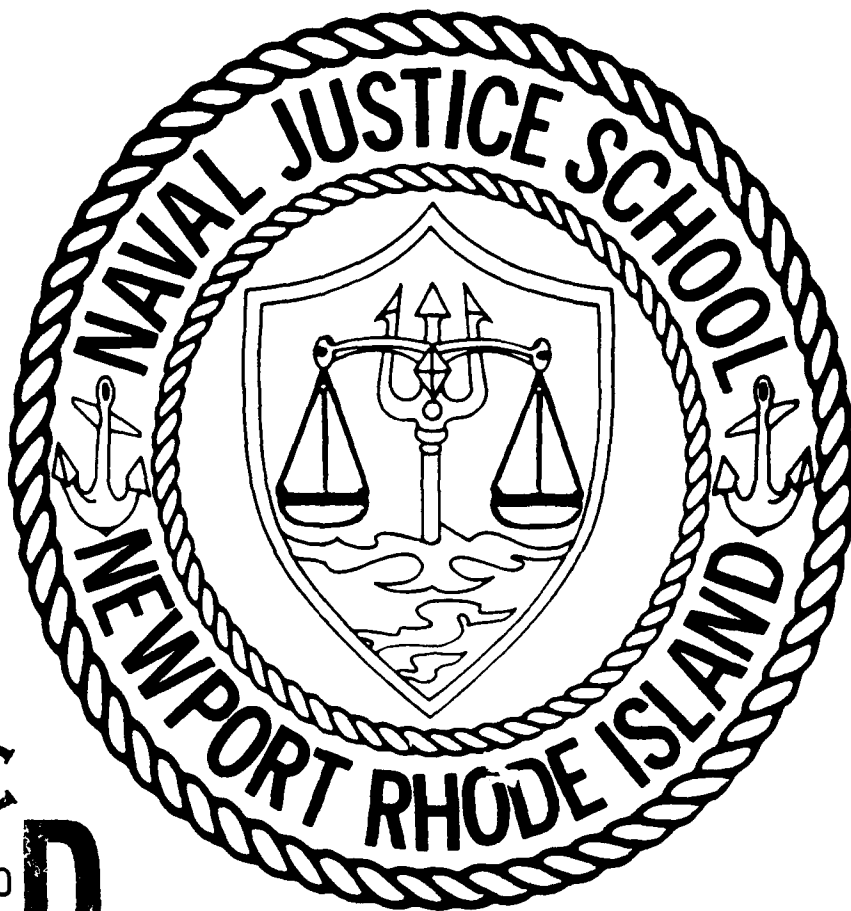


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# STUDY GUIDE

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## PROCEDURE STUDY GUIDE

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PREFACE

The term "procedure" is used at the Naval Justice School to refer generally to the rules, regulations, and laws which exist for the administration of the military justice system. The purpose of the procedure course is to enable a military lawyer to understand how a particular case moves through the military justice system from the initiation of a complaint against a servicemember through the court-martial appellate review process. It is expected that, at the end of the course, the student will be able to provide professionally competent advice concerning nonpunitive measures, nonjudicial punishment, trial by court-martial, and the court-martial appellate review process. It is further expected that the student will be able to use the knowledge gained from the procedure course of instruction to function as an effective trial advocate in the military judicial system.

This study guide is the primary resource for the procedure course. This text also is intended to be a convenient reference for use by Navy and Marine Corps judge advocates. As such, it provides a detailed discussion of the procedural aspects of the Uniform Code of Military Justice (UCMJ), the Manual for Courts-Martial, 1984 (MCM), and the Manual of the Judge Advocate General of the Navy (JAGMAN). It should be noted, however, that this study guide can only be considered a starting point for legal research and not a substitute for the comprehensive legal research required for the effective practice of law in the military.

With the permission of the West Publishing Company, the West Military Justice Reporter key number system is referenced in several of the chapters of this study guide to assist the reader in doing research.



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## CHAPTER I

### INTRODUCTION TO THE MILITARY JUSTICE SYSTEM

#### 0101 GENERAL JURISDICTIONAL REQUIREMENTS (MILJUS Key Number 500)

Military tribunals do not share the Federal judicial power defined in Article III of the U.S. Constitution. They are not courts of general jurisdiction but possess only the jurisdiction conferred upon them by Congress pursuant to its authority to govern and regulate the armed forces. U.S. Const. art. I, § 8, cl. 14. This unique source of military jurisdiction has several conceptual and practical consequences. Absent statutory authority, military courts have no power to try persons or offenses or to adjudge penalties. Congress has not, for example, purported to authorize courts-martial to resolve private controversies by adjudging liability for damages or enforcing the collection of debts. The military judicial system created by Congress is, for the most part, an entirely self-contained system. It is not part of the Federal judicial system in the full sense of the word, and it is not subject to certain requirements applicable to article III courts, such as indictment by grand jury, jury trial, and tenure and compensation of judges.

Although decisions finally reached within the military judicial system are not subject to direct review by appeal or otherwise in any court outside the military system with the exception of the United States Supreme Court, there are avenues of collateral attack upon the validity of court-martial convictions in the Federal courts which will be discussed in a later chapter. While none of these avenues involve a direct review or appeal procedure through the Federal courts, they do provide a means of review limited to questions of jurisdiction and denials of fundamental rights. Significantly, the Manual for Courts-Martial, 1984 now provides for review by writ of certiorari by the United States Supreme Court for cases having been reviewed by the United States Court of Military Appeals, the highest military court. The military justice system, however, remains outside the general supervisory jurisdiction of the Supreme Court that it exercises with respect to other Federal courts.

It must also be borne in mind that the constitutional power of Congress to authorize trial by court-martial is limited to the minimum possible scope adequate to the accomplishment of the end proposed. "Since the exercise of military criminal jurisdiction encroaches upon areas otherwise within the judicial powers of federal or state courts, ... military jurisdiction may be authorized by Congress only where actually necessary to the maintenance of military discipline." Toth v. Quarles, 250 U.S. 258, 263 (1955). See O'Callahan v. Parker, 395 U.S. 258 (1969); Reid v. Covert, 354 U.S. 1 (1957). These cases limited both the persons and the offenses triable by courts-martial. However, the case of Solorio v. United States, 483 U.S. 435, 107 S. Ct. 2924 (1987) has done away with the so-called "service-connection" requirement established by O'Callahan, *supra*. Consequently, it is certainly arguable that any offense now committed by a servicemember will be triable by court-martial.

## 0102 NONPUNITIVE MEASURES

Commanders are responsible for the maintenance of discipline within their commands. In the great majority of instances, discipline can be maintained by the exercise of effective leadership including, when required, the use of those nonpunitive measures which a commander is expected to use to further the efficiency of his command or unit. These nonpunitive measures include administrative censure, extra military instruction, and administrative withholding of privileges. R.C.M. 306(c)(2), MCM, 1984 [hereinafter R.C.M. \_\_\_\_]; JAGMAN, § 0111. These nonpunitive measures are discussed in Chapter III, infra.

## 0103 NONJUDICIAL PUNISHMENT (MILJUS Key Number 525)

Nonjudicial punishment is a unique tool made available to commanding officers and officers in charge whereby they may dispose of minor breaches in discipline in an expeditious fashion. Art. 15, UCMJ; Part V, MCM, 1984.

A. The proceedings are considered administrative in nature and lack many of the due process safeguards commonly associated with court-martial proceedings.

B. The maximum punishment authorized is very limited in quantity and quality, and is further limited by, among other things, the rank and status of the officer imposing it.

C. Nonjudicial punishment, known as Captain's Mast in the Navy and Coast Guard and Office Hours in the Marine Corps, cannot be refused by anyone attached to or embarked in a military vessel, but may be refused by anyone stationed ashore.

## 0104 REQUISITES OF COURT-MARTIAL JURISDICTION

The jurisdiction of a court-martial, that is, its power to try and determine a case, is conditioned on the following factors. The court must:

A. Have jurisdiction over the person, i.e., have authority to try the accused;

B. be properly convened, i.e., be properly created by one with authority to create courts-martial;

C. have charges properly referred, i.e., by an individual who has the authority to refer charges to courts-martial; and

D. be properly constituted, i.e., consist of persons legally qualified to perform the various roles in a court-martial.

1. The actual constitution of a court-martial depends on the type of court involved.

2. The jurisdictional limitation on the punishment a court may impose also depends on its classification. This will be discussed in Chapter XVIII, *infra*.

## 0105 CLASSIFICATION OF COURTS-MARTIAL AND JURISDICTIONAL LIMITS ON COURTS-MARTIAL

A. Introduction. Courts-martial are classified, in order of increasing formality and power, as:

1. Summary courts-martial (SCM);
2. special courts-martial (SPCM); and
3. general courts-martial (GCM).

Each type of court-martial is governed by different rules as to composition. Failure to comply with these rules is a jurisdictional error and causes the court-martial to be a nullity. This section will delineate the proper composition of each type of court. In addition, this section will set forth the jurisdictional limitations of courts-martial as they apply to persons and offenses that may be tried. The limitations of punishments are covered in Chapter XVIII, *infra*.

### B. The summary court-martial

1. Composition. The summary court-martial is composed of one commissioned officer who is on active duty and is a member of the same armed force as the accused. Arts. 16, 25, UCMJ; R.C.M. 1301(a). As a policy matter, the summary court-martial officer should be at least a Navy lieutenant or Marine captain when practicable. R.C.M. 1301(a).

a. The function of the summary court-martial is to exercise justice promptly for relatively minor offenses using a simple procedure. The summary court-martial officer is responsible for a thorough and impartial inquiry into both sides of the matter, assuring that the interests of the government and the accused are safeguarded. R.C.M. 1301(b). In short, the summary court-martial officer performs the functions normally allocated to prosecution, defense, judge and members.

b. Reporters, interpreters and clerical personnel may be detailed to assist the summary court-martial officer when appropriate. JAGMAN, § 0120c(1)(b)(i).

2. Jurisdictional limitations as to persons. The SCM has power to try only enlisted personnel subject to the UCMJ. Excluded from the jurisdiction of the SCM are commissioned officers, warrant officers, cadets, aviation cadets, midshipmen, and persons who are not subject to the UCMJ but who are otherwise triable by court-martial. Art. 20, UCMJ; R.C.M. 1303.

No person may be tried by SCM over his objection. If an accused objects to trial by SCM, the charges may be dismissed or disposed of at NJP, or referred for trial by SPCM or GCM. Art. 20, UCMJ; R.C.M. 1303.

3. Jurisdictional limitations as to offenses. Generally, a SCM has power to try all noncapital offenses made punishable by the UCMJ, except those for which a mandatory punishment is prescribed which is beyond its power to adjudge. Art. 20, UCMJ; R.C.M. 1301(d). For example, premeditated murder cannot be tried by SCM even if it is not considered capital, since the penalty in the event of conviction must be either death or life imprisonment. Art. 118, UCMJ; Part IV, para. 43, MCM, 1984.

C. The special court-martial

1. Composition

a. A special court-martial consists of:

(1) Not less than three members; or

(2) a military judge and not less than three members; or

(3) only a military judge, if one has been detailed to the court and the accused, before assembly of the court, knowing the identity of the military judge, and after consulting with defense counsel, requests a court composed only of a military judge, and the military judge approves. Art. 16, UCMJ.

b. In a SPCM composed only of members without a military judge, the members perform functions normally allocated between judge and court members. All members participate in determining the findings and sentence of the court. As to certain interlocutory matters involving questions of law, the senior member of the court, designated as its president, makes final rulings. As to certain other interlocutory matters, the president rules subject to objections by the other members. This allocation of functions will be discussed in greater detail in Chapters VII and VIII, infra. In a SPCM composed of only a military judge, the judge determines the findings and sentence of the court in addition to ruling upon all interlocutory questions.

c. For each SPCM, competent authority must detail commissioned officers to act as trial counsel and defense counsel. Art. 27, UCMJ; R.C.M. 502(d). In addition, the accused has a right to civilian or military counsel of his own selection if reasonably available, as set forth in Article 38, UCMJ. The accused must also be afforded the right to be represented at trial before a SPCM by a military lawyer certified in accordance with Article 27(b) of the UCMJ. R.C.M. 502(d)(1). The right to counsel will be discussed in Chapter X, infra.

d. A reporter must be detailed by the convening authority to maintain a verbatim record of the proceedings of any SPCM where the maximum punishment imposable may include a bad-conduct discharge (a BCD SPCM). R.C.M. 1103(c)(1); JAGMAN, § 0120c(1)(b).

2. Jurisdictional limits as to persons. A SPCM has power to try any person subject to the UCMJ, including commissioned officers. Art. 19, UCMJ; R.C.M. 201(f)(2). Article 2, UCMJ, identifies those persons subject to the UCMJ. Excluded from the jurisdiction of the SPCM are persons not subject to the UCMJ but otherwise triable by court-martial. See, e.g., Art. 106, UCMJ (spies).

3. Jurisdictional limits as to offenses. Like the SCM, a SPCM has power to try all noncapital offenses made punishable by the UCMJ, except those for which a mandatory punishment is prescribed which is beyond its power to adjudge. R.C.M. 201(f)(2).

D. The general court-martial

1. Composition

a. A general court-martial consists of:

(1) A military judge and not less than five members; or

(2) only a military judge, if the accused, before assembly of the court, knowing the identity of the military judge, and after consulting with defense counsel, requests a court composed only of a military judge and the military judge approves. Art. 16, UCMJ.

b. The functions of military judge and members are identical to those performed in a SPCM to which a military judge has been detailed.

c. For each GCM, competent authority must detail as trial and defense counsel military lawyers certified in accordance with Article 27b, UCMJ. Other commissioned officers may be detailed as assistant counsel if necessary or appropriate. In addition, the accused may be represented by individual counsel of his own selection. Art. 38, UCMJ.

d. A reporter must be detailed by the convening authority to maintain a verbatim record of the proceedings of any GCM. Interpreters and additional clerical assistants may be detailed when necessary. JAGMAN, § 0120.

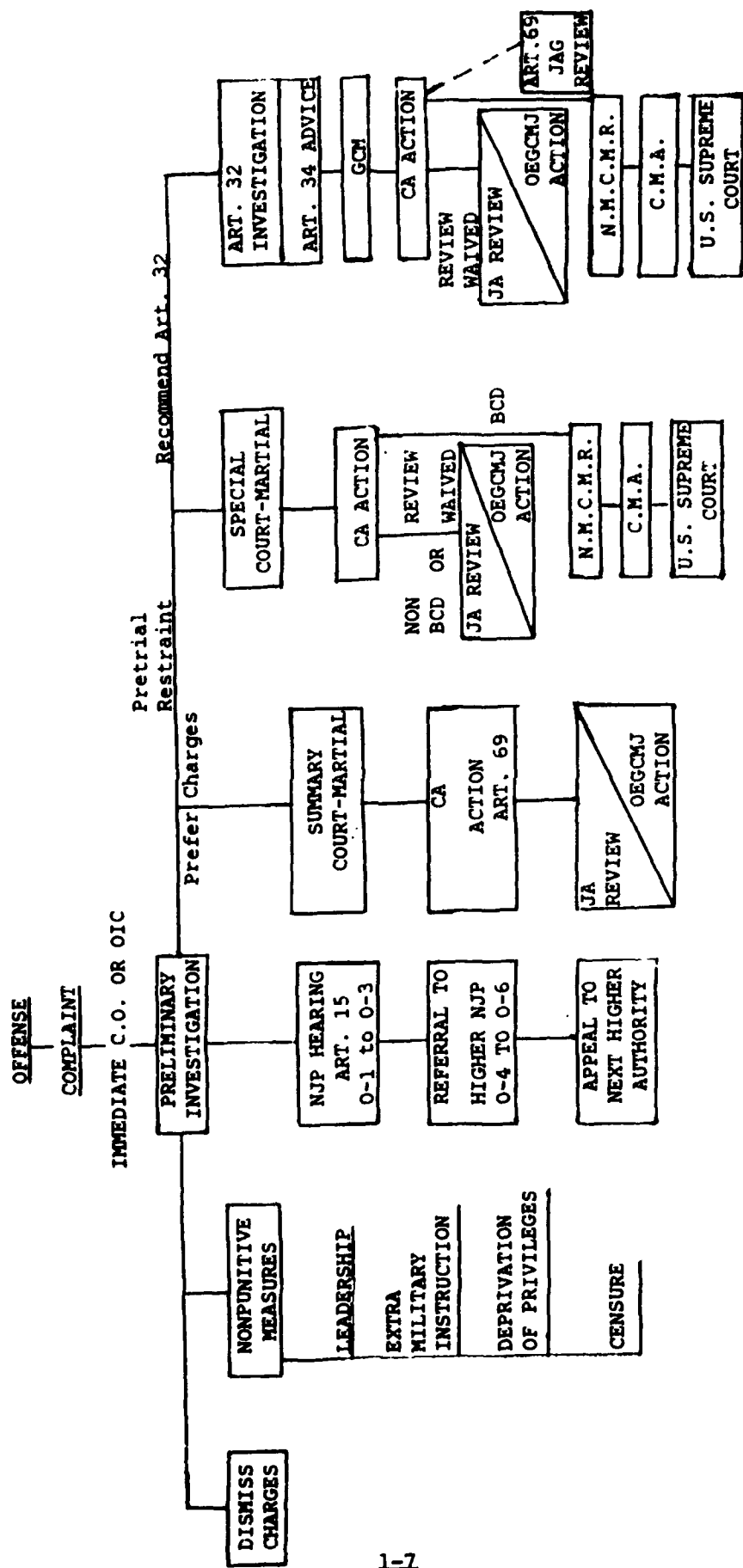
2. Jurisdiction over persons. A GCM has the power to try any person subject to the UCMJ, as well as any person subject to trial by a military tribunal under the law of war. Art. 18, UCMJ. With respect to the latter category, GCM jurisdiction is concurrent with that of other military tribunals. Art. 21, UCMJ.

3. Jurisdiction over offenses. A GCM has the power to try all offenses made punishable by the UCMJ, as well as offenses against the law of war and offenses against the law of territory occupied under military government or martial law.

A GCM composed only of a military judge does not have jurisdiction to try any person for any offense for which the death penalty may be adjudged unless the case has been previously referred to trial as a noncapital case. Art. 18, UCMJ.

0106      OVERVIEW OF PROCEDURE

Perhaps the best method of obtaining an overview of military procedural law is to scan the table of contents. The following chart also depicts the relationship among the major events covered in this course.



OVERVIEW OF MILITARY JUSTICE

CHAPTER II  
MILITARY JUSTICE INVESTIGATIONS  
(MILJUS Key Number 921)

0201 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 defines the limitations on his discretion in disposing of such complaints.

0202 PRELIMINARY INVESTIGATORY ACTION

A. The initiation of charges

1. The initiation of charges is nothing more than bringing to the attention of proper authority the known, suspected, or probable commission of an offense punishable under the Uniform Code of Military Justice (UCMJ) or civilian law.

2. Who may initiate a complaint

Any person can initiate a complaint -- military or civilian, adult or child, officer or enlisted. R.C.M. 301(a), MCM, 1984 [hereinafter R.C.M. \_\_\_\_].

Note: It is important to differentiate between initiating a complaint and preferring charges. The preferal 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. See Chapter VIII, infra.

3. How a complaint may be initiated

A complaint may be initiated in any of a number of ways. For example, a complaint may be based upon the receipt of a Report and Disposition of Offense(s) Form (NAVPERS Form 1626/7). The 1626/7 form-- most frequently referred to as a "report chit" -- is by far the most common method of submitting a complaint in the Navy. The Marine Corps equivalent is the Unit Punishment Book (UPB) Form (NAVMC 10132). The UPB form, however, is seldom used to submit an initial complaint in the Marine Corps; a locally prepared form is frequently 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 Investigative Service (NIS) or similar agency; or upon receipt of signed and sworn charges (i.e., preferred charges on DD Form 458).



#### 4. Duty to report offenses

Article 1139, U.S. Navy Regulations (1973), requires personnel of the naval service to report to proper authority offenses committed by persons in the naval service which come under their observation. However, it is noted that Article 1139 is currently undergoing revision.

#### 5. To whom made

a. A suspected offense may be reported to any person in military authority over the accused. This may be the CO, but usually it is to a designated subordinate -- such as the OOD, CDO, XO, the discipline officer, or the legal officer.

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

#### B. Action upon receipt of complaint

R.C.M. 401(b) states 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 thereof in the interests of justice and discipline. The immediate commander shall make or cause to be made a preliminary inquiry into the charges or the suspected offenses sufficient to enable him to make an intelligent disposition of them.

#### C. Investigation by the Naval Investigative Service (NIS). See SECNAVINST 5520.3 of 16 July 1975 (Appendix 2-1).

1. The NIS is the primary investigative and counterintelligence agency for the Department of the Navy.

2. Mandatory referral to NIS. The following types of incidents must be referred to NIS for investigation:

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

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

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

d. incidents involving ordnance;

e. incidents of perverted sexual behavior;

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

g. incidents involving narcotics, dangerous drugs or controlled substances;

(1) It is NIS policy to decline investigation in cases involving "user amounts" of marijuana, amphetamines, and barbiturates.

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

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

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

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

k. all thefts of government property; and

l. national security cases. See ALNAV 013/87 221810Z Jun 87. See also, Manual of the Judge Advocate General, § 0116f(3).

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 5520.3 as matters which must be referred to NIS.

3. NIS may decline investigation. NIS may decline to investigate any case which in its judgment would be fruitless and unproductive. SECNAVINST 5520.3, para. 4a(2).

4. Command action held in abeyance. See Manual of the Judge Advocate General, § 0116f(2) [hereinafter JAGMAN, § \_\_\_\_]. Upon referral to NIS, commanding officers receiving information indicating that naval personnel have committed a major Federal offense, including those described in SECNAVINST 5520.3, committed on a naval installation shall refrain, in such cases, from taking action with a view to trial by court-martial and refer the matter to the senior resident agent of the cognizant NIS office or his nearest representative for their determination in accordance with SECNAVINST 5520.3.

5. Referral by NIS to other investigative agencies. See JAGMAN, § 0116f(2). If a case is referred by NIS to another Federal investigative agency, any resulting prosecution will be handled by the cognizant U.S. Attorney subject to the exceptions set forth below.

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 Navy JAG and the cognizant officer exercising general court-martial jurisdiction (OEGCMJ). JAGMAN, § 0116f(4)(a).

b. If, following referral of a case to a civilian Federal investigative agency for investigation, the U.S. Attorney declines prosecution, NIS may resume investigation, and the command may prosecute. JAGMAN, § 0116f(4)(b).

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 Navy JAG if agreement cannot be reached at the local level. JAGMAN, § 0116f(4)(c).

d. In the event initial command investigation is necessary, either because immediate referral to NIS is impossible or because the necessity for such referral is not apparent, steps should be taken to preserve evidence and record changing conditions, and care should be taken not to compromise or impede any subsequent investigation. SECNAVINST 5520.3, para. 4a(2).

#### D. Factfinding 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, a factfinding body should be convened. The regulations covering factfinding bodies are contained in the JAG Manual. These bodies have thus become known as "JAG Manual investigations."

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

3. JAG Manual investigations are discussed extensively in the Civil Law portion of the course.

#### **E. The preliminary inquiry**

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

a. Upon 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 on the locally prepared report chit (or shore patrol report or base police report), and using Part IV, MCM, 1984, for guidance. These charges should then be set forth on a 1626/7 for the Navy or a UPB for the Marine Corps.

b. Using the accused's service record, the 1626/7 should be completed to include the data called for on the front page. See Appendix 2-2, infra.

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 P5800.8B (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 OFFENSES(S)" block. If there is not enough space on the 1626/7 for the charges and specifications, type them on a separate sheet and staple them to the form. Type in the name and duty stations or residences of all witnesses then known. This information should be found on the initial report chit.

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

f. The accused is 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.

Caution: The discipline 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. If authorized by the commanding officer to do so, the discipline officer should determine and impose whatever premax (office hours) restraint upon the accused is necessary pending disposition of the case and indicate the restraint imposed on the 1626/7. This could be accomplished by other officers designated by the commanding officer, such as the executive officer.

2. If the discipline 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 of 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. It is not the function of the PIO merely to prepare a case against the accused. Cf. R.C.M. 405(a), discussion.

b. After being given all of the information in the possession of the discipline 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 should be listed in the appropriate blanks on the reverse side of the 1626/7.

(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; and

(4) personally interview the division officer 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 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.

d. A summary of the above information should be set forth in the "COMMENT" block of the 1626/7 along with the signature of the PIO. The statements and documents collected during the investigation of the PIO should be attached to the 1626/7.

e. The PIO should prepare whatever charges he has probable cause to believe the accused committed if he feels the offense may be referred to a court-martial. 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 discussed in chapter XIII.

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 officer/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.

3. Appendix 2-4 at the end of this chapter is a sample instruction setting forth the duties of a PIO and giving guidance regarding the conduct of the inquiry.

#### F. Final premast screening

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

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

3. The executive officer reviews the report and calls the accused before him, 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 executive officer 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. If the formal screening is used, the executive officer should not attempt to conduct a preliminary hearing to develop evidence but should only review the information against the accused and determine that he has been properly advised. Depending upon the working relationship between the commanding officer and the executive officer and any delegated authority granted by the commanding officer, the executive officer may dismiss minor violations without referral to the commanding officer at captain's mast.

5. If the preliminary investigation reveals an offense which warrants trial by court-martial, it is not necessary for the accused to be taken to mast/office hours. The commanding officer can refer sworn charges directly to a court-martial for trial.

**SECNAV INSTRUCTION 5520.3**

**From:** Secretary of the Navy  
**To:** All Ships and Stations

**Subj:** Criminal and security investigations and related activities within the Department of the Navy

**Ref:** (a) OPNAVINST 5510.1E  
(b) SECNAVINST 3820.2A  
(c) DOD Directive 5105.42  
(d) OPNAVINST C5500.46B

**1. Purpose.** To establish and restate jurisdiction and responsibilities in the conduct of criminal and security investigations and related activities.

**2. Cancellation.** SECNAV Instruction 5430.13B is hereby canceled.

**3. Discussion.** Good order and discipline are the direct responsibility of command. In the discharge of this responsibility, commanding officers must frequently rely on prompt investigative action by professionally trained personnel, not only for effective resolution of alleged, suspected, or actual criminal and security offenses, but also to preserve facts and construct an evidentiary foundation for subsequent command action. Under the Chief of Naval Operations and the Commander, Naval Intelligence Command, the Naval Investigative Service (NIS), is the primary investigative and counterintelligence agency for the Department of the Navy. The Marine Corps maintains a cadre of accredited counterintelligence and investigative personnel who exercise jurisdiction as delimited by this instruction and implemented by Marine Corps directives. NIS investigative jurisdiction is grounded and documented in Presidential directive, Departmental agreements, and Secretarial authority. The Director, Naval Investigative Service, maintains a worldwide organization composed of Navy and Marine Corps personnel responsive to command requirements of both Services. As a centrally directed organization, the NIS provides support, as needed, both ashore and afloat, consistent with departmental policy and with full regard for individual constitutional rights. In a combat or combat

contingency environment, the task force commander afloat and landing force commander ashore exercise immediate control over assigned Navy and Marine investigative and counterintelligence assets. Commands maintain a limited investigative capability for the resolution of minor offenses and those of a purely military character, and have authority to commission fact-finding bodies to determine the circumstances of specific incidents. This instruction delineates the responsibilities and limitations of both command and the NIS as relate to utilization of assets and policy doctrine applicable to criminal and security investigations, criminal intelligence operations, and counterintelligence activities.

**4. Responsibilities**

**a. Major criminal offenses**

(1) The NIS is the agency within the Department of the Navy responsible for the investigation of actual, suspected, or alleged major criminal offenses committed against a person, the United States government or its property, and certain classes of private property, including attempt or conspiracy to commit such offenses. A major criminal offense is defined for purposes of this instruction as one punishable under the Uniform Code of Military Justice by confinement for a term of more than 1 year, or similarly framed by federal statutes, state, local, or foreign laws or regulations. Incidents of actual, suspected, or alleged major criminal offenses coming to command attention (with the exception of those which are purely military in nature) must be immediately referred to the NIS. It is not normally appropriate that commands request investigation of only a specific phase(s) of a serious incident.

(2) In those rare instances when immediate response by the NIS is not feasible, such as a submarine on patrol or a ship at a remote location, commanding officers shall conduct such preliminary investigation as circumstances dictate, preparatory to later full investigation by the NIS. Appropriate measures shall be taken to insure the preservation and accounting of possible evidence and to avoid any action which might prejudice investigative possibilities or otherwise impair the subsequent process of justice.

The Director, Naval Investigative Service, or his field representatives may decline to undertake investigation of any case which in their judgment would be fruitless and unproductive.

(3) In addition to referral of major criminal offenses, when any of the following circumstances occur, command shall promptly provide available information to the NIS for preliminary inquiry to determine if a request for full investigation is warranted:

(a) Unattended death of military personnel, dependents, or Department of the Navy employees occurring on a Navy or Marine Corps installation when criminal causality cannot be firmly excluded.

(b) Any fire or explosion of questionable origin affecting Department of the Navy property or property under Navy or Marine Corps control.

(c) When a possibility exists that one or more elements of a major criminal offense may attach to an incident apparently minor in nature. An example would be a petty larceny within a barracks cubicle or stateroom wherein entry to effect the larceny may constitute the additional offense of housebreaking.

(d) When aspects surrounding a nominally or minor incident which are of a potentially sensitive nature. Such considerations might include, but are not limited to, incidents involving ordnance, narcotics, dangerous drugs or controlled substances, incidents of perverted sexual behavior, or damage to government property which appears to be the result of arson or other deliberate attempt.

(e) Thefts of personal property when ordnance, contraband, or controlled substances are involved, items of a single or aggregate value of \$500 or more, or when substantive issues of morale and discipline apply, such as a continuing series of unresolved personal thefts.

(4) A major criminal offense, as defined, may constitute a violation of both military and civil law, and may involve both military personnel and civilians.

Sole or concurrent jurisdiction may also rest with another agency outside the Department of the Navy. The NIS is responsible for making investigative referrals in behalf of command in these instances.

(5) Certain instances will occur which are susceptible to administrative resolution without the application of professional investigative techniques. Within this interpretation are matters without criminal basis and which might be resolved by a fact-finding body, an informal inquiry, or administrative audit. Incidents which fall into this category might result from accident, negligence, incompetency, improper accounting procedures, or intervention of the forces of nature.

b. *Minor criminal offenses.* A minor criminal offense is defined as one punishable under the Uniform Code of Military Justice by confinement of 1 year or less, or carrying similar punishment by federal, state, local, or foreign statute or regulation, and lacking any of the considerations enumerated in the discussion of major criminal offenses above.

#### c. Use of Command Investigators

(1) Certain Navy and Marine Corps commands maintain an investigative capability organic to masters at arms forces, military police, base police, security or guard forces, shore patrol, provost marshals, and other compositions. Use of these investigators for criminal and security investigations shall be limited to minor criminal offenses, as defined in this instruction, and those of a purely military character, when the offense involves only Navy or Marine Corps personnel or dependents, and investigation is confined to a ship or station. Off-base investigative activities, with the exception of normal liaison with local law enforcement agencies, shall be restricted to a minimum and to the immediate area surrounding the installation.

(2) This policy shall not in any way restrict the discharge of assigned police and law enforcement functions by authorized personnel, or their responsibilities to execute appropriate procedures on suspicion or discovery of any criminal offense, such as preventing the escape or loss of identity of suspected offenders; preserving crime scenes and the integrity



of physical evidence, effecting preliminary on scene inquiries; investigative assistance under the operational direction of the Naval Investigative Service, or any other actions which, in the judgment of the responsible commander, are necessary for the immediate preservation of good order and discipline.

**d. Training and operational use of Marine Corps personnel**

(1) The Marine Corps has a continuing requirement for training and proficiency in the conduct of criminal and security investigations and counterintelligence matters, for application in zones of action assigned to Fleet Marine Force units during combat operations. To this end, the Chief of Naval Operations and the Commandant of the Marine Corps will, through appropriate delegation, establish mutual agreements whereby sufficient and suitably qualified Marine Corps personnel are provided training in investigative and counterintelligence matters by the Naval Investigative Service.

(2) To maintain required proficiency, experience in all areas of NIS mission responsibility will be required. Mutual agreements shall therefore include provision for assignment of these trained personnel to NIS components, to participate in investigative and counterintelligence matters within NIS jurisdiction, under the operational supervision of the Naval Investigative Service.

**e. Criminal Intelligence Operations.** Criminal intelligence operations are defined as those formalized programs regarding significant criminal activity targeted against or directly involving Navy and Marine Corps personnel, to gain information of a criminal intelligence nature for law enforcement purposes. A high degree of specialized training and experience is mandatory to the successful accomplishment of these operations, and, to the extent that they are undertaken within the Department of the Navy, they will be done exclusively by the NIS, regardless of location. Criminal intelligence operations are undertaken at NIS initiative, in close coordination with senior command authority. During their course, these sensitive operations may disperse over wide geographic areas and extend across multiple command lines. The fullest cooperation of all commanding officers concerned is necessary and directed.

**f. Security and counterintelligence matters**

(1) Departmental agreements between Defense and Justice in part implement a Presidential directive that, for the NIS, establishes exclusive investigative jurisdiction within the Department of the Navy in matters involving actual, potential, or suspected sabotage, espionage, and subversive activities. The foregoing is considered to include actual, suspected, or attempted defection. Command referral of matters in these categories to the NIS is mandatory.

(2) Security matters requiring utilization of the NIS include:

(a) Loss, compromise, leakage, or unauthorized disclosure of classified information, when appropriate in accordance with reference (a).

(b) Unauthorized attempts to obtain classified or other information of intelligence value from Navy and Marine Corps personnel.

(c) Security situations which lend themselves to resolution through the application of counterintelligence operational techniques (less those combat-related counterintelligence matters within the functional responsibilities of the Marine Corps) and counterintelligence studies and analysis of groups or organizations whose interests are inimical to those of the United States, whose actions are targeted against the Navy and represent a clear threat to security. In this regard, regulatory guidance is contained in reference (b), which implements the policies of the Secretary of Defense in the functional area of security and counterintelligence investigations and related information collection and retention actions. It also assigns specific responsibilities and limitations governing initiative or reactive collection and storage of information on individuals and organizations not directly associated with the Department of Defense, but who are considered to be actually or potentially disruptive or dangerous to the operations of the Department of the Navy.

**g. Personnel Security Investigations.** Reference (c) established the Defense Investigative Service (DIS) as a separate operating agency of the Department of Defense, to provide for the conduct

16 July 1975

of personnel security investigations (PSI) for DOD components. The DIS performs this function within the fifty states, the District of Columbia, and the Commonwealth of Puerto Rico; the NIS accomplishes PSI investigations in behalf of the DIS in other areas, and has responsibility for investigative development of matters resulting from personnel security investigations which have a significant counterintelligence or criminal aspect.

h. **Special Activities.** In addition to the above noted categories, the facilities of the NIS may be utilized by the Department of the Navy where unusual circumstances or aspects of sensitivity attach which may require unusual techniques and the exercise of a high degree of discretion or the employment of extensive investigative resources.

i. **Liaison.** The Director, Naval Investigative Service or his designated representatives shall be exclusively responsible for maintaining liaison on all criminal and security investigative and counterintelligence matters with federal law enforcement, security, and intelligence agencies, and shall be the primary agency for liaison in these matters with state, local, and foreign law enforcement, security, and intelligence agencies, including those of the military departments.

j. **Initiation and Reporting**

(1) Requests for NIS support may be initiated by any commander, commanding officer, or other appropriate command authority in the Navy and Marine Corps, to the nearest NIS representative. The NIS is authorized, exclusive of command request, to undertake activities within the purview of this instruction in matters of sabotage, espionage, and subversive activity; and support on a reciprocal basis for other federal, state, local, or foreign law enforcement, security, or intelligence agencies. Separate from the foregoing, the Director, Naval Investigative Service and representatives specifically designated by him are authorized to initiate preliminary investigative action absent a specific request in any category of case under NIS investigative jurisdiction when urgent or unusual circumstances exist. The Director, Naval Investigative Service, shall assure that, in each instance, appropriate Naval or Marine Corps higher authority is promptly advised.

(2) The NIS maintains a cadre of technical specialists qualified to assist commands in their development of a comprehensive audio security posture through the application of technical surveillance countermeasures techniques. Procedures for requesting this support are contained in reference (d).

(3) Determinations as to the initiation of counterintelligence or criminal intelligence operations are reserved to the Director, Naval Investigative Service, and will be undertaken only in conformance with policy set forth by higher authority.

(4) With the exception of those offenses which are purely military in nature or relate to routine traffic violations, copies of all reports of complaint and investigation by command criminal investigative and security personnel and base police shall be furnished to the local NIS representative.

(5) The NIS shall insure that requesting authority is provided a full report of each investigation conducted in the latter's behalf. In addition, it is the responsibility of the NIS to:

(a) Assure the maintenance of a central repository for appropriate reports of investigation and pertinent counterintelligence data.

(b) Provide statistical reporting required by higher authority on investigative and other matters within its mission responsibility.

(c) Report any aspect of investigative, security, or counterintelligence activity indicative of an actual or potential trend, threat to operational integrity, or which otherwise warrants the attention of fleet commanders in chief, Commanding Generals FMFLANT and FMFPAC, and senior authority at the seat of government. This instruction abrogates the responsibility of commands to notify appropriate echelons of significant incidents, investigative action initiated, results thereof, and command actions taken or contemplated. This responsibility cannot be deferred to the NIS.

k. **Credentials and Badges.** Individuals accredited by the Director, Naval Investigative Service, to carry out investigations and other mission-related responsibilities are issued standardized credentials and badges.

designating them as "Special Agents." Certain categories of personnel are also issued credentials identifying them as an "NIS Representative." No other persons in the Navy and Marine Corps engaged in investigative, security, or counterintelligence matters are authorized to use these titles. Personnel issued NIS Special Agent and Representative credentials are cleared for access up to and including Top Secret by the Director, Naval Investigative Service. They shall be presumed to have a need to know with regard to access to information, material, or spaces relevant to the performance of their official duties. Access to special intelligence and compartmented or similarly controlled spaces, material, or information shall be cleared by the authority controlling access prior to the Special Agent or Representative pursuing a matter of official concern. NIS Special Agent and Representative credentials are to be accorded full recognition when presented for purposes of entering or leaving installations. Accredited NIS personnel, vehicles used by them in the course of official business, and all occupants therein shall be exempt from routine search.

1. Investigative policy. The NIS is the activity responsible for developing investigative policy for the Department of the Navy, consistent with directives

and guidance promulgated by higher authority, and for developing regulatory guidance for the employment of polygraph examinations, audio surveillance, and other investigative or countermeasures aids.

5. Limitations. Nothing herein is to be construed as infringing upon, conflicting with, or restricting in any way the investigative functions of the Naval Inspector General, the Inspector General of the Marine Corps, other inspectors general, courts of inquiry, or investigations conducted pursuant to the Uniform Code of Military Justice or the Manual of the Judge Advocate General. Examinations and other actions concerning the effectiveness of command procedures for good order and discipline or the effectiveness with which command personnel have carried out their duties in these areas are not appropriate for NIS inquiry, and should not be so referred.

6. Action. Addressees shall take such action as is expressed or implicit to insure compliance with this instruction.

J. WILLIAM MIDDENDORF II  
Secretary of the Navy

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**REPORT AND DISPOSITION OF OFFENSE(S)**  
 NAVPERS 1626/7 (REV. 8-81) S/N 6106-LF-010-2836

To: Commanding Officer, \_\_\_\_\_ Date of Report: \_\_\_\_\_

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

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

PLACE OF OFFENSE(S)

DATE OF OFFENSE(S)

(BE SPECIFIC)

(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 CHARGE 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 1985, 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: \_\_\_\_\_ (Signature) Acknowledged: \_\_\_\_\_ (Signature of Accused)

PRE-TRIAL  
RESTRAINT
☐ PRE TRIAL  
CONFINEMENT

☐ RESTRICTED: You are restricted to the limits of \_\_\_\_\_

☐ NO RESTRICTIONS

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

(Signature and title of person imposing restraint)

(Signature of Accused)

**INFORMATION CONCERNING ACCUSED**

CURRENT ENL. DATE	EXPIRATION CURRENT ENL. DATE	TOTAL ACTIVE NAVAL SERVICE	TOTAL SERVICE ON BOARD	EDUCATION	GET	AGE
- - - - - INFORMATION FROM SERVICE RECORD - - - - -						
MARITAL STATUS	NO. DEPENDENTS	CONTRIBUTION TO FAMILY OR GRA allowance (amount required by law)		PAY PER MONTH (including sea or foreign duty pay, if any)		
N/A						

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, SCM, 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

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 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:

☐ DISPOSE OF CASE AT MAST

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

☐ NO PUNITIVE ACTION NECESSARY OR DESIRABLE

☐ OTHER

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

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 NOTED.

(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.

WITNESSES

SIGNATURE OF ACCUSED

INAPPLICABLE IF ACCUSED ATTACHED OR EMBARKED ON A VESSEL

## ACTION OF COMMANDING OFFICER

☐ DISMISSED

☐ DISMISSED WITH WARNING (Not considered BJP)

☐ ADMONITION: ORAL/IN WRITING

☐ REPRIMAND: ORAL/IN WRITING

☐ REST TO \_\_\_\_\_ FOR \_\_\_\_\_ DAYS

☐ REST TO \_\_\_\_\_ FOR \_\_\_\_\_ DAYS WITH SUSP. FROM DUTY

☐ FORFEITURE TO FORFEIT \$ \_\_\_\_\_ PAY PER MO. FOR \_\_\_\_\_ MO(S)

☐ DENOTION TO HAVE \$ \_\_\_\_\_ PAY PER MO. FOR (1, 2, 3) MO(S) DETAINED FOR \_\_\_\_\_ MO(S)

☐ CONF. ON \_\_\_\_\_ 1, 2, OR 3 DAYS

☐ CORRECTIONAL CUSTODY FOR \_\_\_\_\_ DAYS

☐ REDUCTION TO NEXT INFERIOR PAY GRADE

☐ REDUCTION TO PAY GRADE OF \_\_\_\_\_

☐ EXTRA DUTIES FOR \_\_\_\_\_ DAYS

☐ PUNISHMENT SUSPENDED FOR \_\_\_\_\_

☐ ART. 32 INVESTIGATION

☐ RECOMMENDED FOR TRIAL BY BCM

☐ AWARDED BPCM

☐ AWARDED SON

DATE OF ACTION

DATE ACCUSED INFORMED OF ABOVE ACTION

SIGNATURE OF COMMANDING OFFICER

USUALLY SAME DATE AS MAST

I have 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 the service.

NOTE: APPEAL TIME IS NOW ONLY 5 NOT 15 DAYS. IF THIS SECTION IS USED THE "15" MUST BE CHANGED TO "5." USE FORMS IN JAGMAN, APP. A-1-V.

SIGNATURE OF WITNESS

(Date)

## FINAL ADMINISTRATIVE ACTION

APPEAL

FINAL RESULT OF APPEAL

DATE

FORWARDED TO \_\_\_\_\_

ALSO INDICATE IF NO APPEAL IS SUBMITTED.

Approved and entered in service record and pay account adjusted

FILED IN UNIT PUNISHMENT BOOK

WHERE REQUIRED

DATE

(Initials)

DATE

(Initials)

Staple Additional pages here.

1. See Chapter 2, Marine Corps Manual for Legal Administration, MCO P5800.8.
2. Form is prepared for each accused enlisted person referred to Commanding Officer's Office Hours.
3. Reverse side may be used to summarize proceedings as required by MCO P5800.8.

1. INDIVIDUAL (Last name, first name, middle initial)

2. GRADE

3. SSN

4. UNIT

**Accused's Parent Organization**

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

Enter the Article(s) violated and a summary of each offense, to include: The date and time of the alleged offense; the place of the alleged offense, and specific details to indicate what the offense was; and, if applicable, whom the offense was against.

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

Accused must indicate his intentions by striking out the inapplicable portions.  
Treat refusal to indicate or sign as refusal to accept NJP.

(Date) (Signature of accused)

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

Immediate CO of accused completes here once item 6 is completed.

(Date) (Signature of immediate CO of accused)

8. FINAL DISPOSITION TAKEN AND DATE

If accused has accepted NJP and the immediate CO or higher authority, if forwarded, decides to impose NJP, enter ONLY punishment imposed and date.

9. SUSPENSION OF EXECUTION OF PUNISHMENT, IF ANY.

Enter the specific suspension and terms. If no portions of punishment are suspended enter: NONE.

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

Enter Name, Grade, and Title of officer taking action in item 8.

11. Upon consideration of the facts and circumstances surrounding (this offense) (these offenses) and upon further consideration of the needs of military discipline in this command, I have determined the offense(s) involved herein to be minor and properly punishable under Article 15, UCMJ, such punishment to be that indicated in 8 and 9.

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

Date accused informed of NJP awarded.

Completed by officer taking action in item 8.

(Signature of CO who took final disposition and 9)

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

Completed by officer imposing NJP (item 8).

(Date)

(Signature of CO who took final action in 11)

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

(Date)

(Signature of accused)

15. DATE OF APPEAL, IF ANY.

If NONE:  
"Not Appealed"

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

Enter decision of appeal with signature of CO making decision and date. If no appeal, leave blank.

(Date)

(Signature of CO making decision on appeal)

17. DATE OF NOTICE TO ACCUSED OF DECISION ON APPEAL. Or, if transferred, date of endorsement forwarded to next

18. REMARKS

Enter recommendations of immediate CO if forwarded to higher authority, vacation of prior susp NJP, and refusal in item 6.

19. Final administrative action, if appropriate, has been completed. Initials of immediate CO or "By direction" upon completion of Admin Action (SRB/Unit

Appendix 2-3

Diary)



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

NAVJUSTSCOLINST 5811.1B  
AD:SAR:110  
12 June 1984

NAVJUSTSCOL INSTRUCTION 5811.1B

Subj: DUTIES OF PRELIMINARY INQUIRY OFFICERS

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

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

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

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

3. Information

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

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

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

12 June 1984

4. Action.

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

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

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

*Dennis F. McCoy*  
DENNIS F. MCCOY

Distribution:

NAVJUSCSOOLINST 5216.3

List 2



INSTRUCTIONS FOR  
PRELIMINARY INQUIRY OFFICERS

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

- a. NAVPERS 1626/7, Report and Disposition of Offense(s);
- b. a NJS Form 5811/1 (Investigator's Report) (See enclosure (2). This form provides a chronological checklist for conduct of the preliminary inquiry.);
- c. statements or summaries of interviews with all witnesses (sworn statements will be obtained if practicable);
- d. statements of the accused's supervisor(s), sworn if practicable;
- e. originals or copies of documentary evidence;
- f. if the accused waives all his rights, a signed sworn statement by the accused; or a summary of interrogation of the accused, signed and sworn to by the accused; or both; and
- g. any additional comments by the investigator as desired.

2. Objectives.

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

b. The secondary objective of the PIO is to collect information about the accused which will aid the commanding officer in making a proper disposition of the case and, in the event nonjudicial punishment is to be imposed, what the appropriate punishment, if any, should be. Items of interest to the commanding officer include: the accused's currently assigned duties; evaluation of his performance; his attitudes and ability to get along with others; and particular personal difficulties or hardships which the accused is willing to discuss. Information of this sort is best reflected in the statements of the accused's supervisors, peers, and the accused himself.

Encl (1)

Appendix 2-4(3)

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

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

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

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

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

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

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

6. Advise the accused of his rights during interrogation.

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

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

7. Interrogate the accused.

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

b. If the accused has waived all his rights, the PIO may then question him. It is suggested that the PIO begin in a low-key manner so as not to disquiet the accused. If the accused is inclined to lie or distort, permit him to do so at this point. Once he has spoken his piece, the PIO may probe with pointed questions and confront the accused with inconsistencies in his story or contradictions with other evidence. The PIO should, with respect to his own conduct, keep in mind that if a confession is not "voluntary," it cannot be used as evidence. To be admissible against him, a confession or admission which was obtained through the use of coercion, unlawful influence, or unlawful inducement is not voluntary.

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

c. If the accused is willing to make a written statement, make sure the accused has acknowledged and waived all of his rights. While the PIO may help the accused to draft the statement, he must be meticulous in refraining from putting words in the accused's mouth or from tricking the accused into saying something which he does not intend to say. If the draft is typed, the accused should read it over carefully and be permitted to make any changes he wishes. All changes should be initialed by the accused and witnessed by the PIO.

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

NJS Form 5811/1

INVESTIGATOR'S REPORT IN THE CASE OF \_\_\_\_\_

1. Read paragraphs in MCM concerning offenses/charges Yes: ☐ ☐  
2. Witnesses interviewed (not the accused).

	(NAME)	(PHONE)	signed statement attached	or	summary of interview attached
a.	_____	_____	<input type="checkbox"/>	or	<input type="checkbox"/>
b.	_____	_____	<input type="checkbox"/>	or	<input type="checkbox"/>
c.	_____	_____	<input type="checkbox"/>	or	<input type="checkbox"/>
d.	_____	_____	<input type="checkbox"/>	or	<input type="checkbox"/>
e.	_____	_____	<input type="checkbox"/>	or	<input type="checkbox"/>
f.	_____	_____	<input type="checkbox"/>	or	<input type="checkbox"/>

3. Accused's supervisor(s) interviewed: ☐ or ☐  
a. \_\_\_\_\_ ☐ or ☐  
b. \_\_\_\_\_ ☐ or ☐

4. Documentary evidence:

	(ORIG.)		(COPY) / (ATTACHED)		(LOCATION)
a.	<input type="checkbox"/>	or	<input type="checkbox"/>	<input type="checkbox"/>	or _____
b.	<input type="checkbox"/>	or	<input type="checkbox"/>	<input type="checkbox"/>	or _____
c.	<input type="checkbox"/>	or	<input type="checkbox"/>	<input type="checkbox"/>	or _____
d.	<input type="checkbox"/>	or	<input type="checkbox"/>	<input type="checkbox"/>	or _____

5. Real evidence:

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

6. Permit the accused to inspect Report Chit. Yes \_\_\_\_\_ No \_\_\_\_\_  
7. Accused initialed second page of charges (if any) N/A Yes \_\_\_\_\_ No \_\_\_\_\_  
8. Accused signed Acknowledgement line on NAVPERS 1626/7 Yes \_\_\_\_\_ No \_\_\_\_\_  
9. Investigator signed witness line on NAVPERS 1626/7 Yes \_\_\_\_\_ No \_\_\_\_\_  
10. Accused waived his rights. Yes \_\_\_\_\_ No \_\_\_\_\_

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

- a. ☐ Accused's signed statement attached.  
b. ☐ Summary of interrogation attached.

Encl (2)

Appendix 2-4(6)

WITNESS' STATEMENT  
NJS Form 5811/2

Name	Rank/Rate	Social Security No.
Command		Division
TAD from/to		
until		
Whereabouts for next 30 days		Phone

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

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(use additional pages if necessary)

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

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

Sworn to before me this date.

\_\_\_\_\_ 19\_\_\_\_

Encl (3)

Appendix 2-4 (7)

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

\_\_\_\_\_  
(Date)

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

\_\_\_\_\_  
INTERVIEWER SOCIAL SECURITY NUMBER RATE/RANK

RIGHTS

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

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

(2) I have the right to remain silent;-----Initial \_\_\_\_\_

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

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

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

WAIVER OF RIGHTS

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

(1) I expressly desire to waive my right to remain silent---Initial \_\_\_\_\_

(2) I expressly desire to make a statement-----Initial \_\_\_\_\_

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

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

Incl (4)

Appendix 2-4(8)

coercion of any kind having been used against me.-----Initial

**TIME**

DATE \_\_\_\_\_

**TIME**

DATE \_\_\_\_\_

**TIME**

DATE \_\_\_\_\_

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

**SIGNATURE (ACCUSED/SUSPECT)**

## CHAPTER III

### INFORMAL DISCIPLINARY ACTIONS: NONPUNITIVE MEASURES

#### 0301 INTRODUCTION

While many violations of the Uniform Code of Military Justice could be handled formally, by imposition of nonjudicial punishment or referral to various levels of courts-martial, this is not necessary--or even desirable--in every case. Often, wise use of nonpunitive measures can be as effective in dealing with minor disciplinary problems. Consequently, the military justice system recognizes the need to provide for informal disciplinary measures. See, e.g., OPNAVINST 3120.32B of 26 September 1986, Subject: Standard Organization and Regulations of the U.S. Navy, Paragraph 142.2; Paragraph 1300.1b, Marine Corps Manual.

The term "nonpunitive measures" is used to refer to various leadership techniques which can be used to develop acceptable behavioral standards in members of a command. Nonpunitive measures generally fall into three areas: nonpunitive censure, extra military instruction, and administrative withholding of privileges. Commanding officers and officers in charge are authorized and expected to use nonpunitive measures to further the efficiency of their commands. See R.C.M. 306(c)(2), MCM, 1984 [hereinafter R.C.M. \_\_\_\_]; Manual of the Judge Advocate General, SECNAVINST 5800.7B, section 0111 [hereinafter JAGMAN, § \_\_\_\_].

While it is commonly believed that a commander's discretion is virtually unlimited in the area of nonpunitive measures, in fact the UCMJ and secretarial regulations prescribe significant limitations on the use of nonpunitive measures. In this regard, it should be noted initially that nonpunitive measures may never be used as a means of informal punishment for any military offense. JAGMAN, § 0111a. 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.

#### 0302 AUTHORITY FOR NONPUNITIVE MEASURES

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

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



Other administrative actions available to a commander include matters related to fitness reports, reassignment, career-field reclassification, administrative reduction for inefficiency, etc. See R.C.M. 306(c)(2) discussion. Section 0111 of the JAG Manual sets forth the general policy concerning the use of nonpunitive measures.

#### 0303 NONPUNITIVE CENSURE

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

A sample nonpunitive letter of caution is set forth in Appendix A-1-a of the JAG Manual. It should be noted that such letters are private in nature and copies may not be forwarded to the Commander, Naval Military Personnel Command (NMPC), or to Headquarters Marine Corps (HQMC). JAGMAN, § 0111d. Additionally, such letters may not be quoted in or appended to fitness reports or evaluations, included as enclosures to JAG Manual or other investigative reports, or otherwise included in the official departmental records of the recipient. Id. The deficient performance of duty or other facts which led to the issuance of a letter of caution can be mentioned, however, in the recipient's next fitness report or enlisted evaluation. In this regard, the requirements of the JAG Manual are met by avoiding any reference to the fact that a nonpunitive letter of caution was issued. There is only one exception to the rule that nonpunitive letters of caution are not forwarded to NMPC or HQMC: Nonpunitive letters issued by the Secretary of the Navy are submitted for inclusion in the recipient's service records. JAGMAN, § 0111d.

#### 0304 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 nonpunitive censure, the law has placed some significant restraints on the commander's discretion in this area.

All EMI involves an order from a superior to a subordinate to do the task assigned. However, it has long been a principle in military law that orders imposing punishment are unlawful and need not be obeyed unless issued pursuant to nonjudicial punishment or a court-martial sentence. Thus, the problem that must be resolved in every EMI situation is whether a valid training purpose is involved or whether the purpose of the extra military instruction is punishment. The resolution of this problem requires some thought but the analysis involved is not complex and should be used to avoid legal complications.

A. 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.

B. Rationally related task. Once the deficiency has been identified correctly, the task assigned to correct that deficiency must logically be related to the deficiency noted or the courts will view the order to perform EMI as one imposing punishment. Appellate military courts have relied heavily on this analysis to determine the real purpose for giving an EMI order. It is this criterion that makes it absolutely essential that the commander properly identify the deficiency in terms of a character trait. Few tasks assigned as EMI will be logically related to a deficient act. For example, what extra task could be assigned to correct one who inadvertently leaves windows unsecured? Perhaps an assignment to close all the windows in the command area each night for two weeks -- or is that task indicative of a punishment motive? How about close order drill? Close order drill logically has nothing to do with windows. On the other hand, if a failure to close windows is the result of lack of knowledge of one's duty (ignorance being the deficiency), it would not be illogical to require the subordinate to study the pertinent security orders for an hour or two each night until he learns of his responsibility. Perhaps the delivery of a short lecture by the individual would demonstrate his new-found knowledge of this responsibility. Where the military superior has analyzed the subordinate's deficiency as relating to some trait of character and assigned a task he determined to be correctionally or instructionally related to the deficiency, the military courts have readily accepted the superior's opinion that the task he assigned was logically related to the deficiency he noted in the subordinate. Where the facts show that the superior assigned a task because the subordinate did some unacceptable act, military courts see the assigned task as retaliatory and, hence, view the task as punishment. In the latter situation, the superior cannot help but appear to be reacting to a breach of discipline instead of undertaking valid training.

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

Roberts, you're assigned close order drill for two hours each night. It'll be a long time before you forget to

secure a window around here! You'll close your windows or you'll wear a trench in the sidewalk!

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

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

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

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

E. Authority to impose. The authority to assign EMI to be performed during working hours is not limited to any particular rank or rate, but is an inherent part of the authority vested in officers and petty officers. The authority to assign EMI to be performed after working hours rests in the commanding officer or officer in charge, but may be delegated to officers, petty officers, and noncommissioned officers. See JAGMAN, § 0111b(6), (7); OPNAVINST 3120.32B of 26 September 1986, para. 142.2.a.

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

senior petty officer. There is no Marine Corps order which is equivalent to the Navy's OPNAVINST 3120.32B; however, the use of nonpunitive measures by officers and noncommissioned officers is discussed in paragraph 1300 of the Marine Corps Manual.

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

F. Cases involving orders to perform EMI

In United States v. Trani, 1 C.M.A. 293, 3 C.M.R. 27 (1952), C.M.A. held that an order given to a prisoner to perform close order drill was valid as a corrective measure to cure a want of discipline and self-control where the prisoner had burned certain confinement records. The C.M.A. concluded that the purpose of the drill was training, not punishment, and there was a reasonable relationship between the duty assigned, close order drill, as a corrective measure in light of the deficiencies exhibited by the accused, i.e., a want of discipline and self-control. See also United States v. Cagle, 40 C.M.R. 550 (A.B.R. 1969), where an Army Board of Review found that an order given to an unsentenced prisoner to drill with sentenced prisoners was a valid order to perform a military duty rather than an imposition of punishment.

Compare Trani and Cagle with United States v. Roadcloud, 6 C.M.R. 384 (A.B.R. 1952), in which an Army Board of Review found an order to the accused to perform close order drill at 2230 was punishment rather than additional training. The timing of the assignment, the antecedent circumstances, and the fact that the accused was held in the bullpen for two hours until he consented to drill, demonstrated the punitive nature of the order in this case.

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

United States v. Raneri, 22 C.M.R. 694 (N.B.R. 1956). The accused improperly deposited a parachute on the floor and was ordered, in company with a petty officer, to take a parachute and deposit it properly in each area of the hangar and to announce to those present, each time, that this was the proper way to deposit a parachute. The Navy Board of Review held that the order was punitive and, therefore, illegal because punishment may legally be imposed only as a result of article 15 proceedings or as a result of conviction by court-martial.

United States v. Robertson, 17 C.M.R. 684 (A.F.B.R. 1954). An inspection of the accused's quarters on Saturday resulted in an unsatisfactory mark. Normal cleaning hours were from 0730-1000. The accused was ordered to draw cleaning gear at 1600 to clean his spaces. The Air Force Board of Review found the order to clean after normal working hours was not additional training but an attempt to punish the accused by assignment of extra duties; therefore, the order was illegal.

United States v. Reeves, 1 C.M.R. 619 (A.F.B.R. 1951). The accused received a "gig" and was placed on a work detail roster. No reference was made to the observed deficiency; rather, the accused was assigned to cut a lawn from a list of jobs which needed doing. The Air Force Board of Review found that the work detail was punitive extra duty and could not be classified as an assignment of extra instruction for training. The board also determined that the word "gig" had punitive connotations.

#### 0305 DENIAL OF PRIVILEGES

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

B. Final authority to withhold a privilege, however temporarily, ultimately rests with the authority empowered to grant that privilege. Therefore, authority of officers and petty officers to withhold privileges is, in many cases, limited to recommendations via the chain of command to the appropriate authority. Officers and petty officers are authorized and expected to initiate such actions when considered appropriate to remedy minor infractions and necessary to further efficiency of the command. Authority to withhold privileges of personnel in a liberty status is vested in the commanding officer or officer in charge. Such authority may, however, be delegated to the appropriate echelon, but in no event may the withholding of privileges, either by the commanding officer, officer in charge, or some lower echelon be tantamount to a deprivation of liberty itself. See OPNAVINST 3120.32B of 26 September 1986, para. 142.2.b.

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

1. United States v. Haynes, 15 C.M.A. 122, 35 C.M.R. 94 (1964). An order restricting the accused for an indefinite period due to prior misconduct, for which the accused had been tried, was held to be punishment and illegal.

2. United States v. Gentle, 16 C.M.A. 437, 37 C.M.R. 57 (1966). An order to the accused to sign in hourly, designated to enforce a restriction to the base, which was imposed "so that he would be present for duty during normal working hours," was held to be illegal as designed to punish the accused.

3. United States v. Wallace, 2 M.J. 1 (C.M.A. 1976). An order issued to the accused, placing him in company arrest in order to insure his presence for duty each day, was held to be illegal and hence breach of the arrest limits would not support a charge of breaking arrest.

0306      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 hack"), is unenforceable and not sanctioned as a nonpunitive measure.

B. Finally, it should be noted that there is a common, although unauthorized, practice of withdrawing and withholding the green military identification card from an individual as a nonpunitive measure, or even as part of an NJP restriction, in order to enforce the presence of the individual for the required period of time. Frequently, an individual must show his identification card to leave the limits of the command, and without it, that individual may not leave. MILPERSMAN 4620150.1 and Paragraph 1004 of MCO P5512.11 require that such cards be carried at all times by all military personnel, and is to be surrendered only for identification or investigation, or while in disciplinary confinement. The Navy Court of Military Review has held illegal an order to surrender the military identification card for the purpose of enforcing a restriction order. United States v. Rao, No. 78-0537 (N.C.M.R. 25 Sep 1978.)

## Chapter IV

### NONJUDICIAL PUNISHMENT (West's Key Number: MILJUS Key Number 525)

0401 INTRODUCTION. The terms "nonjudicial punishment" and "NJP" are used interchangeably to refer to certain limited punishments which can be awarded for minor disciplinary offenses by a commanding officer or officer in charge to members of his command. In the Navy and Coast Guard, nonjudicial punishment proceedings are referred to as "captain's mast" or simply "mast." In the Marine Corps, the process is called "office hours," and in the Army and Air Force, it is referred to as "Article 15." Article 15 of the Uniform Code of Military Justice (UCMJ), Part V of the Manual for Courts-Martial, 1984 (MCM), and Part A of Chapter I of The Manual of the Judge Advocate General constitute the basic law concerning nonjudicial punishment procedures. The legal protection afforded an individual subject to NJP proceedings is more complete than is the case for nonpunitive measures, but, by design, is less extensive than for courts-martial.

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

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

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

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

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

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

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

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

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

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

1. As the term "nonjudicial" implies, they are not a trial;
2. a determination of "guilt" is not a conviction; and
3. a determination by the commanding officer not to impose punishment is not an acquittal precluding later nonjudicial punishment for their offense(s).

0402 NATURE AND REQUISITES OF NONJUDICIAL PUNISHMENT

A. The power to impose nonjudicial punishment

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

a. A commanding officer

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

(2) The power to impose NJP is inherent in the office and not in the individual. Thus, the power may be exercised by a person acting as CO, such as when the CO is on leave and the XO succeeds to command. See Articles 0855-0866, U.S. Navy Regulations, 1973, for complete "succession-to-command" information.

b. An officer in charge

Officers in charge exist in the naval service and the Coast Guard. In the Navy and Marine Corps, an officer in charge is a commissioned officer who is designated as officer in charge of a unit by departmental orders, tables of organization, manpower authorizations, orders of a flag or general officer in command or orders of the Senior Officer Present. See JAGMAN, § 0101b; see also Art. 0901, U.S. Navy Regulations, 1973.

c. Officers to whom NJP authority has been delegated

(1) Ordinarily, the power to impose NJP cannot be delegated. One exception is that a flag or general officer in command may delegate all or a portion of his article 15 powers to a "principal assistant" (a senior officer on his staff who is eligible to succeed to command) with the express approval of the Chief of Naval Personnel or the Commandant of the Marine Corps. Art. 15(a), UCMJ; JAGMAN, § 0101c.



(2) Additionally, where members of the naval service are assigned to a multiservice command, the commander of such multiservice command may designate one or more naval units and for each unit shall designate a commissioned officer of the naval service as commanding officer for NJP purposes over the unit. A copy of such designation must be furnished to the Chief of Naval Personnel or the Commandant of the Marine Corps, as appropriate, and to the Judge Advocate General. JAGMAN, § 0101d.

2. Limitations on power to impose NJP

No officer may limit or withhold the exercise of any disciplinary authority under article 15 by subordinate commanders without the specific authorization of the Secretary of the Navy. JAGMAN, § 0101e.

3. Referral of NJP to higher authority

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

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

B. Persons on whom nonjudicial punishment may be imposed

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

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

3. At the time the punishment is imposed, the accused must be a member of the command of the commanding officer (or of the unit of the officer in charge) who imposes the NJP. JAGMAN, § 0102a(1).

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

b. In addition, a party to a JAG Manual investigation remains "of the command or unit" to which he was attached at the time of his designation as a party for the sole purpose of imposing a letter of admonition or reprimand as NJP. JAGMAN, § 0102a(2).

c. Personnel of another armed force

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

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

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

4. Imposition of NJP on embarked personnel

a. The commanding officer or officer in charge of a unit attached to a ship for duty should, as a matter of policy, refrain from exercising his power to impose NJP, and should refer all such matters to the commanding officer of the ship for disposition. JAGMAN, § 0103a. This policy does not apply to Military Sealift Command (MSC) vessels operating under masters or to organized units embarked on a Navy ship for transportation only. Nevertheless, the commanding officer of a ship may permit a commanding officer or officer in charge of a unit attached to that ship to exercise nonjudicial punishment authority.

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

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

5. Imposition of NJP on reservists

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

b. The provisions of JAGMAN, § 0102c, Art. 3420320 MILPERSMAN, and MCO P1001R.E (Marine Corps Reserve Administrative Manual) discuss the NJP punishment of reservists. A member of a Reserve component who is subject to the UCMJ at the time he/she commits an offense in violation of the UCMJ is not relieved from amenability to NJP or court-martial proceedings solely because of the termination of his/her period of active duty

for training or inactive duty training before the allegation is resolved at NJP or court-martial.

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

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

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

(c) he may 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 commanding officer or officer in charge 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. JAGMAN, § 0102c. This provision does not preclude a "carry-over" of awarded but unserved restraint at a later period of active duty training or inactive duty training.

(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 for, such punishment cannot be served at any time other than a subsequent active duty training session unless the Secretary of the Navy so approves. Article 2(d)(5), UCMJ.

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

a. Article 15a, UCMJ, and Part V, para. 3, MCM, 1984, provide another limitation on the exercise of NJP. Except in the case of a person attached to or embarked in a vessel, an accused may demand trial by court-martial in lieu of NJP. See United States v. Forester, 8 M.J. 560 (N.C.M.R. 1979), to determine when a ship becomes a "vessel" for article 15 purposes. See also Off The Record, No. 85, enclosure (10).

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

c. The category of persons who may not refuse NJP includes those persons assigned or attached to the vessel; on board for passage; or assigned or attached to an embarked staff, unit, detachment, squadron, team, air group, or other regularly organized body. United States v. Penn, 4 M.J. 879 (N.C.M.R. 1978), gives an analysis of the "equal protection" aspects of denying this right to persons attached to or embarked on a vessel.

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

7. There is no power whatsoever for a commanding officer or officer in charge to impose NJP on a civilian.

### C. Offenses punishable under article 15

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

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

b. Nature of offense. The Manual for Courts-Martial, 1984, also indicates in Part V, para. 1e, that, in determining whether an offense is minor, the "nature of the offense" should be considered. This is a significant statement and often is misunderstood as referring to the seriousness or gravity of the offense. Gravity refers to the maximum possible punishment, however, and is the subject of separate discussion in that paragraph. In context, nature of the offense refers to its character, not its gravity. In military criminal law, there are two basic types of misconduct -- disciplinary infractions and crimes. Disciplinary infractions are breaches of standards governing the

routine functioning of society. Thus, traffic laws, license requirements, disobedience of military orders, disrespect to military superiors, etc., are disciplinary infractions. Crimes, on the other hand, involve offenses commonly and historically recognized as being particularly evil (such as robbery, rape, murder, aggravated assault, larceny, etc.). Both types of offenses involve a lack of self-discipline, but crimes involve a particularly gross absence of self-discipline amounting to a moral deficiency. They are the product of a mind particularly disrespectful of good moral standards. In most cases, criminal acts are not minor offenses and, usually, the maximum imposable punishment is great. Disciplinary offenses, however, are serious or minor depending upon circumstances and, thus, while some disciplinary offenses carry severe maximum penalties, the law recognizes that the impact of some of these offenses on discipline will be slight. Hence, the term "disciplinary punishment" used in the Manual for Courts-Martial, 1984, is carefully chosen.

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

2. Notwithstanding the case of Hagarty v. United States, 449 F.2d 352 (Ct.Cl. 1971), the Navy has taken the position that the final determination as to what constitutes a "minor offense" is within the sound discretion of the commanding officer.

Imposition of NJP does not, in all cases, preclude a subsequent court-martial for the same offense. See Part V, para. 1e, MCM, 1984 and page 4-29, infra.

3. The statute of limitations is applicable to NJP

Article 43(b)(2), UCMJ, prohibits the imposition of NJP more than two years after the commission of the offense. This is true notwithstanding the receipt of sworn charges by the officer exercising summary court-martial jurisdiction, which normally tolls the running of the statute of limitations for purposes of trial by court-martial.

#### 4. Cases previously tried in civil courts

a. Sections 0103b and 0116d of the JAG Manual permit the use of nonjudicial punishment to punish an accused for an offense for which he has been tried (whether acquitted or convicted) by a domestic or foreign civilian court, or whose case has been diverted out of the regular criminal process for a probationary period, or whose case has been adjudicated by juvenile court authorities, if authority is obtained from the officer exercising general court-martial jurisdiction (usually the general or flag officer in command over the command desiring to impose nonjudicial punishment).

b. NJP may not be imposed for an act tried by a court that derives its authority from the United States, such as a Federal district court. JAGMAN, §§ 0103b, 0116d(4). See also page 4-29, infra.

c. Clearly, cases in which a finding of guilt or innocence has been reached in a trial by court-martial cannot be then taken to nonjudicial punishment. JAGMAN, §§ 0103b and 0116d(4). However, the last point at which cases may be withdrawn from court-martial before findings with a view toward nonjudicial punishment is presently unclear. See e.g., Dobzynski v. Green, 16 M.J. 84 (C.M.A. 1983). Jones v. Commander, Naval Air Force, U.S. Atlantic Fleet, 18 M.J. 198 (C.M.A. 1984).

#### 5. Offenses not service connected

a. In O'Callahan v. Parker, 395 U.S. 258 (1969), the U.S. Supreme Court held that court-martial jurisdiction over military personnel cannot constitutionally be extended to offenses which are not in some sense service connected. The service connection limitation on the exercise of court-martial jurisdiction has been abandoned. See Solorio v. United States, 483 U.S. 435, 107 S. Ct. 2924 (1987). There never has been a service-connection limitation on the imposition of punishment under article 15, except in Hawaii. It would seem the holding in Solorio does away with even this exception. See JAGMAN, § 0102b.

b. OPNAVINST 11200.5B and MCO 5110.1B state, as a matter of policy, that in areas not under military control, the responsibility for maintaining law and order rests with civil authority. The enforcement of traffic laws falls within the purview of this principle. Off-duty, off-installation driving offenses, however, are indicative of inability and lack of safety consciousness. Such driving performance does not prevent the use of nonpunitive measures, i.e., deprivation of on-installation driving privileges.

#### D. Hearing procedure

1. Introduction. Nonjudicial punishment results from an investigation into unlawful conduct and a subsequent hearing to determine whether and to what extent an accused should be punished. Generally, when a complaint is filed with the commanding officer of an accused, that commander is obligated to cause an inquiry to be made to determine the truth of the matter. When this inquiry is complete, a NAVPERS Form 1626/7 or the UPB Form NAVMC 10132 is filled out. (This inquiry is discussed in Chapter II, supra.) The Navy NAVPERS 1626/7 functions as an investigation report as well as a record of the processing of the nonjudicial punishment case. The Marine Corps

NAVMC 10132 is a document used to record nonjudicial punishment only (MCO P5800.B provides details for the completion of the UPB form). The appropriate report and allied papers are then forwarded to the commander. The ensuing discussion will detail the legal requirements and guidance for conducting a nonjudicial punishment hearing.

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

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

b. Suspected offense. The suspected offense(s) must be described to the accused and such description should include the specific article of the UCMJ which the accused is alleged to have violated.

c. Government evidence. The accused should be advised of the information upon which the allegations are based or told that he may, upon request, examine all available statements and evidence.

d. Right to refuse NJP. Unless the accused is attached to or embarked in a vessel (in which case he has no right to refuse NJP), he should be told of his right to demand trial by court-martial in lieu of nonjudicial punishment; of the maximum punishment which could be imposed at nonjudicial punishment; of the fact that, should he demand trial by court-martial, the charges could be referred for trial by summary, special, or general court-martial; of the fact that he could not be tried at summary court-martial over his objection; and that, at a special or general court-martial, he would have the right to be represented by counsel.

e. Right to confer with independent counsel. United States v. Booker, 5 M.J. 238 (C.M.A. 1977), held that, because an accused who is not attached to or embarked in a vessel has the right to refuse NJP, he must be told of his right to confer with independent counsel regarding his decision to accept or refuse the NJP if the record of that NJP is to be admissible in evidence against him should the accused ever be subsequently tried by court-martial. A failure to properly advise an accused of his right to confer with counsel, or a failure to provide counsel, will not, however, render the imposition of nonjudicial punishment invalid or constitute a ground for appeal. Therefore, if the command imposing the NJP desires that the record of the NJP be admissible for courts-martial purposes, the record of the NJP must be prepared in accordance with applicable service regulations and reflect that:

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

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

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

Recordation of the above so-called "Booker rights" advice and waivers should be made on page 13 (Navy) or page 12 (Marine Corps) of the accused's service record. The accused's Notification and Election of Rights Form (see JAGMAN appendices A-1-r, A-1-s, or A-1-t, as appropriate) should be attached to the 1026/7 or UPB. A simple, straightforward recordation of the three statements given above was accepted by the Court of Military Appeals in United States v. Hayes, 9 M.J. 331 (C.M.A. 1980), as compliance with the Booker requirements. In this regard, section 0104 of the JAG Manual explains precisely how a command may prepare service record entries which will be admissible at any subsequent trial by court-martial. If an accused waives any or all of the above rights, but refuses to execute such a waiver in writing, the fact that he was properly advised of his rights, waived his rights, but declined to execute a written waiver should be so recorded.

Because of recent litigation in Federal court involving an attack on the Navy for issuing a discharge under other than honorable conditions based, at least in part, on prior nonjudicial punishments, the Commandant of the Marine Corps has directed, in ALMAR 097-87, that the Booker advice and service record book entry reflecting compliance with Booker contain the following language:

Date. I certify that I have been given the opportunity to consult with a lawyer, provided by the government at no cost to me, in regard to a pending (NJP/SCM) for violation of Article(s) (Art. No.(s)) of the UCMJ. I understand that I have the right to refuse that (NJP/SCM): I (do) (do not) choose to exercise that right. I further understand that acceptance of (NJP/SCM) does not preclude my command from taking other adverse administrative action against me. I (will) (will not) be represented by a civilian/military lawyer. Signature of accused.

f. Hearing rights. If the accused does not demand trial by court-martial within a reasonable time after having been advised of his rights or if the right to demand court-martial is not applicable, the accused shall be entitled to appear personally before the commanding officer for the nonjudicial punishment hearing. At such hearing the accused is entitled to:

- (1) Be informed of his rights under Article 31, UCMJ;
- (2) be accompanied by a spokesperson provided by, or arranged for, the member, and the proceedings need not be unduly delayed to permit the presence of the spokesperson, nor is he entitled to travel or similar expenses;
- (3) be informed of the evidence against him relating to the offense;
- (4) be allowed to examine all evidence upon which the commanding officer will rely in deciding whether and how much nonjudicial punishment to impose;



(5) present 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, if they are reasonably available, and if their appearance will not require reimbursement by the government, will not unduly delay the proceedings, or, in the case of a military witness, will not necessitate his being excused from other important duties; and

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

3. Forms. The forms set forth in Appendices A-1-r, A-1-s, and A-1-t of the JAG Manual, are designed to comply with the above requirements. Appendix A-1-r is to be used when the accused is attached to or embarked in a vessel. Appendix A-1-s is to be used when the accused is not attached to or embarked in a vessel, and the command does not desire to afford the accused the right to consult with a lawyer to assist the accused in deciding whether to accept or refuse NJP. (Note: In this case the record of nonjudicial punishment will not be admissible for any purpose at any subsequent court-martial.) Appendix A-1-t is to be used when an accused is not attached to or embarked in a vessel, and the command does afford the accused the right to consult with a lawyer to decide whether to accept or reject NJP. Use and retention of the proper forms are essential.

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

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

b. Hearing officer. Normally, the officer who actually holds the nonjudicial punishment hearing is the commanding officer of the accused. Part V, para. 4c, MCM, 1984, allows the commanding officer or officer in charge to delegate his authority to hold the hearing to another officer under extraordinary circumstances. These circumstances are not detailed, but they must be unusual and significant rather than matters of convenience to the commander. This delegation of authority should be in writing and the reasons

for it detailed. It must be emphasized that this delegation does not include the authority to impose punishment. At such a hearing, the officer delegated to hold the hearing will receive all evidence, prepare a summarized record of matters considered, and forward the record to the officer having nonjudicial punishment authority. The commander's decision will then be communicated to the accused personally or in writing as soon as practicable.

c. The record of a formal JAG Manual investigation or other factfinding body (e.g., an article 32 investigation) in which the accused was accorded the rights of a party with respect to an act or omission for which NJP is contemplated, may be substituted for the hearing. Part V, para. 4d, MCM, 1984; JAGMAN, § 0104e.

(1) It is possible to impose NJP on the basis of a record of a JAG Manual investigation at which the accused was afforded the rights of a party because the rights of a party include all elements of the mast hearing, plus additional procedural safeguards, such as assistance of counsel. See JAGMAN, § 0304.

(2) If the record of a JAG Manual investigation or other factfinding body discloses that the accused was not accorded all the rights of a party with respect to the act or omission for which NJP is contemplated, the commanding officer must follow the regular NJP procedure or return the record to the factfinding body for further proceedings to accord the accused all rights of a party. JAGMAN, § 0104e.

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

e. Personal representative. The concept of a personal representative to speak on behalf of the accused at an Article 15, UCMJ, hearing has caused some confusion. The burden of obtaining such a representative is on the accused. As a practical matter, he is free to choose anyone he wants -- a lawyer or a nonlawyer, an officer or an enlisted person. This freedom of the accused to choose a representative does not obligate the command to provide lawyer counsel, and current regulations do not create a right to lawyer counsel to the extent that such a right exists at court-martial. The accused may be represented by any lawyer who is willing and able to appear at the hearing. While a lawyer's workload may preclude the lawyer from appearing, a blanket rule that no lawyers will be available to appear at article 15 hearings would appear to contravene the spirit if not the letter of the law. It is likewise doubtful that one can lawfully be ordered to represent the accused. It is fair to say that the accused can have anyone who is able and willing to appear on his behalf without cost to the government. While a command does not have to provide a personal representative, it should help the accused obtain the representative he wants. In this connection, if the accused desires a personal representative, he must be allowed a reasonable time to obtain someone. Good judgment should be utilized here, for such a period should be neither inordinately short nor long.

f. Nonadversarial proceeding. The presence of a personal representative is not meant to create an adversarial proceeding. Rather, the

commanding officer is still under an obligation to pursue the truth. In this connection, he controls the course of the hearing and should not allow the proceedings to deteriorate into a partisan adversarial atmosphere.

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

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

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

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

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

a. Dismissal with or without warning

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

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

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

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

d. Imposition of NJP. When Marine Corps commanding officers and officers in charge impose nonjudicial punishment, para. 3004.3, MCO P5354.1 (Marine Corps Equal Opportunity Manual) requires racial/ethnic identifiers (e.g., Male/Female/White/Black/Hispanic/Other) should be reflected in unit punishment books and records of nonjudicial punishment proceedings.

#### 0403 AUTHORIZED PUNISHMENTS AT NJP

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

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

2. The status of the imposing officer. Is he a commanding officer or officer in charge? Regardless of the rank of an officer in charge, his punishment power is limited to that of a commanding officer in grade O-1 to O-3; the punishment powers of a commanding officer are commensurate with his permanent grade.

3. The status of the accused. Punishment authority is also limited by the status of the accused. Is he an officer or an enlisted person? If enlisted, what is his/her rate?

4. The nature of the command. Is it an ashore command or is he/she attached to or embarked in a vessel? The maximum punishment limitations discussed below apply to each NJP action and not to each offense. Note, also, there exists a policy that all known offenses of which the accused is suspected should ordinarily be considered at a single article 15 hearing. Part V, para. 1f(3), MCM, 1984.

#### B. Maximum limits -- specific

1. Officer accused. If punishment is imposed by officers in the following grades, the limits are as indicated below.

a. By officer exercising general court-martial jurisdiction or a flag/general officer in command, or designated principal assistant. Part V, para. b(1)(B), MCM, 1984; JAGMAN, § 0101c.

(1) Punitive admonition or reprimand.

(2) Arrest in quarters: not more than 30 days.

(3) Restriction to limits: not more than 60 days.

(4) Forfeiture of pay: not more than 1/2 of one month's pay per month for two months.

b. By officers 0-4 to 0-6. Part V, para. 5b(1), MCM, 1984; JAGMAN, § 0105.

(1) Admonition or reprimand.

(2) Restriction: not more than 30 days.

c. By officers 0-1 to 0-3. JAGMAN, § 0105.

(1) Admonition or reprimand.

(2) Restriction: not more than 15 days.

d. By officer in charge: none.

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

a. By commanding officers in grades 0-4 and above

(1) Admonition or reprimand.

(2) Confinement on bread and water/diminished rations: impossible only on grades E-3 and below, attached to or embarked in a vessel, for not more than 3 days.

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

(4) Forfeiture: not more than 1/2 of one month's pay per month for two months.

(5) Reduction: one grade, not impossible on E-7 and above (Navy) or on E-6 and above (Marine Corps).

(6) Extra duties: not more than 45 days.

(7) Restriction: not more than 60 days.

b. By commanding officers in grades 0-3 and below or any commissioned officer in charge

(1) Admonition or reprimand.

(2) Confinement on bread and water/diminished rations: not more than 3 days and only on grades E-3 and below attached to or embarked in a vessel.

(3) Correctional custody: not more than 7 days and only on grades E-3 and below.

(4) Forfeiture: not more than 7 days' pay.

(5) Reduction: to next inferior pay grade; not impossible on E-7 and above (Navy) or E-6 and above (Marine Corps).

(6) Extra duties: not more than 14 days.

(7) Restriction: not more than 14 days.

C. Nature of the punishments

1. Admonition and reprimand. Punitive censure for officers must be in writing, although it may be either oral or written for enlisted personnel. Procedures for issuing punitive letters are detailed in section 0106 and appendices A-1-b and A-1-c of the JAG Manual. See also SECNAVINST 1920.6 series. These procedures must be complied with. It should be noted that reprimand is considered more severe than admonition.

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

3. Restriction. Restriction also is a form of moral restraint. Part V, para. 5c(2), MCM, 1984. Its severity depends upon the breadth of the limits as well as the duration of the restriction. If restriction limits are drawn too tightly, there is a real danger that they may amount to either confinement or arrest in quarters, which in the former case cannot be imposed as nonjudicial punishment and in the latter case is not an authorized punishment for enlisted persons. As a practical matter, restriction ashore means that an accused will be restricted to the limits of the command except of course at larger shore stations where the use of recreational facilities might be further restricted. Restriction and arrest are normally imposed by a written order detailing the limits thereof and usually require the accused to log in at certain specified times during the restraint. Article 1154.1 of U. S. Navy Regulations, 1973, provides that an officer placed in the status of arrest or restriction shall not be confined to his room unless the safety or the discipline of the ship requires such action.

4. Forfeiture. A forfeiture applies to basic pay and to sea or foreign duty pay, but not to incentive pay, allowances for subsistence or quarters, etc. "Forfeiture" means that the accused forfeits monies due him in compensation for his military service only; it does not include any private funds. This distinguishes forfeiture from a "fine," which may only be awarded by courts-martial. The amount of forfeiture of pay should be stated in whole dollar amounts, not in fractions, and indicate the number of months affected; e.g., "to forfeit \$50.00 pay per month for two months." Where a reduction is also involved in the punishment, the forfeiture must be premised on the new lower rank, even if the reduction is suspended. Part V, para. 5c(8), MCM, 1984. Forfeitures are effective on the date imposed unless suspended. Where a previous forfeiture is being executed, that forfeiture will be completed before any newly imposed forfeiture will be executed. JAGMAN, § 0105b(1).

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

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

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

8. Correctional custody. Correctional custody is a form of physical restraint during either duty or nonduty hours, or both, and may include hard labor or extra duty. Awardees may perform military duty but not watches and cannot bear arms or exercise authority over subordinates. See Part V, para. 5c(4), MCM, 1984. Specific regulations for conducting correctional custody are found in OPNAVINST 1640.7 and MCO 1626.7B. Time spent in correctional custody is not "lost time." Correctional custody cannot be imposed on grades E-4 and above. See JAGMAN, § 0105a(2). To assist commanders in imposing correctional custody, correctional custody units (CCU's) have been established at major shore installations. The local operating procedures for the nearest CCU should be checked before correctional custody is imposed.

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

#### D. Execution of punishments

1. General rule. As a general rule, all punishments, if not suspended, take effect when imposed. Part V, para. 5e, MCM, 1984; JAGMAN, § 0105b. This means that the punishment in most cases will take effect when the commanding officer informs the accused of his punishment decision. Thus, if the commanding officer wishes to impose a prospective punishment, one to take effect at a future time, he should simply delay the imposition of nonjudicial punishment altogether. There are, however, several specific rules which authorize the deferral or stay of a punishment already imposed.

a. Deferral of correctional custody or confinement on bread and water or diminished rations. Section 0105b(2) of the JAG Manual permits a commanding officer or an officer in charge to defer correctional custody, confinement on bread and water, or confinement on diminished rations for a period of up to 15 days when:

- (1) Adequate facilities are not available;
- (2) the exigencies of the service so require; or
- (3) the accused is found to be not physically fit for the service of these punishments.

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

c. Interruption of restraint punishments by subsequent nonjudicial punishments. The execution of any nonjudicial (or court-martial) punishment involving restraint will normally be interrupted by a subsequent nonjudicial punishment involving restraint. Thereafter, the unexecuted portion of the prior restraint punishment will be executed. The officer imposing the subsequent punishment, however, may order that the prior punishment be completed prior to the service of the subsequent punishment. JAGMAN, § 0105b(2). This rule does not apply to forfeiture of pay, which must be completed before any subsequent forfeiture begins to run. JAGMAN, § 0105b(1).

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

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



TABLE ONE

## LIMITS OF PUNISHMENTS UNDER UCMJ, ART. 15

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

(1) May not be combined with restriction

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

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

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

(5) Shall be expressed in whole dollar amounts only

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

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

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

## 0404 COMBINATIONS OF PUNISHMENTS

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

1. Arrest in quarters may not be imposed in combination with restriction;
2. confinement on bread and water or diminished rations may not be imposed in combination with correctional custody, extra duties, or restriction;
3. correctional custody may not be imposed in combination with restriction or extra duties; or
4. restriction and extra duties may be combined to run concurrently, but the combination may not exceed the maximum imposable for extra duties.

### B. Examples

1. If an O-4 commanding officer wishes to impose the maximum amount of all permissible nonjudicial punishments upon an E-3, the maximum that could be imposed would be:

- a. A punitive letter of reprimand or admonition (or an oral reprimand or admonition);
- b. reduction to E-2;
- c. forfeiture of one-half pay per month for two months (based upon the reduced rate); and
- d. forty-five days restriction and extra duties to be served concurrently.

2. If an O-3 commanding officer (or any officer in charge, regardless of grade) wishes to impose the maximum amount of all permissible nonjudicial punishments upon an E-3, the maximum that could be imposed would be:

- a. A punitive letter of reprimand or admonition (or an oral reprimand or admonition);
  - b. reduction to E-2;
  - c. forfeiture of 7 days' pay (based upon the reduced rate);
- and
- d. fourteen days restriction and extra duties to be served concurrently.

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

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

1. The officer who initially imposed the NJP (this authority is inherent in the office, not the person holding the office);
2. the successor in command to the officer who imposed the punishment;
3. the superior authority to whom an appeal from the punishment would be forwarded, whether or not such an appeal has been made;
4. the commanding officer or officer in charge of a unit, activity, or command to which the accused is properly transferred after the imposition of punishment by the first commander. JAGMAN, § 0110b; and
5. the successor in command of the latter.

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

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

2. Remission. Part V, para. 6d, MCM, 1984. This action relates to the unexecuted parts of the punishment; that is, those parts which have not been completed. This action relieves the accused from having to complete his 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 service-member automatically remits any unexecuted punishment imposed under article 15.

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

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

- (1) Arrest in quarters to restriction;
- (2) confinement on bread and water or diminished rations to correctional custody;
- (3) correctional custody or confinement on bread and water or diminished rations to extra duties or restriction or both (to run concurrently); or
- (4) extra duties to restriction.

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

c. Example: As was mentioned, in mitigating nonjudicial punishments, neither the quantity nor the quality of the punishment may be increased. For example, it would be impermissible to mitigate 3 days' confinement on bread and water to 4 days' restriction because this would increase the quantity of the punishment. It would also be impermissible to mitigate 60 days' restriction to one day of confinement on bread and water because this would increase the quality of the punishment.

d. Reduction in grade. Reduction in grade, even though executed, may be mitigated to forfeiture of pay. The amount of forfeiture can be no greater than that which could have been imposed by the mitigating commander had he initially imposed punishment. This mitigation may be done only within 4 months after the date of execution. Part V, para. 6b, MCM, 1984.

4. Suspension of punishment. Part V, para. 6a, MCM, 1984. This is an action to withhold the execution of the imposed punishment for a stated period of time pending good behavior on the part of the accused. Only subsequent misconduct during the probationary period will cause the suspension to be vacated (revoked) and this misconduct must constitute an offense under the UCMJ. This action can be taken with respect to unexecuted portions of the punishment, or, in the case of a reduction in rank or a forfeiture, such action may be taken even though the punishment has been executed.

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

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

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

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

(1) Vacation of the suspended punishment may only be based upon an offense under the UCMJ committed during the probationary period.

(2) Before a suspension may be vacated, the service-member ordinarily should be notified that vacation is being considered and informed of the reasons for the contemplated action and his right to respond. A formal hearing is not required unless the punishment suspended is of the kind set forth in Article 15(e)(1)-(7), UCMJ (i.e., O-4 to O-6 CO punishment), in which case the accused should, unless impracticable, be given an opportunity to appear before the officer contemplating vacation to submit any matters in defense, extenuation, or mitigation of the offense on which the vacation action is to be based.

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

(4) The order vacating a suspension must be issued within ten working days of the commencement of the vacation proceedings and the decision to vacate the suspended punishment is not appealable as a nonjudicial punishment appeal. JAGMAN, § 0110d.

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

A. Procedure. If punishment is imposed at NJP, the commanding officer is required to ensure that the accused is advised of his right to appeal. Part V, para. 4c(4)(B)(iii), MCM, 1984; JAGMAN, § 0104f and app. A-1-v. A person punished under article 15 may appeal the imposition of such punishment through proper channels to the appropriate appeal authority. Art. 15e, UCMJ; JAGMAN, § 0109. If, however, the offender is transferred to a new command prior to filing his appeal, the immediate commanding officer of the offender at the time the appeal is filed should forward the appeal directly to the officer who imposed punishment. JAGMAN, § 0108b.

1. When the officer who imposed the punishment is in the Navy chain of command, the appeal will normally be forwarded to the area coordinator authorized to convene general courts-martial. JAGMAN, § 0109a.

a. A GCM authority superior to the officer imposing punishment may, however, set up an alternative route for appeals.

b. When the area coordinator is not superior in rank or command to the officer imposing punishment, or when the area coordinator is the officer imposing punishment, the appeal will be forwarded to the GCM authority next superior in the chain of command to the officer who imposed the punishment.

c. An immediate or delegated area coordinator who has authority to convene GCM's may take action in lieu of an area coordinator if he is superior in rank or command to the officer who imposed the punishment.

d. For mobile units, the area coordinator for the above purposes is the area coordinator most accessible to the unit at the time of forwarding the appeal.

2. When the officer who imposed the punishment is in the chain of command of the Commandant of the Marine Corps, the appeal will be made to the officer next superior in the chain of command to the officer who imposed the punishment; e.g., an appeal from company office hours should be submitted to the battalion commander. JAGMAN, § 0109b.

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

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

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

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

1. Extension of time. If it appears to the accused that good cause may exist which would make it impracticable or extremely difficult to prepare and submit the appeal within the 5-day period, the accused should immediately advise the officer who imposed the punishment of the perceived problems and request an appropriate extension of time. The officer imposing NJP shall determine whether good cause was shown and shall advise the accused whether an extension of time will be permitted. JAGMAN, § 0108a(2).

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

C. Contents of appeal package. Sample nonjudicial punishment appeal packages are included as appendices at the end of this chapter. One is a suggested format for Marine Corps use and the other is for use in Navy cases. See appendices 4-1 and 4-2.

1. Appellant's letter (grounds for appeal). The letter of appeal from the accused should be addressed to the appropriate appeal authority via the commander who imposed the punishment and other appropriate commanding officers in the chain of command. The letter should set forth the salient features of the nonjudicial punishment (date, offense, who imposed it, and punishment imposed) and detail the specific grounds for relief. There are only two grounds for appeal: the punishment was unjust, or the punishment was disproportionate to the offense committed. The grounds for appeal are broad enough to cover all reasons for appeal. Unjust punishment exists when the evidence is insufficient to prove the accused committed the offense; when the statute of limitations (Article 43(b)(2), UCMJ) prohibits lawful punishment; or when any other fact, including a denial of substantial rights, calls into question the validity of the punishment. Punishment is disproportionate if it is, in the judgment of the reviewer, too severe for the offense committed.

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

2. Contents of the forwarding endorsement. All via addressees should use a simple forwarding endorsement normally and should not comment on the validity of the appeal. The exception to this rule is the endorsement of the officer who imposed the punishment. Section 0108c of the JAG Manual requires that his endorsement should normally include the following information. Marine Corps units should also refer to LEGADMINMAN, chapter 2 for more specific information.

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

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

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



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

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

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

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

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

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

D. Review guidelines. As a preliminary matter, it should be noted that NJP is not a criminal trial, but rather an administrative proceeding, primarily corrective in nature, designed to deal with minor disciplinary infractions without the stigma of a court-martial conviction. As a result, the standard of proof applicable at article 15 hearings is "preponderance of the evidence," vice "beyond reasonable doubt." JAGMAN, § 0104c.

1. Procedural errors. Errors of procedure do not invalidate punishment unless the error or errors deny a substantial right or do substantial injury to such right. Part V, para. 1h, MCM, 1984. Thus, if an offender was not properly warned of his right to remain silent at the hearing, but made no statement, he has not suffered a substantial injury. If an offender was not informed that he had a right to refuse nonjudicial punishment, and he had such a right, then the error amounts to a denial of a substantial right.

2. Evidentiary errors. Strict rules of evidence do not apply at nonjudicial punishment hearings. Evidentiary errors, except for insufficient evidence, will not normally invalidate punishment. If the reviewer believes the evidence insufficient to punish for the offense charged, but believes another offense has been proved by the evidence, the best practice would be to return the package to the commanding officer who imposed punishment and direct a rehearing on the other offense. The reviewer should then review the new action and complete his review. Such a practice, though not required, comports with the basic due-process-of-law notion that an accused is entitled to fair notice as to what he must defend against. This guidance does not apply where the other offense is a lesser included offense of the offense charged. Note that, although the rules of evidence do not apply at NJP, Article 31, UCMJ, should be complied with at the hearing. Part V, para. 4c(3), MCM, 1984.

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

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

5. Delegation of authority to action appeals. Pursuant to Part V, para. 7f(5), MCM, 1984, and section 0109d of the JAG Manual, an officer exercising general court-martial jurisdiction or an officer of general or flag rank in command may delegate his power to review and act upon NJP appeals to a "principal assistant" as defined in section 0101d of the JAG Manual. The officer who has delegated his NJP powers may not act upon an appeal from

punishment imposed by the principal assistant. In other cases, it may be inappropriate for the principal assistant to act on certain appeals (as where an identity of persons or staff may exist with the command which imposed the punishment), and such fact should be noted by the command in the forwarding endorsement. JAGMAN, § 0109d.

E. Authorized appellate action. Part V, para. 7f, MCM, 1984; JAGMAN, § 0109. In acting on an appeal, or even in cases in which no appeal has been filed, the superior authority may exercise the same power with respect to the punishment imposed as the officer who imposed the punishment. Thus, the reviewing authority may:

1. Approve the punishment in whole;
2. mitigate, remit, or set aside the punishment to correct errors;
3. mitigate, remit, or suspend (in whole or in part) the punishment for reasons of clemency;
4. dismiss the case (If this is done, the reviewer must direct the restoration of all rights, privileges, and property lost by the accused by virtue of the imposition of punishment.); or
5. authorize a rehearing on an uncharged but supported offense, or on the same offense, if there has been a substantial procedural error not amounting to a finding of insufficient evidence to impose NJP. At the rehearing, however, the punishment imposed may be no more severe than that imposed during the original proceedings, unless other offenses which occurred subsequent to the date of the original proceeding are added to the original offenses. If the accused, while not attached to or embarked in a vessel, waived his right to demand trial by court-martial at the original proceedings, he may not assert this right as to those same offenses at the rehearing but may assert the right as to any new offenses at the rehearing. JAGMAN, § 0109e.

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

#### 0407 IMPOSITION OF NJP AS A BAR TO FURTHER PROCEEDINGS

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

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

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

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

2. A superior in the chain of command may require that certain types of cases be forwarded to him prior to the immediate commanding officer imposing NJP. See R.C.M. 401, MCM, 1984. But, a superior may not withhold or limit the exercise of a subordinate's NJP authority without the express authorization of the Secretary of the Navy. See JAGMAN, § 0101e.

C. Imposition of NJP as a bar to subsequent court-martial. R.C.M. 907(b)(2)(D)(iv), MCM, 1984, would prohibit an accused from being tried at court-martial for a minor offense for which he has already received NJP. Part V, para. 1e, MCM, 1984, defines "minor" offenses, in part, as "offense(s) for which the maximum sentence imposable would not include a dishonorable discharge or confinement for longer than one year if tried by general court-martial." The rule further provides, however, that the commanding officer imposing punishment has the discretion to consider as "minor" even certain offenses carrying punishments in excess of that provided in the rule. See, e.g., Capello v. United States, 624 F.2d 976 (Ct.Cl. 1980) (possession of heroin); United States v. Rivera, 45 C.M.R. 582, n.3 (N.C.M.R. 1972) (possession of heroin). Should the court-martial determine that the offense was not "minor," it may go ahead and try the offense notwithstanding the prior imposition of nonjudicial punishment. See, e.g., Hagarty v. United States, 449 F.2d 352 (Ct.Cl. 1971); United States v. Fretwell, 11 C.M.A. 377, 29 C.M.R. 193 (1960); United States v. Vaughn, 3 C.M.A. 92, 11 C.M.R. 121 (1953).

#### 0408 TRIAL BY COURT-MARTIAL AS A BAR TO NJP

A. General. In two cases, the Court of Military Appeals has considered the propriety of the imposition of nonjudicial punishment for offenses which have already been litigated (at least to some degree) before a court-martial. A reading of these cases would appear to indicate that the question of whether the offense may lawfully be taken to NJP following a court-martial will depend upon whether trial on the merits had begun on the offenses at court-martial prior to the imposition of NJP.

B. Imposition of NJP after dismissal at court-martial before findings. In Dobynski v. Green, 16 M.J. 84 (C.M.A. 1983), a charge of possession of marijuana was referred to special court-martial. After the military judge granted the defense motion to suppress the marijuana, the convening authority withdrew the charge and imposed NJP upon the accused for the offense. As the accused was then attached to a vessel, he was unable to refuse the NJP. On petition for extraordinary relief before the Court of Military Appeals, the accused argued that the military judge violated his due process rights by allowing withdrawal of the charge after arraignment and prior to the presentation of evidence on the merits. In denying the petition for extraordinary relief, the Court held not only that the military judge properly allowed the withdrawal, but also that the "convening authority acted in accordance with the law and within his discretion in withdrawing the charges from the special court-martial." Id. at 86.

C. Imposition of NJP after acquittal at court-martial. In Jones v. Commander, Naval Air Force, U.S. Atlantic Fleet, 18 M.J. 198 (C.M.A. 1984), the accused's motion for a finding of not guilty was granted by the military judge following the presentation of the Government's case-in-chief. The convening authority then imposed NJP upon the accused for substantially the same offense. Here, the Court again denied the petition for extraordinary relief but in dicta condemned the imposition of NJP following the earlier court-martial conviction as an "unreasonable abuse of command disciplinary powers which cannot be tolerated in a fundamentally fair military justice system." Id. at 198-199.

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

SAMPLE

NAVY APPEAL PACKAGE

OF

NONJUDICIAL PUNISHMENT

APPENDIX 4-1

S A M P L E

5800  
8 Jul 19cy

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

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

Subj: APPEAL FROM NONJUDICIAL PUNISHMENT

1. I acknowledge receipt, and have noted the contents of the second endorsement on my appeal from nonjudicial punishment.
2. The appeal and all attached papers are returned for file with the record of my case.

  
JOHN P. WILLIAMS

5800  
Ser /  
6 Jul 19cy

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

From: Commanding Officer, USS BENSON (DD-895)

To: RDSN John P. Williams, USN, 434-52-9113

Subj: APPEAL FROM PUNISHMENT ICO RDSN JOHN P. WILLIAMS

1. Returned for delivery.

S. D. DUNN



5800  
Ser /  
1 Jul 19cy

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

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

Subj: APPEAL FROM PUNISHMENT ICO RDSN JOHN P. WILLIAMS

1. Returned, appeal (granted) (denied).
2. Your appeal has been referred to a lawyer for consideration and advice prior to my action.
3. (Statement of reasons for action on appeal, and remarks of admonition and exhortation, if desired.)
4. You are directed to return this appeal and accompanying papers to your immediate commanding officer for file with the record of your case.

*M. J. Hughes*  
M. J. HUGHES

S A M P L E

5800  
Ser /  
29 Jun 19cy

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

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

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

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

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

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

  
S. D. DUNN

See JAGMAN 0108c

5800  
27 Jun 19cy

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

Subj: APPEAL FROM NONJUDICIAL PUNISHMENT

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

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

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

a. Offenses

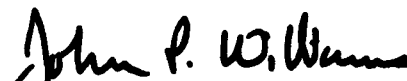
Charge: Violation of Article 134, UCMJ

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

b. Punishment: Forfeiture of \$50.00 pay

c. Grounds of Appeal

Punishment for the Charge is unjust because I, in fact, did not know there was a knife in my pants pocket. The clothes were borrowed.

  
JOHN P. WILLIAMS

REPORT AND DISPOSITION OF OFFENSE(S)  
NAVPERS 1020/7 (REV. 8-81) G/N 0100-1P-010-2000

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

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

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

PLACE OF OFFENSE(S) Quarterdeck, USS BENSON DD-895 DATE OF OFFENSE(S) 16 June 19cy

DETAILS OF OFFENSE(S) (Refer by article of UCMJ, if known. If unauthorized absence, give following info: time and date of commencement, whether over 1000 or liberty, time and date of apprehension or surrender and arrival on board, loss of ID card and/or liberty card, etc.):

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

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

QMC, USN /s/ Harold B. Johnson  
(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-ARREST 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 monitor.

(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	AGE
24 May 19xx	23 May 19xx	1 yr 1 mo	10 mos	HS	57

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

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

None

**PRELIMINARY INQUIRY REPORT**

From: Commanding Officer

Date: 20 June 19cy

To: ENS David S. Willis, USNR

I 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 reported evidence.

Seaman Williams is a good worker who is learning his rate thru on the job training. He needs occasional supervision, but works willingly when assigned a job to do. I consider him petty officer material, and this is the first trouble he has been in aboard ship.

s/s LT Garry V. Brown

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

Recommendation as to disposition:



DISPOSE OF CASE AT MOST



REFER TO COURT MARTIAL FOR TRIAL OF ATTACHED CHARGES  
(Complete Charge Sheet (DD Form 950) through Page 2)



NO PUNITIVE ACTION NECESSARY OR DESIRABLE



OTHER

Comment: (Include data regarding availability of witnesses, summary of reported evidence, conflicts in evidence, if reported, attach statements of witnesses, documentary evidence such as service record entries in DD Form 1300, etc.)

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

/s/ David S. Willis

**ACTION OF EXECUTIVE OFFICER**



DISMISSED



REFERRED TO CAPTAIN'S MAST

SIGNATURE OF EXECUTIVE OFFICER

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

**STENTY TO DEMAND TRIAL BY COURT-MARTIAL**

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

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

WITNESS

SIGNATURE OF ACCUSED

**ACTION OF COMMANDING OFFICER**



DISMISSED



DISMISSED WITH WARNING (Not considered RUP)



ADMONITION: ORAL/IN WRITING



REPRIMAND: ORAL/IN WRITING



REST TO \_\_\_\_\_ FOR \_\_\_\_\_ DAYS



REST TO \_\_\_\_\_ FOR \_\_\_\_\_ DAYS WITH SUPP. FROM DUTY



FORFEITURE: TO FORFEIT \$ 50.00 PAY PER MO. FOR 1 MO. (DD)



CONF. ON \_\_\_\_\_ 1, 2, OR 3 DAYS



CORRECTIONAL CUSTODY FOR \_\_\_\_\_ DAYS



REDUCTION TO NEXT INFERIOR PAY GRADE



REDUCTION TO PAY GRADE OF \_\_\_\_\_



EXTRA DUTIES FOR \_\_\_\_\_ DAYS



PUNISHMENT SUSPENDED FOR \_\_\_\_\_



NOT BE INVESTIGATED



RECOMMENDED FOR TRIAL BY CCM



AWARDED SPCM



AWARDED SDN

DATE OF MAST

DATE ACCUSED INFORMED OF ABOVE ACTION

SIGNATURE OF COMMANDING OFFICER

25 June 19cy

25 June 19cy

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

If 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 30 days.

SIGNATURE OF ACCUSED

John P. Williams

DATE

25 June 19cy

I have explained the above right to appeal to the accused.

SIGNATURE OF WITNESS

H. D. Hughes

25 June 19cy

**FINAL ADMINISTRATIVE ACTION**

APPROPRIATE OFFICER OF ACCUSED

DATE 27 June 19cy

FINAL RESULT OF APPEAL

FORWARDED FOR CCM TRIAL ON \_\_\_\_\_

APPROPRIATE OFFICER OF ACCUSED TO REVIEW AND PAY ACCOUNT ADJUSTED

DATE 25 June 19cy

/s/ Leg Off  
(Initials)

FILED IN JAG FILE (Initials)

DATE 25 June 19cy

/s/ Leg Off  
(Initials)

REVISIONS 1000-7 (REV 8-81) (BACK)

U.S. Government Printing Office: 1982-545-500/0000 11

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

Notification and election of rights concerning the contemplated imposition of nonjudicial punishment in the case RDSN John P. Williams  
SSN 434-52-9113, assigned or attached to USS BENSON (DD 895)

NOTIFICATION

1. In accordance with the requirements of paragraph 4 of Part V, MCM 1962, you are hereby notified that the commanding officer is considering imposing nonjudicial punishment on you because of the following alleged offenses:

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

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

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

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

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

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

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

(3) To be accompanied by a spokesperson provided or arranged for by you. A spokesperson is not entitled to travel or similar expenses, and the proceedings will not be delayed to permit the presence of a spokesperson. The spokesperson may speak on your behalf, but may not question witnesses except as the commanding officer may permit as a matter of discretion. The spokesperson need not be a lawyer.

Appendix A-1-r(1)

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

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

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

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

#### ELECTION OF RIGHTS

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

a. Personal appearance. (Check one)

JW ☒ I request a personal appearance before the commanding officer  
☐ I waive a personal appearance (Check one)

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

JW ☒ I do not desire to submit any written matters for consideration  
☐ Written matters are attached

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

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

NONE  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

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

Appendix A-1-r(2)

(Signature of witness)

(Signature of accused)  
25 June 1924  
(Date)

Appendix A-1-r(3)



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

I, RDSN John P. Williams, SSN 434-52-9113  
(Name and grade of accused)

assigned or attached to USS BENSON (DD-895),  
have been informed of the following facts concerning my rights of appeal as a  
result of (captain's mast) (office hours) held on 25 June 19CY:

- a. I have the right to appeal to (specify to whom the appeal should be addressed).
- b. My appeal must be submitted within a reasonable time. Five days after the punishment is imposed is normally considered a reasonable time, in the absence of unusual circumstances. Any appeal submitted thereafter may be rejected as not timely. If there are unusual circumstances which I believe will make it extremely difficult or not practical to submit an appeal within the five-day period, I should immediately advise the officer imposing punishment of such circumstances, and request an appropriate extension of time in which to file my appeal.
- c. The appeal must be in writing.
- d. There are only two grounds for appeal; that is:
  - (1) The punishment was unjust;
  - (2) The punishment was disproportionate to the offense(s) for which it was imposed.
- e. If the punishment imposed included reduction from the pay grade of E-4 or above or was in excess of: arrest in quarters for 7 days, correctional custody for 7 days, forfeiture of 7 days' pay, extra duties for 14 days, or restriction for 14 days, then the appeal must be referred to a military lawyer for consideration and advice before action is taken on my appeal.

/s/ John P. Williams  
(Signature of Accused & Date)

25 June 19cy

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

25 June 19cy

A-1-v

18 June 1947

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

On 16 July 1947, I was the JODD on board the USS Benson (DD 597). At approximately 1630, I was on the quarterdeck and RDSN John P. Williams passed me in civilian clothes. He had on a tight pair of double-knit pants and I noticed an oblong bulge in the right-hand front pocket. I suspected that he might have a knife in his pocket. I know that a member of the crew had bought knives when we were in the Med.

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

Harold B. Johnson  
QMC, USN

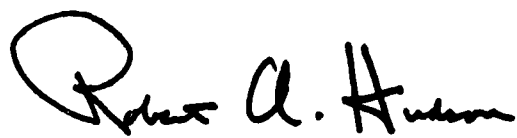
witness: David S. Wells  
ENS, USNR

18 June 1947

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

On 16 June 1947, I was The OOD on board The USS  
Benson. My JOOD was Chief Harold B. Johnson. At  
approximately 1645 Chief Johnson brought RUSN  
Williams to me and showed me a switchblade  
knife which he said he had found on Williams.  
I asked Williams if he had anything to say and  
he said he had no intention of using The knife  
but was only carrying it to protect himself.

I told Chief Johnson to put Williams on report  
and instructed Williams to report to The Legal  
Office The next morning after quarters.

  
WO-1, USN

witness: David S. Wells  
ENS, USNR

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

Suspect's Rights Acknowledgement/Statement

FULL NAME (ACCUSED/SUSPECT) <b>John P. Williams</b>	FILE/SERVICE NO. <b>NA</b>	RATE/RANK <b>RNSN</b>	SERVICE (BRANCH) <b>USN</b>
ACTIVITY/UNIT <b>USS BENSON DD 895</b>	SOCIAL SECURITY NUMBER <b>434-52-9113</b>	DATE OF BIRTH <b>22 May 19xx</b>	
NAME (INTERVIEWER) <b>D. S. Willis</b>	FILE/SERVICE NO. <b>725873</b>	RATE/RANK <b>ENS</b>	SERVICE (BRANCH) <b>USNR</b>
ORGANIZATION <b>USS BENSON DD 895</b>	BILLET <b>PIO</b>		
LOCATION OF INTERVIEW <b>USS BENSON DD 895</b>	TIME <b>1000</b>	DATE <b>19 Jun 19 cy</b>	

RIGHTS

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

(1) I am suspected of having committed the following offense(s): Unlawfully  
carrying a concealed weapon to wit: a switch blade knife

(2) I have the right to remain silent; ----- *[Signature]*

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

(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. ----- *[Signature]*

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

WAIVER OF RIGHTS

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

(1) I expressly desire to waive my right to remain silent; ----- *[Signature]*

(2) I expressly desire to make a statement; ----- *[Signature]*

A-1-n(1)  
Change 2



19 June 1964

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

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

John P. Williams

Witness:

David S. Willis

DAVID S. WILLIS

ENS USNR

**S A M P L E**

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

**O F**

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

**APPENDIX 4-2**

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

5812  
21 July 19cy

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

Subj: APPEAL OF NONJUDICIAL PUNISHMENT

Ref: (a) MCM, 1984

1. In accordance with reference (a), I am appealing the punishment awarded me at company office hours on 18 July 19cy.
2. Because this was my first offense, I feel that the punishment handed down to me at office hours was too hard and disproportionate to the offense that I committed. Additionally, I feel that my commanding officer did not consider my state of mind at the time I went UA.

  
JOHN Q. ADAMS



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

**5812  
23 Jul 19cy**

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

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

**Subj: APPEAL OF NONJUDICIAL PUNISHMENT**

**Ref: (a) JAGMAN  
(b) LEGADMINMAN**

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

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

**a. Summary of recitation of facts**

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

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

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

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

**(4) Private Adams was asked what he pled to the offense; he pleaded guilty and was found guilty.**

**(5) Private Adams was awarded reduction to Private, restriction to the limits of Schools Company, Schools Battalion, for seven days, without suspension from duty, and forfeiture of \$25.00 per month for one month.**

b. Summary assertion of facts made by Private Adams:

The findings of guilty are appealed because he feels the punishment too harsh.

c. Basic record data

(1) Summary of military offenses:

None.

(2) Performance, Proficiency and Conduct marks are 4.3 and 4.5, respectively.

2. In summary, Private Adams was found guilty of the offense against the Uniform Code of Military Justice. Subject-named Marine was aware of regulations pertaining to unauthorized absence and the steps he should have taken to obtain leave. Private Adams' age, length of service, SRB, and matters presented in extenuation and mitigation were also considered in arriving at an appropriate punishment. A brief summarization of the office hours is contained on the attached sheet of enclosure (1).

  
ANDREW JACKSON

Copy to:  
Pvt Adams

NOTE: When a Marine makes an appeal, the original UPB is forwarded as an enclosure with the Commanding Officer's endorsement. A duplicate is retained by the Commanding Officer pending final disposition. The duplicate copy may be used as the Marine's copy upon completion of the appeal.

Staple Additional pages here.

1. See Chapter 2, Marine Corps Manual for Legal Administration, MCO P5800.8.
2. Form is prepared for each accused enlisted person referred to Commanding Officer's Office Hours.
3. Reverse side may be used to summarize proceedings, as required by MCO P5800.8.

1. NAME (Last name, first name, middle initial) **ADAMS, John Q.** 2. GRADE **PFC, E-2** 3. SSN **456-64-5080**

4. UNIT (To include specific circumstances and the date and place of commission of the offense.)

Art 86. UA 1300, 5 Jul cy - 2344, 15 Jul cy, fr SoolsCo, SoolsBn, MCB, CamPen.

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

(Date) **18 Jul cy**

(Signature of accused)

*John Q. Adams*

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

(Date) **18 Jul cy**

(Signature of immediate CO of accused)

*Andrew Jackson*

A. FINAL DISPOSITION TAKEN AND DATE

Reduction to Pvt, restriction to the limits of SoolsCo, SoolsBn, for 7 days, without suspension from duty, and forfeiture of \$25.00 per month for 1 month. 18 Jul cy.

9. SUSPENSION OF EXECUTION OF PUNISHMENT, IF ANY.

None.

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

**Andrew JACKSON, Major, USMC, Commanding Officer**

11. Upon consideration of the facts and circumstances surrounding (this offense) ~~(these offenses)~~ and upon further consideration of the needs of military discipline in this command, I have determined the offense(s) involved herein to be minor and properly punishable under Article 15, UCMJ, such punishment to be that indicated in 8 and 9.

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

**18 Jul cy**

(Signature of CO who took final disposition in 8 and 9)

*Andrew Jackson*

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

**18 Jul cy**

(Date)

*Andrew Jackson*  
(Signature of CO who took final action in 11)

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

**18 Jul cy**

(Date)

*John Q. Adams*  
(Signature of accused)

15. DATE OF APPEAL, IF ANY.

**21 Jul cy**

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

Appeal granted. See 2d encl on the basic ltr for decision.

**24 Jul cy**

(Date)

*Master Van Buren*  
(Signature of CO making decision on appeal)

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

**24 Jul cy**

18. REMARKS

18 Jul - Intent to appeal indicated. Permission of rest for 7 days stayed.

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

*TBP*

18 July 1964  
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.

Exonerating or mitigating factor considered.

PVT Adams stated, relating to the VA, 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 knew it was wrong to leave without permission and that he was sorry for his actions.

Based on recommendation of his 1st SGT, Platoon SGT and his past record the punishment appearing in block 8 was imposed.

17 JUL 1984

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

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

NOTIFICATION

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

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

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

Statement of Pvt. John Q. Adams, USMC dtd 16 July 19cy acknowledges he was absent during period alleged and that his absence was unauthorized.

3. You have the right to demand trial by court-martial in lieu of nonjudicial punishment. If trial by court-martial is demanded, charges could be referred for trial by summary, special, or general court-martial. If charges are referred to trial by summary court-martial, you may not be tried by summary court-martial over your objection. If charges are referred to a special or general court-martial you will have the right to be represented by counsel. The maximum punishment that could be imposed if you accept nonjudicial punishment is:

4. If you decide to accept nonjudicial punishment, you may request a personal appearance before the commanding officer or you may waive this right.

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

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

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

Appendix A-1-t(1)

17 JUL 1984

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

(3) To be accompanied by a spokesperson provided or arranged for by you. A spokesperson is not entitled to travel or similar expenses, and the proceedings will not be delayed to permit the presence of a spokesperson. The spokesperson may speak on your behalf, but may not question witnesses except as the commanding officer may permit as a matter of discretion. The spokesperson need not be a lawyer.

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

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

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

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

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

#### ELECTION OF RIGHTS

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

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

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

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

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

Appendix A-1-t(2)

Enclosure (2)

17 JUL 1984

L. H. WITNELL  
(Signature of witness)

John Q. Adams  
(Signature of accused)

17 July 1984  
(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)  
  
\_\_\_\_\_  
(Date)

N/A  
(Signature of accused)

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

\_\_\_\_\_ I demand trial by court-martial in lieu of nonjudicial punishment  
☒ I accept nonjudicial punishment

(Note: If the accused demands trial by court-martial the matter should be submitted to the commanding officer for disposition.)

c. Personal appearance. (Check one)

☒ I request a personal appearance before the commanding officer

\_\_\_\_\_ I waive a personal appearance (Check one)

☒ 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

Appendix A-1-c(3)

Enclosure (2)

JACNOTE 5800  
17 JUL 1964

punishment imposed.)

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

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

NONE

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

☒

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

T.M. Witness  
(Signature of witness)

17 July 1964  
(Name of witness)

John A. Adams  
(Signature of accused)

\_\_\_\_\_  
(Date)

Appendix A-1-t(4)

Enclosure (2)



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

I, John Q. Adams, SSN 456 64 5080

(Name and grade of accused)

assigned or attached to ScolsCo, ScolsBn, MCB, Campen, have been informed of the following facts concerning my rights of appeal as a result of (captain's mast) (office hours) held on 18 July 19cy:

- a. I have the right to appeal to (specify to whom the appeal should be addressed).
- b. My appeal must be submitted within a reasonable time. Five days after the punishment is imposed is normally considered a reasonable time, in the absence of unusual circumstances. Any appeal submitted thereafter may be rejected as not timely. If there are unusual circumstances which I believe will make it extremely difficult or not practical to submit an appeal within the five-day period, I should immediately advise the officer imposing punishment of such circumstances, and request an appropriate extension of time in which to file my appeal.
- c. The appeal must be in writing.
- d. There are only two grounds for appeal; that is:
  - (1) The punishment was unjust;
  - (2) The punishment was disproportionate to the offense(s) for which it was imposed.
- e. If the punishment imposed included reduction from the pay grade of E-4 or above or was in excess of: arrest in quarters for 7 days, correctional custody for 7 days, forfeiture of 7 days' pay, extra duties for 14 days, or restriction for 14 days, then the appeal must be referred to a military lawyer for consideration and advice before action is taken on my appeal.

/s/ John Q. Adams  
(Signature of Accused & Date)

18 July cy

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

18 July cy

A-1-v

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

5812  
Ser /  
23 Jul 19cy

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

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

Ref: (a) MCM, 1984

Encl: (1) NJP Appeal Package

1. In accordance with reference (a), enclosure (1) is forwarded for review and advice by a judge advocate.
2. It is noted that the Commanding Officer, Schools Company, Schools Battalion, has the authority to promote up to and including the grade of E-3.

  
MARTIN VAN BUREN

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

5812  
24 Jul 19cy

MEMORANDUM ENDORSEMENT

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

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

1. The basic correspondence has been reviewed by a judge advocate. The proceedings are considered to be correct in law and fact, and the punishment awarded is not considered to be unjust or disproportionate to the offense committed.
2. Rejection of the appeal is recommended.

  
WILLIAM H. HARRISON

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

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

5812  
Ser /  
24 Jul 19cy

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

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

Subj: APPEAL OF NONJUDICIAL PUNISHMENT

1. Returned.

2. Your case has been reviewed by a judge advocate. The proceedings in this case are considered to be correct in law and fact, and the punishment is not considered to be unjust or disproportionate to the offense committed. However, as an act of clemency, only so much of the punishment as provides for reduction to private, restriction to the limits of Schools Company, Schools Battalion, for five days without suspension from duty, and forfeiture of \$25.00 per month for one month. That portion of the punishment providing for forfeiture of \$25.00 per month for one month and restriction to the limits of Schools Company, Schools Battalion for five days without suspension from duty is suspended for six months and, unless sooner vacated, will be remitted at that time.

  
MARTIN VAN BUREN

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

5812  
Ser /  
25 Jul 19cy

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

From: Commanding Officer

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

Subj: APPEAL OF NONJUDICIAL PUNISHMENT

1. Returned.
2. Action has been taken on your appeal, and your attention is invited to the second endorsement for the final results.
3. Inasmuch as the original correspondence is to be filed in the Unit Punishment Book, you are provided with a copy of your appeal.

  
ANDREW JACKSON

Copy to:  
Pvt Adams

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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.

## CHAPTER V

### JURISDICTIONAL LIMITATIONS AS TO PERSONS

(MILJUS Key Number 514-523)

#### 0501 JURISDICTION OVER THE PERSON

A. Introduction. This chapter discusses the jurisdiction of courts-martial to try certain classes of individuals, as defined in Articles 2 and 3 of the Uniform Code of Military Justice (UCMJ). The limitations on the jurisdiction of courts-martial to try individual offenses are discussed in Chapter VI, infra.

B. Article 2, UCMJ, provides that the following classes of persons are subject to trial by court-martial for offenses under the Code:

1. Members of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment; volunteers from the time of their muster or acceptance into the armed forces; inductees from the time of their actual induction into the armed forces; and other persons lawfully called or ordered into, or to duty in or for training in, the armed forces, from the dates when they are required by the terms of the call or order to obey it.
2. Cadets, aviation cadets, and midshipmen.
3. Members of a reserve component while on inactive-duty training, but in the case of members of the Army National Guard of the United States or the Air National Guard of the United States only when in Federal service.
4. Retired members of a regular component of the armed forces who are entitled to pay.
5. Retired members of a reserve component who are receiving hospitalization from an armed force.
6. Members of the Fleet Reserve and Fleet Marine Corps Reserve.
7. Persons in custody of the armed forces serving a sentence imposed by a court-martial.
8. Members of the National Oceanic and Atmospheric Administration, Public Health Service, and other organizations, when assigned to and serving with the armed forces.

9. Prisoners of war in custody of the armed forces.

10. In time of war, persons serving with or accompanying an armed force in the field.

11. Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the Canal Zone, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.

12. Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside the Canal Zone, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.

0502 PERSONS SUBJECT TO THE UCMJ AS DEFINED IN ARTICLE 2(a)(1)

A. Commencement of jurisdiction

1. Volunteers from the time of their muster or acceptance into the armed forces

a. Enlistees are subject to court-martial jurisdiction upon enlistment. Irregularities in the enlistment process, however, led to extensive litigation in the military courts from 1974 through 1979 regarding the existence of court-martial jurisdiction over servicemembers whose enlistments were alleged to have been coerced or the result of recruiter misconduct.

The landmark cases in this area were United States v. Catlow, 23 C.M.A. 142, 48 C.M.R. 758 (1974) and United States v. Russo, 1 M.J. 134 (C.M.A. 1975). In Catlow, the accused, who was a juvenile, was offered "five years indefinite in jail" or a three-year enlistment in the Army. The recruiter cooperated with the judge in effecting the accused's enlistment, although Army regulations prohibited the enlistment of a person in this situation. The pendency of civilian criminal charges was a nonwaivable bar to enlistment. The C.M.A. held for the first time that such a bar was not solely for the benefit of the government, i.e., the accused had standing to assert the invalidity of his enlistment as a bar to trial. The C.M.A. held that the enlistment was void at its inception. The C.M.A. also rejected the government's argument that the Army had acquired jurisdiction by means of a constructive enlistment; that is, that even though the initial enlistment may have been void, a "constructive enlistment" resulted from the accused's actual service in the armed forces without objection coupled with acceptance of pay and allowances. The court assumed, without deciding, that it might be possible for an accused in this situation to enter into a valid constructive enlistment,

but held that the government had not sustained its burden of proving a constructive enlistment after termination of the condition of ineligibility. (The civilian charges had been dismissed eight days after the accused enlisted).

In Russo, the accused suffered from a condition known as dyslexia; a person with dyslexia, who has not had proper special education, cannot read. The recruiter was advised of the accused's inability to read, a nonwaivable bar to enlistment. The recruiter effected Russo's enlistment by supplying him the answers to the Armed Forces Qualification Test (AFQT). The C.M.A. held there was no court-martial jurisdiction over the accused's person, with the following observations: the accused has standing to challenge the validity of his enlistment; the government is precluded from relying on a constructive enlistment where a government agent has acted improperly; and, when the issue is raised at trial, the government has an affirmative burden to establish jurisdiction over the person.

Following the Catlow and Russo decisions, hundreds of cases were dismissed for lack of court-martial jurisdiction based on allegations of coerced enlistments or enlistments effected by recruiter misconduct. The adverse impact on morale and discipline within the armed forces created by this situation prompted the enactment by Congress, in November 1979, of an amendment to article 2:

Section 802 of title 10, United States Code [Uniform Code of Military Justice (Article 2)], is amended --

(1) by designating the existing section as subsection (2); and

(2) by adding at the end thereof the following new subsections:

(b) The voluntary enlistment of any person who has the capacity to understand the significance of enlisting in the armed forces shall be valid for purposes of jurisdiction under subsection (a) of this section, and a change of status from civilian to member of the armed forces shall be effective upon the taking of the oath of enlistment.

(c) Notwithstanding any other provision of law, a person serving with an armed force who

(1) submitted voluntarily to military authority;

(2) met the mental competency and minimum age qualifications of sections 504 and 505 of this title at the time of voluntary submission to military authority;

(3) received military pay or allowances;  
and



(4) performed military duties;

is subject to this chapter until such person's active service has been terminated in accordance with the law or regulations promulgated by the Secretary concerned.

Subsequent to the amendment, ALNAV 105/79 was promulgated. Excerpts appear below.

To assist in the interpretation of the subject amendments, part of Senate Report No. 96-197, 96th Cong., 1st Sess. 122 (1979), The Legislative History, is quoted: The first portion of the amendment (new subsection (b) of Article 2) overrules that portion of *United States v. Russo* (1 M.J. 134 (C.M.A. 1975)) which invalidated for jurisdictional purposes an otherwise valid enlistment because of recruiter misconduct in the enlistment process. It does so by reaffirming the law as set forth by the Supreme Court in *In re Grimley*, 137 U.S. 147 (1890), and requiring compliance with only two factors before an enlistment will be considered valid: capacity to understand the significance of enlistment in the Armed Forces and the voluntary taking of the oath of enlistment. By recommending these amendments, the committee does not suggest that recruiter malpractice be tolerated, but reliance should be placed on prosecution under Articles 83 and 84, and on administrative reforms, to solve this problem. The second portion of the amendment (new subsection (c) of Article 2) provides for jurisdiction based upon a constructive enlistment. A constructive enlistment arises at the time an individual submits voluntarily to military authority, meets the mental competency and minimum age qualifications contained in sections 504 and 505 of Title 10, United States Code, receives military pay or allowances and performs military duties. This doctrine is applicable when there is not an otherwise valid enlistment. An individual who meets the four-part test for constructive enlistment will be amenable to UCMJ jurisdiction even if the initial entry of the individual into the armed forces was invalid for any reason, including recruiter misconduct or other improper government participation in the enlistment process. This amendment thus overrules those portions of *United States v. Brown*, 23 U.S.C.M.A. 162, 165, 48 C.M.R. 770, 781 (1974), *United States v. Barrett*, 1 M.J. 74 (C.M.A. 1975), *United States v. Harrison*, 5 M.J. 476, 481 (C.M.A. 1978), and *United States v. Russo*, which held that improper government participation in the enlistment process stops the government from asserting constructive enlistment. It also overrules that portion of *United States v. Valadez*, 5 M.J. 470, 473 (C.M.A. 1978) which stated that an uncured regulatory enlistment disqualification, not amounting to a lack of capacity or voluntariness, prevented application of the doctrine of

constructive enlistment. The new subsection is not intended to affect reservists not performing active service or civilians. It is intended only to reach those persons whose intent it is to perform as members of the active armed forces and who met the four statutory requirements. It thus overrules such cases as United States v. King, 11 U.S.C.M.A. 10, C.M.R. 243 (1959) (sic). An individual comes within new subsection (c) whenever he meets the requisite four-part test regardless of other regulatory or statutory disqualification. A person who initially does not voluntarily submit to military authority or who lacks the capacity to do so may do so successfully at a later time and jurisdiction shall attach at that moment. As a result, an individual who fails to meet the minimum age requirement set forth by statute, 17 years of age at present, may form a constructive enlistment upon reaching that age. Similarly, an individual who initially submits to military authority because he or she is given a choice between jail or military service and who subsequently does not protest the enlistment, make any effort to secure his or her release, and accepts pay or allowances may effect a constructive enlistment for jurisdictional purposes.

b. The retroactive application of the amendment to article 2 has been determined in United States v. McDonagh, 14 M.J. 415 (C.M.A. 1983). In McDonagh, the court analyzed the principles behind the constitutional provisions proscribing ex post facto laws and, after determining that procedural changes are not barred from retroactive application, it ruled that the amendment does not apply to strictly military offenses (military status is an element) but does apply to all other offenses no matter when committed. It appears that the Catlow/Russo bar to jurisdiction now applies only to strictly military crimes committed before 9 November 1979. See United States v. Marsh, 15 M.J. 252 (C.M.A. 1983); United States v. McGinnis, 15 M.J. 345 (C.M.A. 1983); see also summary dispositions beginning at 15 M.J. 159 (C.M.A. 1983).

In addition, there is some doubt as to the applicability of the amendment to the Catlow line of cases. The Army Court has said in dictum that "[w]hen a civilian court uses its sentencing power -- 'carrot stick' fashion -- to compel a defendant to choose between the certainty of going to jail and enlisting in the Army, a resulting enlistment is involuntary and affords no basis for the exercise of military jurisdiction." United States v. Boone, 10 M.J. 715 (A.C.M.R. 1981) (emphasis added). The court apparently discounted the amendment as a solution to the Catlow problem thereby negating the legislative history of the amendment. Neither the Navy-Marine Corps Court of Military Review nor the Court of Military Appeals has ruled on the question.

## 2. Enlistment by minors

a. An individual under age 17 is statutorily incompetent to acquire military status. See 10 U.S.C. § 505. However, where the minor continues to serve after passing the minimum statutory age, the government may show a constructive enlistment. United States v. Harrison, 5 M.J. 476 (C.M.A. 1978).

b. Current law permits original enlistment in the Regular armed forces of persons aged 17 to 35, but requires written consent of the parent or guardian for persons under 18. 10 U.S.C. § 505.

c. One who is over the statutory minimum age at the time of his enlistment, but within the area in which parental consent is required, has legal capacity to assume a military status (i.e., he may be tried by court-martial even if neither parent consented). The provision for consent is designed to protect the parent's right to the minor's custody and services. An enlistment by a minor without the required consent is voidable by the government at the request of the nonconsenting parent but, until discharged pursuant to such a request, the enlistee is subject to the UCMJ. United States v. Bean, 13 C.M.A. 203, 32 C.M.R. 203 (1962); United States v. Scott, 11 C.M.A. 655, 29 C.M.R. 471 (1960); United States v. Willis, 7 M.J. 827 (C.G.C.M.R. 1979). Parents who do not consent at the time of their minor's enlistment may lose the right to object to the minor's service if they ratify the enlistment contract by their subsequent actions, e.g., accepting allotments of military pay. United States v. Scott, *supra*. In any event, if they take no action to secure his discharge until after he has committed an offense under the UCMJ, he is subject to trial and punishment for that offense prior to being discharged. United States v. Bean, *supra*; United States v. Harrison, *supra*; United States v. Willis, *supra*.

In United States v. Lenoir, 18 C.M.A. 387, 40 C.M.R. 99 (1969), the accused's mother enlisted the accused in the Marine Corps when he was 16, using his brother's birth certificate. Finding parental consent, C.M.A. in dicta indicated that the enlistment would be voidable if the enlistment was against the will of the accused. (Statutory minimum age for enlistment with parental consent at this time was 14.)

d. One who is over the statutory maximum age at the time of his enlistment has legal capacity to assume a military status but is statutorily disqualified from doing so. Hence, if he misrepresents his age to join an armed force, he is treated as a fraudulent enlistee subject to the UCMJ during his service. In re Grimley, 137 U.S. 147 (1890).

### 3. Inductees from the time of their actual induction into the armed forces

a. Compliance with the induction ceremony required under the Universal Military Training and Service Act and departmental regulations (generally involving an oath and a step forward) is essential to creation of a military status. United States v. Hall, 17 C.M.A. 88, 37 C.M.R. 352 (1967); United States v. Ornelas, 2 C.M.A. 96, 6 C.M.R. 96 (1952).

b. Irregularities in the required induction ceremony may be cured by subsequent conduct indicating acceptance of military status, such as wearing a uniform, submitting to military authority, and accepting military pay and benefits. United States v. Hall, *supra*; United States v. Rodriguez, 2 C.M.A. 101, 6 C.M.R. 101 (1952); United States ex rel Stone v. Robinson, 431 F.2d 548 (3d Cir. 1970). However, one who refuses to participate in the induction ceremony, submits to military authority only under protest, and accepts military pay and benefits only out of necessity does not acquire a military status by his conduct. United States v. Hall, *supra*; United States ex rel Norris v. Norman, 296 F. Supp. 1270 (N.D. Ill. 1969).

c. Neither a ground for exemption from service nor mental reservations negate the creation of a military status where the individual submits to induction without protest and thereafter undertakes to serve. United States v. Scheunemann, 14 C.M.A. 479, 34 C.M.R. 259 (1964); Gilliam v. Resor, 407 F.2d 281 (5th Cir. 1969), cert. denied, 399 U.S. 933 (1970); Mayborn v. Heflebower, 145 F. 2d 864 (5th Cir. 1944); United States v. Martin, 9 C.M.A. 568, 26 C.M.R. 348 (1958).

4. Other persons lawfully called or ordered into, or to duty in or for training in, the armed forces from the dates when they are required by the terms of the call or order to obey it

A reservist called to active duty for training becomes subject to the UCMJ and military jurisdiction at one minute past midnight of the date on which he was to report. United States v. Cline, 29 M.J. 83 (C.M.A. 1989). The reservist who fails to obey orders to active duty is nonetheless subject to the UCMJ from the date specified for reporting and may be tried by court-martial for his failure to report and the resulting unauthorized absence. United States v. Kaase, 34 C.M.R. 883 (A.F.B.R. 1964); United States v. Wagner, 33 C.M.R. 853 (A.B.R. 1963).

A Ready Reserve may be called involuntarily to active duty for failure to perform satisfactorily his training requirements under the provisions of either 10 U.S.C. § 270 or 10 U.S.C. § 673a. If the member fails to obey his orders to active duty, he is subject to apprehension by military authorities and to trial by court-martial for unauthorized absence.

#### B. Termination of jurisdiction

1. Those awaiting discharge after expiration of their terms of enlistment. The general rule is that jurisdiction ceases upon discharge from the service or other termination of one's status. R.C.M. 202(a), discussion (2)(B). Discharge requires the delivery of discharge papers to the service-member, final accounting of pay, and completion of the clearing process required under applicable service regulations (e.g., turn in ID). United States v. King, 27 M.J. 327 (C.M.A. 1989). Mistaken delivery, or delivery before effective date of discharge, does not terminate jurisdiction. United States v. Garvin, 26 M.J. 194 (C.M.A. 1988); United States v. Brunton, 24 M.J. 566 (N.M.C.M.R. 1987). Service regulations authorizing commander to retain accused until midnight on the date of discharge does not extend jurisdiction once discharge is delivered. United States v. Howard, 20 M.J. 353 (C.M.A. 1985). Although there are no cases on point, it is the author's opinion that release from active duty is not equivalent to a discharge because there is no complete severing of all ties which current case law, and Articles 2 and 3 of the UCMJ, require in order to terminate jurisdiction.

2. Mere expiration of enlistment, however, without an actual discharge, does not alter one's status as subject to the UCMJ. United States v. Klunk, 3 C.M.A. 92, 11 C.M.R. 92 (1953). In this regard, R.C.M. 202(a), discussion (2)(B), states in part:

[S]ervicemembers may be retained past their scheduled time of separation, over protest, by action with a view to trial while they are still subject to the code. Thus, if

action with a view to trial is initiated before discharge or the effective terminal date of self-executing orders, a person may be retained beyond the date that the period of service would otherwise have expired or the terminal date of such orders.

R.C.M. 202(c)(2) lists the following as actions with a "view to trial": apprehension; imposition of restraint, such as restriction, arrest, confinement; and preferral of charges. The actions listed in R.C.M. 202(c)(2), however, are not exclusive. For example, in United States v. Rubenstein, 7 C.M.A. 523, 22 C.M.R. 313 (1957), the initiation of an investigation into a suspected offense and an order to report daily were sufficient to retain jurisdiction. In United States v. Hout, 19 C.M.A. 229, 41 C.M.R. 299 (1970), jurisdiction attached where the accused was interrogated and placed on administrative hold prior to the expiration of his enlistment. See also United States v. Bedford, 27 M.J. 518 (N.M.C.M.R. 1988).

3. In United States v. Hutchins, 4 M.J. 190, 192 (C.M.A. 1978), the court held that jurisdiction "continues ... until the formalities of a discharge... have been met, or... [the person]... objects to his continued retention [after the expiration of his term of enlistment] and a reasonable time expires without appropriate action by the Government." See also United States v. Brown, 11 M.J. 769 (N.M.C.M.R. 1981). But compare United States v. Gunter, 1 M.J. 1039 (N.C.M.R. 1976) with United States v. Hutchins, *supra*. In Gunter, the accused was placed on restriction and interrogated and later released from restriction. Thereafter, his active duty obligation expired; he then made a written request for release from active duty; finally, charges were preferred. The Navy court held that court-martial jurisdiction had not attached. The court also distinguished the facts in Gunter from United States v. Hout, *supra*, on the ground that the accused in Hout was placed on an "administrative hold" and continued to serve without objection.

4. Note, however, that merely conducting an investigation and drafting charges (as opposed to formal preferral of charges) may not be sufficient to maintain jurisdiction over an accused. In United States v. Smith, 4 M.J. 265, 267 (C.M.A. 1978), the Court of Military Appeals held that it is necessary that some affirmative action be taken with a view to trial prior to an accused's discharge date, and that such action "must be such that one can say that at some precise moment the sovereign authoritatively signaled its intention to impose its legal process upon the individual.... That action, whatever it is, must have been official." In Smith, the accused's discharge orders were automatically effective on a specified date without any further action being required. The accused had been warned by investigators of his rights under article 31, and admitted committing several larcenies. Charges were drafted, but were not signed or sworn to -- i.e., preferred -- until after the accused's discharge orders became effective. Under these circumstances, the court held that jurisdiction had not been maintained. But see United States v. Self, 13 M.J. 132, 137, 138 (C.M.A. 1982), wherein the court indicated that "when a criminal investigation reaches the point where the guilt of a particular suspect seems particularly clear and it is highly likely that he will be prosecuted, we believe that ... investigative actions can fulfill the requirements of paragraph 11d of the Manual [MCM, 1969 (Rev.)] even though no formal charges have been preferred." In Self, the accused had been "targeted"

by CID, summoned for an interview, apprised of the charges, advised of his rights prior to expiration of his term of service, and retained on active duty pursuant to an Army regulation which prescribed grounds for retention of a servicemember on active duty in connection with an ongoing investigation. The fact that a service regulation provided authority to retain the accused on active duty seems to be the sole basis for distinguishing Self from Smith. Accord United States v. Hudson, 5 M.J. 413 (C.M.A. 1978); United States Douse, 12 M.J. 473 (C.M.A. 1982); United States v. Meadows, 13 M.J. 165 (1982); United States v. Grom, 21 M.J. 53 (C.M.A. 1985); see also MILPERSMAN 1050155 h; United States v. Peel, 4 M.J. 28 (C.M.A. 1978). It should be noted that "action taken to continue jurisdiction need not be communicated to the accused to give it legal efficacy." United States v. Douse, supra at 478; United States v. Fitzpatrick, 14 M.J. 394 (C.M.A. 1983).

5. In summary, jurisdiction may be involuntarily extended beyond a servicemember's expiration of active obligated service (EAOS) if: (1) The government proceeds to trial prior to the member's EAOS; (2) the servicemember is retained beyond his EAOS but there is no demand for release from active duty; or (3) if the servicemember passes his EAOS and there is a demand for release from active duty, the government takes appropriate action within a reasonable time to comply with the provisions of R.C.M. 202(c). See United States v. Hutchins, supra; United States v. Davenport, 16 M.J. 219 (C.M.A. 1983). Eighteen days and 15 days have been held to be "reasonable time" for the government to take appropriate action after demand for release. United States v. Douse, supra; United States v. Freedman, 23 M.J. 820 (N.M.C.M.R. 1987).

#### 0503 PRESERVATION OF JURISDICTION OVER CERTAIN OFFENSES

A. Article 3, UCMJ, was enacted to preserve jurisdiction over certain offenses even though the individual had been discharged from the armed forces. The general rule that one may not be tried by court-martial for an offense once his status as a member of the armed forces has been terminated is subject to exception. One exception, set forth in article 3(a), requires that four general conditions be met:

1. Subject to any applicable statute of limitations, the individual must have committed an offense in violation of the UCMJ while he was subject to the UCMJ;
2. the offense must be punishable by confinement for five years or more;
3. the individual must not be amenable to trial for the offense in the courts of the United States, or of a state, a territory, or the District of Columbia; and
4. authorization must be obtained from the Secretary of the Navy. JAGMAN, § 0116c(1), (2). See also R.C.M. 202(a), discussion (B)(iii)(a).

B. Article 3(a) is valid only insofar as it makes those who have reacquired a status as persons subject to the UCMJ, as by reenlistment or voluntary recall to active duty, amenable to trial by court-martial. See United States v. Gladue, 4 M.J. 1 (C.M.A. 1977); United States v. Winton, 15 C.M.A. 222, 35 C.M.R. 194 (1965); United States v. Wheeler, 10 C.M.A. 646, 28 C.M.R. 212 (1959); United States v. Gallagher, 7 C.M.A. 506, 22 C.M.R. 296 (1957).

This provision was held unconstitutional by the Supreme Court insofar as it purports to extend court-martial jurisdiction to persons who, although subject to the UCMJ at the time of the alleged offense, have ceased to occupy that status and have severed all ties with the armed forces at the time of trial. Toth v. Quarles, 350 U.S. 11 (1955).

C. Article 3(b) maintains jurisdiction over individuals who have procured a fraudulent enlistment. This provision is unusual in that it requires two courts-martial, the first to determine if the discharge was fraudulent and the second for all other crimes committed while the individual was subject to the code. Wickham v. Hall, 12 M.J. 145 (C.M.A. 1981); United States v. Cole, 24 M.J. 18 (C.M.A. 1987); R.C.M. 202(a), discussion (B)(iii)(d).

D. A recent change to the UCMJ enacted by Congress in 1986, article 3(d) provides that jurisdiction over a member of a Reserve component is not lost upon termination of the active or inactive duty training period. No longer must the member's command "take action with a view to trial" before the end of the drill or ACDUTRA, or lose jurisdiction.

E. Interruption of status

1. R.C.M. 202(a), discussion (2)(B)(iii)(f), states the following rule:

When a person's discharge or other separation does not interrupt the status as a person belonging to the general category of persons subject to the code, court-martial jurisdiction over that person does not end.

The example given is that of a Reserve officer on active duty resigning his commission in order to augment to a Regular component.

2. In a series of decisions, the Court of Military Appeals confronted the question of whether a discharge of an enlisted man for the purpose of immediate reenlistment "interrupted his status" by creating a "hiatus" between enlistments. In each case, the court examined controlling regulations and circumstances attending the discharge to determine whether an actual separation had been accomplished prior to reenlistment. See United States v. Steidley, 14 C.M.A. 108, 33 C.M.R. 320 (1963); United States v. Nobel, 13 C.M.A. 413, 32 C.M.R. 413 (1962); United States v. Martin, 10 C.M.A. 636, 28 C.M.R. 202 (1959); United States v. Solinsky, 2 C.M.A. 153, 7 C.M.R. 29 (1953).

3. In United States v. Ginyard, 16 C.M.A. 512, 37 C.M.R. 132 (1967), the court, after citing the disagreement and misunderstanding stemming from its earlier decisions, announced its preference for a "simple rule of easy interpretation." The rule was stated:

Once an enlisted man has been discharged from the armed forces, that discharge operates as a bar to subsequent trial for offenses occurring prior to discharge, except in those situations expressly saved by Article 3a of the Code.

Id. at 516, 37 C.M.R. at 136.

4. The rule announced in Ginyard has been the subject of much criticism. See United States v. Caprio, 10 M.J. 587 (N.C.M.R. 1980, Donovan, J., concurring); Woodruff, The Rules in Ginyard's Case -- Congressional Intent or Judicial Expedient?, 21 A.F. L. Rev. 285 (1979). Following the rationale in the Woodruff article, the Army decided to challenge the Ginyard ruling in United States v. Clardy, No. 43917 (A.C.M.R. 1981), cert. filed, 10 M.J. 121 (1981). The facts of the case indicate that the accused committed several offenses during a prior enlistment and that he was discharged prior to the expiration of his active obligated service solely for the purpose of reenlisting. Recognizing that a "... person who is discharged before the expiration of his term of enlistment for the purpose of immediate reenlistment has experienced no termination of -- and no hiatus in -- his 'active service'... despite his receipt of a discharge from the prior enlistment..." the Court of Military Appeals held that court-martial jurisdiction exists to try the member for offenses committed during the prior enlistment. United States v. Clardy, 13 M.J. 308, 316 (C.M.A. 1982). In so holding, the court expressly overruled Ginyard. The court further indicated, however, that "military jurisdiction is terminated by a discharge at the end of an enlistment ... even though the servicemember immediately reenters the service." Id. Clardy applies to discharges after 26 July 1982. See also United States v. Horton, 14 M.J. 96 (C.M.A. 1982); R.C.M. 202(a), discussion (B)(iii)(b). Discharge for any length of time (e.g., two days) before expiration of enlistment for the purpose of reenlisting is enough to preserve jurisdiction. United States v. Moore, 22 M.J. 523 (N.M.C.M.R. 1986).

0504 JURISDICTION OVER CADETS, AVIATION CADETS AND MIDSHIPMEN, Article 2(a)(2), UCMJ

Article 1(6) and (7), UCMJ, define the above categories.

An officer candidate does not fall in the above categories but is a special class of enlisted person. See 10 U.S.C. § 600. Officer candidates are enlisted reservists who have consented to be on active duty.



MEMBERS OF A RESERVE COMPONENT WHILE THEY ARE ON  
INACTIVE DUTY TRAINING

A. In United States v. Caputo, 18 M.J. 259 (C.M.A. 1984), a reservist was arrested by civilian authorities for an off-base drug offense in Hawaii, where he was performing a two-week tour of active duty for training (ACDUTRA). The Navy took no action with a view to trial, but instead released Caputo at the end of his ACDUTRA. During the next month, the Navy investigated the offense and concluded that a court-martial was appropriate. When Caputo reported for his next weekend drill, he was apprehended, advised of the charges, and ordered into pretrial confinement. At trial he moved to dismiss the offenses for lack of in personam jurisdiction and, when the military judge denied his motion, he sought extraordinary relief. Chief Judge Everett examined paragraph 11a, MCM, 1969 (Rev.), which provided, "The general rule is that court-martial jurisdiction over [persons subject to the Code] ceases on discharge from the service or other termination of that status and that jurisdiction as to an offense committed during a period of service or status thus terminated is not revived by re-entry into the military service or return into such a status." He concluded that none of the exceptions contained in paragraph 11b, MCM, 1969 (Rev.) (interruption of status, see 0503.D, supra; overseas offenses, see 0503.A, supra) applied in this case, and so in personam jurisdiction was lacking. Senior Judge Cook pointed out that the language of paragraph 11a, MCM, 1969 (Rev.) does not appear in MCM, 1984. See R.C.M. 202(a).

B. The decision in Caputo was the catalyst that pushed Reserve jurisdiction problems to the attention of Congress. The resulting legislation had several major provisions. First, article 2(a)(3) extends jurisdiction over both inactive-duty training (i.e., weekend drills) and active-duty training, without any threshold requirements. If the member is training, he is subject to in personam jurisdiction. Second, article 2(d) now authorizes Regular component GCM authorities to recall Reserves to involuntary active duty for article 32 investigations, courts-martial, or nonjudicial punishment. Third, article 3(d) provides that jurisdiction is not lost over the Reserve upon termination of his inactive or active-duty training period. Thus, there should no longer be the problem of losing jurisdiction because a crime committed by a Reserve was not discovered until after the drill period ended.

C. When jurisdiction is based upon Article 3(d), UCMJ, members of a Reserve component not on active duty may be ordered to active duty involuntarily by a GCM authority over a Regular component for purposes of an article 32 investigation, trial, or imposition of nonjudicial punishment for offenses committed while subject to the UCMJ. JAGMAN, § 0116c.

0506 RETIRED MEMBERS OF A REGULAR COMPONENT OF THE ARMED FORCES WHO ARE ENTITLED TO PAY, Article 2(a)(4), UCMJ

RETIRED MEMBERS OF A RESERVE COMPONENT WHO ARE RECEIVING HOSPITALIZATION FROM AN ARMED FORCE, Article 2(a)(5), UCMJ

MEMBERS OF THE FLEET RESERVE AND FLEET MARINE CORPS RESERVE, Article 2(a)(6), UCMJ

A. The above three provisions represent an effort to continue military jurisdiction over specified categories of retired servicemembers who retain financial and other ties to the armed forces. On the basis of these ties, articles 2(a)(4) and (6) have been held to be a valid exercise of congressional power to regulate the land and naval forces. United States v. Hooper, 9 C.M.A. 637, 26 C.M.R. 417 (1958), upheld on collateral review, 326 F.2d 982 (Ct. Cl.), cert. denied, 377 U.S. 977 (1964); United States v. Overton, 24 M.J. 309 (C.M.A. 1987). Cf. United States v. Tyler, 105 U.S. 244 (1881). Contra Bishop, Court-Martial Jurisdiction Over Military - Civilian Hybrids: Retired Regulars, Reservists and Discharged Prisoners, 112 U. Pa. L. Rev. 317 (1964); Blair, Court-Martial Jurisdiction Over Retired Regulars: An Unwarranted Extension of Military Power, 50 Geo. L.J. 79 (1961).

1. These provisions draw no distinction between officer and enlisted retirees (United States v. Hooper, 9 C.M.A. 637, 26 C.M.R. 417 (1958); Pearson v. Bloss, 28 M.J. 376 (C.M.A. 1989)), nor is a distinction drawn between those retired for physical disability and those retired for length of service and other causes. United States v. Bowie, 14 C.M.A. 631, 34 C.M.R. 411 (1964).

2. It is not essential to jurisdiction under these provisions that the retiree be recalled to active duty for trial by court-martial. United States v. Hooper, supra.

3. Members of the Fleet Reserve are subject to the UCMJ. United States v. Overton, 24 M.J. 309 (C.M.A. 1987).

B. No retiree or member of the Fleet Reserve described in these provisions may be recalled to active duty solely for trial by court-martial. Neither may he be apprehended, arrested, or confined, or his case referred for trial by court-martial, without prior authorization of the Secretary of the Navy. JAGMAN, § 0116c.

0507 PERSONS IN CUSTODY OF THE ARMED FORCES SERVING A SENTENCE IMPOSED BY A COURT-MARTIAL, Article 2(a)(7), UCMJ

A. This provision retains military jurisdiction over persons, not otherwise subject to the UCMJ, who are in custody of the armed forces serving a court-martial sentence. A servicemember sentenced to confinement and punitive discharge remains subject to the UCMJ while serving confinement after execution of the discharge if he is in custody of the armed forces at the

time of the offense and remains in custody of the armed forces until the date of trial. United States v. Harry, 25 M.J. 513 (A.F.C.M.R. 1987); United States v. Ragan, 14 C.M.A. 119, 33 C.M.R. 331 (1963); United States v. Nelson, 14 C.M.A. 93, 33 C.M.R. 305 (1963); Ragan v. Cox, 320 F.2d 815 (10th Cir. 1963), cert. denied 375 U.S. 981 (1963); R.C.M. 202(a), discussion (B)(iii)(c). Military jurisdiction over such a prisoner is not terminated by interruption of the sentence, as where the prisoner escapes or serves a period of confinement in a civilian prison for other offenses. Upon his return to military custody, he is again subject to the UCMJ. United States v. Ragan, *supra*.

B. In cases of Navy personnel sentenced to confinement and punitive discharge, the discharge is not executed until completion of the sentence to confinement, except where the confinement is to be served in a Federal penitentiary. MILPERSMAN 3640420.4. Such undischarged prisoners are, of course, subject to the UCMJ as members of an armed force without regard to article 2(a)(7).

0508 MEMBERS OF THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, PUBLIC HEALTH SERVICE, AND OTHER ORGANIZATIONS WHEN ASSIGNED TO AND SERVING WITH THE ARMED FORCES, Article 2(a)(8), UCMJ

PRISONERS OF WAR IN CUSTODY OF THE ARMED FORCES, Article 2(a)(9), UCMJ

A. Article 2(a)(8), UCMJ, was a consolidation of statutes passed prior to the First and Second World Wars to expand jurisdiction of courts-martial over individuals who were part of existing civilian, governmental agencies who were assigned to work with the armed forces. When drafted, no distinction was made between wartime or peacetime service. The scope of "other organizations" has not been judicially tested or defined. *See* R.C.M. 202(a), discussion (3).

B. Article 2(a)(9), UCMJ, is the municipal law enactment of then existing international law. Under the provisions of the 1949 Geneva Prisoner of War Convention, a distinction was made between penal and disciplinary sanctions, Article 82(2) GPW; thus the limitations of this treaty would be followed if a prisoner of war were tried under the UCMJ.

0509 IN TIME OF WAR, PERSONS SERVING WITH OR ACCOMPANYING AN ARMED FORCE IN THE FIELD, Article 2(a)(10), UCMJ

A. 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. *See Reid v. Covert*, 354 U.S. 1 (1957) and cases cited therein, and United States v. Robertson, 5 C.M.A. 806, 19 C.M.R. 102 (1955). Certain of these decisions have construed the words "in the field" to embrace all military operations undertaken against an enemy including, for example, domestic staging operations and merchant shipping to a battle zone. *E.g.*, Hines v. Mikell, 259 F. 28 (4th Cir. 1919); In re Berue, 54 F. Supp. 252 (S.D. Ohio 1944); United States v. Robertson, *supra*. Language of the Supreme Court strongly suggests, however, that the permissible limits of a military

commander's jurisdiction over civilians "in the field" extends no further than the actual area of battle "in the face of an actively hostile enemy." Reid v. Covert, supra, at 33.

1. In Latney v. Ignatius, 416 F.2d 821 (D.C. Cir. 1969), the court held that article 2(a)(10) may not "be read so expansively as to reach" a civilian merchant seaman serving aboard an American-owned tanker under Military Sealift Command time charter, who was tried by court-martial for murdering a shipmate in a civilian bar in Danang, South Vietnam. Relying upon the implications of several Supreme Court decisions limiting peacetime military jurisdiction over civilians, the court suggests that even in the area of battle a civilian must be "assimilated" to military personnel and operations in order to be considered "in the field." The court, however, decided the case neither on the "serving with" issue nor the "time of war" issue but, after sitting on the case for a year pending decision in O'Callahan v. Parker, supra, said that the spirit of O'Callahan precludes an expansive reading of article 2(a)(10).

2. In United States v. Averette, 19 C.M.A. 363, 41 C.M.R. 363 (1970), a civilian was employed every day within Camp Davies, Republic of Vietnam. The C.M.A. said that, in view of the Supreme Court decisions in the area, time of war meant war declared by Congress. This decision seems to conflict with the earlier case of United States v. Anderson, 17 C.M.A. 588, 38 C.M.R. 386 (1968), where the court held that an unauthorized absence commencing on 3 November 1964 was "in time of war" within the meaning of article 43 providing for suspension of the statute of limitations on absence offenses in time of war. But see United States v. Robertson, 1 M.J. 934 (N.C.M.R. 1976).

0510 SUBJECT TO ANY TREATY OR AGREEMENT TO WHICH THE UNITED STATES IS OR MAY BE PARTY, OR TO ANY ACCEPTED RULE OF INTERNATIONAL LAW, PERSONS SERVING WITH, EMPLOYED BY, OR ACCOMPANYING THE ARMED FORCES OUTSIDE THE UNITED STATES AND OUTSIDE THE CANAL ZONE, THE COMMONWEALTH OF PUERTO RICO, GUAM, AND THE VIRGIN ISLANDS, Article 2(a)(11), UCMJ

A. This provision has been declared unconstitutional by the Supreme Court insofar as it purports to authorize trial of civilians by court-martial in time of peace. Reid v. Covert, supra (civilian dependent for capital offense); Kinsella v. Singleton, 361 U.S. 234 (1960) (dependent for noncapital offense); Grisham v. Hagan, 361 U.S. 278 (1960) (civilian employee for capital offense); McElroy v. Guagliardo, 361 U.S. 281 (1960). See also R.C.M. 202(a) discussion (4).

0511      SUBJECT TO ANY TREATY OR AGREEMENT TO WHICH THE UNITED STATES IS OR MAY BE PARTY, OR TO ANY ACCEPTED RULE OF INTERNATIONAL LAW, PERSONS WITHIN AN AREA LEASED BY OR OTHERWISE RESERVED OR ACQUIRED FOR THE USE OF THE UNITED STATES, WHICH IS UNDER THE CONTROL OF THE SECRETARY CONCERNED, AND WHICH IS OUTSIDE THE UNITED STATES AND OUTSIDE THE CANAL ZONE, PUERTO RICO, GUAM, AND THE VIRGIN ISLANDS, Article 2(a)(12), UCMJ

It should be noted that this provision purports to extend military jurisdiction to all persons found within overseas military enclaves, regardless of their relationship to the armed forces. In light of the Supreme Court cases cited above, there is substantial doubt this provision would be held constitutional insofar as it purports to authorize trial of civilians by court-martial in time of peace.

0512      RECIPROCAL JURISDICTION

Each armed force has court-martial jurisdiction over all persons subject to the UCMJ. The exercise of jurisdiction by one armed force over personnel of another armed force shall be in accordance with regulations prescribed by the President. Article 17(a), UCMJ.

A. Jurisdiction by one armed force over personnel of another armed force should be exercised only when the accused cannot be delivered to the armed force of which he is a member without manifest injury to the service. The commander of a joint command or joint task force, who has authority to convene general courts-martial, however, may convene courts-martial for the trial of members of another armed force when specifically empowered by the President or the Secretary of Defense to refer such cases to trial by court-martial. Such a commander may also authorize subordinate joint commanders to convene special and summary courts-martial for the trial of members of other armed forces. R.C.M. 201(e).

B. In United States v. Hooper, 5 C.M.A. 391, 18 C.M.R. 15 (1955), the construction and effect of the last two provisions were in issue. The court unanimously upheld the jurisdiction of a GCM convened by the commanding general of a joint command, who had been authorized by DoD directive to exercise reciprocal jurisdiction, to try a Navy enlisted man absent from his ship. There was no requirement that this GCM authority first demonstrate manifest injury to the service.

C. In United States v. Houston, 17 C.M.A. 280, 38 C.M.R. 78 (1967), the C.M.A. was faced with a similar problem of construction involving provisions for detailing members of courts-martial from armed forces other than that of the accused. With Chief Judge Quinn dissenting, the court held that para. 4g, MCM, 1951 (Rev.) limitations on detailing such members were, in effect, jurisdictional; that is, they go to eligibility of the member as opposed to being mere statements of policy.

A. In Peebles v. Froehlke, 22 C.M.A. 266, 46 C.M.R. 266 (1973), the accused was tried, convicted, and sentenced by two general courts-martial. The first (GCM-1) sentenced him to a dishonorable discharge (DD) and 10 years' confinement at hard labor (CHL). The second (GCM-2) sentenced him to a DD and 14 months' CHL. On 13 March, the DD adjudged by GCM-2 was executed. On 23 June, the findings and sentence of GCM-1 were set aside and a rehearing authorized. On 6 December, the accused was released from confinement, having served the CHL adjudged by GCM-2, and was allowed to return to his home. Held: the accused was subject to court-martial jurisdiction for the rehearing on the charges involved in GCM-1. Reason: his status as a person subject to the UCMJ was fixed at the time the proceedings began.

B. In United States v. Pells, 5 M.J. 380 (C.M.A. 1978), the court held that, although the convening authority had suspended the discharge, the accused was obliged to await completion of the appellate action, i.e., approval by the supervisory authority. Therefore, where prior to the action of the supervisory authority, the period of suspension was interrupted by commencement of proceedings to vacate the sentence, the pending vacation proceedings tolled the running of the suspension and the accused was still subject to court-martial jurisdiction when the suspension of the sentence was vacated.

CHAPTER VI  
JURISDICTION OVER THE OFFENSE  
(MILJUS Key Number 552)

0601 INTRODUCTION

A. With the exception of offenses triable by general court-martial under the laws of war, courts-martial have jurisdiction to try only those offenses defined in the punitive articles (77-134) of the Uniform Code of Military Justice (UCMJ). Arts. 18-20, UCMJ; R.C.M. 203.

Failure of a specification to allege such an offense results in a jurisdictional defect as to that specification in the sense that any proceedings relating to the defective specification are a nullity.

The defect is not waived by failure to raise the issue at trial or by entry of a guilty plea or otherwise, and the defect may be asserted at any time. R.C.M. 907(b)(1)(B), MCM, 1984 [hereinafter R.C.M. \_\_\_\_].

Until recently, even if an offense defined in the Code was properly pleaded, a court-martial did not have jurisdiction over an offense if it did not meet the service-connection test of O'Callahan v. Parker, 395 U.S. 258 (1969). This decision was overruled in Solorio v. United States, 483 U.S. 435, 107 S.Ct. 2924 (1987), which returned to a status test for jurisdiction. Both decisions will be discussed in this chapter.

B. Time of offense

1. Courts-martial have jurisdiction to try offenses under the UCMJ committed after the UCMJ's effective date, 31 May 1951.

2. The statute of limitations, Article 43, UCMJ, is not a jurisdictional issue, but is a matter of defense which may be asserted in bar of trial or waived. R.C.M. 907(b)(2)(B).

C. Place of offense

1. The UCMJ applies in all places. Art. 5, UCMJ; R.C.M. 201(a)(2); United States v. Newvine, 23 C.M.A. 208, 48 C.M.R. 960 (1974).

2. The jurisdiction of a court-martial does not necessarily depend on the place of the offense or the place of the trial. R.C.M. 201(a)(2), (3).

3. Certain noncapital crimes and offenses under Federal and state law are triable by court-martial under Article 134, UCMJ, only when committed in areas of exclusive or concurrent Federal jurisdiction. See Part IV, para. 60c(4), MCM, 1984 [hereinafter Part IV, para. \_\_\_\_]. Such limitations, however, are a function of territorial applicability of the law in question rather than applicability of the UCMJ.

4. Improper venue of trial is not a jurisdictional issue, nor is it a ground for dismissal of charges. It is merely a ground for a motion for appropriate relief requesting the court to order the trial to be held elsewhere. See R.C.M. 906(b)(11); United States v. Nivens, 21 C.M.A. 420, 45 C.M.R. 194 (1972).

#### D. Nature of the offense

The UCMJ purports to authorize trial by court-martial for all offenses defined therein. These offenses include not only distinctively military offenses (such as desertion, unauthorized absence, disobedience, and disrespect), but also common-law felonies (such as murder, rape, larceny, assault), statutory offenses embraced by Article 134's coverage of disorders and neglects, and crimes and offenses not capital. Implicit in the formulation of the UCMJ was the notion that status as a person subject to the UCMJ makes one amenable to trial by court-martial for any offense Congress has chosen to define and make punishable. The constitutionality of this presupposition is discussed in detail in section 0602, infra.

### 0602 O'CALLAHAN, RELFORD, AND SOLORIO ANALYZED

A. Overview. The drafters of the UCMJ, and most authorities who dealt with the Code for the next nineteen years, simply assumed that one's status as a member of the military was sufficient to confer court-martial jurisdiction over that person, regardless of the place or nature of the offense. However, in 1969, the Supreme Court interpreted the constitutional power of Congress to regulate the armed forces (Article 1, Section 8) as limiting the kinds of offenses that may legitimately be tried by court-martial. O'Callahan v. Parker, supra. The Court held by a 5-to-3 majority that a court-martial lacked jurisdiction to try a member of the armed forces charged with committing a crime, in time of peace and within the territory of the United States, that was cognizable in a civilian court and that had no military significance. Two years after O'Callahan, the Supreme Court attempted to clarify the uncertainty it had created and set forth specific considerations to determine "service-connection" and, thus, jurisdiction. Relford v. Commandant, 401 U.S. 355 (1971). For eighteen years, an ad hoc "service-connection" test was applied whenever jurisdiction was challenged. But, in a dramatic reversal, the Supreme Court overruled O'Callahan and held that jurisdiction of a court-martial depends solely on the accused's status as a member of the armed forces and not on the "service-connection" of the offenses charged. Solorio v. United States, supra. An analysis of O'Callahan and its progeny helps one understand the significant impact of Solorio on the military justice system.

#### B. O'Callahan v. Parker, 395 U.S. 258 (1969).

1. The petitioner in O'Callahan was convicted by court-martial of the offenses of attempted rape, housebreaking, and assault with intent to commit rape, all arising from his assault upon a civilian in a Honolulu hotel in the then (1956) Territory of Hawaii, at a time when he was off post on leave.



Additional circumstances deemed significant by the Court include the following:

There was no connection -- not even the remotest one-- between his military duties and the crimes in question. The crimes were not committed on a military post or enclave; nor was the person whom he attacked performing any duties relating to the military. Moreover, Hawaii, the situs of the crime, is not an armed camp under military control as are some of our far-flung outposts. Finally, we deal with peacetime offenses, not with authority stemming from the war power. Civil courts were open. The offenses were committed within our territorial limits, not in the occupied zone of a foreign country. The offenses did not involve any question of the flouting of military authority, the security of a military post or the integrity of military property....

Id. at 273.

2. The Court's analysis centered on the fact that an accused tried by court-martial is denied certain procedural safeguards extended by the Constitution to Article III prosecutions tried in civilian courts, such as the requirements of indictment by grand jury and jury trial. Conceding that cases "arising in the land and naval forces" are exempted from those requirements, the Court was unwilling to read that phrase so broadly as to deprive every servicemember of the benefits of indictment and jury trial regardless of the offense charged. The phrase was read, therefore, to authorize court-martial jurisdiction over cases of servicemembers charged with service-connected crimes only. This limitation upon court-martial jurisdiction was, in effect, read back into the grant of power to regulate the armed forces. That grant of power, in the Court's view, "presents another instance calling for limitation to the least possible power adequate to the end proposed" and "is to be exercised in harmony with express guarantees of the Bill of Rights." Id. at 273.

3. The Court thus made it clear that mere status as a person subject to the UCMJ would not alone confer court-martial jurisdiction. What would confer jurisdiction was quite uncertain.

C. Relford v. Commandant, 401 U.S. 355 (1971).

1. Two years after the O'Callahan decision, the Court decided Relford v. Commandant, supra. In an attempt to clarify the uncertainty which it had earlier created, the court in Relford set forth additional specific considerations and criteria bearing upon jurisdictional determinations.

2. In 1961, Corporal Relford was stationed at Fort Dix, New Jersey. He abducted a 14-year-old sister of another serviceman from the base hospital and raped her at knifepoint. Several weeks thereafter, he entered a car stopped at a stop sign and ordered the woman (a military dependent), at knifepoint, to drive to a remote area where he raped her. He was convicted by GCM of two counts of rape and kidnapping. The case was final five-and-one-half years before O'Callahan. Relford sought habeas corpus in 1967, alleging inadequacy of counsel. The District Court and Tenth Circuit denied relief. Then came the O'Callahan decision.

3. Claiming lack of jurisdiction for the first time in 1969, Corporal Relford maintained that service-connection requires that the crime itself be military in nature, "one involving a level of conduct required only of servicemen and, because of the special needs of the military one demanding military disciplinary action." Id. at 363. He contended that the situs of the crimes and the dependent identity of one of the victims did not "substantially support the military's claim of a special need to try him." Id. at 363. Basically, Relford was contending that the military ought to retain jurisdiction over only purely military offenses.

4. Justice Blackmun, for the undivided court, reviewed O'Callahan and said:

We stress seriatim what is thus emphasized in the holding:

(a) The serviceman's proper absence from the base.

(b) The crime's commission away from the base.

(c) Its commission at a place not under military control.

(d) Its commission within our territorial limits and not in an occupied zone of a foreign country.

(e) Its commission in peacetime and its being unrelated to authority stemming from the war power.

(f) The absence of any connection between the defendant's military duties and the crime.

(g) The victim's not being engaged in the performance of any duty relating to the military.

(h) The presence and availability of a civilian court in which the case can be prosecuted.

(i) The absence of any flouting of military authority.

(j) The absence of any threat to a military post.

(k) The absence of any violation of military property.

One might add still another factor implicit in the others:

(1) The offenses being among those traditionally prosecuted in civilian courts.

Id. at 401 U.S. at 365.

5. Justice Blackmun acknowledged that the court was committed to an ad hoc approach when court-martial jurisdiction is challenged. Factors (d), (f), (h), (k), (l), and perhaps (e) and (i) operated in Relford's favor. However, (a), (b), (c), (g), (j) were not present in Relford's case. Examining these factors and considering as well that the victims were respectively the sister and wife of servicemen and that tangible property (the cars) was forcefully and unlawfully entered, the court "readily" concluded that the crimes were triable by court-martial.

6. The court further stressed the military's interest in the security of persons and property on base; the commander's responsibility for ensuring order on base; the adverse effect of on-base crimes on health, morale, and fitness for mission of the base generally; the recognition that regulation of the land and naval forces requires more than the punishment of purely military offenses; the possibility that civil courts will have less interest in vindicating the military's problems; the significance of geographical and military relationships; the historical acceptance of military jurisdiction over on-base crimes; and the inability of the court to distinguish remote and central areas of a military reservation. It concluded: "When a serviceman is charged with an offense committed within or at the geographical boundary of a military post and violative of the security of a person or of the property there, that offense may be tried by a court-martial." Id. at 369.

7. There were a great number of lower court decisions, since O'Callahan, on the question of service-connection. Courts-martial ruled on the issue on a day-to-day basis, thus sending to the appellate military courts facts with which to build on the O'Callahan foundation. Another avenue to the C.M.A. was through petitions for extraordinary relief by personnel at all stages of the court-martial process. See Chapter XXI, infra. In addition, many petitioners sought relief in the Federal system, with the obvious result of differences in approach by the various Federal courts, both civilian and military.

D. Application of the service-connection test pre-Solorio. As predicted by the dissent in O'Callahan, it fell to the C.M.A. to work out -- on a case-by-case basis -- the application of the jurisdictional rule. Two rules emerged based on the situs of the offense:

1. All offenses committed on base by a person subject to the UCMJ were service-connected, and court-martial jurisdiction therefore existed. There appeared to be no exceptions to this rule. United States v. Smith, 18 C.M.A. 609, 40 C.M.R. 321 (1969).

2. Offenses committed off base were not service-connected, and court-martial jurisdiction did not exist, unless:

a. The offense was a petty offense to which O'Callahan was not applicable [United States v. Sharkey, 19 C.M.A. 26, 41 C.M.R. 26 (1969)];

b. the offense was committed outside the territorial limits of the United States [United States v. Newvine, 23 C.M.A. 208, 48 C.M.R. 960 (1974)]; or

c. application of the Relford criteria to the offense resulted in a determination that the military interest in deterring the offense was distinct from and greater than that of the civilian jurisdiction, and that this distinct military interest could not be vindicated adequately in the civilian courts. See Schlesinger v. Councilman, 420 U.S. 738 (1975). The following factors were found to create a distinct military interest:

(1) Accused used his military status to facilitate commission of the offense. See United States v. Fryman, 19 C.M.A. 71, 41 C.M.R. 71 (1969).

(2) Victim was in the military. See United States v. Wilson, 2 M.J. 24 (C.M.A. 1976). Note that this factor alone was not controlling.

(3) Drug offenses. United States v. Trotter, 9 M.J. 337 (C.M.A. 1980).

E. Solorio v. United States, 483 U.S. 435, 107 S. Ct. 2924 (1987).

1. While on active duty in the Coast Guard in Juneau, Alaska, petitioner sexually abused two young daughters of fellow Coast Guardsmen at his off-base home. Petitioner engaged in this abuse over a two-year period until he was transferred to Governors Island, New York. Coast Guard authorities learned of the Alaska crimes only after petitioner's transfer, and discovered that he had committed similar sexual abuse offenses while stationed in New York, but in government quarters. The Governors Island commander convened a general court-martial to try the petitioner for crimes alleged to have occurred in Alaska and New York.

2. Petitioner moved to dismiss the Alaska crimes on the ground that the military lacked jurisdiction under O'Callahan and Relford. Ruling that the Alaska offenses were not sufficiently "service-connected" to be tried in the military criminal justice system, the court-martial judge granted the motion to dismiss. The Government appealed the dismissal of the charges to the Coast Guard Court of Military Review, which reversed the trial judge's order and reinstated the charges. 21 M.J. 512 (1985).

C.M.A. granted a petition for review and affirmed the lower appellate court decision, concluding that the Alaska offenses were indeed service-connected within the meaning of O'Callahan and Relford. 21 M.J. 251 (1986).

3. The Supreme Court granted certiorari and affirmed the C.M.A. decision; however, it hurdled the issue of whether there was service-connection and, instead, reexamined and overruled the decision in O'Callahan.

The Court found that the service-connection test was predicated on O'Callahan's less-than-accurate reading of the history of court-martial jurisdiction in England and the United States during the 17th and 18th centuries -- a history far too ambiguous to justify restricting the plain meaning of Art. 1, 8, cl. 14 of the Constitution, which grants Congress plenary power "to make Rules for the Government and Regulations of the land and naval forces." Exercising this authority in 1951, Congress empowered

courts-martial to try servicemembers for crimes proscribed by the UCMJ. Thus, Congress provided that jurisdiction of a court-martial depended solely upon the accused's status as a member of the armed forces, and not on the service-connection of the offense charged.

4. Justice Marshall's dissenting opinion frames the potential impact of this decision:

Unless Congress acts to avoid the consequences of this case, every member of our armed forces, whose active duty members number in the millions, can now be subjected to court-martial jurisdiction--without grand jury indictment or trial by jury--for any offense, from tax fraud to passing a bad check, regardless of its lack of relation to "military discipline, morale and fitness."

Id. at 2941.

Whether a servicemember is tried by court-martial or the local civilian court for an off-base offense will be decided by the convening authority, area coordinator, and civilian prosecution authorities. This was true before Solorio, but only when the offense was somehow "connected" to the military community.

5. The new status test for jurisdiction established in Solorio is to be applied retroactively to offenses committed before such case was decided. United States v. Avila, 27 M.J. 62 (C.M.A. 1988).

#### 0603 PLEADING AND PROVING JURISDICTION

It is well established that a charge against an accused must be dismissed where the specification of the charge fails to state an offense. United States v. Fout, 3 C.M.A. 568, 13 C.M.R. 121 (1953). Similarly, the specification should show the basis for the court's jurisdiction over the person of the accused and the offense. R.C.M. 307(c)(3), discussion (C)(iv); United States v. Alef, 3 M.J. 414 (C.M.A. 1977). After Solorio, however, jurisdiction over the offense is alleged simply by alleging the military status of the accused. Again, a brief review of the pleading requirements before Solorio is helpful to understand its impact.

Prior to Alef, it was assumed that allegations setting forth the court's jurisdiction over the offense were not required to be included in the specification. In Alef, the court announced a new rule: "The better practice, and the one we now make mandatory, is for the government affirmatively to demonstrate through sworn charges/indictment, the jurisdictional basis for trial of the accused and his offenses." 3 M.J. at 419. The Alef rule was reinforced by the requirement in the Manual for Courts-Martial that the government plead and prove service-connection. R.C.M. 203, discussion (b); R.C.M. 307(c)(3), discussion (F).

The court in Alef further provided instructions as to how the defense counsel should proceed should he desire to challenge the jurisdictional allegations:

Defense counsel may, of course, always as a preliminary matter challenge the indictment as being too uncertain or vague utilizing a motion for a Bill of Particulars. Counsel who wish to challenge the sufficiency of a charge to allege military jurisdiction should do so by motion to quash, demonstrating in what particulars the charge fails to allege facts sufficient to demonstrate 'service connection'. Counsel desiring to challenge the factual accuracy of the allegations regarding jurisdiction also should move to quash the charge, accompanying the motion with specific evidence to rebut the facts alleged in the indictment.

Id. at 419 n.18.

The burden of proof was upon the government to establish jurisdiction over the offense. United States v. McCarthy, 2 M.J. 26 (C.M.A. 1976); United States v. Trotter, at 351 n.30. In this regard, the government had to prove service-connection and that speculative conclusions or assumptions as to what might have occurred in connection with the commission of an offense, or as to what impact the offense might have on the military service, was sufficient to establish jurisdiction. Such conclusions or assumptions had to be founded upon facts in evidence in order to carry the day. The standard of proof to be utilized by the military judge in determining the interlocutory issue of personal jurisdiction over the accused is a preponderance of the evidence. United States v. Jessie, 5 M.J. 573 (A.C.M.R. 1978), petition denied, 5 M.J. 300 (C.M.A. 1978); United States v. Bailey, 6 M.J. 965 (N.C.M.R. 1979). This same standard applied in determining the similar interlocutory issue of service-connection over the offense(s) for which an accused is being tried.

After Solorio, the government need not allege or prove that a charged offense is service-connected. Jurisdiction over the offense is alleged and proved simply by alleging and proving the military status of the accused. Proof of status is generally accomplished simply by submitting into evidence the enlistment contract of the accused.

## CHAPTER VII

### CONSTITUTION OF COURTS-MARTIAL AND THE RIGHT TO COUNSEL (MILJUS Key Numbers 870-88 and 1238-45)

#### 0701 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. R.C.M. 201(b), MCM, 1984 [hereinafter R.C.M. \_\_\_\_]. 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, 1984, (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; chapter XVII (Voir Dire and Challenges) will deal with disqualification or ineligibility in particular cases.

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." McClaghry v. Deming, 186 U.S. 49 (1902). But see United States v. Glover, 15 M.J. 419 (C.M.A. 1983) (mistake in convening order which indicated court was to be a special court-martial did not limit the power of the court as a general court-martial where it was obvious to all participants that a general court-martial was intended). 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. An analysis of the differences between prejudicial and jurisdictional errors is contained in chapter XIX, infra. 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. The composition of the various types of courts-martial were discussed in chapter I. In brief, 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. R.C.M. 501(a)(1).
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. R.C.M. 501(a)(2).
3. A summary court-martial (SCM) consists of one commissioned officer. R.C.M. 1301(a).

The counsel required to complete the composition of GCMs and SPCMs will be discussed in section 0706, infra.



A. 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. Art. 26(c), UCMJ. GCM judges are assigned to the Navy-Marine Corps Trial Judiciary and are directly responsible only to the JAG. This ensures that the convening authority (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. See United States v. Beckermann, 27 M.J. 334 (C.M.A. 1989) (temporary assignment of Coast Guard district legal officer as military judge in violation of Art. 26(c), UCMJ resulted in setting aside of findings and sentence).

B. 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:

1. Must be on active duty [R.C.M. 502(c)]; and
2. may be from an armed force other than that in which the court-martial is convened when permitted by JAG [R.C.M. 503(b)(3)].

C. 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. R.C.M. 201(b)(2), 201(b)(5) discussion.

D. 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. SECNAVINST 5813.6C of 13 April 1979. 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 to the maximum extent possible, although he is authorized to utilize other certified judges at special courts-martial if the workload should so require. JAGINST 5813.4C of 13 April 1979. 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.

0703      QUALIFICATIONS OF MEMBERS (MILJUS Key Numbers 870, 872, 884)

A. 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. United States v. Smith, 27 M.J. 242 (C.M.A. 1988). 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. Art. 25(d)(1), UCMJ.

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." Art. 25(d)(2), UCMJ. 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." Smith, supra, at 249. See United States v. Crawford, 15 C.M.A. 31, 35 C.M.R. 3 (1964).

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. Crawford, supra. See also United States v. McGee, 15 M.J. 1004 (N.M.C.M.R. 1983), wherein it was held that a court-martial had jurisdiction to try the accused even though three of the sitting members were junior to him.

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. R.C.M. 1301(a). Members of commands other than that of the CA may be detailed with the informal concurrence of their commanding officer. R.C.M. 503(a)(3). 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.

In United States v. Rice, 3 M.J. 1094 (N.C.M.R. 1977), court members were nominated and appointed pursuant to an instruction requiring various commands in the Norfolk area to nominate officers of designated grades to serve as prospective court members for a six-month period. The instruction directed the various commands to "ensure that their nominees are qualified for such duty by reason of age, education, training, experience, length of service, and judicial temperament." Id. at 1097. The N.C.M.R. upheld this procedure, noting that the convening authority "merely made reasonable use of his subordinate commanders and the members of his staff to carry out the nomination process. This did not prevent the convening authority from discharging

his duty to 'select' members whom he believed most qualified, as there is certainly no indication that the convening authority was in any way bound by his subordinates' recommendations." Id. at 1098. See also United States v. Yager, 7 M.J. 171 (C.M.A. 1979), in which C.M.A. approved a program for randomly selecting members previously determined to be qualified. Although randomly selected, the members were still subject to the approval of the convening authority. The court also permitted the exclusion of servicemembers who had not achieved the paygrade of E-3 from consideration for court membership. The existing promotion standards in the Army were such that it was reasonable for a convening authority to exclude such servicemembers based on the application of the statutory criteria of age, education, training experience, length of service, and judicial temperament. It is doubtful, however, that rank exclusion could be justified as to any other rank classification. In United States v. McClain, 22 M.J. 124 (C.M.A. 1986), the court held that the systematic exclusion of enlisted personnel between the grades of E-4 through E-6 and of junior officers as members at a court-martial of an E-3 for the purpose of obtaining a court membership less disposed to lenient sentences violated Art. 25, UCMJ and the limitations on command influence contained in Art. 37, UCMJ. See also United States v. Daigle, 1 M.J. 139 (C.M.A. 1975), wherein the systematic exclusion of lieutenants and warrant officers from membership at a general court-martial was held to be inconsistent with Art. 25, UCMJ.

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. R.C.M. 1301(a).

B. 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 SPCMs and GCMs; and

b. for the trial of any person except a commissioned officer.  
Art. 25(b), UCMJ.

3. Any enlisted member is qualified:

a. Only for SPCMs and GCMs; and

b. only for the trial of an enlisted person; and

c. only if requested in writing 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. Art. 25(c)(1), UCMJ; R.C.M. 503(a), discussion. 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. United States v. Taggart, 11 M.J. 677 (N.M.C.M.R. 1981).

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. R.C.M. 503. Note that, in United States v. Brandt, 20 M.J. 74 (C.M.A. 1985), 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. Id. An accused will be advised of this right by the military judge at trial prior to its expiration. R.C.M. 903(a)(1).

0704 JURISDICTIONAL ASPECT OF IMPROPER CONSTITUTION WITH RESPECT TO MILITARY JUDGE AND MEMBERS (MILJUS Key Numbers 882, 884)

The jurisdictional effect of errors regarding participation and qualification of members and the military judge appear to be identical.

A. 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. Arts. 16, 29(b), (c), UCMJ.

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. Art. 19, UCMJ.

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. United States v. Dean, 20 C.M.A. 212, 43 C.M.R. 52 (1970). 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. United States v. Butler, 14 M.J. 72 (C.M.A. 1982); R.C.M. 903(c)(2)(B), discussion.

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, 6 M.J. 73 (C.M.A. 1978), 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, 18 C.M.A. 61, 39 C.M.R. 61 (1968). See also chapter X (Command Influence), infra.

B. 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. Compare United States v. Harnish, 12 C.M.A. 443, 31 C.M.R. 29 (1961) with United States v. Pulliam, 3 C.M.A. 95, 11 C.M.R. 95 (1953) (no jurisdictional defect where second most senior member acted as president of SPCM).

C. Military judge not detailed. Trial by a military judge who had been replaced by an amendment to the original convening order, under rules which required the convening authority to detail the military judge, was jurisdictional error. United States v. Johnson, 23 C.M.A. 104, 48 C.M.R. 665 (1974); United States v. Febus-Santine, 23 C.M.A. 226, 49 C.M.R. 145 (1974).

D. Member or military judge not sworn. Failure to swear any member or the military judge will result in a jurisdictional defect. United States v. Kendall, 17 C.M.A. 561, 38 C.M.R. 359 (1958); United States v. Robinson, 13 C.M.A. 674, 33 C.M.R. 206 (1963); United States v. Stephenson, 2 C.M.R. 571 (N.B.R. 1951).

E. 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. R.C.M. 912(f)(1)(A). Despite this, the law is not well-settled as to which of the various requirements for eligibility are jurisdictional. United States v. Bland, 6 M.J. 565 (N.C.M.R. 1978), discusses the eligibility of Medical, Dental, and Chaplain Corps personnel as members.

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, 3 M.J. 326 (C.M.A. 1977), 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.

0705 ABSENCE, EXCUSE OR CHANGE OF MEMBERS OR A MILITARY JUDGE (MILJUS Key Number 888)

A. Military judge

1. Absence. In any case where a military judge has been detailed, no proceedings may be held in his absence; he must be present at all times, except during closed sessions of the court.

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.

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. R.C.M. 505(e)(1). See United States v. Sayers, 20 C.M.A. 462, 43 C.M.R. 302 (1971), wherein the C.M.A. held that it was improper to detail two military judges, subsequently excusing one at the time of trial. The detailing authority cannot appoint an extra judge for the limited purpose of presiding over an Article 39a, UCMJ, session. Absent good cause, the same judge who sits at the Article 39a, UCMJ, session must also sit at trial. United States v. Weishaar, 5 M.J. 889 (N.C.M.R. 1978).

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. R.C.M. 505(e)(2). There is, however, no necessity for the same judge who ruled on pretrial motions to preside over the trial on the merits. United States v. Smith, 23 C.M.A. 555, 50 C.M.R. 774 (1975). 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. R.C.M. 505(f). 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. R.C.M. 505(b). The reason for the change should be reflected in the record of trial. United States v. Ware, 5 M.J. 24 (C.M.A. 1978). Note that failure to object to the replacement of the military judge may constitute waiver of any defect. United States v. Jones, 6 M.J. 568 (N.C.M.R. 1978).

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. R.C.M. 805(d)(2).

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.

#### B. Members of the court

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. R.C.M. 505(b), (c)(1)(A). 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. R.C.M. 505(c)(1)(B); JAGMAN, § 0128. 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. R.C.M. 805(b).

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. See United States v. McLaughlin, 18 C.M.A. 61, 39 C.M.R. 61 (1968). A convening authority can properly accomplish the same objective, however, by convening separate courts.

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. R.C.M. 505(b), (c)(1)(A).

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. Art. 29a, UCMJ; R.C.M. 505(c)(2)(A). Good cause contemplates a critical situation, such as military exigency or physical disability, as distinguished from the normal conditions of military life. R.C.M. 505(f). 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).

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. R.C.M. 505(c)(2)(B).

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. R.C.M. 805(d)(1).

0706 COUNSEL AT A GENERAL COURT-MARTIAL (MILJUS Key Numbers 1235-1240)

A. 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 Army, Navy, Air Force, or Marine Corps, 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. In re Taylor, 12 C.M.A. 427, 31 C.M.R. 13 (1961). At present, Navy and Marine Corps judge advocates normally are certified upon successful completion of the lawyer course at Naval Justice School.

B. 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. R.C.M. 501(b). Such counsel need not be certified in accordance with article 27(b). R.C.M. 502(d)(2).

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. R.C.M. 505(d)(1).

C. 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.

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. See Art. 27(b), UCMJ; R.C.M. 502(d)(1). 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. R.C.M. 502(d)(6), discussion (F). The meaning of the phrase "under the supervision" was analyzed in United States v. Kraskouskas, 9 C.M.A. 607, 26 C.M.R. 387 (1958), wherein the C.M.A. held it prejudicial for noncertified associate defense counsel to assume control of a case. The court, in United States v. McFadden, 19 C.M.A. 412, 42 C.M.R. 14 (1970), reiterated the principle that a military judge's refusal to allow uncertified associate defense counsel to be sworn or to participate was not per se error, but would be examined for specific prejudice. McFadden was followed in United States v. Flood, 20 C.M.A. 148, 42 C.M.R. 340 (1970).

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. Art. 38(b)(4), UCMJ. See also United States v. Maness, 23 C.M.A. 41, 48 C.M.R. 512 (1974), wherein the



C.M.A. held that "when an accused has civilian counsel, detailed military counsel can remain in the case only if the accused 'so desires' and then only as 'associate counsel.'" In addition, the court said that "...as associate counsel, appointed military counsel is unquestionably a valuable part of the defense team, but his position does not import the same 'primacy of authority and responsibility' as the accused's individually selected lawyer." Id.

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. R.C.M. 502(d)(3)(A); United States v. Kraskouskas, *supra*. It is unsettled whether a lawyer, properly licensed only by a foreign government, is qualified to represent a servicemember before a court-martial. See United States v. Batts, 3 M.J. 440 (C.M.A. 1977). But cf. Soriano v. Hosken, 9 M.J. 221 (C.M.A. 1980), wherein the C.M.A. held that, while a member of a local bar in a foreign country may be qualified to represent a military accused at court-martial, whether such a lawyer is qualified to act as civilian counsel is a question within the discretion of the military judge. This holding is now stated at R.C.M. 502(d)(3)(B), which 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. United States v. Nichols, 8 C.M.A. 119, 23 C.M.R. 343 (1957). A nonlawyer 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. R.C.M. 502(d)(1); 506(e); see also section 0711, *infra*, concerning the right of an accused to proceed pro se.

b. An accused must be given a reasonable opportunity to secure civilian counsel. United States v. Potter, 14 C.M.A. 118, 33 C.M.R. 330 (1963) (abuse of discretion to refuse five-day continuance so individual counsel could represent accused). Compare United States v. Thomas, 22 M.J. 57 (C.M.A. 1986) (military judge did not abuse his discretion in denying a fourth continuance where, after a three-month delay, civilian counsel remained unavailable for trial).

c. See also United States v. Andrews, 21 C.M.A. 165, 44 C.M.R. 219 (1972), where the detailed defense counsel was released from active duty and had arranged with the accused to continue on the case as civilian counsel, but was prevented from doing so by superior officers who said that it would be improper to continue in the case, citing 18 U.S.C. § 207 (1982), which prohibits an officer or employee, after the end of his government service, from knowingly acting as attorney or agent for anyone other than the government in connection with a matter in which he participated personally and substantially as a government officer or employee. The C.M.A. held that the authorities had improperly applied the statute to deprive the accused of his right to civilian counsel.

### 3. Individual military counsel

a. As previously indicated, an accused has the right to be represented at a general or special court-martial by a military counsel of his

own choice, i.e., an "individual military counsel" (IMC) if such counsel is reasonably available. Art. 38(b)(3)(B), UCMJ. On 20 November 1981, Article 38(b), UCMJ, was amended by Congress to provide the service secretaries with authority to define the term "reasonably available" by departmental regulations and to establish procedures for determining whether a military counsel selected by an accused is, in fact, reasonably available to represent an accused. Acting on this authority, the President, in R.C.M. 506, and the Secretary of the Navy, in the JAG Manual, address the accused's right to request IMC in detail. The JAG Manual, at section 0120b(2)(b), defines "reasonably available" as follows.

(b) Definition of "reasonably available"

(i) An Army, Air Force, or Coast Guard military counsel is "reasonably available" to represent a Navy or Marine Corps accused before a proceeding if that counsel is not otherwise unavailable within the meaning of R.C.M. 506, MCM, 1984, or regulations of the Secretary concerned for the Department in which that counsel is on duty.

(ii) A Navy or Marine Corps military counsel is "reasonably available" to represent an accused before a proceeding if, at the time scheduled for the proceeding, the requested counsel:

(A) Will be on the active-duty list of the Navy or Marine Corps; and

(B) Will be certified in accordance with Article 27(b), UCMJ; and

(C) Will not be one of the following:

1 a flag or general officer; or

2 performing duties as trial or appellate military judge; performing duties as a trial counsel; performing duties as appellate defense or government counsel; performing duties as fleet, force, or staff judge advocate, or principal legal advisor to a command, organization or agency, or the principal assistant to such judge advocate or legal advisor when the command, organization or agency has general court-martial jurisdiction; assigned as commanding officer, executive officer, or officer in charge except those officers assigned to a Naval Legal Service Trial Defense Activity or Detachment; performing duties as an instructor or student at a college, university, service school or academy; or

3 assigned to any of the following commands, activities, organizations, or agencies: Office of the Counsel to 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; Office of Legislative Affairs; Office of the Naval Inspector General; Naval Military Personnel Command; or any other agency or department outside of the Department of Defense; and

(D) Will be assigned:

1 to a command or activity located with the Navy-Marine Corps Trial Judiciary Circuit within which the proceeding is to be held; or

2 within 100 miles of where the proceeding is to be held (distance determined in accordance with the Official Table of Distances); or

3 to a Naval Legal Service Trial Defense Activity or Detachment for a proceeding to be held within the area of responsibility of that Naval Legal Service Trial Defense Activity and its detachments; and

(E) Will be reasonably available, such availability having been determined by the commander of the requested counsel, defined as the commanding officer or head of the organization, activity, or agency with which the requested military counsel will be serving at the time of the proceeding. See subsection (c)(iii).

(iii) Notwithstanding the above, if a requested military counsel meets the requirements of subsections (ii)(A) and (ii)(B) and an attorney-client relationship regarding a charge in question existed prior to the request, the requested military counsel should ordinarily be made available to act as individual military counsel. As used herein, an attorney-client relationship exists when counsel and the accused have had a conversation which is privileged and counsel has engaged actively in the preparation and pretrial strategy of the case. Specifically excluded are relationships which arose solely because the counsel represented the accused on post-trial review, including review under Article 70, UCMJ.

(iv) The Secretary of the Navy may impose geographical limitations in addition to those provided for in subsection (ii)(D) when required by exigent circumstances or military necessity.

The JAG Manual at section 0120b(2)(c) establishes the following procedure for disposing of an IMC request.

(c) Procedure

(i) Request by accused. An accused may request a determination of the availability of only one individual military counsel at a time. Such request for an individual military counsel shall be in writing, indicating the duties and location of the requested counsel, if known. It shall clearly state whether there is an existing attorney-client relationship between the accused and the requested military counsel regarding a charge in question. It shall indicate whether the requested military counsel possesses unique or special qualifications relevant to the case and specify those qualifications. Such request will be made by the accused or the detailed defense counsel promptly and be submitted through the trial counsel, if any, to the convening authority.

(ii) Action on request by convening authority

(A) When requested military counsel will not be assigned to the convening authority at the time of the proceeding. If the requested military counsel is a member of the Army, Air Force, or Coast Guard and unavailable within the meaning of R.C.M. 506, MCM, 1984, or a member of the Navy or Marine Corps and unavailable within the meaning of subsections (b)(ii)(A)-(D) and there is no claim of an existing attorney-client relationship regarding a charge in question, the convening authority shall promptly deny the request and so inform the accused in writing, citing the dispositive subsection(s). In all other cases, the convening authority shall promptly forward the request to the commander of the requested counsel. The convening authority shall provide that authority with the following information: the nature and complexity of the charges and legal issues involved in the case; the estimated duration of the necessary absence (travel, preparation, and participation in the proceeding); the experience level and any special or unique qualifications of detailed defense counsel; and any other information or comments deemed appropriate.

(B) When requested military counsel will be assigned to the convening authority at time of the proceeding. If the requested military counsel is unavailable within the meaning of subsections (b)(ii)(A)-(D) and there is no claim of an existing attorney-client relationship regarding a charge in question, the convening authority shall promptly so inform the accused, in writing, citing the dispositive subsection(s). Otherwise, the convening authority shall make the determination of whether the requested military counsel will be reasonably available to act as individual military counsel in accordance with the procedures contained in subsection (iii).

(iii) Action on request by commander of counsel.

The commander shall promptly determine whether such counsel will be "reasonably available." In making that 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 the requested military counsel including authorized leave; the estimated duration of the necessary absence (travel, preparation, and participation in the proceeding); any unique or special qualifications relevant to the proceeding possessed by the requested military counsel; the ability of other counsel to assume the duties of the requested military counsel; the nature and complexity of the charges or legal issues involved in the proceeding; the experience level and any special or unique qualifications of detailed defense counsel; and the information or comments of the convening authority. The commander shall promptly inform the convening authority and accused of such determination. If a determination of unavailability is made, the reasons therefor shall be set forth in writing and provided to the convening authority and the accused. The decision whether a requested military counsel will be available to act as an individual military counsel is an administrative determination within the sole discretion of the commander of the requested counsel.

(iv) Administrative review of denial of request.

If requested military counsel is determined to be unavailable, the accused may appeal that decision to the immediate superior in command of the authority who made such determination, via that authority, but appeals may not be made which require action at the departmental or higher level. The basis for such appeal will normally be an abuse of discretion. If, however, the accused claims that the person who made that determination did not have the 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 cooperative action. The appeal shall be promptly reviewed and the commander of the requested military counsel, convening authority, and accused shall be promptly informed of the decision.

(v) 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 alleged offenses, the retention of civilian defense

counsel, the complexity of legal or factual issues, and the detailing of additional trial counsel are among the factors which may be considered in the exercise of this of this discretion. This decision is not subject to administrative review.

c. The amendment to Article 38(b), UCMJ, is considered, inter alia, to have codified a substantial body of case law pertaining to the issue of reasonable availability of IMC. See, e.g., United States v. Cutting, 14 C.M.A. 347, 34 C.M.R. 127 (1964); United States v. Quinones, 1 M.J. 64 (C.M.A. 1975); United States v. Seaton, 3 M.J. 812 (N.C.M.R. 1977). In fact, the amendment was intended to obviate the need to litigate the issue of availability of IMC at the trial level. 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. United States v. Redding, 11 M.J. 100 (C.M.A. 1981). See R.C.M. 906(b)(2), and section 0706.3.e, infra.

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." United States v. Kilby, 3 M.J. 938, 943 (N.C.M.R. 1977). 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." 3 M.J. at 942.

d. Appeal from a denial of individual military counsel. R.C.M. 506(b)(2) provides:

(3) 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 Judge Advocate General is also assigned additional duty as Commander, Naval Legal Service Command. As such, he is in the chain of command of CNO and reports in this regard directly to 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). (This discussion presumes that the requested officer is assigned to a Naval Legal Service Office (NLSO), and that the denial has been made by the Commanding Officer, NLSO.) 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. See JAG Opinion JAG:131.1 REC:ado Ser 13/4098 of 17 June 1976, in Off The Record, Issue No. 2 of 24 August 1976.

e. 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 applicable) 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.

f. 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. R.C.M. 905(b)(6), (e). Compare United States v. Mitchell, 15 C.M.A. 516, 36 C.M.R. 14 (1965) (where the record was silent as to reasons for unavailability of IMC and as to the method of processing the request, the C.M.A. held that the accused had waived any error by failure to complain of the denial of IMC) with United States v. Hartfield, 17 C.M.A. 269, 38 C.M.R. 67 (1967) (wherein C.M.A. held no waiver where the record affirmatively showed that the convening authority did not personally make a decision concerning IMC and the accused could not have known of his decision). Any such waiver must, of course, be preceded by proper advice under United States v. Donohew, 18 C.M.A. 149, 39 C.M.R. 149 (1969).

g. Legal qualifications of IMC. Individual military counsel must be certified in accordance with Article 27(b), UCMJ, JAGMAN, § 0120b(2)(b)(ii)(B).

4. 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. United States v. Patterson, 22 C.M.A. 157, 46 C.M.R. 157 (1973).

#### 0707 COUNSEL AT A SPECIAL COURT-MARTIAL (MILJUS Key Numbers 1235-1240)

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.

A. 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. R.C.M. 502(d)(2), (4). See also United States v. Goodson, 1 C.M.A. 298, 3 C.M.R. 32 (1952) (it was error, but neither jurisdictional nor prejudicial, to detail a noncommissioned warrant officer to act as TC at SPCM). TC or ATC may be excused or changed at any time without showing cause by the authority who detailed him. R.C.M. 505(d)(1). Failure to properly detail trial counsel is not jurisdictional error. United States v. Hicks, 6 M.J. 587 (N.C.M.R. 1978).



## B. Counsel for the accused

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 Manual for Courts-Martial, 1984, 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. BCD SPCM. A convening authority must initially detail Article 27(b), UCMJ, counsel to act as detailed defense counsel in every case before an SPCM authorized to adjudge a BCD. If Article 27(b), UCMJ, counsel is not detailed to an SPCM, a BCD may not be adjudged, even though the military judge and verbatim record requirements are fulfilled. Article 19, UCMJ; R.C.M. 201(f)(2)(B)(ii)(a).

### b. All other SPCMs

-- Generally. Defense counsel initially detailed to a court-martial must be certified under Article 27(b), UCMJ. R.C.M. 502(d)(1). 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. Art. 27(c)(1), UCMJ.

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. Art. 27(c)(2), UCMJ. 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 convening authority convenes an SPCM not authorized to adjudge a BCD and details non-lawyer counsel to both sides. The accused declines Article 27(b), UCMJ, counsel, but obtains the services of a civilian counsel. At many commands, the convening authority 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. United States v. Cushing, 22 C.M.R. 673 (N.B.R. 1956). 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. Art. 38e, UCMJ; R.C.M. 502(d)(6), discussion (F). See United States v. Kraskouskas, 9 C.M.A. 607, 26 C.M.R. 387 (1958).

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 SPCMs -- there are no qualifications required, i.e., the accused may be represented by a layman if he wishes. R.C.M. 506(e).

b. Individual military counsel

(1) Qualifications. IMC must be certified in accordance with Article 27b, UCMJ. JAGMAN, § 0120b(2)(b)(ii)(B).

(2) Reasonable availability and procedure for obtaining individual military counsel. The test and procedure for obtaining individual military counsel 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. See United States v. Williams, 18 C.M.A. 518, 40 C.M.R. 230 (1969) (an expression of interest in Article 27(b), UCMJ, counsel requires action by convening authority where the accused is represented by a nonlawyer).

#### 0708 DISQUALIFICATION OF COUNSEL

A. 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. United States v. Lee, 1 C.M.A. 212, 2 C.M.R. 118 (1952).

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. United States v. Schreiber, 5 C.M.A. 602, 18 C.M.R. 226 (1955). 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. See also United States v. Payne, 3 M.J. 354 (C.M.A. 1977).

4. If a person acted for one side, he may not later act for the other side in the same case. Article 27(a)(2), UCMJ. 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. R.C.M. 502(d)(4), discussion.

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. See United States v. Collier, 20 U.S.C.M.A. 261, 43 C.M.R. 101 (1971) (reversal required where accused had consulted with officer about disobedience charge and that officer later prosecuted accused for same disobedience offense and assault); United States v. Diaz, 9 M.J. 691 (N.C.M.R. 1980).

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. United States v. Sparks, 29 M.J. 52 (C.M.A. 1989). 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. Sparks, supra.

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." See United States v. Smith, 26 M.J. 152 (C.M.A. 1988); United States v. Catt, 1 M.J. 41 (C.M.A. 1975). In 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. See United States v. Green, 5 C.M.A. 610, 18 C.M.R. 234 (1955).

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. United States v. Moore, 9 C.M.A. 284, 26 C.M.R. 64 (1958); United States v. Eskridge, 8 C.M.A. 261, 24 C.M.R. 71 (1957); United States v. Thornton, 8 C.M.A. 57, 23 C.M.R. 281 (1957); United States v. Cahill, 3 M.J. 1030 (N.C.M.R. 1977). Accord United States v. Cote, 11 M.J. 892 (A.F.C.M.R. 1981) (A detailed defense counsel cannot cross-examine a prior client; the military judge erred, however, in ruling that the detailed defense counsel was disqualified due to prior representation of a government witness. The appropriate action is to inform the accused of the attendant risks and obtain a waiver from the accused of his right to unlimited representation by a conflict-free counsel.)

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. United States v. Fowler, 6 M.J. 501 (A.F.C.M.R. 1978); United States v. McKee, 2 M.J. 981 (A.C.M.R. 1976).

## B. 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
<u>For</u> other side	no	only on request	only on request
As accuser	possibly	only on request	yes

C. 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. R.C.M. 502(d)(4). 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. See United States v. Donohew, 18 C.M.A. 149, 39 C.M.R. 149 (1969).

The doctrines of waiver and harmless error are probably applicable on appeal, unless invoking them would work a miscarriage of justice. See United States v. Stringer, 4 C.M.A. 494, 16 C.M.R. 68 (1954); United States v. Green, 5 C.M.A. 610, 18 C.M.R. 234 (1955).

## 0709 JURISDICTIONAL EFFECT OF IMPROPER CONSTITUTION WITH RESPECT TO COUNSEL

### A. Trial counsel

1. Failure to swear. The requirements of Article 42, UCMJ, relative to swearing of trial counsel do not appear to be jurisdictional. See United States v. Pitts, 33 C.M.R. 589 (A.C.M.R. 1963); United States v. Fowler, 20 C.M.R. 779 (A.F.B.R. 1955), petition denied, 20 C.M.R. 398 (1955).

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. R.C.M. 502(d)(1); United States v. Durham, 15 C.M.A. 479, 35 C.M.R. 451 (1965) (dictum); but see United States v. Wright, 2 M.J. 9 (C.M.A. 1976), wherein the Court of Military Appeals held that the presence of uncertified trial counsel was not a jurisdictional defect. Rather, the appointment and presence of such counsel was tested for prejudice and, in the instant case, none was found. The court in Wright appears to have grounded its holding on the absence of prosecutorial misconduct. Such misconduct, if prejudicial to the substantial rights of the accused, would no doubt result in a reversal without regard to whether trial counsel was a certified Article 27(b), UCMJ, lawyer.

3. Qualifications at an SPCM. The requirement contained in R.C.M. 502(d)(2) that trial counsel be a commissioned officer is not jurisdictional. United States v. Goodson, 1 C.M.A. 298, 3 C.M.R. 32 (1952). Requirements regarding assistant trial counsel are not jurisdictional at either a GCM or SPCM. United States v. Durham, *supra*. See also United States v. Royer, 10 C.M.R. 699 (A.F.B.R. 1953) (ATC prosecuting in absence of TC was not jurisdictional error).

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. United States v. Stringer, 4 C.M.A. 494, 16 C.M.R. 68 (1954) (assistant trial counsel acting previously as counsel for prosecution witness); United States v. Lee, 1 C.M.A. 212, 2 C.M.R. 118 (1952) (trial counsel at SPCM acting previously as preliminary inquiry officer and accuser); United States v. Blake, 21 C.M.R. 809 (A.F.B.R. 1956) (trial counsel acting previously as staff judge advocate); United States v. Trakowski, 10 M.J. 792 (A.F.C.M.R. 1981) (pretrial confinement hearing held by the staff judge advocate who later was appointed trial counsel).

#### B. Defense counsel

1. Failure to swear. Failure to swear defense counsel is not jurisdictional. See United States v. Francis, 38 C.M.R. 628 (A.B.R. 1967), *aff'd*, 17 C.M.A. 595, 38 C.M.R. 393 (1968).

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. Nicholson, 18 C.M.A. 69, 39 C.M.R. 69 (1968); United States v. Jean-Baptiste, 5 M.J. 374 (C.M.A. 1978).

d. Unqualified civilian defense counsel held not jurisdictional, at least where the accused was actively represented by his fully qualified detailed military counsel. United States v. Batts, 3 M.J. 440 (C.M.A. 1977); Soriano v. Hosken, 9 M.J. 221 (C.M.A. 1980).

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); see United States v. Best, 6 C.M.A. 39, 19 C.M.R. 165 (1955).

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. R.C.M. 502(d)(4). 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; see United States v. Bell, 20 C.M.R. 804 (A.F.B.R. 1955) (error held not to be jurisdictional).

#### 0710 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.

A. 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.

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. R.C.M. 503(c)(2).

c. Method no. 3: Withdrawal and rereferral. The referring command's legal office drafts a new convening order, withdrawing the case from the first court and rereferring it to the second court. The authority which initially detailed the defense counsel must then redetail or replace him.

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. R.C.M. 505(d)(2)(A); United States v. Tavalilla, 17 C.M.A. 395, 38 C.M.R. 193 (1968); United States v. Murray, 20 C.M.A. 61, 42 C.M.R. 253 (1970). But see United States v. Catt, 1 M.J. 41 (C.M.A. 1975); United States v. Littlejohn, 5 M.J. 637 (A.F.C.M.R. 1978). 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. United States v. Donohew, 18 C.M.A. 149, 39 C.M.R. 149 (1969); United States v. McGovern, 11 M.J. 582 (N.C.M.R. 1980). 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, 20 M.J. 719 (N.M.C.M.R. 1985), 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. United States v. Jerasi, 21 M.J. 380 (C.M.A. 1986). Prior to its decision in Jerasi, however, the C.M.A., in United States v. Johnson, 21 M.J. 211 (C.M.A. 1986), 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 United States v. Jerasi, 23 M.J. 162 (C.M.A. 1986), 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.

3. 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 Manual for Courts-Martial, 1984, 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. United States v. Tavalilla, 17 C.M.A. 395, 38 C.M.R. 193 (1968). 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." *Id.* at 398, 38 C.M.R. at 197.

b. United States v. Murray, 20 C.M.A. 61, 42 C.M.R. 253 (1970). Detailed defense counsel was replaced, over accused's objection, because of a routine change of duty station. Held: "Once entered into, the relationship between the accused and his appointed military counsel may not be severed or materially altered for administrative convenience." *Id.* at 62, 42 C.M.R. at 254. 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. Accord United States v. Eason, 21 C.M.A. 335, 45 C.M.R. 109 (1972); United States v. Anderson, 10 M.J. 743 (N.C.M.R. 1981). But see Stanton v. United States, 21 C.M.A. 431, 45 C.M.R. 205 (1972), where the C.M.A. found it permissible to terminate an attorney-client relationship based on the attorney's release from active duty.

c. United States v. Baca, 27 M.J. 110 (C.M.A. 1988). 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 [United States v. Tackett, 16 C.M.A. 226, 36 C.M.R. 382 (1966) and United States v. Timberlake, 22 C.M.A. 117, 46 C.M.R. 117 (1973)]; disqualification of defense counsel for once having acted for the prosecution in the same case, Art. 27(a), UCMJ. 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. See United States v. Taylor, 3 M.J. 947 (N.C.M.R. 1977).

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. United States v. Thomas, 45 C.M.R. 908 (N.C.M.R. 1972), where the court said that, "in Murray, supra, and Eason, supra, the severance of the relationship was occasioned by the government for its own convenience. Here we have unlawful acts of the appellant precipitating this dilemma, and for which acts we hold him chargeable." Id. at 910.

f. Note also that, when an accused is represented by individual military counsel, detailed defense counsel shall normally be excused. R.C.M. 506(b)(3); JAGMAN, § 0120b(2)(c)(v).

g. 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. United States v. Rachels, 6 M.J.

232 (C.M.A. 1979); United States v. Seaton, 3 M.J. 812 (N.C.M.R. 1977). A single, brief consultation, however, falls short of establishing a viable attorney-client relationship. United States v. Taylor, 3 M.J. 947 (N.C.M.R. 1977). 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.

h. 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. United States v. Schmidt, 7 M.J. 15 (C.M.A. 1979).

i. 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. United States v. Gnibus, 21 M.J. 1 (C.M.A. 1985).

4. 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. United States v. Nicholson, 18 C.M.A. 69, 39 C.M.R. 69 (1968) (accused's consent to representation by Article 27(b), UCMJ, ADC was sufficient to excuse DC); United States v. Tavalilla, 17 C.M.A. 395, 38 C.M.R. 193 (1968) (accused's consent to absence of two of three ADC was valid). 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. United States v. Donohew, 18 C.M.A. 149, 39 C.M.R. 149 (1969); United States v. McGovern, 11 M.J. 582 (N.C.M.R. 1981).

5. 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. R.C.M. 503(c)(1); United States v. McLaughlin, 18 C.M.A. 61, 39 C.M.R. 61 (1968).

B. 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. R.C.M. 505(d)(2)(A).

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. United States v. Howell, 11 C.M.A. 712, 29 C.M.R. 528 (1960). Accord United States v. Silva, 38 C.M.R. 854 (A.F.C.M.R. 1967). This complete waiver is in accord with the Supreme Court holding in Faretta v. California, 422 U.S. 806 (1975).

B. An accused does not have an unfettered right to proceed pro se. The Manual for Courts-Martial 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. R.C.M. 506(d). Recently, 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. See United States v. Freedman, 28 M.J. 789 (N.M.C.M.R. 1989). The N.M.C.M.R. now requires 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. For a delineation of the military judge's further responsibility in this area, and discussion of the waiver inquiry required prior to granting a pro se request, see United States v. Tanner, 16 M.J. 930 (N.M.C.M.R. 1983).

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. R.C.M. 506(d). 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 United States v. Howell, supra, the court appeared to use this principle as an alternative ground for approving a waiver of counsel. In United States v. Bell, 11 C.M.A. 306, 29 C.M.R. 122 (1960), 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 Military Review). The C.M.A. 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. See United States v. Kinard, 21 C.M.A. 300, 45 C.M.R. 74 (1972) (no error in forcing accused to go to trial with unwanted detailed defense counsel after accused had refused all military lawyers in Vietnam and demanded a field grade defense counsel). 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. Faretta v. California, supra.

A. Duty of the defense counsel. "Defense counsel is an advocate for the accused, not an amicus to the court." United States v. Mitchell, 16 C.M.A. 302, 36 C.M.R. 458, 469 (1966). 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. R.C.M. 502(d)(6). On duties of defense counsel generally, see Abrams, The Defense Counsel's Syllabus, 10 A.F. L. Rev. No. 6, p. 19 (1968); Note, Post Trial Defense Counselling, 15 JAG J. 89 (1961).

B. 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, 24 M.J. 186 (C.M.A. 1987), 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, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 674 (1984). 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.

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").

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).

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). But see United States v. Bedford, 9 M.J. 769 (A.F.C.M.R. 1980).

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." United States v. Babbitt, 26 M.J. 157 (C.M.A. 1988) quoting Strickland v. Washington, *supra*, 466 U.S. at 692, 104 S. Ct. at 2067. The C.M.A. did not find an actual conflict of interest in Babbitt, where counsel's emotional involvement with the accused resulted in their engaging in sexual relations the evening before the last day of trial. Based on a review of the record, the C.M.A. concluded that counsel's handling of the accused's case "was, if anything, spurred on by his relationship with [the accused]." United States v. Babbitt, 26 M.J. at 159. In United States v. Davis, 3 M.J. 430 (C.M.A. 1977), 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. Accord United States v. Cahill, 3 M.J. 1030 (N.C.M.R. 1977). 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, 1 M.J. 1138 (N.C.M.R. 1977). 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. United States v. Davis, *supra*. See United States v. Nicholson, 15 M.J. 436 (C.M.A. 1983) (accused chose to retain counsel even though TC was DC's immediate military superior). 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. United States v. Devitt, 20 M.J. 240, on remand 22 M.J. 940, *aff'd*, 24 M.J. 307 (C.M.A. 1985); United States v. Breese, 11 M.J. 17 (C.M.A. 1981). 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 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." United States v. Devitt, 24 M.J. at 308.

5. Switching sides after trial: United States v. Williams, 21 C.M.A. 292, 45 C.M.R. 66 (1972). 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. See Arts. 6c, 27a, UCMJ. See also United States v. Green, 5 C.M.A. 610, 18 C.M.R. 234 (1955) (DC at Article 32, UCMJ, investigation ordered to prepare memorandum of evidence that could be offered against accused at trial).

6. Failure to present extenuation/mitigation documents: In United States v. Sifuentes, 5 M.J. 649 (A.F.C.M.R. 1978), 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. See also United States v. Vos, 7 M.J. 553 (A.F.C.M.R. 1979); United States v. Rowe, 18 C.M.A. 54, 39 C.M.R. 54 (1968), where the Court of Military Appeals found ineffective assistance of counsel where the defense counsel failed to introduce on sentence evidence of the accused's entitlement to wear Vietnam service ribbons.

7. Inadequate individual civilian counsel. In United States v. Walker, 21 C.M.A. 376, 377, 45 C.M.R. 150, 152 (1972), 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. Compare United States v. Scott, 24 M.J. 186 (C.M.A. 1987), wherein civilian counsel's failure to promptly investigate and prepare accused's sole defense of alibi was held to be ineffective assistance of counsel.

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. United States v. Stephens, 46 C.M.R. 917 (N.C.M.R. 1972) (the court noted it was not addressing the ethical and moral consideration involved).

9. Adequacy of post-trial representation. In United States v. Palenius, 2 M.J. 86 (C.M.A. 1977), the Court of Military Appeals 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. A full discussion of Palenius and the post-trial duties of the trial defense counsel is contained in chapter XIX (Review of Courts-Martial), infra.

### C. 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. R.C.M. 502(d)(6), discussion (A).

2. The law appears somewhat unsettled as to the limits of activity required of the detailed counsel when acting as associate counsel. See, e.g., United States v. Feely, 19 C.M.A. 152, 41 C.M.R. 152 (1969) (accused in Vietnam pleaded guilty pursuant to pretrial agreement for suspended BCD, negotiated by the detailed defense counsel, despite instruction from stateside individual counsel not to agree to BCD; the court held that the detailed DC had not exceeded the limits). 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. United States v. Maness, 23 C.M.A. 41, 48 C.M.R. 512 (1974) indicates that civilian counsel is the primary counsel in the case and that the military counsel serves only as an associate.

### D. 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 timesaver 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. R.C.M. 502(d)(6), discussion (A), (B).

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. R.C.M. 502(d)(6), discussion (B).

E. 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, 19 C.M.A. 424, 42 C.M.R. 26 (1970), 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. See United States v. Drake, 21 C.M.A. 226, 44 C.M.R. 280 (1972); United States v. Richard, 21 C.M.A. 227, 44 C.M.R. 281 (1972).

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, 17 C.M.A. 158, 37 C.M.R. 422 (1967), 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. For other alternative actions in cases involving a "BCD striker," see United States v. Weatherford, 19 C.M.A. 424, 42 C.M.R. 26 (1970); United States v. Cornell, 9 M.J. 758 (N.C.M.R. 1980); United States v. Mosley, 11 M.J. 729 (A.F.C.M.R. 1981).

5. 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. See United States v. McNally, 16 M.J. 32 (C.M.A. 1983).

#### 0713 DUTIES OF TRIAL COUNSEL

A. 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.

In regard to the duty to disclose evidence helpful to the defense, see United States v. Brickey, 16 M.J. 258 (C.M.A. 1983). 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. See R.C.M. 502(d)(5).

B. 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.

C. 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.

#### D. 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. R.C.M. 502(d)(5), discussion (B).

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. See JAGMAN, § 0130. A discussion of interview techniques sometimes useful for witnesses as well as legal assistance clients can be found in Kastl, How To Conduct Better Interviews, 12 A:F. L. Rev. 120 (1970).

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. R.C.M. 502(d)(5), discussion (D).

5. Finally, trial counsel should prepare himself to represent the government with respect to any pretrial requests to the convening authority that may arise.

E. 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. See R.C.M. 701. 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. R.C.M. 701(a). 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. For a more complete discussion of the military law on discovery, see the NJS Evidence Study Guide.

The trial counsel should, regardless of the zealotry 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.

F. Administrative duties

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. See R.C.M. 603.

The convening order should be examined to ensure that it is personally signed by the convening authority. JAGMAN, § 0121. 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. See R.C.M. 601(e)(1), discussion.

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.

The trial counsel must serve a copy of the charge sheet on the accused personally, not on the defense counsel. United States v. Larson, 42 A.C.M.R. 847 (1970). 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. R.C.M. 602.

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. See R.C.M. 703. 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 franked envelope. See R.C.M. 703(e)(2); JAGMAN, § 0137; for form of subpoena, see MCM, 1984, app. 7.

To secure the attendance of military witnesses, trial counsel should advise the commanding officer of the witness that his presence is needed. R.C.M. 703(e)(1). For discussion of production of government documents, see R.C.M. 703(f)(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. See JAGMAN, app. A-1-p, Rule 33, Uniform Rules of Practice Before Navy-Marine Corps Courts-Martial.

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.

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, R.C.M. 804(c)(1), 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. See United States v. Rowe, 18 C.M.A. 54, 39 C.M.R. 54 (1968).

CHAPTER VIII  
CONVENING COURTS-MARTIAL

0801 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, 1984 (MCM) as "convening" courts-martial, and the officer authorized to convene courts-martial is the "convening authority" (CA). R.C.M. 504(a), MCM, 1984 [hereinafter R.C.M. \_\_\_\_]. Also discussed in this chapter are the mechanics of convening a court-martial and the effect of defects in the convening process.

0802 AUTHORITY TO CONVENE (MILJUS Key Number 879)

A. 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.

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 a SCM. In addition, officers in charge so empowered by the Secretary of the Navy (SECNAV) may convene SCMs. See Art. 24, UCMJ; R.C.M. 1302(a); JAGMAN, § 0115a(3).

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 SPCMs. See JAGMAN, § 0115a(2).

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, 16 C.M.A. 127, 36 C.M.R. 283 (1966), 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 SPCMs, even though the Secretary had provided that every command so designated by that grade officer could convene SPCMs. 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. See also United States v. Greenwell, 19 C.M.A. 460, 42 C.M.R. 62 (1970); United States v. Newcomb, 5 M.J. 4 (C.M.A. 1978).

(2) In United States v. Cunningham, 21 C.M.A. 144, 44 C.M.R. 198 (1971), 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. See U.S. Navy Regulations, 1973, art. 0611.

(3) In United States v. Surtasky, 16 C.M.A. 241, 36 C.M.R. 397 (1966), 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 SPCMs by SECNAV are set forth in JAGMAN, § 0115a(2). This list is not all inclusive, however.

c. The procedures to be followed by a command to request designation by SECNAV to convene courts-martial are set forth in JAGMAN, § 0115b.

3. General courts-martial (GCM). The categories of persons who have authority to convene GCMs are set forth in Article 22, UCMJ. SECNAV also may designate other specific officers who may convene GCMs and some of these officers are specified in JAGMAN, § 0115a(1).

B. Nondelegability 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. United States v. Bunting, 4 C.M.A. 84, 15 C.M.R. 84 (1954); United States v. Allen, 5 C.M.A. 626, 18 C.M.R. 250 (1955). United States v. Ryan, 5 M.J. 97 (C.M.A. 1978); United States v. Flowers, 7 M.J. 659 (A.C.M.R. 1979); United States v. Duvall, 7 M.J. 832 (N.C.M.R. 1979). See also R.C.M. 504(b)(4). 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. United States v. Yates, 28 M.J. 60 (C.M.A. 1989); United States v. Kugima, 16 C.M.A. 183, 36 C.M.R. 339 (1966). See also U.S. Navy Regulations, 1973, arts. 0855, 0860.

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. United States v. Rice, 3 M.J. 1094 (N.C.M.R. 1977), petition denied, 4 M.J. 163 (C.M.A. 1977). Compare United States v. McCall, 26 M.J. 804 (A.C.M.R. 1988) (findings of guilty set aside where convening order was not presented to convening authority until after commencement of first session of trial, leaving him no choice but to approve selection of members made by subordinate).

2. JAGMAN, § 0121 requires that the convening order be personally signed by the convening authority and show his name, grade, and title, including organization or unit.

C. 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. See R.C.M. 504(b)(1)-(2), 1302(a); JAGMAN, § 0116. A specific example of the operation of this authority is set forth in the JAG Manual, section 0116b, 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. United States v. Blaylock, 15 M.J. 190 (C.M.A. 1983). See section 1003 (The accuser concept), infra; R.C.M. 504(c).

2. SECNAV has also directed the withholding of court-martial jurisdiction in certain types of cases. See, e.g., JAGMAN, § 0116c, which requires authority from SECNAV before exercising jurisdiction over an individual under Article 2 (4)-(6) or Article 3, UCMJ; JAGMAN, § 0116d, which requires prior approval before trying offenses previously adjudicated in civilian criminal courts; and JAGMAN, § 0116f, which withholds jurisdiction to try national security cases and, in certain instances, major felonies where there is reciprocal jurisdiction in the Federal courts.

3. Authority may be lost where the command is disestablished or redesignated. See United States v. Masterman, 46 C.M.R. 615 (A.C.M.R. 1972), in which the Army C.M.R. held that, where a commanding officer had been specifically designated by Secretary of the Army to convene courts-martial, when the command was redesignated, the authority to convene did not devolve to the new command.

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 0845 of U.S. Navy Regulations, 1973. In convening such courts-martial, the commanding officer is performing duties related to the administration of his medical unit. United States v. Banks, 4 M.J. 620 (N.C.M.R. 1977).

#### 0803 MECHANICS OF CONVENING COURTS-MARTIAL (MILJUS Key Numbers 879-883)

A. 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 and chapter IX, infra, will consider the referral of charges to a court-martial for trial.

#### B. 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.

C. Form of a convening order

1. A court-martial convening order should be in the form set out in Appendix 6 to the MCM and section 0121 of the JAG Manual. A sample SPCM convening order appears at the end of this chapter.

2. It should be on command letterhead.

3. It should have a date and a court-martial convening order number.

D. 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. R.C.M. 504(d)(1)-(2).

2. The type of court to be convened must be specified, i.e., whether it is a SCM, SPCM, or GCM. R.C.M. 504(d)(1)-(2).

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. United States v. Sayers, 20 C.M.A. 463, 43 C.M.R. 302 (1971).

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. United States v. McLaughlin, 18 C.M.A. 61, 39 C.M.R. 61 (1968).

(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. R.C.M. 503(a)(3). 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. But see United States v. Robertson, 7 M.J. 507 (A.C.M.R. 1979), petition denied, 7 M.J. 137 (C.M.R. 1979).



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. See MCM, app. 6; chapter VIII, section 0807, infra.

7. Section 0121 of the JAG Manual 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. See United States v. Newcomb, 5 M.J. 4 (C.M.A. 1978); United States v. Ryan, 5 M.J. 97 (C.M.A. 1978). Failure of the convening authority to sign personally the convening order constitutes jurisdictional error. See section 0802B, supra. See United States v. Leahy, 20 M.J. 564 (N.M.C.M.R. 1984) (no requirement to make determination on record regarding capacity of signatories where different persons signed convening order and amending order where internal consistency of documents was otherwise indicated).

#### E. Miscellaneous

1. In a one-officer command, the commanding officer is the SCM. See R.C.M. 1302(b).

2. A copy of a convening order and any amendments thereto should be sent to each person named in the convening order. JAGMAN, § 0121.

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. R.C.M. 501(c); JAGMAN, § 0120c.

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.

#### F. 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. R.C.M. 505(b). United States v. Parkinson, 16 M.J. 400 (C.M.A. 1983) (failure to confirm the modification in writing is error).

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. R.C.M. 505(c)(1)(A). 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. R.C.M. 505(c)(1)(B)(i). SECNAV has authorized such a delegation in section 0128 of the JAG Manual. 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. R.C.M. 505(c)(1)(B)(ii).

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. R.C.M. 505(c)(2)(A). "Good cause" is defined as a critical situation; i.e., illness, emergency leave, or military exigencies. Article 29a, UCMJ; R.C.M. 505(f).

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. See United States v. Greenwell, 12 C.M.A. 560, 31 C.M.R. 146 (1961).

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. Articles 29b & c, and Article 25c(1), UCMJ; R.C.M. 505(c)(2)(B).

4. The form to be followed for amending convening orders is found in Appendix 6, MCM, 1984. A sample GCM amended convening order appears at the end of the chapter.

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. R.C.M. 505(b). Failure to include such written confirmation is jurisdictional error.

NAVAL JUSTICE SCHOOL  
NEWPORT, RHODE ISLAND

15 February 19CY

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 John C. Peterson, U.S. Navy  
Lieutenant Edward M. Wiley, U.S. Navy  
Lieutenant Junior Grade Thomas M. Johnson, U.S. Naval Reserve  
Ensign Jerry F. Samuels, U.S. Naval Reserve  
Ensign John B. Bryant, U.S. Navy

/s/  
ROBERT A. GASTON  
Captain, U.S. Navy  
Commanding Officer  
Naval Justice School  
Newport, Rhode Island

Appendix 8-1

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 CW03 Jeffrey 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 19CY, vice Lieutenant Anthony R. Patrilli, U.S. Navy, relieved.

RICHARD J. ANDERSON  
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.

Appendix 8-2

CHAPTER IX  
REFERRAL OF CHARGES TO A COURT-MARTIAL  
(MILJUS Key Number 967)

0901 INTRODUCTION. This chapter discusses the procedural steps necessary for trial of a specific case by court-martial. This process is defined as referral of charges. This chapter covers preparation of a charge sheet and referral generally; chapter XX, *infra*, addresses the additional prerequisites for trial by general court-martial, i.e., the convening of an article 32 pretrial investigation and the preparation of article 34 advice.

0902 THE CHARGE SHEET

The charge sheet, DD Form 458 (1984 edition), is used for all types of courts-martial and consists of two pages. Page one contains information concerning the accused, the charges and specifications, and a block for the preferral of charges. Page two is the referral page of the charge sheet.

A. The information concerning the accused listed on page one of the charge sheet can be prepared from the service record of the accused. The investigation of the reported offenses serves as the basis for the charges and specifications.

B. The bottom of page one and page two comprise a record of several distinct steps leading to referral of charges to a court-martial.

1. Block 11 at the bottom of page one, records the preferral of charges, i.e., having them sworn to by an accuser. Informing the accused of charges preferred, and recording the command receipt of these charges, thereby tolling the statute of limitations, are accomplished in blocks 12 and 13 on page two.

2. Block 14 on page two, the referral block, when properly completed, is the actual referral of the preferred and received charges by the convening authority to a court-martial.

3. The last division of page two, block 15, is the record of personal service of the referred charges by trial counsel, or the summary court when the case is referred to a summary court-martial, upon the accused.

A. An accused may not be tried on unsworn charges over his objection. Art. 30a, UCMJ; see R.C.M. 307(b), 905(b)(1), MCM, 1984 [hereinafter R.C.M. \_\_\_\_]. Failure to object to unsworn charges, however, will constitute waiver by the accused. United States v. Taylor, 15 C.M.A. 565, 36 C.M.R. 63 (1965). This protection applies to substantial portions of a specification as well as to an entire charge.

B. Requirements as to swearing. Article 30, UCMJ, requires:

1. That the accuser be a person subject to the UCMJ;
2. that the person administering the oath be authorized to do so and be a commissioned officer;
3. that the accuser have personal knowledge of or have investigated the charges; and
4. that the accuser swear that the charges are true in fact to the best of his knowledge and belief.

C. Officers authorized to administer oaths. Various categories of officers authorized to administer oaths are listed in Article 136(a), UCMJ, and sections 2502a(1) and (3) of the JAG Manual. These JAG Manual provisions were held to be a valid exercise of secretarial authority in United States v. Johnson, 3 M.J. 623 (N.C.M.R. 1977).

D. Degree of knowledge required: the preliminary inquiry

A preliminary inquiry officer may become an accuser by signing and swearing to whatever charges he believes to be true in fact. Also, a victim or any other person, if subject to the Code, may prefer charges as an accuser. Additionally, an accuser may rely upon the results of an investigation conducted by others in preferring charges. In both of these latter situations, to become an accuser one must swear to his actual belief in the truth of the charge, i.e., the accuser is not a mere arbiter determining the existence of probable cause. A person may not be ordered to sign and swear to charges if he is unable truthfully to make the required oath on his own responsibility. R.C.M. 307(a), discussion.

E. Sufficiency of the oath itself. Deviations from the prescribed procedure for administering the oath will not necessarily result in prejudicial error. See R.C.M. 307(b), discussion. The Court of Military Appeals has strongly encouraged the use of a ceremonial swearing, but has held that failure to raise the right hand or read the oath aloud does not render it insufficient. United States v. Koepke, 15 C.M.A. 542, 36 C.M.R. 40 (1965).

F. Waiver. It is well settled that sworn charges are not a prerequisite for jurisdiction, and that failure to make timely objections will constitute waiver. United States v. Taylor, 15 C.M.A. 565, 36 C.M.R. 63 (1965); United States v. Napier, 20 C.M.A. 422, 43 C.M.R. 262 (1971); R.C.M. 905(e). The appropriate time for objection is prior to plea. R.C.M. 905(b).

G. Procedure upon timely objection. Where the accused objects to trial upon unsworn charges, the defect ordinarily may be remedied by the original accuser or some other qualified person swearing to the charges. Where the accused would be prejudiced by this procedure, however, other relief may be warranted, such as an additional Article 32, UCMJ, pretrial investigation for a case referred to a GCM or rereferral of the case to trial. R.C.M. 906(c).

#### 0904 INFORMING THE ACCUSED OF PREFERRED CHARGES

A. Article 30(b), UCMJ, requires that, once charges are preferred, "the person accused shall be informed of the charges against him as soon as practicable."

B. R.C.M. 308(a) requires that the immediate commanding officer of the accused inform him of the preferred charges and execute block 12 on page two recording this fact. The information given the accused need extend only to reading the charge and specification set forth on page one of the charge sheet. In practice, this is normally done by someone in the unit's legal office and the legal officer signs that it has been done. See United States v. Moore, 6 M.J. 644 (N.C.M.R. 1978), where the N.C.M.R. held that the charge sheet's failure to show the accused was informed of the charge prior to referral was not a jurisdictional defect and that the error could be waived by defense failure to object at trial.

#### 0905 RECEIPT OF PREFERRED CHARGES

A. R.C.M. 403(a) requires that the officer exercising summary court-martial jurisdiction over the accused, upon receipt of charges, shall cause block 13 on page two to be completed as to the time and date of the receipt of the charges. A timely completion of block 13 is of great importance because receipt of the charges tolls the running of the statute of limitations.

Article 43, UCMJ, sets forth the statute of limitations for offenses under the Code.

1. A person charged with absence without leave or missing movement in time of war, or with any offense punishable by death, may be tried and punished at any time without limitation.

2. Except as otherwise provided in this article, a person charged with an offense is not liable to be tried by court-martial if the offense was committed more than five years before the receipt of sworn charges and specifications by the officer exercising summary court-martial jurisdiction over the command.

3. The Code also sets a two-year statute of limitations on offenses which are handled at NJP from the date of the offense to imposition of punishment at NJP.

4. Periods of unauthorized absence are excluded in computing the periods of limitation above.

5. Exceptions to the above rules are created for the offenses of desertion (article 85) or UA (article 86) in time of war; aiding the enemy (article 104); mutiny (article 94); and murder (article 118). As to these offenses, no limitation is prescribed. Art. 43, UCMJ.

B. If, after charges are received, new charges are drafted or the original charges are amended so as to change the nature of the offense alleged, receipt of the original charges will not operate to toll the statute of limitations. See R.C.M. 603(d); section 0907 (Amendment of charges), infra.

#### 0906 REFERRAL OF CHARGES (MILJUS Key Number 967)

A. The referral of charges is accomplished when block 14 on page two of the charge sheet is completed by the convening authority. Block 14 is usually signed personally by the convening authority, but the signature may be that of a person acting by the order or direction of the convening authority, and in such cases, the signature element must reflect the signer's authority. R.C.M. 601(e)(1), discussion. Any special instructions, such as trial in joinder or in common with other cases referred to trial, or that a bad-conduct discharge (BCD) is not authorized, are included in the referral block.

-- The power to refer a case to trial is in the office of the convening authority and may not be delegated to a subordinate.

a. In United States v. Williams, 6 C.M.A. 243, 19 C.M.R. 369 (1955), the C.M.A. stated that it was proper for a successor in command to refer a case to trial.

b. In United States v. Roberts, 7 C.M.A. 322, 22 C.M.R. 112 (1956), the C.M.A. held that a court-martial lacked jurisdiction where the referral to trial was by the staff judge advocate (SJA) based upon a delegation by the convening authority. See also United States v. Bunting, 4 C.M.A. 84, 15 C.M.R. 84 (1954).

c. In United States v. Simpson, 16 C.M.A. 137, 36 C.M.R. 293 (1966), the C.M.A. found nonprejudicial error where the convening authority referred a case to a special court-martial (SPCM), but did not designate which of several courts that he had convened was to try the accused. The specific SPCM was selected by trial counsel and defense counsel when defense counsel was ready for trial. The C.M.A. strongly urged that the normal procedures for referral set forth in the MCM, 1969 (Rev.), be followed in the future. See United States v. McLaughlin, 18 C.M.A. 61, 39 C.M.R. 61 (1968), wherein the C.M.A. reversed, finding improper command control when the convening authority convened one court and, by internal memorandum, referred cases to panels of the court.

d. In United States v. Richardson, 5 M.J. 627 (A.C.M.R. 1978), the Army Court of Military Review found no error in the referral of charges to a court previously created by the temporarily absent CO of the same command by the executive officer properly functioning as "acting CO." See also United States v. Ryan, 5 M.J. 97 (C.M.A. 1978).



e. In United States v. Duvall, 7 M.J. 832 (N.C.M.R. 1979), the court found improper the attempt of a commanding officer of a Reserve squadron, while he was in an inactive duty status, to refer charges to a court by telephone from his home.

B. The decision to refer. Generally, a convening authority is given broad discretion in determining whether to refer a case to a court-martial. See Williams v. United States, *supra*, at 245, 19 C.M.R. at 371. His discretion, however, is structured to a degree by several provisions of the Manual for Courts-Martial, 1984.

1. R.C.M. 401(c)(1), discussion, provides that a charge may be dismissed "when it fails to state an offense, when it is unsupported by available evidence, or when there are other sound reasons why trial by court-martial is not appropriate."

2. In selecting a court-martial to try offenses, R.C.M. 306(b) provides that "[a]llegations of offenses should be disposed of in a timely manner at the lowest appropriate level of disposition listed in ... this rule [no action, administrative action, nonjudicial punishment, etc.]."

3. While the C.M.A. has not addressed the question of abuse of authority in referring particular charges to a particular type of court-martial [see United States v. Showalter, 15 C.M.A. 410, 35 C.M.R. 382 (1965)], the court has determined that referral of charges, when no evidence will be offered to a court, is reviewable and may require corrective action if the facts of the case disclose prejudice to the accused. United States v. Phare, 21 C.M.A. 244, 45 C.M.R. 18 (1972). See also United States v. Duncan, 46 C.M.R. 1031 (N.C.M.R. 1972), where the Navy Court of Military Review held that trial counsel had an affirmative duty to report unprovable charges to the convening authority and that the convening authority had a duty not to refer to trial any offense on which the government would be unable to present any evidence.

C. Referral to a GCM. Articles 32 and 34, UCMJ, establish certain requirements which must be met before a convening authority may refer charges to a general court-martial (GCM).

1. Article 32 and R.C.M. 405(a), provide for an impartial pretrial investigation of charges and specifications before they may be referred to a GCM. The pretrial investigation is discussed in chapter XX, *infra*.

2. Article 34 and R.C.M. 406(a), provide that, prior to referral of charges to a GCM, the convening authority will refer the investigation and allied papers to his SJA for a written review. This review is to test the sufficiency of the evidence. Article 34(a), UCMJ, requires the convening authority to find "that the specification alleges an offense under [the Code and] is warranted by evidence indicated in the report of investigation...." The scope of the pretrial advice required by article 34 and by R.C.M. 406 is discussed in chapter XX, *infra*.

A. Amendments of specifications. Generally, the scope of an amendment will determine its effect upon a prosecution of an accused upon the amended specification. If the amendment is a correction of an error in preparation or form, the effect usually is not critical to the prosecution and, depending upon when it is made, may only be grounds for an accused to seek a delay in his trial. If the amendment is material such that it changes the nature of the offense alleged or alleges an offense when one was not alleged previously, the effect is to terminate the prosecution on the previous specification and to require that all steps necessary to prosecute any specification be taken before proceeding with the trial of an accused on the "new" or amended specification.

1. Minor defects in a charge or specification may be corrected at any time before arraignment. R.C.M. 603(b) provides that "any person forwarding, acting upon, or prosecuting charges on behalf of the United States, except an investigating officer appointed under R.C.M. 405 [article 32 pretrial investigation], may make minor changes to charges or specifications before arraignment." The corrections should be initialed by the officer making the correction. A minor change is defined as one which does not add a party, offense, or substantial matter not fairly included in those charges previously preferred, or which is likely to mislead the accused as to the offenses charged. R.C.M. 603(a).

R.C.M. 502(d)(5), discussion, authorizes the trial counsel to correct "minor errors or obvious mistakes in the charges."

2. Corrections of charges after arraignment are dealt with in R.C.M. 603(c), which authorizes the military judge, upon motion, to permit minor changes in the charges at any time before findings are announced if no substantial right of the accused is prejudiced. The military judge may grant the accused a continuance if, in light of the correction, the accused needs additional time to prepare his defense. R.C.M. 906(4), discussion.

a. In United States v. Johnson, 12 C.M.A. 710, 31 C.M.R. 296 (1962), the C.M.A. stated that charges and specifications could be amended any time prior to findings provided 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. This third provision is not in conflict with the provisions of para. 69b(3), MCM, 1969 (Rev.) [precursor to R.C.M. 906(4) discussed above], for the court indicated in the earlier case of United States v. Brown, 4 C.M.A. 683, 16 C.M.R. 257 (1954), that the word "mislead" was to be construed as requiring that the accused show that the amendment would prejudice him in his defense. See also United States v. Porter, 12 M.J. 715 (N.M.C.M.R. 1982).

b. In United States v. Dyer 5 M.J. 643 (A.F.C.M.R. 1978), the Air Force Court of Military Review approved an upward modification of the amount of value alleged in a larceny specification from \$500 to \$1500.

The court held that the accused was not misled as to the offense charged, and that the accused was not prejudiced since there was no increase in the maximum permissible punishment. As to the argument that the offense charged was made to look more serious, the court acknowledged that consequence, but said that, since the aggregate value of all the other larceny specifications exceeded \$10,000, there was no prejudice to the substantial rights of the accused. As an interesting sidelight, the court noted that if the government had preferred and referred an entirely new charge and specification to correct the problem, the statute of limitations would have applied. Finally, the court indicated that, since the funds stolen were in the form of a check, it considered that it was "simply the amount of the check which was erroneously averred." Id. at 645.

3. A special problem presents itself in the amendment of specifications that allege desertion or UA without setting forth a termination date at the time they are received by the command, because the accused is still gone and receipt seeks to toll the statute of limitations.

a. In two cases, United States v. French, 9 C.M.A. 57, 25 C.M.R. 319 (1958), and United States v. Rodgers, 8 C.M.A. 226, 24 C.M.R. 36 (1957), charges were timely received to toll the running of the statute. When the accuseds were apprehended, new charge sheets were prepared alleging the date of termination. The C.M.A. held that as to these new charges the statute had run. In Rodgers, the C.M.A. stated that all that was necessary was to amend the original charges to allege the date of termination, and the statute would have been tolled.

b. In United States v. Arbic, 16 C.M.A. 292, 36 C.M.R. 448 (1966), the C.M.A., relying upon Rodgers, supra, held that an amendment of a desertion specification to allege UA and a termination date did not work a change in the nature of the offense alleged so as to preclude the tolling of the statute of limitations when the charge was received. See also United States v. Lee, 19 M.J. 587 (N.M.C.M.R. 1984).

c. French and Rodgers, both supra, were distinguished in United States v. Brown, 1 M.J. 1151 (N.C.M.R. 1977). In Brown, the charges were preferred, sworn to, and receipted for in a timely fashion. Thereafter, a new page 3 of the charge sheet was prepared and the charges were receipted for a second time. The N.C.M.R. held that receiving the charges the second time was mere surplusage and did not change the fact that these same charges were originally received in time to toll the statute.

4. If the amendment changes the nature of the offense charged, by adding any person, offense, or matter not fairly included in the charges as originally preferred, new charges, consolidating all offenses that are to be charged, should be signed and sworn to by an accuser. R.C.M. 603(d). If an amendment at trial will change the nature of the offense alleged, trial counsel should seek a continuance in order to refer the matter to the convening authority for appropriate action. See R.C.M. 502(d)(5), discussion (A).

a. In United States v. Ellsey, 16 C.M.A. 455, 37 C.M.R. 75 (1966), the trial counsel, without authority from the convening authority, amended a specification to allege a different offense. The C.M.A. held that the amendment was a nullity and that trial counsel's action did not create a valid charge against the accused.

b. In United States v. McMullen, 21 C.M.A. 465, 45 C.M.R. 239 (1972), the accused was charged with the offense of disobeying an order to get a haircut. After receiving evidence, the military judge modified the specification to disobeying an order to get a "regulation haircut." The C.M.A. held the the military judge was not authorized to change the nature of the offense and reversed.

5. The C.M.A. has held that failure to follow the provisions of para. 33d, MCM, 1969 (Rev.) [precursor to R.C.M. 603(a), discussed above], where an amendment changes the nature of the offense, does not preclude further prosecution on the amended specification provided there is a knowing and intelligent waiver.

a. In United States v. Smith, 8 C.M.A. 178, 23 C.M.R. 402 (1957), the convening authority directed an amendment of the specification to allege robbery rather than larceny. The amendment was accomplished prior to trial, but the charge was not resworn. The C.M.A. relied upon Article 34(b), UCMJ, in holding that the convening authority had acted properly to have the charge conform with the evidence, and any objection that the accused had to being tried on unsworn charges had been waived.

b. In United States v. Krutsinger, 15 C.M.A. 235, 35 C.M.R. 207 (1965), a UA charge was amended at trial. The amendment had the effect of increasing the authorized punishment. The trial defense counsel did not object to the amendment. The C.M.A. reiterated its position that specifications can be amended any time prior to findings, within the limits set forth in United States v. Johnson, *supra*. The court found prejudice to the accused because of the increased punishment and, thus, the amendment by trial counsel was improper. Because the record did not show a knowing and intelligent waiver, the court, to avoid a miscarriage of justice, did not find waiver in this case.

The inclusion of jurisdictional language, prompted by the requirements of United States v. Alef, 3 M.J. 414 (C.M.A. 1977), in larceny and housebreaking specifications which were rereferred by the CA but not reserved on the accused, was found to create neither a denial of due process nor a jurisdictional defect. The court determined that the additional language was surplusage because jurisdiction was obvious from the original specifications and that as a result there was no need for another service of the charges on the accused. The court specifically noted that the inclusion of the language did not meet any of the criteria of United States v. Krutsinger, *supra*. United States v. Lewis, 5 M.J. 712 (A.C.M.R. 1978).

c. In United States v. Rodman, 19 C.M.A. 102, 41 C.M.R. 102 (1969), the C.M.A. stated that amendments of specifications were not like amendments of Federal indictments, and the military judge is granted discretion to allow amendments of specifications at trial. The amended specification here was to allege robbery rather than larceny. The C.M.A., looking to the record, found that the accused had not been misled by the change and that defense counsel, when his attention was called to the defective specification, consented to the amendment. Thus, the court concluded that there had been a knowing and intelligent waiver. Whether Rodman may be considered as an exception to United States v. Ellsey, *supra*, is doubtful, for the court opined

that it was clear from the record that the convening authority had intended to allege robbery and nothing would have been gained in having the convening authority approve the change in the specification.

B. Additional charges. Additional charges and specifications may be added to original charges referred to trial any time prior to the arraignment of the accused. R.C.M. 601(e)(2); United States v. Davis, 11 C.M.A. 407, 29 C.M.R. 223 (1960).

1. All preliminary steps to have additional charges preferred and referred to trial must be accomplished prior to arraignment in order for the court to consider such charges at trial. Id. But see United States v. Lee, 14 M.J. 983 (N.M.C.M.R. 1982) (not a jurisdictional bar to try an accused on additional charges where waiver can be found).

2. The preparation of additional charges is discussed in chapter II (Pleading), NJS Criminal Law Study Guide.

#### 0908 WITHDRAWAL OF CHARGES GENERALLY (MILJUS Key Number 968)

A. Withdrawal. Withdrawal is the process by which the convening authority takes from the consideration of a court charges and specifications in a case that he has referred to the court for trial. Generally, the convening authority or superior competent authority may, for any reason, withdraw a case or charge any time before findings are announced. R.C.M. 604(a). The general rule, however, is that when charges have been referred to a court for trial they may not be withdrawn and referred to another court without proper reason. R.C.M. 604(b). In no event will a specification or case be withdrawn arbitrarily or unfairly to an accused. R.C.M. 604(a), discussion. With regard to withdrawal, the trial counsel may act as agent for the convening authority and has implied authority to withdraw charges. Satterfield v. Drew, 17 M.J. 269 (C.M.A. 1984).

1. The procedure for rereferral of charges to a new court, where the old court is not disestablished, is set out in R.C.M. 601(e)(1), discussion.

2. When the original court is disestablished and it is desired to rerefer pending cases to a new court-martial, referral to the new court is accomplished by referral in the convening order. A sample form is included in Appendix 6, n.4, MCM, 1984.

B. Withdrawal with a view to future prosecution. When a case, or any part of it, is withdrawn from a court-martial with a view to future prosecution, the withdrawal must be for "good cause." (The C.M.A. has also used the terms "proper grounds" and "proper reason.")

1. The MCM rule. R.C.M. 604(b), discussion, provides that, when charges have been withdrawn from a court-martial and referred to another, the reasons for the withdrawal and later referral should be included in the record of the later court-martial if the later referral is more onerous to the accused. Therefore, if further prosecution is contemplated at the time of the withdrawal, the reasons for the withdrawal should be included in, or attached

to, the record of the earlier proceeding. This requirement to state the reasons for withdrawal and later rereferral is the product of United States v. Hardy, 4 M.J. 20 (C.M.A. 1977). The court's reasoning is clear from the following language:

[T]he reason for withdrawal [must] be "proper." Whether it was proper is a matter for appellate review and the only way an appellate tribunal may perform this function is if the matter affirmatively is made a matter of record at the trial level. . . . Therefore, we will require, for all trials beginning on or after the effective date of this decision, an affirmative showing on the record of the reason for withdrawal and re-referral of any specification. Only in this way can we assure compliance with the admonition of paragraph 56a of the Manual [precursor to R.C.M. 604(a), discussion] that "(i)n no event will a specification or case be withdrawn arbitrarily or unfairly to the accused."

Id. at 25.

Note that in United States v. Meckler, 6 M.J. 779 (A.C.M.R. 1978), the Army Court of Military Review held that failure to comply with the requirements of United States v. Hardy, supra, was not a jurisdictional defect, but rather was a procedural error. As such, the court found the error to be harmless in view of the complete lack of evidence, or even allegation, that the withdrawal was arbitrary or unfair to the accused. Accord United States v. Adams, 6 M.J. 948 (A.C.M.R. 1979). See also United States v. Blaylock, 15 M.J. 190 (C.M.A. 1983); United States v. Charette, 15 M.J. 197 (C.M.A. 1983).

### 3. What constitutes good cause?

a. In United States v. Walsh, 22 C.M.A. 509, 47 C.M.R. 926 (1973), the accused and three others were referred to trial for assault, battery, and UA. After the first three were tried, the accused's case was withdrawn from the original court and rereferred to another because, as the SJA testified, "the court-martial appointed to Special Order AE-181 had heard three cases wherein the sentences adjudged by the members were believed by [the convening authority] to be inadequate in that they were overly lenient." Id. at 510. The C.M.A. held that "leniency of sentences" is not good cause for withdrawing a case from one court and rereferring it to another, but it did indicate that the convening authority did not forfeit his authority to appoint courts-martial; thus, a court to which the case is subsequently referred has jurisdiction to try the accused.

b. In Vanover v. Clark, 27 M.J. 345 (C.M.A. 1988), the accused was referred to trial for two specifications of larceny. After the military judge ruled inadmissible seven checks written by the accused and returned for insufficient funds, the trial counsel withdrew the larceny specifications over defense objection. These same larceny specifications were subsequently referred to another court-martial, along with seven specifications of uttering checks with insufficient funds relating to the seven checks previously held inadmissible at trial. Upon request for writ of mandamus to

dismiss the charges, the C.M.A. found the government's withdrawal to have controverted the military judge's ruling on the inadmissibility of the checks and necessitated extraordinary relief.

c. In Petty v. Moriarty, 20 C.M.A. 438, 43 C.M.R. 278 (1971), the petitioner sought a writ of prohibition to prevent Colonel Moriarty, the convening authority, from sending his case to an article 32 investigation, where the convening authority had withdrawn the accused's case from an SPCM and had forwarded it to a pretrial investigation after the accused had requested certain defense witnesses. At the time of the withdrawal, the accused had not requested trial by military judge alone and the trial proceedings had not begun. The C.M.A. granted the writ and found that the withdrawal was initiated because of the defense request for witnesses, an improper ground for withdrawal.

The C.M.A. has found good cause for withdrawal in cases where, prior to the introduction of evidence on the general issue of the guilt or innocence of an accused, a question was raised as to the accused's mental competence or when evidence of other offenses was discovered and the original and additional charges were combined.

(1) As to an inquiry into the mental competency of an accused, see R.C.M. 706, and Lozinski v. Wetherill, 21 C.M.A. 52, 44 C.M.R. 106 (1971).

(2) In United States v. Wells, 9 C.M.A. 509, 26 C.M.R. 289 (1958), the accused's case was referred to an SPCM. At trial, after the court had been convened and the pleas of the accused received, the convening authority withdrew the charges because of the receipt of additional charges. The case, with the additional charges, was referred to a GCM. At the second trial, defense counsel objected and the motion was overruled. The C.M.A. held that the ruling of the law officer (military judge) was correct and the accused was not prejudiced by the action of the convening authority.

(3) The C.M.A. has shown that it will go beyond the conclusory statements of the convening authority in determining whether good cause existed for withdrawal. In United States v. Fleming, 18 C.M.A. 524, 40 C.M.R. 236 (1969), a rehearing was ordered on a charge of desertion. It was expected that the accused would enter pleas of guilty. The plea was entered, but rejected by the military judge after questioning the accused; a plea of not guilty was then entered. Trial counsel informed the convening authority and the charges were withdrawn from the court. The convening authority, as grounds for withdrawal, indicated that the rejection of the guilty plea was unexpected and that the evidence to establish the offense was not available locally, but was available at the situs of the original trial. On review, the C.M.A. found that the witnesses were available equally to either situs and held that the withdrawal was without good cause.

4. When withdrawal is attempted over the objection of an accused, after the introduction of evidence on the general issue of the guilt or innocence of the accused, and there is a subsequent referral to another court, the question of former jeopardy is presented. Former jeopardy is defined in Article 44, UCMJ, and R.C.M. 907(b)(2)(C), which generally provide that an accused may not, without his consent, be tried twice for the same offense. In United States v. Wells, *supra*, the C.M.A. held that jeopardy attached in the military at the point in trial where evidence is received on the general issue of guilt or innocence.

a. But see Crist v. Bretz, 437 U.S. 28 (1978), wherein the Supreme Court held that the Federal rule that jeopardy attaches upon the empaneling and swearing of the jury was an integral part of the fifth amendment protections applicable to the states via the fourteenth amendment. Although the Court of Military Appeals generally has acknowledged the applicability of the fifth amendment's double jeopardy protections to court-martial proceedings, the court has not adopted the rule enunciated in Crist as being applicable to courts-martial. See Wade v. Hunter, 336 U.S. 684 (1949); United States v. Richardson, 21 C.M.A. 54, 44 C.M.R. 108 (1971). See also chapter X (Defenses), NJS Criminal Law Study Guide.

b. R.C.M. 604(b) provides that charges withdrawn after introduction of evidence on the general issue of guilt may be referred to another court-martial only if the withdrawal was necessitated by urgent and unforeseen military necessity.

(1) In Wade v. Hunter, *supra*, while holding that the fifth amendment's double jeopardy provision applies to courts-martial, the Supreme Court found that the provision had not been violated when charges were withdrawn from one court and referred to another court when the advance of the unit to which the original court personnel belonged took it out of the area where the witnesses were located.

(2) Chapter XVII (Voir dire and challenges), *infra*, discusses in more detail the question of withdrawal in relation to the declaration of a mistrial. Mistrial has been treated as good cause in the interest of justice, allowing for the withdrawal of charges and subsequent referral to another court. See R.C.M. 915(c).



# CHARGE SHEET

## I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, MI)		2. SSN	3. GRADE OR RANK	4. PAY GRADE	
5. UNIT OR ORGANIZATION			6. CURRENT SERVICE		
			a. INITIAL DATE	b. TERM	
7. PAY PER MONTH:			8. NATURE OF RESTRAINT OF ACCUSED		9. DATE(S) IMPOSED
a. BASIC	b. SEA/FOREIGN DUTY	c. TOTAL			

## II. CHARGES AND SPECIFICATIONS

10. CHARGE: VIOLATION OF THE UCMJ, ARTICLE

SPECIFICATION:

## III. PREFERRAL

11a. NAME OF ACCUSER (Last, First, MI)	b. GRADE	c. ORGANIZATION OF ACCUSER
d. SIGNATURE OF ACCUSER		e. DATE

**AFFIDAVIT:** Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_\_, 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.

\_\_\_\_\_  
Typed Name of Officer

\_\_\_\_\_  
Organization of Officer

\_\_\_\_\_  
Grade

\_\_\_\_\_  
Official Capacity to Administer Oath  
(See R.C.M. 307(b) must be commissioned officer)

\_\_\_\_\_  
Signature

Appendix 9-1(1)

12. On \_\_\_\_\_, 19\_\_\_\_\_, 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.)

Typed Name of Immediate Commander

Organization of Immediate Commander

Grade

Signature

#### IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13.

The sworn charges were received at \_\_\_\_\_ hours, \_\_\_\_\_ 19\_\_\_\_\_ at \_\_\_\_\_  
Designation of Command or

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

FOR THE<sup>1</sup>

Typed Name of Officer

Official Capacity of Officer Signing

Grade

Signature

#### V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY

b. PLACE

c. DATE

Referred for trial to the \_\_\_\_\_ court martial convened by \_\_\_\_\_

\_\_\_\_\_, \_\_\_\_\_ 19\_\_\_\_\_, subject to the following instructions:<sup>2</sup> \_\_\_\_\_

By \_\_\_\_\_ of \_\_\_\_\_  
Command or Order

Typed Name of Officer

Official Capacity of Officer Signing

Grade

Signature

15.

On \_\_\_\_\_, 19\_\_\_\_\_, I (caused to be) served a copy hereof on (each of) the above named accused.

Typed Name of Trial Counsel

Grade or Rank of Trial Counsel

Signature

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

## CHAPTER X

### THE ACCUSER CONCEPT AND UNLAWFUL COMMAND INFLUENCE

(MILJUS Key Number 878)

#### 1001 INTRODUCTION

The Uniform Code of Military Justice is structured to give the convening authority extensive areas of permissible involvement in the military justice system. For example, he may administer nonjudicial punishment; he may determine to what type of court-martial a case 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.

#### 1002 THE ACCUSER CONCEPT

A. 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 [Article 22(b) and 23(b), UCMJ; R.C.M. 504(c), MCM, 1984 [hereinafter R.C.M. \_\_\_\_], referring charges to a court-martial (R.C.M. 603(c)), and taking post-trial action [R.C.M. 1107 (discussion); see United States v. Jackson, 3 M.J. 153 (C.M.A. 1977)]. 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. R.C.M. 504(c)(3). Section 0119 of the JAG Manual 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. R.C.M. 1302(b).

B. 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.

C. 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 (block 11d., app. 4, MCM, 1984), 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." See United States v. Jackson, 3 M.J. 153 (C.M.A. 1977).

D. 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, 17 M.J. 137 (C.M.A. 1984), 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, 8 C.M.A. 178, 23 C.M.R. 402 (1957) 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 decided that the convening authority was merely acting in his official capacity under Article 34(b), 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. See United States v. Bloomer, 21 C.M.A. 28, 44 C.M.R. 82 (1971); United States v. Huff, 10 C.M.R. 736 (A.B.R. 1953).

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, 33 C.M.R. 729 (A.F.B.R. 1963), 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. Compare United States v. Fretwell, 11 C.M.A. 377, 29 C.M.R. 193 (1960), where, in a similar factual context, the issue was not even raised, but the case was decided upon a former punishment basis, and United States v. Hinton, 2 M.J. 564, 565 (A.C.M.R. 1976).

b. Wharton was originally viewed with some skepticism in light of United States v. Hardy, 4 M.J. 20 (C.M.A. 1977), 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, 15 M.J. 190 (C.M.A. 1983), 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. See also United States v. Charette, 15 M.J. 197 (C.M.A. 1983) (same facts as Blaylock, but defense raised rereferral issue at trial and court found no unlawful influence and no improper withdrawal).

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, 7 C.M.A. 293, 22 C.M.R. 83 (1956) 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. See also United States v. Williams, 8 M.J. 506 (A.F.C.M.R. 1979).

(2) In United States v. Harrison, 19 C.M.A. 179, 41 C.M.R. 179, 182 (1970), the Court of Military Appeals 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, 26 M.J. 787 (A.F.C.M.R. 1988), 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. United States v. Rembert, 47 C.M.R. 755 (A.C.M.R. 1973) and United States v. Hardy, supra, have good discussions of this issue.

E. Type-three accuser -- any person who has an interest other than an official interest in the prosecution of the accused. The Court of Military Appeals has consistently applied an objective test to consider whether a convening authority would be disqualified as a type-three accuser. In United States v. Gordon, 1 C.M.A. 255, 261, 2 C.M.R. 161 (1952), the court said:

We 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 has a personal interest in the matter.

Id. at 167.

The same objective test was applied by the Court of Military Appeals in United States v. Conn, 6 M.J. 351 (C.M.A. 1979). See United States v. Corcoran, 17 M.J. 137 (C.M.A. 1984).

1. Convening authority as the "victim"

a. 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.

Id.; see also United States v. Moseley, 2 C.M.R. 263 (A.B.R. 1951).

2. Direct order of convening authority violated

a. In United States v. Marsh, 3 C.M.A. 48, 11 C.M.R. 48 (1953), 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. See also United States v. Orsic, 8 M.J. 657 (A.F.C.M.R. 1979).

b. In United States v. Keith, 3 C.M.A. 579, 13 C.M.R. 135 (1953), 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, 9 C.M.A. 302, 26 C.M.R. 82 (1958), 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. . . ." Id. at 305; 26 C.M.R. at 85.

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." Id. at 305; 26 C.M.R. at 85.

d. In Brookins v. Cullins, 23 C.M.A. 216, 49 C.M.R. 5 (1974), 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 NIS agent, his executive officer, and by his legal officer who had the responsibility for drafting the charges and making recommenda-



tions 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, 49 C.M.R. 120 (N.C.M.R. 1974), 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, 9 C.M.A. 90, 25 C.M.R. 352 (1958), 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. Compare United States v. Doyle, 9 C.M.A. 302, 26 C.M.R. 82 (1958), (discussed above) (wherein the offense involved theft from a fund drive of which the convening authority was military chairman).

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. See United States v. Hurt, 9 C.M.A. 735, 27 C.M.R. 3 (1958).

c. In United States v. Jackson, 3 M.J. 153 (C.M.A. 1977), 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." *Id.* at 154.) 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. See, e.g., United States v. McClenny, 5 C.M.A. 507, 18 C.M.R. 131 (1955) (CA authenticated UA entry used to convict); United States v. Taylor, 5 C.M.A. 523, 18 C.M.R. 147 (1955) (CA signed UA entries used to convict); United States v. Long, 5 C.M.A. 572, 18 C.M.R. 196 (1955) (CA signed service record entries showing prior convictions); United States v. White, 10 C.M.A. 63, 27 C.M.R. 137 (1958) (CA granted immunity to prosecution witness); United States v. Vickery, 1 M.J. 1063 (N.C.M.R. 1976)) (CA granted immunity to prospective

government witness); United States v. Reed, 2 M.J. 64 (1976) (CA received a letter from the accused, urged speedy drafting of charges, and negotiated with accused's counsel). Although the foregoing actions were held not to disqualify the convening authority from convening the courts-martial, there is a separate but related issue of whether the CA is disqualified from taking post-trial action on the case. See also United States v. Bloomer, 21 C.M.A. 28, 44 C.M.R. 82 (1971). Chapter XIX, *infra*, discusses this issue further.

a. In another of its pronouncements on the accuser concept, the Court of Military Appeals faced both the disqualification to convene and disqualification to review issues. In United States v. Conn, 6 M.J. 351 (C.M.A. 1979), 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, 6 M.J. 832 (N.C.M.R. 1979), 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. See also United States v. Crawley, 6 M.J. 811 (A.F.C.M.R. 1978), *petition denied*, 7 M.J. 67 (C.M.A. 1979).

c. The Navy Court of Military Review held in United States v. King, 4 M.J. 785 (N.C.M.R. 1977), 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.

F. An officer subordinate to the accuser. Although Article 1(9), UCMJ does not so indicate, case law and R.C.M. 504(b)(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:

1. Subordinate in the chain of command. See United States v. Grow, 3 C.M.A. 77, 11 C.M.R. 77 (1953); United States v. Haygood, 12 C.M.A. 481, 31 C.M.R. 67 (1961). But see United States v. Avery, 30 C.M.R. 885 (A.C.M.R. 1960); United States v. Garcia, 16 C.M.R. 674 (A.C.M.R. 1954).

2. Junior in rank and outside the chain of command. See United States v. LaGrange, 1 C.M.A. 342, 3 C.M.R. 76 (1952); United States v. Burnette, 5 C.M.R. 522 (A.B.R. 1952); United States v. Navarro, 20 C.M.R. 778 (A.B.R. 1955); United States v. Chaves, 23 C.M.R. 701 (C.G.B.R. 1957).

3. Successor in command, at least where junior in rank. See United States v. Corcoran, 17 M.J. 137 (C.M.A. 1984); United States v. Kostas, 38 C.M.R. 512 (A.B.R. 1967).

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 Newport, 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. See, e.g., United States v. Grow, supra.

b. The Navy Court of Military Review found an exception to this general rule, where a qualified convening authority ratified the actions of an ineligible convening authority. In United States v. Driver, No. 72 0939 (N.C.M.R. 24 May 1972), a superior convening authority convened an SPCM to try an accused for assault on his commanding officer. The original convening authority was succeeded in command by a convening authority subordinate in rank to the victim. The second convening authority modified the convening order and entered into a pretrial agreement with the accused. After trial, the original convening authority took the action on the record and "adopted" the actions of the subordinate convening authority. The N.C.M.R. held that the accused benefited by the adopting action and thus there was no prejudice to the accused.

c. 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. See United States v. Grow, 5 C.M.A. 77, 11 C.M.R. 77 (1953).

G. Remedy for accuser problems. Whether one falls within the class of persons authorized to convene a court-martial under Articles 22a and 23a, 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 22b and 23b, UCMJ. Therefore, if not raised at trial, such error is waived. United States v. Ridley, 22 M.J. 43 (C.M.A. 1986). 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.

## 1003 UNLAWFUL COMMAND INFLUENCE

A. 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. (As an historical note, the primary evil that the 1951 UCMJ was enacted to correct was unlawful command influence). Two notions form the basis of the unlawful command influence concept. The first notion is that military justice is the fair and impartial evaluation of probative facts by judge and/or court members. The second notion is that nothing but legal and competent evidence presented in court can be allowed to influence the judge and/or court members. If unlawful command influence exists, the findings and sentence of the court may be invalidated. If the accused has pleaded guilty, it is possible that only the sentence may be invalidated. In some instances, the unlawful command influence could arise from an impermissible personal interest so that the convening authority is also an accuser. In other instances, the convening authority may be disqualified from taking an action on review. 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.

B. 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. R.C.M. 104(a)(1).

....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)(1).

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.

Art. 37(a), UCMJ.

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. United States v. Walsh, 11 M.J. 858 (N.M.C.M.R. 1981).

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. Art. 37(a), UCMJ. See United States v. Hollcraft, 17 M.J. 1111 (A.C.M.R. 1984).

c. In United States v. Rosser, 6 M.J. 267 (C.M.A. 1979), 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.

C. 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 Court of Military Appeals has 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.

1. General informational lectures or policy directives. The C.M.A. consistently has found that general orientation lectures or publication of general command policies are proper under appropriate conditions.

a. In United States v. Piatt, 15 M.J. 636 (N.M.C.M.R. 1982), rev'd on other grounds, 17 M.J. 442 (C.M.A. 1984), 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, 19 M.J. 170 (C.M.A. 1985). See United States v. Treakle, 18 M.J. 646 (A.C.M.R. 1984), where the policy directives were unclear and interpreted by many as a policy not to give character evidence for an accused. The court found the appearance of unlawful command influence existed, set aside the sentence, and allowed a new sentence hearing.

b. In United States v. Isbell, 3 C.M.A. 782, 14 C.M.R. 200 (1954), 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. United States v. Littrice, 3 C.M.A. 487, 13 C.M.R. 43 (1953).

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. United States v. Albert, 16 C.M.A. 111, 36 C.M.R. 267 (1966).

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. United States v. Cole, 17 C.M.A. 296, 38 C.M.R. 94 (1967).

e. In United States v. Miller, 19 M.J. 159 (C.M.A. 1985), 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.

2. Lectures to designated court members. Like other lectures, the Court of Military Appeals has held that general orientation lectures to designated court members are permissible. However, the court has 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. Danzing, 12 C.M.A. 350, 30 C.M.R. 350 (1961). See also United States v. Davis, 12 C.M.A. 576, 31 C.M.R. 162 (1961). 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. United States v. Wright, 17 C.M.A. 110, 37 C.M.R. 374 (1967).

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. United States v. Grady, 15 M.J. 275 (C.M.A. 1983). United States v. Allen, 20 C.M.A. 317, 43 C.M.R. 157

(1971). See United States v. Estrada, 7 C.M.A. 22, 23 C.M.R. 99 (1957), (reading a SECNAV directive on larceny held prejudicial on sentencing). See also United States v. Brice, 19 M.J. 170 (C.M.A. 1984) (in a drug case, the court was recessed for the jury members to attend a lecture by CMC on drug abuse). Every in-court reference to policy will not result in unlawful command influence; a case-by-case approach is required. See United States v. Robertson, 17 M.J. 846 (N.M.C.M.R.), petition denied, 19 M.J. 7 (C.M.A. 1984) (reference to drug policy during voir dire is proper, as is reference through cross-examination and argument to dispel defense claim the accused was not fully aware of the policy).

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 [Article 37(a), UCMJ] and should be given to the entire command as opposed to detailed court-martial members as a segregated group. See United States v. Hollcroft, 17 M.J. 1111 (A.C.M.R. 1984). See also United States v. Kitts, 23 M.J. 105 (C.M.A. 1986), where the SJA prepared a film discussing a recent drug bust which was shown to the crew before trial.

3. Policy directives affecting the discretion of the convening authority to refer charges or to review certain courts-martial. The Court of Military Appeals has held that a commanding officer has broad discretion in determining whether to refer charges to trial. See Chapter VIII, section 0805, *supra*. As to the review process, the convening authority similarly is given broad discretion as to the approval or disapproval of findings and sentence. See generally, Chapter XIX, *infra*. The C.M.A. has 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. See United States v. Betts, 12 C.M.A. 214, 30 C.M.R. 214 (1961).

a. In United States v. Rivera, 12 C.M.A. 507, 31 C.M.R. 93 (1961), 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, 15 M.J. 190 (C.M.A. 1983), 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). See United States v. Charette, 15 M.J. 197 (C.M.A. 1983). Blaylock repudiated United States v. Hardy, 4 M.J. 20 (C.M.A. 1977), insofar as that case seemed to rule that such a superior command decision to withdraw was itself a violation of Article 37, UCMJ, and therefore a jurisdictional defect to the subsequent rereferral.



c. In the area of approval of sentences, the C.M.A. held in United States v. Prince, 16 C.M.A. 314, 36 C.M.R. 470 (1966), 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. Massey, 5 C.M.A. 514, 18 C.M.R. 138 (1954).

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, 11 C.M.A. 642, 29 C.M.R. 458 (1960), 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, 15 C.M.A. 31, 35 C.M.R. 3 (1964), 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, 8 M.J. 236 (C.M.A. 1980), discusses the necessity for developing the exclusion issue at trial.

c. In United States v. Greene, 20 C.M.A. 232, 43 C.M.R. 72 (1970), 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. See also United States v. Daigle, 1 M.J. 139 (C.M.A. 1975).

d. In United States v. McClain, 22 M.J. 124 (C.M.A. 1986), 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. See also United States v. Smith, 27 M.J. 242 (C.M.A. 1988), where the convening authority was found to have improperly included female personnel as members to achieve a particular result in assault cases where the victim was female.

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. Petty v. Moriarty, 20 C.M.A. 438, 48 C.M.R. 278 (1971).

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, 5 C.M.A. 786, 19 C.M.R. 82 (1954).

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, 22 M.J. 388 (C.M.A. 1986), 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, 25 M.J. 334 (C.M.A. 1987), 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.

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, 2 M.J. 37 (C.M.A. 1976), 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). See United States v. Mabe, 28 M.J. 326 (C.M.A. 1989).

D. 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. See United States v. Levite, 25 M.J. 334 (C.M.A. 1987) (concurring opinion of Judge Cox, at 341). Something more than mere assertions of impartiality by the person influenced is required to rebut the presumption of innocence [United States v. Rosser, 6 M.J. 267 (C.M.A. 1979)], and any doubt must be resolved in favor of the accused. United States v. Kitchens, 12 C.M.A. 589, 31 C.M.R. 175 (1961).

2. The C.M.A. has not applied the doctrine of waiver to the issue of command influence raised for the first time on appeal. See United States v. Blaylock, 15 M.J. 190 (C.M.A. 1983); cf. United States v. Aho, 8 M.J. 236 (C.M.A. 1980). The rationale here is that even though unlawful command influence is not a jurisdictional error [United States v. Blaylock, *supra*], waiver should not attach because unlawful command influence strikes at the heart of the court-martial system and gravely affects the military community. See United States v. Hawthorne, 7 C.M.A. 293, 22 C.M.R. 83 (1956); United States v. Ferguson, 5 C.M.A. 68, 17 C.M.R. 68 (1954).

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. See United States v. Yslave, 18 M.J. 670 (A.C.M.R. 1984) (*en banc*). 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. United States v. Walls, 9 M.J. 88 (C.M.A. 1982), but see United States v. Treakle, 18 M.J. 646, 662 n.10 (A.C.M.R. 1984) (J. Naughton, concurring). 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. United States v. Thomas, 22 M.J. 388 (C.M.A. 1986).

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. United States v. Greene, 20 C.M.A. 232, 43 C.M.R. 72 (1980).

E. 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. United States v. Cruz, 20 M.J. 873 (A.C.M.R. 1985) (*en banc*).

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. United States v. Karlson, 16 M.J. 469 (C.M.A. 1983). In the first instance, the accused is the victim, and in the second, the military justice system is the victim. United States v. Cruz, *supra*.

2. Although the appearance doctrine has been referred to in many cases over the years [e.g., United States v. Miller, 19 M.J. 159 (C.M.A. 1985); United States v. Grady, 15 M.J. 275 (C.M.A. 1983); United States v. Walters, 4

C.M.A. 617, 16 C.M.R. 951 (1954)], 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, 6 M.J. 267 (C.M.A. 1979), 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." Id. at 272.

b. In United States v. Zagar, 5 C.M.A. 410, 18 C.M.R. 34 (1955), 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 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." Id. at 38.

#### F. Review of command influence issues.

1. To avoid conflicting affidavits and trials de novo on appeal, the C.M.A. has 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. See United States v. DuBay, 17 C.M.A. 147, 37 C.M.R. 411 (1967) and Chapter XIX, infra.

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. United States v. Hardy, 4 M.J. 20 (C.M.A. 1977); United States v. DuBay, 17 C.M.A. 147, 37 C.M.R. 411 (1967).

See United States v. Sullivan, 26 M.J. 442 (C.M.A. 1988) for an example of ways to resolve unlawful command influence problems at the trial level.

CHAPTER XI  
PRETRIAL AGREEMENTS  
(MILJUS Key Number 990)

1101 INTRODUCTION

A. The evolution of pretrial agreements in the military. In April 1953, the Army adopted a procedure in keeping with civilian practice whereby a convening authority, in his discretion, might contractually accept the offer of an accused to plead guilty at court-martial in return for some consideration granted in return by the convening authority (ordinarily a promise by the convening authority to approve no more than a certain portion of the sentence subsequently adjudged in the case). The Navy and Marine Corps followed suit in 1957, and the Air Force adopted the practice in 1975.

Although the Manual for Courts-Martial, 1969 (Rev.) did not specifically address the subject of pretrial agreements, thus leaving this area of the law to develop entirely by case law, R.C.M. 705, MCM, 1984 [hereinafter R.C.M. \_\_\_\_] now specifically codifies the rules pertaining to pretrial agreements in the military. Additionally, section 0129 of the JAG Manual details the procedures and rules to be followed in the Navy and Marine Corps and provides, in Appendices A-1-e and A-1-f, suggested forms for the finalized agreement. It must be noted, however, that these forms require careful tailoring in all cases, as the final written agreement must be clear, precise, and inclusive of all contingencies.

B. The nature of pretrial agreements. A pretrial agreement is a written agreement between the accused and the convening authority whereby each agrees to take or refrain from taking certain acts regarding the trial by court-martial.

1. Advantages to the government. While the practice of pretrial agreements is not without its critics, there is no doubt that plea bargaining is just as essential to the administration of justice in the military as it is in the civilian setting. Clearly, negotiated pleas result in savings of time, personnel, and the reduction of paperwork in the trial and review of cases. Additionally, there is the distinct advantage to the government that in guilty pleas there is a substantially reduced opportunity for error which might otherwise result in reversal and rehearings.

2. Advantages to the accused. In the typical situation, where the accused has agreed to plead guilty to some or all of the offenses in return for the convening authority's promise to approve only certain portions of any sentence which may be adjudged, the accused is assured that the sentence which he will ultimately receive will be the lesser of either that awarded at court-martial or that agreed to in the pretrial agreement. Further, even though there is a pretrial agreement in the case, the accused may still make any motions he has prior to entering his pleas and may try to "beat the pretrial agreement" by presenting evidence in extenuation and mitigation before

the members (who will not know of the existence of the pretrial agreement) or before the military judge (who, although knowing of the existence of the pretrial agreement, will not know what the exact sentence limitations are). In any case, even though there is a pretrial agreement, the accused may elect not to conform to its terms and may simply plead not guilty, thereby releasing the convening authority from his obligations under the agreement and requiring the government to prove its case on the merits.

1102      NEGOTIATING THE PRETRIAL AGREEMENT (MILJUS Key Number 991)

A. Procedure. R.C.M. 705(d) prescribes the procedures that must be followed in negotiating the terms of the pretrial agreement. Section 0129 of the JAG Manual applies this procedure to the Navy and Marine Corps.

1. The initial offer. Any offer to plead guilty or to enter into a confessional stipulation must originate with the accused and the defense counsel. R.C.M. 705(d)(1).

a. The proposed pretrial agreement ordinarily is submitted by the defense counsel to the assigned trial counsel who conveys the offer to the convening authority. This is not required, however. The defense counsel may choose to approach the convening authority directly without consulting the trial counsel. In any event, counsel should be wary of engaging in "sharp practices."

b. The trial counsel usually conducts arrangements as to the offer and makes recommendations to the convening authority (through the staff judge advocate in general courts-martial cases).

2. Negotiations. After initiation by the defense, the convening authority, the staff judge advocate, and the trial counsel may negotiate the terms of the agreement with the defense. All negotiations shall be with the defense counsel unless the accused is not represented. R.C.M. 705(d)(2).

a. Although the formal written proposal from the accused to the trial counsel is usually considered to be the initiation of negotiations, there is nothing wrong with the accused and his counsel informally approaching the trial counsel in advance of negotiations with the convening authority to determine what the trial counsel may recommend or what the convening authority might be willing to accept.

b. In any case, once the original offer is submitted by the defense, the accused has the right to have his offer personally considered by the convening authority. The trial counsel or staff judge advocate have no authority to accept or reject the offer on their own.

3. Formal submission. After negotiations, or even before any negotiations have taken place, the accused may submit a written proposed pretrial agreement utilizing the general format provided in appendices A-1-e and A-1-f of the JAG Manual. R.C.M. 705(d)(3).

a. The proposed agreement should be in writing and must be signed by the accused and defense counsel, if any. If the accused is represented by civilian counsel or individual military counsel at the time of the submission of the proposed agreement, they should sign the agreement also.

b. The proposed agreement must contain all of the terms, conditions, and promises between the parties -- as any unwritten terms, oral understandings or "gentleman's agreements" not included in the agreement will be unenforceable. JAGMAN, § 0129.

c. If the agreement contains a promise by the convening authority to take any specified action on the adjudged sentence, this provision should be set forth on a separate page of the agreement. This will allow the military judge, in a trial without members, to examine the general terms of the agreement during the providency inquiry with the accused, without learning of the sentence limitations. Thereafter, if the accused's pleas are accepted, the military judge can sentence the accused without being prejudiced by knowledge of the sentence limitations. See R.C.M. 910(f)(3).

4. Acceptance by the convening authority. The proposed agreement may be accepted or rejected by the convening authority who has the sole discretion in making the decision. R.C.M. 705(d)(4). Significantly, as the accused has no "right" to the protections of a pretrial agreement, there is no remedy for a convening authority's arbitrary or unreasonable refusal to accept the accused's offer.

a. Should the convening authority reject the offer, he may then make counterproposals which may be accepted or rejected by the accused.

b. To accept the offer, the convening authority may personally sign the pretrial agreement or the agreement may be signed by a person authorized by the convening authority to do so, such as the staff judge advocate or the trial counsel. R.C.M. 705(d)(4). It must be noted, however, that the decision as to whether to enter into the agreement must be made personally by the convening authority regardless of who actually signs the agreement.

5. Withdrawal from the pretrial agreement. Even though the pretrial agreement has been signed, the convening authority is not obligated to perform under the agreement until the accused has actually fulfilled his promises thereunder. Thus, should the accused choose not to comply with his obligations under the agreement, his failure of performance would release the convening authority from any obligations under the agreement. But what happens if one of the parties decides to withdraw from the pretrial agreement prior to the time of performance? This issue has been the subject of evolving case law which culminated in the enactment of R.C.M. 705.

a. The evolution of the rule. Prior to the enactment of R.C.M. 705, case law had provided that, once the agreement had been signed by both the accused and the convening authority, it was generally binding on the convening authority, who could not thereafter withdraw from its terms. However, the courts did recognize certain circumstances which would permit a convening authority to withdraw.

b. In United States v. Jacques, 5 M.J. 598 (N.C.M.R. 1978), the court noted that a convening authority may withdraw from an agreement with judicial concurrence, for any proper reason, at any time prior to arraignment, so long as the accused has taken no action in reliance upon the pretrial agreement that might prejudice his defense. In United States v. Kazena, 8 M.J. 814 (N.C.M.R. 1980), the accused agreed to plead guilty to three unauthorized absences in consideration for a limitation on the sentence. Prior to trial, the accused went UA again and all four offenses were tried at a special court-martial. At trial, the defense counsel asserted that the convening authority was still bound by the pretrial agreement on the first three specifications, but admitted that no agreement had been reached as to the last unauthorized absence. The convening authority indicated, through the trial counsel, that he had disapproved the pretrial agreement. The Navy Court of Military Review held that "there is no pretrial agreement if the agreement does not encompass all the charges and specifications under which an accused is arraigned." United States v. Kazena, *supra*, at 816. The Court of Military Appeals, however, did not review that aspect of the Navy court's decision. Instead, the court determined that additional charges and specifications referred to the same court-martial, but discovered after referral of the original charges, provided good cause for the convening authority to withdraw from the pretrial agreement. United States v. Kazena, 11 M.J. 28 (C.M.A. 1981). In Shepardson v. Roberts, 14 M.J. 354 (C.M.A. 1983), the issue of the convening authority's ability to withdraw became more focused. The pretrial agreement in that case had language to the effect that the agreement was to be considered binding upon both parties. There was additional language, however, which stated: "[T]his agreement will also be cancelled and of no effect if any of the following occurs: [W]ithdrawal by either party to the agreement prior to trial." C.M.A. found that this language gave the convening authority the power to unilaterally withdraw unless there was some indication of incurable detrimental reliance by the accused. Shepardson clearly expanded the power of the convening authority to withdraw. Still unresolved, though, was whether a convening authority may withdraw in the absence of the type of language relied upon in Shepardson.

c. The present rule. R.C.M. 705(d)(5) now specifically draws the line at which each party may no longer unilaterally withdraw from the pretrial agreement.

(1) Withdrawal by the accused. R.C.M. 705(d)(5)(A) provides that the accused may withdraw from the pretrial agreement "at any time." However, the rule further acknowledges that other procedural rules may, incidentally, prevent the accused from "undoing" his earlier performance. For example, assume that the accused originally enters guilty pleas but subsequently changes his mind and wishes to enter pleas of not guilty. The question of whether he may change his pleas will then be determined under R.C.M. 910(h), which allows the military judge to determine whether this will be allowed if requested prior to the announcement of sentence and which would ordinarily prohibit such a change of pleas after sentence announcement. Likewise, should the accused be sentenced based upon his guilty pleas, but wish to change his pleas at a subsequent rehearing on sentencing, R.C.M. 810(a)(2)(B) would prevent his doing so unless his earlier pleas had been judicially determined to have been improvident.



(2) Withdrawal by the convening authority. R.C.M. 705(d)(5)(B) allows the convening authority to withdraw from the pretrial agreement:

(a) At any time before the accused begins performance of promises contained in the pretrial agreement; or

(b) upon the failure of the accused to fulfill any material promise or condition in the agreement; or

(c) when inquiry by the military judge discloses a disagreement as to a material term in the pretrial agreement; or

(d) if the findings of the court-martial are ultimately set aside because a guilty plea, entered pursuant to the pretrial agreement, is held to be improvident on appellate review. (Note: If only the sentence is set aside, the convening authority would still be bound provided the accused complied with the agreement and entered a provident plea of guilty at the rehearing.)

#### 6. Other cautions

a. Unreasonable multiplication of charges, which might tend to persuade the accused to enter pretrial agreement, must be avoided.

b. An accused shall not be induced to plead guilty to a lesser included offense by preferring more serious charges, where the evidence indicates that the lesser charge is the more appropriate, e.g., preferring charge of larceny when the evidence indicates that wrongful appropriation is the appropriate charge. See ABA CPR EC 7-13.

c. JAGMAN, § 0129(b) requires that appropriate consultation take place under the Memorandum of Understanding Between the Departments of Defense and Justice (App. 3, MCM, 1984) prior to the negotiation of any pretrial agreement in all cases involving major Federal offenses likely to be prosecuted in the U.S. district courts.

#### 7. Other terms and conditions

a. It is recommended that the sentence agreed upon be sufficiently wide in scope so that the convening authority can cope with any sentence the court might return.

b. It is recommended that, in every case, express provisions be made with regard to:

(1) Punitive discharge (character of and, if on probation, the terms thereof);

(2) confinement or restraint (amount);

(3) forfeiture or fine (amount); and

(4) reduction to (rank or grade).

There may be an additional provision permitting the convening authority to commute any punishment that might be awarded by the court to a lesser punishment that is within the agreement. In addition, if the convening authority would like terms of probation within the agreement, he should have them expressly stated within the agreement itself. Such provisions are not included in the JAGMAN forms. For conditions of probation which have been held to be permissible, see United States v. Lallande, 22 C.M.A. 170, 46 C.M.R. 170 (1973) and United States v. Figuerua, 47 C.M.R. 212, (N.C.M.R. 1973). Be advised, however, that the Court of Military Appeals consistently has taken a "long standing position [of] refusing to encourage expansive pretrial agreement provision-making by military authorities." United States v. Dawson, 10 M.J. 142, 144 (C.M.A. 1981).

c. In the absence of any provision to the contrary in the agreement, in deciding whether the sentence approved by the convening authority after trial is equal to or less severe than the sentence provided for in the agreement, the C.M.A. considers the sentence in its entirety, rather than treating each of the four different types of punishments separately. United States v. Monett, 16 C.M.A. 179, 36 C.M.R. 335 (1966) (pretrial agreement for BCD and 1 year confinement; court-martial sentence of forfeiture of \$50 monthly for 18 months and reduction to E-3; within limits for convening authority to approve forfeiture of \$50 monthly for one year and reduction to E-3).

d. The terms concerning suspension of any portions of the sentence must be stated specifically. If it is apparent that at least a portion of the sentence was to be suspended, but it is unclear which portions were to be affected, the remedy may be to suspend the entire sentence. United States v. Neal, 3 M.J. 593 (N.C.M.R. 1977). See United States v. Russo, 11 C.M.A. 352, 29 C.M.R. 168 (1960); United States v. Johnson, 12 C.M.A. 640, 31 C.M.R. 226 (1962); United States v. Prow, 13 C.M.A. 63, 32 C.M.R. 63 (1962); United States v. Monett, 16 C.M.A. 179, 36 C.M.R. 335 (1966); United States v. Brice, 17 C.M.A. 336, 38 C.M.R. 134 (1967).

e. In negotiating pretrial agreements, counsel must be aware of applicable regulations regarding appellate leave and the pretrial agreement should address involuntary appellate leave in any case where the sentence of the court could include a punitive discharge. Under the provisions of Article 76a of the UCMJ, the Secretary of the Navy may prescribe regulations which require that an accused take leave pending completion of the appellate review process if the sentence, as approved by the convening authority, includes an unsuspended dismissal or an unsuspended dishonorable or bad conduct discharge. The Secretarial regulations concerning appellate leave are contained in article 3420280 of the MILPERSMAN for Navy personnel and paragraph 3025 of MCO P1050.3F, Regulations for Leave, Liberty and Administrative Absence, for Marine Corps personnel. Stated very simply, procedures applicable to Navy and Marine Corps personnel have been revised to provide authority to place a member on mandatory appellate leave. In addition, paragraph 3025 of MCO P1050.3F, supra, provides authority for Marine Corps personnel sentenced to dismissal or to a punitive discharge, whose sentence has not yet been approved by the OEGCMJ, to request voluntary leave while review action is pending.

f. Under the provisions of Article 58a of the UCMJ and section 0145(a)(7) of the JAG Manual, a court-martial sentence of an enlisted member in a paygrade above E-1, as approved by the convening authority, that includes a punitive discharge or confinement in excess of 90 days (if the sentence is awarded in days) or 3 months (if awarded in other than days), automatically reduces the member to the paygrade of E-1 as of the date the sentence is approved. As a matter within his sole discretion, the convening authority or the supervisory authority may retain the accused in the paygrade held at the time of sentence or at any intermediate paygrade and suspend the automatic reduction to paygrade E-1, which would otherwise be in effect. Additionally, the convening authority may direct that the accused serve in paygrade E-1 while in confinement, but be returned to the paygrade held at the time of sentence or an intermediate paygrade upon release from confinement. Failure of the convening authority to address automatic reduction will result in the automatic reduction to paygrade E-1 on the date of the convening authority's action. For obvious reasons, the written pretrial agreement should address the convening authority's intentions with regard to the automatic reduction provisions of Article 58a of the UCMJ and section 0145(a)(7) of the JAG Manual. The agreement should also reflect what the accused understands concerning the convening authority's options in this area.

g. With regard to fines, unless the pretrial agreement specifically mentions fines or there is other evidence indicating the accused is aware a fine could be imposed, a general court-martial may not award a fine in addition to total forfeitures. United States v. Williams, 18 M.J. 186 (C.M.A. 1984). Accord United States v. Edwards, 20 M.J. 439 (C.M.A. 1985). A special court-martial can award a fine up to a maximum of two-thirds pay per month for six months and can combine it with forfeitures if the total is not greater than two-thirds pay per month for six months. United States v. Sears, 18 M.J. 190 (C.M.A. 1984). Where the pretrial agreement says fines as adjudged, a fine is an appropriate punishment even if there has been no unjust enrichment of the accused. United States v. Czeck, 28 M.J. 563 (N.M.C.M.R. 1989).

## 1103 POST NEGOTIATION RULES

A. Introduction. Before a plea of guilty may be accepted at court-martial, the military judge must conduct an inquiry of the accused as to the facts and circumstances surrounding the offense to ensure that the plea is providently made. It is during this inquiry that the military judge inquires into the existence of a pretrial agreement. Significantly, there is no "right" to have a plea of guilty accepted at court-martial. Indeed, a military judge may not accept a guilty plea to an offense for which the death penalty may be adjudged. R.C.M. 910(a)(1). Further, the military judge may not accept a guilty plea in any case where, after appropriate inquiry and advice, it appears that the plea is: involuntary [R.C.M. 910(d)]; the product of promise or inducements not included in the written pretrial agreement (Id.); or based upon a misunderstanding as to the nature of the offense, the maximum penalty authorized for the offense and the rights given up by virtue of the plea [R.C.M. 910(c)]. Finally, the plea may not be accepted if it appears that there is no factual basis for the plea [R.C.M. 910(e)]. Thus, any pretrial agreement requiring the accused to plead guilty under these circumstances would be unenforceable, as the accused could not comply with its requirements.

B. Members not informed of pretrial agreement. R.C.M. 705(e) provides that, except in a special court-martial without a military judge, no court member will be informed:

1. Of any negotiations between counsel and convening authority on the subject of pretrial agreement;
2. of any such agreement existing at the time of trial; or
3. of any such agreement made and later rejected by the accused to permit a plea of not guilty.

See United States v. Custer, 7 M.J. 919 (N.C.M.R. 1979), where it was error for the military judge to instruct the members concerning the possible existence of a pretrial agreement. See also, Mil.R.Evid. 410, MCM, 1984, which makes inadmissible any statements of the accused made during plea negotiations or inquiries except in a prosecution for perjury/false swearing or for limited purposes regarding impeachment.

C. Pretrial agreement inquiry (MILJUS Key Number 995). R.C.M. 910(f) requires that the parties inform the military judge if a pretrial agreement exists and flatly prohibits the acceptance of any pretrial agreement which does not comply with the requirements of R.C.M. 705. It further requires the military judge to examine the agreement and inquire to ensure that the accused understands its terms and that both parties agree to those terms.

1. Examination of the agreement. R.C.M. 910(f)(3) states that, in a trial by military judge alone, the military judge ordinarily shall not examine any sentence limitation until after the sentence of the court-martial has been announced. Although, prior to 1 August 1984, section 0114b(1)(C) of the JAG Manual expressly allowed the military judge to examine the agreement in toto, even in a trial by military judge alone, this provision was omitted from the new chapter I, JAGMAN, effective 1 August 1984. It appears that, although the safer practice is to defer examination of the sentencing portion of the agreement until after sentencing in a military judge alone trial, a presentencing examination would not necessarily be fatal as the Court of Military Appeals has approved such an examination. United States v. Villa, 19 C.M.A. 564, 42 C.M.R. 166 (1970) (no provision in Coast Guard); United States v. Razor, 19 C.M.A. 570, 42 C.M.R. 172 (1970) (advisory provision in Army). But see United States v. Green, 1 M.J. 453, 456 (C.M.A. 1976): "Inquiry into the actual sentence limitations specified in the plea bargain should be delayed until after announcing sentence where the accused elects to be sentenced by the military judge rather than a court with members."

Although the Court of Military Appeals has not forbidden the military judge to view the sentencing provisions prior to announcing sentence, such previews must be undertaken with great caution. See United States v. Sallee, 4 M.J. 681 (N.C.M.R. 1977), where the military judge announced that he considered an unsuspended BCD to be inappropriately severe and that he would not impose a BCD unless the convening authority would suspend it. He then examined the sentence provisions of the PTA, which called for suspension of any BCD, and afterwards announced a sentence, which included a BCD. HELD: prejudicial error.

After awarding the sentence, the military judge must then examine the sentence portion of the agreement. If it appears the parties do not agree as to the terms, or if the accused has misunderstood the terms, the military judge must conform the agreement -- with the consent of the government -- to the accused's understanding or allow the accused to withdraw the plea. R.C.M. 910(h)(3).

2. The providence inquiry. The Court of Military Appeals has further defined the responsibilities of the military judge to determine the full meaning and effect of pretrial agreements. United States v. Elmore, 1 M.J. 262 (C.M.A. 1976); United States v. Green, 1 M.J. 453 (C.M.A. 1976); and United States v. King, 3 M.J. 358 (C.M.A. 1977).

In accordance with Green and King, in United States v. Hoaglin, 10 M.J. 769, 771 (N.C.M.R. 1981), the Navy Court of Military Review has made the following inquiry into the providence of a plea mandatory. The military judge must:

1. Ask the accused and his counsel if there is a pretrial agreement.
2. If there is an agreement, then view it in its entirety before findings when trial is before a court composed of members; otherwise, reserve inquiry into the sentence provisions until after imposition.
3. Go over each provision of the agreement with the accused (including, at the appropriate point in the proceedings, the sentence terms), paraphrase each in the judge's own words, and explain in the judge's own words the ramifications of each provision.
4. Obtain from the accused either his statement of concurrence with the judge's explanation or his own understanding, followed by a resolution on the record of any differences.
5. Strike all provisions, with the consent of the parties, that violate either appellate case law, public policy, or the judge's own notions of fundamental fairness; further, make a statement on the record that the judge considers all remaining provisions to be in accord with appellate case law, not against public policy, and not contrary to his own notions of fundamental fairness.
6. Ask trial and defense counsel if the written agreement encompasses all the understandings of the parties, and conduct further inquiry into any additional understandings that are revealed.

7. Ask trial and defense counsel if the judge's interpretation of the agreement comports with their understanding of the meaning and effect of the plea bargain, and resolve on the record any differences.

The purpose of this procedure is to ensure that a latent misunderstanding of the terms of the agreement will not surface after trial. The court warned, however, that rote compliance may not be enough to ensure the accused's understanding of the pretrial agreement. On the other hand, the Court of Military Appeals has held that the military judge's failure to ask both counsel whether their understanding comported with his was not error where the pretrial agreement was so straightforward as to be susceptible to only one interpretation. United States v. Passini, 10 M.J. 108 (C.M.A. 1980). Moreover, the court recently said that, even if both sides conceal the existence of a pretrial agreement, the guilty plea is not automatically violated. United States v. Cooke, 11 M.J. 257 (C.M.A. 1981).

Caveat: Cooke was a Navy case which predated Hoaglin and may not have been affirmed by the Navy court had it been decided after Hoaglin because the military judge never asked the accused about the existence of a pretrial agreement. See United States v. Cooke, 8 M.J. 679 (N.C.M.R. 1979) (Donovan J., dissenting).

If it cannot be determined from the inquiry of record whether the accused assumed any obligations not set forth in the written agreement in order to obtain the benefit of the sentence limitations agreed to by the convening authority, the inquiry may fail to establish the providency of the plea and the findings of guilty based thereon may be set aside. United States v. Cain, 5 M.J. 698 (N.C.M.R. 1978). In United States v. Partin, 7 M.J. 409 (C.M.A. 1979), the court held that the military judge's misinterpretation of the terms was, in effect, an attempt to add new terms not agreed to by the parties. The unagreed-to terms were not binding on the parties or the appellate courts, i.e., they had no effect. The court rejected the argument that the misinterpretation rendered the pleas unintelligent, finding that, in this case, the defendant did not waive any of his rights as a result of his acceptance of the incorrect advice.

A suggested checklist for a guilty plea/pretrial agreement inquiry is provided at appendix 11-1, infra.

D. The defense case in extenuation and mitigation. The existence of a pretrial agreement will not preclude the accused from presenting matters in extenuation and mitigation. R.C.M. 705(c)(1)(B). Counsel for the accused has a continuing duty, despite such an agreement, to attempt to obtain the lightest sentence possible from the court.

In this regard, see United States v. Wood, 23 C.M.A. 57, 48 C.M.R. 528 (1974) and United States v. Sanders, 23 C.M.A. 75, 48 C.M.R. 546 (1974), wherein both accused testified that they would prefer lengthy confinement to punitive discharge. At the time, however, pretrial agreements substantially limited confinement that could be approved. In each case, the trial judge expressed his view that the accused was perpetrating a fraud on the court. In

Sanders, the court held that the judge's comment constituted prejudicial error "since it might have deterred defense counsel from arguing in accordance with the accused's testimony...." Id. Both cases, however, stand for the proposition that the agreement leaves the accused "unbridled" and allows him to "bring before the court-martial members any fact or circumstance which might influence them to lessen the punishment." The accused also is "entitled to have his testimony presented to them in its most favorable light and in the usual form; that is, in the argument by his counsel." Id. at 76, 48 C.M.R. at 547.

E. Withdrawal of plea

1. One of the provisions of the form agreement is to the effect that the accused may withdraw his plea at any time before sentence is adjudged. There are two ways in which a plea might be withdrawn:

a. Where the accused simply changes his mind and substitutes a not guilty plea. See R.C.M. 910(h)(1).

b. Where the court enters a plea of not guilty for an accused, after he has pleaded guilty, because in mitigation he set up matters inconsistent with his plea, or it appeared to the court that he entered the plea improvidently or through lack of understanding of its meaning and effect. R.C.M. 910(h)(2). See United States v. Penister, 25 M.J. 148 (C.M.A. 1987). If the military judge rejects a provident guilty plea due to misapplication or misunderstanding of law, the rejection is not a "failure by the accused" to fulfill a material promise or condition of agreement.

2. In the first situation, it is clear that the government is no longer bound by the terms of the agreement; but, in the second, problems might be involved. Compare the situation in which the accused, during presentencing, deliberately makes a statement inconsistent with his plea with the situation in which the military judge, perhaps through overzealousness, mistakenly declines to accept the accused's good faith plea. This issue is presently unsettled; each case involving such a problem will require a determination on its merits. It is advisable to have the pretrial agreement itself explicitly deal with these contingencies.

3. If the accused is permitted to withdraw his pleas of guilty after findings, or if the military judge rejects the pleas after findings, the military judge must recuse himself. This is because the military judge, by announcing findings, is deemed to have expressed his views on the guilt of the accused. United States v. Bradley, 7 M.J. 332 (C.M.A. 1979). Requiring a trial by members will not cure the defect. In United States v. Sherrod, 26 M.J. 30 (C.M.A. 1988), the Court of Military Appeals ruled that, when the military judge is disqualified, all the judge's actions from that moment on are void, except those necessary to assure the swift and orderly substitution of judges. If the military judge is disqualified to sit as judge alone, he is also disqualified to sit with members.

4. In all cases, the original agreement shall be entered as an appellate exhibit or included as an enclosure to the convening authority's action on the record of trial.

A. The meaning of the agreement

1. Misunderstandings. In United States v. Hamill, 8 C.M.A. 464, 24 C.M.R. 274 (1957), the accused agreed to a DD, total forfeiture, and CONF for two years, but was told that the DD would be suspended during the period of confinement and that, if he were a good man in confinement, the DD would not be executed and he would be restored to duty. The sentence as approved by the convening authority provided for DD, total forfeitures, and two years CONF; the DD was suspended until "accused's release from confinement or until completion of appellate review, whichever is the later date." HELD: Since facts clearly indicated that the accused interpreted the nature of the suspension in one manner, while the convening authority construed it differently, the plea of guilty must be rejected. His plea was based upon a misunderstanding as to the sentence, such being brought about by the remarks of the convening authority. Accord United States v. Harden, 1 M.J. 258 (C.M.A. 1976). Cf. United States v. Frangoules, 1 M.J. 467 (C.M.A. 1976), which stated that "if the accused is aware that some, or all, of the offenses may be multiplicitous and he is still willing to plead guilty 'regardless of the ultimate decision' as to the legal maximum, it cannot be reasonably argued that he entered the plea without adequate understanding" of the maximum punishment. For a discussion of the factors that may be analyzed to determine if the accused was laboring under a substantial misunderstanding concerning the maximum punishment imposable under the pretrial agreement, see United States v. Walls, 3 M.J. 882 (A.C.M.R. 1977).

In United States v. Santos, 4 M.J. 610 (N.C.M.R. 1977), 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. Cf. United States v. Bedania, 12 M.J. 373 (C.M.A. 1982), wherein the court held, inter alia,

when collateral consequences of a court-martial conviction -- such as administrative discharge, loss of a license or a security clearance, removal from a military program, failure to obtain promotion, deportation, or public derision and humiliation -- are relied upon as the basis for contesting the providence of a guilty plea, the appellant is entitled to succeed only when the collateral consequences are major and the appellant's misunderstanding of the consequences (a) results foreseeably and almost inexorably from the language of a pretrial agreement; (b) is induced by the trial judge's comments during the providence inquiry; or (c) is made readily apparent to the



judge, who nonetheless fails to correct that misunderstanding. In short, chief reliance must be placed on defense counsel to inform an accused about the collateral consequences of a court-martial conviction and to ascertain his willingness to accept those consequences. (Emphasis supplied.)

In United States v. Llewellyn, 27 M.J. 825 (C.G.C.M.R. 1989), the accused was awarded a BCD and 90 days confinement. The sentence limitation provided only that "the CA will approve no more than 60 days confinement." There was no mention of other punishments and the military judge did not inquire on the record as to the parties' understanding as to what the convening authority could do with the BCD. The Coast Guard Court of Military Review held that ambiguous pretrial agreement provisions should be interpreted in favor of the accused unless the court could determine the understanding of the parties from a complete review of the record. (Here, it was clear from the record that the parties understood that the CA could approve the BCD.)

2. Disagreement as to the terms. Where there is a disagreement as to the terms of a pretrial agreement that cannot be determined on appeal, a Dubay-type hearing may be conducted. United States v. Dubay, 17 C.M.A. 147, 37 C.M.R. 411 (1967). That is, a GCM convening authority will, prior to taking action on the record, refer the case to the military judge of an SPCM to conduct an article 39a session to "hear the respective contentions of the parties ... permit the presentation of witnesses and evidence in support thereof, and to enter findings of fact and conclusions of law based thereon. ..." Smith v. Helgemoe, 23 C.M.A. 38, 40, 48 C.M.R. 509, 511 (1974).

3. Failure to effect the pretrial agreement. The ultimate tactic to enforce a pretrial agreement seems to be a writ of habeas corpus. Ussery v. United States, 16 M.J. 885 (A.F.C.M.R. 1983), wherein the pretrial agreement stated that the maximum approved would be a BCD; 3 months CONF; forfeitures of \$250.00 per month for 3 months; and reduction to E-1. When the accused received 6 months CONF; forfeitures of \$382.00 pay per month for 6 months, and reduction to E-1 (Note: no BCD), the convening authority approved the punishment awarded. The accused filed a writ of habeas corpus to be released from confinement after serving a 3-month sentence as per the agreement. The court denied the relief, stating that the total approved sentence (no BCD) did not exceed the sentence negotiated for by the parties.

#### B. Impermissible provisions

1. Agreements to testify. A pretrial agreement, which provided that the accused's sentence of confinement be reduced by one year for each time he testified against an accomplice, was held against public policy and not to be used in the future since it offered an almost irresistible temptation to falsify testimony. United States v. Scoles, 14 C.M.A. 14, 33 C.M.R. 226 (1963). See also United States v. Gilliam, 23 C.M.A. 4, 48 C.M.R. 260 (1974), where C.M.A. held that a pretrial agreement with a prosecution witness that specified testimony to be given against an accomplice was improper and prejudicial.

2. Waiver of pretrial issues. In United States v. Cummings, 17 C.M.A. 376, 38 C.M.R. 174 (1968), the court held a pretrial agreement including a waiver of any speedy trial issue to be invalid. In United States v. Brady, 17 C.M.A. 614, 38 C.M.R. 412 (1968), the court examined a provision stating that the accused understood his failure to raise the speedy trial issue would constitute a waiver. The court declined to invalidate the entire agreement but declared the provision to be devoid of any legal effect. The court reiterated its prior holding in Cummings -- that the only proper subject matters for a pretrial agreement are the pleas, charges and sentence. In United States v. Holland, 1 M.J. 58 (C.M.A. 1976), the court repeated this prohibition in even stronger terms. The pretrial agreement in that case included an agreement that the plea would be entered prior to the presentation of evidence on the merits and/or presentation of motions going to matters other than jurisdiction. The court disapproved this condition, stating: "Our approval of (pretrial agreements) ... was not intended either to condone or to permit the inclusion of indiscriminate conditions in such agreements, even when initiated or concurred in by the accused." Id. at 59. There is support for allowing waiver of a motion to suppress based on illegal search and/or seizure of the provision as initiated by the accused. See United States v. Jones, 23 M.J. 305 (C.M.A. 1987). However, one should avoid provisions requiring withdrawal of all motions and be extremely cautious concerning inclusion of provisions involving waiver of constitutionally based protection. See United States v. Carriere, 20 M.J. 905 (A.C.M.R. 1985).

3. "Gentlemen's agreements." United States v. Troglin, 21 C.M.A. 183, 44 C.M.R. 237 (1972). An unwritten "understanding" or "gentlemen's agreement" by the defense counsel not to raise an issue of former jeopardy in return for a recommendation to the staff judge advocate that a proffered pretrial agreement be accepted was contrary to public policy requiring reversal of the accused's conviction in accordance with pleas of guilty entered pursuant to the pretrial agreement. (There was no indication the accused knew of, was a party to, or was informed of any promise not to bring into question the claim of former jeopardy). United States v. Green and United States v. Elmore, supra, provide a mechanism to enforce the Troglin prohibition against "gentlemen's agreements:" "The trial judge should secure from counsel for the accused as well as the prosecutor their assurance that the written agreement encompasses all understandings of the parties...." United States v. Elmore, supra at 264; United States v. Green, supra at 456.

In United States v. Myles, 7 M.J. 132 (C.M.A. 1979), following the accused's guilty pleas, the military judge asked about the existence of a pretrial agreement. Both trial and defense counsel assured him that there was no agreement. On appeal, it was established that there was in fact a verbal agreement with the convening authority that, in return for guilty pleas to four specifications, the remaining thirty-six specifications would be withdrawn. The court held that the judge's failure to inquire into the existence of any "sub rosa" agreements following the assertions of counsel did not require reversal. Accord United States v. Cooke, supra.

4. Trial by military judge alone. In United States v. Schmeltz, 1 M.J. 8 (C.M.A. 1975), the accused entered, and the trial court accepted, a plea pursuant to a pretrial agreement including the provision that the court would be composed of military judge alone. On review, the court reiterated its prior position stated in Troglin and Cummings, *supra*, that pretrial agreements should concern themselves only with bargaining on the charges and sentence, and specifically indicated that, as a general proposition, it "did not condone" such a provision for trial by judge alone. However, it approved the provision, stating:

Seldom has a case presented a stronger basis for holding the accused accountable for the terms of an agreement which he and his counsel proposed. It did not concern the waiver of a constitutional right or fundamental principle, but only the accused's agreement to elect one of two sentencing agencies open to him.... As the entire matter originated with him and his counsel, we are loath to permit him at this level to attack his own action and to claim relief therefrom.

United States v. Schmeltz, *supra*, at 12.

Schmeltz subsequently was reexamined and reversed pursuant to United States v. Holland, *supra*, in that the agreement also included a provision waiving all motions other than jurisdiction; however, the court specifically affirmed that portion of the previous opinion addressing the propriety of a "military judge alone" clause. United States v. Schmeltz, 1 M.J. 273 (C.M.A. 1976). In United States v. Boyd, 2 M.J. 1014 (A.C.M.R. 1976), the findings and sentence were set aside specifically because the offer to waive a court composed of members originated with the government and not the accused, even though the defense stated on the record that it "had no qualms" about agreeing to the waiver. Note that R.C.M. 705(c)(2) specifically lists waiver of either the right to a trial by members or the right to trial by military judge alone as permissible terms in a pretrial agreement.

5. Good behavior pending convening authority's action. In United States v. Dawson, 10 M.J. 142 (C.M.A. 1981), the accused entered, and the trial court accepted, pleas of guilty pursuant to a pretrial agreement which included a provision indicating that, if the accused committed any violation of the UCMJ between the date of trial and the convening authority's action, the convening authority would be authorized to approve the sentence as adjudged. No hearing of any kind was provided for in the agreement. After the trial, but before the convening authority's action, drugs were found in the accused's clothes at the confinement facility. As a result, and because of the post-trial misconduct clause in the pretrial agreement, the convening authority no longer considered himself bound by the agreement and approved the whole sentence awarded by the court. On review, the C.M.A. set aside the unbargained for portion of the sentence approved by the convening authority and held that the use of such a post-trial misconduct clause without certain minimum due-process protections for the accused was clearly contrary to the UCMJ. The court felt it inappropriate for the accused to be effectively placed in a probationary status without the protection of Article 72, UCMJ. Moreover, the C.M.A. clearly implied that the more appropriate way to handle post-trial misconduct

which takes place prior to the convening authority's action was to have the accused and the convening authority specifically agree that vacation of a suspended sentence can be based on misconduct occurring after trial but prior to the convening authority's suspension action. In other words, instead of disapproving a portion of the sentence awarded by the trial counsel, the convening authority should only agree to suspend it -- with the suspension to run from the date the sentence is adjudged. This procedure would then allow the accused to have the protection of Article 72, UCMJ. Also, it should be noted that the Navy-Marine Court of Military Review has held that a misconduct clause contained in a pretrial agreement does not render the pleas improvident where the misconduct clause is not invoked. United States v. Melancon, 11 M.J. 753 (N.M.C.M.R. 1981).

6. Alternative provisions. Absent clear indication in the record of trial that alternative provisions ("if BCD \_\_\_, if no BCD \_\_\_") originated with the accused and/or the accuseds' counsel, such terms may be deemed violative of public policy.

C. Permissible provisions

1. Pleas before the presentation of evidence on the merits. The agreement clearly may include provisions regarding the charges and specifications, the nature of the pleas, and the limitations, if any, on sentence. United States v. Elmore and United States v. Holland, *supra*. The court also has approved a provision stating that the pretrial agreement was void unless the accused entered a plea of guilty prior to a presentation of evidence on the merits. It reasoned that "the challenged provision imposes no condition upon an accused in the exercise of his rights, but expresses a truism as to the normal sequence of events at trial." United States v. Green, *supra* at 264. (In a dissenting opinion, Senior Judge Ferguson questioned why the government required the provisions at all, and why it was such a popular one, if it merely expresses a truism. He indicated that such a provision was impermissible, since it could effect a "restrictive orchestration of the exercise of trial rights and procedures," thereby "posing an intolerable risk of jading military justice." *Id.* at 265.)

2. Automatic cancellation clauses. Attempts by a convening authority to void the pretrial agreement based on post-trial conduct of the accused.

a. During a post-trial interview, the accused gave statements inconsistent with the providency inquiry at his trial. The convening authority, on the advice of his SJA, set aside the findings and sentence and ordered a rehearing. At the rehearing, the accused pleaded not guilty. HELD: The CA was still bound by the agreement, which was written expressly in terms of pretrial and trial actions required of the accused, all of which he complied with fully. Furthermore, a post-trial review based upon *ex parte* conversation cannot repudiate a proper inquiry concerning a guilty plea, the providence of which is reached by judicial determination. United States v. Lanzer, 3 M.J. 60 (C.M.A. 1977).

b. Note, however, that a specific provision which released the convening authority from the terms of the agreement if the accused failed to plead guilty at a rehearing has been approved by panels of the Navy and Army courts. United States v. Brown, 8 M.J. 559 (N.C.M.R. 1979), United States v. Stoutmire, 5 M.J. 724 (A.C.M.R. 1978).

3. Probation. In United States v. Lallande, 22 C.M.A. 170, 46 C.M.R. 170 (1973), the pretrial agreement contained substantial provisions regarding post-trial conduct. The most far-reaching of these provisions required a defendant convicted of use of marijuana and dangerous drugs to submit to a search of his person, vehicle, place of berthing, locker, etc., "at any time of the day or night with or without a search warrant or appropriate command authorization...." Id. at 173, 46 C.M.R. at 173. The court approved these conditions based upon two rationales: (1) The conditions were proffered by the accused, and "were the exclusive product of his own voluntary effort, not a response to a demand by the government that they be accepted 'or else'"; (2) the conditions are identical to those imposed upon other Federal parolees and probationers, and long approved by other Federal courts. See United States v. Biswell, 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972); Arginiega v. Freeman, 404 U.S. 4, 92 S.Ct. 22, 30 L.Ed.2d 126 (1971)).

4. Restitution. Where the pretrial agreement made suspension of forfeitures contingent upon the accused's repayment of stolen funds, a Navy court held the agreement to be "valid since it did not require the accused to waive any fundamental right, and he acknowledged that he and his counsel initiated the request for the agreement, that he fully understood its meaning and effect, and that he had voluntarily entered into it." United States v. Evans, 49 C.M.R. 86, 89 (N.C.M.R. 1974). But see United States v. Rogers, 49 C.M.R. 268 (A.C.M.R. 1974), where the Army Court of Military Review disapproved a provision of a pretrial agreement that conditioned the suspension of a bad conduct discharge to reimbursement of a larceny victim without regard to the accused's financial ability to make the payments. Accord United States v. Brown, 4 M.J. 654 (A.C.M.R. 1977). In United States v. Callahan, 8 M.J. 804 (N.C.M.R. 1980), the Navy court specifically approved a restitution clause in a pretrial agreement, but stated, "We do not wish to encourage imaginative forms of restitution 'in kind', such as arduous labor arrangements in lieu of dollar remuneration." Id. at 806. In United States v. Olson, 25 M.J. 293 (C.M.A. 1987), the Court of Military Appeals ruled that a pretrial agreement may legally require restitution for "any loss caused by misconduct related in any way to any offense for which the accused has been charged - regardless of his plea thereto." Id. at 296. (Emphasis added.)

#### 5. Miscellaneous provisions

a. If knowingly done, the defense may agree not to raise the statute of limitations as an affirmative defense. United States v. Clemens, 4 M.J. 791 (N.C.M.R. 1978).

b. It has been stated in dictum that pretrial bargains may include a waiver of the right to call certain extenuation and mitigation witnesses as part of the inducement for favorable sentence limitation by the convening authority. United States v. Hanna, 4 M.J. 938 (N.C.M.R. 1978).

See also United States v. Krautheim, 10 M.J. 763 (N.C.M.R. 1981); United States v. Mills, 12 M.J. 1 (C.M.A. 1981). This practice is now specifically authorized by R.C.M. 705(c)(2)(E).

c. The Army Court of Military Review has held that a provision requiring waiver of all evidentiary objections to pretrial statements of victims in a sexual abuse of children case did not violate public policy because extensive inquiry of both accused and defense counsel by the military judge on the record established that the waiver was a freely conceived defense product. United States v. Gibson, 27 M.J. 736 (A.C.M.R. 1988).

## GUILTY PLEA/PRETRIAL AGREEMENT INQUIRY CHECKLIST

References:    United States v. Care  
                  United States v. Green  
                  R.C.M. 910, MCM, 1984  
                  R.C.M. 705, MCM, 1984

### GUILTY PLEA INQUIRY

- \_\_\_\_\_ Advise the accused as to the nature of the offense(s) to which the plea relates. R.C.M. 910(c)(1).
  - Elements of the offense should be described. R.C.M. 910(c)(1) (Discussion).
  - Elements should be tailored to the specific offense.
  - Elements of other offenses embraced by the basic plea should be explained.
- \_\_\_\_\_ Advise the accused of the applicable mandatory minimum penalty. R.C.M. 910(c)(1).
- \_\_\_\_\_ Advise the accused of the maximum possible penalty. R.C.M. 910(c)(1).
- \_\_\_\_\_ If the accused is not represented by counsel at either a GCM or SPCM, advise the accused of the right to counsel at every stage of the proceeding. R.C.M. 910(c)(2).
  - If the accused is not represented by counsel at a GCM or SPCM, a plea of guilty should not be accepted. R.C.M. 910(c)(2) (Discussion).
- \_\_\_\_\_ Advise the accused of the right to plead not guilty. R.C.M. 910(c)(3).
- \_\_\_\_\_ Advise the accused of the right to be tried by a court-martial. R.C.M. 910(c)(3).
- \_\_\_\_\_ Advise the accused of the right to confront and cross-examine the witnesses against him/her. R.C.M. 910(c)(3).
- \_\_\_\_\_ Advise the accused of the right against self-incrimination. R.C.M. 910(c)(3).
- \_\_\_\_\_ Advise the accused that, if he/she pleads guilty, there will be no trial and the accused will thereby waive the right to plead not guilty, the right to a trial of the facts, the right to confront and cross-examine witnesses, and the right against self-incrimination. R.C.M. 910(c)(4).

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- Advise the accused that the military judge will question the accused about the offense. R.C.M. 910(c)(5).
- Advise the accused that, if he/she answers the judge's questions about the offense under oath, on the record, and in the presence of counsel, those responses may later be used in a subsequent prosecution for perjury or false statement. R.C.M. 910(c)(5).
- Address the accused personally to ensure that the plea is voluntary and not the result of force or threats. R.C.M. 910(d).
- Inquire of the accused whether the plea is the result of prior discussions between the convening authority, a representative of the convening authority, or the trial counsel and the accused or defense counsel. R.C.M. 910(d).
- Personally question the accused to ensure that there is a factual basis for the plea. R.C.M. 910(d).

The accused must admit every element of the offense(s).  
R.C.M. 910(e) (Discussion).

If any potential defense is raised, the judge must explain the defense and may not accept the plea unless the accused admits facts which negate the defense.  
R.C.M. 910(e) (Discussion).

#### PRETRIAL AGREEMENT INQUIRY

- Inquire of the parties whether there is a pretrial agreement. R.C.M. 910(f) (Discussion).

The parties are required to disclose the existence of a pretrial agreement to the military judge. R.C.M. 910(f)(2).

- Require the parties to disclose the entire agreement, except the quantum portion, when trial is by military judge alone. R.C.M. 910(f)(3).

- Examine the agreement to ensure that it complies with R.C.M. 705. R.C.M. 910(f)(1).

Ensure that the accused voluntarily agreed to the agreement and all the terms and conditions thereof. R.C.M. 705(c)(1)(A).

Ensure that none of the terms or conditions deprive the accused of any fundamental rights. R.C.M. 705(c)(1)(B).

Examine the terms to ensure that all other conditions are permissible. R.C.M. 705(c)(2).

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Ensure that the written document has been signed by the accused and defense counsel. R.C.M. 705(d)(3).  
Ensure that the convening authority or an authorized representative of the convening authority has signed the agreement indicating acceptance. R.C.M. 705(d)(4).

\_\_\_\_\_ Inquire of the accused to ensure that he/she understands the agreement. R.C.M. 910(f)(4)(A).

\_\_\_\_\_ Inquire of the parties whether all parties agree to the terms and conditions of the pretrial agreement. R.C.M. 910(f)(4)(B).

If any terms or conditions are unclear or ambiguous, get clarification from the parties. R.C.M. 910(f)(4)(B) (Discussion).

If there is any doubt about the accused's understanding of the agreement, explain the agreement to the accused. R.C.M. 910(f)(4)(B) (Discussion).

Obtain the assurances of all parties that their interpretation of the pretrial agreement is the same as that of the judge.

#### FINDINGS

\_\_\_\_\_ Findings based upon a guilty plea may be entered immediately upon acceptance of the plea unless:

Prohibited by service regulations; or  
The plea is to a lesser included offense and the prosecution intends to present evidence on the greater offense. R.C.M. 910(g).

#### AFTER FINDINGS

\_\_\_\_\_ After findings, but before sentence is announced, the military judge may as a matter of discretion permit the accused to withdraw a previously accepted plea of guilty. R.C.M. 910(h)(1).

\_\_\_\_\_ If, before sentence is announced, the accused presents anything inconsistent with the plea of guilty, the judge shall further inquire into the providence of the plea. If, based upon such inquiry, it appears that the accused entered the plea improvidently or through lack of understanding of its meaning and effect, a plea of not guilty shall be entered as to the affected charges and specifications. R.C.M. 910(h)(2).

#### ADDITIONAL PRETRIAL AGREEMENT INQUIRY

- After sentence is announced, inquiry shall be conducted into any portion of a pretrial agreement not previously examined. R.C.M. 910(h)(3).
- The judge should explain the effect of any sentence limitation upon the adjudged sentence. R.C.M. 910(h)(3).
- If the accused does not understand the material terms of the agreement, or if the parties disagree as to the terms, the military judge shall conform the agreement -- with the consent of the government -- to the accused's understanding or permit the accused to withdraw the plea. R.C.M. 910(h)(3).

Appendix 11-1(4)

## CHAPTER XII

### PRETRIAL RESTRAINT OF MILITARY PERSONNEL

(MILJUS Key Number 938)

#### 1201 INTRODUCTION

This chapter defines and explains the authority and necessity for ordering pretrial restraint of an accused.

#### 1202 FORMS OF PRETRIAL RESTRAINT

A. Confinement. Art. 9(a), UCMJ; R.C.M. 304(a)(4), 305, MCM, 1984 [hereinafter R.C.M. \_\_\_\_]. This is the physical restraint of a person. Normally, this involves incarceration of the individual in a brig. Any person subject to trial by court-martial may be confined if the requirements of R.C.M. 305 are met. Confinement is effected by:

1. Placing the person under guard and delivering him to the place of confinement; and

2. delivering to the person in authority at the place of confinement a confinement order. (NAVPERS 1640/4; see Appendix 12-1, infra.)

B. Arrest. Art. 9(a), UCMJ; R.C.M. 304(a)(3). This is the moral restraint of a person by delivering an order to him to remain within certain designated limits. An individual placed in the status of arrest may not be required to perform his full military duty. R.C.M. 304(a)(3). See also Art. 1154, U.S. Navy Regulations, 26 February 1973. The term "arrest," as used in military law, must be distinguished from the term "apprehension"; the latter term is defined in Article 7, UCMJ, and R.C.M. 302(a)(1), as the authority of one performing police duties to take a person into custody.

C. Restriction in lieu of arrest. This form of restraint is considered a lesser type of arrest and is authorized in R.C.M. 304(a)(2). It is a form of moral restraint imposed by oral or written orders to an accused directing him to remain within certain specified limits. Restriction, under certain conditions, may be imposed upon both officers and enlisted personnel. Restriction being a lesser form of restraint, the limits of restriction are intended to be less stringent than those for arrest, and a person in the status of restriction may be required to perform his full military duties. If the terms of the restriction are too stringent, the restriction may be deemed punitive and illegal. United States v. Carmel, 4 M.J. 744 (N.C.M.R. 1978). See also United States v. Guerrero, 28 M.J. 223 (C.M.A. 1989).

D. Conditions on liberty. R.C.M. 304(a)(1). This form of pretrial restraint is imposed by orders directing a person to do or refrain from doing specified acts. Such conditions may be imposed in conjunction with other forms of restraint or separately. The discussion to this rule lists as examples

of conditions on liberty orders to report periodically to a specified official, orders not to go to a certain place (such as the scene of the alleged offense), and orders not to associate with specified persons (such as the alleged victim or potential witnesses). Conditions on liberty must not hinder pretrial preparation, however. Thus, when conditions are imposed, they must be sufficiently flexible to permit pretrial preparation. Be aware that, pursuant to Executive Order Number 12,550 of 19 February 1986, conditions on liberty no longer is a form of restraint which starts the running of the 120-day speedy time clock.

E. Notice required. Whenever a person is placed under any of the above forms of pretrial restraint, he must be informed of the nature of the offense which is the basis for the restraint. R.C.M. 304(e). Furthermore, whenever a person is placed in pretrial confinement, R.C.M. 305(e) requires that he be advised not only of the nature of the offenses for which he is held, but also of his right to remain silent and that any statement could be used against him, of his right to retain civilian counsel at his own expense and to request assignment of military counsel, and of the procedures by which pretrial confinement will be reviewed.

#### 1203 POWER TO IMPOSE PRETRIAL RESTRAINT

A. On civilians and officers. Only a commanding officer to whose authority the civilian or officer (commissioned or warrant) is subject may order pretrial restraint of that civilian or officer. R.C.M. 304(b)(1). Note that civilians may be restrained under this provision only when they are subject to trial by court-martial. See R.C.M. 202. The authority to order pretrial restraint of civilians and commissioned and warrant officers may not be delegated. Art. 9(c), UCMJ; R.C.M. 304(b)(3).

B. On enlisted persons. Any commissioned officer may order pretrial restraint of any enlisted person. R.C.M. 304(b)(2). A commanding officer may delegate to warrant, petty, and noncommissioned officers authority to order pretrial restraint of enlisted persons of the commanding officer's command or subject to the authority of that commanding officer. R.C.M. 304(b)(3). In the Navy, authority to impose arrest or confinement may only be delegated to warrant officers and master chief, senior chief, and chief petty officers. MILPERSMAN 1850300. There is no similar limitation on the Marine Corps' ability to delegate this power to noncommissioned officers.

C. Authority to withhold. A superior competent authority may withhold from a subordinate the authority to order pretrial restraint. R.C.M. 304(b)(4).

#### 1204 GROUNDS FOR IMPOSITION OF PRETRIAL RESTRAINT

A. Probable cause is required before any form of pretrial restraint may be imposed; that is, reasonable grounds must exist for believing that an offense triable by court-martial was committed by the person being restrained. Article 9, UCMJ. In addition to the requirement of probable cause -- that is, reasonable grounds for believing the accused committed an offense -- a person imposing pretrial restraint must have grounds for believing the degree of restraint imposed is required by the circumstances. R.C.M. 304(c), 305(d).

## B. Necessity for pretrial confinement

1. Article 10, UCMJ, is the authority for the imposition of pretrial restraint. Article 10 provides, in part: "Any person subject to (the UCMJ) charged with an offense under (the UCMJ) shall be ordered into arrest or confinement, as circumstances may require ...."

R.C.M. 304(c) and R.C.M. 305(d) indicate that a person subject to the Code may be ordered into arrest or confinement without the formal preferral of charges, if probable cause is shown. See United States v. Moore, 4 C.M.A. 482, 485, 16 C.M.R. 56 (1954); Tuttle v. Commanding Officer, 21 C.M.A. 229, 45 C.M.R. 3 (1972). Consider also the mandates of United States v. Mason, 21 C.M.A. 389, 45 C.M.R. 163 (1972) and Article 33, UCMJ, in general court-martial (GCM) cases.

2. R.C.M. 305(h)(2)(B)(iii) amplifies the provisions of Article 10, UCMJ ("as circumstances may require"), by providing that confinement will not be imposed pending trial unless "[c]onfinement is necessary because it is foreseeable that (a) [t]he prisoner will not appear at a trial, pretrial hearing, or investigation, or (b) [t]he prisoner will engage in serious criminal misconduct."

3. Article 13, UCMJ, provides:

No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances required to insure his presence....

4. R.C.M. 304(f) reiterates the language of article 13.

5. Although the C.M.A. has had a difficult time over the years in deciding how to interpret the "as circumstances may require" language in article 10, two C.M.A. decisions have eliminated some of the ambiguity. See Fletcher v. Commanding Officer, 2 M.J. 234 (C.M.A. 1977) and United States v. Heard, 3 M.J. 14 (C.M.A. 1977). In Fletcher, the military magistrate approved confinement of the accused based solely on the criterion of the "seriousness of the offense." Although the offenses charged were serious enough to authorize a bad-conduct discharge, the court held that the pretrial confinement was illegal since there was nothing to indicate a disposition to resort to flight to avoid prosecution. Without mentioning any of its prior rulings, the court specifically disapproved of "seriousness of the offense," standing alone, as the basis for pretrial confinement.

In United States v. Heard, *supra*, Judge Perry (writing the lead opinion) analyzed the court's prior decisions in the area and concluded that article 13 dealt only with the conditions of pretrial confinement and not with the issue of whether an accused should be confined prior to trial. The court thus overruled prior decisions holding to the contrary. Judge Perry then addressed the issue of the proper bases for pretrial confinement and concluded that there were two: (1) "the necessity to assure the presence of the accused

at his trial," and (2) the avoidance of "foreseeable future serious criminal misconduct of the accused, including any efforts at obstructing justice, if he is set free pending his trial." 3 M.J. at 20. It must be noted at this juncture that Chief Judge Fletcher, in a concurring opinion, conditioned his approval of the second basis for pretrial confinement, preventive detention, on the existence of "proper safeguards." He went on to indicate such "safeguards" would have to be the same as a "full scale trial, without a jury." 3 M.J. at 25. Judge Cook, in an opinion concurring in part and dissenting in part, did not speak to the issue of whether preventive detention is an authorized basis for pretrial confinement.

Having addressed the issue of what constitutes a lawful basis for the imposition of pretrial confinement, Judge Perry proceeded to impose an additional restriction upon the use of pretrial confinement heretofore unknown in military law.

Assuming the presence in a given case of one or both of these concerns of assuring presence at trial and of protecting the safety of the community, the inquiry then must proceed to whether there is the need for confinement to meet the exigency, as opposed to some lesser form of restriction or condition of release.... We are convinced, therefore, that Article 10 of the UCMJ, which authorizes confinement only 'as circumstances may require', must be interpreted quite literally, and we believe that the only time that circumstances require the ultimate device of pretrial incarceration is when lesser forms of restriction or conditions on release have been tried and have been found wanting . . . In other words, only when this "stepped" process of appropriate lesser forms of restriction or conditions on release is first tried and proves inadequate, is pretrial confinement "require[d]" within the meaning of Article 10, UCMJ.

3 M. J. at 2022.

Since Chief Judge Fletcher's concurring opinion in Heard did not disapprove of the stepped-process requirement spelled out by Judge Perry, it is apparent that this requirement is now a part of military law. Whether this requirement will be applied literally and strictly by the C.M.A. remains to be seen. The various service courts of review have dealt with the question of how to interpret this language.

The Navy Court of Military Review has interpreted Heard as recognizing two bases for ordering pretrial confinement: to assure the accused's presence for trial, and to avoid foreseeable future serious criminal misconduct by the accused. United States v. Burke, 4 M.J. 530 (N.C.M.R. 1977). The court also indicated a disinclination to apply the stepped process requirement of Heard strictly.

The Heard decision is not interpreted to be so inflexible as to absolutely require a stepped confinement process in all but a capital case. Rather, Heard is taken to require the exercise of reasonable judgment in determination of

pretrial confinement issues, bearing in mind society's need to protect itself, the need for an accused's presence at trial, and the complete undesirability and unlawfulness of unnecessary pretrial confinement.

4 M.J. at 534-535.

The Air Force Court of Military Review has interpreted the stepped-process requirement of Heard in a similar fashion. United States v. Franklin, 4 M.J. 635 (A.F.C.M.R. 1977). The Army Court of Review has made an even cleaner break, holding, in United States v. Otero, 5 M.J. 781 (A.C.M.R.), petition denied, 6 M.J. 121 (C.M.A. 1978) (assault with a dangerous weapon), that the stepped-process rule for imposing pretrial confinement does not require that less restrictive forms of restraint be first tried and progressively demonstrated to be insufficient before the ultimate restraint of confinement may be imposed; rather, the rule means that a commander must first consider lesser restrictions or conditions and conclude that they would be inadequate before he may impose confinement.

These cases form the background for R.C.M. 305(h)(2)(B)(iv), which requires a commander to direct a prisoner's release from pretrial confinement unless the commander believes upon probable cause -- that is, upon reasonable grounds -- that less severe forms of restraint are inadequate.

6. The provisions of Article 10, UCMJ, and R.C.M. 305(d), discussion, indicate that pretrial confinement normally will not be imposed if the alleged offense is a minor one. Specifically, Article 10, UCMJ, states that a minor offense is one that is normally triable by summary court-martial. It is important to understand that these provisions are not directory and that broad discretion is left to the confining authority to determine whether, in a particular case, pretrial restraint is warranted. C.M.A. has held that such discretion may be limited by superior authority. United States v. Nixon, 21 C.M.A. 489, 45 C.M.R. 254 (1972); United States v. Jennings, 19 C.M.A. 88, 41 C.M.R. 88 (1969); United States v. White, 17 C.M.A. 211, 38 C.M.R. 9 (1967); see also R.C.M. 304(b)(4).

The discretion of the commanding officer to order confinement has been structured to some degree by service directives.

a. MILPERSMAN 1850100 states that it is the responsibility of commanding officers to give careful and individual consideration to cases before ordering pretrial restraint. It sets forth certain categories of offenders where pretrial restraint may not be required. The provisions of the MILPERSMAN do not set limitations on the authority as to who may order pretrial restraint; rather, they require a commanding officer to review the necessity for the use of pretrial restraint concerning members of his command.

b. The Navy Corrections Manual (SECNAVINST 1640.9A) sets standards and policies for brigs in the naval service. Section 108 discusses the use of confinement as a form of pretrial restraint. Paragraph 2 indicates that pretrial restraint may be ordered to insure the presence of an accused, or because of the seriousness of the offense charged, or because of "the presence of factors making it probable that failure to confine would endanger life or property." Limitations on this apparently limitless ability to confine are set forth in the following discussions.

c. To ensure the lawfulness of pretrial restraint, local regulations should be reviewed to determine what, if any, local policies must be adhered to in ordering confinement. See United States v. White, 17 C.M.A. 211, 38 C.M.R. 9 (1967).

## 1205 OTHER PURPOSES TO RESTRAIN

A. The nature of a military organization, coupled with the authority and responsibility of individuals in command situations, has given rise to the recognition of the need for authority to deprive individuals of their liberty when it becomes necessary in maintaining the discipline and welfare of the military unit.

1. R.C.M. 304(h) lists certain areas where restraint may be authorized: "for operational or other military purposes independent of military justice, including administrative hold or medical reasons." In United States v. Haynes, 15 C.M.A. 122, 125, 35 C.M.R. 94 (1964), C.M.A., in holding that restriction may not be imposed except as authorized in the UCMJ or MCM, parenthetically recognized that restraint of an individual for these purposes would be lawful.

2. In United States v. Smith, 21 C.M.A. 231, 45 C.M.R. 5 (1972), C.M.A. upheld an order by a noncommissioned officer (NCO) which directed Smith to remain in a specific room of the barracks after the NCO had broken up a fight between Smith and another individual to insure immediate maintenance of order within the unit.

3. The Corrections Manual, section 108.4, would authorize confinement in cases other than for pretrial restraint when "fully justifiable and wherein no alternative action is practicable or appropriate."

4. Restraint may be used for medical reasons. See Article 1158, U.S. Navy Regulations, 26 February 1973.

5. United States v. Gaskins, 5 M.J. 772 (A.C.M.R.), petition denied, 6 M.J. 14 (C.M.A. 1978), concluded that the protection of an accused from bodily harm may, under certain circumstances, warrant pretrial restraint of an accused's personal liberty (confinement was ordered partially on basis of protection of accused from hostile German community when he was charged with rape of German national).

B. The deprivation of liberty for the purpose of maintaining discipline, the health and welfare of the command, or in the interest of training, need not meet the test of probable cause as defined in R.C.M. 304(c). Yet, its use must be dictated by circumstances and not used as punishment. Such action, being only interim in nature, is utilized to accomplish a specific purpose and requires frequent review to insure that such action is still justified by conditions that gave rise to the use of restraint initially.



A. The broad latitude which the Manual for Courts-Martial allows in the area of pretrial restraint is subject to limitation by higher authority: by the division commander [United States v. Gray, 6 C.M.A. 615, 20 C.M.R. 331 (1956)]; by the post commander [United States v. White, *supra*]; by the force commander [United States v. Jennings, *supra*]; see also R.C.M. 304(b)(4).

B. Section 108.3, SECNAVINST 1640.9A directs that pretrial confinement in excess of thirty days will be permitted only when approved in writing in each instance by the GCM authority. Similar approval is required every 30 days thereafter. This provision was rescinded by ALNAV 037187 and by Military Justice Advisory 1-87; however, local directives may still require GCMA approval.

## PROCEDURES REQUIRED UPON INITIATION OF PRETRIAL CONFINEMENT

A. Notification and action by commander

1. Notice. Unless the accused's commander ordered the pretrial confinement, the officer in charge of the brig must submit a report to the accused's commander within 24 hours after the initiation of pretrial confinement. The report may be oral or written and must contain the accused's name, his charges, and the name of the person who ordered confinement. R.C.M. 305(h)(1).

2. Decision. Not later than 72 hours after ordering an accused into pretrial confinement or after receiving a report that a member of his unit has been confined, the commander must decide whether pretrial confinement will continue. Before he may continue pretrial confinement, the commander must believe upon probable cause, i.e., upon reasonable grounds, that an offense triable by court-martial has been committed; that the accused committed it; that confinement is necessary because it is foreseeable that the accused will not appear at trial or will engage in serious criminal misconduct; and that less severe forms of restraint are inadequate. Serious criminal misconduct includes intimidation of witnesses or other obstruction of justice, seriously injuring others, or other offenses which pose a serious threat to the safety of the community or to the effectiveness of the command or to the national security of the United States. R.C.M. 305(h)(2)(A), (B).

3. Memorandum. If he approves continued pretrial confinement, the commander must submit to the initial review officer a written memorandum stating the reasons for his decision. This memorandum may include hearsay and may incorporate by reference other documents, such as witness statements, investigative reports, or official records. R.C.M. 305(h)(2)(C).

The Air Force Court of Military Review has determined that a written memorandum is not necessary where the commander personally appears and gives sworn testimony before the initial review officer conducting the pretrial confinement hearing. The court found that the purpose for the written memorandum is to assist the initial review officer in reviewing the case and that the commander's testimony is an adequate substitute for such memorandum. United States v. Walker, 26 M.J. 886 (A.F.C.M.R. 1988).

## B. Review of pretrial confinement

1. In general. While many people may initially order an accused into pretrial confinement, in order for him to remain there, an "initial review officer" (IRO) (formerly known as the military magistrate) must determine whether there is probable cause to confine the accused and whether the confinement is necessary. Courtney v. Williams, 24 C.M.A. 87, 51 C.M.R. 260 (1976). The IRO does not review the commander's decision to confine for an abuse of discretion; rather, he is to make an independent decision of probable cause and necessity. The IRO requirement set forth in Courtney was a response to Gerstein v. Pugh, 420 U.S. 103 (1975). In Gerstein, the Supreme Court held that a neutral magistrate must determine whether there is probable cause to restrain an individual after his arrest. As a result of Gerstein and Courtney, R.C.M. 305(i) requires that a review of pretrial confinement be made within 7 days of its imposition by a neutral and detached officer appointed in accordance with secretarial regulations. An accused who is confined as a deserter by civilian authorities with notice and approval of military authorities is also entitled to an IRO hearing under the seven-day time period set forth in R.C.M. 305(i). United States v. Ballesteros, 29 M.J. 14 (C.M.A. 1989). The Secretary of the Navy has directed that the senior officer exercising general court-martial jurisdiction at the location of the brig shall designate one or more officers in grade O-4 or higher to act as the IRO. They should be selected for their maturity and experience and, if practicable, should have had command experience. JAGMAN, § 0117c.

2. Nature of review. The IRO will review the command memorandum and any additional written matters submitted by either the unit or the accused. The accused and his counsel, see 1211.E, infra, will be present and may make a statement, if practicable. A command representative, often the unit's legal officer, may appear and make a statement; this practice is recommended so that he can assist the IRO in obtaining additional evidence and present the command's position in the case. Except for section V (Privileges), Mil.R.Evid. 302 (privilege concerning mental examination), and Mil.R.Evid. 305 (rights warnings), the Military Rules of Evidence do not apply. The standard of proof used by the IRO is preponderance of the evidence. The IRO may, for good cause, extend the time limit for completion of the review from 7 to 10 days after the imposition of pretrial confinement or order immediate release. He is required to state his conclusions, including the facts on which they are based, in a written memorandum which must be maintained together with all other documents considered and provided to the defense or government upon request. The IRO, after notice to both parties, must reconsider his decision to continue confinement upon the accused's request based on significant information not previously considered. R.C.M. 305(i).

3. Civilian confinement facilities. The IRO will hold a review hearing in all cases involving pretrial confinees, including those in "rented" space in civilian jails. This practice is preferable to a civilian magistrate's hearing for two reasons: first, the authority of a civilian magistrate to release servicemembers is questionable; and, second, one of the key decisions usually made by civilian magistrates, i.e., the granting and amount of bail, is not applicable to military confinees.

4. R.C.M. 305(l) implies that the decision of the IRO to release the accused from confinement is final and binding on all parties. In United States v. Malia, 6 M.J. 65 (C.M.A. 1978), C.M.A. held that while the commander could not overrule the decision of the magistrate (precursor to the IRO) to release the accused, the decision was nonetheless reviewable either on the magistrate's own motion, upon application of the accused (when the decision was confinement), or upon request of the command. If the accused is ordered released by the IRO, however, the command may elect to place the accused under a lesser form of restraint such as restriction in lieu of arrest.

5. Review by military judge. See 1208.B.5, infra.

6. Exceptions

a. Operational necessity. The Secretary of Defense may suspend the requirements for appointment of military counsel, the command memorandum, and IRO review in the case of specific units or in specified areas when operational requirements would make application of these requirements impracticable. R.C.M. 305(m)(1).

b. At sea. The requirements for appointment of military counsel, the command memorandum, and IRO review do not apply to accuseds aboard a vessel at sea. In such situations, confinement aboard a vessel at sea may continue only until the accused can be transferred to a brig ashore. This transfer must take place at the earliest opportunity permitted by the operational requirements and mission of the vessel. Upon transfer, the command memorandum must be transmitted to the IRO and must include an explanation of the delay. R.C.M. 305(m)(2).

## 1208 RELEASE FROM PRETRIAL RESTRAINT

A. A person may be released from pretrial restraint by a person authorized to impose it, except as otherwise provided for in R.C.M. 305 (pretrial confinement). See 1208.B, infra. Pretrial restraint terminates when a sentence is adjudged, the accused is acquitted of all charges, or all charges are dismissed. If charges are to be reinstated, pretrial restraint may be reimposed. R.C.M. 304(g).

B. Who may order release from pretrial confinement. Any commander of a prisoner, the IRO, or, after referral of charges, a military judge detailed to the court-martial to which the charges have been referred may direct release from pretrial confinement. The term "commander" includes the immediate or higher commander of the prisoner and the commander of the installation where the brig is located. R.C.M. 305(g).

If the IRO decides to continue pretrial confinement, release from pretrial confinement is still possible. There are several courses of action an accused and his defense counsel may wish to pursue to obtain his release.

1. The officer ordering confinement may be requested to reconsider his decision.

2. The accused may later petition the IRO for a reconsideration of his decision based on new circumstances that have arisen since the initial determination or any new information bearing upon whether continued pretrial confinement is necessary. R.C.M. 305(i)(7).

3. Article 138, UCMJ, is still available as an administrative remedy, but practical objections remain. See Chapter XXI, infra.

4. The accused may petition C.M.A. for extraordinary relief. See Chapter XXI, infra.

5. The military judge has the power to order release. In Porter v. Richardson, 50 C.M.R. 910 (C.M.A. 1975), C.M.A. ordered the trial judge to which the case was referred to hold a hearing into the legality of the petitioner's pretrial confinement and directed him to issue whatever orders were necessary to effectuate his findings. C.M.A. therefore assumed that the military judge had the power to order relief. Accord Milanes-Canamero v. Richardson, 50 C.M.R. 916 (C.M.A. 1975). In Phillippy v. McLucas, 50 C.M.R. 915 (C.M.A. 1975), C.M.A. ordered the convening authority to refer the case immediately if he intended to do so and then directed the military judge of the case to hear petitioner's claims and to issue orders necessary to effectuate the judge's findings. This approach is an indication that a military judge could not act until the case was referred. Given the jurisdictional considerations of military courts, the above may seem obvious, but in Courtney v. Williams, *supra*, Judge Ferguson stated in a concurring opinion that a military judge could hold a pretrial confinement hearing and that it was "immaterial" whether the case had been referred to a court to which he was detailed. And, in United States v. Alonzo, 1 M.J. 1044 (N.C.M.R. 1976), the military judge ordered release of an accused because of illegal pretrial confinement. While the case was ultimately returned for a new convening authority's action, no appellate judge disapproved the actions of the trial military judge. In United States v. Carmel, 4 M.J. 744 (N.C.M.R. 1978), N.C.M.R. held that the military judge erred in declining to rule on the legality of the accused's second period of pretrial confinement because the issue was then pending before a military magistrate. More recently, in United States v. Lamb, 6 M.J. 542 (N.C.M.R. 1978), the Navy court emphasized that the magistrate's decision is reviewable by the military judge after referral of charges to court and, further, that the military judge is empowered to take steps to effectuate the release of an accused who is illegally confined.

If the military judge can hold a hearing and order release, other questions still remain. What standard of review must the military judge use? Does the judge have to review the decisions of the officer ordering confinement and the IRO for an abuse of discretion, or must he make his own independent determination of probable cause and necessity? C.M.A. has not yet spoken but, in Lamb, the court intimated that the relief requested determines the scope of the military judge's review of the pretrial confinement. If the defense requests a credit on the sentence ultimately imposed, then the judge will rule whether the IRO abused his discretion in determining that continued pretrial confinement was justified. On the other hand, if the defense requests immediate release of the accused from pretrial confinement, the judge must review all existing facts and circumstances relevant to the issue of confinement continuation. In a concurrent opinion in Lamb, Judge

Granger asserted that the military judge has the responsibility to determine the issue of the legality of the confinement de novo, and should not resort to merely reviewing the handiwork of the IRO. See United States v. Otero, supra.

Although C.M.A. has not yet decided the question of what standard of review is to be used by the military judge, the Manual for Courts-Martial position is contained in R.C.M. 305(j). Once the charges for which the accused has been confined are referred to trial, the military judge shall review the propriety of pretrial confinement upon motion for appropriate relief. The military judge shall order release from pretrial confinement only if: (a) The IRO's decision was an abuse of discretion and there is not sufficient information presented to the military judge justifying continuation of pretrial confinement, or (b) information not presented to the IRO establishes that the prisoner should be released, or (c) there was no review by an IRO and information presented to the military judge does not establish sufficient grounds for continued confinement.

6. The military judge has the same duty set forth in Lamb, supra, regarding lesser forms of pretrial restraint. Richards v. Deuterman, 13 M.J. 990 (N.M.C.M.R. 1982).

1209 ILLEGAL PRETRIAL RESTRAINT. Even though pretrial restraint is legally imposed, i.e., the requirements of Article 10, UCMJ, are complied with, and the IRO has held a hearing, it may nevertheless be punitive and, therefore, illegal if the conditions of confinement violate Article 13, UCMJ. Article 13 provides that a person held for trial may not be subjected to punishment or penalty other than arrest or confinement pending trial, and that the pretrial restraint may not be any more rigorous than the circumstances require to insure his presence. R.C.M. 304(f) enlarges upon article 13 by providing that an accused may not be subjected to punishment or penalty other than restraint upon the charges pending against him.

In the Navy and Marine Corps, these provisions are further amplified by the Naval Corrections Manual, SECNAVINST 1640.9A.

In determining whether confinement is punitive, the following considerations are relevant:

- A. Whether the accused is compelled to work with sentenced prisoners;
- B. whether the accused is required to observe the same work schedules and duty hours as sentenced prisoners;
- C. whether the type of work normally assigned to him is the same as that performed by persons serving sentences at hard labor;
- D. whether the accused is dressed so as to distinguish him from those being punished;
- E. whether it is the policy of the brig to have all prisoners governed by one set of instructions; and

F. whether there is any difference in the treatment accorded to the accused from that given to sentenced prisoners.

United States v. Nelson, 18 C.M.A. 177, 39 C.M.R. 177 (1969); United States v. Bayhand, 6 C.M.A. 762, 21 C.M.R. 84 (1956); but see United States v. Southers, 12 M.J. 924 (N.M.C.M.R. 1982) (wherein N.M.C.M.R. set forth guidelines for the trial judge to follow in determining whether a certain restraint is illegal). Similarity with the treatment afforded to sentenced prisoners is the beginning of the analysis in determining whether an accused is being punished, but the analysis must not end there. If the similar treatment is related to normal command and control measures and is not distinctively punishment or a means to "stigmatize," a court is not likely to find a violation of article 13. United States v. Bruce, 14 M.J. 254 (C.M.A. 1982); United States v. Thacker, 16 M.J. 841 (N.M.C.M.R. 1983). However, unlawful pretrial punishment will be found where there is unusual stigmatization, as in a situation where the accused is publicly denounced by his commander and subsequently subjected to military degradation before troops prior to his court-martial. United States v. Cruz, 25 M.J. 326 (C.M.A. 1987).

1210 RELIEF FROM ILLEGAL PRETRIAL RESTRAINT. The courts have long recognized that the jailed defendant suffers innumerable hardships while awaiting trial. DeChamplain v. Lovelace, 510 F.2d 419, 424 (8th Cir. 1975); Stack v. Boyle, 342 U.S. 1 (1951); Courtney v. Williams, 1 M.J. 267 (C.M.A. 1976).

A. Where pretrial confinement has been illegally imposed or administered, military appellate courts have granted "meaningful reassessment" of the accused's sentence. United States v. Jennings, 19 C.M.A. 88, 41 C.M.R. 88 (1969); United States v. Nelson, *supra*; United States v. Pringle, 19 C.M.A. 324, 41 C.M.R. 324 (1970). It is incumbent upon an accused, however, to affirmatively assert noncompliance with Rule 305; and, failure to assert this issue at trial waives the issue on appeal. United States v. Kuczaj, 29 M.J. 604 (A.C.M.R. 1989); R.C.M. 905(e).

B. In United States v. Larner, 1 M.J. 371 (C.M.A. 1976), the court stated that the only legal and fully adequate remedy for an accused whose confinement prior to trial was imposed unlawfully is a judicially ordered administrative "credit" on any confinement at hard labor imposed. The credit need be applied so that the accused is in the same position he would be in if he had served the illegal pretrial confinement after sentencing; that, upon entering the brig, the accused has already served time on the sentence. Although it appears from Larner that day-for-day credit is the correct remedy, C.M.A. has recognized that more credit may be justified under some conditions. United States v. Suzuki, 14 M.J. 491 (C.M.A. 1983) (military judge awarded 3-for-1 credit).

C. R.C.M. 305(k) provides that the remedy for noncompliance with the substantive sections of R.C.M. 305 shall be an administrative credit against the sentence adjudged for any confinement served as a result of such noncompliance. See also United States v. Gregory, 23 M.J. 246 (C.M.A. 1986), which says R.C.M. 305(k) relief applies to restriction tantamount to confinement.

This credit is to be computed at the rate of one day credit for each day of confinement served as a result of noncompliance. This credit is to be applied in addition to any other credit the accused may be entitled as a result of pretrial confinement served. The credit shall be applied first against any confinement adjudged. If no confinement is adjudged, or if the confinement adjudged is insufficient to offset all the credit to which the accused is entitled, the credit, using the conversion formula under R.C.M. 1003(b)(6) and (7), shall be applied against hard labor without confinement, restriction, fine, and forfeiture of pay, in that order, if adjudged. If the credit is applied to a fine or forfeitures, then one day of confinement shall be equal to one day of total forfeiture or a like amount of fine. The credit shall not be applied against any other form of punishment.

D. Bear in mind that an accused will receive day-for-day administrative credit for legal pretrial confinement under the holding of United States v. Allen, 17 M.J. 126 (C.M.A. 1984). This Allen credit also applies to restriction tantamount to confinement. United States v. Mason, 19 M.J. 274 (C.M.A. 1985).

E. Another source of largesse to be gained by the defense after suffering illegal pretrial confinement is to request an appropriate instruction to the members. United States v. Davidson, 14 M.J. 81 (C.M.A. 1982); United States v. Kimball, 50 C.M.R. 337 (A.C.M.R. 1975).

#### 1211 THE RIGHT TO COUNSEL BEFORE TRIAL: PRETRIAL CONFINEMENT (MILJUS Key Numbers 1238-1248)

A. The right to assistance of counsel at various critical stages before trial is covered primarily in the NJS Evidence Study Guide. Here, we deal only with the right to consult with counsel during pretrial confinement.

B. At the outset, note that we are concerned here with the right to consult with a military lawyer when an accused has been placed in confinement -- but before a detailed defense counsel has been appointed. The right to detailed defense counsel for representation at a court-martial does not arise until charges have been filed against the accused. United States v. Moore, 4 C.M.A. 130, 23 C.M.R. 354 (1957); United States v. Gunnels, 8 C.M.A. 130, 23 C.M.R. 354 (1957); United States v. Tempia, 16 C.M.A. 629, 37 C.M.R. 249 (1967). This detailing of a defense counsel for court-martial representation may occur some time after the accused has been placed in pretrial confinement. Note, further, that we are not dealing with the situation in which an accused has retained civilian counsel. Denial to an accused, whether or not in pretrial confinement, of access to his civilian counsel is error. United States v. Nichols, 8 C.M.A. 119, 23 C.M.R. 343 (1957) (civilian counsel excluded from article 32 investigation because he did not have security clearance); United States v. Gunnels, *supra*. See also United States v. Turner, 5 M.J. 148 (C.M.A. 1978) (denial of civilian counsel's request to converse with client prior to interrogation of accused constitutes a sixth amendment violation, but accused effectively waived all his rights at subsequent interrogation after conference with his civilian attorney).

C. There are two sources of the right to counsel in the Federal district courts: the sixth amendment of the Constitution and Rule 5 of the Federal Rules of Criminal Procedure. The Supreme Court has construed the sixth amendment as giving an individual the right to the assistance of counsel at "critical stages" of the proceedings. If a person cannot afford to hire a lawyer, then one must be provided for him at no expense. United States v. Wade, 388 U.S. 218 (1967). This subject is covered in the NJS Evidence Study Guide. Confinement alone, however, has not been held to be a "critical stage" that raises the sixth amendment right to counsel. Further, the pretrial confinement review hearing conducted by the IRO does not trigger the sixth amendment right to counsel or otherwise initiate adversary judicial proceedings. United States v. Jordan, 29 M.J. 177 (C.M.A. 1989).

D. In United States v. Jackson, 5 M.J. 223 (C.M.A. 1978), the defense asserted on appeal that the accused was denied effective assistance of counsel by being confined for 42 days before counsel was appointed for representational purposes. The Court of Military Appeals nevertheless found that the accused was represented at all critical stages of the trial. The court, while declining to adopt a static rule for the assignment of counsel for representational purposes, did state that fundamental fairness calls for representation for all prisoners confined for more than a brief period of time. Finally, the court indicated that the 42-day delay was potentially prejudicial, but that on the record the responses of counsel with regard to his opportunity to prepare the case effectively waived any objections concerning denial of fundamental fairness.

E. Although not constitutionally required, R.C.M. 305(f) confers on an accused in pretrial confinement the right to request that military counsel be provided to him before the review hearing conducted by the IRO. Counsel may be assigned for the limited purpose of representing the accused only during the pretrial confinement proceedings before charges are referred. If assignment is made for this limited purpose, the prisoner shall be so informed. The prisoner does not have a right under this rule to have individual military counsel. JAGMAN, § 0117.



CONFINEMENT ORDER  
DAVPERS 1001/4 (REV. 2-78) S/N 0106-LF-016-4021

NAME (Last first middle)		DOB		RACE/ETHNIC		CHARGE #	
UNIT OR ORGANIZATION				DATE			

STATUS							
IF NAMED - alleged violation of UCMJ Article _____		CONFINED AS RESULT OF <input type="checkbox"/> VACATED SUSPENSION					
		<input type="checkbox"/> RLP <input type="checkbox"/> SCM <input type="checkbox"/> SPCL <input type="checkbox"/> COM					
I have been informed that I am being confined for the above alleged offense(s)		CHARGES AND SPECIFYING STATUTES OF _____					
		IF SUSPENSES IN PRISON HAVE EXPIREDLY VERIFIED					
Date _____ Signature of accused _____  Date _____ Signature of accused _____		SENTENCE APPROVED		APPROVED BY		DATE	
				CA			
				SA			
				SCM			
				USCBA			
				OTHER			

REMARKS SECTION	
FOR ARTICLE 86 OFFENSES ONLY	
<input type="checkbox"/> BECAUSE OF THE SERIOUSNESS OF THE OFFENSE CHARGED  <input type="checkbox"/> TO ENSURE THE PRESENCE OF THE ACCUSED AT THE TRIAL	<input type="checkbox"/> SURRENDERED (VOLUNTARY RETURN)  <input type="checkbox"/> APPREHENDED BY CIVIL/MILITARY AUTHORITIES

CONFINEMENT DIRECTED AT		TYPED NAME/RANK/TITLE	
HOUR	DATE	SIGNATURE	

MEDICAL CERTIFICATE	
The above named individual was examined by me at _____ on _____ and found fit	
<input type="checkbox"/> fit <input type="checkbox"/> unfit for confinement    The following irregularities were noted during the examination, (if none, so state):	
TYPED NAME/RANK/TITLE _____ SIGNATURE _____	

RECEIPT FOR PRISONER	
The above named individual was received at _____	
NAME OF CORRECTIONAL CENTER	
at _____ DATE _____	
TYPED NAME/RANK/TITLE _____ SIGNATURE _____	

## CHAPTER XIII

### SPEEDY TRIAL

(MILJUS Key Number 1170)

1301 INTRODUCTION. This chapter discusses the accused's constitutional and statutory right to a speedy trial. Section 1302 discusses the Manual for Courts-Martial's treatment of the right to a speedy trial, see R.C.M. 707, MCM, 1984 [hereinafter R.C.M. \_\_\_\_], while subsequent sections address the development of the right to speedy trial through case law. It is important to remember that there exist several avenues, the products of both statute and case law, by means of which the accused may seek judicial enforcement of his right to 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 Carta and the English common law. United States v. Wilson, 10 C.M.A. 398, 27 C.M.R. 472 (1959). It is specifically guaranteed by the sixth amendment 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.

Article 10, UCMJ, provides broader protection for the accused than the sixth amendment. United States v. Powell, 2 M.J. 6 (C.M.A. 1976). In addition to article 10, Article 30(b), UCMJ, provides:

Upon 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 a 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 C.M.A. to mean pretrial restraint, including restriction. United States v. Weisenmuller, 17 C.M.A. 636, 38 C.M.R. 434 (1968) (pretrial restriction which did not differ from restriction normally imposed as NJP was sufficient to raise the right to a speedy trial); United States v. Williams, 16 C.M.A. 589, 37 C.M.R. 209 (1967) (restriction to company area equivalent to arrest for speedy trial purposes). The 90-day speedy trial requirement adopted by the C.M.A. in United States v. Burton, 21 C.M.A. 112, 44 C.M.R. 166 (1971), discussed *infra*, however, applies only when an accused is in pretrial confinement, and not when merely under restriction or arrest. See also United States v. Nelson, 5 M.J. 189 (C.M.A. 1978).

C. The remedy for denial of the right to a speedy trial is dismissal of the charges. R.C.M. 707(e); United States v. Rowsey, 14 M.J. 151 (C.M.A. 1982); United States v. Hounshell, 7 C.M.A. 3, 21 C.M.R. 129 (1956). See generally, Right to Speedy Trial: State of the Law, 18 JAG J. 290 (1964); Ross, Avoiding the Speedy Trial Issue, 21 JAG J. 101 (1967).

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.

1302 THE SPEEDY TRIAL RULE IN THE MANUAL FOR COURTS-MARTIAL. In United States v. Leonard, 21 M.J. 67 (C.M.A. 1985), the C.M.A. held that speedy trial provisions of R.C.M. 707 would not be applied retroactively, but, rather, would apply only to those cases in which notice of preferral of charges or imposition of restraint occurred on or after August 1, 1984.

A. Starting the clock. R.C.M. 707(a) states the accused's right to speedy trial as it exists under the Manual for Courts-Martial: the accused shall be brought to trial within 120 days after notice to the accused of preferral of charges under R.C.M. 308 or the imposition of pretrial restraint under R.C.M. 304(a)(2)-(4), whichever is earlier. Note that conditions on liberty do not "trigger" the speedy-trial clock. Nor does imposition of liberty risk, unless used as a subterfuge for pretrial restriction. United States v. Bradford, 25 M.J. 181 (C.M.A. 1987). Involuntary extension beyond EAOS (i.e. legal hold) by itself is not restraint under R.C.M. 707. United States v. Brunton, 24 M.J. 566 (N.M.C.M.R. 1987).

B. Preferral of charges. Under R.C.M. 707(a), formal notification of the accused of preferral of charges under R.C.M. 308 starts the speedy-trial clock. R.C.M. 308 requires that such notice be given "as soon as practicable." In United States v. Maresca, 28 M.J. 328 (C.M.A. 1989), the court construed this language to require the immediate commander to notify the accused as soon as he can reasonably be found. The court held that the speedy-trial clock begins when the accused could have been notified, even if not notified. Therefore, unless the accused is UA or on leave, preferral will likely start the clock. Given this, charges should not be preferred until the offense is fully investigated and the government is ready to proceed to trial.

C. Accountability. R.C.M. 707(b). The date on which the accused is notified of the preferral of charges or the date on which pretrial restraint is imposed 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 when he enters a plea of guilty to an offense or when presentation to the factfinder of evidence on the merits begins.

1. Resetting the clock. If charges are dismissed, if a mistrial is granted, or if the accused is released from pretrial restraint for a significant period when no charges are pending, the 120-day period begins to run only from the date on which charges or restraint are reinstituted. R.C.M. 707(b)(2). Withdrawal of charges from court-martial is not tantamount to "dismissal" within the meaning of the rule. United States v. Muethison, 28 M.J. 1113 (N.M.C.M.R. 1989). See also United States v. Britton, 26 M.J. 24 (C.M.A. 1988).

In United States v. Gray, 26 M.J. 16 (C.M.A. 1988), the accused was suspected of aggravated assault and placed in pretrial confinement on 6 December. He was released on 4 January. Although the matter was being investigated, charges were not preferred until 6 February. The accused was notified of the preferred charges on 19 February. At trial, the defense moved to dismiss for denial of speedy trial because the accused was not brought to trial within 120 days from imposition of pretrial restraint. The military judge found that the speedy trial clock started on 6 December and continued until trial, although the accused was released from pretrial restraint. However, defense delay brought the number of days for which the government was accountable within 120 days. C.M.A. affirmed, but held that charges are "pending" under R.C.M. 707b when preferred. Thus, when the accused was released from pretrial confinement for a significant period (i.e. 32 days), this stopped the speedy trial clock. Justices Everett and Cox differed as to whether it restarted at zero upon preferral or notification of accused of preferral of charges. Justice Sullivan ruled that imposition of pretrial restraint on 6 December did not even start the speedy trial clock in the absence of preferred charges. In his opinion, only notification of preferred charges starts the speedy trial clock, despite the language of R.C.M. 707a.

2. Multiple clocks. When charges are preferred at different times, the inception of the 120-day period for each charge is determined from the date on which the accused was notified of preferral or on which pretrial restraint was imposed on the basis of that offense. R.C.M. 707(b)(4). Even when charges are preferred at the same time, imposition of pretrial restraint will only start the clock for the offenses that were the basis for imposing pretrial restraint. United States v. Robinson, 28 M.J. 481 (C.M.A. 1989).

3. Rehearing or other trial ordered. When cases are reversed on appeal and a rehearing is ordered, the 120-day clock commences when the convening authority, not the accused, is notified of the C.M.R. decision. United States v. Moreno, 24 M.J. 752 (A.C.M.R. 1987).

D. Exclusions. R.C.M. 707(c). The following periods are excluded when determining whether the 120-day period has run:

1. Any periods of delay resulting from other proceedings in the case, including:

a. Any examination into the accused's mental capacity or responsibility [see United States v. Mahoney, 28 M.J. 865 (A.F.C.M.R. 1989) and United States v. Pettaway, 24 M.J. 589 (N.M.C.M.R. 1987)];

b. any hearing on the accused's capacity to stand trial and any time during which the accused lacks capacity to stand trial;

c. any session on pretrial motions (see Pettaway, supra);

d. any appeal filed by the government under R.C.M. 908 unless it is determined that the appeal was filed solely for the purpose of delay, knowing that it was frivolous and without merit [see United States v. Ramsey, 28 M.J. 370 (C.M.A. 1989)]; and

e. any petition for extraordinary relief by either party (see Ramsey, supra).

2. Any periods of delay resulting from unavailability of the military judge due to extraordinary circumstances.

3. Any period of delay resulting from a continuance in an Article 32, UCMJ, investigation or court-martial granted at the request of the defense or with its consent.

In United States v. Burris, 21 M.J. 140 (C.M.A. 1985), the C.M.A. held that the trial judge did not abuse his discretion in finding that there was no defense delay under R.C.M. 707(c)(3) where trial date was postponed due to defense counsel's ambiguous input on a routine Docket Notification form. Defense counsel lined through words "delay until" on the form and communicated ex parte with the clerk of court regarding openings on the court calendar. The military judge resolved the apparent ambiguity by finding it to be "notice that the defense did not intend to be taxed with any exclusionary delay." C.M.A., based upon the information within record of trial, concurred, reaffirming that docketing delays are generally attributable to the government. In United States v. Carlisle, 25 M.J. 426 (C.M.A. 1986), the court held that each day that an accused is available for trial is chargeable to the government unless delay has been approved either by the convening authority or by the military judge, in writing or on the record. Therefore, only a defense-requested delay in writing or on the record to the military judge will stop the clock. See also United States v. Cook, 27 M.J. 212 (C.M.A. 1988).

4. Any period of delay resulting from a failure of the defense to provide notice (e.g., alibi), make a request (e.g., witnesses), or submit any matter in a timely manner as required by the MCM.

5. Any period of delay resulting from a continuance in the Article 32, UCMJ, investigation or in the court-martial requested by the prosecution if:

a. The continuance is granted because substantial evidence relevant and necessary to the prosecution's case is unavailable despite the government's exercise of diligence in attempting to obtain it, and it appears that the evidence will be available within a reasonable time(see Maresca, supra); or

b. the continuance is granted to allow the trial counsel additional time to prepare the prosecution's case and additional time is justified because of the exceptional circumstances of the case.

6. Any period of delay resulting from the accused's absence. See United States v. Turk, 24 M.J. 277 (C.M.A. 1987) in UA case where accused's voluntary absence from ship created a time-lapse between his return to Navy control and his subsequent transport to his assigned ship, such time will not be charged to the government if delay deemed reasonable.

7. Any reasonable period of delay when the accused is joined for trial with a co-accused as to whom the 120-day period has not yet run and there is no good cause for not granting a severance.

8. Any other period of delay for good cause, including unusual operational requirements and military exigencies.

See United States v. Kuelker, 20 M.J. 715 (N.M.C.M.R. 1985). In Kuelker, the court said that the delay in obtaining essential items of evidence in the custody of another agency of the United States is a common difficulty encountered by the government in preparing for trial. The court held that the plain meaning of the terms "unusual operational requirements and military exigencies" as an example of "delay for good cause" in R.C.M. 707(c)(9) is some type of "extraordinary situation," therefore, delay associated with the trial counsel's obtaining evidence was not excludable from government delay under R.C.M. 707(c)(9). In yet another case, the court held that routine deployments of a convening authority do not constitute delay for "good cause" under R.C.M. 707(c)(9). United States v. Harris, 20 M.J. 795 (N.M.C.M.R. 1985).

In United States v. Higgins, 27 M.J. 150 (C.M.A. 1988), the court held that delay of trial caused by processing of resignation request outside of local command was excludable as delay for good cause.

In United States v. Facey, 26 M.J. 421 (C.M.A. 1988), the court held that delaying a trial in order to await trial of a material witness who would be entitled to plead the privilege against self-incrimination should usually be treated as "good cause" for purposes of R.C.M. 707(c)(9).

In United States v. Longhofer, 29 M.J. 22 (C.M.A. 1989), the court held that delay in obtaining security clearance for civilian defense counsel constituted unusual event not ordinarily encountered. Such time was excluded to the extent it was reasonable.

9. In Longhofer, supra, the court set down four rules for counting delay under R.C.M. 707(c).

a. If the delay fits into one of the enumerated exclusions listed in R.C.M. 707(c)(1)-(8), the government shall be relieved from accountability if the length of delay is reasonable.

b. The government is not accountable for defense-requested delays made in writing or on the record under R.C.M. 707(c)(3).

c. The government is not accountable for requested delay for good cause made in writing or on the record by the government and granted by the military judge.

d. If good cause (including unusual operational requirements and military exigencies) exists, even though not previously litigated or no delay was granted, the government shall be relieved of accountability subject to the reasonableness test. R.C.M. 707(c)(9). The military judge has to find that the unusual event being relied upon actually caused a delay in the government's preparation of its case and that it was reasonable for the delay to result. The government need not establish that this delay "proximately caused" the trial not to take place within the total time period.

E. Accused in arrest or confinement. R.C.M. 707(d). When the accused is in pretrial arrest or confinement, the government must take immediate steps to bring him to trial. He will not be held in pretrial arrest or confinement for more than 90 days for the same or related charges, although the military judge may extend this period by 10 days upon showing of extraordinary circumstances. The periods of delay described in R.C.M. 707(c) are excluded from computation of this 90-day period, except periods of delay when the accused is joined for trial with a co-accused. Note that under some circumstances the government could satisfy the requirements of R.C.M. 707(d) yet still face dismissal of charges under the 90-day pretrial confinement speedy trial rule announced by the Court of Military Appeals in United States v. Burton, 44 C.M.R. 166 (C.M.A. 1971). Therefore, the government must be careful to comply with both R.C.M. 707(d) and Burton.

F. Remedy. R.C.M. 707(e). Failure to comply with the MCM speedy trial rule will result in dismissal of the affected charges upon timely motion by the defense.

1303 RAISING THE ISSUE -- BURDEN OF PROOF. The accused must raise the issue of speedy trial by a motion to dismiss. In support of it, he need show no more than that trial has been delayed beyond 120 days (or 90 days), e.g., by reference to the charge sheet. Once the issue has been raised by the defense, the burden is upon the prosecution to show by a preponderance of the evidence that the accused was brought to trial within 120 days (or 90 days) after excluding certain time periods under R.C.M. 707(c). R.C.M. 905(c)(2)(B).

1304 THE RIGHT TO SPEEDY TRIAL IN PRETRIAL CONFINEMENT CASES. When the accused is in pretrial confinement, his right to a speedy trial is protected not only by R.C.M. 707 but also by a series of cases beginning with United States v. Burton, 44 C.M.R. 166 (C.M.A. 1971). Some believed Burton and its progeny were repealed when R.C.M. 707 was enacted in 1984; however, in United States v. Harvey, 23 M.J. 280 (C.M.A. 1986), the court found no Presidential intent to do so. Therefore, R.C.M. 707 and Burton coexist.

A. Presumption of prejudice from pretrial confinement

1. In United States v. Burton, 21 C.M.A. 112, 44 C.M.R. 166 (1971), the C.M.A. issued a rule regarding the right to speedy trial when the accused is placed in pretrial confinement. For offenses occurring after 17 December 1971, in the absence of a defense request for a continuance, a presumption will exist that the accused has been denied a speedy trial in violation of article 10 when his pretrial confinement exceeds three months. "In such cases, this presumption will place a heavy burden on the government to show diligence and in the absence of such a showing the charges should be dismissed." Id. at 118, 44 C.M.R. at 172. It is stressed that the Burton presumption applies only to cases of pretrial confinement including any form of restraint that is tantamount to confinement because of the conditions of restraint.

2. In United States v. Marshall, 22 C.M.A. 431, 47 C.M.R. 409 (1973), C.M.A. explained what Burton really stood for. It held that "mere diligence would not be sufficient to overcome the Burton presumption. Really extraordinary circumstances, other than normal problems such as mistakes in drafting, manpower shortages, illness and leave, would be required. The government may still show diligence ... in such cases as those involving problems found in a war zone or in a foreign country ..., or those involving serious or complex offenses in which due care requires more than a normal time ... or ... for reasons beyond the control of the prosecution..." United States v. Marshall, supra, at 434, 47 C.M.R. at 412.

B. Counting under Burton

1. "90 days." In United States v. Driver, 23 C.M.A. 243, 49 C.M.R. 376 (1974), C.M.A. modified Burton's three-month rule. In the interest of establishing a single standard for all cases, the court revised the period of pretrial confinement to "90 days" instead of "three months."

2. How to count. Do not count the first day of pretrial confinement; do count the day of trial. Cf. United States v. Manalo, 1 M.J. 452 (1976). Therefore, if the accused enters pretrial confinement on 1 January and goes to trial on 1 April (in a non-leap year), he has been in pretrial confinement 90 days. (30 + 28 + 31 + 1).

3. What to count. Pretrial confinement has been the only form of pretrial restraint that will "trigger" the Burton presumption. But, if the terms of pretrial arrest or restriction are severe enough, they may be considered to be pretrial "confinement" for purposes of Burton. See United States v. Burrell, 13 M.J. 437 (C.M.A. 1982); United States v. Schilf, 1 M.J. 251 at 252 n.2 (C.M.A. 1976). In United States v. Cahandig, 47 C.M.R. 933 (N.C.M.R. 1973),



the court counted eight days of restriction as pretrial confinement, but gave no explanation of its decision. If the accused is an adjudged prisoner serving the sentence of another court-martial, he is not considered to be in pretrial confinement. United States v. Gettz, 49 C.M.R. 79 (N.C.M.R. 1974). If the accused is serving correctional custody previously imposed under article 15 for a separate offense, he is not considered to be in pretrial confinement for Burton purposes. United States v. Miller, 2 M.J. 77 (C.M.A. 1976). If the correctional custody is imposed as a subterfuge to avoid responsibility for pretrial confinement, it will be counted. United States v. Miller, supra; United States v. Schilf, supra.

4. 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 Burton purposes. E.g., United States v. Talayero, 8 M.J. 14 (C.M.A. 1979); United States v. Johnson, 1 M.J. 101 (C.M.A. 1975); United States v. Johnson, 23 C.M.A. 91, 48 C.M.R. 599 (1974); United States v. Mohr, 21 C.M.A. 360, 45 C.M.R. 134 (1972); United States v. Craft, 50 C.M.R. 334 (A.C.M.R. 1975). Government accountability for these additional offenses begins when the government has in its possession substantial information on which to base preferral of charges. United States v. Johnson, 23 C.M.A. 91, 48 C.M.R. 599 at 601; United States v. Shavers, 50 C.M.R. 298 (A.C.M.R. 1975). Therefore, 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 Burton purposes for Charge II is 15 January, not 25 January when the charge was preferred.

In determining when the government has such substantial knowledge, the court has not considered the government to be a single entity. United States v. O'Brien, 22 C.M.A. 557, 48 C.M.R. 42 (1973). If, therefore, the accused is confined on 1 January by authorities at point A for Charge I, and authorities at point B learn of a Charge II on 1 January, the inception date for Burton purposes for Charge II will not begin on 1 January. The authorities at point B will have a "reasonable time" to inform point A of Charge II. United States v. O'Brien, supra. In O'Brien, a delay of 56 days was not considered "reasonable" by the court.

5. Rehearings. "[R]ehearings fall within the Burton mandate, and such rehearings must be held within 90 days of the date the convening authority is notified of the final decision authorizing a rehearing." United States v. Flint, 1 M.J. 428, 429 (C.M.A. 1976). Dubay-type proceedings [United States v. Dubay, 17 C.M.A. 147, 37 C.M.R. 411 (1967)] are not included within the Burton mandate. United States v. Flint, supra, affirming 50 C.M.R. 865 (A.C.M.R. 1975). (A Dubay hearing typically involves a post-trial hearing before a military judge alone on an issue not resolved at trial to the satisfaction of the reviewing authority ordering the hearing. The judge will hear evidence and make findings. See section 1616, infra.)

6. Accused in the hands of civilian authorities. If the accused is confined by civilian authorities pending delivery to military authorities, the government has a reasonable time to arrange for his transportation and arrival at his ultimate destination before the Burton period begins to run. United

States v. Smith, 50 C.M.R. 237 (A.C.M.R. 1975); United States v. Halderman, 47 C.M.R. 871 (N.C.M.R. 1973). See also United States v. Harris, 50 C.M.R. 225 (A.C.M.R. 1975). But see United States v. O'Brien, *supra*, in which C.M.A. seems to assume that the inception date of one period of pretrial confinement was the date the accused was confined by civilian authorities even though that confinement occurred at a place over 2000 miles from the site of the trial. See United States v. Hubbard, 21 C.M.A. 131, 44 C.M.R. 185 (C.M.A. 1971).

The rationale of the Courts of Military Review cases in this area is that the prosecution is responsible for only those delays over which it has control. But, transportation delays arising from confinement at a military post distant from the location of the trial have been held chargeable to the government. United States v. Howell, 49 C.M.R. 394 (A.C.M.R. 1975).

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. United States v. Reed, 2 M.J. 64 (C.M.A. 1976); United States v. Williams, 12 C.M.A. 81, 30 C.M.R. 81 (1961). See also United States v. Asbury, 28 M.J. 595 (N.M.C.M.R. 1989). Likewise, if the accused is apprehended by military authorities and released to civilian authorities or a foreign government [United States v. Stubbs, 3 M.J. 630 (N.C.M.R. 1977)] for prosecution, the military is not accountable for such periods of confinement. United States v. Reed, *supra*. The court's statements in Reed are broader than is necessary to support the holding, however, and in appropriate circumstances it may be possible to apply the balancing test of United States v. Sewell, 1 M.J. 630 (A.C.M.R. 1976).

7. Release from confinement. Confinement does not have to be for 90 consecutive days for Burton to apply. United States v. Brooks, 23 C.M.A. 1, 48 C.M.R. 257 (1974). Therefore, if the accused is confined on 1 January, released on 1 February, reconfined on 1 March, and tried on 15 May, the Burton presumption will apply. Although a post-trial confinement case, United States v. Ledbetter, 2 M.J. 37 (C.M.A. 1976), is authority for a convening authority to release an accused on the 89th day of pretrial confinement solely to avoid the Burton presumption.

8. The accused who goes UA. An accused who absents himself without authority upon his release will thereby lose Burton credit for the previous pretrial confinement served. United States v. McAnally, NCM 791819, 30 May 1980, *cert. by JAG on other grounds*, 10 M.J. 270 (C.M.A. 1981) [court declined to answer the certified issue (not relevant here) because it would not materially alter the situation for the accused or the government]. United States v. O'Brien, *supra*; United States v. Bush, 49 C.M.R. 97 (N.C.M.R. 1974).

9. Stopping the count. The government's accountability for delay stops when the accused is brought to trial. United States v. Burton, *supra*. The court has not required that the trial be completed within 90 days, but how much less than a complete trial will suffice is unclear. It has held that an article 39(a) session at which findings of guilty are entered stops the running of pretrial confinement for Burton purposes, United States v. Marell, 23 C.M.A. 240, 49 C.M.R. 373 (1974), but the Court did not accept a government argument in that case that every article 39(a) session constitutes bringing an accused to

trial. Accord, United States v. Cole, 3 M.J. 220 (C.M.A. 1977). See also United States v. Beach, 1 M.J. 118 (C.M.A. 1975). The Navy Court of Military Review attempted to extend Marell in United States v. Williams, 1 M.J. 1042 (N.C.M.R. 1976), where it held that "whenever an Article 39(a) session is conducted, if the Government is ready to proceed to trial but the arraignment of the accused is delayed for the benefit of the accused, ... pretrial confinement for purposes of the Burton rule is thereby terminated." Id. at 1044. In Williams, the court emphasized that there was an un rebutted statement from the government at the article 39(a) session that it was prepared to proceed. The accused then requested a delay since his civilian counsel was not available at that time. In United States v. Towery, 2 M.J. 468 (A.F.C.M.R. 1975), the Air Force court held that an article 39(a) session was sufficient to begin the trial and stop the clock where the accused was arraigned, entered his plea, the court assembled, and both sides were prepared for trial. Difficulties in obtaining an unbiased panel thereafter made it necessary to delay the case beyond the 90th day.

### C. Defense delay

1. "[C]ontinuances or delays granted only because of a request of the defense and for its convenience are excluded from the 3-month period." United States v. Driver, 23 C.M.A. 243, 49 C.M.R. 376 (1974). Mere acquiescence in delay is not sufficient to attribute it to the defense. There must be an affirmative request or waiver by the defense. E.g., United States v. Wolzok, 1 M.J. 125 (C.M.A. 1975); United States v. Reitz, 22 C.M.A. 584, 48 C.M.R. 178 (1974). Therefore, if the government sets a late date for trial and the defense agrees, this alone will not be sufficient to constitute defense delay without some further indication of waiver by the defense. United States v. Wolzok, supra; United States v. Reitz, supra. In United States v. Carlisle, 25 M.J. 426 (C.M.A. 1988), the court held that the accused was not estopped from asserting lack of speedy trial even though a trial date exceeding the 120-day requirement was deliberately selected by the defense. "In our judgment, each day that an accused is available for trial is chargeable to the Government, unless a delay has been approved by either the convening authority of the military judge, in writing or on the record." Id. at 428. This case underscores the critical importance C.M.A. assigns to determinations of accountability for trial delay, and should be regarded as mandatory reading by both trial and defense counsel.

2. Sanity inquiry. Delay occasioned by the accused's request for psychiatric examination is not chargeable to the government except in cases where the government has responsibility for obtaining the examination and fails to proceed with reasonable diligence. United States v. McClain, 1 M.J. 60 (C.M.A. 1975); United States v. Leonard, 3 M.J. 214 (C.M.A. 1977); United States v. Rogers, 7 M.J. 274 (C.M.A. 1979).

3. A defense request to the staff judge advocate that he defer submitting his article 34 advice letter so that the defense could submit additional material was sufficient to exclude 37 days from government accountability in United States v. McClain, supra. In McClain, the defense also requested to meet with the convening authority in an attempt to have the charges dropped. The court excluded 24 days on this ground, although it stated that the requests "seem insufficient to exclude any period other than the time for the meetings..." Id. at 63. See also United States v. Buskirk, 49 C.M.R. 789 (A.C.M.R. 1975).

4. Requests for administrative discharge in lieu of court-martial. One of the primary benefits to the government of a discharge in lieu of court-martial would seem to be that it would not have to undergo the burden and expense of a trial. C.M.A. has held that delays due to such a request are not justifiably chargeable to the accused, at least where the government continued to process the case and the record was devoid of any evidence that the request impeded disposition. United States v. O'Brien, 22 C.M.A. 557, 48 C.M.R. 42 (1973). Accord United States v. Shavers, 50 C.M.R. 298 (A.C.M.R. 1975); United States v. Fernandez, 48 C.M.R. 460 (N.C.M.R. 1974); United States v. Battie, 48 C.M.R. 317 (A.C.M.R. 1974); United States v. Parker, 48 C.M.R. 241 (A.C.M.R. 1973).

In United States v. Walker, 50 C.M.R. 213 (A.C.M.R. 1975), the accused specifically requested a "reasonable delay" to permit processing of an administrative discharge. The court held that such a request was still not sufficient to charge delay to the defense where there was nothing to indicate that the request impeded the processing of the case. But see United States v. Abner, 48 C.M.R. 557 (A.C.M.R. 1974). Thus, it appears that processing of an administrative discharge request will be considered an "incident of the normal processes of military justice," United States v. O'Brien, *supra*, at 46, which will not be charged as defense delay, unless the government can show why the administrative discharge request delayed the case. This would appear to be difficult for the government to prove, and the Navy-Marine Corps Court of Military Review may not allow it to do so at all. See United States v. Fernandez, *supra*, at 463: "[T]he Court does not accept that a request for an undesirable discharge permits a complete halt of pretrial processing in a case in which an accused is being held in pretrial confinement." None of the courts have stated a concern that a policy against charging such delays to the defense may inhibit favorable action on such discharge requests.

5. Co-accused. Delays requested by one accused for his convenience and benefit will not be chargeable against a co-accused. United States v. Johnson, 1 M.J. 294 (C.M.A. 1976).

6. Defense indication of a guilty plea. In United States v. Walker, *supra*, the prosecutor contended that he was not notified until five days before trial that the case would be contested. The court indicated that delay may be attributable to the defense where the prosecutor is acting on assurances of a guilty plea, because it will be necessary for the government to obtain witnesses or evidence. But, this would be a matter for the prosecution to prove; in Walker, the court dismissed the charges. The only delays at issue here would seem to be those attributable to such matters as witnesses being unavailable. Failure by the government to interview a witness or to test a suspect for drugs would arguably not be excused.

7. Article 35, UCMJ, waiting period. The delay caused by the exercise by an accused of his statutory waiting period between service of charges and trial has been held not to be defense delay. United States v. Howell, 49 C.M.R. 394 (A.C.M.R. 1974); United States v. Parker, 48 C.M.R. 241 (A.C.M.R. 1973). But see United States v. Ward, 1 M.J. 21 (C.M.A. 1975): "Of course, the accused had the right to refuse to waive the waiting period, but the resulting period of delay is a factor for consideration in assessing the

reasonableness of the time required to bring the accused to trial on this charge." Id. at 25, n.6. In United States v. Cherok, 22 M.J. 438 (C.M.A. 1986), on the 90th day of pretrial confinement and the day of trial, the defense asserted the accused's right to a 5-day delay between service of charges and trial. The delay was requested solely to set up the speedy trial issue, as the defense had notice of the charge and was prepared for trial. The court ruled that invocation of article 35 under the circumstances did not create a delay attributable to the government.

8. Leave by defense counsel. In United States v. Marshall, 22 C.M.A. 431, 47 C.M.R. 409, (1973), the court stated: "[W]hen a Burton violation has been raised by the defense, the government must demonstrate that really extraordinary circumstances beyond such normal problems as mistakes in drafting, manpower shortages, illnesses, and leave contributed to the delay." Id. at 434, 47 C.M.R. 413.

This dicta could be read to indicate that the period the defense counsel is on leave is not attributable to the defense. In United States v. Perkins, 1 M.J. 571 (A.C.M.R. 1975), the court held that defense counsel leave was not attributable to the defense where the counsel had not requested a delay in the proceedings. The court did indicate, however, that leave by defense counsel might be considered tantamount to a defense request for the delay if the government could show that it was prepared to try the case during defense counsel's leave. Furthermore, in United States v. O'Neal, 48 C.M.R. 89 (A.C.M.R. 1973), the court stated that trial defense counsel's concurrence in a trial date that was beyond the 90-day period and his leave period were not "ordinary delays" that C.M.A. considered in setting the 90-day period. The result in that case may now be questionable in light of United States v. Wolzak, supra; United States v. Reitz, supra; United States v. Marshall, supra; and United States v. Perkins, supra. Despite those decisions, the A.C.M.R., in United States v. Lyons, 50 C.M.R. 804 (A.C.M.R. 1975), again held that defense counsel's leave was defense delay, citing O'Neal but not citing any other decisions. But, in the same case, a delay for defense counsel's temporary additional duty travel was not chargeable as defense delay. See United States v. Carlisle, supra, where approved annual leave for the accused's individual military counsel did not constitute "defense delay."

9. Defense request for IMC. In at least one case, the defense was charged with delay when it requested individual military counsel and then appealed the decision as to unavailability. The request was made 53 days after article 27b counsel had been appointed. United States v. Rivera, 49 C.M.R. 259 (A.C.M.R. 1974). See also United States v. Roman, 5 M.J. 385 (C.M.A. 1978), where the delay in conducting an article 32 investigation caused by the accused's request for an IMC was attributable to the defense.

10. The Speedy Trial Act of 1974 (18 U.S.C. § 3161). The Speedy Trial Act sets standards for speedy disposition of a criminal case in the Federal system. It also lists categories of delay that may be excluded in determining the applicable time limits [i.e., examination for mental competency, hearings on pretrial motions, etc. See 18 U.S.C. § 3161(h)]. The Speedy Trial Act is not applicable to the military, United States v. Aragon, 1 M.J. 662 (N.C.M.R. 1975), but R.C.M. 707 is generally similar to the act except where different procedures require variations.

D. Extraordinary circumstances. In United States v. Marshall 22 C.M.A. 431, 47 C.M.R. 409 (1973), C.M.A. elaborated on the "heavy burden" it imposed on the government in Burton to justify delays beyond the 90th day. The court stated that such delays would have to be justified by "extraordinary reasons." The court stated:

Under Burton, the Government may still show diligence, despite pretrial confinement of more than 3 months, in such cases as those involving problems found in a war zone or in a foreign country ... [citations omitted], or those involving serious or complex offenses in which due care requires more than a normal time in marshaling the evidence, or those in which for reasons beyond the control of the prosecution the processing was necessarily delayed.

Id. at 433-34, 47 C.M.R. at 412-13.

It added that "operational demands, a combat environment, or a convoluted offense are examples that might justify a departure from the norm." Id. at 435, 47 C.M.R. at 413. It then drew a distinct line between these types of delays and those such as "mistakes in drafting, manpower shortages, illnesses, and leave" which would not justify additional delay. Conditions such as these were already considered by C.M.A. in establishing the 90-day standard. Since the dismissal in Marshall, the courts have made a large number of similar rulings due to a lack of extraordinary circumstances, making the "heavy burden" a practical as well as a literal one. The court has thereby enforced the duty of the government to provide adequate administrative support to the judicial system. E.g., United States v. Wolzok, 1 M.J. 125 (C.M.A. 1975) (docketing delays); United States v. McClain, 1 M.J. 60 (C.M.A. 1975) (military judge not available); United States v. Toliver, 23 C.M.A. 197, 48 C.M.R. 949 (1974) (trial counsel sent to USS KITTY HAWK and could not work on case of accused); United States v. Reitz, 22 C.M.A. 584, 48 C.M.R. 178 (1974) (delay to complete CID investigation); United States v. Durr, 22 C.M.A. 562, 48 C.M.R. 47 (1973), rev'd, 47 C.M.R. 622 (A.C.M.R. 1973) (delays in completing and transcribing article 32 investigation); United States v. Johnson, 22 C.M.A. 524, 48 C.M.R. 9 (1973) (inadequate number of personnel available); United States v. Kaffenberger, 22 C.M.A. 478, 47 C.M.R. 646 (1973) (delays in article 32 investigation and referring case to trial). Cf. United States v. Johnson, 3 M.J. 143 (C.M.A. 1977), where the court approved the government's decision to try a companion case first in order to have that person's testimony for use against the accused, even though pretrial confinement extended to 150 days. In a footnote, the court commended the trial counsel for explaining the reasons for the delay on the record to the military judge in the form of a motion for a continuance, thus involving judicial discretion early in the proceedings. Other examples of extraordinary circumstances are contained in United States v. Groshong, 14 M.J. 186 (C.M.A. 1982) (pretrial confinement of 104 days chargeable to the government but government showed reasonable diligence in bringing accused to trial in light of additional serious charges preferred after original confinement); United States v. Miller, 12 M.J. 836 (A.C.M.R. 1982) (Burton presumption applied to pretrial confinement over 90 days chargeable to government, but extraordinary circumstances existed).

1. Seriousness of the offense. In United States v. Henderson, 1 M.J. 421 (C.M.A. 1976), the C.M.A. stated that just because an offense is serious (here murder), that factor may not itself constitute an "extraordinary circumstance." The court reasoned that, although charges may be serious, they may still be relatively easy to prove.

2. Complex offenses. The court in Henderson did state that a complex offense may justify additional time to gather evidence. The difficulties that the government encounters in meeting this burden of proof are illustrated by the facts in Henderson. Pretrial confinement was 132 days, 113 of which was attributed to the government. The charges were conspiracy to murder and premeditated murder. The article 32 investigation contained 140 pages of verbatim testimony and 89 pages of verbatim deposition. Two of the conspirators were civilians and nearly half of the 36 witnesses called by the prosecution were Okinawan civilians. Many of those did not speak English. Some of the witnesses were in custody and obtaining their presence required coordination efforts with Okinawan authorities. Despite these factors, the court held that extraordinary circumstances were not present and dismissed the charges. Accord United States v. Toliver, 23 C.M.A. 197, 48 C.M.R. 949 (1974); United States v. Holmes and Huff, 23 C.M.A. 24, 48 C.M.R. 316 (1974); United States v. Brooks, 23 C.M.A. 1, 48 C.M.R. 257 (1974); United States v. Gettz, 49 C.M.R. 79 (N.C.M.R. 1974); United States v. Presley, 48 C.M.R. 464 (N.C.M.R. 1974). Contrary to the general tendency of courts to hold that the complexity of the offense is not an extraordinary circumstance are United States v. Hensley, 50 C.M.R. 677 (A.C.M.R. 1975); United States v. Lovins, 48 C.M.R. 160 (A.C.M.R. 1973); and United States v. Cole, 3 M.J. 220 (C.M.A. 1972).

3. Foreign situs. Complications arising from prosecution in a foreign country may justify delays greater than 90 days. United States v. Marshall, *supra*. Again, however, C.M.A. has been reluctant to accept this as a rationale. See United States v. Henderson, *supra*, in which the court rejected it; United States v. Young, 1 M.J. 71 (C.M.A. 1975); United States v. Stevenson, 22 C.M.A. 454, 47 C.M.R. 495 (1973). See also United States v. Miller, 12 M.J. 836 (A.C.M.R. 1982). In United States v. Rowel, 50 C.M.R. 752 (A.C.M.R. 1975), the Army court did excuse some delay due to the foreign situs. But, Rowel appears to be clearly outside the Henderson line of cases since the government did not connect the delay with the foreign situs. The government must demonstrate that the extraordinary circumstance (i.e., foreign situs) did in fact cause the delay. United States v. Henderson, *supra*. For example, in United States v. Shavers, 50 C.M.R. 288 (A.C.M.R. 1975), the court did not allow the foreign situs to be considered as an extraordinary circumstance where it could not find that this factor contributed to the delay. Accord United States v. Eaton, 49 C.M.R. 426 (A.C.M.R. 1974). See also United States v. Hensley, 50 C.M.R. 677 (A.C.M.R. 1975).

4. Additional charges. "[T]he commission of additional misconduct may, in an appropriate case, amount to extraordinary circumstances within the meaning of Marshall sufficient to overcome the Burton presumption ...." United States v. Johnson, 1 M.J. 101, 102 (C.M.A. 1975). But, while making this admission, the court refused to accept the commission of an assault while the accused was in the stockade as an extraordinary circumstance. It specifically placed the right of an accused to a speedy trial under the UCMJ above the MCM's policy that all known charges against an accused be handled at a single trial. Para. 33h, MCM, 1969 (Rev.); R.C.M. 401(c), discussion. See also United

States v. McNally, *supra* (UA begins the pretrial confinement clock anew). But see United States v. Groshong, 14 M.J. 186 (C.M.A. 1982), a case in which the court ruled that paragraphs 30g, 32c, and 33h, MCM, 1969 (Rev.), imposed a responsibility on the command to consolidate all offenses at a single trial. In view of this responsibility and repeated misconduct by the accused the court held that reasons beyond the control of the prosecution delayed the court-martial and pretrial confinement extended to 104 days. The court reviewed the unusual circumstances of the case and determined a dismissal would not lie because the government showed reasonable diligence in bringing the accused to trial. In a footnote, the court cited United States v. O'Brien, 22 C.M.A. 557, 48 C.M.R. 42 (1973) as a case where it had held that additional charges justified delay. The additional charge in O'Brien was unauthorized absence which, of necessity, would stop the processing of the case for trial. In United States v. Huddleston, 50 C.M.R. 99 (A.C.M.R. 1975) and United States v. O'Neal, 48 C.M.R. 89 (A.C.M.R. 1973), the Army Court of Military Review did allow the government to justify delay because of additional charges. But, in Huddleston, the court's analysis gave more weight to the policy in favor of trying all known offenses than it did to the right of the accused to a speedy trial. See also United States v. Getty, 49 C.M.R. 79 (N.C.M.R. 1974). The Army court rejected an "additional charge" rationale in United States v. First, 2 M.J. 1266 (A.C.M.R. 1976). In this area as well as others, the tendency of the courts has been against finding that extraordinary circumstances exist where additional charges are brought against the accused. See United States v. Ward, 1 M.J. 21 (C.M.A. 1975); United States v. Smith, 2 M.J. 394 (A.C.M.R. 1975); United States v. Shavers, 50 C.M.R. 298 (A.C.M.R. 1975). *Contra*, United States v. Groshong, 14 M.J. 186 (C.M.A. 1982).

5. Unavailability of witnesses. In United States v. Dinkins, 1 M.J. 185 (C.M.A. 1975), a prosecution witness was not available at trial in Germany because a passport had not been secured in advance of the scheduled trial date. The court held: "Assuring the presence of witnesses for trial is one of the routine responsibilities of the prosecution for which ample allowance was made in establishing the 90-day standard." *Id.* at 186. It ordered the charges dismissed. This rationale had been used earlier in United States v. Jordan, 48 C.M.R. 841 (N.C.M.R. 1974), where several witnesses had been transferred to new duty stations. In United States v. Johnson, 23 C.M.A. 91, 48 C.M.R. 599 (1974), trial was delayed in part because an essential government witness was in an unauthorized absence status. The court accepted this as an extraordinary circumstance, but it did not have to deal with the problem of how long the government can reasonably wait for the witness' return. Accord United States v. Getty, 49 C.M.R. 79 (N.C.M.R. 1974).

6. War zone, operational demands, or a combat environment. In United States v. Cahandig, 47 C.M.R. 933 (N.C.M.R. 1973), the Navy court concluded that operational demands of the submarine USS SALMON in the western Pacific in connection with the Vietnam conflict justified delay beyond 90 days. Key witnesses in the trial were also key crew members of the submarine, and the time in question was near the time of the mining of Haiphong harbor. And, in United States v. Rowel, 50 C.M.R. 752 (A.C.M.R. 1975), the Army court excused eight days of government delay due to battalion field training in Germany. The court noted "that the state of readiness and training in Europe demands frequent and full unit participation." *Id.* at 753.



7. Investigation delays. As a general rule, delays due to the criminal investigatory process such as investigative agency reports or laboratory reports have not been considered extraordinary circumstances. In United States v. Reitz, 22 C.M.A. 584, 48 C.M.R. 178 (1974), the court held that the need to complete a criminal investigation report was not an excuse for pretrial delay. Accord United States v. Pyburn, 23 C.M.A. 179, 48 C.M.R. 795 (1974) (laboratory report); United States v. Presley, 48 C.M.R. 464 (N.C.M.R. 1974) (JAG Manual investigation); United States v. Perry, 2 M.J. 113 (C.M.A. 1977) (no excuse for a delay of 55 days in conducting an article 32 investigation simply because the accused raised the issue of self-defense). But, there can be circumstances where the court will accept investigative delays if the facts are striking enough. In United States v. Johnson, 23 C.M.A. 91, 48 C.M.R. 599 (1974), the agent investigating the offense committed by the accused and as many as four out of the eight other agents otherwise available were diverted to investigate a series of fires aboard the USS FORRESTAL. The court pointed out that this resulting delay was due to "an incident of apparent sabotage of an important operational unit of the Fleet"; but it did not indicate what other priorities would justify investigatory diversion. Finally, in United States v. Gettz, 49 C.M.R. 79 (N.C.M.R. 1974), the court held, without citing Reitz, that delays caused by sending drugs from Thailand to Japan for analysis were, along with other factors, extraordinary circumstances.

E. The second prong of Burton. A second aspect of the Burton opinion, "often forgotten or ignored," United States v. Johnson, 1 M.J. 101, 105 (C.M.A. 1975), arises from this language: "When the defense alertly avoids what could otherwise be a waiver of the speedy trial issue by urging prompt trial, the government is on notice that delays from that point forward are subject to close scrutiny and must be abundantly justified." United States v. Burton, *supra* at 117, 44 C.M.R. at 171. "The Government must respond to the request and either proceed immediately or show adequate cause for any further delay. A failure to respond to a request for a prompt trial or to order such a trial may justify extraordinary relief." *Id.* at 118, 44 C.M.R. at 172.

While pretrial confinement is necessary to cause the court to examine subsequent government actions, the confinement does not have to amount to 90 days. In United States v. Johnson, 1 M.J. 101 (C.M.A. 1975), the Court of Military Appeals used this aspect of Burton to affirm an A.C.M.R. decision (49 C.M.R. 13) that ordered charges against the accused dismissed when the accused had been in pretrial confinement for 82 days. Johnson makes it clear that the N.C.M.R. was incorrect in its prior decision in United States v. Barnes, 50 C.M.R. 625 (N.C.M.R. 1975), when it declared that the request for a speedy trial, standing alone, did not place an added burden on the government. United States v. Zammit, 14 M.J. 554 (N.M.C.M.R. 1982), *rev'd. on other grounds*, 16 M.J. 330 (C.M.A. 1983); United States v. Williams, 14 M.J. 994 (N.M.C.M.R. 1982).

The so-called "demand" or "second" prong of Burton was prospectively overruled in United States v. McCallister, 27 M.J. 138 (C.M.A. 1988). The court found that an accused's right to a speedy trial was fully protected by the 90-day Burton rule in pretrial confinement cases, R.C.M. 707(a) in all other cases, and the four-part analysis in Barker v. Wingo, 92 S. Ct. 2182 (1972). It should be noted that one element of such analysis is the accused's

demand for a speedy trial. (The other three elements are length of delay, reason for delay, and prejudice to the accused.) It is unlikely the defense can successfully rely on Barker, since it is less restrictive than Burton or R.C.M. 707. After McCallister, if the defense requests a speedy trial, the government no longer must either respond to the request and proceed to trial immediately nor show adequate cause for further delay.

1305 REMEDY. "For denial of the right to speedy trial only dismissal is compensatory." United States v. Rowsey, 14 M.J. 151, 153 (C.M.A. 1982); United States v. Morrow, 16 M.J. 328 (C.M.A. 1983); R.C.M. 707(e).

1306 WAIVER OF THE SPEEDY TRIAL ISSUE. The general rule is that the issue is waived if not raised at trial. R.C.M. 907(b)(2)(A). There may be an exception, however, where the denial of speedy trial amounts to a denial of due process.

A. In United States v. Schalck, 14 C.M.A. 371, 34 C.M.R. 151 (1964), the accused pleaded guilty to UA and willful disobedience at a general court-martial and was sentenced to a BCD. At the Board of Review, 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." Id. at 372, 34 C.M.R. at 153. 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. Id. at 373, 34 C.M.R. at 153. 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. But see United States v. Tibbs, 15 C.M.A. 350, 35 C.M.R. 322 (1965).

#### B. 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. United States v. Sloan, 22 C.M.A. 587, 48 C.M.R. 211 (1974). However, failure to raise issue at trial does not preclude the appellate courts from considering issue. In United States v. Britton, 26 M.J. 24 (C.M.A. 1988), the defense did not raise speedy trial at the trial level. A.F.C.M.R. 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.

C. Unlike suppression motions, if denial of speedy trial is raised at the trial level, a guilty plea does not waive the issue on appeal. United States v. Angel, 28 M.J. 600 (N.M.C.M.R. 1989).

## CHAPTER XIV

### THE SUMMARY COURT-MARTIAL

(West's Key Number: MILJUS Key Number 1210)

1401 INTRODUCTION. A summary court-martial is the least formal of the three types of courts-martial and the least protective of individual rights. The summary court-martial is a streamlined trial process involving only one officer who theoretically performs the prosecutorial, defense counsel, judicial, and member functions. The purpose of this type of court-martial is to dispose promptly of relatively minor offenses. The one officer assigned to perform the various roles incumbent on the summary court-martial must inquire thoroughly and impartially into the matter concerned to ensure that both the United States and the accused receive a fair hearing. Since the summary court-martial is a streamlined procedure providing somewhat less protection for the rights of the parties than other forms of court-martial, the maximum imposable punishment is very limited. Furthermore, it may try only enlisted personnel who consent to be tried by summary court-martial.

As the summary court-martial has no "civilian equivalent," but is strictly a creature of statute within the military system, persons unfamiliar with the military justice system may find the procedure something of a paradox at first blush. While it is a criminal proceeding at which the technical rules of evidence apply, and at which a finding of guilty can result in loss of liberty and property, there is no constitutional right to representation by counsel and it, therefore, is not a true adversary proceeding. The United States Supreme Court examined the summary court-martial procedure in Middendorf v. Henry, 425 U.S. 25 (1976). Holding that an accused at summary court-martial was not a "criminal prosecution" within the meaning of the sixth amendment, the Supreme Court cited its rationale previously expressed in Toth v. Quarles, 350 U.S. 11 (1955):

[I]t is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. But trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function. To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served ... [M]ilitary tribunals have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts.

A. Authority to convene. A summary court-martial is convened (created) by an individual authorized by law to convene summary courts-martial. Article 24, UCMJ, R.C.M. 1302a, MCM, 1984, and JAGMAN, § 0115 indicate those persons who have the power to convene a summary court-martial. Commanding officers authorized to convene general or special courts-martial are also empowered to convene summary courts-martial. Thus, the commanding officer of a naval vessel, base, or station, all commanders and commanding officers of Navy units or activities, commanding officers of Marine Corps battalions, regiments, aircraft squadrons, air groups, barracks, etc., have this authority.

The authority to convene summary courts-martial is vested in the office of the authorized command and not in the person of its commander. Thus, Captain Jones, U.S. Navy, has summary court-martial convening authority while actually performing his duty as Commanding Officer, USS Brownson, but loses his authority when he goes on leave or is absent from his command for other reasons. The power to convene summary courts-martial is nondelegable, and in no event can a subordinate exercise such authority "by direction." When Captain Jones is on leave from his ship, his authority to convene summary courts-martial devolves upon his temporary successor in command (usually the executive officer) who, in the eyes of the law, becomes the commanding officer.

Commanding officers or officers in charge not empowered to convene summary courts-martial may request such authority by following the procedures contained in JAGMAN, § 0115b.

B. Restrictions on authority to convene. Unlike the authority to impose nonjudicial punishment, the power to convene summary and special courts-martial may be restricted by a competent superior commander. JAGMAN, § 0116a(1). Further, the commander of a unit which is attached to a naval vessel for duty therein should, as a matter of policy, refrain from exercising his summary or special court-martial convening powers and should refer such cases to the commanding officer of the ship for disposition. JAGMAN, § 0116b. This policy does not apply to commanders of units which are embarked for transportation only. Finally, JAGMAN, § 0116d requires that the permission of the officer exercising general court-martial jurisdiction over the command be obtained before imposing nonjudicial punishment or referring a case to summary court-martial for an offense which has already been tried in a state or foreign court. Offenses which have already been tried in a court deriving its authority from the United States may not be tried by court-martial. JAGMAN, § 0116d(4).

It is important to note that, even if the convening authority or the summary court-martial officer is the accuser, the jurisdiction of the summary court-martial is not affected and it is discretionary with the convening authority whether to forward the charges to a superior authority or to simply convene the court himself. R.C.M. 1302(b).

C. Mechanics of convening. Before any case can be brought before a summary court-martial, the court must be properly convened (created). It is created by the order of the convening authority detailing the summary court-martial officer to the court. R.C.M. 504(d)(2) requires that the convening order specify that it is a summary court-martial and designate the summary court-martial officer. Additionally, the convening order may designate where the court-martial will meet. If the convening authority derives his power from designation by SECNAV, this should also be stated in the order. JAGMAN, § 0121 further requires that the convening order be assigned a court-martial convening order number; be personally signed by the convening authority; and show his name, grade, and title -- including organization and unit.

While R.C.M. 1302(c) authorizes the convening authority to convene a summary court-martial by a notation on the charge sheet signed by the convening authority, the better practice is to use a separate convening order for this purpose. Appendix 6b of the Manual for Courts-Martial, 1984, contains a suggested format for the summary court-martial convening order and a completed form is included at page 14-5, infra.

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

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

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

E. Jurisdictional limitations: persons. Article 20, UCMJ, and R.C.M. 1301(c) provide that a summary court-martial has the power (jurisdiction) to try only those enlisted persons who consent to trial by summary court-martial. The right of an enlisted accused to refuse trial by summary court-martial is absolute and is not related to any corresponding right at nonjudicial punishment. No commissioned officer, warrant officer, cadet, aviation cadet and midshipman, or person not subject to the UCMJ (Article 2, UCMJ) may be tried by summary court-martial. The forms at pages 14-16 to 14-18, infra, may be used to document the accused's election regarding his right to refuse trial by summary court-martial.

The accused must be subject to the UCMJ at the time of the offense and at the time of trial; otherwise, the court-martial lacks jurisdiction over the person of the accused. See Chapter V, supra.

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

In 1977, the United States Court of Military Appeals ruled that the jurisdiction of summary courts-martial is limited to "disciplinary actions concerned solely with minor military offenses unknown in the civilian society." United States v. Booker, 3 M.J. 443 (C.M.A. 1977). Read literally, this would have precluded summary courts-martial from trying civilian crimes such as assault, larceny, drug offenses, etc. Following a reconsideration of that decision, the court rescinded that ruling and affirmed that "with the exception of capital crimes, nothing whatever precludes the exercise of summary court-martial jurisdiction over serious offenses' in violation of the Uniform Code of Military Justice." United States v. Booker, 5 M.J. 246 (C.M.A. 1978).

- SAMPLE -

USS FOX (DD-983)  
FPO New York 09501

1 July 19CY

SUMMARY COURT-MARTIAL CONVENING ORDER 1-CY

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

*Able B. Seeweed*  
ABLE B. SEEWEEED  
Commander, U. S. Navy  
Commanding Officer, USS FOX  
FPO New York, 09501

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

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

B. Preliminary inquiry. Every court-martial case begins with either a complaint by someone that a person subject to the UCMJ has committed an offense or some inquiry which results in the discovery of misconduct. See Chapter II, *supra*. In any event, R.C.M. 303 imposes upon the officer exercising immediate nonjudicial punishment (Article 15, UCMJ) authority over the accused the duty to make, or cause to be made, an inquiry into the truth of the complaint or apparent wrongdoing. This investigation is impartial and should touch on all pertinent facts of the case, including extenuating and mitigating factors relating to the accused. Either the preliminary investigator or other person having knowledge of the facts may prefer formal charges against the accused if the inquiry indicates such charges are warranted.

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

1. Personal data. Block I of page 1 of the charge sheet should 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.

2. The charges. Block II of page 1 of the charge sheet is then completed to indicate the precise misconduct involved in the case. Each punitive article found in Part IV, MCM, 1984, contains sample specifications. A detailed treatment of pleading offenses is contained in the criminal law portion of the course.

3. Accuser. The accuser is a person subject to the UCMJ who signs item 11 in block III at the bottom of page 1 of the charge sheet. (As previously discussed, this person is only one of several possible types of accusers. This is relevant when considering potential disqualification of a convening authority. See Chapter X, *supra*.) The accuser should swear to the truth of the charges and have the affidavit executed before an officer authorized to administer oaths. This step is important, as an accused has a right to refuse trial on unsworn charges.

4. Oath. The oath must be administered to the accuser and the affidavit so indicating must be executed by a person with proper authority. Article 136, UCMJ, authorizes commissioned officers who are judge advocates, staff judge advocates, legal officers, law specialists, summary courts-martial, adjutants, and Marine Corps and Navy commanding officers, among others, to administer oaths for this purpose. JAGMAN, § 2502a(3) further authorizes officers certified by the Judge Advocate General of the Navy as counsel under Article 27, UCMJ, all officers in pay grade O-4 and above, executive officers, and administrative officers of Marine Corps aircraft squadrons to administer



oaths. No one can be ordered to prefer charges to which he cannot truthfully swear. Often the legal officer will administer the oath regardless of who conducted the preliminary inquiry. When the charges are signed and sworn to, they are "preferred" against the accused. For example:

III. PREFERRAL		
11a. NAME OF ACCUSER (Last, First, MI) ● ● Hoover, Jay E.	b. GRADE PN1	c. ORGANIZATION OF ACCUSER USS FOX (DD-983)
d. SIGNATURE OF ACCUSER <i>Jay E. Hoover</i>		e. DATE 5 Jul 84
<p>AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this <u>5th</u> day of <u>July</u>, 19 <u>84</u>, 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.</p>		
<u>John Mitchell</u> Typed Name of Officer		<u>USS FOX (DD-983)</u> Organization of Officer
<u>Lieutenant</u> Grade		<u>Legal Officer</u> Official Capacity to Administer Oath (See R.C.M. 307(b)—must be commissioned officer)
<u><i>John Mitchell</i></u> Signature		

D. Informing the accused. Once formal charges have been signed and sworn to, the preferral process is completed when the charges are submitted to the accused's immediate commanding officer. Normally, the legal officer or discipline officer will actually receive these charges and, indeed, may have drafted them. Often, in the Navy, the accused's immediate commanding officer for Article 15, UCMJ, purposes is also the summary court-martial convening authority (commanding officer of a ship, base, or station, etc.). In the Marine Corps, the company commander is normally the immediate commander for Article 15, UCMJ cases, and he does not possess summary court-martial convening authority. Thus, the remaining discussion is premised on the assumption that the Marine Corps company commander has forwarded the charges to the battalion commander (who has convening authority) recommending trial by summary court-martial.

Assuming that the legal/discipline officer of the summary court-martial convening authority has the formal charges and the preliminary inquiry report, the first step which must be taken is to inform the accused of the charges against him. The purpose of this requirement is to provide an accused with reasonable notice of impending criminal prosecution in compliance with criminal due process of law standards. R.C.M. 308 requires the immediate commander of the accused to have the accused informed as soon as practicable of the charges preferred against him, the name of the person who preferred them, and the person who ordered them to be preferred.

The important aspect of this requirement is that notice must be given from official sources. The accused should appear before the immediate commander or other designated person giving notice and should be told of the existence of formal charges, the general nature of the charges, and the name of the person who signed the charges as accuser. A copy of the charges can also be given to the accused, although not required by law at this time. No attempt should be made to interrogate the accused. After notice has been given, the person who gave notice to the accused will execute item 12 at the top of page 2 of the charge sheet. If not the immediate commander of the

accused, the person signing on the "signature" line should state their rank, component, and authority. The law does not require a formal hearing to provide notice to the accused, but the charge sheet must indicate that notice has been given. A failure to properly record the notice to the accused will not necessarily void subsequent processing steps or trial, but care should be taken to avoid such possibilities. For example:

12. On <u>5 July</u> , 19 <u>84</u> , the accused was informed of the charges against him/her and of the name of the accuser (if known to me (See R.C.M. 308 (a)). (See R.C.M. 308 if notification cannot be made.)	
<u>Able B. Seaweed</u> Typed Name of Immediate Commander	<u>USS FOX (DD-983)</u> Organization of Immediate Commander
<u>Commander, USN</u>	
<u>M B Jenks</u> Signature	M. B. Jenks, LN1, USN By direction

E. Formal receipt of charges. R.C.M. 403(a). Item 13 in block IV on page 2 of the charge sheet records the formal receipt of sworn charges by the officer exercising summary court-martial jurisdiction. Often this receipt certification and the notice certification will be executed at the same time, although it is not unusual for the notice certification to be executed prior to the receipt certification -- especially in Marine Corps organizations. The purpose of the receipt certification is to establish that sworn charges were preferred before the statute of limitations operated to bar prosecution.

Article 43, UCMJ, sets forth time limitations for the prosecution of various offenses. If sworn charges are not received by an officer exercising summary court-martial jurisdiction over the accused within the time period applicable to the offense charged, then prosecution for that offense is barred by Article 43, UCMJ. The time period begins on the date the offense was committed and ends on the date appropriate to that offense.

For example, assume Seaman Jones unlawfully absents himself from his ship, the USS Brownson, on 1 October 19CY(-5). Article 43, UCMJ, requires (in peacetime) that sworn charges of UA be received within two years of its commission. Accordingly, if sworn charges are not received by the officer exercising summary court-martial jurisdiction by 2400, 30 September 19CY, article 43 prohibits trial for that offense unless the accused knowingly agrees to be tried notwithstanding the bar.

Periods of time during which the accused was in the hands of the enemy, in the hands of civilian authorities for reasons relating to civilian matters, or absent without authority in territory where the United States could not apprehend him do not count in computing the limitations set forth in Article 43, UCMJ. Thus, the receipt certification is extremely important and must be completed in exacting detail to preserve the right to prosecute the accused.

Where the accused is absent without leave at the time charges are sworn, it is permissible and proper to execute the receipt certification even though the accused has not been advised of the existence of the charges. In such cases, a statement indicating the reason for the lack of notice should be attached to the case file. When the accused returns to military control, notice should then be given to him. The receipt certification need not be executed personally by the summary court-martial convening authority and is often

completed for him by the legal officer, discipline officer, or adjutant. For example:

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY	
The sworn charges were received at <u>1300</u> hours, <u>5 July</u> , 19 <u>84</u> at <u>USS FOK (DD-983)</u> <small>Designation of Command or</small>	
Officer Exercising Summary Court Martial Jurisdiction (See R.C.M. 403)	
<u>John Mitchell</u> <small>Typed Name of Officer</small>	FOR THE <u>Commanding Officer</u> <u>Legal Officer</u> <small>Official Capacity of Officer Signing</small>
<u>Lieutenant, USN</u> <small>Grade</small>	
<u>John Mitchell</u> <small>Signature</small>	

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

At this point, the importance of serializing convening orders becomes clear. A court-martial can only hear a case properly referred to it. The simplest and most accurate way to describe the correct court is to use the serial number and date of the order creating that court. Thus, the referral might read "referred for trial to the summary court-martial appointed by my summary court-martial convening order 1-CY dated 15 January 19CY." This language precisely identifies a particular kind of court-martial and the particular summary court-martial to try the case.

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

V. REFERRAL: SERVICE OF CHARGES		
14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY <u>USS FOK (DD-983)</u>	b. PLACE <u>At sea</u>	c. DATE <u>5 Jul 84</u>
Referred for trial to the <u>SUMMARY</u> court-martial convened by <u>my summary court-martial convening order number 1-84 dated</u>		
<u>1 July</u> , 19 <u>84</u> , subject to the following instructions: <u>none</u>		
By _____ of _____ <small>Command or Order</small>		
<u>Able B. Seamed</u> <small>Typed Name of Officer</small>	<u>Commanding Officer</u> <small>Official Capacity of Officer Signing</small>	
<u>Commander, USN</u> <small>Grade</small>		
<u>Able B. Seamed</u> <small>Signature</small>	14-9	

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

B. Preliminary preparation. Upon receipt of the charges and accompanying papers, the summary court-martial officer should begin preparation for trial. The charge sheet should be carefully examined, and all obvious administrative, clerical, and typographical errors corrected. R.C.M. 1304. The summary court-martial officer should initial each correction he makes on the charge sheet. If the errors are so numerous as to require preparation of a new charge sheet, reswearing of the charges and rereferral is required. In this connection, Article 30, UCMJ, requires that the person who swears to the charges be subject to the UCMJ. In addition, the accuser must either have knowledge of or have investigated the charges and swear that the charges are true in fact to the best of his/her knowledge and belief. The accuser may rely upon the results of an investigation conducted by others in preferring charges. The oath that the accuser takes must be administered by a commissioned officer authorized to administer such oaths [the form of the oath is found in R.C.M. 307(b)]. If the summary court-martial officer changes an existing specification to include any new person, offense, or matter not fairly included in the original specification, R.C.M. 603 requires the new specification to be resworn and rereferred. The summary court-martial officer should continue his examination of the charge sheet to determine the correctness and completeness of the information on pages 1 and 2 thereof:

1. The accused's name, social security number, rate, unit, and pay grade;
2. pay per month;
3. initial date and term of current service;
4. data as to restraint, including the correct type and duration of pretrial restraint;
5. signature, rank or rate, and armed force of the accuser;
6. signature and authority of the officer who administered the oath to the accuser;
7. date of receipt of sworn charges by the officer exercising summary court-martial jurisdiction (important as it stops the running of the statute of limitations);
8. block V, referring charge(s) to a specific summary court-martial for trial (compare with convening order to ensure proper referral); and
9. the charge(s) and specification(s). Check for proper form and determine the elements of the offense. "Elements" are facts which must be proved in order to convict the accused of an offense. Part IV, MCM, 1984, contains some guidance in this respect, but for more detailed guidance consult the Military Judge's Benchbook, DA Pam. 27-9. The summary court-martial

officer should also review the evidence relating to the charges. Problems in connection with proof of the charges should be brought to the attention of the convening authority.

C. Pretrial conference with accused. After initial review of the court-martial file, the summary court-martial officer should meet with the accused in a pretrial conference. The accused's right to counsel is discussed later in this chapter. If the accused is represented by counsel, all dealings with the accused should be conducted through his counsel. Thus, the accused's counsel, if any, should be invited to attend the pretrial conference. At the pretrial conference, the summary court-martial officer should follow the suggested guide found in appendix 9, MCM, 1984, and should document the fact that all applicable rights were explained to the accused by completing blocks 1, 2 and 3 of the form for the record of trial by summary court-martial found at appendix 15, MCM, 1984.

1. Purpose. The purpose of the pretrial conference is to provide the accused with information concerning the nature of the court-martial, the procedure to be used, and his rights with respect to that procedure. It cannot be overemphasized that no attempt should be made to interrogate the accused or otherwise discuss the merits of the charges. The proper time to deal with the merits of the accusations against the accused is at trial. The summary court-martial officer should provide the accused with a meaningful and thorough briefing in order that the accused fully understands the court-martial process and his rights pertaining thereto. This effort will greatly reduce the chances of post-trial complaints, inquiries, and misunderstandings.

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

a. That the officer has been detailed by the convening authority to conduct a summary court-martial;

b. that the convening authority has referred certain charge(s) and specification(s) to the summary court for trial. (The summary court-martial officer should serve a copy of the charge sheet on the accused, and complete the last block on page 2 of the charge sheet noting service on the accused. For example:

15	
On <u>8 July</u> , 19 <u>84</u> , I (caused to be) served a copy hereof on <u>(attach)</u> the above named accused.	
<u>John H. Smith</u> <small>Typed Name of Trial Counsel</small>	<u>Lieutenant, JAGC, USN</u> <small>Grade or Rank of Trial Counsel</small>
<u>John H. Smith</u> <small>Signature</small>	
<small>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.</small>	

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

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

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

The accused should then be advised that he has the following legal rights:

- (1) The right to refuse trial by summary court-martial;
- (2) the right to plead "not guilty" to any charge and/or specification and thereby place the burden of proving his guilt, beyond reasonable doubt, upon the government;
- (3) the right to cross-examine all witnesses called to testify against him or to have the summary court-martial officer ask a witness questions desired by the accused;
- (4) the right to call witnesses and produce any competent evidence in his own behalf and that the summary court-martial officer will assist the accused in securing defense witnesses or other evidence which the accused wishes presented at trial;
- (5) the right to remain silent, which means that the accused cannot be made to testify against himself nor will the accused's silence count against him in any way should he elect not to testify;
- (6) rights concerning representation by counsel (see subparagraph 3 below);
- (7) that if the accused refuses summary court-martial the convening authority may take steps to dismiss the case or refer it to trial by special or general court-martial;
- (8) the right, if the accused is found guilty, to call witnesses or produce other evidence in extenuation or mitigation and the right to remain silent or to make a sworn or unsworn statement to the court; and
- (9) the maximum punishment which the summary court-martial could adjudge if the accused is found guilty of the offense(s) charged.

(a) E-4 and below. The jurisdictional maximum sentence which a summary court-martial may adjudge in the case of an accused who, at the time of trial, is in paygrade E-4 or below extends to reduction to the lowest paygrade (E-1); forfeiture of two-thirds of one-month's pay [convening authority may apportion collection over three months; JAGMAN, § 0145a(4)] or a fine not to exceed two-thirds of one month's pay; confinement 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. Also, if the accused is attached to or embarked in a vessel and is in paygrade E-3 or below, he may be sentenced to serve 3 days confinement on bread and water/diminished rations and 24 days confinement in lieu of 30 days confinement. R.C.M. 1301(d)(1).

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

### 3. Advice to accused regarding counsel

a. In 1972, the Supreme Court held, with respect to "criminal prosecutions," that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor or felony, unless he was represented by counsel at this trial." Argersinger v. Hamlin, 407 U.S. 25, 37, 92 S.Ct. 2066, 2077, 32 L.Ed.2d 530 (1972).

b. The Supreme Court in Middendorf v. Henry, 425 U.S. 25, 96 S.Ct. 1281, 47 L.Ed.2d 556 (1976), held that a summary court-martial was not a "criminal prosecution" within the meaning of the sixth amendment, reasoning that the possibility of loss of liberty does not, in and of itself, create a proceeding at which counsel must be afforded. Rather, it reasoned that a summary court-martial was a brief, nonadversary proceeding, the nature of which would be wholly changed by the presence of counsel. It found no factors that were so extraordinarily weighty as to invalidate the balance of expediency that has been struck by Congress.

c. In United States v. Booker, 5 M.J. 238 (C.M.A. 1977), reconsidered at 5 M.J. 246 (C.M.A. 1978), the C.M.A. considered the Supreme Court's decision in Middendorf and concluded that there existed no right to counsel at a summary court-martial.

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

#### e. Booker warnings

(1) Although holding that an accused had no right to counsel at a summary court-martial, the C.M.A. ruled in Booker, supra, that if

an accused was not given an opportunity to consult with independent counsel before accepting a summary court-martial, the summary court-martial will be inadmissible at a subsequent trial by court-martial. The term "independent counsel" has been interpreted to mean a lawyer qualified in the sense of Article 27(b), UCMJ, who, in the course of regular duties, does not act as the principle legal advisor to the convening authority. (Note that these provisions mirror the provisions with respect to the right to consult with counsel prior to NJP). See Chapter IV, supra.

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

(a) The accused was advised of his right to confer with counsel prior to deciding to accept trial by summary court-martial;

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

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

(3) If an accused has been properly advised of his right to consult with counsel and to refuse trial by summary court-martial, as well as the legal ramifications of these decisions, his elections and/or waivers in this regard should be made in writing and should be signed by the accused. Recordation of the advice/waiver should be made on page 13 (Navy) or page 11 (Marine Corps) of the accused's service record with a copy attached to the record of trial. The forms found at pages 14-16 to 14-18, *infra*, may be utilized to comply with the requirements of United States v. Booker, supra. The "Acknowledgement of Rights and Waiver," properly completed, contains all the necessary advice to an accused and, properly executed, will establish a voluntary, knowing, and intelligent waiver of the accused's right to consult with counsel and/or his right to refuse trial by summary court-martial. The "Waiver of Right to Counsel" may be used to establish a voluntary, knowing, and intelligent waiver of counsel at a summary court-martial. Should the accused elect to waive his rights, but refuse to sign these forms, this fact should be recorded on page 13 of the service record with a copy attached to the record of trial.

(4) Assuming that the requirements of Booker have been complied with (proper advice and recordation of election/waivers), evidence of the prior summary court-martial will be admissible at a later trial by court-martial as evidence of the character of the accused's prior service pursuant to R.C.M. 1001(b)(2). Unless the accused was actually represented by counsel at his summary court-martial or affirmatively rejected an offer to provide counsel, however, the summary court-martial would not be considered a "criminal conviction" and would not be admissible as a prior conviction under R.C.M. 1001(b)(3), nor for purposes of impeachment under Mil.R.Evid. 609, MCM, 1984. See United States v. Booker, 3 M.J. 443, 448 (C.M.A. 1977). See also United States v. Rivera, 6 M.J. 535 (N.C.M.R. 1978); United States v. Kuehl, 9 M.J. 850 (N.C.M.R. 1980); United States v. Cofield, 11 M.J. 422 (C.M.A. 1981). While these cases would seem to allow a prior summary court-martial's



use as a "conviction" to trigger the increased punishment provisions of R.C.M. 1003(d) if the accused had been actually represented by counsel or had rejected the services of counsel provided to him, the discussion following R.C.M. 1003(d) opines that convictions by summary court-martial may not be used for this purpose. As the discussion and analysis sections of MCM, 1984, have no binding effect and represent only the drafters' opinions, this issue remains unresolved.

**SUMMARY COURT-MARTIAL  
ACKNOWLEDGMENT OF RIGHTS AND WAIVER**

I, \_\_\_\_\_, assigned \_\_\_\_\_, 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

Confinement for one month

45 days hard labor without confinement

60 days restriction

Forfeiture of 2/3 pay for one month

Reduction to the lowest pay grade

On E-5 and above

60 days restriction

Forfeiture of 2/3 pay for one month

Reduction to next inferior 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.

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Signature of accused and date

---

Signature of witness and date

## WAIVER OF RIGHT TO COUNSEL

### SUMMARY COURT-MARTIAL

I have been advised by the summary court-martial officer that I cannot be tried by summary court-martial without my consent. I have also been advised that if I consent to trial by summary court-martial I may be represented by civilian counsel provided at my own expense. If I do not desire to be represented by civilian counsel provided at my own expense, a military lawyer may be appointed to represent me upon my request, if such appearance will not unreasonably delay the proceedings and if military exigencies do not preclude it. It has also been explained to me that if I am represented by a lawyer (either civilian or military) at the summary court-martial, or if I waive (give up) the right to be represented by a lawyer, the summary court-martial will be considered a criminal conviction and will be admissible as such at any subsequent court-martial. On the other hand, if I request a military lawyer to represent me and a military lawyer is not available to represent me, or is not provided, and I am not represented by a civilian lawyer, the results of the court-martial will not be admissible as a prior conviction at any subsequent court-martial. I further understand that the maximum punishment which can be imposed in my case will be the same whether or not I am represented by a lawyer. Understanding all of this, I consent to trial by summary court-martial and I waive (give up) my right to be represented by a lawyer at the trial.

\_\_\_\_\_  
Signature of Summary Court-Martial

\_\_\_\_\_  
Signature of Accused

\_\_\_\_\_  
Date

\_\_\_\_\_  
Typed Name, Rank, Social  
Security Number of Accused

#### D. Final pretrial preparation

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

An orderly trial procedure should be planned to include a chronological presentation of the facts. The admissibility and authenticity of all known evidentiary matters should be determined and numbers assigned all exhibits to be offered at trial. These exhibits, when received at trial, should be marked "received in evidence" and numbered (prosecution exhibits) or lettered (defense exhibits). The evidence reviewed should include not only that contained in the file as originally received, but also any other relevant evidence discovered by other means. The summary court-martial officer has the duty of insuring that all relevant and competent evidence in the case, both for and against the accused, is presented. It is the responsibility of the summary court-martial officer to insure that only legal and competent evidence is received and considered at the trial. Only legal and competent evidence received in the presence of the accused at trial can be considered in determining the guilt or innocence of the accused. The Military Rules of Evidence apply to the summary court-martial and must be followed.

2. Subpoena of witnesses. The summary court-martial is authorized by Article 46, UCMJ, and R.C.M.'s 703(e)(2)(C) and 1301(f) to issue subpoenas to compel the appearance at trial of civilian witnesses. In such a case, the summary court-martial officer will follow the same procedure detailed for a special or general court-martial trial counsel in R.C.M. 703(c) and JAGMAN, § 0137. Appendix 7 of the Manual for Courts-Martial, 1984, contains an illustration of a completed subpoena while JAGMAN, § 0137 details procedures for payment of witness fees. Depositions may also be used, but the advice of a lawyer should be first obtained. See Article 49, UCMJ; R.C.M. 702.

1405 TRIAL PROCEDURE. See app. 9, MCM, 1984.

1406 POST-TRIAL RESPONSIBILITIES OF THE SUMMARY COURT-MARTIAL

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

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

1. Announce the findings to the accused in open session [R.C.M. 1304(b)(2)(F)(i)];
2. inform the convening authority as soon as practicable of the findings [R.C.M. 1304(b)(2)(F)(v)];
3. prepare the record of trial in accordance with R.C.M. 1305, using the record of trial form in appendix 15, MCM, 1984;
4. cause one copy of the record of trial to be served upon the accused [R.C.M. 1305(e)(1)], and secure the accused's receipt; and
5. forward the original and one copy of the record of trial to the convening authority for his action [R.C.M. 1305(e)(2)].

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

1. Announce the findings and sentence to the accused in open session [R.C.M. 1304(b)(2)(F)(i) and (ii)];
2. advise the accused of the following appellate rights under R.C.M. 1306:
  - a. The right to submit in writing to the convening authority any matters which may tend to affect his decision in taking action (see R.C.M. 1105) and the fact that his failure to do so will constitute a waiver of this right (Additionally, the accused may be informed that he may expressly waive, in writing, his right to submit such written matters [R.C.M. 1105(d)].); and
  - b. the right to request review of any final conviction by summary court-martial by the Judge Advocate General in accordance with R.C.M. 1201(b)(3).
3. if the sentence includes confinement, inform the accused of his right to apply to the convening authority for deferment of confinement [R.C.M. 1304(b)(2)(F)(iii)];
4. inform the convening authority to the results of trial as soon as practicable; such information should include the findings, sentence, recommendations for suspension of the sentence and any deferment request [R.C.M. 1304(b)(2)(F)(v)];
5. prepare the record of trial in accordance with R.C.M. 1305, using the form in appendix 15, MCM, 1984.

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

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

NOTE: The convening authority's action and the review procedures for summary courts-martial are discussed in chapter XIX, infra.

ADDENDA TO TRIAL GUIDE  
SPECIAL EVIDENCE PROBLEM -- CONFESSIONS

NOTE: Before you consider an out-of-court statement of the accused as evidence against him, you must be convinced by a preponderance of the evidence that the statement was made voluntarily and that, if required, the accused was properly advised of his rights. Mil.R.Evid. 304, 305.

A confession or admission is not voluntary if it was obtained through the use of coercion, unlawful influence, or unlawful inducement, including obtaining the statement by questioning an accused without complying with the warning requirements of Article 31(b), UCMJ, and without first advising the accused of his rights to counsel during a custodial interrogation. You must also keep in mind that an accused cannot be convicted on the basis of his out-of-court self-incriminating statement alone, even if it was voluntary, for such a statement must be corroborated if it is to be used as a basis for conviction. Mil.R.Evid. 304(g). If a statement was obtained from the accused during a custodial interrogation, it must appear affirmatively on the record that the accused was warned of the nature of the offense of which he was accused or suspected, that he had the right to remain silent, that any statement he made could be used against him, that he had the right to consult lawyer counsel and have lawyer counsel with him during the interrogation, and that lawyer counsel could be civilian counsel provided by him at his own expense or free military counsel appointed for him. After the above explanation, the accused or suspect should have been asked if he desired counsel. If he answered affirmatively, the record must show that the interrogation ceased until counsel was obtained. If he answered negatively, he should have been asked if he desired to make a statement. If he answered negatively, the record must show that the interrogation ceased. If he affirmatively indicated that he desired to make a statement, the statement is admissible against him. The record must show, however, that the accused did not invoke any of these rights at any stage of the interrogation. In all cases in which you are considering the reception in evidence of a self-incriminating statement of the accused, you should call the person who obtained the statement to testify as a witness and question him substantially as follows:

SCM: (After the routine introductory questions) Did you have occasion to speak to the accused on \_\_\_\_\_?

WIT: (Yes) (No) \_\_\_\_\_.



SCM: Where did this conversation take place and at what time did it begin?

WIT: \_\_\_\_\_.

SCM: Who else, if anyone, was present?

WIT: \_\_\_\_\_.

SCM: What time did the conversation end?

WIT: \_\_\_\_\_.

SCM: Was the accused permitted to smoke as he desired during the period of time involved in the conversation?

WIT: \_\_\_\_\_.

SCM: Was the accused permitted to drink water as he desired during the conversation?

WIT: \_\_\_\_\_.

SCM: Was the accused permitted to eat meals at the normal meal times as he desired during the conversation?

WIT: \_\_\_\_\_.

SCM: Prior to the accused making a statement what, if anything, did you advise him concerning the offense of which he was suspected?

WIT: (I advised him that I suspected him of the theft of Seaman Jones' Bulova wristwatch from Jones' locker in Building 15 on 21 January 1984.)

SCM: What, if anything, did you advise the accused concerning his right to remain silent?

WIT: (I informed the accused that he need not make any statement and that he had the right to remain silent.)

SCM: What, if anything, did you advise the accused of the use that could be made of a statement if he made one?

WIT: (I advised the accused that, if he elected to make a statement, it could be used as evidence against him at a court-martial or other proceeding.)

SCM: Did you ask the accused if he desired to consult with a lawyer or to have a lawyer present?

WIT: (Yes.) (No.)

SCM: (If answer to previous question was affirmative) What was his reply?

WIT: (He stated he did (not) wish to consult with a lawyer (or to have a lawyer present).)

NOTE: If the interrogator was aware that the accused had retained or appointed counsel in connection with the charge(s), then such counsel was required to be given notice of the time and place of the interrogation.

SCM: To your knowledge, did the accused have counsel in connection with the charge(s)?

WIT: (Yes.) (No.)

SCM: (If answer to previous question was affirmative) Did you notify the accused's counsel of the time and place of your interview with the accused?

WIT: (Yes.) (No.)

SCM: What, if anything, did you advise the accused of his rights concerning counsel?

WIT: (I advised the accused that he had the right to consult with a lawyer counsel and have that lawyer present at the interrogation. I also informed him that he could retain a civilian lawyer at his own expense and additionally a military lawyer would be provided for him. I further advised him that any detailed military lawyer, if the accused desired such counsel, would be provided at no expense to him.)

SCM: Did you provide all of this advice prior to the accused making any statement to you?

WIT: (Yes.)

SCM: What, if anything, did the accused say or do to indicate that he understood your advice?

WIT: (After advising him of each of his rights, I asked him if he understood what I had told him and he said he did. (Also, I had him read a printed form containing a statement of these rights and sign the statement acknowledging his understanding of these rights.))

SCM: (If accused has signed a statement of his rights) I show you Prosecution Exhibit #2 for identification, which purports to be a form containing advice of a suspect's rights and ask if you can identify it?

WIT: (Yes. This is the form executed by the accused on \_\_\_\_\_ 19\_\_\_\_. I recognize it because my signature appears on the bottom as a witness, and I recognize the accused's signature, which was placed on the document in my presence.)

SCM: Did the accused subsequently make a statement?

WIT: (Yes.)

SCM: Was the statement reduced to writing?

WIT: (Yes.) (No.)

SCM: Prior to the accused's making the statement, did you, or anyone else to your knowledge, threaten the accused in any way?

WIT: (Yes.) (No.)

SCM: Prior to the accused's making the statement, did you, or anyone else to your knowledge, make any promises of reward, favor, or advantage to the accused in return for his statement?

WIT: (Yes.) (No.)

SCM: Prior to the accused's making the statement, did you, or anyone else to your knowledge, strike or otherwise offer violence to the accused should he not make a statement?

WIT: (Yes.) (No.)

SCM: (If the accused's statement was reduced to writing) Describe in detail the procedure used to reduce the statement in writing.

WIT: \_\_\_\_\_.

SCM: Did the accused at any time during the interrogation request to exercise any of his rights?

WIT: (Yes.) (No.)

NOTE: If the witness indicates that the accused did invoke any of his rights at any stage of the interrogation, it must be shown that the interrogation ceased at that time and was not continued until such time as there had been compliance with the request of the accused concerning the rights invoked. If the witness testifies that he obtained a written statement from the accused, he should be asked if and how he can identify it as a written statement of the accused. When a number of persons have participated in obtaining a statement, you may find it necessary to call several or all of them as witnesses in order to inquire adequately into the circumstances under which the statement was taken.

SCM: I now show you Prosecution Exhibit 3 for identification, which purports to be a statement of the accused, and ask if you can identify it?

WIT: (Yes. I recognize my signature and handwriting on the witness blank at the bottom of the page. I also recognize the accused's signature on the page.)

SCM: (To accused, after permitting him to examine the statement when it is in writing) The Uniform Code of Military Justice provides that no person subject to the Code may compel you to incriminate yourself or answer any question which may tend to incriminate you. In this regard, no person subject to the Code may interrogate or request any statement from you if you are accused or suspected of an offense without first informing you of the nature of the offense of which you are suspected and advising you that you need not make any statement regarding the offense of which you are accused or suspected; that any statement you do make may be used as evidence against you in a trial by court-martial; that you have the right to consult with lawyer counsel and have lawyer counsel with you during the interrogation; and that lawyer counsel can be civilian counsel provided by you or military counsel appointed for you at no expense to you. Finally, any statement obtained from you through the use of coercion, unlawful influence, or unlawful inducement, may not be used in evidence against you in a trial by court-martial. In addition, any statement made by you that was actually the result of any promise of reward or advantage, or that was made by you after you had invoked any of your rights at any time during the interrogation, and your request to exercise those rights was denied, is inadmissible and cannot be used against you. Before I consider receiving this statement in evidence, you have the right at this time to introduce any evidence you desire concerning the circumstances under which the statement was obtained or concerning whether the statement was in fact made by you. You also have the right to take the stand at this time as a witness for the limited purpose of testifying as to these matters. If you do that, whatever you say will be considered and weighed as evidence by me just as is the testimony of other witnesses on this subject. I will have the right to question you upon your testimony, but if you limit your testimony to the circumstances surrounding the taking of the statement or as to whether the statement was in fact made by you, I may not question you on the subject of your guilt or innocence, nor may I ask you whether the statement is true or false. In other words, you can only be questioned upon the issues concerning which you testify and upon your worthiness of belief, but not upon anything else. On the other hand, you need not take the witness stand at all. You have a perfect right to remain silent, and the fact that you do not take the stand yourself will not be considered as an admission by you that the statement was made by you under circumstances which would make it admissible or that it was in fact made by you. You also have the right to cross-examine this witness concerning his testimony, just as you have that right with other witnesses, or, if you prefer, I will cross-examine him for you along any line of inquiry you indicate. Do you understand your rights?

ACC: \_\_\_\_\_.

SCM: Do you wish to cross-examine this witness?

ACC: \_\_\_\_\_.

SCM: Do you wish to introduce any evidence concerning the taking of the statement or concerning whether you in fact made the statement?

ACC: \_\_\_\_\_.

SCM: Do you wish to testify yourself concerning these matters?

ACC: \_\_\_\_\_.

SCM: Do you have any objection to my receiving Prosecution Exhibits 2 and 3 for identification into evidence?

ACC: (Yes, sir (stating reasons).) (No, sir.)

SCM: (Your objection is sustained.)

--  
(Your objection is overruled. These documents are admitted into evidence as Prosecution Exhibits 2 and 3.)

--  
(There being no objection, these documents are admitted into evidence as Prosecution Exhibits 2 and 3.)

NOTE: If the accused's statement was given orally, rather than in writing, anyone who heard the statement may testify as to its content, if all requirements for admissibility have been met.

**SAMPLE INQUIRY INTO THE FACTUAL BASIS OF A PLEA  
OF GUILTY TO THE OFFENSE OF UNAUTHORIZED ABSENCE**

1. **Assumption.** Assume the accused has entered pleas of guilty to the following charge and specification:

**Charge:** Violation of the Uniform Code of Military Justice, Article 86

**Specification:** In that Seaman Virgil A. Tweedy, U.S. Navy, on active duty, Naval Justice School, Newport, Rhode Island, did, on or about 5 July 19-- , without authority, absent himself from his unit, to wit: Naval Justice School, Newport, Rhode Island, and did remain so absent until on or about 23 July 19-- .

2. **Procedure.** The summary court-martial officer, after he has completed the inquiry indicated in the TRIAL GUIDE as to the elements of the offense, should question the accused substantially as follows:

**SCM:** State your full name and rank.

**ACC:** Virgil Armond Tweedy, Seaman.

**SCM:** Are you on active duty in the U.S. Navy?

**ACC:** Yes, sir.

**SCM:** Are you the same Seaman Virgil A. Tweedy who is named in the charge sheet?

**ACC:** Yes, sir.

**SCM:** Were you on active duty in the U.S. Navy on 5 July 19--?

**ACC:** Yes, sir.

**SCM:** What was your unit on that date?

**ACC:** The Naval Justice School.

**SCM:** Is that located in Newport, Rhode Island?

**ACC:** Yes, sir.

SCM: Tell me in your own words what you did on 5 July that caused this charge to be brought against you.

ACC: I stayed at home.

SCM: Had you been at home on leave or liberty?

ACC: Yes, sir.

SCM: Which one was it?

ACC: I had liberty on the 4th of July.

SCM: When were you required to report back to the Naval Justice School?

ACC: At 0800 on the 5th of July.

SCM: And did you fail to report on 5 July 19--?

ACC: Yes, sir.

SCM: When did you return to military control?

ACC: On 23 July 19--.

SCM: How did you return to military control on that date?

ACC: I took a bus to Newport and turned myself in to the duty officer at the Naval Justice School.

SCM: When you failed to report to the Naval Justice School on 5 July, did you feel you had permission from anyone to be absent from your unit?

ACC: No, sir.

SCM: Where were you during this period of absence?

ACC: I was at home, sir.

SCM: Where is your home?

ACC: In Blue Ridge, West Virginia.

SCM: Is that where you were for this entire period?

ACC: Yes, sir.

SCM: During this period, did you have any contact with military authorities? By "military authorities" I mean not only members of your unit, but anyone in the military.

ACC: No, sir.

SCM: During this period, did you go on board any military installations?

ACC: No, sir.

SCM: Were you sick or hurt or in jail, or was there anything which made it physically impossible for you to return?

ACC: No, sir.

SCM: Could you have reported to the Naval Justice School on 5 July 19-- if you had wanted to?

ACC: Yes, sir.

SCM: During this entire period, did you believe you were an unauthorized absentee from the Naval Justice School?

ACC: Yes, sir; I knew I was UA.

SCM: Do you know of any reason why you are not guilty of this offense?

ACC: No, sir.



## CHAPTER XV

### TRIAL BY COURTS-MARTIAL GENERALLY AND THE ART. 39(a) SESSION (West's Key Number: MILJUS Key Numbers 1210-1278)

#### 1501 INTRODUCTION

A. There are three types of sessions occurring in a trial by court-martial with military judge and members:

1. The art. 39(a) session where counsel, the accused, the military judge, and reporter are present, but the members are absent;
2. open sessions of the trial where all participants, including members, are present; and
3. closed sessions of the trial at which only the court members are present to deliberate and vote on findings -- and sentence, if the accused is found guilty.

B. 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.

C. 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 art. 39(a) session.

#### 1502 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. R.C.M. 802. 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.

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. R.C.M. 802(e).

#### 1503 CHRONOLOGY OF EVENTS AT TRIAL

A. Preliminary formalities. All trials, whether ultimately to be heard before the members or by judge alone, commence with an art. 39(a) session.

1. Calling the session to order. This is done by the military judge. R.C.M. 803, 901.

2. Announcement of the convening of the court and referral of charges. This is normally done by the trial counsel, who refers to the convening order, any modifications thereto, and indicates the date of service of charges upon the accused.

3. Announcement of persons present at the art. 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.

4. Swearing of the reporter, if not previously sworn. Art. 42(a), UCMJ, sets forth the requirement for swearing the reporter. Section 0126d of the JAG Manual prescribes that a reporter may be given a one-time oath.

5. Affirmation by trial counsel of the qualifications (Art. 27(b), UCMJ certified) and status as to oaths (Art. 42(a), UCMJ) of all members of the prosecution.

6. Statement by defense counsel of his or her qualifications (Art. 27(b), UCMJ) and status as to oaths (Art. 42(a), UCMJ) and introduction of individual military counsel and/or civilian counsel.

7. A personal inquiry by the military judge of the accused to determine whether the accused understands his rights to counsel as set forth in Art. 38(b), UCMJ, and R.C.M. 901(d)(4).

8. Swearing of military judge and detailed counsel, if not sworn previously. Individual military counsel who is certified in accordance with Art. 27(b), UCMJ, but not previously sworn, and/or civilian counsel, must be sworn in each case. JAGMAN, § 0126.

9. The stating by trial counsel of the general nature of the charges.

10. Disclosure of grounds for challenge of the military judge and challenge of the military judge for cause, if any.

11. Inquiry by the military judge of the accused to determine that the accused understands his right to request trial by military judge alone.

12. 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.

B. Additional proceedings heard at an art. 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.

1. Arraignment. Arraignment procedure includes the reading of the charges by trial counsel, 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. See Art. 35, UCMJ, and R.C.M. 602.

b. Arraignment is complete when the accused is called upon to plead by the military judge. R.C.M. 904, discussion. (The pleas are not part of the arraignment.)

2. 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. See generally R.C.M. 905-907, 909.

3. Entry of the pleas of the accused.

4. If the accused pleads guilty to any offense, including any lesser included offense, the judge conducts an inquiry into the voluntariness of the accused's plea. R.C.M. 910(c); United States v. Care, 18 C.M.A. 535, 40 C.M.R. 247 (1969). Whether or not the judge enters findings at this stage depends on whether the government will be presenting evidence on the merits (as where the accused has plead guilty to an LIO and the government intends to prove the greater offense alleged).

5. The military judge may also resolve other evidentiary and procedural matters at the art. 39(a) session to expedite the subsequent trial on the merits.

C. Convening the court with members at the conclusion of the art. 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. R.C.M. 911.

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. R.C.M. 912.

6. Announcement by the military judge of the prior arraignment and pleas of the accused.

D. Trial on the merits

1. Opening statements by counsel. R.C.M. 913(b).

2. Presentation of evidence by counsel. R.C.M. 913(c).

3. Final argument of counsel. R.C.M. 919.

4. Instructions on findings by the military judge. R.C.M. 920.

5. Closing the court for deliberations and voting by the members on the issue of the guilt or innocence of the accused. R.C.M. 921.

6. Announcement, in open court, of the findings of the court members. R.C.M. 922.

**E. Sentencing procedure**

1. Matters presented by the prosecution. R.C.M. 1001.
  - 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. R.C.M. 1001(a). This advice, called the allocution rights, must be given. United States v. Hawkins, 2 M.J. 23 (C.M.A. 1976), but failure to give complete advice is not necessarily prejudicial error. United States v. Barnes, 6 M.J. 356 (C.M.A. 1979); United States v. Christenson, 12 M.J. 875 (N.M.C.M.R. 1982).
3. Presentation of matters in extenuation and mitigation by the defense. R.C.M. 1001(c).
4. Arguments of counsel on sentence. R.C.M. 1001(g).
5. Instructions on sentence and voting procedure by the military judge. R.C.M. 1005.
6. Closing the court for the members to deliberate and vote on sentence. R.C.M. 1006.
7. Announcement in open court of the sentence arrived at by the members. R.C.M. 1007.

1504 THE ART. 39(a) SESSION. Art. 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 Art. 35, UCMJ. R.C.M. 803 makes it clear that the art. 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 art. 39(a) sessions called by the military judge to dispose of matters prior to assembly of the court. However, the military judge may call art. 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 art. 39(a) sessions. Further, R.C.M. 803 and 1102 provide that art. 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 speedy trial or allegations of misconduct by trial participants.

1505 PRESENCE OF THE ACCUSED AND PUBLIC TRIAL  
(West KeyNumber: MILJUS Key Number 1227)

A. Art. 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. R.C.M. 804.

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, 20 C.M.A. 504, 43 C.M.R. 344 (1971), 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. See R.C.M. 804(b), discussion.

c. In United States v. Staten, 21 C.M.A. 493, 45 C.M.R. 267 (1972), 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. But see United States v. Johnson, 7 M.J. 396 (C.M.A. 1979); United States v. Ellison, 13 M.J. 90 (C.M.A. 1982). In United States v. Peebles, 3 M.J. 177 (C.M.A. 1977), 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, 2 C.M.A. 230, 8 C.M.R. 30 (1953), 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. See also United States v. Byszczyski, 8 M.J. 540 (N.C.M.R. 1979); United States v. Minter, 8 M.J. 867 (N.C.M.R. 1980).

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 is normally accomplished by offering an entry to this effect from the service record of the accused. United States v. Day, 48 C.M.R. 627 (N.C.M.R. 1974). Mere assertions by defense counsel that the absence is authorized or involuntary are insufficient to rebut the presumption raised by admissible service record entries. United States v. Baker, No. 74-0550 (N.C.M.R. 7 May 1974). R.C.M. 804(b), discussion.

f. In United States v. Nixon, No. 79-0908 (N.C.M.R. 15 Sep 1980), the accused argued that his absence was unauthorized but not voluntary due to duress. The Navy Court of Military Review rejected the argument on a factual determination that the accused was not acting on duress. In United States v. Knight, 7 M.J. 671 (A.C.M.R. 1979), however, 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.

## 2. Temporary absence from trial

a. In United States v. Goodman, 31 C.M.R. 397, 405 (N.B.R. 1961), 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. See R.C.M. 804(b), discussion.

b. The right of an accused to be present during all phases of his trial is found in the sixth amendment. United States v. Cook, *supra*. When an accused is in custody, there is a substantial question as to whether he may voluntarily waive his presence. See Diaz v. United States, 233 U.S. 443 (1912); Bustamante v. Eyman, 456 F.2d 269, (9th Cir., 1972).

3. Disruptive accused. Removal of a disruptive accused from the courtroom is not violative of the accused's sixth amendment rights. Illinois v. Allen, 397 U.S. 337 (1970). The Supreme Court stated that there are three constitutionally permissible means for a trial judge to handle a disruptive accused: "(1) bind and gag him; (2) cite him for contempt; and (3) take him out of the courtroom until he promises to conduct himself properly." *Id.* at 344. R.C.M. 804(b) also permits removal because of disruptive behavior. See United States v. Henderson, 11 C.M.A. 556, 29 C.M.R. 372 (1960), where the C.M.A. held that use of manacles was proper where the accused's behavior in pretrial confinement was violent and unpredictable. 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. Compare United States v. Gentile, 1 M.J. 69 (C.M.A. 1975) and United States v. West, 12 C.M.A. 670, 31 C.M.R. 256 (1962). The discussion following R.C.M. 804(b) provides practical guidance for dealing with disruptive accuseds.

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, 18 C.M.A. 54, 39 C.M.R. 54 (1968), 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, 14 C.M.A. 14, 33 C.M.R. 226 (1963), 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.

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. See Mil.R.Evid. 412(c), 505(i) and (j), and 506(i). A comprehensive discussion and citations of authority on this issue can be found in United States v. Grunden, 2 M.J. 116 (C.M.A. 1977). ("In excising the public from the trial, the trial judge employed an ax in place of the constitutionally required scalpel." *Id.* at 120.) See also United States v. Zarnecki, 10 M.J. 570 (A.F.C.M.R. 1980); United States v. Hershey, 17 M.J. 973 (A.C.M.R. 1984).

#### 1506 INQUIRIES BY THE MILITARY JUDGE PRIOR TO ARRAIGNMENT

A. Accused's understanding of his rights to counsel. (West Key Number: MILJUS Key Numbers 1231 and 1423)

1. The Donohew inquiry. The accused may waive any or all of his rights to the various types of counsel under Art. 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 art. 38(b). United States v. Donohew, 18 C.M.A. 149, 39 C.M.R. 149 (1969). 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. United States v. Fortier, 19 C.M.A. 149, 41 C.M.R. 149 (1969); United States v. Bowman, 20 C.M.A. 119, 42 C.M.R. 311 (1970).



2. The Donohew inquiry has been incorporated into R.C.M. 901(d)(4), which now 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. United States v. Kinard, 21 C.M.A. 300, 45 C.M.R. 74 (1972); United States v. Jordan, 22 C.M.A. 164, 46 C.M.R. 164 (1973);

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 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." United States v. O'Dell, 19 C.M.A. 37, 41 C.M.R. 37 (1969). The Navy court has also condemned the practice but will test for prejudice to ensure that the proper advice was given. United States v. Velis, 7 M.J. 699 (N.C.M.R. 1979). 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. R.C.M. 901(d)(4)(D).

B. Accused's request to be tried by military judge alone. (West Key Number: MILJUS Key Numbers 874-76)

1. Requirements for trial by military judge alone. Under art. 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 art. 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. R.C.M. 903(c). United States v. Butler, 14 M.J. 72 (C.M.A. 1982).

2. Capital cases. A general court-martial composed of a military judge alone does not have jurisdiction to try a capital case. Art. 18, UCMJ; R.C.M. 903.

3. Timeliness of request. Art. 16, UCMJ, requires the request to be made prior to assembly. Request may be made prior to trial, at an art. 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. R.C.M. 903. Although the request should be timely, the C.M.A. indicated, in United States v. Morris, 23 C.M.A. 319, 49 C.M.R. 653 (1975), 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 . . . ." See also United States v. Cunningham, 6 M.J. 559 (N.C.M.R. 1978) (the accused submitted a request for trial by military judge alone after the judge had accepted the accused's plea and entered findings, but before assembly. N.C.M.R. viewed the request as timely); United States v. Strow, 10 M.J. 647 (N.C.M.R. 1980).

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. See MCM, 1984, app. 8.

5. Inquiry into request. Where the accused has requested trial by military judge alone, the military judge should determine whether it is understandingly made. R.C.M. 903(c)(2). 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. United States v. Jenkins, 20 C.M.A. 112, 42 C.M.R. 304 (1970). See also United States v. Turner, 20 C.M.A. 167, 43 C.M.R. 7 (1970); United States v. Parkes, 5 M.J. 489 (C.M.A. 1978).

6. Ruling on the request. The accused does not have an absolute right to trial by military judge alone, since Art. 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 factfinder. 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. *Id.* See also United States v. Butler, 14 M.J. 72 (C.M.A. 1982). In United States v. Ward, 3 M.J. 365 (C.M.A. 1977), 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 trial counsel, 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, 7 M.J. 332 (C.M.A. 1979), 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, 26 M.J. 30 (C.M.A. 1988), 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.

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. United States v. Wright, 5 M.J. 106 (C.M.A. 1978); United States v. Atwell, 7 M.J. 1011 (N.C.M.R. 1979). In United States v. Thomas, 7 M.J. 299 (C.M.A. 1979), 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. See also United States v. Shackelford, 2 M.J. 17 (C.M.A. 1977); United States v. Schaffner, 16 M.J. 903 (A.C.M.R. 1983).

C. Request for enlisted representation. (West Key Number: MILJUS Key Numbers 871-73)

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. R.C.M. 903(a). A request for enlisted members may be made in writing or orally. R.C.M. 903(b)(1).

2. If the accused indicates that he does not wish enlisted representation, the art. 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. Art. 25(c)(1), UCMJ; R.C.M. 903(c)(1).

4. Art. 25(c), UCMJ, provides that any enlisted member on active duty with the armed forces is eligible to serve on GCMs and SPCMs 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. See also United States v. Tagert, 11 M.J. 677 (N.M.C.M.R. 1981).

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. Art. 25(c)(1), UCMJ; R.C.M. 903(c)(1).

6. Art. 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 art. 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 art. 39(a) session, or, in the absence of such a session, before assembly. R.C.M. 903(d)(1). 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. R.C.M. 903(e). 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. R.C.M. 903(e), discussion.

#### 1507 PLEAS BEFORE COURTS-MARTIAL

A. Types of pleas. There are four types of pleas which may be made before courts-martial: (1) Not guilty, (2) guilty, (3) mixed (i.e., not guilty of the offense charged, but guilty of a lesser included offense), and (4) conditional. R.C.M. 910. If an accused enters an irregular plea or refuses to plead, a not guilty plea will be entered. Art. 45(a), UCMJ; R.C.M. 910(b).

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. R.C.M. 910(b), discussion.

2. Entry of a plea is not a jurisdictional prerequisite for trial. In United States v. Taft, 21 C.M.A. 68, 44 C.M.R. 122 (1972), the accused was arraigned and presented several motions at the conclusion of which trial counsel proceeded to put on the government's case. The C.M.A. held that the provisions of Art. 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.

B. 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. See United States v. Lopez, 20 C.M.A. 76, 42 C.M.R. 268 (1970) (provident guilty plea waives any objection on appeal as to the regularity of the art. 32 investigation). Cf. United States v. Engle, 1 M.J. 387 (C.M.A. 1976).

C. 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. R.C.M. 910(a)(2). The trial counsel is authorized to consent to a conditional plea on behalf of the government. JAGMAN, § 0127b.

D. Guilty pleas. (West Key Number: MILJUS Key Numbers 980-989, 998-1000)

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. Art. 45(b), UCMJ; R.C.M. 910.

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." Art. 45(a), UCMJ; R.C.M. 910. The "record of trial must reflect the basis for the refusal . . . ." however; United States v. Williams, 43 C.M.R. 579, 582 (A.C.M.R. 1970).

c. The court should not receive a plea of guilty when the accused has refused counsel. R.C.M. 910(c)(2), discussion.

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. United States v. Care, 18 C.M.A. 535, 40 C.M.R. 247 (1969). 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. R.C.M. 910.

a. Where guilty plea constitutes waiver. A voluntary plea of guilty waives nonjurisdictional defects occurring in earlier stages of the trial. The C.M.A. 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. United States v. Johnson, 20 C.M.A. 592, 44 C.M.R. 22 (1971); United States v. Hamil, 35 C.M.R. 82 (C.M.A. 1964). 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. United States v. Mirabel, 48 C.M.R. 803 (A.C.M.R. 1974); United States v. McIver, 4 M.J. 900 (N.C.M.R. 1978); United States v. Dixon, 8 M.J. 858 (N.C.M.R. 1980). United States v. Peters, 11 M.J. 875 (N.M.C.M.R. 1981) (incorrect assurance by MJ that issue would be preserved); United States v. Higa, 12 M.J. 1008 (A.C.M.R. 1983) (incorrect assurance by MJ that issue would be preserved). But see para. 1107 C (conditional pleas), supra, and para. 1107 I. (confessional stipulations), infra.

McMann v. Richardson, 397 U.S. 759 (1970); Brady v. United States, 397 U.S. 742 (1970); and Park v. North Carolina, 397 U.S. 790 (1970), are holdings of the Supreme Court regarding the constitutional invulnerability of guilty pleas.

b. Where guilty plea is not waiver. In cases involving erroneous denial of speedy trial motions, the C.M.A. has held that a subsequent guilty plea does not waive due process errors. United States v. Davis, 11 C.M.A. 410, 29 C.M.R. 226 (1960); United States v. Schalk, 14 C.M.A. 371, 34 C.M.R. 151 (1964); United States v. Cummings, 17 C.M.A. 376, 38 C.M.R. 174 (1968). Nor does a guilty plea waive an objection to the validity of findings not predicated upon a plea of guilty or as to the sentence. United States v. Engle, 1 M.J. 387 (C.M.A. 1976).

3. 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. R.C.M. 911(h). United States v. Politano, 14 C.M.A. 518, 34 C.M.R. 298 (1964) (court did not abuse its discretion by refusing to allow change of plea to all three charges where court had ruled guilty plea to one charge improvident and accused desired to change plea on two remaining charges because he had been deprived of opportunity to throw himself on mercy of court).

E. 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 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. United States v. Hook, 20 C.M.A. 516, 43 C.M.R. 356 (1971) (military judge failed to fulfill responsibility where defense counsel conducted substantial portion of inquiry). The military judge must elicit the personal response of the accused. United States v. Terry, 21 C.M.A. 442, 45 C.M.R. 216 (1972).

2. In United States v. Care, 18 C.M.A. 535, 40 C.M.R. 247 (1969), 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 [United States v. Bingham, 20 C.M.A. 521, 43 C.M.R. 361 (1971)]; 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 [see United States v. Kilgore, 21 C.M.A. 35, 44 C.M.R. 89 (1971)];

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 [R.C.M. 910(c)(5) always requires that the military judge advise the accused that his answers may later be used against him in a prosecution for perjury or false statement. Where the accused has no independent recollection of the facts constituting the offense, this, in itself, is not grounds for rejection of a guilty plea. The accused may admit the factual basis for the plea based upon his understanding and belief of witnesses. United States v. Butler, 20 C.M.A. 247, 43 C.M.R. 87 (1971); United States v. Lyebis, 20 C.M.A. 475, 43 C.M.R. 315 (1971); United States v. Moglia, 3 M.J. 216 (C.M.A. 1977); R.C.M. 910(e), discussion];

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 (see United States v. Zemartis, 10 C.M.A. 353, 27 C.M.R. 427 (1959) (escalator clauses); United States v. Darusin, 20 C.M.A. 354, 43 C.M.R. 194 (1971) (advice on rehearing);

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 [see chapter XI, supra, for detailed discussion of the military judge's obligation to inquire into the terms of a pretrial agreement; United States v. Green, 1 M.J. 453 (C.M.A. 1976); United States v. King, 3 M.J. 358 (C.M.A. 1977)];

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. United States v. Care, supra. However, failure to do so is not error. United States v. Palos, 20 C.M.A. 104, 42 C.M.R. 296 (1970). Cf. United States v. Lasagni, 8 M.J. 627 (N.C.M.R. 1979) where the Navy court declared that the judge must make an express finding.

It is prejudicial error for the military judge to consider information elicited from the accused during the Care inquiry in assessing the punishment. United States v. Richardson, 6 M.J. 654 (C.M.A. 1978).

For a verbatim example of a Care inquiry, see MCM, 1984, app. 8. Because of continuing developments in this area, the latest case law must be consulted in addition to any trial guide.

#### F. Problems encountered in determining providency

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, 3 M.J. 51 (C.M.A. 1977), 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, 4 M.J. 610 (N.C.M.R. 1977), 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. Cf. United States v. Ponka, 9 M.J. (N.C.M.R. 1980).



b. Forfeitures and fines. In United States v. Brown, 1 M.J. 465 (C.M.A. 1976), 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. See also United States v. Hinkle, 8 M.J. 731 (N.C.M.R. 1979). But see United States v. Williams, 18 M.J. 186 (C.M.A. 1984) (unless the record of trial or pretrial agreement states that the accused knows an adjudged fine may be approved in addition to total forfeitures, the convening authority may not approve the fine). See also United States v. Edwards, 20 M.J. 439 (C.M.A. 1985). See also United States v. Olson, 25 M.J. 293 (C.M.A. 1987). (Accused had the right to withdraw his guilty pleas in light of additional, unanticipated subtraction from pay [after trial, over \$1100 was administratively subtracted from the accused's pay to recoup payment of allegedly false travel vouchers which had been removed from the specifications to which he pled guilty] if he had a good-faith belief that he had fully settled his liability to reimburse the government and if that belief had induced his entry of guilty pleas. Either the accused receives the benefit of the plea bargain which he thought he had entered or he is allowed to withdraw his guilty plea.)

c. Confinement. It is often difficult to determine the maximum term of confinement authorized, because two or more offenses may be multiplicitous for purposes of determining the maximum authorized punishment. See chapter XVIII, *infra*, for a detailed discussion of multiplicity as a limitation on the sentences which courts-martial may lawfully adjudge. 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, 2 M.J. 214 (C.M.A. 1977) -- life versus 10 years

United States v. Bowers, 1 M.J. 200 (C.M.A. 1975) -- 30 years versus 15 years

United States v. Harden, 1 M.J. 258 (C.M.A. 1976) -- 20 years versus 10 years

United States v. Castrillon-Moreno, 7 M.J. 414 (C.M.A. 1979) -- 10 years versus 2 years

United States v. Dowd, 7 M.J. 445 (C.M.A. 1979) -- 7 years versus 2 years

(2) Insubstantial misunderstandings

(a) In United States v. Muir, 7 M.J. 448 (C.M.A. 1979), 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. Sauter, 1 M.J. 1066 (N.C.M.R. 1976), rev'd on other grounds, 5 M.J. 281 (C.M.A. 1977), 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. See also United States v. Walls, 9 M.J. 588 (C.M.A. 1980); United States v. Hunt, 10 M.J. 222 (C.M.A. 1981).

(c) In United States v. Frangoules, 1 M.J. 467 (C.M.A. 1976), where all parties (MJ, TC, DC, and accused) were apparently in disagreement as to the maximum confinement authorized because of multiplicitous 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.)

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. United States v. Leggs, 18 C.M.A. 245, 39 C.M.R. 245 (1969) (where court had ordered inquiry into sanity of accused and board concluded accused had been incompetent at time of first hearing, but was sane at time of offense and capable of standing trial, court erred by accepting plea on defense counsel's assurance that accused was capable of standing trial); United States v. Batts, 19 C.M.A. 521, 42 C.M.R. 123 (1970) (military judge bound to inquire into accused's sanity to determine providence of plea where defense exhibits introduced solely as matter in mitigation indicated accused had been declared incompetent during period of UA by Florida authorities, but that Navy psychiatrists found him sane throughout same period); United States v. Acemoglu, 21 C.M.A. 561, 45 C.M.R. 335 (1972) (issue not raised when accused claimed mental confusion at time of offense, amounting to faulty judgment).

3. Cases where accused desires to plead guilty although maintaining innocence. In North Carolina v. Alford, 400 U.S. 25 (1970), 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.

Art. 45(a), UCMJ, specifically requires the court to reject a guilty plea where the accused claims innocence. United States v. Reeder, 22 C.M.A. 11, 46 C.M.R. 11 (1972). 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.

G. 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. R.C.M. 910(h)(2). 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. United States v. Butler, 20 C.M.A. 247, 43 C.M.R. 87 (1971); United States v. Woodrum, 20 C.M.A. 529, 43 C.M.R. 369 (1971); United States v. Woodley, 20 C.M.A. 357, 43 C.M.R. 197 (1971); United States v. Juhl, 20 C.M.A. 327, 43 C.M.R. 167 (1971); United States v. Clausen, 20 C.M.A. 288, 43 C.M.R. 128 (1971). See also United States v. Jemmings, 1 M.J. 414 (C.M.A. 1976). 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. United States v. Bradley, 7 M.J. 332 (C.M.A. 1979); United States v. Sherrod, 26 M.J. 30 (C.M.A. 1988). If the determination to change the plea occurs before findings no such action is required. United States v. Cooper, 8 M.J. 5 (C.M.A. 1979).

#### H. 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. Art. 39(a)(3), UCMJ; R.C.M. 910; JAGMAN, § 0127.

Where the accused has pleaded guilty to a lesser included offense 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. R.C.M. 910(g)(2).

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. R.C.M. 910(g), discussion.

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. R.C.M. 910(g)(3).

I. 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 (see para. 1107 (D)(2)(a), supra) 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, 3 M.J. 314 (C.M.A. 1977). See also United States v. Aiello, 7 M.J. 99 (C.M.A. 1979). The above rule applies, however, only when the stipulation constitutes a de facto plea of guilty by establishing, directly or by reasonable inference, every criminal element charged. United States v. Taylor, 16 M.J. 882 (A.F.C.M.R. 1983).

J. 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, 6 M.J. 184 (C.M.A. 1979), discusses the dangers inherent in discussing a case with the judge prior to trial. See R.C.M. 802(a), discussion.

CHAPTER XVI  
MILITARY MOTION PRACTICE

1601 RULINGS ON MOTIONS AND OBJECTIONS

A motion is an application to the military judge or president of a special court-martial without a military judge for particular relief. R.C.M. 905, MCM, 1984 [hereinafter R.C.M. \_\_\_\_]. The role of the military judge or the president of a special court-martial without a military judge in ruling on issues presented by motion is set forth in Arts. 51(b), (d), UCMJ, and R.C.M. 801. The following is a distillation of these and other provisions concerning military motion practice.

1. The military judge

a. Sitting alone. The military judge determines all questions of law and fact arising during the trial, makes findings, and, if the accused is convicted, adjudges the sentence.

b. Sitting with members. Any ruling by the military judge upon a question of law, including a motion for a finding of not guilty, or upon any interlocutory question is final. Essentially this means that the military judge rules on all matters except the guilt or innocence of the accused, the factual issue of the mental responsibility of the accused, and the sentence if the accused is convicted. If, however, the defendant raises the issue of his mental responsibility at the time of the offense by motion, the military judge may order a mental examination of the accused under R.C.M. 706. See section 1609, infra.

c. Thus, the ruling of the military judge is final with respect to:

- (1) Challenges;
- (2) all interlocutory questions, objections, and motions generally;
- (3) questions of the defendant's mental capacity to stand trial;
- (4) instructions; and
- (5) continuances.

## 2. President of special court-martial without military judge

a. The membership of the court decides the issue of guilt or innocence and the sentence. The president sits as a member. The membership will also decide challenges, with the president voting as any member would. See chapter XVII, infra.

b. The president rules on all other questions arising at trial as follows:

(1) The president's rulings on question of law are final, except that his ruling on a motion for a finding of not guilty is subject to objection by the other members. Questions of the applicability of a rule of law to an undisputed set of facts are normally questions of law.

(2) The president's rulings on interlocutory questions of fact, including the factual issue of the accused's mental responsibility, are made subject to objection of the other members.

(3) A question may be both interlocutory and a question of fact. The distinction between the two is important because, as noted above, the president of a special court-martial without a military judge rules finally on questions of law, but not on interlocutory questions of fact. In the latter case, he rules subject to the objection of any other member. On mixed questions of fact and law, rulings by the president are subject to objection by a member to the extent that the issue of fact can be isolated and considered separately. R.C.M. 801(e)(5), discussion.

c. When the president rules subject to objection, he gives the members instructions that will enable them to understand the issue and the standards to be applied. If no member objects to the president's ruling, that ruling is final. If there is objection, the court is closed and a vote is taken orally with the president voting as well. The issue is decided by a majority vote. A tie vote on a challenge is a vote to disqualify the member challenged. A tie vote on a motion for a finding of not guilty or on a motion relating to the accused's insanity is a vote against the accused. On all other questions, a tie vote is a determination in favor of the accused. Art. 52(c), UCMJ; R.C.M. 801(e)(3)(B) and (C).

## 1602 POST-ARRAIGNMENT MOTIONS

A. Types of motions in the military. The discussion accompanying R.C.M. 905(a) indicates that defenses or objections raised prior to plea shall be in the form of a motion to dismiss, a motion for appropriate relief, or a motion to suppress. Motions may be either oral or in writing. It is the substance of the motion rather than its form or designation which shall control the relief granted. R.C.M. 905(a).

1. A motion to dismiss is a request to terminate further proceedings as to one or more charges and specifications on grounds capable of resolution without trial of the general issue of guilt. It essentially operates as a bar to trial. R.C.M. 907 categorizes three general grounds for dismissal:

a. Nonwaivable grounds. A charge or specification will be dismissed at any time when it is discovered that:

(1) The court-martial lacked jurisdiction to try the person for the offense; or

(2) the specification failed to state an offense.

b. Waivable grounds. A charge or specification will be dismissed upon motion by the accused prior to the final adjournment of the court-martial if:

(1) The accused has been denied a speedy trial. See R.C.M. 707;

(2) the statute of limitations has run, provided that the accused was aware of his right to assert the statute of limitations as a bar to trial;

(3) the accused has been tried previously by a court-martial or Federal civilian court for the same offense. See R.C.M. 907(b)(2)(C) for exceptions to this rule;

(4) the accused has been pardoned by the President;

(5) the accused has been granted transactional immunity [see Cooke v. Orser, 12 M.J. 335 (C.M.A. 1982)];

(6) constructive condonation of desertion has been established by the unconditional restoration to duty without trial by a general court-martial convening authority who knew of the desertion; or

(7) the accused has been previously punished for the same offense under Arts. 13 or 15, UCMJ, if the offense was minor.

c. Permissible grounds. A specification may be dismissed upon timely motion if:

(1) The specification is so defective that the accused was substantially misled and, in the interest of justice, the trial should proceed without any further delay on the remaining specifications; or

(2) the specification is multiplicitious for findings purposes with another specification and is unnecessary to meet the exigencies of proof.

A motion to dismiss may arise as a result of a successful motion to suppress or motion for appropriate relief or other circumstances which occur during trial. Examples: Granting of a motion for defense witnesses by the military judge, but the convening authority subsequently refuses to adhere to the ruling [United States v. Sears, 20 C.M.A. 380, 43 C.M.R. 220 (1971); United States v. McElhinney, 21 C.M.A. 436, 45 C.M.R. 210 (1972)]; granting a motion that deprives the government of evidence to prove a charge and specification [United States v. Phare, 21 C.M.A. 244, 45 C.M.R. 18 (1972)].

2. Motions for appropriate relief are motions to cure a defect of form or substance that impedes the accused in properly preparing for trial or conducting his defense. R.C.M. 906(a). When the accused has sought relief through a pretrial request to the convening authority and is dissatisfied with the results, he may raise the issue before the military judge by way of a motion for appropriate relief. R.C.M. 906 gives the following nonexclusive list of grounds for appropriate relief.

a. Continuances. A continuance may be granted only by the military judge. See United States v. Mencken, 14 M.J. 10 (C.M.A. 1982).

b. Establishment of a record of denial of individual military counsel or of a denial to retain detailed counsel as associate counsel after the granting of a request for individual military counsel. Although the military judge may not dismiss the charges or prevent further proceedings based on this issue, the defense has the right to establish the facts surrounding the issue for the benefit of appellate review. Additionally, the military judge may grant reasonable continuances until the requested counsel is available, if the denial was based on temporary conditions. R.C.M. 906(b)(2).

c. Correction of defects in the article 32 investigation or article 34 pretrial advice.

d. Amendment of minor defects in charges and specifications. An amendment may be appropriate when the specification is unclear, redundant, inartfully drafted, misnames an accused, laid under the wrong article, or incomplete as to identification of time, place, personnel, etc. See R.C.M. 603(a).

e. Severance of a duplicitous specification into two or more specifications. A duplicitous specification is one which alleges two or more separate offenses.

f. Bill of particulars. The purposes of a bill of particulars are to inform the accused of the nature of the charge with sufficient precision to enable the accused to prepare for trial, to avoid or minimize the danger of surprise at the time of trial, and to enable the accused to plead an acquittal or conviction in bar of another prosecution for the same offense when the specification itself is too vague and indefinite for such purposes.

g. Discovery and production of evidence and witnesses.

h. Relief from illegal pretrial confinement. See chapter XII, supra.

i. Severance of multiple accused.

j. Severance of offenses.

k. Change of place of trial.

l. Determination of multiplicity of offenses for sentencing purposes.



m. Preliminary ruling on admissibility of evidence. Also called a motion in limine, this is a request that certain matters which are ordinarily decided during trial of the general issue be resolved before they arise, outside of the presence of members.

n. Motions relating to mental capacity or responsibility of the accused.

3. A motion to suppress is essentially a request for a determination as to the admissibility of evidence, e.g., a confession or admission of the accused, items seized in a pretrial search, identification of the accused as the result of a lineup. R.C.M. 905(b)(3); Mil.R.Evid. 304, 311, 321. The Military Rules of Evidence use the terms "motion to suppress" and "objection to evidence" synonymously; but note, if the defense fails to raise the admissibility issue prior to pleas and later objects to the evidence, the issue will normally have been waived. R.C.M. 905(b); Mil.R.Evid. 304(d)(2), 311(d)(2), 321(c)(2). Specific areas for motions to suppress under the Mil.R.Evid. are listed below.

a. Involuntary confessions and admissions of the accused. Mil.R.Evid. 304.

b. Statements made by the accused at a mental examination under R.C.M. 706. Mil.R.Evid. 302.

c. Evidence obtained from unlawful searches and seizures. Mil.R.Evid. 311, 312-317.

d. Eyewitness identification as a result of an unlawful lineup or other identification processes. Mil.R.Evid. 321.

e. Other evidentiary issues under the Military Rules of Evidence, Part III, MCM, 1984. Mil.R.Evid. 103. The objection may take the form of a motion to strike. Mil.R.Evid. 103(a)(1).

4. Motion for a finding of not guilty is covered in section 1610, infra.

#### B. Timeliness of motions and waiver

1. Although most motions to dismiss, to suppress, and for appropriate relief are routinely raised before pleas, R.C.M. 905 requires the following motions to be made before pleas are entered:

a. Defenses or objections based on defects (other than jurisdictional defects) in the preferral, forwarding, investigation, or referral of charges;

b. defenses or objections based on defects in the charges and specifications (other than any failure to show jurisdiction or to state an offense);

c. motions to suppress [Mil.R.Evid. 304, 311, and 321 state that motions to suppress must be made prior to submission of pleas or be waived, providing the prosecution has complied with its disclosure obligations. Compare Mil.R.Evid. 304(d)(1) with Mil.R.Evid. 311(d)(1) and 321(c)(1) as to the extent of disclosure required. However, the military judge may permit the motion at any time for good cause shown. If the prosecution has not disclosed the evidence prior to arraignment, the defense may object or move to suppress after it receives timely notice of the evidence and the military judge may take appropriate action in the interest of justice. Motions to suppress are waived by guilty pleas even though timely raised. Mil.R.Evid. 304(d)(5), 311(2), 321(g)];

d. motions for discovery under R.C.M. 701 or for production of witnesses or evidence;

e. motions for severance of charges or accused; and

f. objections based on denial of a request for individual military counsel or for retention of detailed counsel when individual military counsel has been provided.

2. Failure to raise these objections or make the appropriate request prior to pleas will waive the issue unless the military judge, for good cause, grants relief from the waiver. R.C.M. 905(e). The military judge should be liberal in granting relief from strict application of the waiver rule. See United States v. Coffin, 25 M.J. 32 (C.M.A. 1987). The ruling by the military judge on these motions will also be made prior to pleas unless the judge, for good cause, defers the ruling until trial on the merits. The judge, however, shall not defer the ruling if a party's right to appeal is adversely affected thereby. R.C.M. 905(d).

3. Other motions, except lack of jurisdiction or failure of a charge to state an offense, must be raised before the trial is concluded, or are waived. Issues of lack of jurisdiction or failure to allege an offense are never waived. R.C.M. 905(e).

4. The C.M.A. has held that failure to object by timely motion will not waive a deprivation of due process of law. United States v. Cutting, 14 C.M.A. 347, 34 C.M.R. 127 (1964) (right to reasonably available lawyer counsel at an SPCM). United States v. Schalck, 14 C.M.A. 371, 34 C.M.R. 151 (1964) (speedy trial). United States v. Wiedemann, 16 C.M.A. 365, 36 C.M.R. 521 (1966) (statute of limitations, where the accused was convicted of LIO where statute had run (UA) and he was not advised by the law officer (military judge) of his right to plead the statute). United States v. Koch, 17 C.M.A. 79, 37 C.M.R. 343 (1967) (mental capacity of accused at time of trial, where circumstances should have made it apparent to all that the accused's mental state was questionable). United States v. Schilling, 7 C.M.A. 482, 22 C.M.R. 272 (1957) (lacking unusual circumstances, failure to raise former jeopardy at second trial is waiver). See Mil.R.Evid. 103.

5. Rule 34, Uniform Rules of Practice Before Navy-Marine Corps Courts-Martial (JAGMAN, app. A-1-p), requires that the defense counsel, prior to trial, inform the military judge of any motions to be made. Such notice is to be in writing with a copy to the trial counsel. However, Change 1 to the

JAG Manual removed language indicating that motions which were not presented in accordance with Rule 34 would not be entertained except for good cause shown. The reason for the change was that the C.M.A. struck down a virtually identical Army rule in United States v. Kelson, 3 M.J. 139 (C.M.A. 1977). The court reasoned that such a rule was inconsistent with a former MCM provision, paragraph 66b, MCM, 1969 (Rev.), which stated that motions in bar of trial "... should ordinarily be asserted ... before a plea is entered; but failure to assert them at that time does not constitute a waiver of the defense or objection." The court also rejected the government's argument that the Army rule, although not binding, served as an advisory guideline for the military judge. Such a guideline, the court held, would constitute improper interference with the military judge's authority to control the proceedings. Presumably the rule in Kelson remains good law under MCM, 1984.

6. Unless the accused has been permitted to enter a conditional plea of guilty (see chapter XV, *supra*), a plea of guilty will waive any motion, whether or not previously raised, insofar as that motion relates to the factual issue of guilt of the offense to which the plea was made. R.C.M. 910(j).

C. Burden of proof. The general rule, as stated in R.C.M. 801(e)(4) and 905(c), is that the burden rests on the moving party to support by a preponderance of the evidence a motion raising a defense or objection. However, there are exceptions to this rule. See R.C.M. 905(c)(2). Exceptions are as follows.

1. Statute of limitations. If it appears from the charges or evidence that the statute has run, the burden is on the government to show by a preponderance of the evidence that the statute has been tolled, extended, or suspended for one of the reasons listed in Article 43, UCMJ.

2. Confession or admission of the accused. When the defense objects or moves to suppress, the prosecution must establish by a preponderance of the evidence that the accused's statement was made voluntarily. Mil.R.Evid. 304(e). When the military judge has required the defense to state specific grounds for the objection, the burden on the prosecution extends only to the specified grounds. If the defense challenges evidence as being derivative, the prosecution must prove by a preponderance of the evidence that the statement was voluntary or that the challenged evidence was not obtained by use of the statement. Mil.R.Evid. 304(e)(3). Note that, if the accused's statement is admitted into evidence, the military judge will still permit the defense to present evidence as to the voluntariness of the statement and instruct the members that this evidence goes to the weight to be given to the admitted statement. Mil.R.Evid. 304(e)(2).

3. Search and seizure. When the defense makes a timely objection or motion to suppress, the prosecution has the burden of proving by a preponderance of the evidence that the challenged evidence was not obtained as the result of an unlawful search or seizure; except that, where the question of the validity of a consent is involved, the standard of proof is clear and convincing evidence. Mil.R.Evid. 311(e)(1) and 314(e)(5). When the defense has been required by the military judge to state specific grounds for the objection, the prosecution's burden of proof extends only to the specified grounds. Mil.R.Evid. 311(e)(3). See also Lego v. Twomey, 404 U.S. 477 (1972).

4. Illegal pretrial confinement. The burden of persuasion rests upon the defense. See chapter XII, supra.

5. Speedy trial. The prosecution has the burden of establishing that the delay in bringing the accused to trial was not unreasonable. R.C.M. 707, 905(c). See section 1604, infra.

6. Lack of jurisdiction over the person. When raised as an interlocutory question, the prosecution has the burden of establishing, by a preponderance of the evidence, that the accused is subject to the UCMJ. R.C.M. 905(c)(1) and (c)(2)(B). In United States v. Bailey, 6 M.J. 965 (N.C.M.R. 1979), the Navy court, sitting en banc, overruled United States v. Spicer, 3 M.J. 689 (N.C.M.R. 1977), which had held that the standard of proof for resolving the jurisdictional issue where unauthorized absence was alleged was beyond a reasonable doubt. The court concluded that proof of military status must be beyond a reasonable doubt only when that issue is raised on the merits on the ultimate issue of guilt or innocence. When presented to the military judge at the motion stage of the proceedings, the question is interlocutory in nature, and the standard of proof requires only a preponderance of the evidence.

7. Lack of jurisdiction over the offense. The prosecution has the burden of establishing jurisdiction over the offense for which the accused is being tried.

8. Eyewitness identification

a. When the defense objects to an eyewitness identification on the basis of a denial of the right to presence of counsel at the time of the identification (lineup), the prosecution has the burden of proving by a preponderance of the evidence that counsel was present at the lineup or that the accused was advised of the right to presence of counsel and voluntarily and intelligently waived that right prior to the lineup. If the military judge determines that an identification is a result of a lineup conducted without counsel or an appropriate waiver, any later identification by one present at such a lineup is also the result thereof unless the prosecution shows the contrary by clear and convincing evidence. Mil.R.Evid. 321(d)(1).

b. When the defense objects on the issue of an unnecessarily suggestive identification process or other denial of due process regarding eyewitness identification, the prosecution must prove by a preponderance of the evidence that the identification was "not so unnecessarily suggestive, in light of the totality of the circumstances, as to create a very substantial likelihood of irreparable mistaken identity." Mil.R.Evid. 321(d)(2). See also Neil v. Biggers, 409 U.S. 188 (1972); Stovall v. Denno, 388 U.S. 293 (1967). If it is determined that an identification process, although unnecessarily suggestive, did not create a very substantial likelihood of irreparable mistaken identity, a later identification may be admitted if the prosecution proves by clear and convincing evidence that the subsequent identification was not the result of the improper identification. Mil.R.Evid. 321(d)(2). See also Kirby v. Illinois, 406 U.S. 682 (1972).

c. When the defense has been required to state a specific ground for an objection under Mil.R.Evid. 321(c), the prosecution has the burden only as to the ground raised. Mil.R.Evid. 321(d).

9. Command influence. If the accused can show some evidence of unlawful command influence and prejudice, the government must prove, beyond a reasonable doubt, no command influence and/or prejudice. See United States v. Levite, 25 M.J. 334 (C.M.A. 1987).

## 1603 ACTION ON GRANTED MOTIONS

A. Effect of rulings on motions to dismiss. If the motion is denied, the trial will proceed; however, the military judge, on the motion of either party or sua sponte, may reconsider a ruling at any time prior to the conclusion of the trial. R.C.M. 905(f). If a motion is granted that affects a charge and/or a specification under the charge, the accused is not required to plead to that charge or specification.

### B. Government appeal

1. Generally. Art. 62, UCMJ, provides a mode of interlocutory appeals for the government from certain orders or rulings. R.C.M. 908 implements the procedure and states at paragraph (a):

In a trial by a court-martial over which a military judge presides and in which a punitive discharge may be adjudged, the United States may appeal an order or ruling that terminates the proceedings with respect to a charge or specification or which excludes evidence that is substantial proof of a fact material in the proceedings. However, the United States may not appeal an order or ruling that is or amounts to, a finding of not guilty, with respect to the charge or specification.

2. On appeal, the reviewing court must first decide whether the military judge's order or ruling falls within the scope of appealable issues defined in Art. 62, UCMJ. For example, the Court of Military Appeals has held that denying a government continuance request to produce a critical government witness does not amount to an order or ruling that excludes evidence; therefore, the ruling is not appealable under Art. 62, UCMJ. United States v. Browers, 20 M.J. 356 (C.M.A. 1985).

3. Procedure. After an order or ruling which is subject to appeal by the United States, as described above, the trial may not proceed as to the affected specification if the trial counsel requests a delay in order to decide whether to appeal. He has 72 hours in which to make this decision. R.C.M. 908(b). After coordinating with the Director, Appellate Government Division, Navy-Marine Corps Appellate Review Activity, the trial counsel may file a notice of appeal. JAGMAN, § 0131. The notice of appeal is a written document identifying the ruling or order to be appealed and the charges or specifications affected. It should also include a certification signed by the trial counsel that the appeal is not taken for the purpose of delay and, if the order or ruling appealed is one which excludes evidence, that the evidence excluded is substantial proof of a fact material in the proceeding. R.C.M. 908(b)(3).

4. Forwarding. The following documents must be forwarded to the Director, Appellate Government Division, Navy-Marine Corps Appellate Review Activity, who shall make the final decision as to whether the appeal shall be filed:

a. The notice of appeal filed by the trial counsel;

b. an appeal substantially in the form provided in the Rules of Practice and Procedure of the Court of Military Review (see 10 M.J.) including:

(1) A summary of the proceedings;

(2) a statement of facts which were decided by the military judge with respect to the error assigned (The Court of Military Review will only review the appeal with respect to matters of law and will be bound by the factual determinations of the military judge. This is unlike the scope of review available to it when it reviews completed courts-martial. See chapter XIX, infra.);

(3) the error assigned followed by an argument supporting the government's position on each error;

(4) the specific relief requested;

c. an authenticated record of the portion of the trial dealing with the error alleged; and

d. a letter of justification from the trial counsel indicating why the appeal is being taken and describing the anticipated impacts should the military judge's position be upheld. JAGMAN, § 0131.

5. Appellate proceedings. Both parties will be represented by appellate counsel before the Navy-Marine Court of Military Review (N.M.C.M.R.). The appeal will have priority over all other proceedings before the court. Unlike its normal scope of review, N.M.C.M.R. may take action on the appeal only with respect to matters of law. The accused may petition a contrary ruling of N.M.C.M.R. to the Court of Military Appeals within 60 days of receiving notification of the ruling. The Judge Advocate General may certify a contrary ruling to the Court of Military Appeals. R.C.M. 908(c).

1604 SPEEDY TRIAL (MILJUS Key Number 1170)

See chapter XIII, infra.

1605 SEVERANCE - JOINT AND COMMON TRIALS (MILJUS Key Number 1217)

A. Definitions. A joint trial is the trial of two or more accuseds at one trial where the offense charged is one committed by the accuseds acting together pursuant to a common intent and who are charged jointly. R.C.M. 307(c)(5), discussion.

A common trial is the trial of several persons who are separately 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. R.C.M. 601(e)(3); United States v. Payne, 12 C.M.A. 455, 31 C.M.R. 41 (1961); United States v. Respass, 19 C.M.A. 230, 41 C.M.R. 230 (1970) ("substantially" same evidence justifies common trial of two accuseds charged with violating same order).

B. Grounds for severance. The accused's right to an impartial trial may be prejudiced by being tried with another. Some of the situations in which this may occur are:

1. The accused requesting a severance desires to use the testimony of a co-accused or the testimony of the wife of a co-accused;

2. the defense of a co-accused is antagonistic to that of the accused, e.g., co-accused will admit that he is involved but claims insanity [United States v. Oliver, 14 C.M.A. 192, 33 C.M.R. 404 (1963)]. See also United States v. Tackett, 16 C.M.A. 226, 36 C.M.R. 382 (1966) (accuseds had conflicting stories concerning alleged rape)];

3. evidence against one accused is inadmissible against the other and will prejudice him [The accused seeking severance has the burden of showing risk of prejudice, and it is in the discretion of the military judge to grant or deny the request];

4. one accused will plead not guilty and the other accused will plead guilty [United States v. Baca, 14 C.M.A. 76, 33 C.M.R. 288 (1963)]; or

5. the government will introduce confession of one accused that implicates one or more co-accused [See United States v. Gooding, 18 C.M.A. 188, 39 C.M.R. 188 (1969)].

C. Procedure for granting severance. An accused may request severance of his case of the convening authority and/or of the military judge at trial. Requests for severance in the case of a common trial should be granted liberally. Further, the request should be granted as to any accused charged with offenses unrelated to the common offenses. R.C.M. 906(b)(9). In any case, the request should be granted if there is good cause shown. Convening authorities are likely to be more exacting in joint trials when the essence of the offense is a combination or conspiracy between the parties.

## 1606 POSTPONEMENTS (MILJUS Key Numbers 1187, 1188)

### A. Definitions

1. Continuance - Delay of trial for more than one day.

2. Recess - A short delay in the trial, less than one day.

3. Adjournment - An overnight recess. When the proceedings are terminated for the day and will be resumed the following day, the court is said to "adjourn."

**B. Who may grant a postponement (before trial) or a continuance (during trial)**

1. Before referral of a case for trial. Before referral for trial, either side may request the convening authority to postpone any portion of the proceedings, e.g., the pretrial investigation. The convening authority may informally postpone the trial simply by delaying referral of the case to trial. This is inadvisable except upon written application of the defense. See R.C.M. 707.

2. After referral for trial. After the convening authority refers a case for trial, the military judge (or president of an SPCM without a military judge) is solely responsible for setting the date of trial. R.C.M. 801(a)(1). Although the military judge may consider information furnished by the convening authority on whether to grant a continuance, the determination rests with the military judge independently of the convening authority's preference. Art. 40, UCMJ; R.C.M. 801, 906(b)(1); United States v. Knudson, 4 C.M.A. 587, 16 C.M.R. 161 (1954); Petty v. Moriarty, 20 C.M.A. 438, 43 C.M.R. 278 (1971).

**C. Grounds for a continuance**

1. In general. Basically, the ground for a continuance is that one side or the other will be prejudiced by proceeding with the trial. R.C.M. 906(b)(1), discussion.

2. Examples

- a. Absence of a material witness;
- b. illness of counsel or the accused;
- c. insufficient time to prepare for trial; or
- d. prosecution for the same offense is pending before a civil court.

D. Ruling on continuance. A trial judge should exercise caution in denying a continuance when, by doing so, one side may be deprived of essential evidence. United States v. Browers, 20 M.J. 356 (C.M.A. 1985). The ruling of the military judge on a continuance is within his sound discretion and the standard by which his decision is reviewed on appeal is abuse of discretion. United States v. Johnson, 20 C.M.A. 359, 43 C.M.R. 199 (1971); United States v. James, 14 C.M.A. 247, 34 C.M.R. 27 (1963); United States v. Daniels, 11 C.M.A. 52, 28 C.M.R. 276 (1959); United States v. Vanderpool, 4 C.M.A. 561, 16 C.M.R. 135 (1954). Absent clear abuse of discretion, the decision of the military judge concerning granting or denying a continuance will not be overturned. United States v. Thomas, 22 M.J. 57 (C.M.A. 1986).

1607      **CHANGE OF VENUE (MILJUS Key Number 1226)**

A. A change of venue is a change in the place of trial. It is appropriate where an accused demonstrates that so great a general atmosphere of prejudice exists at the place of trial that he cannot get a fair and impartial



trial in that place. R.C.M. 906(b)(11), discussion. The accused need not demonstrate the effect of such an atmosphere on the court members in support of his request; such a showing is required in the case of a challenge for cause. The convening authority may, within his sound discretion, change the place of trial at the request of either side for any proper reason, such as convenience of witnesses.

B. Common grounds for a request for a change of venue are:

1. Prejudicial publicity in the news media;
2. hostility of the civilian or military community; or
3. command influence.

C. The convening authority has several options in responding to a request for a change of venue. He may:

1. Order the trial to be held in a different place;
2. change the membership of the court;
3. send the case file to a different convening authority for action;

or

4. take any combination of the above actions.

The type of action the convening authority orders depends upon the reason given in support of the request. For example, the convening authority need merely change courtrooms where the issue is convenience of witnesses. On the other hand, where the issue is publicity and knowledge of the case by members, the appropriate remedy would be to change the courtrooms and membership. The power of the convening authority to detail members of other commands will be useful in this area.

D. In United States v. Nivens, 21 C.M.A. 420, 45 C.M.R. 194 (1972), the military judge had granted a defense motion for a change of venue after the convening authority had refused to grant the motion. The defense request was made so as to facilitate the examination of witnesses and preparation of the defense case. No claim was made that the accused could not receive a fair trial because of a prejudicial atmosphere at the site of the trial. The C.M.A. held that the military judge was empowered to grant a change in the site of the trial for the convenience of the parties and witnesses and in the interest of justice; thus incorporating the provisions of Rule 12(b) of the Federal Rules of Criminal Procedure into military practice. See R.C.M. 906(b)(11).

1608 UNLAWFUL COMMAND INFLUENCE (MILJUS Key Number 526)

See chapter X, infra.

When raised at trial, the issues of whether to inquire into the mental capacity of the accused to stand trial or the mental responsibility of the accused at the time of the offense are ruled upon by the military judge. R.C.M. 909(c)(1), discussion, 916(k)(3)(B). See Defenses, NJS Criminal Law Study Guide. A ruling on whether to inquire into this issue by the president of a special court-martial without a military judge is final, if the issue, as presented in the particular case, involves only a legal determination. For instance, if the accused has a history of psychiatric problems, the president would make a final ruling whether, as a matter of law, the issue of mental responsibility must be examined by the court. On the other hand, a factual issue would be present if an accused takes the stand and testifies that he has been depressed and subject to hallucinations, and trial counsel then presents evidence that the accused has stated that the whole business is a hoax. In such a case, the president would rule subject to the objection of the other members. R.C.M. 801(e), 909(c)(1), 916(k)(3)(B).

A. Mental capacity. R.C.M. 909(a) states:

No person may be brought to trial by court-martial if that person is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable to understand the nature of the proceedings against that person or to conduct or cooperate intelligently in the defense of the case.

A person is presumed to have sufficient mental capacity to stand trial. The trial may proceed unless the defense proves, by a preponderance of the evidence, lack of sufficient capacity to stand trial. See R.C.M. 909(c)(2). In United States v. Massey, 27 M.J. 371 (C.M.A. 1989), the C.M.A. ruled that an accused can prevail on an insanity defense only if he "convinces" the factfinder that he was not mentally responsible at the time of the crime; it does not suffice that he merely creates "reasonable doubt" in the mind of the factfinder as to his mental responsibility. Any commander, investigating officer, trial counsel, defense counsel, military judge, or member may raise the issue. R.C.M. 706(a). Once this is done, a mental examination may be ordered either by the convening authority or the military judge, depending upon the stage of the proceedings. R.C.M. 706(b).

The question of mental capacity will be decided by the military judge as an interlocutory question of fact. In a special court-martial without a military judge, the president will rule subject to the objection of any member. If the accused is found not to possess sufficient mental capacity to stand trial, the proceedings should be suspended. Depending upon the potential duration of the incapacity, the case may be continued or the charges withdrawn or dismissed. R.C.M. 909(c)(2), discussion.

B. Mental responsibility. The lack of mental responsibility is a defense to any offense under the UCMJ. As stated in R.C.M. 916(k)(1):

It is an affirmative defense to any offense that, at the time of the commission of the acts constituting the offense, the accused, as a result of severe mental disease or defect, was unable to appreciate the nature and quality or wrongfulness of his or her acts. Mental disease or defect does not otherwise constitute a defense.

A person is presumed to be sane and mentally responsible for his actions. This presumption continues until the defense establishes, by clear and convincing evidence, that he or she was not mentally responsible at the time of the alleged offense. R.C.M. 916(k)(3)(a). The military judge will rule finally on whether or not a mental examination under R.C.M. 706 will be ordered. The president of a special court-martial without a military judge will rule finally, except to the extent that the question is one of fact. In that case, he rules subject to the objection of the members. R.C.M. 916(k)(3)(B). The ultimate issue of mental responsibility, however, will not be decided as an interlocutory question. R.C.M. 916(k)(3)(C). R.C.M. 916(k)(3)(A), discussion. See also NJS Criminal Law Study Guide.

1610 MOTION FOR A FINDING OF NOT GUILTY (MILJUS Key Number 1185)

R.C.M. 917 provides that the defense may move for a finding of not guilty as to any offense charged, either at the conclusion of the prosecution case or at any time thereafter before findings are announced. The issue is treated as an interlocutory question and is ruled upon finally by a military judge. The ruling by a president of a special court-martial without a military judge is subject to objection by the members. Art. 51(b), UCMJ; R.C.M. 801(e).

A. R.C.M. 917(d) sets forth the following test for ruling on a motion for a finding of not guilty:

A motion for a finding of not guilty shall be granted only in the absence of some evidence which, together with all reasonable inferences and applicable presumptions could reasonably tend to establish every essential element of an offense charged. The evidence shall be viewed in the light most favorable to the prosecution, without an evaluation of the credibility of witnesses.

1. Compare Rule 29, Fed. R. Crim. P., where the test is insufficiency of the evidence to convict, and 8, Moore's FEDERAL PROCEDURE (2d Edition).

2. In United States v. Spearman, 23 C.M.A. 31, 32, 48 C.M.R. 405, 406 (1974), C.M.A. stated:

[W]hen a motion for a judgment of acquittal [motion for a finding of not guilty] of the specific offense charged is

overruled, this does not mean that an accused has no remedy in the event the Government fails to introduce sufficient evidence on the major offense charge but produces a *prima facie* case with respect to lesser included offenses. In such an instance, the accused may well be entitled to make a motion for appropriate relief and seek to have the military judge instruct the fact-finders that no evidence has been introduced as to the offense charged and that their consideration of the issue of guilt or innocence is limited to the lesser included degrees.

See R.C.M. 917(e).

B. R.C.M. 917(b), (c), and the discussion thereunder, further provide that the military judge or president of a special court-martial without a military judge may require the defense counsel to specify in what respect he believes the evidence of the government is deficient and may allow the trial counsel to reopen his case to present evidence prior to ruling on the motion. If the motion for a finding of not guilty is denied, and the accused elects to present evidence, the accused waives any error in the ruling of the military judge or president if the defense evidence remedies the deficiency in the government's case. R.C.M. 917(g).

#### 1611 MISTRIAL (MILJUS Key Number 1211)

The military judge or president of a special court-martial without a military judge may declare a mistrial as to the proceedings, either on his own motion or upon the motion of counsel. R.C.M. 915. A mistrial may be declared either as to some or all of the charges, the entire proceedings, or only the sentencing proceedings. R.C.M. 915(a); United States v. Goffe, 15 C.M.A. 112, 35 C.M.R. 84 (1964). A ruling on the issue of mistrial is an interlocutory one. R.C.M. 915(b).

A. Test. The test set forth in R.C.M. 915(a) is that a mistrial may be declared "when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the trial." See also United States v. Johnpier, 12 C.M.A. 90, 30 C.M.R. 90 (1961). The C.M.A. held the declaration of a mistrial to be proper where the military judge ruled that limiting instructions would be insufficient to have the court disregard improper evidence and possible command influence. The C.M.A. indicated further that a mistrial may be declared whenever it appears that some circumstance arising during the proceedings casts substantial doubt upon the fairness of the trial. However, giving a curative instruction, rather than declaring a mistrial, is the preferred remedy for curing error when the members have heard inadmissible evidence, so long as the curative instruction avoids prejudice to the accused. United States v. Evans, 27 M.J. 34 (C.M.A. 1988).

The C.M.A. first held that a law officer (military judge) could, in his sound discretion, declare a mistrial in United States v. Stringer, 5 C.M.A. 122, 17 C.M.R. 122 (1954). Since Stringer, the C.M.A. has reviewed the issue of mistrial on a case-by-case basis. The C.M.A. has indicated that a mistrial

is appropriate where there is misconduct by court members, United States v. Smith, 6 C.M.A. 521, 20 C.M.R. 237 (1955); failure of recording equipment such that a record cannot be constructed, United States v. Schilling, 7 C.M.A. 482, 22 C.M.R. 272 (1957); where the law officer (military judge) omitted required instructions and the omission was not discovered until after findings had been entered in open court, United States v. Cooper, 15 C.M.A. 322, 35 C.M.R. 294 (1965); where evidence of other serious misconduct by the accused comes before the court and limiting instructions would be inadequate, United States v. Keenan, 18 C.M.A. 108, 39 C.M.R. 108 (1969). In United States v. Walter, 14 C.M.A. 142, 33 C.M.R. 354 (1963), C.M.A. held that a mistrial was not mandatory where the accused first entered pleas of guilty and later the military judge directed that the pleas be changed to not guilty. However, the court indicated that, given a different factual situation, a different result may be dictated. In United States v. Jeanbaptiste, 5 M.J. 374 (C.M.A. 1978), the C.M.A. held that a mistrial was not required after a witness refused to testify on the ground that, if he had, he would be a "dead man." The court reiterated what it has said before; that is, a mistrial is a drastic remedy and surrounding circumstances must demonstrate a manifest necessity. Whether circumstances warrant such a drastic measure rests within the discretion of the military judge, and his decision will not be overturned absent a showing of an abuse of that discretion. See also United States v. Thompson, 5 M.J. 28 (C.M.A. 1978). An example of such abuse is found in United States v. Rosser, 6 M.J. 267 (C.M.A. 1979). There, the court held, *inter alia*, that the military judge's inquiry into the facts and circumstances of the case was so perfunctory as to provide an inadequate factual basis for his decision to deny a defense motion for a mistrial; he applied an incorrect legal standard in reaching his decision; and he was remiss in his responsibility to avoid the appearance of evil in his courtroom and to foster public confidence in the proceeding.

B. Effect of a mistrial and former jeopardy. A declaration of mistrial acts to withdraw the case from the court. R.C.M. 915(c)(1). The record up to that point will be prepared and sent to the convening authority for review. R.C.M. 915(c)(1), discussion. If a mistrial is declared after jeopardy has attached and before findings, a retrial may be ordered as long as the declaration was not an abuse of discretion by the military judge, and without defense consent or the result of intentional prosecutorial misconduct designed to necessitate a mistrial. R.C.M. 915(c)(2). United States v. Waldron, 5 C.M.A. 628, 36 C.M.R. 126 (1966). See Defenses, NJS Criminal Law Study Guide.

1. In United States v. Richardson, 21 C.M.A. 54, 44 C.M.R. 108 (1971), in a trial by military judge alone, after findings of guilty and during the sentencing hearing, the military judge expressed doubts that defense counsel had effectively represented his client because of inconsistencies in the testimony of the accused and certain exhibits before the court. The military judge was not satisfied by an explanation offered by counsel and declared a mistrial as to the whole proceedings. At a second trial, the defense moved to dismiss on grounds of former jeopardy. Chief Judge Darden opined that, under Art. 44(b), UCMJ, jeopardy did not attach until the case was finally reviewed. He found no prejudice to the accused under the double jeopardy provisions of the fifth amendment, even assuming an abuse of discretion of the military judge. In his opinion, the only possible prejudice to a defendant from an erroneously declared mistrial would be a deprivation of the possibility of being

acquitted had the trial been permitted to continue. Since the mistrial in this case was declared after findings of guilty, the defendant could not be harmed by the judge's ruling. Chief Judge Darden finds this to be the extent of the protection offered by the fifth amendment, citing U.S. v. Jorn, 400 U.S. 470 (1971). Concurring in the result, Judge Quinn found that the military judge had not abused his discretion. Compare United States v. Richardson, *supra*, with United States v. Ivory, 9 C.M.A. 516, 26 C.M.R. 296 (1958).

2. In Arizona v. Washington, 434 U.S. 497 (1978), the U.S. Supreme Court considered a case in which the defense counsel made an improper and highly prejudicial reference during opening argument to prosecutorial misconduct in a previous trial of the defendant on the same charge. Upon motion by the prosecution, the trial judge declared a mistrial although he did not specifically find manifest necessity or articulate on the record all the factors leading to the mistrial declaration. In spite of defense argument to the contrary, the Supreme Court held that the fifth amendment double jeopardy clause was not violated because the record supported the conclusion that the trial judge had acted reasonably and deliberately and had accorded careful consideration to the defendant's interest in having the trial concluded in a single proceeding. Therefore, the mistrial order was supported by the "high degree of necessity" required and, as there was no abuse of judicial discretion, jeopardy did not attach.

3. In United States v. Platt, 21 C.M.A. 16, 44 C.M.R. 70 (1971), C.M.A. considered the effect of a declaration of a mistrial by a military judge when there was a failure of the recording equipment during the original art. 39(a) session. After declaring a mistrial, the military judge had inquired of counsel if they were prepared to proceed anew in the trial of the accused. Both counsel indicated they were. Judge Quinn indicated that there was authority to hold that a mistrial was not applicable to trials before a military judge alone; however, he found that the court had jurisdiction, even though the case had not been returned to the convening authority and rereferred to the court, because the defense counsel failed to object to any defect in the reference to trial prior to the end of the original art. 39(a) session. Chief Judge Darden, concurring in the result, stated that he did not find a slip of the tongue of the military judge as a mistrial in the normal sense of the term.

MOTIONS TO DISMISS, MOTIONS TO SUPPRESS, AND MOTIONS FOR APPROPRIATE RELIEF

A. Motions to dismiss - R.C.M. 907, MCM, 1984

<u>GROUNDS</u>	<u>TIME/WAIVER</u>	<u>BURDEN OF PROOF</u>	<u>ISSUE PRESENTED</u>	<u>CASES</u>
1. <u>Speedy trial</u> R.C.M. 707, 907(b)(2)	Before plea/ waived at conclusion of trial (unless delay is equivalent to a denial of "due process"); will survive guilty plea	Accused to raise/government to establish no denial by preponderance	Unreasonable delay; exceeding time periods established by R.C.M. 707	<u>U.S. v. Burton</u> 21 C.M.A. 112, 44 C.M.R. 166 (1971) <u>U.S. v. Nelson</u> 5 M.J. 189 (C.M.A. 1978) <u>Barker v. Wingo</u> 407 U.S. 514 (1972)
2. <u>Statute of</u> <u>limitations</u> Art. 43, UCMJ; R.C.M. 907(b)(2)	Before plea/ waived at conclusion (if accused is aware that the statute of limitations has run)	Accused or military judge to raise; if prima facie, government must establish by preponderance	Length of time between completed offense and receipt of sworn charges	<u>U.S. v. Burkey</u> 49 C.M.R. 204 (A.C.M.R. 1974)
3. <u>Lack of</u> <u>jurisdiction</u> <u>over person</u> R.C.M. 201, 202, 907(b)(1)	Anytime/ not waived	Anyone raises/government established by preponderance	Existence of valid enlistment; termination of enlistment	<u>In re Grimley</u> 137 U.S. 147 (1890)

<u>GROUND</u>	<u>TIME/WAIVER</u>	<u>BURDEN OF PROOF</u>	<u>ISSUE PRESENTED</u>	<u>CASES</u>
4. <u>Lack of jurisdiction over the offense</u> R.C.M. 201, 203, 907(b)(1)	Any time/ not waived	Anyone raises/government proves by preponderance	Military status of the accused	<u>Solorio v. U.S.</u> <u>107 S.Ct. 2924</u> <u>(1987)</u> <u>U.S. v. Avila</u> <u>27 M.J. 62</u> <u>(C.M.A. 1988)</u>
5. <u>Failure to allege an offense</u> R.C.M. 907(b)(1)	Anytime/ not waived	Anyone raises/question of law	Does specification fail to state offense or give notice of an essential element of the offense	<u>U.S. v. Suggs</u> <u>20 C.M.A. 196,</u> <u>43 C.M.R. 36</u> <u>(1970)</u> <u>U.S. v. Fleig</u> <u>16 U.S.C.M.A. 444,</u> <u>37 C.M.R. 64</u> <u>(1966)</u>
6. <u>Former jeopardy</u> Art. 44(a), UCMJ; R.C.M. 907(b)(2)	Before plea/ waived at conclusion of trial	Accused/preponderance	1) Was former proceeding a "trial" 2) Was a withdrawal or declaration of mistrial proper?	<u>Yates v. U.S.</u> <u>355 U.S. 68</u> <u>(1957)</u> <u>Crist v. Bretz</u> <u>437 U.S. 28</u> <u>(1978)</u>
7. <u>Transactional immunity</u> R.C.M. 704, 907(b)(2)	Before plea/ waived at conclusion of trial	Accused/preponderance	Promise of immunity made by GCM authority or someone purportedly acting on his behalf	<u>Cooke v. Orser</u> <u>12 M.J. 335</u> <u>(C.M.A. 1982)</u>



<u>GROUND</u>	<u>TIME/WAIVER</u>	<u>BURDEN OF PROOF</u>	<u>ISSUE PRESENTED</u>	<u>CASES</u>
8. <u>Testimonial immunity</u> R.C.M. 704, 907(b)(2)	Before plea/ waived at conclusion of trial	Accused/government must show independent source by preponderance	Has government established an independent source for its evidence	<u>U.S. v. Rivera</u> 1 M.J. 107 (C.M.A. 1975) <u>U.S. v. Whitehead</u> 5 M.J. 294 (C.M.A. 1978) <u>Kastigar v. U.S.</u> 406 U.S. 441 (1972)
9. <u>Former punishment</u> R.C.M. 907(b)(2)	Before plea/ waived at conclusion of trial	Accused/preponderance	Was accused previously punished for a minor offense under article 15 or article 13?	<u>U.S. v. Fretwell</u> 11 U.S.C.M.A. 377, 29 C.M.R. 193 (1960)

B. Motions to Grant Appropriate Relief

<u>GROUND</u>	<u>TIME/WAIVER</u>	<u>BURDEN OF PROOF</u>	<u>ISSUE PRESENTED</u>	<u>CASES</u>
1. <u>Lack of mental capacity to stand trial</u> R.C.M. 909	Anytime/ not waived	Anyone/defense proves by preponderance of evidence; MJ rules finally	1) Does accused understand the nature of the proceedings and 2) Can accused assist in his own defense	<u>U.S. v. Williams</u> 5 C.M.A. 197, 17 C.M.R. 197 (1954)
2. <u>Lack of mental responsibility</u> R.C.M. 916(k)	Anytime/ not waived	Anyone/defense proves by clear and convincing evidence; MJ rules finally	Whether a mental examination under R.C.M. 706 should be ordered. (The ultimate issue of mental responsibility may not be resolved by motion. The defense must prove mental responsibility by clear and convincing evi- dence on the merits.)	<u>U.S. v. Massey</u> 27 M.J. 371 (C.M.A. 1989)
3. <u>Illegal pretrial confinement</u> R.C.M. 906(b)(8), 305	Before sentencing/ waived at conclusion of trial	Accused raises/burden: 1) If based on condition of confinement or continuation of confinement - accused by preponderance 2) If based on reasons for confinement - accused by preponderance under R.C.M. 305. But see chapter XII, <u>supra</u> . 3) If based on restriction tantamount to confinement - accused by preponderance	1) Treated as adjudged prisoner 2) Confined for an improper reason 3) Relief a) Credit b) Release	<u>Courtney v. Williams</u> 1 M.J. 267 (C.M.A. 1976) <u>U.S. v. Heard</u> 3 M.J. 14 (C.M.A. 1977) <u>U.S. v. Malia</u> 6 M.J. 65 (C.M.A. 1978)

<u> GROUNDS </u>	<u> TIME/WAIVER </u>	<u> BURDEN OF PROOF </u>	<u> ISSUE PRESENTED </u>	<u> CASES </u>
4. Defects in article 32 investigation R.C.M. 406, 905(b)(1), 906(b)(3)	Before plea/ waived if not raised prior to plea. Normally waived by guilty plea.	Accused/preponderance	Substantial defect in investigation	<u>U.S. v. Ledbetter</u> 2 M.J. 37 (C.M.A. 1976) <u>U.S. v. Chestnut</u> 2 M.J. 84 (C.M.A. 1976) <u>U.S. v. Collins</u> 6 M.J. 256 (C.M.A. 1979)
5. Defects in article 34 advice R.C.M. 406, 905(b)(1), 906(b)(3)	Before plea/ waived if not raised prior to plea. Normally waived by guilty plea.	Accused/preponderance	Substantial defect in advice	<u>U.S. v. Donaldson</u> 23 C.M.A. 293, 49 C.M.R. 542 (1975) <u>U.S. v. Engle</u> 1 M.J. 387 (C.M.A. 1976) <u>U.S. v. Collins</u> 6 M.J. 256 (C.M.A. 1979)
6. Defects in specification not amounting to failure to allege an offense R.C.M. 307, 905(b)(2), 906(b)(4)	Before plea/ waived if not raised prior to plea	Accused/question of law	1) Vague, ambiguous improper form 2) Mislaidd or hampered in preparation	<u>U.S. Whyte</u> 1 M.J. 163 (C.M.A. 1975)

<u>GROUND</u>	<u>TIME/WAIVER</u>	<u>BURDEN OF PROOF</u>	<u>ISSUE PRESENTED</u>	<u>CASES</u>
7. Severance a. common trial b. joint trial R.C.M. 812, 905(b)(5), 906(b)(9) and (10)	Before plea/ waived if not raised prior to plea	Accused/preponderance A discretionary ruling by MJ but severance may not be denied where improper reaction or if statement prejudices movant	Common trial: Liberally granted, particularly when different offenses alleged against movant than against others. Joint trial: More stringent showing - movant must show prejudice by joint trial	U.S. v. Respass 19 C.M.A. 230, 41 C.M.R. 230 (1970) U.S. v. Davis 14 C.M.A. 607, 34 C.M.R. 387 (1964) U.S. v. Pringle 3 M.J. 308 (C.M.A. 1977) U.S. v. Green 3 M.J. 320 (C.M.A. 1977)
8. Venue R.C.M. 906(b)(11)	When necessary	Accused/preponderance	1) Publicity so prejudicial accused cannot receive a fair trial 2) Convenience of parties and witnesses and interests of justice	U.S. v. Nivens 21 C.M.A. 420, 45 C.M.R. 194 (1972)
9. Request for IMC R.C.M. 506(b), 905(b)(6), 906(b)(9) and (10)	Before plea/ waived if not raised prior to plea. Will survive guilty plea.	Accused/preponderance government must put on reasons for denial	Was there abuse of discretion in denial of request? (But trial judge will not rule; see R.C.M. 906(b)(2).)	U.S. v. Quinones 1 M.J. 64 (C.M.A. 1975)

<u>POINTS</u>	<u>TIME/WAIVER</u>	<u>BURDEN OF PROOF</u>	<u>ISSUE PRESENTED</u>	<u>CASES</u>
10. <u>Request for witnesses</u> R.C.M. 703, 905(b)(4), 906(b)(7), 914, 1001(e)	Before plea/ waived if not raised prior to plea. Not waived by plea of guilty.	Accused/preponderance	Is requested witness material and necessary?	<u>U.S. v. Carpenter</u> 1 M.J. 384 (C.M.A. 1976) <u>U.S. v. Williams</u> 3 M.J. 239 (C.M.A. 1977) <u>U.S. v. Tangpuz</u> 5 M.J. 426 (C.M.A. 1978)
11. <u>Continuance</u>	When needed/ waived	Movant/preponderance	Prejudice to movant's substantial rights unless continuance granted	<u>U.S. v. Dunks</u> 1 M.J. 254 (C.M.A. 1976)
12. <u>Improper referral</u> R.C.M. 905(b)(1)	Before plea/ not waived	Accused/preponderance	1) Accuser 2) Improper referral date	<u>U.S. v. Conn</u> 6 M.J. 351 (C.M.A. 1979)
13. <u>Improper withdrawal</u>	Before plea/ not waived	Accused raises; government must prove by preponderance	Good cause	<u>U.S. v. Jackson</u> 1 M.J. 242 (C.M.A. 1976) <u>U.S. v. Hardy</u> 4 M.J. 20 (C.M.A. 1977) <u>U.S. v. Blaylock</u> 15 M.J. 190 (C.M.A. 1983)

<u>GROUND</u>	<u>TIME/WAIVER</u>	<u>BURDEN OF PROOF</u>	<u>ISSUE PRESENTED</u>	<u>CASES</u>
14. <u>Mistrial</u> R.C.M. 915	Anytime; waived except for plain error	Movant	Manifest necessity; interests of justice	<u>U.S. v. Rosser</u> 6 M.J. 267 (C.M.A. 1979) <u>U.S. v. Evans</u> 27 M.J. 34 (C.M.A. 1988)
15. <u>Discovery</u> R.C.M. 701, 703, 905(b)(4), 906(b)(7), 914, 1001(e)	Before plea/ Waived if not raised prior to plea (or when information disclosed to the accused)	Accused	Witnesses; witness' statements; <u>Jencks material</u> (R.C.M. 914); <u>Brady material</u>	18 U.S.C. § 3500 <u>Goldberg v. U.S.</u> 425 U.S. 94 (1976) <u>U.S. v. Lucas</u> 5 M.J. 167 (C.M.A. 1978) <u>U.S. v. Agurs</u> 427 U.S. 97 (1976) <u>Weatherford v.</u> <u>Bussey</u> 429 U.S. 545 (1977) <u>Brady v. Maryland</u> 373 U.S. 83 (1963)

C. Motions to Suppress

<u> GROUNDS </u>	<u> TIME/WAIVER </u>	<u> BURDEN OF PROOF </u>	<u> ISSUE PRESENTED </u>	<u> CASES </u>
1. <u> Confession or admission </u> Mil.R.Evid. 304, 305	Before plea/ waived if not raised prior to plea. Guilty plea waives	Defense raises/ government by preponderance	1. Voluntariness 2. Warnings	
2. <u> Search and seizure </u> Mil.R.Evid. 311-317	Before plea/ waived if not raised prior to plea. Guilty plea waives	Defense raises/ government burden 1. Validity of consent -- clear and convincing 2. All other cases -- preponderance	1. Consent 2. Probable cause 3. Authorization 4. Inspection 5. Lawful, generally	
3. <u> Identification </u> Mil.R.Evid. 321	Before plea/ waived if not raised prior to plea. Guilty plea waives	Defense raises/ government by preponderance. If identification unlawful, use of later identification requires clear and convincing evidence.	1. Unnecessarily suggestive 2. Denial of counsel presence	

CHAPTER XVII  
VOIR DIRE AND CHALLENGES  
(MILJUS Key Number 889)

1701 INTRODUCTION. This chapter discusses the various grounds upon which the military judge and members may be disqualified from participating in the special and general court-martial process. Section 1702 deals with the exercise of peremptory challenges and section 1703 discusses challenges for cause. Section 1704 deals with a party's right to challenge the process used by the convening authority to select the members. Finally, section 1705 outlines the procedural context in which grounds for challenge are established, i.e., the voir dire examination.

1702 PEREMPTORY CHALLENGES

A. Number of peremptory challenges. While the military judge may be challenged only for cause, Art. 41, UCMJ, and R.C.M. 912(g), MCM, 1984 [hereinafter R.C.M. \_\_\_\_] give the trial counsel and each accused the right to exercise one peremptory challenge against a member at a special or general court-martial. While Art. 41, UCMJ, may be interpreted to grant discretion to the military judge, in all cases, to permit more than one peremptory challenge to a party, the general rule has been to limit the exercise of peremptory challenge to only one per party. United States v. Calley, 46 C.M.R. 1131 (A.C.M.R.), aff'd, 23 C.M.A. 534, 48 C.M.R. 19 (1973). If, however, the accused exercises his peremptory challenge, and thereafter the panel is reduced below quorum and additional members are seated, the accused is entitled to additional peremptory challenges. United States v. Carter, 25 M.J. 471 (C.M.A. 1988).

B. Waiver of peremptory challenge. R.C.M. 912(g)(1) provides that no party may be required to exercise a peremptory challenge before the examination (voir dire) of members and rulings on challenges for cause have been completed. R.C.M. 912(g)(2) makes the failure to exercise a peremptory challenge, when properly called upon to do so, a waiver. The rule, however, allows the military judge to grant relief from the waiver for good cause shown prior to the presentation of evidence on the merits. If new members have been detailed and a peremptory challenge has not previously been exercised by a party, a peremptory challenge is permissible even if the presentation of evidence on the merits has begun. R.C.M. 912(g)(2). See United States v. Hamil, 23 C.M.R. 827 (A.F.B.R.), petition denied, 23 C.M.R. 421 (C.M.A. 1957); United States v. Hooks, 23 C.M.R. 750 (A.F.B.R. 1956), petition denied, 23 C.M.R. 421 (C.M.A. 1957). R.C.M. 912(g)(1) also provides that ordinarily the trial counsel shall enter any peremptory challenge before the defense. A military judge cannot create a new peremptory challenge procedure (such as having the defense counsel enter its peremptory challenge prior to the government) in the absence of extraordinary circumstances. United States v. Newson, 29 M.J. 17 (C.M.A. 1989).



C. Racially based peremptory challenge. The Court of Military Appeals has adopted the holding of Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), which recognizes the equal protection right of an accused to be tried by a jury from which no cognizable racial group has been excluded. United States v. Santiago-Davila, 26 M.J. 380 (C.M.A. 1988). Noting that "Hispanics" or "Puerto Ricans" are cognizable racial groups for purposes of this rule, the court held that a prima facie case of purposeful exclusion of a cognizable racial group had occurred because the trial counsel had peremptorily challenged one of two Hispanics from the membership of Santiago-Davila's court without explanation for the challenge. Id. at 392. The court remanded the case for a determination of whether the trial counsel purposefully discriminated in striking the Hispanic court member, cautioning that the trial counsel cannot rebut the accused's case merely by denying a discriminatory purpose, but must articulate a neutral explanation related to the case tried to justify the use of the peremptory challenge. Id. Thereafter, the trial judge will determine whether purposeful discrimination has been established by the accused. Id.

The C.M.A. recently reaffirmed the law established in United States v. Santiago-Davila, stating that every peremptory challenge made by the government to a member of the accused's own race must be explained by trial counsel upon the timely objection by defense counsel. United States v. Moore, 28 M.J. 366 (C.M.A. 1989). To be considered timely, defense counsel's objection to trial counsel's peremptory challenge of a member should be made prior to the time the member departs the courtroom after being excused by the military judge. United States v. Shelby, 26 M.J. 921 (N.M.C.M.R. 1988). After defense counsel's timely objection, trial counsel may state the reasons for the peremptory challenge as an officer of the court rather than as a witness subject to cross-examination by the defense. The military judge must then determine whether the trial counsel has articulated a neutral explanation, i.e. a clear and reasonably specific explanation of legitimate reasons to challenge this member. United States v. Moore, 28 M.J. 366 (C.M.A. 1989).

A conservative reading of Moore suggests that its holding only applies to "cognizable racial groups" (i.e. blacks, Mexican-Americans, Puerto Ricans) articulated in Santiago-Davila. A more liberal reading of Moore suggests that the holding applies to any situation where the accused and the member who is peremptorily challenged by the government are of the same race.

## 1703      GROUNDS FOR CHALLENGES FOR CAUSE

A. R.C.M. 902 lists six grounds for challenge for cause of a military judge at a special or general court-martial, only one of which may be waived by the parties. Once a challenge for cause is granted, the military judge is disqualified to sit as judge on that particular case. Where a military judge is disqualified to sit on a court-martial as judge alone, this military judge is also disqualified to sit with members. United States v. Sherrod, 26 M.J. 30 (C.M.A. 1988). The court in Sherrod held that, once a trial judge is disqualified, all of the judge's actions from the moment of disqualification on are void -- except for those immediately necessary to assure the swift and orderly substitution of judges. Id. at 33.

R.C.M. 912 lists fourteen grounds for challenge for cause of a member, all of which may be waived except one. The grounds for challenge for cause of both the military judge and members are summarized in the table below and discussed in more detail thereafter.

TABLE OF DISQUALIFICATIONS

TYPE OF DISQUALIFICATION	AS TO THE MILITARY JUDGE	AS TO A MEMBER
Not statutorily qualified	*Art. 26, UCMJ R.C.M. 902(d)(4) R.C.M. 502(c)	***Art. 25(a), (b), (c), UCMJ R.C.M. 912(f)(1)(A) R.C.M. 502(a)
Not properly detailed	*R.C.M. 503(b) R.C.M. 902(b)(4)	**R.C.M. 503(a) R.C.M. 912(f)(1)(B)
Accuser	*R.C.M. 902(b)(3)	**R.C.M. 912(f)(1)(C)
Witness in the case	*R.C.M. 902(b)(3) "has been or will be a witness"	**R.C.M. 912(f)(1)(D) "will be a witness"
Acted as counsel for either party	*R.C.M. 902(b)(2) "as to offense charged or same case generally"	**R.C.M. 912(f)(1)(E) "as to offense charged"
Investigating officer	*R.C.M. 902(b)(2) "as to offense charged or same case generally"	**R.C.M. 912(f)(1)(F) "as to offense charged"
Convening authority (CA); legal officer or staff judge advocate to CA	*R.C.M. 902(b)(2) "has acted as to offense charged or same case generally"	**R.C.M. 912(f)(1)(G) "has acted in the same case"
Reviewing authority; legal officer or staff judge advocate to same	Not addressed by by MCM	**R.C.M. 912(f)(H) "will act in the same case"
Forwarded charges with personal recommendation	*R.C.M. 902(b)(3)	**R.C.M. 902(f)(1)(I)
Upon rehearing, new trial, or other trial was member of earlier court	R.C.M. 810(b)(2) expressly allows	**R.C.M. 912(f)(1)(J) R.C.M. 802(b)(1)
In arrest or confinement	<u>See</u> R.C.M. 902(a)	**R.C.M. 912(f)(1)(L)

TYPE OF DISQUALIFICATION	AS TO THE MILITARY JUDGE	AS TO A MEMBER
Junior to accused	<u>See</u> R.C.M. 902(a)	**R.C.M. 912(f)(1)(K) "unless established it could not be avoided"
Expressed opinion regarding guilt or innocence as to any charge	*R.C.M. 902(b)(3) "except as military judge in previous trial in same or related case"	**R.C.M. 912(f)(1)(M) "has formed or expressed"
Where impartiality might reasonably be questioned	****R.C.M. 902(a)	**R.C.M. 912(f)(1)(N)
Personal bias or prejudice toward a party	*R.C.M. 902(b)(1)	<u>See</u> R.C.M. 912(f)(1)(N)
Personal knowledge of disputed evidentiary fact	*R.C.M. 902(b)(1)	<u>See</u> R.C.M. 912(f)(1)(N)
Where military judge, judge's spouse, or person within third degree of relationship to either of them or such person's spouse:	*R.C.M. 902(b)(5)	<u>See</u> R.C.M. 912(f)(1)(N)
<p>(a) Is a party;</p> <p>(b) is known by military judge to have an interest that could be substantially affected; or</p> <p>(c) is, to the military judge's knowledge, likely to be a material witness.</p>		
* Not waivable. R.C.M. 902(e)		
** Waivable, if party knew or reasonably could have discovered disqualification but failed to raise objection in timely manner. R.C.M. 902(f)(4).		
*** Not waivable, except right to enlisted members from unit other than the accused's. R.C.M. 912(f)(4).		
**** Waivable, if preceded by full disclosure on the record of the reasons for the disqualification. R.C.M. 902(e).		

1. Not statutorily qualified. The military judge must be qualified and certified in accordance with Art. 26, UCMJ, and must meet the requirements of R.C.M. 502(c). Members must be qualified under Art. 25, UCMJ, and R.C.M. 502. Significantly, these requirements are jurisdictional and therefore are not subject to waiver. R.C.M. 912(f)(4), however, specifically makes the right to have enlisted members from a unit other than the accused's waivable if the party knew or could have discovered the disqualification and failed to raise it in a timely manner. Thus, membership of enlisted members from the accused's unit is not jurisdictional. See United States v. Wilson, 16 M.J. 678 (A.C.M.R. 1983); United States v. Kimball, 13 M.J. 659 (N.M.C.M.R. 1982); United States v. Tagert, 11 M.J. 677 (N.M.C.M.R. 1981).

2. Not properly detailed. R.C.M. 503 governs the detailing of both the military judge and members. This procedure is discussed in Chapter VIII, supra. The rule allows both the military judge and the members to be from an armed force other than the accused's. In the case of members, however, the discussion to R.C.M. 503(a)(3) points out that at least a majority of the members should be from the same armed force as the accused unless exigent circumstances make it impracticable.

3. Witness in the case. R.C.M. 902(b)(3) provides for the disqualification of the military judge when it appears that he has been or will be a witness in the case. R.C.M. 912(f)(1)(D) extends essentially the same prohibition to members. These disqualifications are not limited to actual appearance as a witness.

a. Military judge

(1) In United States v. Wilson, 7 C.M.A. 656, 23 C.M.R. 120 (1957), the military judge was disqualified where all evidence of a previous conviction attested to by the same judge was admitted into evidence. Cf. United States v. Head, 2 M.J. 131 (C.M.A. 1977).

(2) In United States v. Conley, 4 M.J. 327 (C.M.A. 1978), the military judge was disqualified when he considered his own expertise as a documents examiner in arriving at the verdict.

(3) In United States v. Griffin, 8 M.J. 66 (C.M.A. 1979), the military judge was not disqualified where he advised the members that a defense witness had been granted immunity.

b. Members. In United States v. Mansell, 8 C.M.A. 153, 23 C.M.R. 377 (1957), a member was disqualified as a witness for the prosecution where he had certified (signed) a record of a previous conviction which was admitted at trial.

4. Previously acting as counsel for the government or the accused. This disqualification will extend to counsel appointed to represent the accused at an article 32 investigation or other type of investigation covering the offenses charged. United States v. Hurt, 8 C.M.A. 224, 24 C.M.R. 34 (1957). The Court of Military Review (C.M.R.) has styled one who assists in the preparation of charges against the accused prior to trial as "counsel for the government" and, thus, disqualified from sitting as law officer (military judge) at trial. United States v. Law, 10 C.M.A. 573, 28 C.M.R. 139 (1959). On the

other hand, the fact that the military judge was the trial counsel in a former trial of the accused on a different matter will not necessarily disqualify him, especially if it is clear the military judge has "no recollection of the facts" of the prior case. United States v. Head, 2 M.J. 131 (C.M.A. 1977). The disqualification has also extended to trial counsel who, while serving as legal assistance officer, rendered advice to the accused concerning the same matter now under prosecution. United States v. Fowler, 6 M.J. 501 (C.M.A. 1978). See also United States v. McKee, 2 M.J. 981 (A.C.M.R. 1976).

5. Investigating officer. Generally, one is an investigating officer if detailed as a preliminary inquiry officer, pretrial investigating officer, or if he conducted a personal investigation of a general matter involved in an offense charged. United States v. Bound, 1 C.M.A. 224, 2 C.M.R. 130 (1951) (security watch officer who investigated incident which occurred on his watch was disqualified). United States v. Burkhalter, 17 C.M.A. 266, 38 C.M.R. 64 (1967) (public affairs officer who prepared press releases on case was disqualified because he had conducted a personal investigation into the facts to be able to answer questions of reporters at the time of the press release). A military judge who furnishes legal advice on a single occasion to one who is in fact an investigating officer, however, does not thereby become an investigating officer so as to disqualify him from acting as military judge in the case. United States v. Goodman, 3 M.J. 1 (C.M.A. 1977).

6. Convening authority, legal officer, or staff judge advocate. R.C.M. 902(b)(2) disqualifies a military judge who has acted as convening authority, legal officer, or staff judge advocate as to the offense charged or in the same case generally. R.C.M. 912(f)(1)(G) extends this same disqualification to members. Additionally, R.C.M. 912(f)(1)(H) would disqualify any member who will act during any post-trial review as reviewing authority or as legal officer or staff judge advocate to a reviewing authority. In two cases, United States v. Schuller, 5 C.M.A. 101, 17 C.M.R. 101 (1953) and United States v. Roberts, 7 C.M.A. 322, 22 C.M.R. 112 (1956), the Court of Military Appeals held that the law officer (military judge) was disqualified from acting where he had prepared the pretrial advice to the convening authority. In United States v. Turner, 9 C.M.A. 124, 25 C.M.R. 386 (1958), the law officer (military judge) had disclosed on the record that he had prepared the pretrial advice to the convening authority. Here, the defense counsel expressly indicated that the defense did not wish to challenge the law officer (military judge) and the C.M.A. found waiver, although expressing the court's view that the better practice under the circumstances would have been for the law officer (military judge) to disqualify himself.

7. Forwarded charges with a personal recommendation. This disqualification, applicable to both the military judge [R.C.M. 902(b)(3)] and to members [R.C.M. 912(f)(i)(I)], is similar to the challenge regarding investigating officers, but is somewhat broader. In United States v. Lakey, 22 C.M.R. 384 (A.B.R. 1956), a member of the court who helped the accuser prepare and draft the charges, administered the oath to the accuser, and who forwarded the charges and investigation with the recommendation that the accused be separated from the service, was disqualified. See also United States v. Strawbridge, 21 C.M.R. 482 (A.B.R. 1956).

8. Member or military judge when case heard on rehearing, new trial or other trial. R.C.M. 810 generally provides that the procedure at a rehearing, new trial, or other trial shall be that followed for the original trial. R.C.M. 802(b)(1), however, prohibits any member of the court-martial which previously heard the case from again sitting as a member at any rehearing, new trial, or other trial of the same case. R.C.M. 912(f)(1)(J) contains the same rule as a waivable disqualification for a member. The military judge who sat at the original trial would not be automatically disqualified at the subsequent forum, as this is expressly allowed under R.C.M. 810(b)(2). Where his participation in the prior trial would prejudice his judgment in later action, however, a successful challenge would still lie notwithstanding the language of R.C.M. 810(b)(2). See United States v. Broy, 15 C.M.A. 382, 35 C.M.R. 354 (1975).

9. In arrest or confinement. R.C.M. 912(f)(1)(L) lists as a waivable disqualification of a member the fact that such member is in arrest or confinement.

10. Junior to accused. R.C.M. 912(f)(1)(K) would disqualify a member who was junior to the accused unless it is affirmatively shown on the record that this could not be avoided. This language comports with Art. 25(d)(1), UCMJ, and the disqualification is waivable under R.C.M. 912(f)(4). No such requirement exists regarding the military judge.

11. Formed or expressed opinion regarding the accused's guilt or innocence. R.C.M. 912(f)(1)(M) disqualifies any member who has either formed or expressed a definite opinion as to the guilt or innocence of the accused as to any offense charged. More difficult is the question of when a military judge is disqualified under R.C.M. 902(b)(3) for having expressed such an opinion, because that rule would expressly exempt such expressions made while acting as military judge "in the same or a related case." *Id.* Generally, the military judge would not necessarily be disqualified if the subsequent trial was by members, as in the case where the judge, having initially announced findings of guilty pursuant to the accused's pleas, later permitted or mandated the entering of not guilty pleas based upon the accused's request to change his pleas [R.C.M. 910(h)(1)] or a finding by the military judge that the pleas were improvidently entered [R.C.M. 910(h)(2)]. See United States v. Cooper, 8 M.J. 5 (C.M.A. 1979); United States v. Bradley, 7 M.J. 332 (C.M.A. 1979). In United States v. Crider, 21 C.M.A. 193, 44 C.M.R. 247 (1972), C.M.A. decided a question addressed to the disqualification of judges of the Navy Court of Military Review (N.C.M.R.) from reviewing a case closely related to one previously decided by the N.C.M.R. The decision in Crider is germane here for its discussion of facts necessary to disqualify a judge from sitting on a case. C.M.A. adopted the rationale of 28 U.S.C. § 144, that the facts must show that the judge has a personal bias or prejudice for or against a party to the proceedings. In construing the terms "personal bias or prejudice," C.M.A. adopted the language of United States v. Grinnel Corp., 384 U.S. 563, 583 (1966), that "the alleged bias and prejudice to be disqualifying must stem from an extra judicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." See also United States v. Howe, 17 C.M.A. 165, 37 C.M.R. 429 (1967).

In United States v. Fry, 7 C.M.A. 682, 23 C.M.R. 146 (1957), and again in United States v. Broy, 15 C.M.A. 382, 35 C.M.R. 354 (1965), the C.M.A. pointed out that the UCMJ and MCM do not limit challenge of the military judge to personal bias or personal interest. In Fry, the C.M.A. condemned the practice where the law officer (military judge) reviewed the pretrial investigation prior to trial to acquaint himself with potential issues. Compare United States v. Paulin, 6 M.J. 38 (C.M.A. 1978), which held that the military judge was not necessarily disqualified to hear the accused's case by virtue of his having read the article 32 investigation report prior to trial. The court acknowledged that the prior cases had presented varying views concerning what the trial judge should or should not consider in the way of pretrial information, but it emphasized that those same cases contained a "single military judge." Id. at 40. In Paulin, the case was tried before members and the record was devoid of any indication that the military judge had prejudged the accused's guilt. Under the circumstances, the military judge did not err in refusing to disqualify himself. In Broy, C.M.A. held that the military judge who sat on the original trial was not precluded from sitting on a rehearing of the case. The test the court expounded was: "When the challenge is on the ground of previous action in the case, in a capacity other than that prohibited by the Uniform Code, the question is whether the knowledge gained from, or the nature of, the participation would have a harmful effect upon a right of the accused." United States v. Broy, supra, at 356. Thus, it is still possible to challenge a military judge for cause as a result of his participation in a prior or closely related case if the circumstances are such that replacement of the military judge is in the interest of having the trial free from substantial doubt as to legality, fairness, and impartiality. Such replacement would normally be based on personal bias rather than exposure to the same issue. United States v. Jarvis, 22 C.M.A. 260, 46 C.M.R. 260 (1973). In the absence of such personal bias, it is clear that mere exposure of the military judge to a case related to the accused's will not alone disqualify the military judge from hearing the accused's case. United States v. Lewis, 6 M.J. 43 (C.M.A. 1978). In United States v. Priest, 19 C.M.A. 446, 42 C.M.R. 48 (1970), C.M.A. condemned the military judge for conferring with the staff judge advocate as to the sufficiency of a specification, when the military judge determined the evidence did not show a violation of the charge alleged and sought to have it modified so the guilty pleas of the accused would be provident. See United States v. Bradley, 7 M.J. 332 (C.M.A. 1979) and United States v. Cooper, 8 M.J. (C.M.A. 1979) (a military judge, sitting alone, must recuse himself or force a members trial when a guilty plea is withdrawn after the military judge has formed an opinion of the accused's guilt, normally when findings are entered).

12. Where impartiality might reasonably be questioned. A "catchall" disqualification exists as to both the military judge [R.C.M. 902(a)] and members [R.C.M. 912(f)(1)(N)], where their impartiality might reasonably be questioned in the interest of having the proceedings free from substantial doubt as to legality or fairness. While it is impossible to discuss every situation which would trigger this rule, the following cases are illustrative.

a. Military judge

(1) In United States v. Clower, 23 C.M.A. 15, 48 C.M.R. 307 (1974), the military judge abandoned his impartial role in examining the accused. Cf. United States v. Hobbs, 8 M.J. 71 (C.M.A. 1979) (questions to clarify or amplify are allowable).

(2) In United States v. Shackelford, 2 M.J. 17 (C.M.A. 1976), the military judge's numerous questions of the accused, asked in a prosecutorial tone with information derived from the providency inquiry, required reversal. See also United States v. Posey, 21 C.M.A. 188, 44 C.M.R. 242 (1972).

(3) In United States v. Hodges, 22 C.M.A. 506, 46 C.M.R. 923 (1973), the military judge, who received information that the accused had offered to plead guilty, should recuse himself or insist on a members trial. United States v. Head, 2 M.J. 131 (C.M.A. 1976) discusses the standard to be utilized in determining the propriety of recusal. In United States v. Bradley, 7 M.J. 332 (C.M.A. 1979), the court emphasized that the recusal decision lies within the military judge's discretion, and that simply because the judge is aware of certain factual circumstances does not necessarily disqualify him. In Bradley, the facts were obtained during the Care inquiry; the judge expressed certain conclusions regarding the guilt of the accused, then accepted guilty pleas and found the accused guilty. Under these circumstances, the judge abused his discretion by not forcing a members trial or recusing himself.

(4) In United States v. Sherrod, 26 M.J. 30 (C.M.A. 1988), the military judge, who lived next door to one of the homes allegedly burglarized by the accused and whose daughter was a close friend of a female child assaulted during the burglary, should have disqualified himself from presiding over the accused's court-martial absent a defense waiver.

b. Court members. United States v. Jarvis, 22 C.M.A. 260, 46 C.M.R. 260 (1973); United States v. Watson, 47 C.M.R. 990 (A.C.M.R. 1973); and United States v. Toon, 48 C.M.R. 139 (A.C.M.R. 1973), are cases where the military judge erred in denying challenges of court members who were aware of the convening authority's letter, expressing the convening authority's views regarding those convicted of drug offenses. In United States v. Aaron, 1 M.J. 1051 (N.C.M.R. 1976), where the accused's unique clothing was the basis of his identification, a court member who had previously seen the accused wear such clothing should have been excused by the military judge. United States v. Johnson, 3 M.J. 558 (A.C.M.R. 1977), held that it was error for the military judge to refuse to excuse three members who indicated a predisposition to believe the government's witnesses on the basis of rank (a first sergeant, a second lieutenant, and a captain) while all the defense witnesses were privates or privates first class. Accord United States v. Tomchek, 4 M.J. 66 (C.M.A. 1977). United States v. Jobson, 28 M.J. 844 (A.F.C.M.R. 1989) held that a court member who had knowledge about the existence of a pretrial agreement should have been removed for cause. But see United States v. Condon, 1 M.J. 984 (N.C.M.R. 1976), holding that the military judge did not err in refusing to sustain a defense challenge against a member, in a six-year desertion case, where the member indicated a predisposition to believe that the accused intended to remain away permanently (based on the length of the absence) and also indicated a belief that the government's burden of proof would be less (because of the accused's guilty plea to unauthorized absence), in view of the member's statement that he would have to hear all the evidence before making a final decision. Also, mere knowledge of an accused's past military record will not necessarily disqualify a member from sitting on an accused's case. United States v. Lowman, 1 M.J. 1149 (N.C.M.R. 1977) held that, just because two members of the court knew of the accused's prior court-martial, this was



not a ground for the military judge sua sponte to excuse them, especially in view of the fact that neither member was challenged by the defense. See also United States v. Lamela, 7 M.J. 277 (C.M.A. 1979) (questioning by member did not indicate bias).

13. Personal bias or prejudice toward a party or personal knowledge of a disputed evidentiary fact. These disqualifications are applicable to the military judge under R.C.M. 902(b)(1). This same rationale would apply to members under R.C.M. 912(f)(1)(N), where such knowledge or bias would cast doubt on the member's fairness and impartiality.

14. Relative kinship of military judge to parties or witnesses. The disqualification found in R.C.M. 902(b)(5) did not exist in the military prior to the promulgation of the Manual for Courts-Martial, 1984. It is patterned upon the Federal rule in 28 U.S.C. § 455(b)(5).

15. "Inelastic attitude" on sentence. Although not specifically mentioned as a disqualification in the MCM, it has traditionally been held that such an attitude regarding what is an appropriate sentence, based solely on the nature of the offense, is a proper basis for challenge. United States v. Karnes, 1 M.J. 92 (C.M.A. 1975); United States v. Cosgrove, 1 M.J. 199 (C.M.A. 1975); United States v. Goodman, 3 M.J. 1106 (N.C.M.R. 1977) (member held view that discharge would be "required" in the absence of sufficient guidance in extenuation and mitigation). Note, however, that a predisposition to award "some" punishment is not an inelastic attitude, United States v. McGowan, 7 M.J. 205 (C.M.A. 1979). See also United States v. Chaplin, 8 M.J. 621 (N.C.M.R. 1979) and United States v. Lenoir, 13 M.J. 452 (C.M.A. 1982). See United States v. Heriot, 21 M.J. 11 (C.M.A. 1985) (member felt that a reduction by at least one paygrade was appropriate for a noncommissioned officer in a drug case and was "inflexible" on that point; C.M.A. held that the military judge abused his discretion in denying the challenge for cause, but found no prejudice to the accused).

The disqualification may work in favor of the government as well. See United States v. Sumpter, 1 M.J. 588 (A.C.M.R. 1975), where the member was challenged on the basis of his opinion that a mere cut on the arm with a straight razor did not warrant a BCD.

In a recent case, United States v. Smart, 21 M.J. 15 (C.M.A. 1985), the court held that a member's perfunctory disclaimer of personal interest or impartiality will not be held conclusive. The court stated that, in the interest of fairness and the appearance of fairness, the challenges should have been granted.

16. Miscellaneous considerations. In United States v. Brown, 3 M.J. 368 (C.M.A. 1977), failure of defense counsel to move for mistrial or to challenge member who fell asleep (or nearly asleep) during instructions, did not waive the error. In United States v. Cleveland, 6 M.J. 939 (A.C.M.R. 1979), an inquiry of all the members individually by the military judge, following "disparaging looks" toward a defense witness by one member, convinced the trial judge (and A.C.M.R.) that they were not influenced by the conduct. In United States v. Murphy, 26 M.J. 454 (C.M.A. 1988), the court held that a per se rule of disqualification is not required for a senior member of a court-martial who writes or endorses efficiency or fitness reports of a junior member.

## B. Waiver of disqualifications

1. Case law. In United States v. Bound, 1 C.M.A. 224, 2 C.M.R. 130 (1952), C.M.A. first addressed the problem of challenges and waiver where the evidence showed that a member of the court had acted as an investigating officer. The court pointed out that such disqualification was statutory and that para. 62c of the MCM, 1951, made the first eight disqualifications listed in para. 62f, MCM, 1969, self-executing. Thus, the court did not find waiver even though defense counsel had indicated that he did not wish to challenge the member. The question arose again in United States v. Beer, 6 C.M.A. 180, 19 C.M.R. 306 (1955), where a member of the court was a witness for the prosecution by virtue of the fact that certain service record entries received in evidence were signed by the witness. Here, the law officer (military judge) held an out-of-court hearing on the issue, and defense counsel expressly waived any challenge after all of the facts were made a part of the record. Although recognizing its holding in Bound, C.M.A. held that full development of the facts and the action of defense counsel showed an intelligent and conscious waiver of the disqualification by defense counsel. The C.M.A. has since continued to follow the rationale laid down in Beer concerning waiver.

a. In United States v. Wilson, 7 C.M.A. 656, 23 C.M.R. 120 (1957), C.M.A. held that the record failed to show that the defense counsel realized that the law officer (military judge) was disqualified because of the entry of pages from the accused's service record signed by the law officer (military judge). Failure to object to the introduction of the exhibits was not a waiver of the disqualification.

b. In United States v. Hurt, 8 C.M.A. 224, 24 C.M.R. 34 (1957), the failure to challenge a member who had previously acted as counsel for the accused was held to be a waiver where facts appeared in the record and the defense counsel expressly stated that he did not wish to challenge the member.

c. Express waiver of disqualification of the military judge for prior participation in the case was found where the facts were set forth in the record and the defense counsel did not challenge. United States v. Wismann, 19 C.M.A. 554, 42 C.M.R. 156 (1970); United States v. Powell, 20 C.M.A. 45, 42 C.M.R. 237 (1970).

d. In United States v. Airhart, 23 C.M.A. 124, 48 C.M.R. 685 (1974), C.M.A. held that, although the military judge's implied authentication of the accused's testimony in a related case made him a witness for the prosecution, the ineligibility of the military judge was waived where the defense counsel expressly stated he did not want to challenge the military judge after being informed of the military judge's prior participation in the related trial.

2. MCM, 1984. The Manual for Courts-Martial, 1984, expressly addresses waiver of challenges for cause. R.C.M. 902(e) allows the military judge to accept a waiver by the parties for any disqualification of the military judge arising under R.C.M. 902(b), provided such waiver is preceded by a full disclosure on the record of the basis for such disqualification. Any disqualification of the military judge arising under R.C.M. 902(a), however, remains nonwaivable even with the consent of the parties. As to members, R.C.M. 912(f)(4) makes all challenges for cause against members waivable except those

arising under R.C.M. 912(f)(1)(A), because the competency of a member to serve under Art. 25(a), (b), or (c), UCMJ, is jurisdictional. The rule further makes the right of an accused to have enlisted members from units other than his own waivable if a party knew or could have discovered, by the exercise of diligence, such ground for challenge, but failed to raise it in a timely manner.

3. Waiver of challenge for cause by use of peremptory challenge. During the conduct of voir dire, if the defense counsel develops a certain bias or other grounds for challenge against a member, he will probably make a challenge for cause against the member. If the judge agrees and sustains the challenge, there is no problem. But, should the judge fail to sustain the challenge, the defense counsel is faced with a decision which will affect the fate of his client, not only at trial but also later on appeal. Should the defense counsel use his peremptory challenge against that member, use it against another member he would like to remove from the court for reasons not giving rise to a ground for challenge, or should he waive his peremptory challenge? On first blush, the answer appears clear: get rid of the biased member. But, is this the solution?

a. Case law. Prior to the promulgation of the Manual for Courts-Martial, 1984, military case law had generally recognized that the military judge's erroneous failure to sustain a challenge for cause was not prejudicial to the accused's rights where the member was thereafter peremptorily challenged. United States v. Harris, 13 M.J. 288 (C.M.A. 1982); United States v. Michaud, 48 C.M.R. 379 (N.C.M.R. 1973). See United States v. Haynes, 398 F.2d 980 (2d Cir. 1968), cert. denied, 393 U.S. 1120 (1969). This also was the rule where the challenging party failed to exercise its peremptory challenge at all. United States v. Bush, 12 M.J. 647 (A.F.C.M.R. 1981). More confusing was the situation where the challenging party chose to use its peremptory challenge against a member other than the one whom it had unsuccessfully challenged for cause. In United States v. Hentzner, No. 76 0660 (N.C.M.R. 19 July 1976), the government advocated the proposition that, in order to ensure review of a denial of a challenge for cause, an accused must exercise his peremptory challenge on the contested member. In support of this proposition, the government cited United States v. Henderson, 11 C.M.A. 556, 29 C.M.R. 372 (1960). In Henderson, Judge Ferguson wrote: "Normally [a failure to exercise a peremptory challenge on a disqualified member] would completely waive any error arising from his participation." Id. at 572, 29 C.M.R. at 388. No authority was cited for such a rule and Judge Ferguson went on to find no waiver in Henderson, since that case involved a capital offense. In United States v. Baker, 2 M.J. 773 (A.C.M.R. 1976), however, the court concluded that "[a]lthough there is a diversity of opinion as to whether or not the use of the peremptory challenge against another member waives the challenge for cause, we agree that it does not." Id. at 776.

b. The present rule. R.C.M. 912(f)(4) now clarifies the issue of waiver in this area. Under this rule, the failure to exercise a peremptory challenge at all will waive further consideration of the ruling on the challenge for cause as an appellate issue. A peremptory challenge of any member other than the member originally challenged for cause will preserve the issue. If the challenging party exercises its peremptory challenge against the same member whom it unsuccessfully challenged for cause, however, the issue will be waived unless the challenging party affirmatively states for the record that it would have exercised its peremptory challenge against some other member if the challenge for cause had been granted.

A. Introduction. Art. 25(d)(2), UCMJ requires in part that the convening authority shall detail members to courts-martial who, in his opinion, "are best qualified for duty by reason of age, education, training, experience, length of service and judicial temperament." The convening authority, however, is not precluded from using other criteria not specified in art. 25 in appointing court-martial members, as long as this new method will best assure that the court-martial panel constitutes a representative cross-section of the military community. United States v. Smith, 27 M.J. 242 (C.M.A. 1988). Thus, a convening authority is free to insist that no important segment of the military community (such as blacks, Hispanics, or women) be excluded from service on court-martial panels. Id. However, it is undisputed that a selection process of members that is designed or intended to achieve a particular result as to either findings or sentence is clearly prohibited. The remedy for a convening authority's attempt to "stack the court" if discovered prior to trial, is a judicial order abating any proceedings requiring the presence of members until the members are properly selected.

B. Procedure

1. Discovery. R.C.M. 912(a)(2) entitles either party, upon request, to be provided with a copy of any written materials considered by the convening authority in selecting the members, except those materials which pertain only to persons not selected need not be provided unless the military judge, for good cause, so directs.

2. Motion. If, after examining the written materials and other evidence, a party believes that the members have been selected improperly, that party should move to stay the proceedings. The moving party must, pursuant to R.C.M. 912(b)(2), make an offer of proof of matters which, if true, would constitute improper selection of members before it is allowed to introduce evidence on the motion. Assuming that the offer of proof is sufficient to properly raise the issue, both parties will be allowed to present evidence on the motion.

3. Waiver. R.C.M. 912(b)(1) requires that the moving party present its motion prior to the time the voir dire examination of members begins or at the next session after the party discovered or reasonably could have discovered the grounds therefore, whichever is earlier. Failure to make the motion at this time may operate as a waiver of the issue unless the disqualification of a member was a jurisdictional defect (e.g., member was incompetent to serve) or, perhaps, if the improper selection process was tantamount to unlawful command influence. See United States v. Blaylock, 15 M.J. 190 (C.M.A. 1983). See also United States v. Hilow, 29 M.J. 641 (A.C.M.R. 1989).

C. Case law. Perhaps the most common errors which convening authorities make in the selection of members are the following:

1. Improperly delegating the selection to a subordinate. While it is not inappropriate for a convening authority to allow a subordinate to prepare lists of potential members from which the convening authority then personally selects the members based upon their qualifications under Art. 25,

UCMJ, or, alternatively, having a subordinate select members from a list of persons already found qualified by the convening authority using Article 25, UCMJ, criteria [see, e.g., United States v. Rice, 3 M.J. 1094 (N.C.M.R. 1977)] it is generally inappropriate to have the subordinate personally make the ultimate decision as to the qualifications of the members. See United States v. Ryan, 5 M.J. 97 (C.M.A. 1978). It is also improper to have the trial counsel participate in nominating or selecting members of the court-martial in which he/she is involved. United States v. Smith, 27 M.J. 242 (C.M.A. 1988).

2. Systematic exclusion of certain classes. Except for the statutory preference for the exclusion of members whose rank or grade is lower than the accused's [article 25(d)(1); United States v. Pearson, 15 C.M.A. 63, 35 C.M.R. 35 (1964)], all ranks are generally eligible to serve as members at a court-martial [United States v. Greene, 20 C.M.A. 232, 43 C.M.R. 72 (1970); United States v. Crawford, 15 C.M.A. 31, 35 C.M.R. 3 (1964)]. Therefore, deliberate exclusion of otherwise qualified persons based upon rank or grade violates Article 25, UCMJ. United States v. Daigle, 1 M.J. 139 (C.M.A. 1975).

## 1705 THE VOIR DIRE EXAMINATION

A. Preparation. Generally, the purpose of the voir dire examination is to elicit sufficient information from the potential members in order to develop challenges for cause and to enable counsel to exercise the peremptory challenge intelligently. To accomplish this, counsel needs to discover, prior to the voir dire examination, as much information concerning the members as possible to recognize areas of potential inquiry. To facilitate this, R.C.M. 912(a)(1) provides that, before trial, the trial counsel may submit written member questionnaires to the members requesting the personal information contained in the rule. Indeed, trial counsel must do this if requested by the defense. Additional information may be requested if the military judge approves. Should a request for additional information be disapproved by the military judge, counsel may wish to consider a request under the Freedom of Information Act, 5 U.S.C. § 552. See United States v. Credit, 2 M.J. 631 (A.F.C.M.R. 1976), rev'd on other grounds, 4 M.J. 118 (C.M.A. 1978).

If utilized, the members' questionnaires should be marked as appellate exhibits and attached to the record of trial.

### B. Procedure

1. Members' oath. As the voir dire examination takes place after the assembly of the court, the members will ordinarily have previously been sworn. Counsel should ensure, however, that the original oath of the members also included a promise to answer truthfully during voir dire. If it did not, the members should be sworn again using the oath found in R.C.M. 807(b)(2), discussion (B).

2. Discharge of grounds for challenges for cause. Prior to the voir dire examination, trial counsel should state any grounds for challenges for cause of which he is aware. R.C.M. 912(c).

3. Scope of voir dire. R.C.M. 912(d) gives the military judge the discretion to control the nature and scope of the examination. To this end, the military judge may allow the parties to conduct the examination or may conduct it himself, as there is no right of the parties to personally question the members. United States v. Slubowski, 7 M.J. 461 (C.M.A. 1979), petition denied, 9 M.J. 264 (C.M.A. 1980). Should the military judge personally conduct the inquiry, the parties should be allowed to supplement the inquiry by additional questions personally or through the military judge. Where personal voir dire is permitted, the trial counsel should go first, followed by the defense. Also, members may be questioned individually outside the presence of other members in appropriate cases.

The fundamental rule governing the conduct of voir dire inquiry is that the questions asked must relate to some possible challenge. In the language of one of the leading cases, "[members] may be asked any pertinent question tending to establish a disqualification for duty on the court. Statutory disqualifications, implied bias, actual bias, or other matters which have some substantial and direct bearing on an accused's right to an impartial court are all proper subjects of inquiry." United States v. Parker, 6 C.M.A. 274, 275, 19 C.M.R. 400, 401 (1955). In the same case, a second and only slightly less fundamental rule was also enunciated: "Because bias and prejudice can be conjured up from many imaginary sources ... the areas in which counsel seeks to question must be subject to close supervision by the [military judge]." Id. at 275, 19 C.M.R. at 401. As between the principle that counsel should have wide latitude in seeking to discover if members can fairly and impartially try the issues, and the principle that the military judge has wide discretion in supervising the questions asked by counsel, it appears that the discretion of the military judge has been greatly limited by the emphasis placed upon the accused's right to an impartial court and the necessary means to ensure that impartiality (a searching examination of the attitudes and beliefs of the court members).

Although it is clear that the military judge still retains considerable discretion in controlling questions propounded by counsel, this supervision is concerned primarily with ensuring that questions are understandable and in proper form. See generally Holdaway, Voir Dire - A Neglected Tool of Advocacy, 40 Mil. L. Rev. 1 (1968). Even if the military judge should abuse his discretion by prohibiting certain questions, this error is not always prejudicial. United States v. Huntsman, 22 C.M.A. 100, 46 C.M.R. (1973).

4. Challenges. R.C.M. 912(f)(2) allows challenges to be made upon completion of the examination. Additional challenges for cause may be made at any other time during the trial they become apparent, and additional voir dire may be conducted at that time. R.C.M. 912(f)(2). Challenges are made outside the presence of the members and ordinarily the trial counsel enters challenges for cause before the defense counsel. R.C.M. 912(f)(3). The burden of establishing a challenge for cause is upon the party making the challenge and the military judge rules finally on each challenge. Members successfully challenged are excused. Should this reduce the membership below quorum, additional members must then be detailed by the convening authority.

5. Special courts-martial without a military judge. R.C.M. 912(h) requires that, in a special court-martial without a military judge, a challenge to the president or any member, by counsel, is ruled upon by the court. During the hearing in open court upon a challenge, the president will rule on any interlocutory matters. Any challenge of a member shall be decided in closed session; the challenged member will be excluded and shall not take part in the voting. Before the court closes, the president should instruct the court on the applicable law and procedure to be followed by the court in voting on a challenge. A majority vote shall determine whether the challenge will be sustained or not. A tie vote disqualifies the member challenged. When the president is challenged, the next senior member shall act as president for purposes of deciding the challenge.

## CHAPTER XVIII

### THE DELIBERATIONS PROCESS AND PUNISHMENTS (West's Key Number: MILJUS Key Numbers 1270-1278; 1300-1331)

1801 INTRODUCTION. This chapter is divided into two parts. Part A, entitled "The Deliberations Process," discusses how findings are made and how an accused is sentenced in a court-martial with members. Part B, entitled "Punishments," describes the process employed to determine the maximum sentence imposable at court-martial and examines the nature of court-martial punishments.

#### PART A: THE DELIBERATIONS PROCESS

1802 FINDINGS (West Key Number: MILJUS Key Number 1272)

A. Deliberations. R.C.M. 921, MCM, 1984 [hereinafter R.C.M. \_\_\_\_] prescribes the procedure applicable to the process of deliberations and voting on the issue of guilt in a court-martial with members. After counsel for both parties have completed their closing arguments and the members have received instructions from the military judge, R.C.M. 921(a) requires that the members deliberate and vote "in a closed session." The members may take with them and consider during deliberations all exhibits admitted into evidence and, unless otherwise directed by the military judge, their notes and any written instructions. R.C.M. 921(b). Further, the military judge has discretion to grant any request from the members that the court-martial be reopened and that portions of the record be read to them or additional evidence introduced. Id.

1. In United States v. Tubbs, 1 C.M.A. 588, 5 C.M.R. 16 (1952), the Court of Military Appeals (C.M.A.) held that the court is free to arrive at findings that reflect the accused's guilt or innocence of the offense charged or guilt of a lesser included offense. It is error for the military judge to attempt to direct a verdict or to instruct a court that it may not find a lesser included offense. United States v. Swain, 8 C.M.A. 387, 24 C.M.R. 197 (1957). However, it is prejudicial error for the court to return a finding of guilty as to a lesser included offense which has not been instructed upon. United States v. Morgan, 8 C.M.A. 659, 25 C.M.R. 163 (1958). The military judge has a duty to instruct sua sponte on all lesser included offenses reasonably raised by the evidence. United States v. Rodwell, 20 M.J. 264 (C.M.A. 1985).

2. Permissible findings of a court-martial are set forth in R.C.M. 918 and include findings of guilty or not guilty of the offense charged, guilty with exceptions with or without substitutions, not guilty to the exceptions but guilty of the substitutions, and not guilty only by reason of lack of mental responsibility. See R.C.M. 918(a)(1). A court may not divide a single charge into findings of guilty of two offenses. In United States v. Pardue, 15 C.M.A. 483, 35 C.M.R. 455 (1965), the accused was charged with larceny of a car, and the court announced findings of wrongful appropriation of the car and larceny



of the tires of the car. C.M.A. held such findings were error. One exception to this rule is when the offense charged is a compound offense, such as robbery. Findings of guilty of assault and wrongful appropriation in this case would be permissible. United States v. Calhoun, 5 C.M.A. 428, 18 C.M.R. 52 (1955). Another exception is when an accused is charged with a period of unauthorized absence and determined to have come under military control sometime during the charged period, creating two separate absences. In this case, the accused may be found guilty of two periods of unauthorized absence so long as the maximum punishment for the two absences is limited to no more than would have been permitted if he had been convicted on the original charge. United States v. Francis, 15 M.J. 424 (C.M.A. 1983).

B. Voting (West Key Number: MILJUS Key Number 1270)

1. Procedures. Voting procedures are set forth in R.C.M. 921(c). Voting must be by secret written ballot and all members must vote. R.C.M. 921(c)(1). Members must first vote on individual specifications before voting on the corresponding charge but, where there are several specifications or charges, the president may specify the order of voting unless a majority of the members object. R.C.M. 921(c)(5)(A). Superiority in rank may not be used in any manner to control the independence of members in the exercise of their judgment. R.C.M. 921(a). Members may not vote on a lesser included offense unless a finding of not guilty has been reached as to the offense charged, at which time the members vote on each included offense on which they have been instructed, in decreasing order of severity. R.C.M. 921(c)(5). Votes are taken only after free discussion, at which time the junior member collects the ballots and counts the votes. The president then checks the count and informs the members. R.C.M. 921(c)(5)(B). If the offense carries a mandatory death penalty, all members must concur in the death penalty. R.C.M. 921(c)(2). Unanimous findings of guilt are also required in all capital cases as a precondition to imposition of death sentences. R.C.M. 921(c)(2) (as amended by Executive Order Number 12,550 of 19 February 1986). In all other cases, two-thirds of the members present must concur in any finding of guilty. R.C.M. 921(c)(2). In computing the number of votes required to convict, any fraction of a vote is rounded up to the next whole number. See R.C.M. 921(c)(2)(B), discussion.

-- Not guilty only by lack of mental responsibility. Voting procedures differ in that, first, the members vote on whether the government has proven all elements of the offense(s) beyond a reasonable doubt. If the required percentage of members concur that the government has met its burden, the members will then vote on whether the accused has proven, by clear and convincing evidence, lack of mental responsibility. If a majority of the members conclude that the accused has met this burden, a finding of not guilty only by reason of lack of mental responsibility results.

2. Reconsideration of findings. R.C.M. 924 allows the members to reconsider any of their findings before such findings are "announced in open session." R.C.M. 924(a). If any member proposes that a finding be reconsidered, the members then vote in closed session by secret written ballot on the issue of whether to reconsider. A finding of not guilty may be reconsidered only if a majority of the members vote for reconsideration.

Only a one-third vote is required for reconsideration of a finding of guilty. If the offense carries a mandatory death penalty, a request by any member for reconsideration of a finding of guilty will require reconsideration. R.C.M. 924(b). Any finding of not guilty only by reason of lack of mental responsibility shall be reconsidered if more than one-third of the members vote for reconsideration, and on the issue of mental responsibility if a majority vote for reconsideration. If reconsideration is allowed, the voting procedures of R.C.M. 921, discussed above, are again followed.

C. Announcement of findings. After members have reached findings, the court is reopened and the president informs the military judge that findings have been reached. At this point, the military judge may examine the findings worksheet (see app. 10, MCM, 1984) and may assist the members in putting their findings in proper form. R.C.M. 921(d).

Prior to the enactment of the Manual for Courts-Martial, 1984, there was some confusion as to when an "announcement" of the findings had occurred, as the "announcement" will later preclude any reconsideration of the findings by the members or the military judge.

1. In United States v. McAllister, 19 C.M.A. 420, 42 C.M.R. 22 (1970), the court opened and the president indicated that, because of the abstention of one member, an insufficient number of votes had been cast for a finding of guilty. The court was instructed on reballoting and closed again. C.M.A. held that the announcement showed that the members did not consider the opening of the court and the statement of the president as an announcement of their findings and, thus, the statement of the president was not an announcement of a finding of not guilty.

2. In United States v. Downs, 4 C.M.A. 8, 15 C.M.R. 8 (1954), the president announced the findings of the court which included a not guilty finding of one offense charged. The president failed to indicate that two-thirds of the members concurred as to other findings of guilty. When questioned by the law officer (military judge) as to the proper form of the announcement, the court again went into closed session. When the court returned, the president properly announced the guilty findings as to the other offenses and that the court had found the accused guilty of the lesser included offense of the remaining offense charged, and that the first announcement had not been the findings of the court and had been error. C.M.A. held that the second announcement was proper, and that a court could correct an erroneous announcement, and such correction was not a reconsideration of a not guilty finding.

3. United States v. Hitchcock, 6 M.J. 188 (C.M.A. 1979), posed a somewhat different problem. Here, the military judge granted a motion for a finding of not guilty for one of two charges. Moments later, after apparently being shown additional cases by the trial counsel which were contrary to his ruling, the military judge reconsidered, withdrew his original ruling, and denied the motion. C.M.A., in addressing the question of whether this was proper, pointed out that military practice does not require entry of a formal order or judgment of a finding of not guilty as does Rule 2g of the Federal Rules of Criminal Procedure. "Instead, announcement of the finding in court, in the presence and hearing of the accused, gives operative effect to it." Id. at 190.

The court analogized the announcement of findings and sentence by a court-martial under Article 53, UCMJ, to a trial judge's ruling on a motion for a finding of not guilty under Article 51(b), UCMJ, which empowers the judge to rule with finality on that motion. Therefore, since that is a ruling of the court, it follows that when it is correctly announced in the presence of the accused, the trial is concluded, at least for that specification, and the ruling may not later be reconsidered and retracted. Accordingly, C.M.A. reversed the ruling of the military judge as to his second ruling on the motion for a finding of not guilty.

Hopefully, this problem has now been clarified by R.C.M. 921(d), which provides that the consideration of the findings worksheet and discussions regarding the findings shall not constitute an "announcement" of the findings. Additionally, under R.C.M. 922(e), any error in the formal announcement of the findings may be corrected before the final adjournment of the court. Finally, R.C.M. 922 no longer requires that the president, in formally announcing the findings, incant that two-thirds of the members concurred. However, if a finding is based upon a plea of guilty, the president should so state. R.C.M. 922(b). Polling of the members is prohibited by R.C.M. 922(e) except to the extent permitted under Mil.R.Evid. 606, MCM, 1984. See United States v. Connors, 23 C.M.R. 636 (A.B.R. 1957); United States v. Hendon, 6 M.J. 171 (C.M.A. 1979).

D. Special findings. In a trial by military judge alone, the military judge must make special findings when requested by either party. R.C.M. 918(b). This rule is patterned after Rule 23(c) of the Federal Rules of Criminal Procedure which makes such findings mandatory when requested prior to the announcement of general findings. See also, United States v. Gerard, 11 M.J. 440 (C.M.A. 1981). Absent a request by counsel, the military judge may make special findings at his discretion.

1. If findings are requested on specific matters, the military judge may require that the request be in writing.

2. Special findings may be requested only as to matters of fact reasonably in issue for an offense and need be made only for offenses of which the accused was found guilty. R.C.M. 918(b).

3. Special findings may be made orally, either during or after the court-martial, but in any event must be made before authentication of the record of trial. Id.

4. As to essential findings of fact which must be made even absent a request by counsel regarding motions, see Mil.R.Evid. 304(d)(4) and 311(d)(4).

1803 THE SENTENCE (West Key Number: MILJUS Key Number 1300 et seq.)

A. Deliberations. R.C.M. 1006 governs the procedure for deliberations and voting by members on sentence. After receiving instructions from the military judge, all members must be present during deliberations in closed

session. Significantly, even those members who voted to acquit on the merits must be present and must vote on sentencing. R.C.M. 1006(d)(1). After a full and free discussion, the members shall vote on the appropriate sentence. R.C.M. 1006(b).

B. Voting. After deliberations, any member may propose a sentence. The junior member will collect the written proposals and submit them to the president. R.C.M. 1006(c). The proposed sentences are then voted upon by secret written ballot, beginning with the least severe and continuing until a concurrence of the requisite number of members is achieved. R.C.M. 1006(d)(3)(A). In United States v. Johnson, 18 C.M.A. 436, 40 C.M.R. 148 (1969), C.M.A. held that the voting procedures then set forth in paragraph 76(b)(2), MCM, 1969 (Rev.), were mandatory and that it was prejudicial error for the military judge to fail to instruct the court that it should begin its balloting with the lightest sentence proposed.

1. Number of votes required. R.C.M. 1006(d)(4) requires that, if the sentence includes death, all members must concur. If the sentence includes confinement for more than ten years, at least three-fourths of the members must concur. All other sentences must be based on a concurrence of at least two-thirds of the members present.

2. Effect of failure to agree. If the required number of members do not agree on a sentence after a reasonable period of time, a mistrial may be declared and the record of trial returned to the convening authority who may order a rehearing on sentence or order that a sentence of "no punishment" be imposed. R.C.M. 1006(d)(6). In United States v. Jones, 14 C.M.A. 177, 33 C.M.R. 389 (1963), C.M.A. recognized that a court with members, after deliberations on sentence, could fail to arrive at a sentence for which the required number of votes by the members would be attained. The court stated that, if there were a "hung jury" on sentence, it was error for the law officer (military judge) to instruct that the court was required to arrive at a sentence. If it appeared that the court could not arrive at a sentence, then the case should be returned to the convening authority. The convening authority then could order a rehearing on the sentence before a different court.

3. In Jones, the C.M.A. further recognized that it would be a proper sentence for the court to give no punishment at all, i.e., a sentence of "no sentence."

C. Announcement of sentence. After agreement on sentence is reached, the court is reopened and the military judge may examine the sentence worksheet (app. 11, MCM, 1984) and assist the members in putting the sentence into proper form. R.C.M. 1006(e). See United States v. Justice, 3 M.J. 451 (C.M.A. 1977). This does not, however, constitute an "announcement" and, if an error exists, the members may properly reconsider their sentence. If the sentence appears to be in proper form, the president shall then announce it in open court. R.C.M. 1007(a).

1. Erroneous announcement. If the announced sentence is not the one actually determined by the court, R.C.M. 1007(b) allows the error to be corrected by a new announcement made before the record of trial is authenticated and forwarded to the convening authority. However, this

procedure may not be used to allow the members to reconsider their sentence because the procedures for reconsideration under R.C.M. 1009 must be followed in such instances.

2. Impeachment of sentence. R.C.M. 1008 forbids the impeachment of any sentence which was proper on its face unless first shown that extraneous prejudicial information was brought to the attention of a member or that outside influence or command influence was brought to bear upon a member.

D. Reconsideration of sentence. R.C.M. 1009(a) provides that a sentence may be reconsidered at any time before the record of trial has been authenticated. This reconsideration may occur with a view toward either increasing or decreasing the sentence except that, if the sentence as already announced was equal to the mandatory minimum authorized for the offense, the sentence could not, of course, be increased. R.C.M. 1009(b).

1. Reconsideration proposal. Any member may propose reconsideration of any sentence reached by the members. R.C.M. 1009(c)(1). Additionally, the military judge may initiate reconsideration of any sentence reached by him or by the members when such sentence is ambiguous or apparently illegal. If the ambiguity is discovered after adjournment of the court, the military judge may call a special session for reconsideration or may simply bring the matter to the attention of the convening authority. R.C.M. 1009(c). The convening authority may then either return the matter to the court-martial for its reconsideration or may choose to approve a sentence no more severe than the legal, unambiguous portions of the announced sentence. R.C.M. 1009(c)(3).

2. Reconsideration procedure. After a proposal has been made to reconsider the sentence, the members shall vote in closed session by secret written ballot on whether to reconsider their sentence. R.C.M. 1009(d)(2). If reconsideration is to take place with a view toward increasing the sentence, at least a majority of the members must concur. If the view is toward decreasing the sentence, at least one member must vote to reconsider a sentence which includes death; more than one-fourth of the members must vote to reconsider a sentence which includes confinement for more than ten years; and more than one-third of the members must vote to reconsider any other sentence. R.C.M. 1009(d)(3). Should the vote to reconsider succeed, the members then follow again the procedures for voting outlined in R.C.M. 1006.

**PART B: COURT-MARTIAL PUNISHMENTS**  
(West Key Number: MILJUS Key Number 1322 et seq.)

1804      **LIMITATIONS ON PUNISHMENTS.** In considering the amount and type of punishments that a court-martial may adjudge in any given case, it must be kept in mind that courts-martial are courts of limited jurisdiction and have no authority to impose any punishment other than those specifically authorized by the Uniform Code of Military Justice (UCMJ), the Manual for Courts-Martial, 1984 (MCM), and the JAG Manual (JAGMAN). These sources also limit the punishment power of a court-martial depending upon the type of court-martial, the offense(s) charged, the status of the accused, the type of punishment, and the prior disciplinary record of the accused.

A.    Limitation by type of court-martial. Articles 18, 19, and 20 of the UCMJ list the punishment powers Congress has conferred on the three types of courts-martial. The limits set forth in these articles are jurisdictional; they cannot be exceeded under any circumstances.

1.    General court-martial (GCM) (Article 18, UCMJ)

A general court-martial "may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter [the UCMJ], including the penalty of death when specifically authorized by this chapter."

2.    Special court-martial (SPCM) (Article 19, UCMJ)

A special court-martial "may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter [the UCMJ], except death, dishonorable discharge, dismissal, confinement for more than six months, hard labor without confinement for more than three months, forfeiture of pay exceeding two-thirds pay per month or forfeiture of pay for more than six months."

3.    Summary court-martial (SCM) (Article 20, UCMJ)

A summary court-martial "may, under such limitation as the President may prescribe, adjudge any punishment not forbidden by this chapter [the UCMJ], except death, dismissal, dishonorable or bad conduct discharge, confinement for more than one month, hard labor without confinement for more than forty-five days, restriction to specified limits for more than two months or forfeiture of more than two-thirds of one month's pay."

B.    Additional UCMJ limitations

1.    In general. In addition to the basic power to punish set forth in articles 18, 19, and 20, each punitive article of the UCMJ, spells out what punishment is authorized for that particular offense.

a.    Some articles simply provide that the offender "shall be punished as a court-martial may direct." See arts. 86, 87, 89 and 92.

b. Other articles are more specific. For example, a service-member convicted of a violation of article 90 (assaulting or willfully disobeying a commissioned officer) "committed in time of war, [shall be punished] by death or such other punishment as a court-martial may direct. . . ."

2. Additionally, the UCMJ prescribes punishments for attempts (Article 80, UCMJ), conspiracies (Article 81, UCMJ), and solicitations (Article 82, UCMJ) to commit offenses made punishable under other articles.

3. Further, the UCMJ sets forth permissible punishments not only for perpetrators of offenses (Article 77, UCMJ) but also for accessories after the fact (Article 78, UCMJ).

C. Presidential limitations. As noted in Articles 18, 19, and 20, UCMJ, and as provided in Article 56, UCMJ, the power of a court-martial to punish in a given case may be further limited by presidential regulations. These are contained for each separate offense in Part IV, MCM, 1984. These punishments are summarized in the maximum punishment chart found at appendix 12, MCM, 1984. (Note, however, that the chart is unofficial and may not be cited as authority for specific punishments as it has no force of law.)

D. Permissible additional punishments. Although the UCMJ and MCM may place a ceiling on punishments for a certain offense, other statutory provisions may authorize additional punishments in certain cases.

1. Punishments in excess of those provided for the offense in Part IV, MCM, 1984, may be adjudged if one of the "escalator" provisions of R.C.M. 1003(d) applies due to the existence of multiple offenses in the case or multiple prior convictions of the accused. These escalator clauses are discussed in section 1804, infra.

2. While Part IV, MCM, 1984, sets maximum punishments for offenses only in terms of death, confinement, forfeiture of pay, and punitive discharge, R.C.M. 1003 further authorizes reduction in rank, confinement on bread and water/diminished rations, hard labor without confinement, fines, loss of lineal numbers, reprimand, and restriction. These punishments are discussed in section 1803, infra.

3. Article 58a, UCMJ, and JAGMAN, § 0145a(7), provide for the automatic administrative reduction to paygrade E-1 of an enlisted accused whose sentence, as approved by the convening authority, includes a punitive discharge or confinement in excess of three months. Administrative reduction is discussed in section 1803, infra.

E. Prohibited punishments. In Article 55, UCMJ, Congress, in addition to providing punishment powers for court-martial, expressly prohibited the imposition of certain punishments. They are:

1. Flogging;
2. branding;
3. marking;

4. tattooing the body;
5. the use of irons (except for safekeeping of prisoners); or
6. any other cruel or unusual punishment.

Any other punishment, or combination of punishments, which is not specifically authorized is prohibited. In United States v. Hewett, 2 M.J. 496 (A.C.M.R. 1976), the Army Court of Military Review held that the military judge did not have authority to include in the sentence an order for the accused to attend Alcoholics Anonymous meetings. The accused, in United States v. Robinson, 3 M.J. 65 (C.M.A. 1977), was sentenced to confinement at a prior court-martial. In accordance with an Air Force regulation, he was transferred to a "retraining group" during the period of confinement. The time required to complete the "retraining group" program extended beyond the period of confinement to which he had been sentenced. He was prosecuted again for violating certain retraining group regulations. In overturning the conviction, the court held that the transfer to the retraining group was in execution of his sentence; therefore, the restriction which accompanied it was an unlawful extension of the sentence when the period of confinement would have otherwise expired. In United States v. Jones, 3 M.J. 348 (C.M.A. 1977), the members included in the sentence an undesirable (other than honorable conditions) discharge, reduction in rank, and confinement. The military judge directed them to close again and reconsider that illegal portion of the sentence (the undesirable discharge) or the whole sentence. They returned 12 minutes later with a bad-conduct discharge to replace the undesirable discharge, and reduced the confinement from 18 to 12 months. C.M.A. held that it was error to allow them to reconsider because the fact that the undesirable discharge was beyond the court's power to adjudge did not adversely affect the remainder of the sentence. The reconsideration procedure allowed the members to increase the severity of the sentence in spite of the reduction in the confinement adjudged.

#### F. Multiplicity as a limitation on punishment

1. General prohibition. R.C.M. 1003(c)(1)(C) provides: "When the accused is found guilty of two or more offenses, the maximum authorized punishment may be imposed for each separate offense. . . (however), (i)f the offenses are not separate, the maximum punishment for those offenses shall be the maximum authorized punishment for the offense carrying the greatest maximum punishment." Clearly, a person may not be punished twice for the same offense. United States v. Modesett, 9 C.M.A. 152, 25 C.M.R. 414 (1958). Thus, it must be determined whether the offenses of which the accused was convicted are separate or multiplicitous for punishment purposes.

2. Tests for "separateness" of offenses. Multiplicity has proven to be a difficult area in which C.M.A. has applied several tests to determine if offenses are separate for punishment purposes.

a. Separate elements test. R.C.M. 1003(c)(1)(C) states that "offenses are not separate if each does not require proof of an element not required to prove the other."



b. One offense included in another. United States v. Posnick, 8 C.M.A. 201, 24 C.M.R. 11 (1957) (unauthorized absence (UA) and missing movement during same period held multiplicitous, as UA is lesser included offense of missing movement).

c. Evidence sufficient to prove one offense also proves another. United States v. Rosen, 9 C.M.A. 175, 25 C.M.R. 437 (1958) (a false claims charge, based on the preparation and presentation of false military pay orders and a charge of larceny of the total amount of the pay orders, held multiplicitous).

d. Accused guided in committing offenses by a "single impulse." United States v. Pearson, 19 C.M.A. 379, 41 C.M.R. 379 (1970) (assault and escape from confinement held multiplicitous). Cf. United States v. Pfifer, 3 M.J. 761 (A.C.M.R. 1977) (aggravated assault on a second policeman as he was leaving the detention facility was not multiplicitous with escape from confinement when the escape had already been accomplished by rendering the first guard unconscious and stealing his pistol).

e. Offenses part of a "continuous transaction" or a "single integrated transaction." United States v. Murphy, 18 C.M.A. 571, 40 C.M.R. 283 (1969) (larceny and wrongful disposition of same government property held multiplicitous). "To qualify as a single integrated transaction for multiplicity purposes, a course of conduct resulting in criminal charges should have a ... combination of like object and insistent flow of events." United States v. Burney, 21 C.M.A. 71, 73, 44 C.M.R. 125, 128 (1971), (wrongful appropriation of vehicle and larceny of the property transported in the vehicle held not to be multiplicitous). However, signing false official pay records was held not to be multiplicitous with wrongful appropriation of government funds when the records were falsified to avoid detection and were not themselves a medium for withdrawal of funds. Likewise, the specifications alleging the signing of false pay records were not multiplicitous with each other because each pay record related to a different day and was single and complete for that day. "That the same process of concealment was used on different days did not transmogrify the several transactions into a single wrong." United States v. Harrison, 4 M.J. 332, 334 (C.M.A. 1978).

f. Offenses violate different standards of conduct or societal norms. United States v. Beene, 4 C.M.A. 177, 15 C.M.R. 177 (1954) (drunken driving and involuntary manslaughter held not multiplicitous); United States v. Rose, 6 M.J. 754 (N.C.M.R. 1978) (burglary, rape, and sodomy not multiplicitous for sentencing). Similarly, a conspiracy to commit the substantive offense and commission of a substantive offense itself are separately punishable. "... formation of conspiratorial groups is deemed socially harmful because there is a danger concentrated in a confederation of law violators." United States v. Washington, 1 M.J. 473, 475 (C.M.A. 1976) (accused convicted of conspiracy to commit larceny and larceny of stereo equipment).

g. Facts of the offenses "are so integrated as to emerge as a single event." United States v. Smith, 1 M.J. 260, 261 (C.M.A. 1976) (quantity of drugs possessed exceeded amount accused had attempted to sell; the possession and attempted sale occurred at about the same time and at the same place; sale and possession held multiplicitous). United States v. Hughes, 1 M.J. 346 (C.M.A. 1976) (accused possessed hashish, amphetamines, and heroin in

three different containers, found in two locations in his apartment, the time proximity of possession was held the key factor in deciding that all offenses were multiplicitous). But see United States v. Irving, 3 M.J. 6 (C.M.A. 1977) (solicitation to sell heroin made in a first-floor room was separately punishable from the actual sale occurring 3-1/2 to 4-1/2 hours later in a third-floor room); United States v. Wenz, 1 M.J. 1030 (N.C.M.R. 1976) (larcenies from three automobiles in same parking lot and at about the same time held not to be multiplicitous).

G. Summary. In order to determine the maximum permissible punishment for an accused who stands convicted of offenses, counsel should:

1. Check Part IV, MCM, 1984, to ascertain the maximum authorized punishment for each offense;
2. determine whether any of the offenses are multiplicitous for punishment purposes;
3. see if the articles defining the offenses contain any specific punishment provisions;
4. check R.C.M. 1003 for available permissible additional punishments; and
5. ascertain whether the maximum authorized punishment is within the court's jurisdictional limits by reviewing Articles 18, 19, or 20, UCMJ.

1805 NATURE OF PUNISHMENTS. Basically, authorized punishments fall into six broad categories: death; separation from the service; restraint and/or hard labor; loss of money; loss of rank; and censure. The punishments within these categories can be examined with the following questions in mind: (1) What is the nature of the punishment? (2) On whom may it be imposed? (3) May it be combined with other punishments? and (4) What type of court-martial may adjudge it?

#### A. Death

1. As a mandatory punishment. There is only one mandatory capital offense under the UCMJ: Spying in time of war in violation of article 106. For this crime, death may be imposed on any person -- military or civilian.

2. As a permissible punishment. The death penalty may be imposed on military or civilian persons for aiding the enemy (Article 104, UCMJ). It also may be imposed on any person subject to the UCMJ for desertion, or attempted desertion, in time of war (Article 85, UCMJ); assault on, or willfully disobeying, a superior commissioned officer in time of war (Article 90, UCMJ); attempted mutiny, mutiny, sedition, or failure to suppress or report a mutiny or sedition (Article 94, UCMJ); misbehavior before the enemy (Article 99, UCMJ); subordinate compelling surrender (Article 100, UCMJ); improper use of a countersign in time of war (Article 101, UCMJ); forcing a safeguard (Article 102, UCMJ); espionage (Article 106a, UCMJ);

willful hazarding of a vessel (Article 110, UCMJ); misbehavior of a sentinel in time of war (Article 113, UCMJ); premeditated murder or murder while engaged in committing certain felonies, e.g., burglary (Article 118, UCMJ); and rape of a victim under the age of twelve or rape of adult when the accused maimed or attempted to kill the victim [Article 120, UCMJ, R.C.M. 1004(c)(9)]. See also Coker v. Georgia, 433 U.S. 584 (1977); United States v. Clark, N.M.C.M.R. 84-1345 (12 July 1984).

3. Combination with other punishments. R.C.M. 1004(e) provides: "A sentence of death includes a dishonorable discharge or dismissal, as appropriate. Confinement is a necessary incident of a sentence of death but not a part of it."

4. What type of court-martial may impose the death penalty? Article 18, UCMJ, states that only a general court-martial has the power to adjudge the death sentence. A general court-martial composed of military judge alone does not have authority to try a capital case.

5. Constitutional safeguards. Prior to the promulgation of the Manual for Courts-Martial, 1984, in United States v. Matthews, 16 M.J. 354 (C.M.A. 1983), the Court of Military Appeals held that neither the UCMJ nor the MCM provided adequate constitutional safeguards for the imposition of the death penalty in a rape and murder conviction. Leaving open the possibility that a different constitutional standard may apply to capital offenses of a military nature, e.g., desertion in time of war, a trial for rape and murder involves no military necessity justifying a relaxation of the rules delineated by the Supreme Court in recent years. See Furman v. Georgia, 408 U.S. 238 (1972); Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976). In many ways, the sentencing procedures of courts-martial met the constitutional safeguards against arbitrary and capricious imposition of the death penalty. For instance, courts-martial employ a bifurcated sentencing procedure and the members are instructed by the military judge as to their duties. The accused has unlimited opportunity to present mitigating and extenuating evidence to balance any aggravating evidence presented by the government. In addition, an extensive investigation and review is conducted before a case is referred to a general court-martial, thus narrowing the class of persons eligible for the death penalty. As an additional safeguard, mandatory review through several levels, including final approval by the President of the United States, is a prerequisite to final execution of the sentence. Military procedures fell short of constitutional safeguards, however, by failing to require court members to identify aggravating factors upon which they relied in choosing to impose death. This shortcoming made it impossible for reviewing authorities to determine whether the members made an individualized determination to impose death on the basis of the accused's character and the circumstances of the crime. It also made it impossible to insure that the members used those aggravating factors to differentiate the case in an objective, even-handed, and rational way from other murder cases in which the death penalty was not imposed. Finally, C.M.A. discussed whether the ex post facto clause would permit a rehearing to sentence Matthews anew based upon revised procedures. Since Matthews was on notice that death was a possible sentence before he committed his crime, C.M.A. ruled that the ex post facto clause would not be violated by such a rehearing as long as the revised procedures were adopted by either

the President or the Congress within 90 days of its October 11, 1983, decision. While no action was taken within the 90-day period, thus invalidating death sentences adjudged in Matthews, supra, and other capital cases decided under the procedures existing prior to 1 August 1984, the drafters of the Manual for Courts-Martial, 1984, provided for a special sentencing procedure in capital cases to conform the constitutional requirements discussed in Matthews, supra. R.C.M. 1004 now requires special findings by members of specific aggravating circumstances before a death sentence may be adjudged. Further, the members must specifically find that, on balance, any extenuating or mitigating facts are substantially outweighed by these aggravating circumstances enumerated in the rule. R.C.M. 1004(a)(4)(B). These special procedures are required to be followed in all capital cases in addition to the regular sentencing procedures mandated by R.C.M. 1001.

B. Separation from service

1. The three types of punitive separation which may be adjudged by courts-martial are:

- a. Dismissal [R.C.M. 1003(b)(10)(A)];
- b. dishonorable discharge [R.C.M. 1003(b)(10)(B)]; and
- c. bad-conduct discharge [R.C.M. 1003(b)(10)(C)].

2. Punitive discharges are not to be confused with the three types of administrative discharges: Honorable discharge, general discharge, and a discharge under other than honorable conditions. Courts-martial cannot adjudge administrative discharges. R.C.M. 1003(b)(10). See United States v. Jones, 3 M.J. 348 (C.M.A. 1977). The general rule is that ordinarily the military judge should not instruct on clemency recommendations and administrative discharges. United States v. King, 51 C.M.R. 664 (N.C.M.R. 1975). But see United States v. Keith, 22 C.M.A. 59, 46 C.M.R. 59 (1972).

3. Dismissal of officers

a. Nature of the punishment

(1) It is a separation from the service with dishonor. It is more than merely a separation without honor. United States v. Ballinger, 13 C.M.R. 465 (A.B.R. 1953). It is in nature equivalent to a dishonorable discharge. United States v. Bell, 8 C.M.A. 193, 24 C.M.R. 3 (1957).

(2) It bars all veterans' benefits (under any laws administered by the Veterans Administration) based upon the period of service to which the dismissal pertains. United States v. Ballinger, supra; 38 U.S.C. § 1625.

(3) It bars some service-provided benefits to which the recipient would otherwise be entitled upon separation.

b. Who may receive dismissal?

(1) R.C.M. 1003(b)(10)(A) states that a dismissal as a punishment applies only to commissioned officers, commissioned warrant officers, cadets, and midshipmen. See United States v. Ellman, 9 C.M.A. 549, 26 C.M.R. 329 (1958).

(2) Dismissal cannot be imposed on a noncommissioned warrant officer (W-1) or an enlisted man.

(3) It is the only means by which an officer, commissioned warrant officer, cadet, or midshipman may be separated from the service by sentence of a court-martial. See United States v. Bell, 8 C.M.A. 193, 24 C.M.R. 3 (1957). See also, United States v. Plummer, 12 C.M.A. 18, 30 C.M.R. 18 (1960).

(4) Officers, commissioned warrant officers, cadets, and midshipmen tried by general court-martial may receive a dismissal for a conviction of any offense under the UCMJ, regardless of the maximum authorized punishments listed for such an offense in Part IV, MCM, 1984.

c. Combination with other punishments. A dismissal may be adjudged whenever authorized and appropriate without reference to other punishments, i.e., a dismissal may be awarded without adjudging any other type of punishment.

d. What type of court-martial may adjudge a dismissal?  
Only a general court-martial can adjudge a dismissal. See Arts. 18, 19, 20, UCMJ; R.C.M. 1003(b)(10)(A).

4. Dishonorable discharge

a. Nature of the punishment

(1) As noted, it is equivalent in nature to a dismissal, i.e., a separation with dishonor.

(2) R.C.M. 1003(b)(10)(B) provides that it should be reserved as a punishment for those convicted of offenses recognized by the civil law as felonies (rape, murder, robbery, etc.) or of offenses of a military nature requiring severe punishment (desertion, assaulting an officer, etc.) where the circumstances indicate that the accused be separated with dishonor.

(3) A dishonorable discharge has the same effect on veterans' benefits as a dismissal.

b. Who may receive a dishonorable discharge?

(1) R.C.M. 1003(b)(10)(B) provides that a dishonorable discharge may be imposed only on an enlisted person or a noncommissioned warrant officer (W-1).

(2) It is the only means by which a noncommissioned warrant officer may be separated by a court-martial.

(3) A noncommissioned warrant officer tried at a general court-martial may receive a dishonorable discharge for conviction of any offense under the UCMJ, regardless of the maximum authorized punishment listed for such offense in Part IV, MCM, 1984. R.C.M. 1003 (as amended by Executive Order Number 12,550 of 19 February 1986).

c. What type of court-martial may adjudge a dishonorable discharge? Only a general court-martial may adjudge a dishonorable discharge. See Arts. 18, 19, and 20, UCMJ; R.C.M. 1003(b)(10)(B).

5. Bad-conduct discharge

a. Nature of the punishment

(1) It is a separation from the service under conditions other than honorable. It is a less onerous form of separation than a dishonorable discharge, since it is not a separation with dishonor. It is designed as a punishment for bad conduct rather than as a punishment for the serious offenses for which a dishonorable discharge is appropriate. It may be an appropriate punishment for an accused who has several convictions for minor offenses. See R.C.M. 1003(b)(10)(B).

(2) The effect of a bad-conduct discharge on veterans' benefits depends on:

(a) Whether it is imposed by a special court-martial or general court-martial; and

(b) whether the benefits are administered by the Veterans Administration or by the armed service to which the accused belonged. See generally 38 U.S.C. § 1625 and 38 C.F.R. § 3.12.

b. Who may receive a bad-conduct discharge? A bad-conduct discharge may only be imposed on enlisted persons. See R.C.M. 1003(c)(10)(C)

c. What type of court-martial may adjudge a bad-conduct discharge?

Either a general court-martial or special court-martial may adjudge a bad-conduct discharge. See Arts. 18, 19, UCMJ. R.C.M. 201(f)(2)(B)(ii), however, states that a bad-conduct discharge may not be adjudged by a special court-martial unless: (1) Counsel qualified under article 27(b) is detailed to represent the accused, and (2) a military judge is detailed to the trial unless prevented by physical conditions or military exigencies, in which case the convening authority must, prior to the trial, prepare a written statement to be appended to the record of trial setting forth the reasons why a military judge could not be detailed and why the trial had to be held at that time and place.

**C. Punishments involving restraint and/or hard labor**

**1. There are four types of punishment under this category:**

- a. Confinement;
- b. confinement on bread and water or diminished rations;
- c. restriction to limits; and
- d. hard labor without confinement.

**2. Confinement**

**a. Nature of the punishment**

(1) It is physical restraint of a person in a brig, disciplinary command, or Federal prison with the imposition of hard labor as a part thereof. See Art. 9(a), UCMJ; R.C.M. 1003(b)(8), discussion.

(2) The omission of the words "hard labor" in any sentence of a court-martial adjudging "confinement" does not deprive the authority executing that sentence of the power to require hard labor as a part of the punishment. See Art. 58(b), UCMJ; R.C.M. 1003(b)(8), discussion; United States v. Carte, 13 C.M.A. 274, 32 C.M.R. 274 (1962).

**b. Who may receive confinement?**

(1) Commissioned officers, commissioned warrant officers, cadets, and midshipmen may be sentenced to confinement only by general courts-martial. R.C.M. 1003(c)(2)(A)(ii).

(2) Enlisted personnel may receive confinement at general, special, and summary courts-martial. Enlisted personnel above paygrade E-4, however, cannot receive confinement as a punishment by a summary court-martial. R.C.M. 1301(d)(2).

**c. What type of court-martial may adjudge confinement?**

All three courts may adjudge confinement in varying amounts.

**(1) Type of court - jurisdictional limitation**

(a) GCM - no jurisdictional limit. Art. 18, UCMJ.

(b) SPCM - may not adjudge more than six months of confinement. Art. 20, UCMJ.

(c) SCM - may not adjudge more than one month of confinement. Art. 20, UCMJ.

(2) Part IV, MCM, 1984, may further limit the confinement power of any particular court as to a particular offense.

d. Lesser included punishments of confinement

(1) Restriction -- reduces the severity of the restraint and eliminates the hard labor portion.

(2) Hard labor without confinement -- eliminates all restraint but retains the hard labor.

3. Confinement on bread and water or diminished rations

a. R.C.M. 1003(b)(9) provides that this punishment may be imposed only upon enlisted members attached to or embarked in a vessel and for no more than three days. For Navy and Marine Corps personnel, JAGMAN, § 0148c, requires that the punishment not be imposed upon an accused who is in paygrade E-4 and above. Summary courts-martial, regardless of branch of service, may not adjudge this punishment on personnel in paygrade E-4 or above. R.C.M. 1301(d)(2).

b. Under the provisions of R.C.M. 1113(d)(6), this punishment may be executed only if a medical officer examines both the accused and the place of confinement and certifies in writing that the service of the punishment will not produce serious injury to the health of the accused.

c. The punishment may be served in a place where the accused can communicate only with authorized personnel. R.C.M. 1113(d)(6). In the Navy and Marine Corps, however, the punishment may be served in approved brigs or confinement facilities ashore. JAGMAN, § 0148c.

d. As this punishment may involve the isolation of the prisoner from other unauthorized personnel, it amounts to a form of solitary confinement. No hard labor is authorized while serving the punishment. The diet of the prisoner may not consist solely of bread and water unless the punishment adjudged specifically included these terms. See discussion, R.C.M. 1003(b)(9). Diminished rations consists of a diet specified by the authority charged with the administration of the punishment. See SECNAVINST 1640.9, para. 109.5.

e. Combination with other punishments. If adjudged in the same sentence with confinement, hard labor without confinement, or restriction, confinement on bread and water or diminished rations shall be treated as the equivalent of two days confinement. R.C.M. 1003(b)(9). Thus, for example, at a summary court-martial, confinement on bread and water for three days might be combined with 24 days of confinement at hard labor without exceeding the jurisdictional limits of the summary court-martial. See discussion, R.C.M. 1301(d)(1).

4. Restriction to limits. R.C.M. 1003(b)(6).

a. Nature of the punishment

(1) It is a moral restraint of a person by an order to remain within certain specified limits for a definite period of time.



(2) The person restricted is allowed the freedom of the specified limits.

(3) The person is required to perform all his military duties.

(4) In effect, restriction is a deprivation of privileges by setting limits of restriction which exclude the place where the privilege may be enjoyed.

b. Who may receive the punishment? Restriction may be adjudged as a punishment upon any accused, officer as well as enlisted.

c. What type of court-martial may adjudge restriction? All courts-martial may adjudge restriction not to exceed a maximum of two months. R.C.M. 1003(b)(6); 1301(d)(1).

d. Combination with other punishments

(1) Restriction may be combined with any other punishment. When restriction is combined with confinement, however, restriction may be adjudged for no more than two months for each month of authorized confinement and the restriction may not, in any event, exceed two months. R.C.M. 1003(b)(6); 1003(c)(1)(A)(ii).

(2) When restriction and hard labor without confinement are adjudged in the same sentence, they shall, unless one is suspended, be executed concurrently.

5. Hard labor without confinement. R.C.M. 1003(b)(7).

a. Nature of the punishment

(1) Hard labor means rigorous work, but not so rigorous as to be detrimental to health.

(2) The work is performed in addition to the person's normal duties.

(a) No person shall be excused or relieved from any military duty for the purpose of performing such hard labor.

(b) Accordingly, hard labor is performed outside normal working hours (before and/or after).

(3) The amount and specific character of the hard labor to be performed during a day is normally designated by the immediate commanding officer of the accused.

(4) Upon completion of the daily assignment, the accused should be permitted the liberty to which he is properly entitled.

(5) A person cannot be required to perform hard labor on Sundays, but may be required to perform it on holidays. See Art. 1158.2, U.S. Navy Regulations, 1973.

b. Who may receive the punishment? Hard labor without confinement may be imposed only on enlisted persons. R.C.M. 1003(c)(2)(A)(iii).

c. What type of court-martial may adjudge hard labor without confinement?

-- All courts-martial may adjudge the punishment.

(a) Special and general courts-martial may adjudge no more than 1 1/2 months of hard labor without confinement for each month of authorized confinement, but in no case may such a court adjudge more than three months of hard labor without confinement. R.C.M. 1003(b)(7).

(b) Summary courts-martial may award no more than 45 days of hard labor without confinement in any case. R.C.M. 1301(d)(1). The punishment may not be imposed on personnel in paygrade E-5 and above at summary court-martial. R.C.M. 1301(d)(2).

d. Combination with other punishments. Hard labor without confinement may be awarded with any other punishments. When combined with confinement in the same sentence, however, the two punishments together may not exceed the maximum authorized for confinement calculating the equivalency at the ratio of 1 1/2 months of hard labor without confinement for one month of confinement. R.C.M. 1003(b)(7).

#### D. Punishments involving money

1. There are two types of punishment involving the taking of money from the accused:

- a. Forfeiture of pay and allowances; and
- b. fines.

2. Forfeiture of pay and allowances. R.C.M. 1003(b)(2).

##### a. Nature of the punishment

(1) A forfeiture is the deprivation of a specified amount of the accused's pay for a stated number of days or months, determined by the court-martial.

(2) There are two types of forfeitures authorized as court-martial punishments:

(a) Total forfeiture of all pay and allowances. Only a general court-martial may adjudge total forfeitures and only when total forfeitures are adjudged may allowances be subject to forfeiture.

-- A sentence may not include total forfeitures of pay when no confinement is adjudged. United States v. Warner, 25 M.J. 64 (C.M.A. 1987).

(b) Partial forfeitures. All courts-martial may adjudge partial forfeitures. The maximum amount of a partial forfeiture is determined by using the basic pay authorized for the accused based upon his cumulative years of service and, if no confinement of the accused is adjudged, any sea or foreign duty pay.

-1- The court should take care to state in terms of whole dollars both the amount of forfeiture per month and the number of months. Otherwise, the forfeiture actually imposed may be much less than that intended. In United States v. Johnson, 13 C.M.A. 127, 32 C.M.R. 127 (1962), for example, \$70.00 was forfeited each month for six months because the court stated "\$420 pay for six months" instead of "\$420 pay per month for six months" when it announced its sentence. See also United States v. Rios, 15 C.M.A. 116, 35 C.M.R. 88 (1964).

-2- If the sentence includes a reduction in rate, either expressly or by operation of law, the basic pay of the accused at the reduced rate must be used in computing the net pay subject to forfeiture.

b. Who may receive a forfeiture? A forfeiture is an authorized form of punishment for all military personnel whatever their rank.

c. What type of court-martial may adjudge a forfeiture?

(1) GCM - no jurisdictional limitation. It may award total forfeiture of pay and allowances. See Art. 18, UCMJ.

(2) SPCM - may award a forfeiture of up to two-thirds pay per month for six months. See Art. 19, UCMJ.

(3) SCM - may award a forfeiture of up to two-thirds of one month's pay. See Art. 20, UCMJ; R.C.M. 1301(d). This forfeiture may be apportioned by the convening authority over a period of more than one month but, as a matter of policy, the period should not exceed three months. See JAGMAN, § 0145a(4).

3. Fine. R.C.M. 1003(b)(3).

a. Nature of the punishment

(1) It is a lump-sum judgment against the accused which he must pay to the United States Government. See discussion R.C.M. 1003 (b)(3).

(a) Payment of this fine is not obtained by taking it from the accused's pay, as in the case of forfeiture of pay. Instead, when the sentence is ordered executed, the fine is immediately due in full. Paragraph 70507b(2) of the Department of Defense Military Pay and Allowances Entitlement Manual (DODPM) provides:

Fines may not be collected involuntarily from the current pay of any member of the Navy or Marine Corps. If a member consents to collection from his pay, a fine is collected in accordance with the terms of his consent. He

may request one-time collection or collection in stated monthly installments. If a member does not pay the fine in cash and does not consent to collection from current pay, the fine is collected from final pay when the member is separated.

(b) A fine is not a lesser form of punishment than forfeiture of pay. It is a more severe punishment. As a result, a fine may be mitigated to forfeiture of pay, but forfeiture of pay cannot be mitigated to a fine. United States v. Cuen, 9 C.M.A. 332, 26 C.M.R. 112 (1958).

(2) In order to enforce collection of a fine, it may be accompanied by a provision in the sentence that, in the event the fine is not paid, the accused shall, in addition to any period of confinement adjudged, be further confined until a fixed period considered a punishment equivalent to the fine has expired (sometimes referred to as "coercive confinement"). R.C.M. 1003(b)(3).

(a) Caveat: The total period of confinement, i.e., the punitive confinement and the coercive confinement, cannot exceed the jurisdictional maximum of the court. Id.

(b) C.M.A. held that the total period of confinement, i.e., punitive plus coercive, may exceed the maximum confinement authorized in the MCM (provided total time is not in excess of the jurisdictional maximum of the court). United States v. DeAngelis, 3 C.M.A. 298, 12 C.M.R. 54 (1953). The validity of DeAngelis is, however, doubtful in view of Williams v. Illinois, 399 U.S. 235 (1970), holding that "an indigent criminal defendant may not be imprisoned in default of payment of a fine beyond the maximum authorized by the statute regulating the substantive offense." See also Tate v. Short, 401 U.S. 395 (1971). Note in both Supreme Court cases, defendants were indigent and Mr. Justice Brennan stated: "We emphasize that our holding today does not suggest any constitutional infirmity in imprisonment of a defendant with the means to pay a fine who refuses or neglects to do so." Tate v. Short, 401 U.S. at 400. See also United States v. Soriano, 22 M.J. 453 (C.M.A. 1986).

b. Who may receive a fine?

(1) Unjust enrichment policy. A fine should not ordinarily be adjudged against any member of the armed forces (officer or enlisted) unless he has been unjustly enriched by his offense [R.C.M. 1003(b)(3), discussion] or when imposed as a punishment for contempt. See Article 48, UCMJ; R.C.M. 809; United States v. Finley, 6 M.J. 727 (A.C.M.R. 1978) (\$30,000 fine held inappropriate for a second lieutenant, a recent graduate of the U.S. Military Academy, for offense of unauthorized absence). But see United States v. Williams, 18 M.J. 186 (C.M.A. 1984) (Army lieutenant convicted of drug offenses, false passes, and fraternization was awarded a \$10,000 fine as well as five years confinement, total forfeitures, and a dismissal. In upholding the fine, the C.M.A. held that the unjust enrichment policy for fines is directive, not mandatory.)

(2) Both officers and enlisted personnel may be fined by a court-martial.

c. What type of court-martial may adjudge fines?

(1) A GCM can award a fine in addition to any other punishment including forfeiture of pay. There is no specified limit upon the amount of fine which a GCM can impose. See United States v. Williams, supra.

(2) SPCMs and SCMs may award a fine upon any accused properly before them. A fine may be combined with forfeitures, but the total of the fine and forfeiture may not exceed the amount which the court could have imposed as a forfeiture. See United States v. Harris, supra.

E. Punishments affecting grade

1. General. There are two punishments affecting grade:

- a. Reduction in grade; and
- b. loss of numbers.

2. Reduction in grade. R.C.M. 1003(b)(5).

a. Nature of the punishment. The punishment, unless suspended by the convening authority, takes away the accused's present grade and substitutes a lower grade.

b. Who may be reduced in grade?

(1) A reduction in paygrade ordinarily may be adjudged only against enlisted personnel of other than the lowest paygrade. However, in time of war or national emergency, the Secretary concerned may commute a sentence of dismissal imposed on an officer, a commissioned warrant officer, cadet, or midshipman to reduction to any enlisted grade. R.C.M. 1003(c)(2)(A)(i).

(2) While both general and special courts-martial may reduce any enlisted member to the lowest paygrade, enlisted personnel above paygrade E-4 may only be reduced to the next inferior paygrade at a summary court-martial. R.C.M. 1301(d)(2).

c. Combination with other punishments. A reduction in grade may be adjudged for any offense and may be adjudged in addition to any other punishment authorized by the UCMJ. R.C.M. 1003(c)(1)(A)(ii).

d. Automatic reduction in grade

(1) Under Article 58(a), UCMJ, a court-martial sentence of an enlisted member, as approved by the convening authority, which includes; whether or not suspended:

- (a) Dishonorable discharge;
- (b) bad-conduct discharge;

(c) confinement; or

(d) hard labor without confinement

reduces that member automatically to the lowest enlisted paygrade unless otherwise provided by regulations of the Secretary concerned. This reduction is not a part of the sentence but is accomplished administratively, effective the date the sentence is approved.

(2) In accordance with the power granted in Article 58(a), UCMJ, the Secretary of the Navy has determined that automatic reduction under Article 58(a), UCMJ, shall be effected in the Navy and Marine Corps only in accordance with the provision of section 0145a(7) of the JAG Manual. JAGMAN, § 0145a(7), provides that a court-martial sentence of an enlisted member in a paygrade above E-1, as approved by the convening authority, that includes a punitive discharge or confinement in excess of 90 days (if the sentence is stated in days) or 3 months (if stated in other than days), whether or not suspended, automatically reduces the member to the paygrade E-1 as of the date the sentence is approved. As a matter within his sole discretion, the convening authority may retain the accused in the paygrade held at the time of sentence or at an intermediate paygrade and suspend the automatic reduction to paygrade E-1 which would otherwise be in effect. Additionally, the convening authority may direct that the accused serve in paygrade E-1 while in confinement but be returned to the paygrade held at the time of sentence or an intermediate paygrade upon release from confinement. Failure of the convening authority to address automatic reduction will result in the automatic reduction to paygrade E-1 on the date of the convening authority's action.

### 3. Loss of numbers

#### a. Nature of the punishment

(1) Loss of numbers is the lowering of an officer on the lineal list by a stated number of places. It is authorized only in cases of Navy, Marine Corps, and Coast Guard officers. See R.C.M. 1003(b)(4). It has the effect of lowering his precedence for all purposes, except that he retains his original position for purposes of consideration for retention or promotion.

(a) The officer becomes junior to all those "numbers" lost for such purposes as quarters priority, board and court seniority, and all other seniority privileges, including actual promotion.

(b) However, he is brought up for consideration for selection for promotion in the same position as he was in formerly.

(2) A loss of numbers cannot reduce an officer to a lower grade nor does it affect his pay or allowances.

(3) If the lineal position of an officer is such that he cannot be dropped the desired number of places, he may be placed at the bottom of the lineal list and remain there until he has lost the required number of places. See app. 11, MCM, 1984.

b. Combination with other punishments. A loss of numbers may be awarded without regard to what other punishments are adjudged. R.C.M. 1003(c)(1)(A)(ii).

c. What type of court-martial may award a loss of numbers? Only general courts-martial and special courts-martial can adjudge a loss of numbers, since a summary court-martial cannot try officers.

F. Punishment involving censure

1. There is only one type of punitive censure available to a court-martial and this is a reprimand. R.C.M. 1003(b)(1).

2. The court-martial punishment of reprimand must be distinguished from other types of censure not awarded by court-martial. For example, a nonpunitive letter of caution is a nonpunitive measure which cannot be adjudged by a court-martial. See R.C.M. 306(c)(2); JAGMAN, § 0106; and chapter III, supra. Likewise, an oral or written admonition or reprimand awarded at nonjudicial punishment, although "punitive," is not an authorized punishment at court-martial. See Part V, MCM, 1984; and chapter IV, supra.

3. Nature of the punishment

a. A reprimand is a written statement criticizing the conduct of the accused.

b. Although the punishment is adjudged by the court-martial, the court does not specify the wording of the reprimand. The court simply sentences the accused "to be reprimanded." See app. 11, MCM, 1984. The convening authority actually formulates the wording of the written reprimand. R.C.M. 1003(b)(1). In the Navy and Marine Corps, the procedure for issuing the written reprimand is set forth at JAGMAN, § 0145A(6).

4. Other considerations. A reprimand may be adjudged by any court-martial against any person subject to the UCMJ, either in addition to or in lieu of any other punishment. R.C.M. 1003(c)(1)(A)(ii).

1806 DETERMINING THE MAXIMUM PERMISSIBLE PUNISHMENT

A. Introduction. As discussed in section 1803, supra, the maximum permissible punishment at court-martial is determined by a variety of factors. In a simple case involving a single specification, the maximum punishment may be ascertained by simply comparing the maximum punishment for the offense (Part IV, MCM, 1984) with the jurisdictional limitation on punishment of the court-martial. (Articles 18, 19, and 20, UCMJ). However, in more complex cases involving "novel" offenses or multiple specifications, additional rules apply.

B. Rules for using Part IV, MCM, 1984

1. The punishment set forth for any offense listed in Part IV, MCM, 1984, is the maximum punishment authorized for:

- a. That particular offense; and for
- b. any lesser included offense to the listed offense if the lesser included offense is not otherwise listed, R.C.M. 1003(c)(1)(A)(i); and for
- c. any closely related offense to either the listed offense or the lesser included offense, if the related offense is not otherwise listed, R.C.M. 1003(c)(1)(A)(ii). See, e.g., United States v. Parks, 3 M.J. 591 (N.C.M.R. 1977) (deliberately jumping from ship into sea was more closely related to breach of the peace than improperly hazarding a vessel, so punishment for the former offense applied).

(1) If an unlisted offense is a lesser included offense of one listed offense, and is closely related to another listed offense, the maximum authorized punishment is the lesser punishment provided for the two listed offenses. R.C.M. 1003(c)(1)(B)(i). See United States v. Sampson, 1 M.J. 266 (C.M.A. 1976) (offense charged under article 134 as violation of 18 U.S.C. § 1001 held as closely related to article 107, false official statement, and maximum punishment limited to such).

(2) If the unlisted offense is not a lesser included offense of, nor closely related to, a listed offense, the maximum authorized punishment is the punishment prescribed in the U.S. Code or the punishment authorized by custom of the service. R.C.M. 1003(c)(1)(B)(ii). See United States v. Cramer, 8 C.M.A. 221, 24 C.M.R. 31 (1957); United States v. Turner, 18 C.M.A. 55, 39 C.M.R. 55 (1968); United States v. Courtney, 1 M.J. 438 (C.M.A. 1976) (charging a marijuana-possession offense under article 134 (maximum 5 years confinement) rather than article 92 (maximum 2 years confinement) is a denial of equal protection of law since the government has no standards for determining under which statute it will proceed). Cf. United States v. Thurman 7 M.J. 26 (C.M.A. 1979). When the U.S. Code provides for confinement for a specified period, or for not more than a specified period, the maximum punishment at court-martial for the offense shall include confinement for that period. If such period is one year or longer, the court-martial punishment may also include a dishonorable discharge and forfeiture of all pay and allowances. If such period is six months or more, the court-martial may also adjudge a bad-conduct discharge and forfeiture of all pay and allowances. If the period is less than six months, forfeiture of two-thirds pay per month for the authorized period may be adjudged at court-martial. R.C.M. 1003(c)(1)(B)(ii).

#### C. Discussion of the rules for use of Part IV, MCM, 1984

1. What is a "lesser included offense (LIO)"? A general discussion of LIOs is set forth in Part IV, para. 2b, MCM, 1984. Also, NJS Criminal Law Study Guide has a detailed discussion of this subject.

2. What is meant by "closely related?"

C.M.A. has not set forth a definitive test. It seems to consider the problem on the basis of a comparison of "gravamen" and speaks in terms of "marked similarity" and "relative gravity." However, the approach is strictly ad hoc and perhaps necessarily so. For instance, in United States v. Stewart, 2 C.M.A. 321, 8 C.M.R. 121 (1953), C.M.A. emphasized that it is not



sufficient for an offense to be related to one listed in the Table of Maximum Punishments (TMP), para. 127c, MCM, 1969 (Rev.), in order to apply this rule. It must be closely related. See also United States v. Middleton, 12 C.M.A. 54, 30 C.M.R. 54, (1960).

3. To whom do the maximum punishments apply?

a. The maximums in Part IV, MCM, 1984, apply in the case of all enlisted personnel and prisoners sentenced to a punitive discharge.

b. These maximums, however, bind courts in sentencing officers, chief warrant officers, warrant officers, cadets, and midshipmen only with regard to maximum periods of confinement. See R.C.M. 1003(c)(1)(A)(i), 1003(c)(2).

(1) The other maximum punishments in Part IV, MCM, 1984, although not binding in the case of commissioned officers, warrant officers, cadets and midshipmen, may be used as a guide.

(2) Example: An officer, convicted of being derelict through neglect in the performance of duty under article 92, may be sentenced to a dismissal, three months of confinement, and total forfeitures, notwithstanding that Part IV, para. 16e(3)(A) authorizes only three months of confinement and forfeiture of two-thirds pay per month for three months.

4. The punishments listed in Part IV, MCM, 1984, apply both in time of peace and war except that, upon declaration of war, increased punishments are authorized under:

- a. Article 82 (solicitation);
- b. article 85 (desertion);
- c. article 86(3) (unauthorized absence);
- d. article 87 (missing movement);
- e. article 90 (assaulting or willfully disobeying superior commissioned officer);
- f. article 91(1) and 91(2) (willfully disobeying superior warrant officer, noncommissioned officer, or petty officer);
- g. article 113 (misbehavior of sentinel); and
- h. article 115 (malingering).

5. If the accused is convicted at trial of two or more separate offenses, the maximum punishment prescribed for each may be imposed up to the jurisdictional maximum of the court. R.C.M. 1003(c)(1)(C).

#### D. Persons punishable

1. Principals. "Any person punishable under this chapter who commits an offense punishable by this chapter, or aids, abets, counsels, commands or procures its commission; or causes an act to be done which if directly performed by him would be punishable by this chapter, is a principal." Article 77, UCMJ. All principals may be punished to the same extent as the actual perpetrator of the offense except that no death penalty may be adjudged. Part IV, para. 1b(1), MCM, 1984.

2. Accessories after the fact. "Any person subject to this chapter who, knowing that an offense punishable by this chapter has been committed, receives, comforts or aids the offender in order to hinder or prevent his apprehension, trial, or punishment shall be punished as a court-martial shall direct." Article 78, UCMJ. However, in no case shall the death penalty nor more than one-half of the maximum confinement authorized for that offense be adjudged, nor shall the period of confinement exceed 10 years in any case, including offenses for which life imprisonment may be adjudged. Part IV, para. 3e, MCM, 1984.

3. Attempts. "Any person subject to this chapter who attempts to commit any offense punishable by this chapter shall be punished as a court-martial may direct, unless otherwise specifically prescribed." Article 80, UCMJ. The punishment shall be the same as authorized for the offense attempted, except that in no case shall the death penalty or confinement exceeding 20 years be adjudged. Part IV, para. 4e, MCM, 1984.

4. Conspirators. "Any person subject to this chapter who conspires with any other person to commit an offense under this chapter shall be punished as a court-martial may direct, unless otherwise specifically prescribed." Article 81, UCMJ. The punishment will be the same as that authorized for the offense which is the object of the conspiracy, except that in no event shall the death penalty be imposed. Part IV, para. 5b, MCM, 1984.

5. Solicitation. "Any person subject to this chapter who solicits or advises others to desert ... or mutiny ... shall, if the offense solicited or advised is attempted or committed, be punished with the punishment provided for the commission of the offense, but, if the offense solicited or advised is not committed or attempted, he shall be punished as a court-martial may direct." Article 82(a), UCMJ. "Any person subject to this chapter who solicits or advises others to commit an act of misbehavior before the enemy ... or sedition ... shall, if the offense solicited or advised is committed, be punished with the punishment provided for the commission of the offense, but, if the offense solicited or advised is not committed, he shall be punished as a court-martial may direct." Article 82(b), UCMJ. Pursuant to Article 82, UCMJ, Part IV, para. 6e, MCM, 1984, prescribes the maximum punishments for the various forms of solicitation.

E. The ultimate offense doctrine. In many instances, the conduct of the accused may amount to violation of orders or dereliction of duty in violation of Article 92, UCMJ, and also be violative of some other article of the UCMJ. In such cases, the note to Part IV, para. 16e, MCM, 1984, provides that the punishment set forth for violations of Article 92, UCMJ, does not apply: (1) If in the absence of the order or regulation which was violated the

accused would on the same facts be subject to conviction for another specific offense for which a lesser punishment is prescribed; or (2) if the violation of the order is a breach of restraint imposed as a result of an order. In these instances, the maximum punishment is that specifically prescribed for the offense.

An example of a case where the ultimate offense doctrine was applied is United States v. Quarles, 1 M.J. 231 (C.M.A. 1975). There the accused was convicted of failure to obey a lawful order (Article 92(2), failure to go to colors). The conviction for violating article 92 was allowed to remain and was not dismissed; only the potential sentence was deemed affected. The maximum punishment was that prescribed for a violation of article 86(1). The court described the doctrine as the only protection the accused is entitled to under these facts: "Our concern in this area is that the giving of an order and the subsequent disobedience of same, not be permitted thereby to escalate the punishment to which an accused otherwise would be subject for the ultimate offense involved." Id. at 232. See also, United States v. Landwehr, 18 M.J. 335 (C.M.A. 1984); United States v. Peterson, 17 M.J. 69 (C.M.A. 1983).

F. Equivalent punishments. Part IV, MCM, 1984, sets forth the maximum authorized punishment for each offense only in terms of punitive discharge, forfeiture of pay, and confinement. It makes no reference to the other forms of punishment authorized at court-martial, i.e., hard labor without confinement, restriction, or confinement on bread and water.

To adjudge these punishments, the court-martial must first determine the maximum authorized punishment in terms of confinement and then convert to the other forms using the following ratio from R.C.M. 1003(b):

1/2 day bread and water = 1 day confinement = 1 1/2  
days hard labor without confinement = 2 days restriction.

Thus, restraint punishments may be easily substituted for each other. However, one must remember the maximum limits for each form of punishment which apply in every case: Bread and water (3 days); confinement (as prescribed for the offense); hard labor without confinement (3 months at SPCM or GCM, 45 days at SCM); restriction (2 months). See R.C.M. 1003.

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

1. Three or more convictions. If an accused is convicted of an offense for which Part IV, MCM, 1984, does not authorize a dishonorable discharge, proof of three or more previous convictions by court-martial during the year preceding the commission of any offense of which the accused is convicted will allow a special court-martial to adjudge a bad-conduct discharge, forfeiture of 2/3 pay per month for six months, and confinement at hard labor for six months, even though the offense per se does not otherwise

authorize that much punishment. In computing the one-year period, any unauthorized absence time, if shown by the findings or by evidence of previous conviction, is excluded. Nonjudicial punishments may not be considered as convictions, nor may periods of unauthorized absence evidenced by nonjudicial punishment be excluded. R.C.M. 1001(d)(1). For example:

Trial (1 Jun cy)	1 Feb cy	1 Sep cy-1	1 May cy-1	1 Apr cy-1
convicted of UA 1 Apr cy to 1 May cy (30 days)	special court conviction	special court conviction	special court conviction for larceny committed on 1 Mar cy-1	1 year prior to present UA commission

In this case, all three convictions can be considered and the escalator applies. The one-year period runs from 1 April cy (commission of instant offense) to 1 April cy-1 (one year prior to commission of instant offense).

Trial (1 Jun cy)	1 Feb cy	1 Sep cy-1	1 Jul cy-1	1 Feb cy-1
UA 1 Apr cy to 1 May cy; larceny 1 Mar cy	special court conviction	special court conviction (UA 1 Jul cy-1 to 1 Aug cy-1)	special court conviction	1-year limit

In this example, the one-year time limit for using the escalator clause would normally run from 1 Mar cy (commission of earliest offense) to 1 March cy-1. The 1 Sep cy-1 conviction for 1-month UA, however, moves the one-year limit back to 1 Feb cy-1. Thus, all convictions can be considered and the escalator applies.

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

Trial: 1 Jun cy	1 Feb cy-1	15 Mar cy-3
convicted of larceny 1 Apr cy	summary court conviction for UA: 1 Dec cy-2 to 1 Jan cy-1	summary court conviction for disrespect to superior commissioned officer

In this situation, the escalator does not apply. Why? The three-year period runs to 1 April 19cy-3. For this escalator clause, the period is not extended by the period of unauthorized absence.

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

4. The question of whether summary courts-martial qualify as convictions has not been answered. The discussion accompanying R.C.M. 1003, MCM, 1984, says that summary courts should not be considered as convictions for escalator clause purposes. There is case law, however, which hold that, if an accused is represented by counsel, the results of a summary court may qualify as a conviction for escalator clause purposes. See, e.g., United States v. Alsup, 17 M.J. 166 (C.M.A. 1984).

Chapter XIX

REVIEW OF COURTS-MARTIAL

1901 INTRODUCTION

This chapter deals with appellate review of trials by courts-martial. 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 (Chapter XVI, supra) or petitions for extraordinary relief (Chapter XXI, infra). Rather, this chapter begins with a general discussion of the sequence of review and ends with an analysis of the convening authority's action.

1902 PRELIMINARY RESPONSIBILITIES AND PREPARATION OF THE  
RECORD OF TRIAL (MILJUS Key Number 1350)

A. Report of results of trial. Immediately following the final adjournment of a court-martial, the trial counsel (TC) must notify the convening authority (CA) and the accused's commanding officer of the results of trial. JAGMAN, § 0143. Additionally, if the sentence includes confinement at hard labor, the notification must be in writing with a copy forwarded to the commanding officer or officer in charge of the brig. See JAGMAN, app. A-1-w for a recommended form.

B. The record of a trial by court-martial

1. When proceedings at the trial-court level are completed, a record of trial must be prepared. If the accused has been acquitted, 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. R.C.M. 1103(e), MCM, 1984 [hereinafter R.C.M. \_\_\_\_]. When the trial has resulted in conviction, the contents of the record of trial are dictated by the type of court-martial and the adjudged sentence. R.C.M. 1103; JAGMAN, § 0144. (See section 1408, supra, for the contents of a record of trial by SCM.) The record of trial by an SPCM which did not adjudge a bad-conduct discharge (BCD) need contain only a summarized report of the proceedings and testimony. See MCM, 1984, app. 13. The record of trial for all other courts-martial must be verbatim if, in the case of a general court-martial, the sentence exceeds that which could be adjudged at a special court-martial or if, in the case of either a general or special court-martial, the sentence includes a bad-conduct discharge. See MCM 1984, app. 14. As a practical matter, the record is prepared by a court reporter, but the trial counsel is ultimately responsible for its preparation. Art. 38(a), UCMJ; R.C.M. 1103(b). Therefore, the trial counsel reviews the record and makes any necessary corrections before the record of trial is authenticated. R.C.M. 1103(i).

C. What constitutes a verbatim record of trial?

Like most works of art, the term "verbatim" has been the subject of considerable judicial interpretation. In United States v. Boxdale, 22 C.M.A. 414, 415, 47 C.M.R. 351, 352 (1973), 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." Accord United States v. Lashley, 14 M.J. 7 (C.M.A. 1982). See also United States v. Velis, 7 M.J. 699 (N.C.M.R. 1979), where portions of an en masse arraignment were not transcribed but merely reflected in the record as "other matters." Such omissions were considered insubstantial as to the accused, and his record of trial was deemed verbatim. In United States v. Richardson, 21 C.M.A. 383, 45 C.M.R. 157 (1972), the court decided that not every sidebar conference between trial judge and counsel need be recorded; however, in United States v. Sturdivant, 1 M.J. 256, 257 (C.M.A. 1976), 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." See also United States v. Averett, 3 M.J. 201 (C.M.A. 1977) and United States v. Gary, 7 M.J. 296 (C.M.A. 1979), requiring reversal following an unrecorded sidebar conference dealing with the issue of identity, one of the main bases of defense. In United States v. Martin, 5 M.J. 657 (N.C.M.R. 1978), the court reporter's recording equipment malfunctioned. Recognizing that a bad-conduct discharge 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. See R.C.M. 1103(b)(2)(B), discussion. See also United States v. Lashley, 17 M.J. 7 (C.M.A. 1982); United States v. Skinner, 17 M.J. 1042 (C.G.C.M.R. 1984); United States v. Arrayo, 18 M.J. 603 (N.M.C.M.R. 1984).

In United States v. Barton, 6 M.J. 16 (C.M.A. 1978), C.M.A., faced with the novel question of whether a videotape transcription constitutes a transcript, verbatim or otherwise, 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.

D. Authentication of the record

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 trial counsel. In cases tried before judge alone, the reporter may authenticate the record if both the military judge and the trial counsel are unable to do so by reason of their death, disability, or absence. See also R.C.M. 1104; JAGMAN, § 0144.

In recent decisions, the Court of Military Appeals has narrowly interpreted the term "absence." Thus, in United States v. Cruz-Rijos, 1 M.J. 429 (1976), the court held that a short, temporary absence was insufficient to authorize substitute authentication. See also United States v. Miller, 4 M.J. 207 (C.M.A. 1978). In United States v. Credit, 4 M.J. 118 (C.M.A. 1977), 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, *supra* at 273, 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 trial counsel 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. But see United States v. Lowery, 1 M.J. 1165 (N.C.M.R. 1977), in which N.C.M.R. approved authentication by the trial counsel pursuant to the written authorization of the military judge who was present on the same base when the record was authenticated, but had been relieved of his judicial duties, holding him to be "absent from his judicial duties." R.C.M. 1103(b)(3)(E) requires a written explanation for substitute authentication to be attached to the record of trial.

#### 1903 SERVICE OF THE RECORD ON THE ACCUSED

A. R.C.M. 1104 requires that a copy of the record of trial be served on the accused as soon as the record has been authenticated. This is to provide him with the opportunity to submit any written "matters" which may reasonably tend to affect the convening authority's decision whether to approve the trial results. R.C.M. 1105. See section 1905, *infra*. The content of such "matters" is not subject to the Military Rules of Evidence and could include:

1. Allegations of error affecting the legality of the findings or sentence;
2. matters in mitigation which were not available for consideration at the trial; and
3. clemency recommendations. The defense may ask any person for such a recommendation -- including the members, military judge, or trial counsel.

B. 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. United States v. Craig, 28 M.J. 321 (C.M.A. 1989); United States v. Hallum, 26 M.J. 838 (A.C.M.R. 1988). In Hallum, the convening authority's action was set aside and the record of trial remanded because neither the convening authority's action nor the SJA recommendation referenced the extensive clemency material submitted by the accused.



C. This option of the accused to submit matters to the convening authority must be exercised within specifically defined time periods:

1. For a general court-martial and a special court-martial, 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 for not more than 20 additional days. See section 1904, infra.

2. The accused at a summary court-martial must submit matters within 7 days after sentence is announced, but this period, for good cause, may be extended for up to 20 additional days.

1904 STAFF JUDGE ADVOCATE OR LEGAL OFFICER RECOMMENDATION  
(MILJUS Key Number 1385 et seq.)

A. 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 general court-martial or a special court-martial case involving a bad-conduct discharge. R.C.M. 1106. If 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. United States v. Dunbar, 28 M.J. 972 (N.M.C.M.R. 1989). Care must be taken to ensure that this SJA or LO is not disqualified from submitting this recommendation. Disqualification will result when the SJA or LO acted as a member, military judge, trial counsel, assistant trial counsel, or, more commonly, the investigating officer in the same case. (There are many cases dealing with SJA disqualification which may or may not have continued viability under the Manual for Courts-Martial, 1984. United States v. Engle, 1 M.J. 387 (C.M.A. 1976) involved an SJA who was held to be disqualified because the defense attacked his art. 34 pretrial advice. See also United States v. Marsh, 20 C.M.A. 42, 42 C.M.R. 234 (1970). In United States v. Choice, 23 C.M.A. 329, 49 C.M.R. 663 (1975), the SJA testified as a defense witness on a motion to dismiss for lack of a speedy trial. The argument for disqualification was that a reviewing authority can not impartially weigh the credibility of his own testimony. C.M.A. held that the SJA's testimony was not contested and, hence, did not involve a factual dispute resting upon his credibility. Since the Manual for Courts-Martial, 1984, no longer requires the SJA or CA to weigh the credibility of witnesses or judge the sufficiency of the evidence, this case appears to have little application to present law.) 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. R.C.M. 1106(c). See United States v. Curry, 28 M.J. 419 (C.M.A. 1989); United States v. Sparks, 20 M.J. 985 (N.M.C.M.R. 1985).

The purpose of the recommendation is simply to assist the convening authority in deciding what action to take on the case. The recommendation is intended to be a concise written communication summarizing:

1. The findings and sentence adjudged;

2. the accused's service record, including length and character of service, awards and decorations, and any records of nonjudicial punishment and previous convictions;

3. the nature of pretrial restraint if any;

4. obligations imposed upon the convening authority because of a pretrial agreement; and

5. a specific recommendation as to the action to be taken by the convening authority on the sentence.

Identifying legal error is not one of the required goals of this recommendation. Nevertheless, an SJA must respond to an allegation of legal error by the accused or defense counsel made either under R.C.M. 1105(b) [see section 1903, *supra*] or in response to the SJA recommendation pursuant to R.C.M. 1106(f)(4) [see section 1904 B, *infra*]. R.C.M. 1106(c)(4); United States v. Hill, 27 M.J. 293 (C.M.A. 1988); United States v. Allen, 28 M.J. 610 (N.M.C.M.R. 1989). (This requirement is not imposed on an LO preparing a recommendation.) 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." Hill, at 296. In Allen, *supra*, defense counsel 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.

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 JAG Manual provides a sample form at appendix A-1-x.

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.

B. Prior to forwarding the recommendation to the convening authority, the SJA or LO must serve a copy on the accused's defense counsel. R.C.M. 1106(f); United States v. Goode, 1 M.J. 3 (C.M.A. 1975).

1. The defense counsel 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. United States v. Barnes, 3 M.J. 406 (C.M.A. 1977)

(the court noted that waiver would not be applied in cases including inadequate representation of counsel); United States v. Morrison, 3 M.J. 408 (C.M.A. 1977) (the court reserved the issue of whether constitutional errors would be waived). R.C.M. 1106(f)(7) provides that the SJA/LO may supplement his recommendation based upon the defense counsel's response. However, the defense counsel must be served with any post-trial recommendation containing new matter and given a further opportunity to comment. R.C.M. 1106(f)(7); United States v. Hein, 29 M.J. 68 (C.M.A. 1989).

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.

C. 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.

1905 CONVENING AUTHORITY'S ACTION IN GENERAL (MILJUS Key Number 1380 et seq.)

A. Responsibility for convening authority's action

1. The first official action to be taken with respect to the results of a trial is the convening authority's action (CA's action). All materials submitted by the accused, SJA/LO, and defense counsel are preparatory to this official review. See sections 1903, 1904, supra.

2. Art. 60, UCMJ, and JAGMAN, § 0145, place the responsibility for this initial review and action on the convening authority. This is true even when the accused is no longer assigned to the convening authority's command. Although responsibility for a CA's action is nondelegable, R.C.M. 1107 and JAGMAN, § 0145, acknowledge the fact that circumstances may exist making it impracticable for the convening authority to act. Situations of impracticability might arise:

a. When the command has been decommissioned or inactivated before the convening authority could act;

b. when the command has been alerted for immediate overseas movement;

c. when the convening authority is disqualified because he has other than an official interest in the case; or

d. because a member of the court-martial which tried the accused has become the convening authority.

If any of these situations exist, the convening authority must forward the case to an officer exercising general court-martial jurisdiction with a statement of the reasons why the convening authority did not act. A Navy command should send the case to the area coordinator or his designee, unless a general court-martial convening authority in the convening authority's

chain of command has directed otherwise. A Marine command should send the case to an officer exercising general court-martial jurisdiction over the command.

#### B. Scope and content

1. The CA's action is a legal document attached to the record of trial setting forth, in prescribed language, the convening authority's decisions and orders with respect to the sentence, the confinement of the accused, and further disposition. The action taken with respect to the sentence is a matter falling within the convening authority's sole discretion. He may, for any reason or no reason, disapprove a legal sentence in whole or in part, mitigate it, suspend it, or change (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. It should be noted that no action is required with respect to findings of guilty. This is because, unlike the procedure which existed before the Military Justice Act of 1983, the convening authority is no longer required to review the case for legal error or factual sufficiency. He is required to act on the sentence only. In his discretion, however, the convening authority may take action disapproving a finding of guilty or approving a finding of guilty to a lesser included offense.

2. In cases of acquittal, or rulings tantamount to findings of not guilty, the convening authority may not take any action of approval or disapproval.

3. In taking his action, the convening authority is required to consider the results of trial, the SJA/LO recommendation when required, and any matter submitted by the accused as previously discussed. Additionally, the convening authority may consider the record of trial, personnel records of the accused, and such other matters deemed appropriate by the convening authority. Any 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.

4. The SJA or LO, who usually drafts the CA's action pursuant to the convening authority's wishes, must take care to insure that it expresses the convening authority's intent and complies with applicable R.C.M.'s and JAG Manual provisions. Incompleteness or ambiguity will result in higher reviewing authorities returning the record for completion or clarification, or simply construing the ambiguous action in favor of the accused.

5. Appendix 16, MCM, 1984, contains sample forms of actions for summary, special, and general courts-martial. One or more of these forms is appropriate to implement the decisions of the convening authority in virtually every case. Deviation from the forms is risky and usually leads to trouble unless the draftsman is experienced. If there is any question as to the form of action necessary to effectuate the convening authority's decisions, assistance should be obtained from the nearest legal service office.

6. After taking his action, the convening authority will publish the results of trial and the CA's action in a legal document called a promulgating order.

7. Specific guidance concerning the responsibilities of the convening authority in reviewing records of trial, drafting CA's actions in particular classes of cases, and publishing the results in the promulgating order, is provided later in this chapter.

## 1906 SUBSEQUENT REVIEW

### A. The nature of mandatory and discretionary review (MILJUS Key Number 1410 et seq.)

1. The CA's action for every trial by court-martial is reviewed by higher authority. Certain reviews are mandatory; once these mandatory reviews are completed, the case is "final." Other reviews are discretionary; for example, the accused and his counsel must decide whether to petition the Court of Military Appeals (C.M.A.) for review of the case, whether to petition for review by the Judge Advocate General (JAG), or whether to petition for a new trial.

2. The terms mandatory and discretionary review imply opposite concepts: In the former case, the review will happen regardless of the accused's wishes; in the latter case, further review will happen only if the accused or some other person takes some positive action. The mutually exclusive nature of these two concepts has been diluted somewhat by the Military Justice Act of 1983. By adding the concepts of waiver and withdrawal, the Act gives an accused the option, except in a case involving the death penalty, to avoid what was formerly mandatory appellate review in all general courts-martial and special courts-martial involving a bad-conduct discharge.

3. R.C.M. 1110 governs waiver and withdrawal: "After any general court-martial, except one in which the approved sentence includes death, and after any special court-martial in which the approved sentence includes a bad-conduct discharge, the accused may waive or withdraw appellate review." According to the Rule, the waiver or withdrawal must be a written document establishing that the accused and defense counsel have discussed the accused's right to appellate review; that they have discussed the effect that waiver or withdrawal will have on that review; that the accused understands these matters; and that the waiver or withdrawal is submitted voluntarily. See also JAGMAN, § 0152d. An accused must file a waiver within 10 days after being served a copy of the CA's action, unless an extension is granted. A withdrawal may be submitted any time before appellate review is completed. See JAGMAN, § 0151. In either case, however, once appellate review is waived or withdrawn, it is irrevocable and the case will thereafter be reviewed locally in the same manner as a summary court-martial or a special court-martial not involving a bad conduct discharge. Appendices 19 and 20 of the Manual for Courts-Martial, 1984, provide forms for waiver or withdrawal.

B. Summary courts-martial, special courts-martial not involving a bad-conduct discharge, and all other noncapital courts-martial where appellate review has been waived

1. Art. 64, UCMJ, and R.C.M. 1112 require that all summary courts-martial, non-BCD special courts-martial, and all other noncapital courts-martial where appellate review has been waived or withdrawn by the accused be reviewed by a judge advocate who has not been disqualified by acting in the same case as an accuser, investigating officer, member of the court-martial, military judge, or counsel, or otherwise on behalf of the prosecution or defense. Section 0146 of the JAG Manual further requires this officer to be the staff judge advocate 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. (There are many cases dealing with SJA disqualification which may or may not have continued viability under the Manual for Courts-Martial, 1984. United States v. Engle, 1 M.J. 387 (C.M.A. 1976) involved an SJA who was held to be disqualified because the defense attacked his art. 34 pretrial advice. See also United States v. Marsh, 20 C.M.A. 42, 42 C.M.R. 234 (1970). In United States v. Choice, 23 C.M.A. 329, 49 C.M.R. 663 (1975), the SJA testified as a defense witness on a motion to dismiss for lack of a speedy trial. The argument for disqualification was that a reviewing authority can not impartially weigh the credibility of his own testimony. C.M.A. held that the SJA's testimony was not contested and, hence, did not involve a factual dispute resting upon his credibility. Since the Manual for Courts-Martial, 1984, no longer requires the SJA or CA to weigh the credibility of witnesses or judge the sufficiency of the evidence, this case appears to have little application to present law.) 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 staff judge advocate of the OEGCMJ next in the chain of command. In all cases, the action of the convening authority will identify the officer to whom the record is forwarded by stating his official title. R.C.M. 1112 states, however, that no review under this section is required if the accused has not been found guilty of an offense or if the convening authority disapproved all findings of guilty.

2. The judge advocate's review is a written document containing the following:

a. A conclusion as to whether the court-martial had jurisdiction over the accused and over each offense for which there is a finding of guilty which has not been disapproved by the convening authority;

b. a conclusion as to whether each specification, for which there is a finding of guilty which has not been disapproved by the convening authority, stated an offense;

c. a conclusion as to whether the sentence was legal;

d. a response to each allegation of error made in writing by the accused; and

e. in cases requiring action by the 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.

3. 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 Art. 76, UCMJ. If this is the case, the judge advocate review will be attached to the original record of trial and a copy forwarded to the accused. The review is not final, and a further step is required, however, 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.

The existence of either of these two situations will require the staff judge advocate to forward the record of trial to the OEGCMJ.

4. 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.

5. 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 JAG for resolution. In all other cases, however, the review is now final within the meaning of Art. 76, UCMJ.

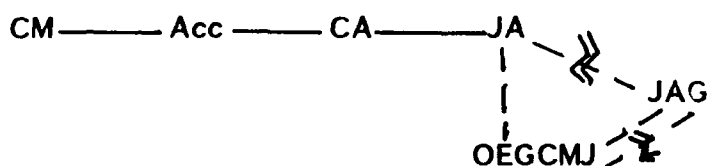
6. The review process of summary courts-martial and special courts-martial not involving a bad-conduct discharge is shown graphically below. All other noncapital courts-martial in which appellate review has been waived or withdrawn (SPCM involving a bad-conduct discharge and GCM) are illustrated at either paragraph C.4 or D.3, infra.

NOTE: The following guidance should be used for interpreting the charts:

1. ——— denotes mandatory review;

2. — — — denotes discretionary review where the case is not yet final; and

3. — >> — denotes discretionary review after the case is final in accordance with Art. 69(b), UCMJ [see paragraph 1910, infra].



C. Special courts-martial involving a bad-conduct charge

1. Assuming that appellate review has not been waived or withdrawn by the accused, a special court-martial involving a bad-conduct discharge, whether or not suspended, will be sent directly to JAG. R.C.M. 1111; JAGMAN, § 0146b. After detailing appellate defense and government counsel, the case will then be forwarded to the Navy-Marine Corps Court of Military Review (N.M.C.M.R.). R.C.M. 1201, 1202. N.M.C.M.R. has review authority similar to that of the convening authority, except that it may not suspend any part of the sentence. It is also limited to reviewing only those findings and sentence which have been approved by the convening authority. In other words, it may not increase the sentence approved by the convening authority, nor may it approve findings of guilty already disapproved by the convening authority. In considering the record of trial, N.M.C.M.R. 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. Art. 66(c), UCMJ; United States v. Banks, 7 M.J. 501 (A.F.C.M.R. 1979). Finally, N.M.C.M.R. may affirm only those findings of guilty and the sentence which it finds correct in law and fact, and which N.M.C.M.R. 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. Art. 59, UCMJ.

2. After review by N.M.C.M.R., the case will go to C.M.A. for review in the following two instances:

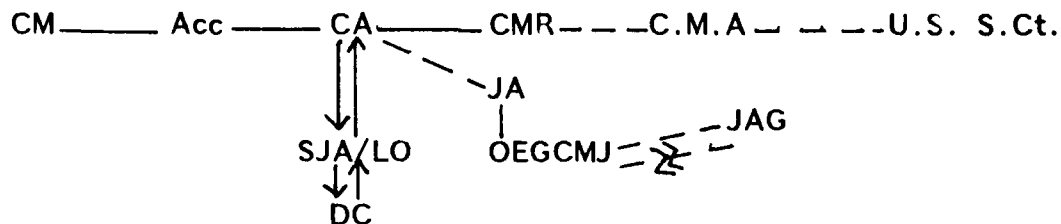
a. If certified to C.M.A. by JAG; or

b. if C.M.A. grants the accused's petition for review.  
R.C.M. 1204.

In any case reviewed by it, C.M.A. may act only with respect to the findings and sentence as approved by the convening authority, and as affirmed or set aside as incorrect in law by N.M.C.M.R. See section 1907, infra.

3. Finally, review by the Supreme Court of the United States is possible under 28 U.S.C. § 1259 and Art. 67(h), UCMJ. See section 1908, infra.

4. The entire review process of a special court-martial involving a bad conduct discharge is shown graphically:





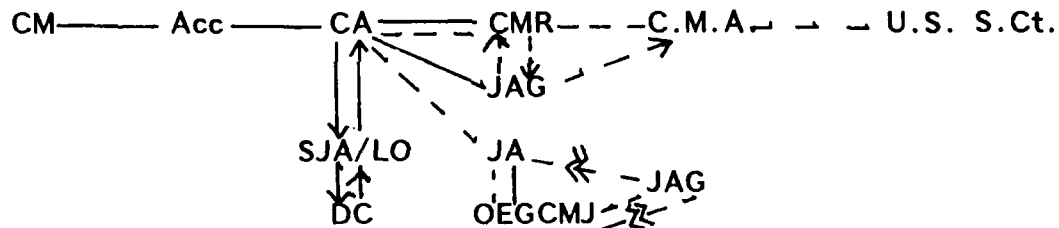
#### D. General courts-martial

1. All general court-martial cases in which the sentence, as approved, includes:

- a. Dismissal,
- b. punitive discharge, or
- c. confinement of at least one year will be reviewed in precisely the same way as a special court-martial involving a bad-conduct discharge. See paragraph c, supra. Cases involving death are reviewed in a similar fashion, except that review by C.M.A. is mandatory.

2. Other general court-martial cases, 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, are reviewed in the Office of the Judge Advocate General under Art. 69(a), UCMJ, and R.C.M. 1201(b). JAG may modify or set aside the findings or sentence or both, if he finds any part of the findings or sentence to be unsupportable in law, or if reassessment of the sentence is appropriate. As an alternative measure, JAG may forward the case for review to N.M.C.M.R. In this latter case, however, no further review by C.M.A. is possible unless the JAG so directs.

3. The entire review process of a general court-martial is shown graphically:



1907 REVIEW BY COURT OF MILITARY APPEALS (MILJUS Key Number 1435 et seq.)

#### A. Scope of review

1. In cases reviewed by it (see section 1906, supra), C.M.A. has authority to act only in regard to matters of law. Art. 67(d), UCMJ; United States v. McCrary, 1 C.M.A. 1, 1 C.M.R. 1 (1951).

2. It does not have the authority to:

- a. Weigh the evidence;
- b. judge the credibility of witnesses; or

c. make new findings of fact. In United States v. Lowry, 2 M.J. 55 (C.M.A. 1976), C.M.A. held, inter alia, that C.M.A. 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.

3. Whether there is sufficient evidence to sustain a finding of guilty, however, is a matter of law. See United States v. Parham, 14 C.M.A. 161, 33 C.M.R. 373 (1963), and cases cited therein. See also United States v. Brown, 3 M.J. 402 (C.M.A. 1977), wherein the court, in an opinion by Judge Cook, with Judge Perry concurring, held that the evidence was insufficient to sustain the identification of the accused as a participant in the robbery. Chief Judge Fletcher dissented, arguing that identity is a question of fact and, therefore, the C.M.A. is without jurisdiction to review the issue.

4. Other evidentiary matters which C.M.A. 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 [United States v. Chinn, 6 C.M.A. 327, 20 C.M.R. 43 (1955)]; and

b. whether there is sufficient evidence to support a determination that a confession was made voluntarily [United States v. Monge, 1 C.M.A. 95, 2 C.M.R. 1 (1952); United States v. Webb, 1 C.M.A. 219, 2 C.M.R. 125 (1952). See also United States v. Collier, 1 M.J. 358 (C.M.A. 1976), in which C.M.A. held that the government had not met its burden of proving voluntariness when it called two witnesses whose testimony was substantially contradictory].

c. See also United States v. Dukes, 5 M.J. 71 (C.M.A. 1978), in which C.M.A. reviewed, as a matter of law, a sentence affirmation resulting from a legal determination by the Court of Military Review.

5. In a case certified by JAG to C.M.A., action by C.M.A. is not restricted to the issues certified by JAG. In a case reviewed by C.M.A. upon petition of an accused, the court is required to take action only with regard to the issues specified in the grant of review. Art. 67(d), UCMJ.

#### B. Procedure for appeal to the C.M.A.

1. The accused has sixty days from the time of service of the Court of Military Review's decision to appeal to C.M.A. Art. 67c, UCMJ; R.C.M. 1203(d).

2. The procedure for appeal is as follows (see JAGMAN, § 0156)

a. JAG sends to the accused by certified mail a "promulgation package" consisting of a copy of the N.M.C.M.R. 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.M.A.

b. 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.

#### 1908 REVIEW BY THE SUPREME COURT

Under 28 U.S.C. § 1259 and Art. 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. 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. R.C.M. 1205.

#### 1909 NEW TRIAL UNDER ART. 73, UCMJ; R.C.M. 1210; JAGMAN, § 0154

##### A. In general

1. 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.

2. The trial authorized by art. 73 is not a rehearing such as is ordered where prejudicial error has occurred.

3. It is not another trial such as that ordered to cure jurisdictional defects.

4. It is a trial de novo as if the accused had never been tried at all.

##### B. Grounds for petition

1. There are only two grounds for petition:

- a. Newly discovered evidence; and
- b. fraud on the court.

2. 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. R.C.M. 1210. The petition must be received by JAG within 2 years after approval by the convening authority of the court-martial sentence.

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. See United States v. Day, 14 C.M.A. 186, 33 C.M.R. 398 (1965); United States v. Malumphy, 13 C.M.A. 60, 32 C.M.R. 60 (1963); United States v. Petersen, 7 M.J. 981 (A.C.M.R. 1979); United States v. Thomas, 11 M.J. 13 (C.M.A. 1981).

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. Classic cases of where new trials were considered appropriate are United States v. Chadd, 13 C.M.A. 438, 32 C.M.R. 438 (1963); United States v. Thomas, 11 M.J. 13 (C.M.A. 1981).

#### C. 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.

#### D. Procedure

1. The accused submits a petition to JAG within two years after approval of the original sentence by the convening authority. If the case is pending before N.M.C.M.R. or C.M.A., JAG must refer the petition to that court for action and JAG takes no further action until directed by the court. Holodinski v. McDowell, 7 M.J. 921 (N.C.M.R. 1979). R.C.M. 1210(e).

2. R.C.M. 1210(c) lists the information which should be contained in the petition. Strict compliance is suggested.

3. JAG, in considering the petition, may upon request allow oral argument. R.C.M. 1210 (g)(1).

4. If the petition is granted, JAG designates an appropriate convening authority to convene a court for the new trial. R.C.M. 1210(h).

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. R.C.M. 1210 (h)(6).

1910 REVIEW IN THE OFFICE OF THE JUDGE ADVOCATE GENERAL  
UNDER ART. 69(b), UCMJ; R.C.M. 1201(b)(3)  
(MILJUS Key Number 1410)

A. The findings or sentence, or both, in a court-martial case that has been finally reviewed, but has not been reviewed by N.M.C.M.R., may be

vacated or modified by JAG on the grounds of newly discovered evidence, fraud on the court, lack of jurisdiction, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence.

B. This procedure is separate from appellate review within the meaning of art. 76 and in no way limits JAG's powers to grant petitions for new trials under art. 73 (see section 1909, supra) nor the authority of the Secretary of the Navy to correct errors or remove injustices through the Board for the Correction of Naval Records (BCNR).

C. In cases where an accused has petitioned for a new trial under Art. 73, UCMJ, and review of his case is final, JAG may choose to grant art. 69 relief instead of granting a new trial. R.C.M. 1210(g)(3). Likewise, JAG may take action under art. 74 (remission and suspension) in an appropriate case. It is likely that petitions for new trials in finally reviewed cases will henceforth be joined with petitions for art. 69 relief. Note here that the grounds for art. 69 relief are broader than those for a petition for a new trial.

D. Petitions must be filed in the Office of the Judge Advocate General on or before the last day of the two-year period beginning on the date the sentence is approved by the convening authority, unless the accused establishes good cause for failure to file within that time.

E. The required contents of the petition are detailed in JAGMAN, § 0153.

F. Also note that Art. 69, UCMJ, expands the remedies which may have to be exhausted before seeking extraordinary relief. See Chapter XXI, infra.

## 1911 POST-TRIAL DUTIES AND RESPONSIBILITIES OF DEFENSE COUNSEL (MILJUS Key Number 1244)

### A. Clemency petition

The accused may submit in writing any matters in clemency. See section 1903, supra. In most cases, the defense counsel will be active in drafting the clemency petition and seeking favorable endorsements. Art. 38(c), UCMJ. It is not uncommon for the defense to approach the military judge, members, or other persons to inquire of their willingness to sign such a petition. Such petitions should be specific as to the amount and character of the clemency recommended and should state the reasons for the recommendation. See United States v. Titsworth, 13 M.J. 147 (C.M.A. 1982), as regards the duty of the trial defense counsel to consider a clemency petition.

1. In several cases, C.M.A. has held that a clemency petition submitted by the court-martial, which indicated that the court was confused as to the scope of its sentencing powers and which recommended either remission of the BCD or substitution of an administrative discharge for a BCD, constituted impeachment of the sentence. United States v. Kaylor, 10 C.M.A. 139, 27 C.M.R. 213 (1959); United States v. Greich, 10 C.M.A. 495, 28 C.M.R. 61 (1959).

2. C.M.A. has sanctioned such recommendations, however, where the record of trial shows that the court understood the relationship of the recommendation and the sentence adjudged. United States v. Turner, 14 C.M.A. 435, 34 C.M.R. 215 (1964). Thus, the court has held that, where the court seeks information as to alternatives open to it, it is the responsibility of the military judge to instruct properly on the court's right to recommend clemency. United States v. Keith, 22 C.M.A. 59, 46 C.M.R. 59 (1972).

#### B. Appellate brief of defense counsel

In addition to matters of clemency, Art. 38c, UCMJ, provides that defense counsel may prepare and have forwarded with the record of trial a brief setting forth of an assignment of errors committed at the trial, as well as other matters he wishes considered by reviewing authorities.

#### C. Post-trial advice

1. Appellate rights statement. A convicted accused is entitled to representation by counsel until completion of the appellate review of his case. Section 0152 of the JAG Manual requires the trial defense counsel 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. See R.C.M. 502(d)(6), discussion (E). The form found at JAG Manual appendix A-1-h is called the appellate rights statement and may be used by the defense counsel 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. JAGMAN, § 0152.

2. Appellate defense counsel. The accused is entitled to be represented before N.M.C.M.R. and C.M.A. by civilian counsel provided by him or by military counsel detailed by JAG. Art. 70, UCMJ; R.C.M. 1202; JAGMAN, § 0152. If the accused desires representation by detailed counsel before N.M.C.M.R., he will so indicate in the appellate rights statement. If the accused petitions C.M.A. for a grant of review, the petition will reflect his desires regarding counsel. See also United States v. Dupas, 14 M.J. 28 (C.M.A. 1982), concerning the responsibility of the trial defense counsel to cooperate with the appellate defense counsel.

3. Continuing responsibilities of trial defense counsel. In an effort to ensure uninterrupted post-trial representation, the Court of Military Appeals, in United States v. Palenius, 2 M.J. 86 (C.M.A. 1977), created the requirement that a trial defense counsel may be relieved from post-trial duties only upon application to the authority before whom the review of the case is pending. See JAGMAN, § 0152c. Application by the trial defense counsel will normally be approved where appellate representation has been provided or waived, or where continued representation by trial defense counsel is not possible. This requirement extends only to general courts-martial and special courts-martial involving BCD punishments. The forms found at appendices 19-1 and 19-2, infra, may be used by the defense counsel to request relief from continued post-trial representation. United States v. Sterling, 5 M.J. 601 (N.C.M.R. 1978).

4. The accused may also be advised of his authority to designate an attorney-in-fact as his agent to accept service of the N.M.C.M.R. decision and to petition C.M.A. for further review on his behalf. JAGMAN, app. A-1-j. If an accused executes this power of attorney, the original shall be attached to the original appellate rights statement in the original record of trial. Copies should be attached to the copy of the appellate rights statement in each copy of the record. JAGMAN, § 0152b.

#### D. Appellate leave

Under the provisions of Art. 76a, UCMJ, the Secretary of the Navy may prescribe regulations which require that an accused take leave pending completion of the appellate review process if the sentence, as approved by the CA, includes an unsuspended dismissal or an unsuspended dishonorable or bad-conduct discharge. The secretarial regulations concerning appellate leave are contained in Art. 3420280 of the Military Personnel Manual for naval personnel and para. 3025 of MCO P1050.3F, Regulations for Leave, Liberty and Administrative Absence, for Marine Corps personnel. Stated simply, Navy and Marine Corps personnel may be placed on mandatory appellate leave. It is essential that counsel be familiar with current regulations concerning appellate leave and with the ramifications of a member being placed on either mandatory or voluntary appellate leave.

E. As indicated in section 1904, supra, the SJA or LO recommendation to the convening authority must be served on the defense counsel. The defense counsel is obligated to examine the recommendation and reply promptly in writing, noting any errors or omissions. This response must be forwarded within 10 days to avoid waiver of those errors or omissions. R.C.M. 1106(f).

### 1912 ISSUES AND OPTIONS FOR THE REVIEWING AUTHORITY

The reviewing authority has many options available to him when he takes his action on review. As an example, the convening authority may approve, substantially reduce, or disapprove the sentence of a court-martial as a matter of command prerogative. Though no action on findings of guilty is required, the convening authority may, as a matter within his discretion, disapprove such findings or approve a lesser included offense. These actions may be taken for many reasons including considerations of command morale, clemency for the accused, or error in the record of trial. As far as error is concerned, it must be remembered that the convening authority is not required to search for legal error or factual sufficiency. He may, on the other hand, determine that time and money may be saved by correcting error at his level of review rather than waiting for some other authority to return the record.

Sections 1913-1922, infra, discuss the various issues and options which face the reviewing authority when he takes his action on review. Though much of the discussion will be applicable to all authorities within the chain of review, the primary emphasis will be upon the action of the convening authority.

A. Generally. 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. See section 1914B (Certificates of correction), infra. Others involve improper or inconsistent action by the court, but which can be corrected without material prejudice to the accused. See section 1914C (Proceedings in revision), infra. 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.

B. 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. (See Chapters V-IX for a detailed discussion of the requisites for court-martial jurisdiction.) If the court-martial lacked jurisdiction over the person or the offense, the charge(s) will be dismissed. If, however, the court was improperly convened 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. United States v. Culver, 22 C.M.A. 141, 46 C.M.R. 141 (1973). For a discussion of the procedure required to conduct "another trial," see section 1914F (Another trial), infra.



C. 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." Art. 59(a), UCMJ. 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.

1. Pretrial investigation rights. Chapter XX discusses the accused's rights at the formal pretrial investigation mandated by Art. 32, UCMJ. In United States v. Ledbetter, 2 M.J. 37 (C.M.A. 1976), and United States v. Chestnut, 2 M.J. 84 (C.M.A. 1976), C.M.A. set aside the findings and sentence because the accused was denied the opportunity to cross-examine available witnesses at the art. 32 investigation. In United States v. Worden, 17 C.M.A. 486, 38 C.M.R. 284 (1968), the findings and sentence were set aside because the accused's counsel was not allowed to prepare for the art. 32 investigation, either by consulting with the accused or by interviewing the witnesses. In United States v. Tomaszewski, 8 C.M.A. 266, 24 C.M.R. 76 (1957), the accused was offered an officer, but not a lawyer, to represent him at the art. 32 investigation, with the same result. In commenting on the need for reversal in such cases, Judge Fletcher has written:

This Court again must emphasize that an accused is entitled to the enforcement of his pretrial rights without regard to whether such enforcement will benefit him at trial. Thus, Government arguments of "if error, no prejudice" cannot be persuasive.

United States v. Chestnut, *supra*, at 85 n.4.

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. United States v. Payne, 3 M.J. 354 (C.M.A. 1977).

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." United States v. Andrews, 21 C.M.A. 165, 168, 44 C.M.R. 219, 222 (1972).

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." United States v. Hall, 1 M.J. 162 (C.M.A. 1975), distinguishing Milton v. Wainwright, 407 U.S. 371 (1972). But see United States v. Remai, 19 M.J. 229 (C.M.A. 1985) (harmless error rule applied to erroneous admission of accused's statement taken in violation of the fifth amendment).

4. Errors founded solely on the U.S. Constitution. 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. United States v. Ward, 1 M.J. 176 (C.M.A. 1975), and cases cited therein, illustrate these principles. In Ward, stolen tools seized from the accused's automobile had been admitted into evidence; the Air Force Court of Military Review found the search of the auto was not based on probable cause, but affirmed the conviction. C.M.A. reversed, reasoning that the physical appearance of the tools lent credibility to the testimony of the government's key witness and the court was unable to declare its belief that the error was harmless beyond a reasonable doubt. In United States v. Moore, 1 M.J. 390 (C.M.A. 1976), C.M.A. applied the test enunciated in Ward. In Moore, the military judge elicited testimony before the members that the accused had requested a lawyer when advised of his right to do so. C.M.A. treated this as an error of constitutional dimensions, although Judge Cook expressed doubt on this point. The court reversed Moore's conviction of carnal knowledge, reasoning that since "the credibility and reputation of the prosecutrix ... was seriously brought into question," the court could not conclude "that there is not a reasonable possibility that this testimony ... might not have contributed to the appellant's conviction of that offense." Id. at 392.

The Ward test was applied again in United States v. Pringle, 3 M.J. 308 (C.M.A. 1977). 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.

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 defense counsel to move for a mistrial, challenge the inattentive member, or request other relief does not constitute waiver. See United States v. Brown, 3 M.J. 368 (C.M.A. 1977) and United States v. Groce, 3 M.J. 369 (C.M.A. 1977).

6. In United States v. Penn, 5 M.J. 514 (N.C.M.R. 1978), 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. See also United States v. Nordstrom, 5 M.J. 528 (N.C.M.R. 1978), in which the court found no violation of due process where the record of a prior shipboard nonjudicial punishment was admitted in evidence in sentencing.

D. 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 Art. 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.

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, United States v. Hawthorne, 7 C.M.A. 293, 22 C.M.R. 83 (1956); rebuttable presumption of prejudice, United States v. Johnson, 14 C.M.A. 548, 34 C.M.R. 328 (1964); reasonable doubt as to the impact of the influence, United States v. Greene, 20 C.M.A. 232, 43 C.M.R. 72 (1970); 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, United States v. Thomas, 22 M.J. 388 (C.M.A. 1986).

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." United States v. Carpenter, 1 M.J. 384, 386 (C.M.A. 1976) (CO requested as witness for extenuation and mitigation). Compare United States v. Willis, 3 M.J. 94 (C.M.A. 1977)];

b. whether the witness' expected testimony would go to the core of the defense [United States v. McElhinney, 21 C.M.A. 436, 45 C.M.R. 210 (1972), United States v. Lucas, 5 M.J. 167 (C.M.A. 1978)];

c. whether the witness' expected testimony would have been merely cumulative of that of other witnesses [United States v. Lucas, 5 M.J. 167 (C.M.A. 1978)];

d. the probable impact of the witness' expected testimony on the findings and sentence [United States v. Lucas, supra, stated that even when testimony is material, "to justify reversal [it] must embrace the 'reasonable likelihood' that the evidence could have affected the judgment of the military judge or court members"]; 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. Lucas, supra. 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. United States v. Scott, 5 M.J. 431 (C.M.A. 1978). Effective 1 August 1981, the revised law limits 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. R.C.M. 1001(e)(2).

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. United States v. Harrison, 19 C.M.A. 179, 41 C.M.R. 179 (1970), and cases cited therein.

4. Misconduct by the trial counsel (TC). Opportunities abound for the overly zealous military prosecutor to commit reversible error. In United States v. Pettigrew, 19 C.M.A. 191, 41 C.M.R. 191 (1970), 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, 1 M.J. 235 (C.M.A. 1975), 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. Consult the Evidence Study Guide for a discussion of improper sentencing arguments.

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 as required by United States v. Webster, 1 M.J. 216 (C.M.A. 1975). See United States v. Saylor, 6 M.J. 647, (N.C.M.R. 1978).

E. 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, 1 C.M.A. 288, 3 C.M.R. 22 (1952), the first cumulative error case under the UCMJ and widely cited since, involved a trial wherein the trial counsel repeatedly used leading questions after several times being admonished by the ruling officer. The ruling officer received substantial amounts of hearsay evidence over objection of the defense counsel, and the prosecution repeatedly referred to uncharged misconduct. See also United States v. Smith, 3 C.M.A. 15, 11 C.M.R. 15 (1953) and United States v. Randall, 5 C.M.A. 535, 18 C.M.R. 159 (1955).

2. In United States v. Exposito, 13 C.M.A. 169, 32 C.M.R. 169 (1962), an entire shore patrol investigative report was received in evidence as was the testimony of a witness who claimed he saw a certain log which was material to the case, but who did not make any of the entries himself, and whose testimony was shown to be erroneous in several instances when the log itself was admitted into evidence. 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, 4 C.M.A. 617, 16 C.M.R. 191 (1954), the legal officer (military judge) fraternized with the members during a recess. He had several conversations with trial counsel 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 defense counsel were to "return to law school," and he requested the defense counsel to render a legal opinion in regard to West German laws, which were in issue in the case, which the defense counsel refused to do -- placing him in an embarrassing position. The court held this case to be within the ambit of the doctrine of cumulative error and reversed conviction of the offense tainted by the errors.

#### F. Remedies for prejudicial error

1. If a prejudicial error affects all findings of guilty, then the findings and sentence must be disapproved. A rehearing may be ordered if there is sufficient evidence of record to support the findings of guilty. R.C.M. 1107(e)(1)(C). See section 1914, infra.

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. See section 1914, infra.

### 1914 POST-TRIAL SESSIONS

A. Generally. 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 art. 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 (Art. 59(a), UCMJ). In such cases, a rehearing may be possible. Still others may affect the jurisdictional status of the court and result in the trial being declared a nullity. Even then, however, "another trial" may be possible.

B. Certificates of correction (MILJUS Key Number 1353)

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 a special court-martial without a military judge, or the summary court-martial for a certificate of correction. Notice shall be given to all parties with an opportunity to examine and respond to the proposed correction. R.C.M. 1104.

2. The certificate is prepared in accordance with Appendix 13 or 14, MCM, 1984. It corrects the record of trial and states the reasons for the error in the original. It is then authenticated in the same manner as the record of trial, a copy is served on the accused, and the certificate is appended to the record directly after the original authentication.

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, 12 M.J. 195 (C.M.A. 1982), 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.

C. Proceedings in revis . Art. 60, UCMJ; R.C.M. 1102 (MILJUS Key Number 1397)

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. Art. 60, UCMJ.

2. A court-martial may also be reconvened for revision proceedings on the initiative of the military judge. R.C.M. 1102(a).

3. 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. See section 1914B, *infra*. Instead, this action is taken when the record correctly shows what happened, but what happened amounts to a defect.

4. 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. United States v. Barnes, 21 C.M.A. 169, 44 C.M.R. 223 (1972).

d. The military judge failed to take judicial notice of a general regulation at trial. United States v. Mead, 16 M.J. 270 (C.M.A. 1983).

5. 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 (art. 106) has a mandatory sentence of death. R.C.M. 1102(c)(3).

c. Supplying an omitted instruction on the sentence cannot be corrected by proceedings in revision. United States v. Roman, 22 C.M.A. 78, 46 C.M.R. 78 (1972).

d. An attempt to cure a defective plea-bargain inquiry unless the accused is given the opportunity to plead anew. Compare, United States v. Dimpter, 6 M.J. 824 (N.C.M.R. 1979) with United States v. Steck, 8 M.J. 688 (N.C.M.R. 1980) and United States v. Newkirk, 8 M.J. 684 (N.C.M.R. 1980).

6. When can error be rectified without material prejudice to substantial rights of the accused? See United States v. Carpenter, 15 C.M.A. 526, 36 C.M.R. 24 (1965), where C.M.A. held proceedings in revision were proper to correct an erroneous admission of a prior conviction during sentencing because the inadmissible evidence presented in the first trial could be disregarded during the proceedings in revision.

#### 7. Procedure

a. The convening authority in writing returns the record to the trial counsel, pointing out the defect and directing proceedings in revision, or, as noted earlier, the court may reconvene on its own motion. R.C.M. 1102.

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, trial counsel, and defense counsel 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, trial counsel 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 a special court-martial 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.

D. Art. 39(a) sessions. R.C.M. 1102 authorizes a post-trial art. 39(a) hearing for the purpose of inquiring into and resolving any matter which may arise after trial and which may substantially affect the legal sufficiency of any finding of guilty or sentence. Basically, it is intended to be a factfinding mechanism. For example, such a session may be called to examine allegations of misconduct by a member or by counsel. 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, 17 C.M.A. 147, 37 C.M.R. 411 (1967). See also United States v. Lucy, 6 M.J. 265 (C.M.A. 1979).

#### E. Rehearings

1. 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.

A rehearing cannot be ordered as to any offense of which the accused was acquitted, nor may a rehearing be ordered if any part of the sentence is approved. The sentence is always disapproved when any rehearing is ordered. R.C.M. 1107.

The convening authority may take a reasonable length of time to decide whether a rehearing is practical. DeChamplain v. United States, 22 C.M.A. 211, 46 C.M.R. 211 (1973). But, if the accused is confined, the convening authority must comply with the Burton speedy trial mandate or the accused will be entitled to dismissal of the charges.

#### 2. Rules relating to rehearing

a. Steps in accomplishing a rehearing. The convening authority takes action, disapproving the entire sentence and ordering trial before a court to be designated later. A statement of the reasons for disapproval is included in the convening authority's action. R.C.M. 1107.

The convening authority designates the court and forwards to the trial counsel:

(1) The charges and specifications upon which the rehearing shall be held;

(2) the record of the first trial;

(3) all pertinent papers accompanying the record of the original trial; and

(4) a statement setting forth his reasons for disapproving the original sentence. (The reason for sending all this matter to the trial counsel is to inform him of the error made at the first trial which necessitated the rehearing.) See R.C.M. 810(c), discussion.

The rehearing may be held as to any offense of which the accused was found guilty at the first trial or a lesser included offense (LIO) thereof. If the accused was found guilty at the first trial of only 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.

b. 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, trial counsel, and defense counsel at the first trial may act in the same capacity at the rehearing. R.C.M. 810.

(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. R.C.M. 810(a)(2)(B).

c. The sentence at a rehearing. The court at the rehearing cannot adjudge a greater sentence than that adjudged at the original trial as properly reduced by reviewing authorities, except:

(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. Art. 63, UCMJ; R.C.M. 810.

*The court members should not be aware of the basis for the sentence limitation. It is error for the trial counsel 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.

d. 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. R.C.M. 1103.

e. 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. See United States v. Blackwell, 19 C.M.A. 196, 41 C.M.R. 196 (1970) and R.C.M. 1107.

(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 1 January 1984 to 1 March 1984 under the sentence as adjudged at the former trial of this case." MCM, 1984, app. 16, form 21.

F. "Another trial." When the convening or higher authority finds a jurisdictional error, the entire trial is declared invalid. At the subsequent trial, persons who participated in the former trial are ineligible to act as court members, but the same military judge may preside. The accused may request trial by military judge alone even though the original trial was with members. The procedure at the subsequent trial is the same as at the original trial. R.C.M. 810. The sentence is limited to that adjudged at the previous trial or, if the sentence was reduced by the convening or other authority, then the sentence as reduced forms the basis of the limitation. This is true except when the convening authority has reduced the adjudged sentence in compliance with a pretrial agreement and where the accused at the rehearing fails to plead guilty in compliance with the agreement. In such a case, the sentence at the rehearing is not limited by the convening authority's action but by the adjudged sentence. Art. 63, UCMJ; R.C.M. 810. Whatever the sentence limitation may be, the court is not informed of its basis or rationale. R.C.M. 810. If the accused is convicted and sentenced at the subsequent trial, the convening authority may approve the sentence; but, when the sentence is executed, the accused must be credited with any portion of the original sentence which was served or executed. R.C.M. 1107.

1915 CONVENING AUTHORITY'S ACTION ON FINDINGS OF GUILTY  
(MILJUS Key Number 1380)

A. Generally. It merits repeating that the convening authority is not required to take action on findings of guilty. On the other hand, issues of legal error or factual sufficiency may have to be considered by subsequent reviewing authorities. For example, the Court of Military Review may affirm only such findings of guilty as it finds correct in law and fact and which it determines, on the basis of the entire record, should be approved. R.C.M. 1203. Occasionally, the court may discover error and order corrective action or dismissal of the charges. In order to avoid this from happening after a lengthy passage of time, a convening authority may choose, in his discretion, to review the findings with the intention of correcting errors at an early stage. R.C.M. 1107.

This section discusses some of the issues considered when reviewing findings of guilty.

B. Reviewing findings of guilty

1. In acting upon findings of guilty, a reviewing authority considers a number of issues:

- a. Did the court have jurisdiction in all respects?
- b. Did the accused have
  - (1) mental responsibility, i.e., was he sane at the time of the offense; and
  - (2) mental capacity, i.e., was he sane at the time of trial?
  - (3) If the issue of insanity is not raised at the trial, the presumption of sanity satisfies both questions.
- c. Did the specifications of which the accused was found guilty state offenses under the UCMJ?
- d. Is there competent evidence of record which is factually sufficient to support each element of the offense(s) of which the accused was found guilty? In this regard, it should be noted that the convening authority has the same power as the court to weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact. If the evidence is not sufficient to support a finding of guilty to a charged offense, but is sufficient to support a finding of guilty to an LIO, the convening authority may approve a finding of guilty of the LIO.
- e. Are there any errors which materially prejudice the substantial rights of the accused as to the findings which are approved? See section 1913, supra.

2. The record of trial is reviewed for error in the order given above because, if found, an error may, in turn, preclude the necessity of further review. For example, if the evidence shows the accused lacked mental responsibility, it would be a futile effort to search the record for sufficient competent evidence to establish each element of the offense.

3. It has long been recognized that the convening authority may consider matters outside the record in disapproving findings of guilty even if such matters would not be admissible in evidence. See, e.g., United States v. Massey, 5 C.M.A. 514, 18 C.M.R. 138 (1955), holding that the convening authority may consider the results of a polygraph (lie detector) test and a sodium pentothal (truth serum) interview, both of which were indicative of innocence, in deciding whether to disapprove findings of guilty. To date there is no clear indication of whether the convening authority must consider such matters submitted to him by the defense. In United States v. Bras, 3 M.J. 637 (N.C.M.R. 1977), however, it was held that when the defense submits such matters to the CA (here, an exculpatory polygraph examination), the SJA must advise the CA what use he may, in his discretion, make of this information.

1916 CONVENING AUTHORITY'S ACTION ON THE SENTENCE (MILJUS  
Key Number 1399)

A. Generally. As long as the sentence is within the jurisdiction of the court-martial and does not exceed the maximum limitations prescribed for each offense in Part IV (Punitive Articles), MCM, 1984, it is a legal sentence and may be approved by the convening authority. Considerable discretion is given to the convening authority in acting on the sentence. R.C.M. 1107 states that "[t]he convening authority shall approve that sentence which is warranted by the circumstances of the offense and appropriate for the accused." It also states, however, that he "may for any or no reason disapprove a legal sentence in whole or in part, mitigate the sentence, and change a punishment to one of a different nature as long as the severity of the punishment is not increased." These issues are discussed below.

B. Determining the appropriateness of the sentence

1. In determining what sentence should be approved or disapproved, the convening authority should consider all relevant factors including the possibility of rehabilitation, the deterrent effect of the sentence, matters relating to clemency, and requirements of a pretrial agreement. He may also, when certain findings of guilty have been disapproved, reassess the sentence to determine its appropriateness for the remaining offenses. In his reassessment he may determine that all, or any part, of the sentence should be approved.

2. If the convening authority considers matters outside the record which are adverse to the accused, the accused must be afforded the opportunity to explain or rebut such matter unless the accused can be charged with knowledge that such matter might be used against him, such as a record of nonjudicial punishment contained in the accused's service record. R.C.M. 1107(b)(3)(B). Generally, if the accused is denied the opportunity to explain or rebut adverse matters from outside the record, he is entitled to a new review of the sentence. See United States v. Littleton, 23 C.M.A. 279, 49 C.M.R. 454 (1975).

C. Reducing and changing the nature of the sentence

1. Mitigation. When a sentence is reduced in quantity (e.g., 4 months confinement to 2 months confinement) or reduced in quality (e.g., 30 days confinement to 30 days restriction), the sentence is said to have been mitigated.

2. Commutation. When a sentence is changed to a punishment of a different nature (e.g., bad-conduct discharge to confinement), the sentence is said to have been commuted.

3. General rules. In taking action on the sentence, the convening authority must observe certain rules.

a. When mitigating forfeitures, the duration and 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.

b. When mitigating confinement on bread and water or diminished rations, confinement, or hard labor without confinement, the convening authority should use the equivalencies at R.C.M 1103(b)(6), (7), and (9) as appropriate. For example, confinement on bread and water may be changed to confinement at the rate of 1 day of confinement on bread and water equaling 2 days of confinement.

c. The sentence may not be increased in severity or duration.

d. No part of the sentence may be changed to a punishment of a more severe type.

e. The sentence as approved must be one which the court-martial could have adjudged.

4. Application

a. A punitive discharge cannot be commuted to an administrative discharge, as the latter could not have been adjudged by the court-martial. United States v. Plummer, 12 C.M.A. 18, 30 C.M.R. 18 (1960).

b. Example. A special court-martial adjudges a bad-conduct discharge, confinement for 6 months, forfeitures of \$68/month for 6 months. The convening authority commutes the bad-conduct discharge to confinement for 5 months and forfeitures of \$68/month for 5 months, then approves confinement for 11 months and forfeitures of \$68/month for 11 months. Result: convening authority's action is illegal; the approved confinement and forfeitures for 11 months is beyond the jurisdiction of SPCM. Jones v. Ignatius, 18 C.M.A. 7, 39 C.M.R. 7 (1968).

c. Confinement and forfeitures for 1 year cannot be commuted to a bad-conduct discharge, even with accused's consent. A bad-conduct discharge is a more severe punishment and can only be approved when included in the sentence of the court-martial. United States v. Johnson, 12 C.M.A. 640, 31 C.M.R. 226 (1962).

d. A bad-conduct discharge can be commuted to confinement and forfeitures for 6 months. The latter is a less severe penalty. Confinement begins to run on the date the original sentence was imposed by the court-martial, rather than the date of the commutation. United States v. Brown, 13 C.M.A. 333, 32 C.M.R. 333 (1962).

e. An unsuspended reduction in rate can be commuted to a suspended reduction and an unsuspended forfeiture of pay. United States v. Whittaker, 3 M.J. 955 (N.C.M.R. 1977).

f. A sentence of death can be commuted to a DD, CONF for life, and total forfeitures. The latter is a less severe sentence. United States v. Russo, 11 C.M.A. 352, 29 C.M.R. 168 (1960).

g. It is often difficult to compare two authorized punishments of different types and decide which is less severe. For example, is the loss of 500 lineal numbers more or less severe than forfeiture of \$25 per month for 12 months? The C.M.A. has opted for "...affirmance of [the CA's] judgment on appeal, unless it can be said that, as a matter of law, he has increased the severity of the sentence." United States v. Christensen, 12 C.M.A. 393, 395, 30 C.M.R. 393, 395 (1961). United States v. McKnight, 20 C.M.R. 520 (N.C.M.R. 1955). United States v. Williams, 6 M.J. 803 (N.C.M.R. 1979).

#### D. Suspending the sentence

##### 1. When used

a. R.C.M. 1108 states: "Suspension of a sentence grants the accused a probationary period during which the suspended part of an approved sentence is not executed, and upon the accused's successful completion of which the suspended part of the sentence shall be remitted." 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.

b. Convening authorities and officers exercising general court-martial jurisdiction are encouraged to suspend all or any part of a sentence when such action would promote discipline and when the accused's prospects for rehabilitation would more likely be enhanced by probation than by the execution of all or any part of the sentence adjudged. JAGMAN, § 0145a(3).

2. Automatic reduction to paygrade E-1. In accordance with the power granted in Art. 58(a), UCMJ, the Secretary of the Navy has determined that automatic reduction under Art. 58(a), UCMJ, shall be effected in the Navy and Marine Corps in accordance with JAGMAN, § 0145a(7). Under the provisions of JAGMAN, § 0145a(7), a court-martial sentence of an enlisted member in a paygrade above E-1, as approved by the convening authority, that includes a punitive discharge, whether or not suspended, or confinement in excess of 90 days (if the sentence is stated in days) or 3 months (if stated in other than days), automatically reduces the member to paygrade E-1 as of the date of approval of the sentence. As a matter within his sole discretion,

the convening authority may retain the accused in the paygrade held at the time of sentence or at an intermediate paygrade and suspend the automatic reduction to paygrade E-1. Additionally, the convening authority may direct that the accused serve in paygrade E-1 while in confinement, but be returned to the paygrade held at the time of sentence or an intermediate paygrade upon release from confinement. Failure of the convening authority to address automatic reduction will result in automatic reduction to paygrade E-1 on the date of the CA's action.

### 3. Requirements for a valid suspension of a sentence

a. The conditions of the suspension must be in writing and served on the accused in accordance with R.C.M. 1108. Unless otherwise stated, an action suspending a sentence includes as a condition that the probationer not violate any punitive article of the UCMJ.

b. The suspension period must be for a definite period of time which is not unreasonably long. This period shall be stated in the CA's action.

c. A provision must be made for the suspension to be remitted at the end of the suspension period, without further action. This provision shall be included in the CA's action.

d. A provision must be made for permitting it to be vacated prior to the end of the suspension period. This provision shall be included in the CA's action. "Vacating" means to do away with the suspension. See section 1916D.5, infra.

e. The punishment to be suspended must not have already run or been served. United States v. Moore, 6 M.J. 644 (N.C.M.R. 1978); United States v. Walzer, 6 M.J. 856 (N.C.M.R. 1979).

### 4. Who has the power to suspend?

a. The convening authority, after approving the sentence, has the power to suspend any sentence except the death penalty. The military judge or members of a court-martial may recommend suspension of part or all of the sentence, but these recommendations are not binding on the convening authority or other higher authorities. United States v. Occhi, 2 M.J. 60 (C.M.A. 1976); United States v. Williams, 2 M.J. 74 (C.M.A. 1976); Stonesifer v. United States, 2 M.J. 212 (C.M.A. 1977). In Occhi and Williams, the military judges recommended suspensions. In Stonesifer, however, the military judge announced that all but 14 days of a five-month sentence to confinement were suspended. After the accused had been confined for 14 days, he sought release via a petition for a writ of habeas corpus to C.M.A. The court denied the petition, holding that the purported suspension was a nullity and was severable from the otherwise lawful sentence. For instructions regarding recommendations for suspension of punitive discharges, see the Military Judges' Guide (DA Pam 27-9), para. 8-4(e). The following additional authorities may suspend:

(1) The officer exercising general court-martial jurisdiction who takes action under R.C.M. 1112 (see section 1906B, supra);



(2) for unexecuted portions of the sentence, the Secretary of the Navy, the Assistant Secretaries of the Navy, the Judge Advocate General, and all officers exercising general court-martial jurisdiction over the command to which the accused is attached (Art. 74(a), UCMJ; JAGMAN, § 0149); and

(3) in the case of a summary court-martial or a special court-martial not involving a bad-conduct discharge, the commander of the accused who has immediate authority to convene a court of the kind that adjudged the sentence. This power extends only to unexecuted portions of the sentence. JAGMAN, § 0149a(3).

b. Do the Courts of Military Review have the power to suspend a sentence? As early as United States v. Simmons, 2 C.M.A. 105, 6 C.M.R. 105 (1952), the Court of Military Appeals held that a Board of Review (now Court of Military Review) had neither inherent nor statutory power to suspend a sentence. In United States v. Cox, 22 C.M.A. 69, 46 C.M.R. 69 (1972), however, the Court of Military Appeals affirmed a C.M.R. decision in which C.M.R. ordered a sentence suspended where the convening authority was obligated to suspend the sentence under the terms of a pretrial agreement and, in reliance of a favorable interpretation of Art. 66(c), UCMJ, N.C.M.R. ordered suspended sentences in the cases of United States v. Silvernail, 1 M.J. 945 (N.C.M.R. 1976) and United States v. March, 1 M.J. 1150 (N.C.M.R. 1977). The issue of whether N.C.M.R. had exceeded its authority when it acted to suspend the sentences in those cases was certified to the Court of Military Appeals and, in the case of United States v. Darville, 5 M.J. 1 (C.M.A. 1978), the Court of Military Appeals reaffirmed its decision in Simmons, *supra*, holding that the Court of Military Review is a judicial body which has no inherent power to suspend sentences and no independent power to do so.

#### 5. Proceedings to vacate suspension

a. General requirements. 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. Furthermore, when all or part of the sentence has been suspended as a result of a pretrial agreement, case law indicates that the suspension may be vacated for violation of any of the lawful requirements of the probation, including the duty to obey 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. United States v. Lallande, 22 C.M.A. 170, 46 C.M.R. 170 (1973).

b. Hearing requirements. Procedural rules for hearing requirements depend on the type of suspended sentence being vacated.

(1) Sentence of any GCM or an SPCM including approved BCD. If the suspended sentence was adjudged by any GCM, or by an SPCM which included an approved BCD, the following rules apply. After giving notice to the accused in accordance with R.C.M. 1109(d), the officer having

SPCM jurisdiction over the probationer holds a hearing to inquire into the alleged violation of probation. The procedure for the hearing is similar to that prescribed for a formal pretrial investigation (Art. 32, UCMJ). 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. Art. 72, UCMJ; R.C.M. 1109. Appendix 18, MCM, 1984, provides a form for use as the vacation hearing record.

(2) Sentence of SPCM not including BCD or sentence of SCM. If the suspended sentence was adjudged by an SPCM and does not include a BCD, or if the sentence was adjudged by an SCM, the following rules apply. The officer having SPCM jurisdiction over the probationer holds a hearing to inquire into the alleged violation of probation. The procedure for the hearing is similar to that prescribed for a formal pretrial investigation. The probationer must be accorded the same right to counsel at the hearing that he was entitled to at the court-martial which imposed the sentence. Such counsel need not be the same counsel who originally represented the probationer, 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. Art. 72, UCMJ; R.C.M. 1109.

(3) Who must hold the hearing? When the accused is entitled to a formal hearing [see (1) and (2) above], R.C.M. 1109 clearly indicates that the officer exercising special court-martial jurisdiction over the accused must personally conduct the hearing. He may not appoint another officer to hold the hearing for him.

(4) The officer who actually vacates the suspension must execute a written statement of the evidence he is relying on and his reasons for vacating the suspension.

(5) If, based on an act of misconduct in violation of the terms of suspension, the accused is confined prior to the actual vacation of the suspended sentence for more than 7 days, a preliminary hearing must be held before a neutral and detached officer to determine whether there is probable cause to believe the accused violated the terms of his suspension. R.C.M. 1109. Section 0150 of the JAG Manual indicates that this officer should be one who is appointed to review pretrial confinement under R.C.M. 305.

E. Post-trial interview. It is the practice at some commands to conduct a post-trial interview of the accused prior to taking the convening authority's action. The primary purpose of such an interview is to determine the accused's attitude toward restoration to duty and often such interviews result in the exercise of clemency, such as suspension of a punitive discharge. On the rationale that, in the absence of counsel, an accused at such a hearing may disclose matters adverse to his interest, the Court of Military Appeals held, in United States v. Hill, 4 M.J. 33 (C.M.A. 1977), that absent an express waiver, an accused is entitled to the presence and assistance of counsel at any

post-trial interview. See also United States v. Moles, 10 M.J. 154 (C.M.A. 1981), wherein the court held that, where an accused was misinformed as to the status of his case when he signed a request for immediate execution of his BCD, and where he did not have the opportunity to consult with counsel before seeking immediate execution of the discharge, matters contained in the request should not have been included in the SJA's post-trial review of the case.

#### 1917 POST-TRIAL RESTRAINT PENDING COMPLETION OF APPELLATE REVIEW

A. Status of the accused. The accused's immediate commander must initially determine whether the accused will be placed in post-trial restraint pending review of the case. Specifically, he must decide whether he will confine, restrict, place in arrest, or set free the accused pending appellate review. This decision is necessary because an accused who has been sentenced to confinement by 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. Art. 57, UCMJ; R.C.M. 1101; Reed v. Ohman, 19 C.M.A. 110, 41 C.M.R. 110 (1969).

B. Criteria. Since the sentence of confinement runs from the date adjudged, whether or not the accused is confined, a commanding officer will usually take prompt action with respect to restraint. R.C.M. 1101(b) indicates that post-trial confinement is authorized when the sentence includes confinement or death. The C.M.A. believes that post-trial restraint is also authorized where the sentence includes a punitive discharge, but no confinement. United States v. Teague, 3 C.M.A. 317, 12 C.M.R. 73 (1953) (arrest); Reed v. Ohman, *supra* (dictum). See United States v. Petroff-Tachomakoff, 5 C.M.A. 824, 19 C.M.R. 120 (1955) (CA properly ordered post-trial restriction pending execution of BCD even though confinement portion of sentence had run).

#### C. 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. See, e.g., U.S. Navy Regulations, 26 February 1973, Art. 1158.

2. Post-trial restraint may change to pretrial restraint when a case is sent back for rehearing. See R.C.M. 1107(e)(1)(A), discussion. DeChamplain v. United States, 22 C.M.A. 211, 46 C.M.R. 211 (1973), involved the status of restraint pending a decision by the CA as to the practicability of

a rehearing of a remanded case. The C.M.A. held, in DeChamplain, that the convening authority is given reasonable time for making the required determination. Pending that determination, the decision respecting continued confinement is governed by the pretrial restraint provisions of Art. 13, UCMJ. Since the Burton presumption applies to rehearings [United States v. Flint, 1 M.J. (C.M.A. 1976)], and the sentence must be set aside before a rehearing is ordered, if the accused remains in confinement his status changes from that of a post-trial (adjudged) confinee to that of a pretrial (detained) confinee. Thus, it would appear that the accused should be afforded a hearing under R.C.M. 305 to review the CA's decision that the accused should be confined. See section 0203, supra.

D. 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." Reed v. Ohman, supra. It is the commanding officer's decision whether or not to confine. He may, however, delegate this authority to the trial counsel. R.C.M. 1101(b)(2).

E. The nature of post-trial restraint. The Navy Corrections Manual, SECNAVINST 1640.9 (series), 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 art. 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.

#### 1918 DEFERMENT OF THE CONFINEMENT PORTION OF THE SENTENCE (MILJUS Key Number 1399)

A. Definition. As indicated in the previous section, the confinement portion of a sentence runs from the date the sentence is adjudged. Art. 57(b), UCMJ. Deferment of a sentence to confinement is a postponement of the running and service of the confinement portion of the sentence, together with a lack of any other post-trial restraint. It is not a form of clemency. R.C.M. 1101(c).

B. Who may defer? Only the convening authority or, if the accused is no longer under his jurisdiction, the officer exercising general court-martial authority over the command to which the accused is attached, may defer the sentence. R.C.M. 1001(c).

C. When deferment may be ordered. Deferment may be considered only upon written application of the accused. If the accused has requested deferment, it may be granted anytime after the adjournment of the court-martial, as long as the sentence has not been executed. R.C.M. 1101(c).

D. Action on the deferment request. The decision to defer is a matter of command discretion. As stated in R.C.M. 1101(c)(3), "the accused shall have the burden to show that the interests of the accused and the community in release outweigh the community's interest in confinement." 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.

E. Imposition of restraint during deferment. No restrictions on the accused's liberty may be ordered as a substitute for the confinement deferred. An accused may, however, be restrained for an independent reason, e.g., pretrial restraint resulting from a different set of facts. R.C.M. 1101(c)(5).

F. Termination of deferment. Deferment is terminated when:

1. The CA takes action, unless the CA specifies in the action that service of the confinement after the action is deferred (In this case, deferment terminates when the conviction is final.);
2. the sentence to confinement is suspended;
3. the deferment expires by its own terms; or
4. the deferment is rescinded by the officer who granted it or, if the accused is no longer under his jurisdiction, by the officer exercising general court-martial authority over the accused's command. R.C.M. 1101(c)(7). Deferment may be rescinded when additional information comes to the authority's attention which, in his discretion, presents grounds for denial of deferment under paragraph 4, above. The accused must be given notice of the intended rescission and of his right to submit written matters. He may, however, be required to serve the sentence to confinement pending this action. R.C.M. 1107(c)(7).

G. Procedure. Applications must be in writing and may be made by the accused or by his defense counsel at any time after adjournment of the court. The granting or denying of the application is likewise in writing.

H. Record of proceedings. Any document relating to deferment or rescission of deferment must be made a part of the record of trial. The dates of any periods of deferment and the date of any rescission are stated in the convening authority or supplementary action.

I. Necessity for request by accused. In United States v. Ledbetter, 2 M.J. 37 (C.M.A. 1976), 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.

J. Review of denial of deferment request. Despite the language of Art. 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. Trotman v. Haebel, 12 M.J. 27 (C.M.A. 1981); United States v. Brownd, 6 M.J. 338 (C.M.A. 1979). See United States v. Alicea-Baez, 7 M.J. 989 (A.C.M.R. 1979) and United States v. Petersen, 7 M.J. 981 (A.C.M.R. 1979) for examples of an accused failing to meet his burden of submitting a sufficient request.

## 1919 EXECUTION OF THE SENTENCE (MILJUS Key Number 1398)

An order executing the sentence directs that the sentence be carried out. In the case of confinement, it directs that it be served; in the case of a punitive discharge, that it be delivered. The decision as to execution of the sentence is closely related to other post-trial decisions involving suspension, deferment of confinement, and imposition of post-trial restraint.

### A. Execution authorities

1. No sentence may be executed by the convening authority unless and until it is approved by him. R.C.M. 1113(a). Once approved, every part of the sentence, except for a punitive discharge, dismissal, or death, may be executed by the convening authority in his initial action. R.C.M. 1113(b). Of course, a suspended sentence is approved, but not executed.

2. A punitive discharge may only be executed by:

a. The officer exercising general court-martial jurisdiction who reviews a case when appellate review has been waived under R.C.M. 1112(f); or

b. the officer then exercising general court-martial jurisdiction over the accused after appellate review is final under R.C.M. 1209. If more than 6 months has passed since the approval of the sentence by the convening authority, the officer exercising general court-martial jurisdiction over the accused shall consider the advice of his staff judge advocate as to whether retention of the accused would be in the best interest of the service. The advice shall include:

(1) The findings and sentence as finally approved;

(2) an indication as to whether the servicemember has been on active duty since the trial and, if so, the nature of that duty; and

(3) a recommendation whether the discharge should be executed. R.C.M. 1113(c)(1).

3. Dismissal may be ordered executed only by the Secretary of the Navy or by such Undersecretary or Assistant Secretary as the Secretary may designate. R.C.M. 1113(c)(2).

4. Death may be ordered executed only by the President. R.C.M. 1113(c)(3).

5. Though a punitive discharge may have been ordered executed, it shall not in fact be executed until all provisions of SECNAVINST 5815.3 (series), concerning Naval Clemency and Parole Board action, have been complied with. JAGMAN, § 0148d.

B. Appellate leave. Under the provisions of Art. 76(a), UCMJ, the Secretary of the Navy may prescribe regulations which require that an accused take leave pending completion of the appellate review process if the sentence, as approved by the convening authority, includes an unsuspended dismissal or an unsuspended dishonorable or bad-conduct discharge. The secretarial regulations concerning appellate leave are contained in Art. 3420280 of the Military Personnel Manual for Navy personnel and para. 3025 of MCO P1050.3f, Regulations for Leave, Liberty and Administrative Absence, for Marine Corps personnel. Procedures applicable to Navy and Marine Corps personnel provide authority to place a member on mandatory appellate leave.

C. Automatic reduction to paygrade E-1. In accordance with the power granted in Art. 58(a), UCMJ, the Secretary of the Navy has determined that automatic reduction under Art. 58(a), UCMJ, shall be effected in the Navy and Marine Corps in accordance with JAGMAN, § 0145a(7). Under the provisions of JAGMAN, § 0145a(7), a court-martial sentence of an enlisted member in a paygrade above E-1, as approved by the convening authority, that includes a punitive discharge or confinement in excess of 90 days (if the sentence is stated in days) or 3 months (if stated in other than days), automatically

reduces the member to paygrade E-1 as of the date of approval of the sentence. As a matter within his sole discretion, the convening authority may retain the accused in the paygrade held at the time of sentence or at an intermediate paygrade and suspend the automatic reduction to paygrade E-1. Additionally, the convening authority may direct that the accused serve in paygrade E-1 while in confinement, but be returned to the paygrade held at the time of sentence or an intermediate paygrade upon release from confinement. Failure of the convening authority to address automatic reduction will result in the automatic reduction to paygrade E-1 on the date of the CA's action.

D. Execution of confinement

1. The convening authority designates the place of confinement in his CA's action. R.C.M. 1113.

2. Though confinement begins to run from the date the sentence is adjudged by the court-martial, the following periods are excluded in computing the service of the term of confinement:

a. Periods in which the confinement is suspended or deferred;

b. periods during which the accused is in custody of civilian authorities under Art. 14, UCMJ, if the accused was convicted in a civilian court;

c. periods of unauthorized absence, escape, or release through fraudulent misrepresentation;

d. periods of absence under parole which is later revoked, or a period of erroneous release from confinement through a writ of habeas corpus which is later reversed; and

e. periods in which another sentence of confinement by a court-martial is being served. This happens when a later court-martial adjudges confinement. The later sentence of confinement interrupts the running of the earlier sentence. (Only restraint punishments interrupt an earlier sentence.) Once the later sentence is served, the remaining portion of the earlier sentence begins again. R.C.M. 1113.

1920 SPEEDY REVIEW (MILJUS Key Number 1384)

Post-trial restraint cases. In Dunlap v. Convening Authority, 23 C.M.A. 135, 48 C.M.R. 751 (1974), 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." Id. at 138, 48 C.M.R. at 754.



Dunlap involved a general court-martial conviction. In United States v. Brewer, 1 M.J. 233 (C.M.A. 1975), 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 special courts-martial in which the sentence, as approved by the convening authority, includes a bad conduct discharge. Post-trial restriction may not be a sufficient degree of restraint to trigger the Dunlap presumption. In United States v. Slama, 1 M.J. 167 (C.M.A. 1975), 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. United States v. Manalo, 1 M.J. 452 (C.M.A. 1976).

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 now 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. United States v. Banks, 7 M.J. 92 (C.M.A. 1979).

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. See United States v. Green, 4 M.J. 203 (C.M.A. 1978) (failure to forward accused's petition for review to the C.M.A. for over a year in no way condoned, but did not alone justify dismissal of charges); United States v. Burns, 2 M.J. 78 (C.M.A. 1976) (no relief granted for unexplained delay of 447 days between date of trial and SA's action); United States v. Ellis, 2 M.J. 616 (N.C.M.R. 1977) (unexplained delay of 314 days between date of trial and SA's action did not require dismissal).

The C.M.A. appears to be aware, however, of the need to be vigilant in finding prejudice whenever lengthy post-trial delay in review occurs. Consider, for example, the case of United States v. Clevidence, 14 M.J. (C.M.A. 1982). In this case, the accused was sentenced to a bad-conduct discharge, confinement at hard labor, and forfeitures for 3 months for two specifications of failing to go to his appointed place of duty, one specification of disrespect, and four specifications of failure to obey lawful orders. The accused spent 77 days in post-trial confinement and thereafter was given appellate leave. The record of trial was not authenticated by the military judge, however, until 200 days after the sentence 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:

[W]e are reluctant to dismiss charges because of errors on the Government's part and we would especially hesitate to do so if the case involved more serious offenses. However, it seems clear that unless we register our emphatic disapproval of such "inordinate and unexplained" delay in a case like this, we 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.

Id. at 19.

In United States v. Gentry, 14 M.J. 209 (C.M.A. 1982), the court set aside findings of guilty and dismissed two charges involving the use of marijuana by a lieutenant junior grade when the convening authority did not take his post-trial action in the case until 490 days after sentence was announced. The court noted:

That no reason appears in the record -- nor is any alleged -- explaining the inordinate delay in the post-trial processing of this routine case;

It further appearing that appellant -- a lieutenant (junior grade) -- was not confined after trial and remained on active duty; that he was shunned by his commander and ordered by him to stay off station and to maintain a low profile; that he was not promoted due to the pendency of the convening authority's action, notwithstanding that he was selected for promotion one and one-half years before that action and was selected each year thereafter; and

That appellant, anticipating prompt action by the convening authority and early dismissal, nevertheless had to reject two civilian job offers only after withholding decision on each for as long as possible;

[T]his case is another example of the "erosion of prompt post-trial review of courts-martial" which must be halted.

Id.

In United States v. Shely, 16 M.J. 431 (C.M.A. 1983), the court again rattled the skeleton of "automatic presumption of prejudice" to the accused in the face of the government. The court seems to declare that unexplained, unnecessary delay in post-trial processing of a case is intolerable if there is any indication that the accused was prejudiced.

A. Overview. In cases resulting in conviction, the document known as the convening authority's action (CA's action) must be prepared. As will be seen, it is a precise legal document setting forth in specific language what the convening authority has decided regarding a case he sent to trial. The following is a list of various parts of a CA's action. Those marked with an asterisk (\*) are always included in cases of conviction; the others are used only when appropriate. The format of the CA's action is specified in Appendix 16 of the Manual for Courts-Martial, 1984:

1. Statement of disapproval or modification of findings;
- \* 2. statement of approval, modification, or disapproval of sentence;
3. declaration of invalidity of proceedings;
4. order of rehearing or dismissal of charges or order of another trial;
5. statement of reasons for disapproval, if a rehearing or another trial is ordered;
6. order of execution or suspension of sentence;
7. statement concerning automatic administrative reduction to paygrade E-1;
8. order of deferment of confinement or rescission of deferment;
9. designation of place of confinement;
10. credit for illegal pretrial confinement or confinement served at a former trial;
11. reprimand;
12. statement regarding companion case;
13. synopsis of accused's conduct;
14. statement of facts in aggravation, extenuation, and mitigation;
15. statement as to accused's opportunity to rebut adverse matter;
16. statement forwarding record of trial; and
- \* 17. signature and authority to act.

Although not covered here in detail, an officer exercising general court-martial jurisdiction taking action under R.C.M. 1112(f) (see section 1906B, supra) may prepare a document similar in scope and content to the convening authority's action. See MCM, 1984, app. 16, forms 28-34.

The following is a discussion of these individual parts of the CA's action and some suggested language for each.

B. Statement of disapproval or modification of findings

1. This statement is not required in the CA's action; as previously discussed, however, the convening authority may, in his discretion, act with respect to the findings. If so, they are addressed in the action only when findings of guilty are disapproved in whole or in part.

2. Examples

a. Some findings disapproved: "In the case of \_\_\_\_\_, the finding of guilty to Specification 2, Charge II is disapproved...." MCM, 1984, app. 16, form 15.

b. Approval of a lesser included offense: "In the case of \_\_\_\_\_, the finding of guilty of Specification 1, Charge II is changed to a finding of guilty of (assault with a means likely to produce grievous bodily harm, to wit: a knife) (absence without authority from (unit) alleged from 1 January 1984 to 3 March 1984, in violation of article 86)." MCM, 1984, app. 16, form 16.

C. Statement of approval, modification, or disapproval of sentence

1. The CA's action must state whether the sentence adjudged is approved or disapproved. If only part of the sentence is approved, the action shall state which parts are approved. Though the action to be taken on the sentence is a matter of command discretion, a pretrial agreement may require the convening authority to take a particular action.

2. Examples

a. "In the case of \_\_\_\_\_, the sentence is approved ...." MCM, 1984, app. 16, form 1.

b. "In the case of \_\_\_\_\_, only so much of the sentence as provides for \_\_\_\_\_ is approved ...." MCM, 1984, app. 16, form 2.

c. "In the case of \_\_\_\_\_, the sentence is approved but \_\_\_\_\_ months of the approved period of confinement is changed to forfeiture of \$\_\_\_\_\_ pay per month for \_\_\_\_\_ months ...." MCM, 1984, app. 16, form 3.

d. "In the case of \_\_\_\_\_, it appears that the following error was committed: (evidence of a previous conviction of the accused was erroneously admitted) (\_\_\_\_\_). This error was prejudicial as to the sentence. The sentence is disapproved ...." MCM, 1984, app. 16, form 10.

D. Declaration of invalidity of proceedings

1. This action is used in any case in which the court lacked jurisdiction or where one or more specifications fail to state an offense. A statement of disapproval is not proper in these cases because such a statement implies validity of the proceedings.

2. Examples

a. Lack of jurisdiction: "In the case of \_\_\_\_\_, it appears that the (members were not detailed to the court-martial by the convening authority) (\_\_\_\_\_). The proceedings, findings and sentence are invalid ...." MCM, 1984, app. 16, form 19.

b. One charge fails to state an offense: "The findings and proceedings as to Charge 1 and its Specification are invalid ...." (No form)

E. Order of rehearing or dismissal of charge or order of another trial

1. If the convening authority's action disapproves any findings of guilty, the action must state either:

a. That the charge and the specification(s) thereunder are dismissed; or

b. that a rehearing or other trial is ordered with respect to that charge and specification. R.C.M. 1107(f)(3).

In the first instance, the sentence may be modified if it is no longer appropriate in light of the dismissed specification. When a rehearing is ordered with respect to a disapproved specification, as in the second instance, the entire sentence must be disapproved. R.C.M. 1107(f)(4). The accused will be sentenced at the rehearing, if convicted.

2. A rehearing on sentencing alone is possible only after the entire sentence has been disapproved. R.C.M. 1107(f)(4).

3. "Another trial" may be ordered when the findings of guilty are declared invalid. Otherwise, the charges should be dismissed. See section 1921.D (Declaration of invalidity of proceedings), supra.

4. Examples

a. Charges dismissed: "In the case of \_\_\_\_\_, the findings of guilty and the sentence are disapproved. The charges are dismissed." MCM, 1984, app. 16, form 20.

b. Some findings disapproved; sentence approved or reassessed: "In the case of \_\_\_\_\_, the finding of guilty of Specification 2, Charge 1 is disapproved. Specification 2, Charge 1 is dismissed. (The sentence is approved ....) (Only so much of the sentence as provides for \_\_\_\_\_ is approved ....)" MCM, 1984, app. 15, forms 15 and 16.

c. Rehearing with respect to disapproved findings: "The findings of guilty as to Specifications 1 and 2 of Charge II and the sentence are disapproved. A combined rehearing is ordered before a court-martial to be designated." MCM, 1984, app. 16, form 17.

d. Sentence disapproved: "This error was prejudicial as to the sentence. The sentence is disapproved. A rehearing is ordered before a ( ) court-martial to be designated." MCM, 1984, app. 16, form 10.

e. Jurisdictional error: "In the case of \_\_\_\_\_, it appears (that the members were not detailed to the court-martial by the convening authority) ( ). The proceedings, findings, and sentence are invalid. Another trial is ordered before a court-martial to be designated." MCM, 1984, app. 16, form 19.

F. Statement of reason for disapproval, if a rehearing or another trial is ordered. In certain situations, the convening authority should state his reasons for disapproving the findings or sentence.

1. Rehearing. If a rehearing of any type is ordered, the convening authority must state the reason for disapproval of findings or sentence. R.C.M. 1107(f)(3). In such a statement, if the entire case is not affected, the drafter must specify what parts of the case are affected by the error causing disapproval, e.g., entire sentence but only some findings, sentence only, etc. The purpose of this statement is to guide the court's actions in the rehearing so that the same error does not occur again.

## 2. Examples

a. Disapproval of sentence: "In the case of \_\_\_\_\_, it appears that the following error was committed: (evidence of a previous conviction of the accused was erroneously admitted) ( ). This error was prejudicial as to the sentence. The sentence is disapproved. A rehearing is ordered before a ( ) court-martial to be designated." MCM, 1984, app. 16, form 10.

b. Some findings disapproved: "In the case of \_\_\_\_\_, it appears that the following error was committed: (Exhibit 1, a laboratory report, was not properly authenticated and was admitted over the objection of the defense) ( ). This error was prejudicial as to Specifications 1 and 2 of Charge II, and the sentence is disapproved. A combined rehearing is ordered before a court-martial to be designated." MCM, 1984, app. 16, form 17.

c. All findings disapproved: "In the case of \_\_\_\_\_, it appears that the following error was committed: (evidence offered by the defense to establish duress was improperly excluded) ( ). This error was prejudicial to the rights of the accused as to all findings of guilty. The findings of guilty and the sentence are disapproved. A rehearing is ordered before a court-martial to be designated." MCM, 1984, app. 16, form 18.

3. Another trial. Where the proceedings are declared invalid because of the failure of the specification to state an offense or because of a correctable jurisdictional defect, e.g., the court was not sworn, the convening authority must state the reason for the declaration of invalidity when he orders another trial. R.C.M. 1107(e)(2). For an example see the previous section.

4. Subsequent administrative action. Even if a rehearing is not ordered, the reason for disapproval might aid in determining the effect of the proceedings upon future administrative disposition of the accused. In those cases, the reasons for disapproval should be set forth in the action. R.C.M. 1107(f)(3), discussion.

5. For information of higher reviewing authorities. In the convening authority's review of the case, it is often desirable for him to state the reason for his action. For example, in a case where the convening authority finds prejudicial error in the admission of a previous conviction in the sentencing portion of the trial, he may choose to reassess the sentence to cure the effect of the error rather than ordering a rehearing. It would be advisable to state the reason for any reduction in the sentence, e.g., reassessment as opposed to clemency, for the information of higher reviewing authorities. If the reason for reduction of the sentence is not apparent from the record of trial, higher reviewing authorities might view the reduction as an exercise of clemency and further reduce the sentence to cure the effect of the erroneously admitted evidence.

#### G. Order of execution or suspension of sentence

1. If the convening authority decides to suspend part or all of a sentence, he must state his decision in the convening authority's action. If he is authorized to execute any part of the sentence and he desires to do so, he should so state in the action. R.C.M. 1107(f)(4). No part of a sentence may be suspended unless it has been approved first. Language should be included in the CA's action providing that unless the suspension is sooner vacated, the suspended portion of the sentence shall be remitted at the end of the suspension period. R.C.M. 1108.

#### 2. Examples

a. Entire sentence executed: "In the case of \_\_\_\_\_, the sentence is approved and will be executed." MCM, 1984, app. 16, form 1.

b. Part of sentence executed: "In the case of \_\_\_\_\_, only so much of the sentence as provides for \_\_\_\_\_ is approved and will be executed." MCM, 1984, app. 16, form 12.

c. Entire sentence suspended: "In the case of \_\_\_\_\_, the sentence is approved. Execution of the sentence is suspended for \_\_\_\_\_ months at which time, unless the sentence is sooner vacated, the sentence will be remitted without further action." MCM, 1984, app. 16, form 5.

d. Part of sentence suspended: "In the case of \_\_\_\_\_, the sentence is approved and will be executed, but the execution of that part of

the sentence extending to (confinement) ( ) is suspended for \_\_\_\_ months, at which time, unless the suspension is sooner vacated, the suspended part of the sentence will be remitted without further action." MCM, 1984, app. 16, form 6.

e. Cases of discharge, dismissal, or death: "In the case of \_\_\_\_\_, the sentence is approved and, except for the part of the sentence extending to (death) (dismissal) (dishonorable discharge) (bad- conduct discharge), will be executed." MCM, 1984, app. 16, form 11.

H. Statement concerning automatic administrative reduction to paygrade E-1

1. Automatic administrative reduction to paygrade E-1 is discussed in section 1919, supra. In his sole discretion, the convening authority may retain the accused at his present paygrade and suspend the automatic reduction. Additionally, the convening authority may direct that the accused serve in paygrade E-1 while in confinement but be returned to the paygrade held at the time of sentencing, or an intermediate paygrade, when released from confinement. Failure to address automatic reduction will result in the reduction taking place automatically on the date of the CA's action.

2. Examples

a. "In the case of \_\_\_\_\_, the sentence is approved (and will be duly executed) but (the execution of so much thereof as provides for reduction to paygrade \_\_\_\_\_ and) automatic reduction to paygrade E-1 is suspended until \_\_\_\_\_, at which time, unless the suspension is sooner vacated, the suspended portions will be remitted without further action. The accused will (continue to) serve in paygrade \_\_\_\_\_ unless the suspension of the (reduction to paygrade \_\_\_\_\_ and) automatic reduction is vacated, in which event the accused at that time will be reduced to the paygrade of E-1." JAGMAN, § 0145.

b. "In the case of \_\_\_\_\_, the sentence is approved (and will be duly executed). The accused will serve in paygrade E-1 from this date until released from confinement at which time he/she will be returned to paygrade \_\_\_\_\_." JAGMAN, § 0145.

I. Order of deferral of confinement or rescission of deferral

1. In those cases in which the granting of an application for deferral of confinement takes place prior to, or concurrently with, the CA's action, the convening authority must state the date upon which the sentence was (or is) deferred in his action. If rescission takes place prior to, or concurrently with, the CA's action, the dates of deferment and rescission of deferment must be included in the action. In the event that deferment or rescission of deferment takes place after the CA's action, a supplementary order to that effect will be issued and forwarded for inclusion in the record of trial. R.C.M. 1101, 1107(f)(4)(E).



## 2. Examples

a. Confinement deferred pending final review: "In the case of \_\_\_\_\_, the sentence is approved and, except for that portion extending to confinement, will be executed. Service of the sentence to confinement (is) (was) deferred effective \_\_\_\_\_ 19\_\_, and will not begin until (the conviction is final) (\_\_\_\_\_), unless sooner rescinded by competent authority." MCM, 1984, app. 16, form 7.

b. Deferment of confinement terminated: "In the case of \_\_\_\_\_, the sentence is approved and will be executed. The service of the sentence to confinement was deferred on \_\_\_\_\_ 19\_\_." MCM, 1984, app. 16, form 8.

c. Deferment of confinement terminated previously: "In the case of \_\_\_\_\_, the sentence is approved and will be executed. The service of the sentence to confinement was deferred on \_\_\_\_\_ 19\_\_, and the deferment ended on \_\_\_\_\_ 19\_\_." MCM, 1984, app. 16, form 9.

## J. Designation of place of confinement

1. In any case in which the convening authority orders confinement executed or imposes post-trial confinement pending final review, he must designate the place of such confinement in his action. R.C.M. 1107(f)(4)(D).

## 2. Examples

a. "\_\_\_\_\_ is designated as the place of confinement." MCM, 1984, app. 16, form 1.

b. "Pending completion of appellate review, the accused will be confined in \_\_\_\_\_"; or "The place of temporary confinement will be \_\_\_\_\_" (No form).

## K. Credit for illegal pretrial confinement or confinement served from a former trial

1. When there has been illegal pretrial confinement, or confinement served from a former trial in the case of action on a rehearing, the entire sentence to confinement may be approved. Credit is then applied as a separate statement in the CA's action.

## 2. Examples

a. Credit for illegal pretrial confinement: "In the case of \_\_\_\_\_, the sentence is approved and will be executed. The accused will be credited with \_\_\_\_ days of confinement against the sentence to confinement." MCM, 1984, app. 16, form 4.

b. Credit for previously executed or served punishment: "In the case of \_\_\_\_\_, the sentence is approved and will be executed. The accused will be credited with any portion of the punishment served from \_\_\_\_\_ 19\_\_ to \_\_\_\_\_ 19\_\_ under the sentence adjudged at the former trial of this case." MCM, 1984, app. 16, form 21.

L. Reprimand. Where the convening authority executes a sentence including a reprimand, he must include the reprimand in his action. R.C.M. 1107(f)(4)(G); JAGMAN, § 0145a(6).

M. Statement regarding companion case

1. In cases in which a separate trial was ordered for a companion case, the convening authority must so indicate in his action on each record of trial. JAGMAN, § 0145a(2). This statement alerts reviewing authorities to look for the companion case and enables them to evaluate the relative appropriateness of the sentences.

2. Example: "This is a companion case to that of SN Mark Fortenberry, USN, 999 99 9999, tried by special court-martial by this command on 31 May 1984."

N. Synopsis of accused's conduct

1. In any case in which the convening authority approves a punitive discharge, whether or not suspended, he must include a synopsis of the accused's conduct during the current enlistment and extension thereof. This synopsis should include a chronological list of all nonjudicial punishments and court-martial convictions including dates, offenses, and sentences. The synopsis should also include information of a favorable nature such as medals and awards. JAGMAN, § 0145a(5).

2. The convening authority may, in any case in which he deems it appropriate, include a synopsis of conduct in his action. JAGMAN, § 0145a(5). The purpose of including a synopsis of conduct in the action is to afford higher reviewing authorities an additional basis for determining the appropriateness of the sentence approved by the convening authority.

3. Example: "A synopsis of the accused's service record during his current enlistment, or extension thereof, considered by the convening authority in connection with his action on the sentence in this case, is as follows:

12 Jan 19CY NJP for UA from 1 Jan 19CY to 5 Jan 19CY;  
awarded 14 days restriction.

5 Mar 19CY SCM for UA from 1 Feb 19CY to 20 Feb 19CY;  
sentenced to one month CONF; CA approved.

The accused is entitled to the following medals and awards:  
Sea Service Deployment Ribbon."

O. Statement of facts in aggravation, extenuation, and mitigation not in record of trial

1. In his action, the convening authority must include a statement of any facts which tend to extenuate, mitigate, or aggravate the offense if:

a. The convening authority approves a punitive discharge, whether or not he suspends it; and

b. the case involves a conviction of larceny or other offense involving moral turpitude; and

c. they do not otherwise appear in the record of trial.

2. If the information set forth is not exclusively extenuating or mitigating, the convening authority shall refer a copy of the information to the accused before acting on the case, and shall afford the accused an opportunity to rebut any portion of the information. JAGMAN § 0145a(8).

3. Example: "A synopsis of the facts tending to extenuate, mitigate, or aggravate the offense of the accused, not otherwise appearing in the record of trial or in the papers accompanying same, is as follows: (State fully but concisely). Prior to taking my action on this case, the foregoing synopsis was referred to the accused for any rebuttal, explanation, or comment he might care to make. (The accused's statement, which is appended to the record of trial, was carefully considered by me before taking my action on this case.) (The accused did not desire to make any statement.)"

P. Statement as to accused's opportunity to rebut adverse matter

1. In any case where the convening authority considers matter adverse to the accused, which does not appear in the record of trial and is not properly included in the accused's service record, he should state in his action:

a. The information which was considered; and

b. that the accused was afforded an opportunity to rebut such matter; and

c. that the accused did or did not make such a rebuttal statement.

2. If the accused makes a statement in rebuttal, a copy of it should be appended to the convening authority's action. JAGMAN, § 0145a(8).

3. Example: "Prior to taking my action on this case, the foregoing information was referred to the accused for any rebuttal, explanation, or comment he might care to make. (The accused's statement, which was carefully considered by me before taking my action on this case, is appended to the record of trial.) (The accused did not desire to make any statement.)"

Q. Statement forwarding the record of trial

1. When a record of trial is forwarded to a judge advocate for review under R.C.M. 1112, the convening authority should include a statement in his action indicating to whom he is forwarding the record of trial. JAGMAN, § 0146a(3).

2. Example: "The record of trial is forwarded to the Staff Judge Advocate, Commander, Naval Base, Norfolk, for review under Article 64(a), UCMJ."

R. Signature and authority. The CA's action must be signed personally by the convening authority. Below his signature he must indicate his rank and authority to take action, e.g., commanding officer. R.C.M. 1107(f).

S. Censure. No action may be taken by the convening authority in his action or otherwise that would amount to censure of the court or member, military judge, or counsel thereof. Art. 37, UCMJ.

T. Action on rehearing

1. The action on a rehearing is the same as an action on an original court-martial in most respects. It differs first in that, as to any sentence approved following the rehearing, the accused must be credited with those parts of the sentence previously executed or otherwise served. Second, in certain cases the convening authority must provide for the restoration of certain rights, privileges, and property. See R.C.M. 1107(f)(5)(A).

2. Examples

a. Credit for previously executed or served punishment: "In the case of \_\_\_\_\_, the sentence is approved and will be executed. The accused will be credited with any portion of the punishment served from \_\_\_\_\_ 19\_\_ to \_\_\_\_\_ 19\_\_ under the sentence adjudged at the former trial of this case." MCM, 1984, app. 16, form 21.

b. Restoration of rights: "In the case of \_\_\_\_\_, the findings of guilty and the sentence are disapproved and the charges are dismissed. All rights, privileges, and property of which the accused has been deprived by virtue of the execution of the sentence adjudged at the former trial of this case on \_\_\_\_\_ 19\_\_ will be restored." MCM, 1984, app. 16, form 22.

Restoration of rights would also be required when the accused is acquitted at the rehearing or if the proceedings are declared invalid because of jurisdictional error.

U. Withdrawal of previous action

1. R.C.M. 1107(f)(2) authorizes the convening authority to withdraw a previous action and modify it under certain conditions.

2. Example: "In the case of \_\_\_\_\_, this action taken by (me) (my predecessor in command) on \_\_\_\_\_ 19\_\_ is withdrawn and the following substituted therefor: \_\_\_\_\_." MCM, 1984, app. 16, form 24.

1922 PROMULGATING ORDERS (i.e., COURT-MARTIAL ORDERS)

A. 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 recordkeeping and informing all those officially interested in the progress of the case. R.C.M. 1114; JAGMAN, § 0147.

B. When used

1. A promulgating order is not issued for summary courts-martial.
2. A promulgating order is issued for every special court-martial and general court-martial, including those resulting in acquittal.

C. Who issues. The convening authority normally issues a promulgating order to publish the results of trial and his action on the case. Any action taken on the case subsequent to the initial action, such as 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. R.C.M. 1114; JAGMAN, § 0147. Where the findings and sentence set forth in the initial promulgating order are affirmed without modification upon subsequent review, no further order need be issued. JAGMAN, § 0147.

D. Form and content of the order. The form for the initial promulgating order is set out in Appendix 17 of the Manual for Courts-Martial, 1984.

Each promulgating order published by a command during the calendar year is numbered consecutively with the year following the number of the order. For example, the 10th special court-martial order published by a command during 19\_\_ would be "Special Court-Martial Order No. 10-19\_\_." 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 19\_\_, the date of the court-martial order would also be 15 March 19\_\_.

The next section of the court-martial order is called the "authority" section. It indicates the place where the trial was held, the command and organization of the convening authority, and the serial number and date of the convening order. For example:

Before a special court-martial which convened  
at Naval Justice School, Newport, Rhode Island,  
pursuant to Commanding Officer, Naval Justice  
School, Special Court-Martial Convening Order  
3-\_\_ of 1 March 19\_\_....

The authority section is followed by the "arraignment and the accused" section of the order. The arraignment section simply contains a statement that the accused was arraigned and tried. The accused section contains the grade, name, social security number, branch of service, and unit of the accused. When added to the authority section, this section looks like this:

Before a special court-martial which convened  
at Naval Justice School, Newport, Rhode Island,  
pursuant to Commanding Officer, Naval Justice  
School Special Court-Martial Convening Order  
3-\_\_ of 1 March 19\_\_, was arraigned and tried:  
BOATSWAIN'S MATE SEAMAN MARK FORTEN-  
BERRY, U.S. NAVY, 999-99-9999, NAVAL  
JUSTICE SCHOOL, NEWPORT, RHODE ISLAND.

The court-martial order next sets forth the charge(s) and specification(s) upon which the accused was arraigned. The specifications should be summarized indicating specific factors such as value, amount, duration, and other circumstances which affect the maximum punishment. The specification may be photographically reproduced from the charge sheet if necessary. Findings should be indicated in parentheses after each charge and specification. For example:

The accused was arraigned on the following offenses and the following findings or other dispositions were reached:

Charge I: Article 86 (guilty).

Specification 1: Unauthorized absence from unit from 1 January 19\_\_ to 15 February 19\_\_ (guilty).

Specification 2: Failure to repair 18 February 19\_\_ (dismissed on motion of defense for failure to state an offense).

Charge II: Article 121 (not guilty).

Specification: Larceny of property of a value of \$150.00 on 27 January 19\_\_ (not guilty).

The plea(s) section follows the charge(s) and specification(s) section of the court-martial order. For example:

The finding of guilty as to Charge I, Specification 1 was based on the accused's plea of guilty. The accused pleaded not guilty to the remaining charge and specification.

If the accused was acquitted of all charges and specifications, the date of the acquittal should be shown: "The findings were announced on \_\_\_\_\_ 19\_\_."

If the accused was convicted of one or more specifications, it is necessary to include the sentence in the court-martial order.

The (military judge) (members) adjudged the following sentence on \_\_\_\_\_ 19\_\_:

Forfeitures of \$100.00 pay per month for six months, confinement for 6 months, and reduction to paygrade E-1.

The "action" section is next. It contains the CA's action verbatim including the heading, date, and signature or evidence of signature. It may be photographically reproduced from the actual CA's action.

## ACTION

NAVAL JUSTICE SCHOOL  
NEWPORT, RHODE ISLAND 02841-5030

15 March 19\_\_

In the case of Boatswain's Mate Mark Fortenberry, U.S. Navy, Naval Justice School, Newport, Rhode Island, the sentence is approved and will be executed. The Naval Brig, Newport, Rhode Island, is designated as the place of confinement. The record of trial is forwarded to the Staff Judge Advocate, Commander, Naval Education and Training Center, Newport, Rhode Island, for action under Article 64(a), UCMJ.

/s/ I.M. LAW  
I.M. LAW  
Captain, JAGC, U.S. Navy  
Commanding Officer

At the end of the court-martial order is the "authentication" section. This section simply contains the signature of the authority issuing the court-martial order or the signature of a subordinate officer designated by him to sign "by direction." The name, rank, title, and organization of the officer actually signing the court-martial order must be shown. If signed "by direction," such fact must be shown together with the name, rank, title, and organization of the person issuing the order.

### E. Distribution of the order

1. The original goes in the record of trial.
2. A duplicate original is placed in the accused's service record only if the accused has been convicted.
3. Certified or plain copies go to many places. See JAGMAN, § 0147a(5).

F. Supplemental orders. Action on the case occurring after the initial promulgating order has been published will be published by issuing a supplementary promulgating order. See JAGMAN, § 0147. Appendix 17 of the Manual for Courts-Martial, 1984, provides the necessary forms.

U. S. NAVY-MARINE CORPS COURT OF MILITARY REVIEW

UNITED STATES	)	NMCM No.
	)	
v.	)	General court-martial
	)	convened by Commandant,
Danny LUCAS	)	Twenty-third Naval District,
123-45-5678	)	at Naval Station, Brooklyn, New York
Boatswain's Mate Seaman Recruit	)	
U.S. Navy	)	MOTION REQUESTING RELIEF FROM
	)	RESPONSIBILITY OF POST-TRIAL
	)	REPRESENTATION OF APPELLANT

COMES NOW trial defense counsel, pursuant to Rule 21, and requests this Honorable Court to relieve trial defense counsel of the responsibility for the post-trial representation of the appellant. Appellant requested appellate representation by appellate defense counsel, and \_\_\_\_\_ has been designated to represent appellant before this Honorable Court and has assumed that duty. Trial defense counsel has performed all of his post-trial duties in appellant's case, including examination of the staff judge advocate's review.

WHEREAS trial defense counsel respectfully requests that the relief sought be provided to him.

J. P. KELLEY  
Lieutenant, JAGC, U.S. Naval Reserve  
Trial Defense Counsel

Appendix 19-1



U. S. NAVY-MARINE CORPS COURT OF MILITARY REVIEW

UNITED STATES	)	NMCM No.
	)	
v.	)	General court-martial
	)	convened by Commandant,
Danny LUCAS	)	Twenty-third Naval District,
123-45-5678	)	Naval Station, Brooklyn, New York
Boatswain's Mate Seaman Recruit	)	
U.S. Navy	)	MOTION REQUESTING RELIEF FROM
	)	RESPONSIBILITY OF POST-TRIAL
	)	REPRESENTATION OF APPELLANT

COMES NOW trial defense counsel, pursuant to Rule 21, and requests this Honorable Court to relieve trial defense counsel of the responsibility for the post-trial representation of the appellant. Appellant has waived his right to representation by appellate defense counsel and trial defense counsel has performed all of his post-trial duties in appellant's case, including examination of the staff judge advocate's review. Intermediate post-trial review in appellant's case has been completed and the record of trial has been forwarded to the Navy Appellate Review Activity for review by the United States Navy-Marine Corps Court of Military Review pursuant to Article 66, Uniform Code of Military Justice.

WHEREAS trial defense counsel respectfully requests that the relief sought be provided to him.

J. P. KELLEY  
Lieutenant, JAGC, U.S. Naval Reserve  
Trial Defense Counsel

Appendix 19-2

## CHAPTER XX

### ART. 32 INVESTIGATIONS AND ART. 34 ADVICE: THE REFERRAL PROCESS IN A GENERAL COURT-MARTIAL

(MILJUS Key Number 921 and 930)

2001 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 Art. 33, UCMJ, when an individual is being held in arrest or confinement awaiting a general court-martial.

A. Art. 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." United States v. Samuels, 10 C.M.A. 206, 212, 27 C.M.R. 280 (1959). In this same vein, Art. 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 art. 32 investigation was, until recently, a difficult one to answer. In United States v. Donaldson, 23 C.M.A. 293, 49 C.M.R. 542 (1975), the Court of Military Appeals found prejudicial error in convening an art. 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. United States v. Donaldson, supra, was distinguished, however, in later Navy-Marine Corps Court of Military Review decision. In United States v. Lillie, 4 M.J. 907 (N.M.C.M.R. 1978), 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 has been resolved, however, by the Manual for Courts-Martial, 1984. It states, at R.C.M. 405(c) [hereinafter R.C.M. \_\_\_\_]: "...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 art. 32 investigation need not be absolutely neutral

and detached; it is the investigating officer who must remain impartial. United States v. Wojciechowski, 19 M.J. 577 (N.M.C.M.R. 1984) (holding that comments by the officer convening the art. 32 investigation, that he was going to send the accused to a general court-martial, and questioning the wisdom of the accused retaining civilian counsel did not give rise to reversible error). See also United States v. Reynolds, 24 M.J. 261 (C.M.A. 1987).

2002      THE ART. 32 PRETRIAL INVESTIGATION (MILJUS  
Key Numbers 921-926)

A. Thorough and impartial investigation. The provisions of Art. 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 Art. 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. United States v. Donaldson, *supra*. See also R.C.M. 405(k).

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. Art. 32(c), UCMJ; United States v. Gandy, 9 C.M.A. 355, 26 C.M.R. 135 (1958); R.C.M. 405(b).

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, 8 C.M.A. 119, 23 C.M.R. 343 (1957), 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 art. 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. See also United States v. Cunningham, 12 C.M.A. 402, 30 C.M.R. 402 (1961), where the PTIO looked only to the confession of the accused and did not call sixteen witnesses listed on the charge sheet.

B. Personnel of the pretrial investigation

1. Pretrial investigating officer. R.C.M. 405(d), discussion, indicates that a PTIO should be a lieutenant commander or major, or above, or be an officer with legal training. The accuser, or an individual expected to be detailed as military judge, defense counsel, or trial counsel if charges are referred to trial, should not be appointed as a PTIO. R.C.M. 405(d). See United States v. Parker, 6 C.M.A. 75, 19 C.M.R. 201 (1955), where a criminal investigator who investigated the case of the accused was appointed as PTIO; the court held him to be disqualified. See also United States v. Davis, 20 M.J.

61 (C.M.A. 1985), wherein the court held the investigating officer should have recused himself on the ground that his supervisory authority over defense counsel could impair counsel's effectiveness in representing the accused.

a. Full disclosure by the PTIO of his prior connection with the case with no objection by the accused will waive a subsequent challenge to the qualifications of the PTIO. United States v. Lopez, 20 C.M.A. 76, 42 C.M.R. 268 (1970).

b. In United States v. Collins, 6 M.J. 256 (C.M.A. 1979), the PTIO specifically advised the accused's defense counsel that additional charges could be preferred against the accused if he made any more threats toward a government witness. The PTIO 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 PTIO 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 PTIO 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.

2. Counsel for the government. The commander who directed the investigation may, as a matter of discretion, detail counsel to represent the government. R.C.M. 405(d)(3). Counsel for the government, or an individual assigned as counsel for an investigation, is not disqualified from acting later as trial counsel. United States v. Plaut, 18 C.M.A. 265, 39 C.M.R. 265 (1969); United States v. Weaver, 13 C.M.A. 147, 32 C.M.R. 147 (1962). Counsel for the government may not act as legal advisor to the investigating officer. In United States v. Payne, 3 M.J. 354 (C.M.A. 1977), the court was extremely critical of the PTIO's ex parte conversations with the prosecuting attorney, declaring that the investigating officer owes the accused the same duty of neutrality, detachment, and independence as does the trial judge. See also United States v. Grimm, 6 M.J. 889 (A.C.M.R.), petition denied, 7 M.J. 135 (C.M.A. 1979); R.C.M. 405(d)(1), discussion.

3. Counsel for the accused. The accused has the right to art. 27b counsel at a pretrial investigation. R.C.M. 405(d)(2); United States v. Mickel, 9 C.M.A. 324, 26 C.M.R. 104 (1958). 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. R.C.M. 405(d)(2)(C); United States v. Nichols, 8 C.M.A. 119, 23 C.M.R. 343 (1957). See also United States v. Wojciechowski, supra.

b. Detailed counsel. Counsel certified under Art. 27(b), UCMJ, must be detailed to represent an accused at an Art. 32, UCMJ, investigation. R.C.M. 405(d)(2)(A). 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. R.C.M. 405(d)(2)(B); see also Chapter VII, supra.

C. 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, if there is one, the names of the witnesses against him, and the purpose of the investigation, United States v. DeLauder, 8 C.M.A. 656, 25 C.M.R. 160 (1958);

2. the right to counsel as previously discussed;

3. the right to confront and to cross-examine witnesses [Availability of military witnesses is determined initially by the PTIO. 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. R.C.M. 405(g)(2). 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. United States v. Davis, 19 C.M.A. 217, 41 C.M.R. 217 (1970). 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." See also United States v. Chestnut, 2 M.J. 84 (C.M.A. 1976), wherein the C.M.A. ordered a new art. 32 investigation after the court determined that the trial court was in error when it upheld the investigating officer's determination that a key witness was unavailable. The court noted that it was ordering a new Art. 32, UCMJ, investigation even though the witness in question had been available at trial, and even though defense counsel had waived any continuance in order to interview the witness prior to her testimony at trial. The court, in Chestnut, relied heavily on United States v. Ledbetter, 2 M.J. 37 (C.M.A. 1976). In Ledbetter, the C.M.A. held that the difficulty and expense side of the availability equation was "somewhat diluted" by the witness' "untimely transfer" from the situs of the art. 32 investigation. The court reversed Ledbetter's conviction, but provided for a rehearing after a new art. 32 investigation and pretrial advice. In United States v. Jackson, 3 M.J. 597 (N.M.C.M.R. 1977), the accused's co-actor was called as a witness for the government at the art. 32 investigation; he refused to testify, asserting his privilege against self-incrimination. After the co-actor's trial, he decided he would testify against Jackson. At Jackson's trial, the defense moved that the investigation be reopened for cross-examination of the co-actor. The military judge denied the motion; N.M.C.M.R. reversed, citing Ledbetter and Chestnut, both supra. The C.M.A. affirmed N.M.C.M.R.'s disposition of the case without opinion. United States v. Jackson, 3 M.J. 206 (C.M.A. 1977). The result in Jackson is puzzling, since a

witness who refuses to testify at trial is deemed to be unavailable. See, e.g., Art. 49, UCMJ; Mil.R.Evid. 804(a); United States v. Shaffer, 18 C.M.A. 362, 40 C.M.R. 74 (1969). 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 art. 32 investigation officer; and, such consideration does not abridge the right to confrontation, so long as defense counsel is afforded full opportunity to cross-examine subject witnesses. See United States v. Connor, 19 M.J. 631 (N.M.C.M.R. 1984)];

4. the right to be informed of evidence known to the investigating officer 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 [Evidence is reasonably available if its significance outweighs the difficulty, expense, delay, and effect on military operations of obtaining it. R.C.M. 405(g). See also R.C.M. 405(h)(1)(B)];

5. the right to have the PTIO call and examine (or have defense counsel examine) witnesses requested by the accused [This right is also conditioned upon the availability of military witnesses and the willingness of civilians to appear voluntarily. It should be noted that the Court of Military Appeals now appears to require that, in order for the defense to ensure the preservation of the issue of alleged improper denial of the right to live cross-examination of a witness at a pretrial investigation, the defense should request the opportunity to depose the absent witness. See United States v. Chuculate, 5 M.J. 143 (C.M.A. 1978); R.C.M. 405(k), discussion. Chuculate involved civilian witnesses who refused to appear at the investigation voluntarily. The court held that "...where a defense counsel fails to timely urge [a] substantial pretrial right -- in this instance, the opportunity to depose in lieu of sworn personal cross-examination -- with no adverse effect at trial, then 'there is no good reason in law or logic to set aside the conviction'." Id. at 146. Note also that the Court of Military Appeals appears to require the renewal of the witness production request at trial, and that failure to do so, combined with no perceptible adverse effect on the accused's rights, will remove any basis for reversal on that issue. United States v. Cruz, 5 M.J. 286 (C.M.A. 1978). See also United States v. Cumberledge 6 M.J. 203 (C.M.A. 1979)];

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.

D. Procedure before pretrial investigation

1. Advice to the accused. At the outset of the pretrial investigation, the PTIO must advise the accused of his rights as enumerated above. He must also advise the accused of his rights under Art. 31b, UCMJ. R.C.M. 405(f).

2. Rules of evidence. The rules of evidence, other than Mil.R.Evid. 301, 302, 303, 305, and sec. V (privileges), do not apply. R.C.M. 405(i). Thus, the PTIO is not required to rule on objections. Upon request, the PTIO should note the objection in the record. R.C.M. 405(h)(2). All testimony, however, should be taken under oath, except for the accused, who may make an unsworn statement. R.C.M. 405(h)(1). Additionally, no unsworn written statements may be considered by the PTIO over defense objection. R.C.M. 405(g)(4)(B); United States v. Samuels, 10 C.M.A. 206, 27 C.M.R. 280 (1959); United States v. Lassiter, 11 C.M.A. 89, 28 C.M.R. 313 (1959) (waiver where objection directed to unavailability of witnesses rather than their unsworn statements).

3. Hearings. The pretrial investigation must be conducted in the presence of the accused and his counsel. But see R.C.M. 405(h)(4). The PTIO 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. MacDonald v. Hodson, 19 C.M.A. 582, 42 C.M.R. 184 (1970); R.C.M. 405(h)(3). 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 PTIO, defense counsel, and accused may "move" the investigation to the witness. See R.C.M. 405(g)(1), discussion.

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 PTIO reduces the substance of the testimony to writing and, unless it would cause undue delay, has the witness sign and swear to the statement as recorded. R.C.M. 405(l), discussion. 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. See Mil.R.Evid. 801(d); R.C.M. 405(d)(3); United States v. Eggers, 3 C.M.A. 191, 11 C.M.R. 191 (1953) (use of investigation transcript as former testimony).

#### E. Report of the pretrial investigating officer

1. R.C.M. 405(j) requires the PTIO 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 defense counsel and whether defense counsel was present throughout the taking of evidence or, if not present, the reason why;

b. the substance of the testimony taken on both sides (The testimony may be either reduced to sworn statements or presented as a transcript.);

c. any other statements, documents, or matters considered by the investigating officer, or recitals of the substance or nature of such evidence;

d. if the accused objected to a determination of witness availability, a statement as to the reasons for unavailability [See R.C.M. 405(g)(2)(D)];

e. notations of objections made by a party during the investigation, if the party so requested [See R.C.M. 405(h)(2)];

f. 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;

g. 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;

h. an explanation of any delays in the investigation;

i. the investigating officer's conclusion whether the charges and specifications are in proper form;

j. the investigating officer's conclusion whether reasonable grounds exist to believe that the accused committed the offenses alleged; and

k. the recommendations of the investigating officer, including disposition.

2. The report may be made using appendix 5 of the Manual for Courts-Martial. In addition, the PTIO may prefer charges and attach a charge sheet, if appropriate.

3. Distribution of the report. The PTIO 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 the accused. R.C.M. 405(j)(3).

F. Defects in the art. 32 pretrial investigation. The requirements of Art. 32, UCMJ, are not jurisdictional and may be waived by the accused. Art. 32(d), UCMJ; Humphrey v. Smith, 336 U.S. 695 (1949). 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 or 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 plea, or are waived. R.C.M. 905(b)(1). Whether corrective action need be taken and the type of relief afforded depends upon the time objection is made and the type of defect. See United States v. Johnson, 7 M.J. 396 (C.M.A. 1979).

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 PTIO promptly upon discovery of the alleged error. R.C.M. 405(h)(2).



a. Most objections must be made at the pretrial investigation itself to preserve the objection. United States v. Lopez, 20 C.M.A. 76, 42 C.M.R. 268 (1970) (accused waived possible disqualification of PTIO by failure to object at the investigation); United States v. Mikel, 9 C.M.A. 324, 26 C.M.R. 104 (1958) (upon timely objection, accused entitled to relief regardless of whether such enforcement will be beneficial to him at trial). See also United States v. Chuculate, 5 M.J. 143 (C.M.A. 1978) (even if the accused makes a timely objection of failure to produce a witness, a defense request for a deposition may be necessary to preserve the issue for later review).

b. After receiving a copy of the PTIO's report, the accused has five days in which to make an objection to the report itself. R.C.M. 405(j)(4).

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 PTIO during the investigation, notations of such objections should be in the PTIO's report. R.C.M. 405(h)(2). 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. See R.C.M. 405(k), discussion.

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. United States v. Parker, 6 C.M.A. 75, 19 C.M.R. 201 (1955) (no waiver of gross violation of Art. 32, UCMJ); United States v. McMahan, 6 C.M.A. 709, 21 C.M.R. 31 (1956) (no waiver of apparent denial of counsel at investigation); United States v. Mickel, 9 C.M.A. 324, 26 C.M.R. 104 (1958) (accused waived right to lawyer at investigation by failure to object at trial); United States v. Wright, 10 C.M.A. 36, 27 C.M.R. 110 (1958) (accused waived improper denial of pretrial request for counsel at investigation by failure to renew objection at trial). In United States v. Donaldson, 23 C.M.A. 293, 49 C.M.R. 542 (1975), the C.M.A. held that an officer in charge of a Marine major did not have power to convene an art. 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." United States v. Chestnut, *supra*, at 85 n.4.

A. When required. Art. 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.

B. 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. R.C.M. 406(b), discussion. The convening authority must communicate directly and personally with his SJA in reference to trial as well as other matters relating to military justice. Art. 6(b), UCMJ.

Ineligibility: No person who has acted as investigating officer, military judge, or member of the court, prosecution, or defense, in any case may later act as SJA in the same case. See Art. 6(c), UCMJ; R.C.M. 406(b), discussion. The C.M.A. has construed this provision rather narrowly. United States v. Smith, 13 C.M.A. 553, 33 C.M.R. 85 (1963) (SJA not disqualified to write SJA advice by drafting charges); United States v. Hardin, 7 M.J. 398 (C.M.A. 1979) (preparation of advice by TC for adoption by SJA did not disqualify SJA); United States v. Collins, 6 M.J. 256 (C.M.A. 1979) (alleged error in pretrial advice prepared by SJA was not so great as to be materially misleading as to gravamen of offense charged and, thus, SJA was not disqualified from later post-trial review).

C. Form and content

1. The SJA advice must be both written and signed by the SJA. R.C.M. 406(b); United States v. Heaney, 9 C.M.A. 6, 25 C.M.R. 268 (1958). 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 first three elements are binding upon the officer exercising general court-martial jurisdiction who would convene the general court-martial. The latter element is merely a recommendation and, thus, nonbinding.

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 endorsements, 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.

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). See R.C.M. 406(b), discussion.

3. Standard. A standard to determine the sufficiency of the evidence is not detailed in Art. 34(a), UCMJ, or R.C.M. 406. In United States v. Engle, 1 M.J. 387 (C.M.A. 1976), 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. Id. at 389 n.4.

D. Effect of defects in Art. 34, UCMJ, SJA advice. The requirements of Art. 34, UCMJ, are not jurisdictional and may be waived by the accused. R.C.M. 601(d)92). United States v. Allen, 5 C.M.A. 626, 18 C.M.R. 250 (1955); United States v. Ragan, 14 C.M.A. 119, 33 C.M.R. 331 (1963); United States v. Murray, 25 M.J. 445 (C.M.A. 1988).

1. Objections based on inadequacy of SJA advice ordinarily must be made prior to plea or are waived. R.C.M. 905(b)(1). But see United States v. Rivera, 20 C.M.A. 6, 42 C.M.R. 198 (1970), where the C.M.A. found error in both pretrial and post-trial review by SJA and remanded the case for a new SJA post-trial review even though the accused had failed to object to the same defect in the pretrial advice.

2. Defects in the SJA advice require corrective action only where prejudice is shown. United States v. Allen, *supra* (error in failure to write SJA advice before reference to trial was harmless because it recommended the same course of action); United States v. Murray, *supra*.

3. Even when a timely objection has been made to the sufficiency of the art. 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. United States v. Hamil, 15 C.M.A. 110, 35 C.M.R. 82 (1964). There are, however, some exceptions to this rule. In United States v. Engle, 1 M.J. 387 (C.M.A. 1976), trial defense counsel moved for a new art. 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 art. 34 advice] is inapplicable. The inadequacies perceived by the defense related not only to the question of accused's guilt, but also to whether the convening authority should refer the charges to trial by 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.

United States v. Engle, supra, at 388.

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.

## CHAPTER XXI

### EXTRAORDINARY RELIEF: WRITS (MILJUS Key Numbers 1460-1462, 1481)

#### 2101 INTRODUCTION

Extraordinary relief refers to the use of petitions for writs to the United States Court of Military Appeals. Two excellent treatments of extraordinary relief in the military are Wacker, The "Unreviewable" Court-Martial Conviction: Supervisory Relief Under the All Writs Act from the United States Court of Military Appeals, 10 Harv. C.R.-C.L. L. Rev. 33 (1975), reprinted in Bicentennial Issue Mil. L. Rev. 609 (1975) [hereinafter Wacker] and H. Moyer, Justice and the Military, Chapter II, Paragraph J at 640 (1972) [hereinafter Moyer], which is now outdated in some areas. Although not an exclusive list of writs, the ones the court is most frequently asked to issue are habeas corpus, prohibition, writ of error coram nobis, and mandamus.

#### A. Definitions

1. The sole function of the writ of habeas corpus is to release a person from unlawful imprisonment. The writ is not to determine the prisoner's guilt or innocence, and the only issue presented is whether the restraint of the prisoner's liberty is in compliance with due process.

2. The writ of prohibition has been defined as the writ issued by a superior court to an inferior court to prevent the latter from exceeding its jurisdiction, either by prohibiting it from assuming jurisdiction in a matter over which it has no control or from going beyond its legitimate powers in a matter in which it has jurisdiction. This writ is directed to the judge and parties of an action in an inferior court, commanding them to cease from the prosecution of the same upon a suggestion that the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction.

3. The writ of error coram nobis is brought for an alleged error in fact not appearing on the record and lies to the same court in order that it may correct the error which, it is presumed, would not have been committed had the fact been brought to the court's notice in the first instance. Its principal aim is to afford the court in which an action was tried an opportunity to correct its own record with reference to a vital fact not known when the judgment was rendered. It is available only in exceptional circumstances and is not a substitute for an appeal. For example, where an accused and counsel know of a possible jurisdictional issue and choose not to raise it at trial or on appeal, it will not be appropriate to raise the issue by petition for writ of error coram nobis. United States v. Sylva, 5 M.J. 753 (A.C.M.R. 1978). And, clearly, if a petitioner cannot establish that an error was in fact committed by the court which convicted him, the writ will not issue. Krause v. United States, 7 M.J. 427 (C.M.A. 1979). It is unclear what constitutes "exceptional circumstances"; but, an accused's alleged misunderstanding of a provision in a pretrial agreement was found insufficient to invoke this writ in United States v. Sena, 6 M.J. 775 (A.C.M.R. 1978).

4. The writ of mandamus is brought in a court of competent jurisdiction to obtain an order of such court commanding an inferior tribunal or person to do, or not to do, an act, the performance or omission of which the law enjoins as a duty resulting from an office, trust, or station. The writ of mandamus either requires the defendant absolutely to obey its order or gives him an opportunity to show cause why it should not be obeyed (an alternative writ). It is the usual practice to issue the show-cause writ first. This commands the defendant to do the particular act or else to appear and show cause against it on a day named. If he neglects to obey the writ, and either makes default in his appearance or fails to show cause against its application, a mandamus will issue commanding him absolutely and without qualification to do the act. C.M.A. has held that a writ of mandamus is a drastic instrument which should only be invoked in truly extraordinary circumstances. Harrison v. United States, 20 M.J. 90 (C.M.A. 1985).

B. Counsel are encouraged to be as precise in their pleadings as possible; however, the Court of Military Appeals has never refused a petitioner relief because he has mislabeled the type of relief sought. Many petitions ask only for "extraordinary relief." See, e.g., Petty v. Moriarity, 20 C.M.A. 438, 43 C.M.R. 278 (1971). Others have asked for imaginative combinations of relief. See Hubbard v. Adcock, 20 C.M.A. 164, 43 C.M.R. 4 (1970), where the accused petitioned for "extraordinary relief, stay of proceedings, writ of mandamus, writ of prohibition, and other appropriate relief."

## 2102 STATUTORY AUTHORITY TO ISSUE WRITS

### A. The All Writs Act, 28 U.S.C. § 1651(a) states:

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

The United States Court of Military Appeals was created by The Uniform Code of Military Justice Act of 5 May 1950 (64 Stat. 108, 50 U.S.C. § 551-736), which went into effect on 31 May 1951. Although there would seem to be no doubt as to the court's power to issue "all writs," in light of the fact that the court was established by an Act of Congress, an affirmative statement to that effect was not made by the court until 1966 when the United States Court of Military Appeals decided United States v. Frischholz, 16 C.M.A. 150, 36 C.M.R. 306 (1966). In that opinion, Chief Judge Quinn, speaking for the court in answer to a government motion to dismiss the accused's petition for lack of jurisdiction, said: "We entertain no doubt, therefore, that this court is a court established by Act of Congress within the meaning of the All Writs Act." Id. at 152, 36 C.M.R. at 308.

B. The Supreme Court of the United States supported the statement of the C.M.A. in Frischholz, supra, when, in footnote 7 of its opinion in Noyd v. Bond, 395 U.S. 683 (1969), it said:

"Since the All Writs Act applies by its terms to any courts established by Act of Congress, and since the Revisers of 1945 expressly noted that 'the revised section extends the power to issue writs in aid of jurisdiction to all courts established by Act of Congress', thus making

explicit the right to exercise powers implied from the creation of such courts, we do not believe there can be any doubt as to the power of the Court of Military Appeals to issue an emergency writ of habeas corpus in cases, like the present one, which may ultimately be reviewed by the court."

Id. at 685. This statement by the United States Supreme Court ended any controversy concerning the Court of Military Appeals' power to issue extraordinary writs.

C. In dealing with writs, the Court of Military Appeals has been inconsistent in several areas. Compare United States v. Snyder, 18 C.M.A. 480, 40 C.M.R. 192 (1969) with McPhail v. United States, 1 M.J. 457 (C.M.A. 1976), United States v. Bevilacqua, 18 C.M.A. 10, 39 C.M.R. 10 (1968), and Unger v. Ziemniak, 27 M.J. 349 (C.M.A. 1989); compare Fleiner v. Koch, 19 C.M.A. 630 (1969) with Priest v. Koch, 19 C.M.A. 293, 41 C.M.R. 293 (1970); compare Belicheskay v. Bowman, 21 C.M.A. 146, 44 C.M.R. 200 (1972) and Del Prado v. United States, 23 C.M.A. 132, 48 C.M.R. 748 (1974) with Allen v. United States, 21 C.M.A. 288, 45 C.M.R. 62 (1972); compare Catlow v. Cooksey, 21 C.M.A. 106, 44 C.M.R. 160 (1971) with Porter v. Richardson, 50 C.M.R. 910 (Sept. 8, 1975). This may be attributable in large part to the brief period of time since the court held, in Frischholz, that it had jurisdiction to issue such writs. More consistent doctrinal trends may emerge after a greater length of time passes.

## 2103 THE C.M.A.'S PRESENT POSITION

A. The All Writs Act. The language of the All Writs Act states that courts "established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions ...". The jurisdiction of the United States Court of Military Appeals to review cases is set out in Art. 67(b) of the Uniform Code of Military Justice. Art. 67(b), UCMJ, states:

The Court of Military Appeals shall review the record in

(1) All cases in which the sentence, as affirmed by a Court of Military Review, extends to death;

(2) All cases reviewed by a Court of Military Review which the Judge Advocate General orders sent to the Court of Military Appeals for review; and

(3) All cases reviewed by a Court of Military Review in which, upon petition of the accused and on good cause shown, the Court of Military Appeals has granted a review.

Thus, the scope of review of the the C.M.A. is limited to those cases which have been, or can be, reviewed by the various Courts of Military Review.

B. Jurisdiction of the Courts of Military Review. The jurisdiction of the Courts of Military Review is set out in Arts. 66 and 69 of the UCMJ. Art. 66(b) states:

The Judge Advocate General shall refer to a Court of Military Review the record in each case of trial by court-martial--

(1) in which the sentence, as approved, extends to death, dismissal of a commissioned officer, cadet or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more; and

(2) except in the case of a sentence extending to death, the right to appellate review has not been waived or an appeal has not been withdrawn under section 861 of this title (article 61).

Art. 69(a) and (b) reads as follows:

(a) The record of trial in each general court-martial that is not otherwise reviewed under section 866 of this title (article 66) shall be examined in the office of the Judge Advocate General if there is a finding of guilty and the accused does not waive or withdraw his right to appellate review under section 861 of this title (article 61). If any part of the findings or sentence is found to be unsupported in law or if reassessment of the sentence is appropriate, the Judge Advocate General may modify or set aside the findings or sentence or both. If the Judge Advocate General so directs, the record shall be reviewed by a Court of Military Review under section 866 of this title (article 66), but in that event there may be no further review by the Court of Military Appeals except under section 867(b)(2) of this title (article 67(b)(2)).

(b) The findings or sentence, or both, in a court-martial case not reviewed under subsection (a) or under section 866 of this title (article 66) may be modified or set aside, in whole or in part, by the Judge Advocate General 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. If such a case is considered upon application of the accused, the application must be filed in the office of the Judge Advocate General by the accused on or before the last day of the two-year period beginning on the date the sentence is approved under section 860(c) of this title (article 60(c)), unless the accused establishes good cause for failure to file within that time.



C. Limitations on appellate review. No appellate court may review cases falling outside these jurisdictional statutes, i.e., summary courts-martial, special courts-martial in which no bad conduct discharge has been awarded, and, normally, general courts-martial in which neither a punitive discharge nor confinement in excess of one year have been awarded (there is a limited possibility that any general court-martial may be reviewed by both appellate courts if the Judge Advocate General (JAG) so orders). Art. 69(a), UCMJ. See, e.g., Littleton v. Persons, 7 M.J. 582 (A.C.M.R. 1979) and Rodgers v. St. George, 6 M.J. 558 (N.C.M.R. 1978). These jurisdictional limitations also mean that the C.M.A. cannot review the great majority of courts-martial. See Willis, The United States Court of Military Appeals: Its Origin, Operation, and Future, 55 Mil. L. Rev. 39, 76 n. 189 (1972). Such a statutory scheme has caused the C.M.A. considerable difficulty in interpreting the "in aid of ... jurisdiction" clause in the All Writs Act. In United States v. Bevilacqua, 18 C.M.A. 10, 39 C.M.R. 10 (1968), the accused was convicted by a special court-martial which did not adjudge a punitive discharge. After the normal review of his case was completed, the accused sought relief from C.M.A. Although the court denied the petition for relief on the merits, it took a broad view of its power to review the case under the All Writs Act:

[A]rticle 67 does not describe the full panoply of power possessed by this Court. . . . These comments and decisions certainly tend to indicate that this Court is not powerless to accord relief to an accused who has palpably been denied constitutional rights in any court-martial; and . . . an accused who has been deprived of his rights need not go outside the military justice system to find relief in the civilian court of the federal judiciary . . . (citations omitted).

Id. at 11-12.

The court retreated from this position in United States v. Snyder, 18 C.M.A. 480, 40 C.M.R. 192 (1969). In Snyder, the accused was tried by special court-martial. His approved sentence was reduction to sergeant. He appealed to JAG for relief under Art. 69, UCMJ. When that was unsuccessful, he petitioned the C.M.A. for extraordinary relief, relying on Bevilacqua. The court dismissed his petition stating:

In sum then, we believe the accused misreads our language in United States v. Bevilacqua, supra. What we there stated concerning our duty and responsibility to correct deprivations of constitutional rights within the military system must be taken to refer to cases in which we have jurisdiction to hear appeals or to those to which our jurisdiction may extend when a sentence is finally adjudged and approved. Resort to extraordinary remedies such as those available under the All Writs Act, supra, cannot serve to enlarge our power to review cases but only to aid us in the exercise of the authority we already have. As such, therefore, we find no basis which permits us to review a special court-martial in which the adjudged and approved sentence extends only to reduction.

Snyder, supra at 195.

The court thereafter used Snyder as a ground for dismissing petitions in several similar cases. See, e.g., Olsson v. Flynn, 23 C.M.A. 229, 49 C.M.R. 179 (1974); Hendrix v. Warden, 23 C.M.A. 227, 49 C.M.R. 146 (1974).

The court returned to a more expansive interpretation of its powers in McPhail v. United States, 1 M.J. 457 (C.M.A. 1976), describing its opinion in Snyder as "too narrowly focused." In McPhail, the court granted relief to a petitioner convicted at a special court-martial whose sentence did not include a bad conduct discharge. Writing for the court, Judge Cook stated:

Assuredly, there are limits to our authority, even as the highest court in the military justice system.... Whatever those limits are, as to matters reasonably comprehended within the provisions of the Uniform Code of Military Justice, we have jurisdiction to require compliance with applicable law from all courts and persons purporting to act under its authority.... (citations omitted).

Id. at 463.

In McPhail, the C.M.A. apparently extended jurisdiction over petitions from any accused at any court-martial, given the appropriate extraordinary circumstances which make it necessary to issue the writ to aid the jurisdiction of the court. This, however, may be too expansive an interpretation of the McPhail opinion. The court has dismissed (rather than denied) a petition for review in a GCM which was reviewed by N.C.M.R. as a result of JAG's forwarding the case to it pursuant to Article 69, UCMJ. The C.M.A. acknowledged that Article 69, UCMJ, expressly provides that, under the circumstances of this case (no punishments requiring C.M.R. review pursuant to Article 66, UCMJ), no further review is authorized by C.M.A. unless the case was referred to it by JAG pursuant to Article 67(b)(2), UCMJ. United States v. Williams, 7 M.J. 68 (C.M.A. 1979). See also Vorbeck v. Commanding Officer, USS PYRO, 11 M.J. 480 (C.M.A. 1982).

Recently, C.M.A. reaffirmed its holding in McPhail in Unger v. Ziemniak, 27 M.J. 349 (C.M.A. 1989), where it decided it had jurisdiction to grant extraordinary relief to a commissioned officer who alleged that her trial by special court-martial violated her constitutional rights. In Unger, the court stated that, although conviction of a commissioned officer by special court-martial did not qualify for review by the C.M.A. under Article 69, UCMJ, the C.M.A. had jurisdiction to grant extraordinary relief in order to prevent the evasion of the safeguards provided to servicemembers by the Constitution and the Uniform Code of Military Justice.

D. Extraordinary circumstances in aid of jurisdiction: frustration of jurisdiction. One interpretation as to when a writ would be in aid of jurisdiction would be when a writ was necessary to prevent frustration of the jurisdiction of the court. If a court ultimately could review an issue, its jurisdiction most likely would not be frustrated. Judge Darden, while on the court, took such a view:

It seems clear, however, that such a broad view of extraordinary writ powers in aid of jurisdiction is still predicated on the threat of a loss of the Court's appellate

powers over the subject matter. Under such a view, if a Court of Military Review or another official or entity were acting or failing to act in a manner that tended to impair the right of an accused to petition this Court or to prevent this Court from discharging its responsibilities under Article 67, an extraordinary writ such as mandamus or prohibition might well be appropriate as an aid of jurisdiction.

Collier v. United States, 19 C.M.A. 511, 42 C.M.R. 113, 119 (1970) (dissenting opinion).

The majority rejected this viewpoint in Collier, and McPhail implicitly affirms this rejection. This rejection seems to be in agreement with the interpretation of the All Writs Act by the Supreme Court. See Wacker, supra, at 630-34, and authorities cited therein. Thus, the C.M.A. may issue writs in cases even though the writ is not necessary to prevent frustration of the jurisdiction of the court. It would be helpful to the petitioner, however, if he can demonstrate that, if he is not given relief, the jurisdiction of the court may be defeated. Egregious deprivations of the right to speedy trial and speedy review would seem to be examples of this frustration.

E. Extraordinary circumstances: Other possibilities. The court has described the circumstances necessary for issuance of a writ in various ways: "... we have jurisdiction to hear appeals or to those to which our jurisdiction may extend when a sentence is finally adjudged and approved. Resort to extraordinary remedies such as those available under the All Writs Act, supra, cannot serve to enlarge our power to review cases but only to aid us in the exercise of the authority we already have." United States v. Snyder, 18 C.M.A. 480, 40 C.M.R. 192, 195 (1969). Since the action contemplated is extraordinary in nature, the conditions warranting resort to the remedies there provided for must also be extraordinary. A petitioner seeking relief in such a proceeding is required to demonstrate that the ordinary course of the proceedings against him through trial and appellate channels is not adequate. Hallen v. Lamont, 18 C.M.A. 652, (1968); Font v. Seaman, 20 C.M.A. 387, 43 C.M.R. 227 (1971). "Coram nobis is not a substitute for an appeal. It is extraordinary relief predicated upon 'exceptional circumstances' not apparent to the court in its original consideration of the case. (Citation omitted). It may not be used to seek a reevaluation of the evidence or a reconsideration of alleged errors. (Citation omitted)." United States v. Frischholz, 16 C.M.A. 150, 153, 36 C.M.R. 306, 309 (1966). "This is not to say, however, that our extraordinary jurisdiction can be invoked for all of the errors that can be reviewed by way of ordinary appeal under Article 67." McPhail, supra, at 463. No one definition, however, can encompass all situations. In some instances, it is possible to discern doctrinal trends. The decisions of the court will be analyzed according to the stage of the proceedings in which relief is sought: before or during trial; after trial, but before review has been completed; or after direct statutory review has been completed.

F. Relief before or during trial

1. The court generally has been reluctant to intervene at this stage of the proceedings. See, e.g., DeChamplain v. McLucas, 47 C.M.R. 552

(1973) (petitioner's motions to dismiss denied by military judge); West v. Samuel, 21 C.M.A. 290, 45 C.M.R. 64 (1972) (military judge refused to sever charges); Henderson v. Wondolowski, 21 C.M.A. 63, 44 C.M.R. 117 (1971) (military judge denied motion, inter alia, to make specification more definite); Doherty v. United States, 20 C.M.A. 163, 43 C.M.R. 3 (1970) (petitioner requested a delay in the trial of Lt. Calley because publicity from that case was allegedly prejudicing his case); Herrod v. Convening Authority, 19 C.M.A. 574, 42 C.M.R. 176 (1970) (petition denied, inter alia, change of venue). See generally, Moyer, supra, at 655, and cases cited therein. A variety of principles operate against intervention. The court has no factfinding procedure to resolve conflicting assertions; therefore, the trial forum is the best place to determine these matters and make them a matter of record. The trial court is able to consider the claims of the petitioner and has the power to remedy perceived deprivations of his right. See Herrod v. Widdecke, 19 C.M.A. 574, 42 C.M.R. 176 (1970). The integrity of the other courts in the statutory review processes is maintained, and the court has the benefit of their reasoning on the issue if the issue ultimately reaches the C.M.A. An increased workload could result from a more liberal policy of intervention, but the C.M.A. has yet to express fears of this result.

The court definitely has not followed a policy of total forbearance, however, and several areas have received more frequent attention than others.

2. Pretrial confinement. R.C.M. 305, MCM, 1984 [hereinafter R.C.M. \_\_\_\_] sets down strict requirements for pretrial confinement and provides remedies for confinement illegally imposed (e.g., administrative credit applied to the sentence to be served). A judicially created remedy may also be available when the conditions of confinement are punitive in nature. United States v. Suzuki, 14 M.J. 491 (C.M.A. 1983) (where the court permitted 3 days administrative credit for 1 day of illegal confinement). See chapter XII, supra. But, unless relief is granted at trial, there is no practical post-trial remedy available to the accused who has completed service of his sentence to confinement prior to judicial review. Even if administrative credit is granted at a pretrial motion, it may be a worthless remedy if the accused was given little or no confinement or if he was acquitted. Then, of course, there is a prejudice for which no remedy can compensate. As stated in Courtney v. Williams, 1 M.J. 267 (C.M.A. 1976):

The "traditional right to freedom before conviction permits the unhampered preparation of a defense." [Cites omitted.] In addition to the psychological and physical deprivations brought about by incarceration and the hardships caused to members of an incarcerated person's family, studies have indicated that the conviction rate for jailed defendants materially exceeds that of bailed defendants....

Id. at 271.

For these reasons, C.M.A. has demonstrated concern for pretrial confinement issues. Many of the significant pretrial confinement cases were heard by the C.M.A. via petitions for extraordinary relief. See e.g., Fletcher v. United States, 2 M.J. 234 (C.M.A. 1977); Courtney v. Williams, supra. See also Hart v. Kurth, 5 M.J. 932 (N.C.M.R. 1978).

The C.M.A. began its consideration of cases in the pretrial confinement area with some indication that it would grant relief if the appropriate extraordinary circumstances were presented. In several early cases, while it denied relief, the C.M.A. did so after testing the legality of the decision to confine the accused. See Levy v. Resor, 17 C.M.A. 135, 37 C.M.R. 399 (1967); Lowe v. Laird, 18 C.M.A. 131, 39 C.M.R. 131 (1969); Horner v. Resor, 19 C.M.A. 285, 41 C.M.R. 285 (1970); Dexter v. Chafee, 19 C.M.A. 289, 41 C.M.R. 289 (1970); Smith v. Coburn, 19 C.M.A. 291, 41 C.M.R. 291 (1970); cf. Kline v. Resor, 19 C.M.A. 288, 41 C.M.R. 288 (1970). The C.M.A. then began to insist that an accused exhaust his administrative remedies under Art. 138, UCMJ, before petitioning the court. Font v. Seaman, 20 C.M.A. 387, 43 C.M.R. 227 (1971); Catlow v. Cooksey, 21 C.M.A. 106, 44 C.M.R. 160 (1971); Tuttle v. Commanding Officer, 21 C.M.A. 229, 45 C.M.R. 3 (1972).

The court began to swing away from this exhaustion requirement in Newsome v. McKenzie, 22 C.M.A. 92, 46 C.M.R. 92 (1973), where it dismissed the petition on grounds other than the failure to comply with Art. 138, UCMJ. Similarly, in DeChamplain v. United States, 22 C.M.A. 211, 46 C.M.R. 211 (1973), the C.M.A. denied a petition of the accused without mentioning compliance or noncompliance with Art. 138, UCMJ. More recently, the court has again considered pretrial confinement petitions without regard to whether a petition had been filed under art. 138. The court has done so over dissenting opinions which would have required such a petition, but it has not discussed the issue. In Porter v. Richardson, 50 C.M.R. 910 (1976), the court ordered the trial judge of the court-martial to which the case was referred to hold a hearing to inquire into the legality of the petitioner's pretrial confinement. Judge Cook dissented, one ground being that the proper remedy for such a petitioner was an Article 138, UCMJ, complaint. Accord Phillippy v. McLucas, 50 C.M.R. 915 (1976); Milanes-Canamero v. Richardson, 50 C.M.R. 916 (1976). But see Courtney v. Williams, 1 M.J. 267 (C.M.A. 1976). In the pretrial confinement area then, the court apparently has returned to a position that it is not necessary to exhaust remedies under Art. 138, UCMJ, before the court will consider a petition. See United States v. Grom, 21 M.J. 53 (C.M.A. 1985) (improper retention beyond EAOS can be ground for habeas corpus relief).

3. Clear error of law. The court has intervened in situations where it considers such intervention necessary "to prevent a waste of time and energy by appellate tribunals when it ... is abundantly clear that any verdict of guilty returned by the court-martial would be overturned." Chenoweth v. Arsdall, 22 C.M.A. 183, 46 C.M.R. 183, 188 (1973). In Fleiner v. Koch, 19 C.M.A. 630, C.M.R. (1969), the court prohibited the continuation of the trial of the accused on certain offenses over which it determined that there was no jurisdiction under O'Callahan v. Parker, 395 U.S. 258 (1969). In Cooke v. Orser, 12 M.J. 335 (C.M.A. 1982), the court held that the appropriate remedy for a denial of due process was to deny military authorities the right to prosecute the accused by court-martial. In Zamora v. Woodson, 19 C.M.A. 403, 42 C.M.R. 5 (1970), the court ordered dismissal of charges against a civilian employee of the armed forces on the basis of its decision in United States v. Averette, 19 C.M.A. 363, 41 C.M.R. 363 (1970), where it had determined that, for purposes of Art. 2(10), UCMJ, the Vietnam conflict was not "in time of war." In Petty v. Moriarity, 20 C.M.A. 438, 43 C.M.R. 278 (1971), the petitioner initially was referred to a special court-martial. He requested

several witnesses. His case was then withdrawn and an art. 32, investigation ordered. The court enjoined the respondent from proceeding with the art. 32, investigation. The C.M.A. also granted relief in Brookins v. Cullins, 23 C.M.A. 216, 49 C.M.R. 5 (1976) and Mangsen v. Snyder, 1 M.J. 287 (C.M.A. 1976). In Brookins, the petitioners allegedly participated in a riot aboard USS LITTLE ROCK (CG-4). The commanding officer of the LITTLE ROCK convened courts-martial, although he had significant personal involvement with the event. The court intervened on the ground that the commanding officer was an accuser. In Mangsen, the military judge ordered the charges dismissed for lack of jurisdiction over the person. The convening authority ordered the judge to reconsider under Art. 62(a), UCMJ. The military judge reversed his decision. The accused sought a writ, and the C.M.A., on the basis of its decision in United States v. Ware, 1 M.J. 282 (C.M.A. 1976) (decided the same day as Mangsen), ordered the charge dismissed. All of the above cases are in some way jurisdictional (i.e., relating to the power of the military to try an individual at a court-martial), but the C.M.A. has not stated that this factor is of significance in determining whether a petition should be granted. It could be argued that any clear error of law may be considered by the court. One example of such an error would be the doctrine of former jeopardy. If an accused is unlawfully placed in jeopardy a second time for the same offense, it is clear that any finding of guilty would have to be overturned. In Abnez v. United States, 431 U.S. 651 (1977), it was held that the denial of a defendant's motion to dismiss on double jeopardy grounds is appealable immediately. The Supreme Court reasoned, *inter alia*, that the rights conferred by the double jeopardy clause would be significantly undermined if appellate review were postponed until after conviction.

4. Speedy trial. An area in which an extraordinary writ may be particularly appropriate is speedy trial. Denial of a speedy trial may indeed frustrate the jurisdiction of the C.M.A. in the traditional sense. The 90-day Burton-Driver rule is one fashioned by the court, and it has a supervisory interest in its enforcement. See Wacker, *supra*, at 644. The court has indicated that it will act in this area given the appropriate grounds. Kidd v. United States, 1 M.J. 302 (C.M.A. 1975). It has yet to do so.

5. Other areas. There is little precedent available to determine whether the C.M.A. will act in situations where relief may be necessary to insure that the accused is provided effective assistance of counsel. In Hutson v. United States, 19 C.M.A. 437, 42 C.M.R. 39 (1970), the court denied the petitioner's request that he be provided with at least two qualified criminal investigators. The court "sympathized" with a defense counsel in such a situation, but was unable to find a basis in the All Writs Act for such relief. Perhaps a reexamination of this position was begun in Halfacre v. Chambers, Misc. Doc. No. 76-29 (13 July 1976), where the court stayed further proceedings in the special court-martial of the petitioner until the respondents complied with an order by the court to transport the accused and his defense counsel from the situs of the trial (Yokosuka, Japan) to the situs of the offense (Karachi, Pakistan) to conduct an investigation. But see Chenoweth v. VanArsdall, 22 C.M.A. 183, 46 C.M.R. 183 (1973), where the court refused to characterize a decision by a military judge to grant the prosecution a change of venue as an abuse of discretion.

G. After trial, but before final review. The C.M.A. has been more reluctant to intervene at this stage of the proceedings. There has been a determination of guilt, and lower level reviewing authorities are responsible for applying the law. The C.M.A. may be able to benefit from their reasoning on issues. In general, the sentence may not be executed until appellate review has been completed. But, the C.M.A. has acted in two areas -- post-trial confinement and speedy review -- and has not foreclosed itself from acting on other issues if the circumstances would dictate.

1. Post-trial confinement. Confinement may not be ordered executed immediately after court-martial. Generally, in a non-BCD case, confinement cannot be executed until the convening authority takes his action. But, confinement begins to run as soon as it is adjudged at a court-martial. (The running of the confinement may be deferred by the convening authority upon written application by the accused. R.C.M. 1101 gives the convening authority broad discretion in making this decision.) As a result, R.C.M. 1101 authorizes post-trial confinement immediately after his court-martial and the accused may in effect be punished by the loss of liberty. See United States v. Heard, 3 M.J. 4 (C.M.A. 1977). The C.M.A. has considered numerous petitions challenging the factual basis, the conditions, and the denial of deferment of post-trial restraint. Levy v. Resor, 17 C.M.A. 135, 37 C.M.R. 399 (1967); Reed v. Ohman, 19 C.M.A. 110, 41 C.M.R. 110 (1969); Walker v. United States, 19 C.M.A. 241, 41 C.M.R. 247 (1970); Dale v. United States, 19 C.M.A. 254, 41 C.M.R. 254 (1970); Collier v. United States, 19 C.M.A. 511, 42 C.M.R. 113 (1970) (deferral); United States v. Daniels, 19 C.M.A. 518, 42 C.M.R. 120 (1970) (deferral). It has, however, given broad discretion to the convening authority in this area. See, e.g., Dale v. United States, *supra*. In Dale, the court did not require the convening authority to state his reasons; instead, it accepted the fact that he acted on the recommendation of his staff judge advocate:

The staff judge advocate disclaimed any suspicion that the petitioner would flee to avoid service of the sentence. He pointed out, however, that as a trained aviator with a top secret security clearance the petitioner might be susceptible to blackmail by an unfriendly foreign power. Although he considered the sex offenses not dangerous in a violent sense, the staff judge advocate thought release of the petitioner might adversely affect the moral and emotional well-being of the community.

Id. at 258.

In Corley v. Thurman, 3 M.J. 192 (C.M.A. 1977), the accused petitioned the C.M.A. to order his release from post-trial confinement after the CA had denied his request for deferment of the confinement portion of his sentence. The court considered briefs and oral arguments on the petition, then denied the petition without prejudice to the accused's right to raise the issue in the ordinary course of appeal. Judge Perry dissented, urging adoption of the Federal Bail Reform Act of 1966, 18 U.S.C. § 3141-3152, and pointing out the futility of requiring an accused who is in post-trial confinement to test the legality of that confinement in the ordinary course of appeal.

A similar fate befell the accused in Brownd v. Commander, 3 M.J. 256 (C.M.A. 1977). There, the petitioner sought review of the convening authority's denial of his request for deferment of adjudged confinement. He petitioned the C.M.A. for relief in the form of a petition for a writ of habeas corpus. On 17 June 1977, the majority denied the petition without prejudice to his right to seek relief in the ordinary course of appeal. Again, Judge Perry dissented, citing his dissent in Corley, supra. The accused in Brownd (an Air Force captain) did raise the issue on appeal and finally prevailed. On 9 April 1979, the C.M.A. decided that Brownd's request for deferment had been improperly denied. However, the court declined relief, since the issue was moot -- the accused no longer being in post-trial confinement. Whether "extraordinary relief" or "ordinary course of appeal" is the proper vehicle for review of the convening authority's denial of a request for deferment is still an open question in view of Brownd.

Brownd represents a significant change in the law regarding post-trial confinement. The court held that, although the accused has the burden of showing that there is no "substantial risk" that he will flee pending review, and that he "is not likely to commit a serious crime, intimidate witnesses or otherwise interfere with the administration of justice," if the accused successfully meets this burden, deferment must be granted. Heretofore, the discretion of the CA under Article 57(d), UCMJ, was virtually absolute. What relief will be considered to be appropriate when, and if, a case which is not moot comes before the court remains to be seen. To date, the only case in this area in which the C.M.A. has granted relief is Collier v. United States, supra, in which the court ordered the petitioner released from post-trial confinement after two general court-martial convening authorities disagreed with each other as to whether the petitioner should be released.

The A.C.M.R. has held that a writ of mandamus or habeas corpus are proper vehicles for seeking administrative credit for restriction tantamount to confinement. Wiggins v. Greenwald, 20 M.J. 823 (A.C.M.R.), petition denied, 20 M.J. 196 (C.M.A. 1985); Washington v. Greenwald, 20 M.J. 699 (A.C.M.R. 1985).

2. Speedy review. As in the case of speedy trial, denial of a speedy review could frustrate the jurisdiction of the court. The C.M.A. has been willing to intervene in this area, either to order the reviewing authority to take his action or to dismiss the charges. In Chenoweth v. VanArsdall, 22 C.M.A. 183, 46 C.M.R. 183 (1973), the C.M.A. gave one reason for such intervention:

In Montavan v. United States, Misc. Doc. No. 70-3 (U.S.C.M.A., Feb. 26, 1970), it appeared that approximately ten months had elapsed subsequent to petitioner's trial by general court-martial and the convening authority had not acted thereon as required by Articles 61-64, UCMJ, 10 U.S.C. Sections 861-864. In order to preserve the possibility of granting meaningful relief for any error which might appear during the course of the normal appellate procedures, we directed immediate compliance with the mentioned articles.

Id. at 188.



The court also ordered review in Rhodes v. Haynes, 22 C.M.A. 189, 46 C.M.R. 189 (1973), describing its remedy in limited terms:

When upon application of a petitioner, a prima facie case of unreasonable delay in the appellate processes appears in a case over which we may obtain jurisdiction, this Court will take appropriate action to protect its power to grant meaningful relief from any error which might appear upon our ultimate review of the record of trial pursuant to Article 67(b)(3), UCMJ, 10 U.S.C. Section 867(b)(3). Chenoweth v. VanArsdall, Misc. Docket No. 73-1 (U.S.C.M.A. March 13, 1973). In such an instance we will not determine responsibility for the delay, nor assess its impact upon substantial rights. Rather, except in the most extraordinary case, we limit our action to the removal of the impediment and direct completion of the appellate processes. Depending on the convening authority's action, assessment of the delay is deferred until the case is reviewed by the Court of Military Review or by this Court, pursuant to Articles 66 and 67, respectively, UCMJ, 10 U.S.C. Sections 66 and 67.

Id. at 190.

But, in Dunlap v. Convening Authority, 23 C.M.A. 135, 48 C.M.R. 751 (1976), the court went beyond this position by ordering that charges against the petitioner be dismissed because of delay by the convening authority in taking his action. This was contrary to the position taken earlier in Lopez v. Resor, 21 C.M.A. 7, 44 C.M.R. 61 (1971), where the C.M.A. denied relief to a petitioner who claimed, in part, that the convening authority's failure to act upon the record of trial until more than three months after the trial denied him due process of law. The C.M.A. ordered similar relief in Bouler v. United States, 1 M.J. 299 (1976). In Bouler, the convening authority took his action on the 98th day after trial. The petitioner filed a petition for extraordinary relief. The court ordered the government to present evidence to rebut the presumption of denial of speedy review. When the government presented no evidence, the court ordered the charges dismissed. The court gave no reasons why the circumstances in this case were more extraordinary than those in any other case in which the convening or supervisory authority takes longer than 90 days for his action. [The petitioner had, however, been before the court in Bouler v. Fuller, 50 C.M.R. 917 (1975) and in Bouler v. Wood, 1 M.J. 191 (C.M.A. 1975)].

3. Vacation of suspension. In Ward v. Carey, 4 M.J. 298 (C.M.A. 1978), the Court of Military Appeals remanded a petition for extraordinary relief to the Navy Court of Military Review. The issue concerned the vacation of a suspended court-martial sentence proceeding conducted in accordance with Art. 72, UCMJ. The C.M.A. considers art. 72 proceedings to be an integral part of a court-martial sentence and, therefore, a proper area in which to entertain petitions for extraordinary relief.

H. After completion of final review. The C.M.A. action at this stage had been largely confined to granting writs of error coram nobis to correct its

own record with reference to a vital fact not known when the judgment was rendered. The writ has been typically used in situations where the court decided a novel issue and made that decision retroactive. In United States v. Chilcote, 20 C.M.A. 283, 43 C.M.R. 123 (1971), the court held that Art. 66, UCMJ, does not permit courts of military review to sit en banc to reconsider the decision of one of the panels of that court. (But see Art. 66(a), UCMJ.) Chilcote was held retroactive in Maze v. United States Army Court of Military Review, 20 C.M.A. 599, 44 C.M.R. 29 (1971), where the C.M.A. granted a writ of error coram nobis. Accord Lohr v. United States, 21 C.M.A. 150, 44 C.M.R. 204 (1972); Coleman v. United States, 21 C.M.A. 171, 44 C.M.R. 225 (1972); Selke v. United States, 21 C.M.A. 299, 45 C.M.R. 73 (1972). In United States v. Dean, 20 C.M.A. 212, 43 C.M.R. 52 (1970), the C.M.A. held that a request in writing is an indispensable jurisdictional prerequisite to trial before a military judge alone. (But see Art. 16, UCMJ.) Dean was held retroactive in Belechsky v. Bowman, 21 C.M.A. 146, 44 C.M.R. 200 (1972). Accord DelPrado v. United States, 23 C.M.A. 132, 48 C.M.R. 748 (1974). But see Allen v. United States, 21 C.M.A. 288, 45 C.M.R. 62 (1972). In United States v. White, 21 C.M.A. 583, 45 C.M.R. 357 (1972), the court made a written request for enlisted members a jurisdictional prerequisite. It made White retroactive in Asher v. United States, 22 C.M.A. 6, 46 C.M.R. 6 (1972), where it granted a petition for writ of error coram nobis. Accord Gallagher v. United States, 22 C.M.A. 191, 46 C.M.R. 191 (1973). Finally, in United States v. Holland, 1 M.J. 58 (C.M.A. 1975), the court held that clauses in pretrial agreements restricting the rights of the accused to present certain motions were invalid. In Schmeltz v. United States, 1 M.J. 273 (C.M.A. 1976), the court granted a petition for a writ of error coram nobis because of the presence of a Holland-type clause.

#### 2104 BEYOND McPHAIL

A. What are the limits of the C.M.A.'s jurisdiction. In McPhail v. United States, 1 M.J. 457 (C.M.A. 1976), the C.M.A. stated that it had the power to review every court-martial. But, it is clear that its extraordinary writ authority will not be exercised in every case. In McPhail, the court did indicate possible areas of further action. One would be in cases involving the supervisory function of the court. The court emphasized the significance of its supervisory function in the military justice system, and then commented on how the Supreme Court had employed the supervisory function in granting extraordinary writs:

The supervisory function has traditionally been exercised by the Supreme Court "to confine an inferior [Federal] court to a lawful exercise of its prescribed jurisdiction." Roche v. Evaporated Milk Assn., 319 U.S. 21, 26, 63 S.Ct. 938, 941, 87 L.Ed. 1185 (1943), reaffirmed in Kerr v. United States District Court, 426 U.S. 394, 96 S.Ct. 2119, 48 L.Ed.2d 725 (June 14, 1976). In United States v. United States District Court, 334 U.S. 258, 263-64, 68 S.Ct. 1035, 92 L.Ed. 1351 (1948), the Court observed that exercise of the supervisory function is "as important" to the safeguarding of a past exercise of its jurisdiction as it is to preservation of the court's "existing or future appellate jurisdiction."

Id. at 461.

In McPhail, the court cited the article by Wacker, supra, and described its author as perceptive. Wacker, supra, at 653-54, suggests other factors besides a relationship to its supervisory function that the court should consider in exercising its jurisdiction:

- a. Is this a novel question which is likely to reoccur;
- b. is there a possibility that trial judges in other cases may render erroneous decisions;
- c. would waiting for a direct appeal be unsatisfactory, either because the issue is difficult to reach on appeal or because waiting for an appeal would be prejudicial to the accused.

The central theme of these factors is whether the case has substantial value as precedent and, therefore, goes beyond the individual petitioner. The boundaries of the court's decision in McPhail are not yet clear and have, in fact, become even more confused by subsequent cases.

Since McPhail, there has been considerable speculation regarding whether the C.M.A. has jurisdiction to afford a petitioner relief from non-judicial punishment (Art. 15, UCMJ). The language of McPhail appears broad enough to support the exercise of such jurisdiction: "we have jurisdiction to require compliance with applicable law from all courts and persons purporting to act under its [the UCMJ's] authority . . ." 1 M.J. 457, 463. The C.M.A. has not decided the jurisdictional issue squarely, but, in Stewart v. Stevens, 5 M.J. 220 (C.M.A. 1978), a petition for extraordinary relief from nonjudicial punishment was dismissed (as opposed to denied) by the C.M.A. No reasons were given by the court except by Judge Cook, who, in a concurring opinion, stated, "I was wrong in McPhail as to the scope of this Court's extraordinary relief jurisdiction." Id. at 221. He then goes on to say that, based on his interpretation of the relevant legislative history of the Code, "... I hold now that the Court (C.M.A.) has no jurisdiction to entertain a petition to inquire into the legality of art. 15 and art. 69 proceedings." Id. at 222. Note that, while the action of the court in dismissing the petition was unanimous, the other judges did not comment as to the basis for the dismissal, nor did they join in Cook's concurring opinion. For a more recent discussion in this area, see Dobzynski v. Green, 16 M.J. 84 (C.M.A. 1983) and Jones v. Commander, Naval Air Force, U.S. Atlantic Fleet, 18 M.J. 198 (C.M.A. 1984). The petitions for extraordinary relief were dismissed in both cases. Judge Fletcher, writing the court's opinion in both cases, indicated that there was no legal error serious enough for the court to grant a petition for extraordinary relief. However, he also indicated in both opinions the court's displeasure with the unreasonable abuse of the NJP powers exercised by the commands. It should also be noted that Chief Judge Everett, in dissenting opinions to both cases, indicated that he felt that the article 15 powers had been illegally used by the commands and, therefore, the court had the authority to grant extraordinary relief and he would have done so.

Since Stewart v. Stevens, the N.C.M.R. has held that, where a court-martial sentence does not include a bad-conduct discharge or other sentence which would confer appellate jurisdiction on the court under Article 66 of the

Code, for the Court to exercise extraordinary powers would exceed the authority granted by the All Writs Act. In such cases, granting the relief sought would not be in aid of the court's jurisdiction. Rogers v. St. George, 6 M.J. 558 (N.C.M.R. 1978).

B. Must the petitioner exhaust "ordinary" remedies?

As discussed in Section 2103F.2, above, the C.M.A., during 1971 and 1972, required petitioners for release from pretrial restraint to exhaust their administrative remedy under Article 138, UCMJ. The court has not required exhaustion of this "ordinary" remedy in later cases, however. Since Tuttle v. Commanding Officer, 21 C.M.A. 224, 45 C.M.R. 3 (1972), the C.M.A. never has stated as a matter of doctrine that a petitioner must exhaust his other administrative or judicial remedies prior to seeking an extraordinary writ. However, the court appears to be following a pattern of requiring exhaustion. Some examples are:

1. Corley v. Thurman, 3 M.J. 192 (C.M.A. 1977) (petition for release from post-trial confinement denied without prejudice to the right to raise the issue in the ordinary course of appeal); and

2. McGinty v. United States, 2 M.J. 222 (C.M.A. 1977) (petition for writ of certiorari or mandamus denied without prejudice to seek further relief upon completion of art. 69 appeal). See also Vorbeck v. Commanding Officer of USS PYRO, 11 M.J. 480 (C.M.A. 1981).

On the other hand, in Ward v. Carey, 4 M.J. 298, (C.M.A. 1978), the N.C.M.R. previously had denied a petition on the grounds that the petitioner had failed to exhaust his administrative remedies. C.M.A., however, remanded the case to the N.C.M.R. for that court to exercise its extraordinary writ powers in reviewing those matters raised by the petitioner. The court based this action on the fact that these matters related to the vacation of the suspension of a sentence which is a proceeding that had previously been held to be an integral part of the court-martial sentence.

C. The government as the petitioner

Can the government petition the C.M.A. to reverse a ruling of a trial judge? The court answered this question in the affirmative in Dettinger v. United States, 7 M.J. 216 (C.M.A. 1979). In Dettinger, the court first clearly differentiates between appellate review and an extraordinary writ. It reaffirms that a trial judge's order dismissing a charge, although not amounting to a finding of not guilty, may not be appealed by the government. This was the result of the court's decision in United States v. Ward, 1 M.J. 282 (C.M.A. 1976), holding that a military judge need not accede to the wishes of the convening authority when reconsidering an earlier ruling. And it was the proposition that the government may not appeal which was the holding of United States v. Ethridge, 3 M.J. 204 (C.M.A. 1977), which had been thought to preclude the type of relief sought in Dettinger. But, by relying on substantial Federal case law, the analyses of several legal commentators, a discussion of the past and present interpretations of Art. 62 (a), UCMJ, and a postulated congressional intent, the C.M.A. concluded that there is no inherent reason that military appellate courts could not consider an application for extraordinary relief instituted by the government. Of significance in their analysis

was the realization that it was the extinction of the government's ability to "appeal" by the ruling in Ware that made the availability of an alternative route to challenge a military judge's rulings necessary. They concluded that the alternative route, in a proper case, may be by application for an extraordinary writ.

Also persuasive to the court that a military judge's dismissal of charges should not be protected from any form of scrutiny was the fact that "Congress differentiated between a dismissal of charges amounting to a finding of not guilty, which accords an accused the Constitutional protection against double jeopardy, and other dismissals." Dettinger, supra, at 221. It is only these "other dismissals," i.e., dismissals not amounting to a finding of not guilty, that may now be challenged via the means of an extraordinary writ. As to those which do amount to a finding of not guilty, the bar of double jeopardy precludes further consideration. See United States v. Kinneer, 7 M.J. 974 (N.C.M.R. 1979), where a military judge's ruling, ostensibly in response to a motion to dismiss, was in reality based on the merits of the case; therefore, the court refused to issue the requested writ. See also United States v. Redding, 11 M.J. 100 (C.M.A. 1981); United States v. Caprio, 12 M.J. 30 (C.M.A. 1982).

The Military Justice Act of 1983 has substantially changed Art. 62(a), UCMJ, making it possible for the government to appeal a contrary ruling by the trial judge. This change may obviate the necessity for most government writs in the future. See section 1603, supra.

## 2105 WRIT AUTHORITY IN LOWER COURTS

### A. Extraordinary relief by Courts of Military Review

There was for some years a question as to whether the various C.M.R.'s had the authority to issue extraordinary writs. However, this issue was resolved in the affirmative by Kelly v. United States, 1 M.J. 172, (C.M.A. 1975). In that case, the appellant petitioned the C.M.A. to order the convening authority to release him from confinement pending a decision to refer his case to another trial. Rather than taking action itself, the C.M.A. returned the petition to the Army Court of Military Review and directed it to exercise its extraordinary writ authority. The court offered no explanation or justification for assuming that the Army court had extraordinary writ authority. Since then, the C.M.A. has also directed the Navy court to exercise its extraordinary writ powers. Ward v. Carey, 4 M.J. 298 (C.M.A. 1978); Hart v. Kurth, 5 M.J. 932 (N.C.M.R. 1978).

The C.M.A. has yet to hold that a petitioner must exhaust his remedies by petitioning the appropriate C.M.R. before taking a petition to the C.M.A. The court has, however, on occasion, referred petitions to the appropriate Court of Military Review for action pursuant to the All Writs Act. See, e.g., Kelly v. United States, supra, and Ward v. Carey, supra.

B. Trial courts. There have been no decisions dealing with the question of whether trial-level courts have extraordinary writ authority. The arguments against it are strong. First is the basic argument that they are not courts established by an Act of Congress -- as is required by the All Writs Act -- but, rather, they are established by the convening authority. Other arguments mitigating against such authority are that the judges have no tenure, opinions are not published, and, indeed, a trial court need not even have a military judge detailed to it.

2106       PROCEDURAL RULES RELATING TO PETITIONS FOR  
EXTRAORDINARY RELIEF

A. Rules of Practice and Procedure. On 1 July 1983, the Court of Military Appeals revised its "Rules of Practice and Procedure." Petitions for extraordinary relief are specifically governed by Rules 27 and 28, although certain other general rules also apply. These rules are contained in volume 15 of the Military Justice Reporter. Because of their importance, Rules 27 and 28 are set out verbatim on the following four (4) pages:

## RULES OF PRACTICE AND PROCEDURE

### EXTRAORDINARY RELIEF

#### **Rule 27. Petition for Extraordinary Relief, Writ Appeal Petition, Answer, and Reply**

**(a) Petition for extraordinary relief.** (1) A petition for extraordinary relief, together with any available record, shall be filed within the time prescribed by Rule 19(d), shall be accompanied by proof of service on all named respondents, and shall contain:

(A) A previous history of the case including whether prior actions or requests for the same relief have been filed or are pending in this or any other forum and the disposition or status thereof;

(B) A concise statement of the facts necessary to understand the issue presented;

(C) A statement of the issue;

(D) The specific relief sought;

(E) The jurisdictional basis for the relief sought and the reasons why the relief sought cannot be obtained during the ordinary course of trial or appellate review or through administrative procedures; and

(F) Reasons for granting the writ.

(2) *Service on Judge Advocate General.* The Clerk shall forward a copy of the petition to the Judge Advocate General of the service in which the case arose.

(3) *Brief, answer and reply.* Each petition for extraordinary relief shall be accompanied by a brief in support of the petition substantially in the form specified in Rule 24, unless it is filed *in propria persona*. The Court may issue an order to show cause, in which event the respondent(s) shall file an answer. The petitioner may file a reply to the answer. See Rule 28(b)(1) and (c)(1).

(4) *Initial action by the Court.* The Court may, as the circumstances require, dismiss or deny the petition, order the respondent(s) to show cause and file an answer within a time specified, or take any other action deemed appropriate, including referring the matter to a special master, who may be a military judge or other person, to make further investigation, to take evidence, and to make such recommendations to the Court as are deemed appropriate. See *United States v. DuBay*, 17 U.S.C.M.A. 147 (1967).

(5) *Hearing and final action.* The Court may set the matter for hearing. However, on the basis of the pleadings alone, the Court may grant or deny the relief sought or issue such other order in the case as the circumstances may require.

## RULES OF PRACTICE AND PROCEDURE

(6) *Electronic message petitions.* The Court will docket petitions for extraordinary relief submitted by means of an electronic message.

(A) The message will contain the verbatim text of the petition, will conclude with the full name and address of petitioner's counsel, and will state when counsel placed the written petition and brief required by subsections (a)(1) and (a)(3) in the mail addressed to the Court and to all named respondents in accordance with Rules 36 and 39.

(B) As the Court does not possess the capability for direct receipt of electronic messages, each such message will be transmitted to the Chief of the Appellate Defense Division or Appellate Government Division, as appropriate, within the Office of the Judge Advocate General of petitioner's service, with copies to all named respondents. Upon receipt of the message in the appropriate appellate division office, clearly legible copies will be reproduced and filed in accordance with Rule 37 by an appellate counsel appointed within such office.

(b) *Writ appeal petition, answer and reply.* A writ appeal petition for review of a decision by a Court of Military Review acting on a petition for extraordinary relief shall be filed by an appellant, together with any available record, within the time prescribed by Rule 19(e), shall be accompanied by proof of service on the appellee, and shall contain the specific information required by subsection (a)(1) above. In addition, unless it is filed *in propria persona*, such petition shall be accompanied by a supporting brief substantially in the form specified in Rule 24. If such petition is filed *in propria persona*, appellate military counsel designated by the Judge Advocate General in accordance with Rule 17 will file a supporting brief no later than 20 days after the issuance by the Clerk of a notice of docketing of the petition. The appellee shall file an answer no later than 10 days after the filing of the appellant's brief. A reply may be filed by the appellant no later than 5 days after the filing of the appellee's answer. See Rule 28(b)(2) and (c)(2). Upon the filing of pleadings by the parties, the Court may grant or deny the writ appeal petition or take such other action as the circumstances may require.

### **Rule 28. Form of Petition for Extraordinary Relief, Writ Appeal Petition, Answer, and Reply**

(a) *Petition/writ appeal petition.* A petition for extraordinary relief or a writ appeal petition for review of a Court of Military Review decision on application for extraordinary relief will be accompanied by any available record and will be substantially in the following form:



# **RULES OF PRACTICE AND PROCEDURE**

## **IN THE UNITED STATES COURT OF MILITARY APPEALS**

_____	(Petitioner) (Appellant)	[PETITION FOR EXTRAORDI- NARY RELIEF IN THE NA- TURE OF (Type of writ sought) ]
v.		
_____	(Respondent) (Appellee)	OR [WRIT APPEAL PETITION FOR REVIEW OF COURT OF MILITARY REVIEW DECISION ON APPLICATION FOR EXTRAORDINARY RELIEF]
		USCMA Misc. Dkt. No. _____ [For Court use only]

### *Preamble*

The (petitioner) (appellant) hereby prays for an order directing the (respondent) (appellee) to:

[Briefly state the relief sought.]

### **I**

#### *History of the Case*

[See Rule 27(a)(1)(A) ]

### **II**

#### *Statement of Facts*

[See Rule 27(a)(1)(B) ]

### **III**

#### *Statement of Issue*

[Do not include citations of authority or discussion of principles. Set forth no more than the full question of law involved.]

### **IV**

#### *Relief Sought*

[State with particularity the relief which the petitioner or appellant seeks to have the Court order.]

## RULES OF PRACTICE AND PROCEDURE

### V

#### *Jurisdictional Statement*

[See Rule 27(a)(1)(E)]

### VI

#### *Reasons for Granting the Writ*

[Where applicable, indicate why the Court of Military Review  
erred in its decision]

\_\_\_\_\_  
Signature of [petitioner] [appellant] [counsel]

\_\_\_\_\_  
Address & phone number of [petitioner] [appellant] [counsel]

#### CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was [mailed] [delivered] to  
the Court and [mailed] [delivered] to the [respondent] [appellee] on

\_\_\_\_\_  
(Date)

\_\_\_\_\_  
(Typed name and  
signature)

\_\_\_\_\_  
(Address and telephone no.)

(b) *Answer.* (1) The respondent's answer to an order to show cause, if ordered by the Court after consideration of a petition for extraordinary relief, shall be in substantially the same form as that of the petition, except that the answer may incorporate the petitioner's statement of facts, add supplementary facts, or contest the statement. To the extent that the petitioner's statement of facts is not contested by the respondent, it shall be taken by the Court as representing an accurate declaration of the basis on which relief is sought. The answer to the order to show cause will be filed no later than 10 days after service on the respondent of the order requiring such answer, unless a different time for filing the answer is specified in the Court's order.

(2) The appellee's answer to a writ appeal petition shall be filed no later than 10 days after the filing of the appellant's writ appeal petition and supporting brief.

(c) *Reply.* (1) A reply may be filed by the petitioner no later than 5 days after the filing of a respondent's answer to an order to show cause.

(2) A reply may be filed by an appellant, in the case of a writ appeal petition, no later than 5 days after the filing of an appellee's answer.

B. Other procedural rules. Other procedural rules should be consulted concerning the proper filing of a petition. For example, mailing address, number of copies required, signatures, and service of pleadings are specifically discussed elsewhere within the rules.

C. Content. The petition should include:

1. A statement of the charges under which the petitioner is laboring at the time of filing of the petition [A copy of the charge sheet, if possible, should be attached. Special leave of court is not required to file supporting exhibits. See Johnson v. Judge Advocate General, 21 C.M.A. 520, 45 C.M.R. 294 (1972)];

2. a summary of proceedings to date with a clear statement setting forth at which stage of the proceedings the case now stands [e.g., referral to trial, Article 39(a), UCMJ, session, convening authority's review, etc.];

3. facts, not unsupported conclusions;

4. the grounds upon which petitioner relies for the requested relief [See Goodman v. Secretary of the Navy, 21 C.M.A. 242, 45 C.M.R. 16 (1972)];

5. the relief requested, specified with particularity;

6. a request that the court order the Judge Advocate General to appoint counsel to represent him on his petition [If the petitioner is submitting the petition on his own, or if it is prepared by a military counsel in the field, he should include such a request. If a civilian attorney is preparing the petition, he may include such a request or not according to his desires. See Goodman, supra.]; and

7. most importantly, a statement by petitioner setting forth as precisely as possible how the granting of the relief sought will be in aid of the U.S. Court of Military Appeals' jurisdiction and why review of the question raised should not be delayed and decided in the normal course of the appellate process.

## 2107 EXTRAORDINARY RELIEF AND COLLATERAL ATTACK IN FEDERAL COURT

The question of what, if any, relief may be available to a military defendant in Federal district court was addressed by the United States Supreme Court in Schlesinger v. Councilman, 420 U.S. 738 (1975). Councilman, an Army captain, was charged with selling and transferring marijuana to an undercover agent in Councilman's off-base apartment. He moved to dismiss the charges at an Art. 39(a), UCMJ, session on the grounds of lack of subject-matter jurisdiction. This motion was denied by the trial judge. Councilman then petitioned the Federal district court for a temporary restraining order and a preliminary injunction to prevent his impending court-martial. The district court permanently enjoined the military authorities from proceeding

with the court-martial and the court of appeals affirmed. The government appealed, basing its position, in part, on Art. 76, UCMJ, which provides "... the proceedings, findings and sentences of courts-martial as approved, reviewed, or affirmed ... are final and conclusive .... All action taken pursuant to those proceedings [is] binding upon all ... courts ... of the United States." From this, the government argued that the Congress intended to limit collateral attack of court-martial convictions in civilian courts to proceedings for writs of habeas corpus under 28 U.S.C. § 2241 (habeas corpus enjoying a preferred status in American jurisprudence). The government further argued that, in enacting Article 76, UCMJ, Congress must have intended to limit Federal court jurisdiction over pending courts-martial. With this, the Supreme Court disagreed. The Court reiterated "the general rule that the acts of a court-martial, within the scope of its jurisdiction and duty, cannot be controlled or reviewed in the civil courts by writ or prohibition or otherwise." Id. at 747. But, the court then pointed to both the rule's own qualification, i.e., "within the scope of its jurisdiction and duty" and an historical analysis to support the proposition that relief is barred unless it appears the judgment is void. As a jurisdictional matter, the Court considered Councilman's suit as standing on the very same footing as suits seeking post-judgment relief. Therefore, Art. 76, UCMJ, does not stand as a jurisdictional bar to the suit. "This is not to say, of course, that for every such consequence there is a remedy in Article III courts. That depends on whether the relief is sought in an action otherwise within the courts subject matter jurisdiction, on a ground that recognizes the distinction between direct and collateral attack, and in a form that the court is able with propriety to grant." Id. at 752.

Of course, this only gets an accused's case before the Federal bar. Once there, before the Federal courts may intervene, he must show that he will suffer harm at the hands of the military court system other than that normally attendant to an accused at a court-martial. Id. at 759. In other words, unless the petitioner can show differently, the civilian courts must assume the military judicial system will adequately perform its task as mandated by Congress and, absent such a showing, he is required to exhaust his remedies in the military system before turning to the civilian system for relief.

Accordingly, if an accused thinks he can demonstrate to a Federal district court that he will suffer unusual consequences that other accuseds would not suffer at the hands of a court-martial unless the Federal court intervenes, he may want to file suit in Federal district court. Before a Navy or Marine Corps defense counsel may take such action on a client's behalf, however, permission must be secured from the Judge Advocate General or Director, Naval Legal Service, as appropriate. See JAGMAN, § 1360(a). The JAG Manual details what must be contained in such a request and dictates that any expenses incurred as a result of the action, if approved, will be at no cost to the government. See JAGMAN, § 1360(b), (c).

## CHAPTER XXII

### DEPARTMENT OF THE NAVY CLEMENCY AND PAROLE REVIEW

#### 2201 INTRODUCTION

Convening authorities and trial defense counsel are well aware of their important post-trial duties involving the accused's appellate rights and clemency review. A full discussion of such duties can be found in Chapter XIX. Very few counsel, however, are aware of clemency opportunities after the convening authority's action. Most feel that if clemency is not granted by the convening authority after submission of the clemency request under R.C.M. 1105, the accused is bound to serve the entire sentence unless an appellate court intervenes. Clemency opportunities exist even after the accused's case is affirmed by the appellate courts. This power to grant clemency is exercised for the Secretary of the Navy (SECNAV) by the Naval Clemency and Parole Board (NC&PB). The governing directive is SECNAVINST 5815.3G of 25 Nov 1985, Subj: Department of the Navy Clemency and Parole Review.

#### 2202 AUTHORITY

The statutory authority for the Secretary of the Navy to exercise clemency is found in Article 74, Uniform Code of Military Justice (UCMJ). Article 74 provides:

(a) The Secretary concerned and, when designated by him, any Under Secretary, Assistant Secretary, Judge Advocate General, or commanding officer, may remit or suspend any part or amount of the unexecuted part of any sentence, including any uncollected forfeitures, other than a sentence approved by the President.

(b) The Secretary concerned may, for good cause, substitute an administrative form of discharge for a discharge or dismissal executed in accordance with the sentence of a court-martial.

SECNAV has implemented this authority by promulgating procedures in the Manual of the Judge Advocate General (JAGMAN), Chapter 1 and SECNAVINST 5815.3G. See especially JAGMAN, § 0143-60.

Secretary of the Navy

Assistant Secretary of the Navy (Manpower and Reserve Affairs)

Naval Council of Personnel Boards

Naval Clemency and Parole Board (NC&PB)

General Court-Martial Convening Authority

NAVAL CLEMENCY AND PAROLE BOARD (NC&PB)

A. SECNAVINST 5815.3G defines NC&PB as: "A board of five Navy and Marine Corps officers administratively constituted by SECNAV to take departmental-level action in clemency and parole review matters."

B. Clemency is any action (other than the correction of a legal error) which results in the mitigation, remission, or suspension of the whole or any part of the unexecuted portion of a court-martial sentence, restoration to duty with or without special conditions, or full or partial restoration of paygrade. A clemency review begins with the convening authority in every case. The Naval Clemency system is involved with cases where significant confinement and/or a punitive discharge or dismissal has been awarded. (See paras. D & E below.)

C. Parole is a form of conditional release from confinement in a military correctional facility granted to carefully selected individuals to help them, through the guidance and supervision of an officer of the Federal Probation Service, make the transition from controlled living in confinement to a life of normal liberty in a civilian community. In order to make equitable release determinations, nonbinding, uniform standards are used, such as those formulated by the United States Parole Commission, modified to preserve the service uniqueness of the naval service.

D. Required reviews. The requirement for clemency review extends to all servicemembers whose court-martial sentence includes confinement for 8 months or more or an unsuspended punitive discharge, or dismissal. This clemency review may be waived by the accused. Any such waiver must be specific and must be in writing.

E. Eligibility for review. The eligibility for parole review extends to all servicemembers whose court-martial sentence includes an unsuspended punitive discharge or dismissal and confinement for more than one year. Parole may be granted until the full-time release date, or for some shorter period. Where parole has been granted for six months or more, or where parole has been granted in incremental periods totaling six continuous months or more, the parole shall not be terminated without conducting a parole review hearing. See infra.

F. Composition. The NC&PB is normally comprised of the following officers:

- 1 Navy line officer from NAVMILPERSCOM (Code 08)
- 1 Navy Medical Corps officer who is a clinical psychologist
- 1 Marine officer from Headquarters, Marine Corps  
(usually the head of the Promotions Branch)
- 1 Navy JAG Corps officer from OJAG (Code 20 - Military Justice)
- 1 Navy line officer or Marine officer from Navy Council of  
Personnel Boards

The NC&PB meets once each week in Washington, D.C. to consider cases brought before it.

## 2205 CLEMENCY POLICY

A. Objectives. The objectives of clemency and parole review are:

- 1. The preservation of good order and discipline;
- 2. equality in the administration of justice; and
- 3. protection of the best interests of the naval service, the individual, the victim, and society.

B. Evaluation. When considering a case, NC&PB will determine the appropriateness of clemency or parole on the basis of:

- 1. Nature and circumstances of the offense;
- 2. military and civilian background;
- 3. recommendations of the military judge and the staff judge advocate, officials commenting in the court-martial progress report, comments of the officer exercising general court-martial jurisdiction, and, if available, the commanding officer at time of trial;
- 4. post-trial attitude/conduct/performance, adaption to confinement, sincerity and motivation, a psychiatric evaluation, and, where deemed applicable by NC&PB, a substance dependency evaluation, and relevant social factors;
- 5. a statement, which may be presented orally or otherwise, by any victim, including a governmental agency, of the offense for which the individual was convicted, the financial, social, psychological, and emotional harm done to, or loss suffered by, such victim; and
- 6. uniform nonbinding guidelines such as those contained in Title 28, Code of Federal Regulations (CFR).

A. NC&PB may take one or more of the following actions on the unexecuted portions of a sentence:

1. Restoration to duty on probation;
2. remission of the punitive discharge or dismissal (and possibly grant a general discharge);
3. reduction in confinement, forfeitures, or fines;
4. mitigation of the discharge to one less severe;
5. full or partial restoration to paygrade or precedence (only if unexecuted); or
6. no clemency.

B. Restoration

1. Persons who are suitable, and who evidence a desire therefor, may be restored to duty upon completion of all or a portion of their sentence of courts-martial. The purpose of such restoration shall be to permit such persons, by their conduct and performance of duty during a probationary period, to demonstrate that they merit the remission of the suspended portions of their sentences.

2. Ordinarily, an individual will not be restored to duty if they:

a. Were convicted of an offense of violence, distributing controlled substances, desertion or unauthorized absence from a ship or unit in or scheduled to enter a combat area, sexual perversion, theft from another member of their ship or unit; or

b. are mentally or physically unsuitable for duty, or have a record of military or civilian offenses indicating incorrigibility.

C. Probation

1. Restoration to duty with a suspended punitive discharge or dismissal will generally be granted only on a probationary basis for a specific period of service, which normally will not exceed one year. This suspension may be vacated for cause in accordance with applicable regulation and law. (See Chapter XIX of this text.)

2. The period of probation starts the day that release from confinement and restoration to duty is directed to be effective by NC&PB or SECNAV.



3. An enlisted person may be restored to duty on probation, even though he/she does not have sufficient time remaining in the current enlistment (as extended for the purpose of making up lost time), to serve a reasonable period of probation. To be eligible, the member concerned must agree in writing to an extension of their enlistment, which, when added to the remainder of the current enlistment, will equal the period of probation.

D. Unexecuted portions. The new Manual for Courts-Martial, 1984, reduced the scope of the board's review by executing all punishments at the time of the convening authority's action, except for an unsuspended BCD or DD. NC&PB may act on any unexecuted BCD or DD, any unserved confinement, or any uncollected forfeitures. Confinement may be the object of clemency because it is executed incrementally or, in other words, a day at a time. Likewise, forfeitures are collected (executed) as pay becomes due.

E. Prerequisite. Clemency review by NC&PB or a valid waiver of clemency review is an absolute prerequisite to the execution of a punitive discharge. See section 2307C, infra, regarding a valid waiver of clemency review.

## 2207 PROCEDURES FOR CLEMENCY REVIEW

A. Responsibilities. SECNAVINST 5815.3G places responsibility for providing input to NC&PB with the commanding officer. To clarify exactly which commanding officer, the instruction provides that, for clemency review purposes, commanding officers are "officers in command of military activities on whose rolls the individuals are assigned. However, in the case of personnel serving sentence in Marine Corps brigs, the commanding officer considered an element of the clemency and parole review system shall be the officer directly in charge of the facility." Therefore, a Navy or Marine Corps convening authority is rarely still the commanding officer of the member at the time of clemency review.

### B. Schedule for clemency review

1. In cases in which the accused is not actually confined post-trial as a result of the sentence of a court-martial, or in cases where all charges involved unauthorized absence, desertion, or their equivalent, commanding officers must submit documentation for clemency review to NC&PB not later than 60 days following trial. Documentation must be submitted unless the accused has waived clemency review. Two copies of FBI Form FD-258, or its equivalent, must be attached to the submission.

2. In cases in which personnel are serving confinement, except in those cases in which the gravamen of all charges is unauthorized absence, desertion or its equivalent, commanding officers and the Commandant, United States Disciplinary Barracks (USDB) shall submit documentation for clemency review to NC&PB in accordance with the following schedule:

<u>Sentence</u>	<u>Initial Submission</u>	<u>Subsequent Submission</u>
Less than twelve months confinement	At least 60 days prior to scheduled release from confinement, or prior to release in cases where the sentence is less than 90 days	Not applicable
Twelve months or more confinement	Within nine months after the sentence begins to run, but not earlier than four months; and not less than 60 days prior to scheduled release from confinement or parole eligibility date where parole is requested	Annually, but not sooner than 9 months after the previous review by the Naval Clemency and Parole Board

[Note: No submission is required if the member has waived review.]

3. Cases will also be reviewed by NC&PB whenever directed by SECNAV, the Director, Naval Council of Personnel Boards (NCPB), or the President, NC&PB or required pursuant to paragraph 306. The Commandant of the Marine Corps, and the Commander, Naval Military Personnel Command (CNMPC) may request special reviews as deemed necessary.

4. Prisoners released on parole from a brig or the USDB will continue to receive clemency review.

#### C. Waiver of clemency review

1. The officer exercising general court-martial jurisdiction (OEGCMJ) shall ensure that persons eligible for clemency review (see section 2307B above) are given the option to request or waive clemency review, and that the member exercises his/her own free choice when deciding to request or waive review.

2. Except for members or ex-members serving court-martial sentences in Federal prisons, all persons eligible for review will be given the opportunity to request or waive clemency each time their cases are subject to review. Members or ex-members serving court-martial sentences in Federal prisons, including those on parole, shall have their cases reviewed each time they are scheduled.

3. A person whose case is subject to review shall be advised of his/her choices and the consequences of those choices. These options will be explained to the member by an officer certified under Article 27b, UCMJ. The officer can be the detailed defense counsel, but is not normally the detailed counsel due to geographic location. The officer so detailed shall make clear to the individual the limited extent of his/her services. This advice shall not be construed as resulting in the formation of a general attorney-client relationship.

4. Any officer detailed for the limited purpose of rendering clemency review advice is strongly advised to contact the detailed defense counsel, individual military counsel, or civilian counsel prior to talking with the member. It is normally advantageous not to waive clemency review, but an informed decision can be made only with full knowledge of what occurred at trial.

5. A waiver of clemency review will be made on a preprinted form, NAVSO 5815/4 (5-81), or its equivalent. The member's signature must be witnessed by the detailed officer certified under Article 27b, UCMJ.

6. Any waiver for one scheduled review is not final and does not bar review at the next scheduled review. Therefore, a member could waive review one year and request it the next year.

7. Unless information is received to the contrary, a waiver of appellate review (see Chapter XIX) shall constitute a waiver of initial clemency review.

8. The commanding officer's endorsement of any such waiver shall contain a certification that the member is either:

a. Not substance dependent within the meaning of Diagnostic and Statistical Manual Third edition (DSM III) and ICD9 (CM), or

b. has been offered treatment through either a military treatment facility (MTF) or the Veterans' Administration.

**D. Documentation**

1. NC&PB has access to volumes of information on every case. The board will have NIS reports, the record of trial, confinement progress reports, etc.

2. NC&PB requires the following documentation for each case scheduled for clemency review:

- a. Request for clemency [NAVSO 5815/2 (Rev. 8-80)];
- b. court-martial progress report (DD Forms 1476, 1477, 1478, and 1479);
- c. endorsements of officials in the chain of review; and
- d. two copies of FBI Form FD-258.

3. The court-martial convening authority shall forward to NC&PB one copy of the record of trial in all cases eligible for clemency review in which the sentence was announced after 1 August 1984.

**E. Action on receipt of clemency review decisions**

1. The Commandant of the Marine Corps or the Commander, Naval Military Personnel Command, as appropriate, shall ensure that the clemency decision is entered in the field service record or service record book indicating the action directed, the date of the action, the authority and, if applicable, the rationale therefor. In cases of restoration to duty, such entry shall include the specified date thereof, the period of probation, and the total unexecuted portion of the sentence remaining to be executed in the event of vacation of suspension. In cases where the person has completed the period of confinement and is placed on probation relative only to the dismissal or discharge, the fact should be clearly stated, i.e., "...no confinement remains to be served on this sentence."

2. In the event clemency review results in modification of the sentence, the officer exercising general court-martial jurisdiction shall issue a supplementary court-martial order implementing such action.

**2208 PAROLE REVIEW PROCEDURES**

**A. Eligibility for parole review**

1. A prisoner who received a punitive discharge or dismissal and who is confined due to a court-martial sentence for more than one year, but less than three years, will be eligible for parole when he/she has served one-third of the term of confinement or six months, whichever is greater.

2. A prisoner with a punitive discharge or dismissal and a sentence to confinement for more than three years will become eligible for parole consideration at such time as NC&PB may determine, but such time shall not be more than one-third of the adjudged and approved sentence. In cases where the sentence is life imprisonment, or when confinement exceeds 30 years, the prisoner will become eligible for parole consideration after 10 years of confinement.

3. "Good time" credit or employment abatement will not be considered when computing the eligibility date.

4. As stated above, a prisoner must have an approved sentence for more than one year to be eligible for parole consideration. Defense counsel may want to take this into account when proposing confinement limits in a pretrial agreement. A limit of one year will mean that the accused will stay in confinement for the full sentence, less good time. A limit of a year and a day will mean that the accused becomes eligible for parole after six months.

5. If parole was denied in the initial review, subsequent reviews will be conducted annually from the date of the initial decision, unless an earlier review is considered warranted by NC&PB.

B. Individual requests for parole. Prior to becoming eligible for parole consideration each prisoner will execute the Parole Statement (NAVSO 1640/3), indicating whether they desire parole. All sections of the form will be completed if the prisoner requests parole. Prisoners may waive parole by indicating on the parole statement that they do not desire parole. In such cases, only sections I, II, and IV of the form will be completed.

C. Parole hearings

1. Each parole applicant is entitled to a personal hearing before an agent of NC&PB. Procedures for the hearing are as follows:

a. The applicant will be given at least 15 days notice of the time, place, and purpose of the hearing.

b. The applicant will have access to the information pertaining to their case which the disposition board, or other agent of NC&PB, has considered. Such access will be conditioned upon the safety of persons whose statements or opinions are under consideration and the necessities of prison security.

c. The applicant is not entitled to a lawyer, but they may be represented by another inmate or member of the staff. The function of the prisoner representative is to offer a statement at the conclusion of the hearing and to provide additional information as may be requested by the presiding officer. The presiding officer shall limit or exclude irrelevant or repetitious statements.

d. The disposition board will indicate the vote of each member and will summarize all evidence considered at the hearing not otherwise included within the report. The summarization will be embodied in the progress report.

2. Failure of the prisoner to formulate a satisfactory parole plan will not delay processing of the parole request. In such instances, the tentative parole plan representing the best efforts of the prisoner, as assisted by his/her commanding officer, will be used in processing the prisoner's request for parole.

D. Parole requirements

1. No prisoner will be released on parole until satisfactory evidence has been furnished that the parolee will be engaged in a reputable business or occupation. Employment requirements for release on parole will be deemed to have been met when:

a. A prospective employer has executed a tender of employment; or

b. a recognized trade union or similar organization has stated that, subsequent to release on parole, the prisoner will be considered a member of the organization in good standing and that, through the normal functions of the organization, the prisoner will be afforded employment rights and assistance equal to that furnished other members in good standing.

## **2. Waiver of the employment requirement**

a. Prior to furnishing employment agencies information from a prisoner's record, the written authorization of the prisoner will be obtained. If, after parole approval, every effort to obtain employment has been made without success, a waiver of employment may be granted by the NC&PB in accordance with the following:

(1) If a reputable prisoners' aid, welfare, or employment organization has given assurance that it will assist the prisoner in obtaining employment after their release on parole and will assure their livelihood pending permanent employment, a waiver may be granted. Because of the heavy burden already carried by prisoners' aid organizations and similar agencies, the use of these agencies will be limited to those cases in which such action appears absolutely essential to a suitable release plan.

The United States Employment Service and similar state agencies will not be considered in the same category as prisoners' aid associations and other welfare organizations, since such Federal and state employment agencies are not always in a position to obtain or offer assurance of employment for individuals prior to release from confinement and prior to personal interview.

(2) When all other resources for obtaining employment have been exhausted, waiver of employment on the basis of obtaining employment subsequent to release through the assistance of the probation officer, the United States Employment Service, and similar state agencies may be granted by the NC&PB.

b. In addition to the types of waivers authorized above, the NC&PB may grant waivers of employment to:

(1) Those who have been approved for on-the-job training or schooling under the laws authorizing government-sponsored benefits; or

(2) those who present evidence of adequate means of support and sufficient funds to defray the expense of education and have been accepted by an accredited educational institution.

## **3. Release procedures**

a. Provided appellate review has been completed, a discharge certificate will be executed prior to release and delivered to the prisoners at the time of their release on parole.

b. If release is granted prior to completion of appellate review, the prisoner will be furnished an armed forces identification card, completed to show rank and an expiration date six months subsequent to issue. The card shall be annotated to indicate "Issued as the result of a General Court-Martial." Identification cards for dependents will bear the same expiration date and notation. The commanding officer will instruct the prisoner to return all identification cards through the Federal probation officer upon completion of appellate review.

c. The conditions of parole will be fully explained to the prisoner.

d. Prior to being released from confinement on parole, the prisoner will execute a written agreement to the specific conditions of parole. All copies of this agreement will be signed by the prisoner and witnessed by a commissioned officer or equivalent grade civilian employee. The parole agreement appears on the reverse side of the certificate of parole. The prisoner will be instructed to execute and return the Notification of Arrival of Parolee (NAVSO 1640/6) or equivalent upon arrival at his/her parole destination.

e. An FBI Form 1-12 (Wanted-Flash-Cancellation Notice) shall be prepared. This form provides a uniform means of filing requests with the Federal Bureau of Investigation to ensure notice to the commanding officer or Commandant USDB of the arrest of an individual on parole by an apprehending officer who files prints with the Federal Bureau of Investigation.

f. Prior to being released on parole, each prisoner will be required to submit a urine sample for analysis in accordance with pertinent directives of CNO or the Commandant of the Marine Corps (CMC), as a service-directed urinalysis. (The chain of command of the brig will determine whether CNO or CMC regulations apply.) The sample will be collected as shortly before the prisoner departs as practicable and will be analyzed before the end of the third week of parole. A positive result will be reported to NC&PB by the most expeditious means available. Upon returning to naval jurisdiction, the subject of the positive urinalysis is amendable to appropriate disciplinary or administrative action by reason thereof.

g. Prisoners will be furnished gratuities upon release on parole as follows:

(1) Civilian outer clothing, if needed; and

(2) a cash discharge gratuity in accordance with Department of Defense Military Pay and Allowances Entitlement Manual (DODPM).

h. Upon release on parole, prisoners will be furnished transportation to their parole destinations in accordance with Joint Travel Regulations.

i. Parolees remain eligible for clemency review at least annually. Requests for clemency review are not required from parolees.

j. Parolees will be assigned to a Federal probation officer who will be responsible for supervising the parolee.

k. Individuals on parole pending completion of appellate review, or whose parole changes to an excess leave status following completion of sentences to confinement while on parole, are members of the military service. Accordingly, they are authorized medical care to the same extent as other servicemembers. At the time of release, the commanding officer will

inform parolees of the address of the uniformed services medical treatment facility closest to their parole destination to which they should report if in need of medical care. An individual on parole whose punitive discharge has been executed is not a member of the military service and is, therefore, not normally eligible for medical care.

**E. Termination of parole**

1. By expiration of the term of parole. A parolee whose term of parole expires while the individual is in a parole status, and whose parole is not extended, shall, within 24 hours of that expiration, report to the commanding officer of the facility from which they were paroled. Transportation costs incident to the return to military custody will be borne by the parolee. Individuals who fail to report within 24 hours are subject to immediate reconfinement.

2. By expiration of term of confinement. A parolee will be released from parole supervision at the expiration of the full term or aggregate term of his/her sentence to confinement. A Certificate of Release from Parole (NAVSO 1640/7) will be prepared in triplicate by the NC&PB. The original copy will be forwarded to the probation officer by a letter of transmittal for delivery to the parolee. One copy of the certificate will be forwarded to the commanding officer and the other copy will be retained by NC&PB.

**F. Suspension of parole**

1. If the parolee materially violates any of the conditions of parole, the Federal probation officer will notify the individual's commanding officer (or the Commandant of the U.S. Disciplinary Barracks). If the probation officer did not forward a copy of the notice of violation to NC&PB, the commanding officer shall forward a copy. NC&PB will decide if parole should be suspended. If parole is suspended, the parolee may be ordered into military custody if it is deemed necessary to assure his/her presence pending final determination of his/her status.

2. The NC&PB shall promptly suspend parole and direct parole violation proceedings in those cases in which it considers there is probable cause to believe that the conditions of parole have been materially violated. The parolee is not entitled to confinement credit during the period parole is suspended. Such credit, however, may be given retroactively.

3. An alleged parole violator whose parole has been suspended shall be afforded a preliminary interview to determine: (a) Whether probable cause exists to believe that conditions of parole have been violated; (b) whether a parole violation hearing should be conducted; and (c) whether the alleged parole violator should be confined pending the final revocation decision. The preliminary interview shall be conducted by a probation officer other than the one initially dealing with the alleged parole violator's case.

4. At the preliminary interview, the parolee has the following rights:

a. To appear and be present;



- b. to speak in his/her own behalf;
- c. to present letters or other documents;
- d. to have individuals speak on his/her behalf (at the parolee's own expense, if any);
- e. to request the presence of and to question those persons giving adverse information regarding the parole violation (unless it is determined by the preliminary interview officer that such persons would be subject to risk of harm if their identities were disclosed or the preliminary interview officer specifically finds good cause to deny confrontations and examination of these witnesses); and
- f. to be represented by civilian counsel (at the parolee's own expense).

5. Upon completion of the interview, the preliminary interview officer shall prepare a written summary of the interview and the reason or reasons supporting his/her recommendations concerning revocation of parole. The report and recommendations shall then be forwarded to NC&PB. The preliminary interview may, upon request of the parolee to the officer conducting the preliminary interview, be postponed for a period of up to 30 days for the following reasons: to allow the parolee to arrange for counsel and/or to permit the parolee to arrange for witnesses. Postponement of a preliminary interview beyond 30 days will not be granted, except at the discretion of the President, NC&PB. If the parolee is convicted of a felony in Federal, state or local court, there is no requirement for a preliminary interview, unless ordered by NC&PB.

#### G. Parole violation hearing

1. Each alleged parole violator, upon request, is entitled to a parole violation hearing to ascertain the facts surrounding his/her case before parole may be revoked. If such a hearing is ordered by NC&PB, the parolee will be given written notice of the time and place of the hearing and of the alleged violation. All evidence pertaining to the violation will be made available to the parolee, and they will be given an opportunity to confront and cross-examine adverse witnesses, unless the hearing officer specifically finds good cause to deny access to the evidence or deny confrontation and examination of witnesses. The parolee will be given the opportunity to be heard in person and to present voluntary witnesses and documentary evidence in his/her own behalf. In all cases, witnesses must be notified by the alleged violator and secured at his/her own expense. The officer presiding at the hearing may limit or exclude any statement or documentary evidence that is irrelevant or repetitious. The parolee may be represented either by a civilian counsel furnished at his/her own expense, or, upon request, by appointed military counsel. The officer conducting the hearing will prepare a summary of proceedings, which will include a summary of the evidence relied upon by the hearing body and the reasons underlying its recommendations regarding revocation of parole. The standard for probable cause to revoke parole shall be clear and convincing evidence.

2. Unless military counsel is otherwise available, including the use of Reserve judge advocates, such counsel, when requested by the parolee, will be provided by the Naval Legal Service Office having territorial jurisdiction or Marine Corps Staff Judge Advocate office in closest proximity to the locale where the violation hearing is scheduled to take place. Any travel costs incurred will be funded by NC&PB.

3. An alleged parole violator may waive a personal appearance at a parole violation hearing. Individuals may be represented by military counsel and/or submit a statement for consideration by the hearing, notwithstanding the waiver of personal appearance.

#### H. Revocation of parole

1. The hearing officer will forward the summary of proceedings to the NC&PB for determination of either revocation or reinstatement of parole.

2. The NC&PB will notify the parolee of its decision regarding revocation. If parole has been revoked and the parolee is confined in a civil institution, NC&PB will request the commanding officer to lodge a detainer with the civil authorities, if such a detainer has not already been lodged. If parole has been revoked and the parolee is not confined in a civil institution, the commanding officer or Commandant of the USDB will initiate action to have the parolee returned to the facility from which he/she was paroled.

3. A parolee at large, whose parole has been terminated or whose parole has been suspended or revoked (except those suspended without prejudice), will be considered the same as an escaped military prisoner whose return to military control is desired. Regulations pertaining to apprehension and return to military control of escaped military prisoners will apply. Flash wanted notices will be filed with the Federal Bureau of Investigation (FBI Form I-12).

4. In the absence of substantial mitigating circumstances, the unexpired term of confinement of a parolee convicted of a new offense subsequent to release on parole shall run consecutively to any term of confinement imposed for the new offense.

5. If NC&PB revoked parole, it shall provide the violator the evidence relied upon and the reasons for revoking parole.

6. Reinstatement of parole following suspension or following revocation proceedings shall, at the discretion of the Board, be made: (a) Effective the date of the reinstatement decision; or (b) retroactively effective to any date in the suspension period, provided the Board concludes that the parolee should be given full or partial confinement credit for the period of suspension. A retroactive effective date shall reflect day-for-day credit for that part of the suspension period for which the Board believes confinement credit is justified.

## I. Parole denial

1. Reasons for denial. NC&PB, or the SECNAV (where the Secretary of the Navy is the parole decisionmaker), will provide a prisoner, who has been denied parole, written notification of the reasons his/her request for parole was denied. Such information shall normally be forwarded to the prisoner through the commanding officer. The prisoner will sign and date the notification of parole denial.

2. Appeal. The prisoner may file a written appeal of NC&PB's decision to SECNAV via the Director, NCPB, 801 North Randolph Street, Suite 905, Arlington, Virginia 22203. The appeal will be submitted to the commanding officer of the brig, or the Commandant of the USDB for prisoners serving sentences at the USDB, within 30 days of receipt of written notification that parole has been denied. Commanding officers will forward all appeals, with their recommendations and supporting reasons, via the officer exercising general court-martial jurisdiction to the Director, NCPB. The Commandant of the USDB shall submit appeals directly to the Director, NCPB. For those cases where the Secretary of the Navy is the parole decisionmaker, there shall be no appeal.

## 2209 ELIMINATION OF THE FEDERAL PAROLE SYSTEM

A. Background. On October 29, 1985, President Reagan appointed the United States Sentencing Commission to review Federal sentencing guidelines and to determine the national sentencing policy. The main purpose for the commission was to devise a system to reduce unwarranted disparities in sentences in the various Federal courts. The commission was tasked with developing a rational, explainable, and principled sentencing system.

B. New system. The system which the commission recommended to the President, and which was implemented 1 November 1987, is known as a determinate sentencing system. In the majority of cases, defendants committing similar crimes will receive similar sentences. Sentence guidelines have been established and will rank offenses by relative seriousness. There will no longer be offenses where a judge could award 0-15 years. The range of punishments will narrow, e.g., 10-15 years, and the judge will be required to make findings of fact for sentencing purposes. Only in extraordinary cases will a judge be allowed to deviate from the guidelines.

C. Effect. The effect will be a determinate sentence, i.e., a sentence which the offender serves day-for-day, minus "good time." There will be no parole. The Federal parole system will essentially be abolished in the future. This does not leave the future of the military parole system in question. The military will not immediately be affected by the new guidelines until a similar change is made to MCM, 1984. Proposed changes to the military parole system are in the making.

## CHAPTER XXIII

### PART A

#### GLOSSARY OF WORDS AND PHRASES

The following words and phrases are those most frequently encountered in Military Justice which have special connotations in Military Law. This list is by no means complete, and is designed solely as a ready reference for the meaning of certain words and phrases. Where it has been necessary to explain a word or phrase in the language of or in relation to a rule of law, no attempt has been made to set forth a definitive or comprehensive statement of such rule of law.

ABANDONED PROPERTY - property to which the owner has relinquished all right, title, claim and possession with intention of not reclaiming it or resuming its ownership, possession or enjoyment.

ABET - to encourage, incite, or set another on to commit a crime.

ACCESSORY AFTER THE FACT - one who, knowing that an offense punishable by the UCMJ has been committed, receives, comforts, or assists the offender in order to hinder or prevent his apprehension, trial or punishment.

ACCESSORY BEFORE THE FACT - one who counsels, commands, procures, or causes another to commit an offense, whether present or absent at the commission of the offense.

ACCUSED - one who is charged with an offense under the UCMJ.

ACCUSER - any person who signs and swears to charges; any person who directs that charges nominally be signed and sworn to by another; and any person who has an interest other than an official interest in the prosecution of the accused.

ACTIVE DUTY - the status of being in the active Federal service of any of the Armed Forces under a competent appointment or enlistment or pursuant to a competent muster, order, call or induction.

ACTUAL KNOWLEDGE - a state wherein a person in fact knows of the existence of an order, regulation, fact, etc. in question.

ADDITIONAL CHARGES - new and separate charges preferred after others have been preferred against the same accused.

ADMISSION - a statement made by an accused which may admit part of an element, an element, or more than one element of an offense charged, but which falls short of a complete confession to every element of an offense charged.

**AFFIDAVIT** - a statement or declaration reduced to writing and confirmed by the party making it by an oath taken before a person who had authority to administer the oath.

**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** - one of two types of punitive discharges that may be awarded an enlisted member; designed as a punishment of bad conduct and is a separation under conditions other than honorable; may be awarded by a GCM or SPCM.

**BATTERY** - an unlawful, and intentional or culpably negligent, application of force to the person of another by a material agency used directly or indirectly.

**BEYOND A REASONABLE DOUBT** - the degree of persuasion based upon proof such as to exclude not every hypothesis or possibility of innocence, but any fair and rational hypothesis except that of guilt; not an absolute or mathematical certainty, but a moral certainty.

**BODILY HARM** - any physical injury to, or offensive touching of, the person of another -- however slight.

**BONA FIDE** - in good faith.

**BREACH OF THE PEACE** - an unlawful disturbance of the public tranquility by an outward demonstration of a violent or turbulent nature.

**BREAKING ARREST** - going beyond the limits of arrest before being released by proper authority.

**BURGLARY** - the breaking and entering in the nighttime of the dwelling house of another with intent to commit murder, manslaughter, rape, carnal knowledge, larceny, wrongful appropriation, robbery, forgery, maiming, sodomy, arson, extortion, or assault.

**BUSINESS ENTRY** - any writing or record, whether in the form of any entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, made in the regular course of any business, profession, occupation, or calling of any kind.

**CAPTAIN'S MAST** - the term applied, through tradition and usage in the Navy and Coast Guard, to nonjudicial punishment proceedings.

**CAPITAL OFFENSE** - an offense for which the maximum punishment includes the death penalty.

**CARNAL KNOWLEDGE** - an act of sexual intercourse with a female not the accused's wife and who has not attained the age of 16 years.

CHALLENGE - a formal objection to a member of a court or the military judge continuing as such in subsequent proceedings; either for cause, based on a fact or circumstance which has the effect of disqualifying the person challenged from further participation in the proceedings, or peremptorily, without grounds or basis.

CHARGE - a formal statement of the article of the UCMJ which the accused is alleged to have violated.

CHARGE AND SPECIFICATION - a formal description in writing of the offense which the accused is alleged to have committed; each specification, together with the charge under which it is placed, constitutes a separate accusation.

CHIEF WARRANT OFFICER - a warrant officer of the Armed Forces who holds a commission or warrant in warrant officer grades W-2 through W-4.

CIRCUMSTANTIAL EVIDENCE - evidence which tends directly to prove or disprove not a fact in issue, but a fact or circumstance from which, either alone or in connection with other facts, a court may, according to the common experience of mankind, reasonably infer the existence or nonexistence of another fact which is in issue; sometimes called indirect evidence.

CLEMENCY - discretionary action by proper authority to reduce the severity of a punishment.

COLLATERAL ATTACK - an attempt to impeach or challenge the integrity of a court judgment in a proceeding other than that in which the judgment was rendered and outside the normal chain of appellate review.

COMMAND - (1) the authority which a commander in the military service lawfully exercises over his subordinates by virtue of rank or assignment; (2) a unit or units, an organization, or an area under the authority of one individual; (3) an order given by one person to another who, because of the relationship of the parties, is under an obligation or sense of duty to obey the order, including demanding of another to do an act towards commission of a crime.

COMMANDING OFFICER - a commissioned officer in command of a unit or units, an organization, or an area of the Armed Forces.

COMMISSIONED OFFICER - an officer of the Naval Service or Coast Guard who holds a commission in an officer grade, Chief Warrant Officer (W-2) and above.

COMMON TRIAL - a trial in which two or more persons are charged with the commission of an offense which, although not jointly committed, was committed at the same time and place and is provable by the same evidence.

COMPETENCY - the presence of those characteristics, or the absence of those disabilities, i.e., exclusionary rules, which renders a particular item of evidence fit and qualified to be presented in court.

CONCURRENT JURISDICTION - jurisdiction which is possessed over the same parties or subject matter at the same time by two or more separate tribunals.

CONCURRENT SERVICE OF PUNISHMENTS - two or more punishments being served at the same time.

CONFESSION - a statement made by an accused which admits each and every element of an offense charged.

CONFINEMENT - physical restraint, imposed by either oral or written orders of competent authority, depriving a person of his freedom.

CONSECUTIVE SERVICE OF PUNISHMENTS - two or more punishments being served in series, one after the other.

CONSPIRACY - a combination of two or more persons who have agreed to accomplish, by concerted action, an unlawful purpose or some purpose not in itself unlawful, by unlawful means, and the doing of some act by one or more of the conspirators to effect the object of that agreement.

CONSTRUCTIVE ENLISTMENT - a valid enlistment arising in a situation where the initial enlistment was void, but the enlistee unconditionally continues in the military and accepts military benefits.

CONSTRUCTIVE KNOWLEDGE - a state wherein a person is inferred to have knowledge of an order, regulation, fact, etc. as a result of having a reasonable opportunity to gain such knowledge, e.g., presence in an area where the relevant information was commonly available.

CONTEMPT - in Military Law, the use of any menacing word, sign or gesture in the presence of the court, or the disturbance of its proceedings by any riot or disorder.

CONTRABAND - items, the possession of which is in and of itself illegal.

CONVENING AUTHORITY - the officer having authority to create a court-martial and who created the court-martial in question, or his successor in command.

CONVENING ORDER - the document by which a court-martial is created, which specifies the type of court, lists the personnel of the court, such as members, counsel and military judge, and, when appropriate, the specific authority by which the court is created.

CORPUS DELICTI - the body of a crime; facts or circumstances showing that the crime alleged has been committed by someone.

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 factfinding body convened under the authority of Article 135, UCMJ, whose function it is to search out, develop, analyze, and record all available information relative to the matter under investigation.



**COURT OF MILITARY APPEALS** - the highest appellate court established under the UCMJ to review the records of certain trials by court-martial, consisting of three judges appointed from civil life by the President, by and with the advice and consent of the Senate, for a term of fifteen years.

**COURT OF MILITARY REVIEW** - an intermediate appellate court established by each Judge Advocate General to review the record of certain trials by court-martial; formerly known as Board of Review.

**CREDIBILITY OF A WITNESS** - his worthiness of belief.

**CULPABLE** - deserving blame; involving the breach of a legal duty or the commission of a fault.

**CULPABLE NEGLIGENCE** - Culpable negligence is a degree of negligence greater than simple negligence. This form of negligence is also referred to as recklessness and arises whenever an accused recognizes a substantial unreasonable risk yet consciously disregards that risk.

**CUSTODIAL INTERROGATION** - questioning initiated by law enforcement officers or others in authority after a suspect has been taken into custody or otherwise deprived of his freedom of action in any significant way.

**CUSTODY** - that restraint of free movement which is imposed by lawful apprehension.

**CUSTOM** - a practice which fulfills the following conditions: (a) it must be long continued; (b) it must be certain or uniform; (c) it must be compulsory; (d) it must be consistent; (e) it must be general; (f) it must be known; (g) it must not be in opposition to the terms and provisions of a statute or lawful regulation or order.

**DAMAGE** - any physical injury to property.

**DANGEROUS WEAPON** - a weapon used in such a manner that it is likely to produce death or grievous bodily harm.

**DECEIVE** - to mislead, trick, cheat, or to cause one to believe as true that which is false.

**DEFERRAL** - discretionary action by proper authority, postponing the running of the confinement portion of a sentence, together with a lack of any post-trial restraint.

**DEFRAUD** - to deprive another person of something of value by cheating, deceiving, misleading, tricking, or causing that person to believe as true something which is false.

**DEMONSTRATIVE EVIDENCE** - anything, such as charts, maps, photographs, models, drawings, etc., used to help construct a mental picture of a location or object which is not readily available for introduction into evidence.

**DEPOSITION** - the testimony of a witness taken out of court, reduced to writing, under oath or affirmation, before a person empowered to administer oaths, in answer to interrogatories (questions) and cross-interrogatories submitted by the parties desiring the deposition and the opposite party, or based on oral examination by counsel for accused and the prosecution.

**DERELICTION IN THE PERFORMANCE OF DUTY** - willfully or negligently failing to perform assigned duties or performing them in a culpably inefficient manner.

**DESIGN** - on purpose, intentionally, or according to plan and not merely through carelessness or by accident; specifically intended.

**DESTROY** - sufficient injury to render property useless for the purpose for which it was intended, not necessarily amounting to complete demolition or annihilation.

**DETENTION OF PAY** - the temporary withholding of pay resulting from a court-martial sentence or nonjudicial punishment. 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** - the most severe punitive discharge; reserved for those warrant officers (W-1) and enlisted members who should be separated under conditions of dishonor, after having been convicted of serious offenses of a civil or military nature warranting severe punishment; it may be awarded only by a GCM.

**DISORDERLY CONDUCT** - behavior of such a nature as to affect the peace and quiet of persons who may witness the same and who may be disturbed or provoked to resentment thereby.

**DISRESPECT** - words, acts, or omissions that are synonymous with contempt and amount to behavior or language which detracts from the respect due the authority and person of a superior.

**DOCUMENTARY EVIDENCE** - evidence supplied by writings and documents.

**DOMINION** - control of property; possession of property with the ability to exercise control over it.

**DRUNKENNESS** - (1) as an offense under the UCMJ, intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties; (2) as a defense in rebuttal of the existence of a criminal element involving premeditation, specific intent, or knowledge, intoxication which amounts to a loss of reason preventing the accused from harboring the requisite premeditation, specific intent, or knowledge; (3) as a defense to general intent offenses, involuntary intoxication which amounts to a loss of reason preventing the accused from knowing the nature of his act or the natural and probable consequences thereof.

DUE PROCESS - a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the enforcement and protection of private rights; such an exercise of the powers of the government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe.

DURESS - unlawful constraint on a person whereby he is forced to do some act that he otherwise would not have done.

DYING DECLARATION - a statement by a victim, concerning the circumstances surrounding his death, made while in extremis and while under a sense of impending death and without hope of recovery.

ELEMENTS - the essential ingredients of an offense which are to be proved at the trial; the acts or omissions which form the basis of any particular offense.

ENTRAPMENT - a defense available when actions of an agent of the government intentionally instill in the mind of the accused a disposition to commit a criminal offense, when the accused has no notion, predisposition, or intent to commit the offense.

ERROR - a failure to comply with the law in some way at some stage of the proceedings.

EVIDENCE - any species of proof, or probative matter, legally presented at trial, through the medium of witnesses, records, documents, concrete objects, demonstrations, etc., for the purpose of inducing belief in the minds of the triers of fact.

EXCULPATORY - anything that would exonerate a person of wrongdoing.

EXECUTION OF HIS OFFICE - engaging in any act or service required or authorized to be done by statute, regulation, the order of a superior, or military usage.

EX POST FACTO LAW - a law passed after the occurrence of a fact or commission of an act which makes the act punishable, imposes additional punishment, or changes the rules of evidence to the disadvantage of a party.

EXTRA MILITARY INSTRUCTION - extra tasks assigned to one exhibiting behavioral or performance deficiencies for the purpose of correcting those deficiencies through the performance of the assigned tasks; also known as Additional Military Duty or Additional Military Instruction.

FEIGN - to misrepresent by a false appearance or statement, to pretend, to simulate or to falsify.

FINE - a type of court-martial punishment in the nature of a pecuniary judgment against an accused, which, when ordered executed, makes him immediately liable to the United States for the entire amount of money specified.

**FORMER JEOPARDY** - a defense in bar of trial that no person shall be tried for the same offense by the same sovereign a second time without his consent; also known as Double Jeopardy.

**FORMER PUNISHMENT** - a defense in bar of trial that no person may be tried by court-martial for a minor offense for which punishment under Articles 13 or 15, UCMJ, has been imposed.

**FORMER TESTIMONY** - testimony of a witness given in a civil or military court at a former trial of the accused, or given at a formal pretrial investigation of an allegation against the accused, in which the issues were substantially the same.

**FORFEITURE OF PAY** - a type of punishment depriving the accused of all or part of his pay as it accrues.

**GREVIOUS BODILY HARM** - a serious bodily injury; does not include minor injuries, such as a black eye or a bloody nose, but does include fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs and other serious bodily injuries.

**HABEAS CORPUS** - "You have the body"; an order from a court of competent jurisdiction which requires the custodian of a prisoner to appear before the court to show cause why the prisoner is confined or detained.

**HARMLESS ERROR** - an error of law which does not materially prejudice the substantial rights of the accused.

**HAZARD A VESSEL** - to put a vessel in danger of damage or loss.

**HEARSAY** - an assertive statement, or conduct, which is offered in evidence to prove the truth of the assertion, but which was not made by the declarant while a witness before the court in the hearing in which it is offered.

**IN CONCERT WITH** - together with, in accordance with a design or plan, whether or not such design or plan was preconceived.

**INCAPACITATION** - the physical state of being unfit or unable to perform properly.

**INCULPATORY** - anything that implicates a person in a wrongdoing.

**INDECENT** - an offense to common propriety; offending against modesty or delicacy; grossly vulgar, or obscene.

**INFERENCE** - a fact deduced from another fact or facts shown by the state of the evidence.

**INSANITY** - see, MENTAL CAPACITY and MENTAL RESPONSIBILITY, infra.

**INSPECTION** - an official examination of persons or property to determine the fitness or readiness of a person, organization, or equipment, not made with a view to any criminal action.

INTENTIONALLY - deliberately and on purpose; through design, or according to plan, and not merely through carelessness or by accident.

IPSO FACTO - by the very fact itself.

JOINT OFFENSE - an offense committed by two or more persons acting together in pursuance of a common intent.

JOINT TRIAL - the trial of two or more persons charged with committing a joint offense.

JURISDICTION - the power of a court to hear and decide a case and to award an appropriate punishment.

KNOWINGLY - with knowledge; consciously, intelligently.

LASCIVIOUS - tending to excite lust; obscene; relating to sexual impurity; tending to deprave the morals with respect to sexual relations.

LESSER INCLUDED OFFENSE - an offense necessarily included in the offense charged; an offense containing some but not all of the elements of the offense charged, so that if one or more of the elements of the offense charged is not proved, the evidence may still support a finding of guilty of the included offense.

LEWD - lustful or lecherous; incontinence carried on in a wanton manner.

LOST PROPERTY - property which the owner has involuntarily parted with by accident, neglect, or forgetfulness and does not know where to find or recover it.

MATTER IN AGGRAVATION - any circumstances attending the commission of a crime which increases the enormity of the crime.

MATTER IN EXTENUATION - any circumstances serving to explain the commission of the offense, including the reasons that actuated the accused, but not extending to a legal justification.

MATTER IN MITIGATION - any circumstance having for its purpose the lessening of the punishment to be awarded by the court and the furnishing of grounds for a recommendation of clemency.

MENTAL CAPACITY - the ability of the accused at the time of trial to understand the nature of the proceedings against him and to conduct or cooperate intelligently in his defense.

MENTAL RESPONSIBILITY - the ability of the accused at the time of commission of an offense to appreciate the criminality of his or her conduct, or to conform his or her conduct to the requirements of the law.

MILITARY DUE PROCESS - due process under protections and rights granted military personnel by the Constitution or laws enacted by Congress.

MILITARY JUDGE - a commissioned officer, certified as such by the respective Judge Advocates General, who presides over all open sessions of the court-martial to which he is detailed.

MISLAID PROPERTY - property which the owner has voluntarily put, for temporary purposes, in a place afterwards forgotten or not easily found.

MISTRIAL - discretionary action of the military judge, or the president of a special court-martial without a military judge, in withdrawing the charges from the court where such action appears manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the trial.

MORAL TURPITUDE - an act of baseness, vileness, or depravity in private or social duties, which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man.

MOTION TO DISMISS - a motion raising any defense or objection in bar of trial.

MOTION FOR APPROPRIATE RELIEF - a motion to cure a defect of form or substance which impedes the accused in properly preparing for trial or conducting his defense.

MOTION TO SEVER - a motion by one or more of several co-accused that he be tried separately from the other or others.

NEGLIGENCE - unintentional conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm. The failure of a person to exercise the care that a reasonably prudent person would exercise under similar circumstances; something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would or would not do.

NONJUDICIAL PUNISHMENT - punishment imposed under Article 15, UCMJ, for minor offenses, without the intervention of a court-martial.

NONPUNITIVE MEASURES - those leadership techniques, not a form of informal punishment, which may be used to further the efficiency of a command.

OATH - a formal external pledge, coupled with an appeal to the Supreme Being, that the truth will be stated.

OBJECTION - a declaration to the effect that the particular matter or thing under consideration is not done or admitted with the consent of the opposing party, but is by him considered improper or illegal, and referring the question of its propriety or legality to the court.

OFFICE HOURS - the term applied, through tradition and usage in the Marine Corps, to nonjudicial punishment proceedings.

OFFICER - any commissioned or warrant officer of the Armed Forces, Warrant Officer (W-1) and above.

OFFICER IN CHARGE - a member of the Armed Forces designated as such by appropriate authority.

OFFICIAL RECORD - a writing made as a record of a fact or event, whether the writing is in a regular series of records or consists of a report, finding, or certificate and made by any person within the scope of his official duties provided those duties included a duty to know, or to ascertain through appropriate and trustworthy channels of information, the truth of the fact or event, and to record such fact or event.

ON DUTY - in the exercise of duties of routine or detail, in garrison, at a station, or in the field: does not relate to those periods when, no duty being required of them by order or regulations, military personnel occupy the status of leisure known as "off duty" or "on liberty."

OPERATING A VEHICLE - driving or guiding a vehicle while in motion, either in person or through the agency of another, or setting its motive power in action or the manipulation of the controls so as to cause the particular vehicle to move.

OPINION OF THE COURT - a statement by a court of the decision reached in a particular case, expounding the law as applied to the case, and detailing the reasons upon which the decision is based.

ORAL EVIDENCE - the sworn testimony of a witness received at trial.

OWNER - a person who has the superior right to possession of property in the light of all conflicting interests therein.

PAST RECOLLECTION RECORDED - memoranda prepared by a witness, or read by him and found to be correct, reciting facts or events which represent his past knowledge possessed at a time when his recollection was reasonably fresh as to the facts or events recorded.

PER CURIAM - "by the court"; a phrase used in the report of the opinion of a court to distinguish an opinion of the whole court from an opinion written by any one judge.

PER SE - taken alone; in and of itself; inherently.

PERPETRATOR - one who actually commits the crime, either by his own hand, by an animate or inanimate agency, or by an innocent agent.

PLEADING - the written formal indictment by which an accused is charged with an offense; in Military Law, the charges and specifications.

POSSESSION - actual physical control and custody over an item of property.

PREFERRAL OF CHARGES - the formal accusation against an accused by an accuser signing and swearing to the charges and specifications.

PREJUDICIAL ERROR - an error of law which materially affects the substantial rights of the accused and requiring corrective action.

PRESUMPTION - a fact which the law requires the court to deduce from another fact or facts shown by the state of the evidence unless that fact is overcome by other evidence before the court.

PRETRIAL INVESTIGATION - an investigation pursuant to Article 32, UCMJ, that is required before convening a GCM, unless waived by the accused.

PRIMA FACIE CASE - introduction of substantial evidence which, together with all proper inferences to be drawn therefrom and all applicable presumptions, reasonably tends to establish every essential element of an offense charged or included in any specification.

PRINCIPAL - (1) one who aids, abets, counsels, commands, or procures another to commit an offense which is subsequently perpetrated in consequence of such counsel, command or procuring, whether he is present or absent at the commission of the offense; (2) the perpetrator.

PROBABLE CAUSE - (1) for apprehension, a reasonable grounds for believing that an offense has been committed and that the person apprehended committed it; (2) for pretrial restraint, reasonable grounds for believing that an offense was committed by the person being restrained; and (3) for search, a reasonable grounds for believing that items connected with criminal activity are located in the place or on the person to be searched.

PROVOKING - tending to incite, irritate, or enrage another.

PROXIMATE CAUSE - that which, in a natural and continuous sequence, unbroken by an efficient intervening cause, produces a result, and without which the result would not have occurred.

PROXIMATE RESULT - a reasonably foreseeable result ordinarily following from the lack of care complained of, unbroken by any independent cause.

PUNITIVE ARTICLES - Articles 78 through 134, UCMJ, which generally describe various crimes and offenses and state how they may be punished.

PUNITIVE DISCHARGE - a discharge imposed as punishment by a court-martial, either a bad conduct discharge or a dishonorable discharge.

RAPE - an act of sexual intercourse with a female, not the accused's wife, done by force and without her consent.

REAL EVIDENCE - any physical object offered into evidence at trial.

RECKLESSNESS - an act or omission exhibiting a culpable disregard for the foreseeable consequences of that act or omission; a degree of carelessness greater than simple negligence.

RECONSIDERATION - the action of the convening authority in returning the record of trial to the court for renewed consideration of a ruling of the court dismissing a specification on motion, where the ruling of the court does not amount to a finding of not guilty.



REFERRAL OF CHARGES - the action of a convening authority in directing that a particular case be tried by a particular court-martial previously created.

RELEVANCY - that quality of evidence which renders it properly applicable in proving or disproving any matter in issue; a tendency in logic to prove or disprove a fact which is in issue in the case.

REMEDIAL ACTION - action taken by proper reviewing authorities to correct an error or errors in the proceedings or to offset the adverse impact of an error.

REMISSION - action by proper authority interrupting the execution of a punishment and cancelling out the punishment remaining to be served, while not restoring any right, privilege or property already affected by the executed portion of the punishment.

REPROACHFUL - censuring, blaming, discrediting, or disgracing of another's life or character.

RESISTING APPREHENSION - an active resistance to the restraint attempted to be imposed by the person apprehending.

RESTRICTION IN LIEU OF ARREST - moral restraint, less severe than arrest, imposed upon a person by oral or written orders limiting him to specified areas of a military command, with the further provision that he will participate in all military duties and activities of his organization while under such restriction.

RESTRICTION TO LIMITS - moral restraint imposed as punishment.

REVISION - a procedure to correct an apparent error or omission or improper or inconsistent action of a court-martial with respect to a finding or a sentence.

SALE - an actual or constructive delivery of possession of property in return for a valuable consideration and the passing of such title as the seller may possess, whatever that title may be.

SEARCH - a quest for incriminating evidence.

SEIZURE - to take possession of forcibly, to grasp, to snatch, or to put into possession.

SELF-DEFENSE - the use of reasonable force to defend oneself against immediate bodily harm threatened by the unlawful act of another.

SELF-INCRIMINATION - the giving of evidence against oneself which tends to establish guilt of an offense.

SET ASIDE - action by proper authority voiding the proceedings and the punishment awarded and restoring all rights, privileges and property lost by virtue of the punishment imposed.

SIMPLE NEGLIGENCE - the absence of due care, i.e., an act or omission by a person who is under a duty to use due care which exhibits a lack of that degree of care for the safety of others which a reasonably prudent man would have exercised under the same or similar circumstances.

SLEEP - a period of rest for the body and mind during which volition and consciousness are in partial or complete abeyance and the bodily functions partially suspended; a condition of unconsciousness sufficient sensibly to impair the full exercise of the mental and physical faculties.

SOLICITATION - any statement, oral or written, or any other act or conduct, either directly or through others, which may reasonably be construed as a serious request or advice to commit a criminal offense.

SPECIFICATION - a formal statement of specific acts and circumstances relied upon as constituting the offense charged.

SPONTANEOUS EXCLAMATION - an utterance concerning the circumstances of a startling event made by a person while he was in such a condition of excitement, shock, or surprise, caused by his participation in or observation of the event, as to warrant a reasonable inference that he made the utterance as an impulsive and instinctive outcome of the event, and not as a result of deliberation or design.

STATUTE OF LIMITATIONS - the rule of law which, unless waived, establishes the time within which an accused must be charged with an offense to be tried successfully.

STRAGGLE - to wander away, to rove, to stray, to become separated from, or to lag or linger behind.

STRIKE - to deliver an intentional blow with anything by which a blow can be given.

SUBPOENA - a formal written instrument or legal process that serves to summon a witness to appear before a certain tribunal and to give testimony.

SUBPOENA DUCES TECUM - a formal written instrument or legal process which commands a witness who has in his possession or control some document or evidentiary object that is pertinent to the issues of a pending controversy to produce it before a certain tribunal.

SUBSCRIBE - to write one's signature on a written instrument as an indication of consent, approval, or attestation.

SUPERIOR COMMISSIONED OFFICER - a commissioned officer who is superior in rank or command.

SUPERVISORY AUTHORITY - an officer exercising General Court-Martial jurisdiction who acts as reviewing authority for SCM and SPCM records after the convening authority has acted.

SUSPENSION - action by proper authority to withhold the execution of a punishment for a probationary period pending good behavior on the part of the accused.

**THREAT** - an avowed present determination or intent to injure the person, property, or reputation of another presently or in the future.

**TOLL** - to suspend or interrupt the running of.

**USAGE** - a general habit, mode or course of procedure.

**UTTER** - to make any use of or attempt to make any use of an instrument known to be false by representing, by words or actions, that it is genuine.

**VERBATIM** - in the exact words; word for word.

**WANTON** - behavior of such a highly dangerous and inexcusable character as to exhibit a callous indifference or total disregard for the probable consequences to the personal safety or property of other persons; heedlessness.

**WARRANT OFFICER** - an officer of the Armed Forces who holds a commission or warrant in a warrant officer grade, pay grades W-1 through W-4.

**WILLFUL** - deliberate, voluntary and intentional, as distinguished from acts committed through inadvertance, accident, or ordinary negligence.

**WRONGFUL** - contrary to law, regulation, lawful order or custom.

CHAPTER XXIII

PART 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
CBW	Confinement on Bread and Water
CC	Correctional Custody
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

<b>IO</b>	<b>Investigating Officer</b>
<b>JAG</b>	<b>Judge Advocate General</b>
<b>JAGC</b>	<b>Judge Advocate General's Corps</b>
<b>JAG Manual; JAGMAN</b>	<b>Manual of the Judge Advocate General of the Navy</b>
<b>LIO</b>	<b>Lesser Included Offenses</b>
<b>LO</b>	<b>Legal Officer</b>
<b>LOD</b>	<b>Line of duty</b>
<b>MCM</b>	<b>Manual for Courts-Martial, United States, 1984</b>
<b>MFNG</b>	<b>Motion for a finding of not guilty</b>
<b>MJ</b>	<b>Military Judge</b>
<b>MILPERSMAN</b>	<b>Naval Military Personnel Manual (formerly BUPERSMAN)</b>
<b>MP</b>	<b>Military Police</b>
<b>Mil.R.Evid.</b>	<b>Military Rules of Evidence</b>
<b>N/A</b>	<b>Not Applicable</b>
<b>NCO</b>	<b>Noncommissioned Officer</b>
<b>NG</b>	<b>Not guilty</b>
<b>NIS</b>	<b>Naval Investigative Service</b>
<b>NJP</b>	<b>Nonjudicial Punishment</b>
<b>NLSO</b>	<b>Naval Legal Service Office</b>
<b>NAVY REGS</b>	<b>U.S. Naval Regulations, 1973</b>
<b>OEGCMJ</b>	<b>Officer exercising General Court-Martial jurisdiction</b>
<b>OINC; OIC</b>	<b>Officer in Charge</b>
<b>OJAG</b>	<b>Officer of the Judge Advocate General</b>
<b>OOD</b>	<b>Officer of the Deck/Day</b>
<b>OPNAV</b>	<b>Office of the Chief of Naval Operations</b>
<b>OTH</b>	<b>Other Than Honorable Discharge</b>
<b>PCS</b>	<b>Permanent Change of Station</b>

PIO	Preliminary Inquiry Officer
PO	Petty Officer
PTA	Pretrial Agreement
PTI	Pretrial Investigation
PTIO	Pretrial Investigating Officer
RED	Reduction
REST; R	Restriction
SA	Supervisory Authority
SCM	Summary Court-Martial
SECNAV	Secretary of the Navy
SJA	Staff Judge Advocate
S/L	Statute of Limitations
SLO	Staff Legal Officer
SOFA	Status of Forces Agreement
SNCO	Staff Noncommissioned Officer
SP	Shore Patrol
SPCM	Special Court-Martial
SPEC.	Specification
SRB	Service Record Book
TAD	Temporary Additional Duty
TC	Trial Counsel
TENP	Table of Equivalent Nonjudicial Punishments
TEP	Table of Equivalent Punishments
TMP	Table of Maximum Punishments
UA	Unauthorized Absence
UCMJ	Uniform Code 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