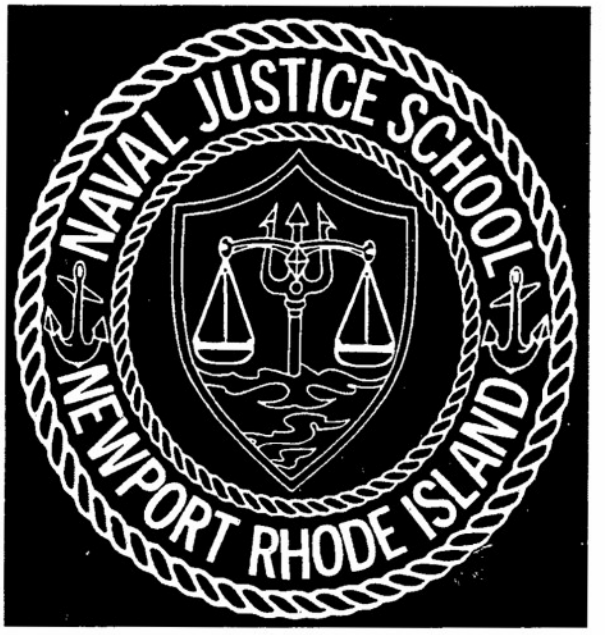
Rules, Regulations, and Laws for the Administration of the Military Justice System

PROCEDURE
Study Guide



NAVAL JUSTICE SCHOOL
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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, 1995* (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

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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*, 350 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) did away with the "service-connection" requirement established by *O'Callahan, supra*. Consequently, ***any*** offense now committed by a servicemember, while on active duty, regardless of its situs, is 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. The focus of nonpunitive measures is to teach and train. No permanent service record book entry is made of their imposition. These nonpunitive measures include administrative censure, extra military instruction, and administrative withholding of privileges. R.C.M. 306(c)(2), MCM [hereinafter R.C.M. ___]; JAGMAN, §§ 0102-0105. 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. Nonjudicial punishment is discussed in Chapter IV, *infra*.

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 SCM 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 SCM officer should be at least a Navy lieutenant or Marine captain when practicable. R.C.M. 1301(a).

a. The function of the SCM is to exercise justice promptly for relatively minor offenses using a simple procedure. The SCM 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 SCM officer performs the functions normally allocated to prosecution, defense, judge, and members.

b. Reporters, interpreters, and clerical personnel may be detailed to assist the SCM officer when appropriate. JAGMAN, § 0130d(2).

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 courts-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, an 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.

C. ***The special court-martial***

1. ***Composition***

a. An SPCM 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 an 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 an 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 an SPCM by a military lawyer certified in accordance with Article 27b 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, § 0130d(2)(a).

2. ***Jurisdictional limits as to persons.*** An 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 courts-martial. *See, e.g.*, Art. 106, UCMJ (spies).

3. ***Jurisdictional limits as to offenses.*** Like the SCM, an 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 GCM 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 an 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, § 0130d(2).

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.

CHAPTER II

MILITARY JUSTICE INVESTIGATIONS
(MILJUS Key Number 921)

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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 preferral of charges is accomplished by the signing and swearing to charges in Block 11 on page 1 of the charge sheet (DD Form 458) by a person subject to the UCMJ. *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 Criminal Investigative Service (NCIS) 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 1137, *U.S. Navy Regulations (1990)*, requires personnel of the naval service to report to proper authority offenses committed by persons in the naval service which come under their observation.

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 Criminal Investigative Service (NCIS)***

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

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

a. Incidents of actual, suspected, or alleged major criminal offenses, except those which are purely military in nature (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 (but not those involving ***consensual*** homosexual conduct);

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

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

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 Manual of the Judge Advocate General*, §§ 0126a & b.

Note: Most, if not all, of the incidents listed in "b" through "j" would constitute "major criminal offenses" as defined in (a), but these incidents are

enumerated separately in SECNAVINST 5520.3B as matters which must be referred to NCIS.

3. ***NCIS may decline investigation.*** NCIS may decline to investigate any case which in its judgment would be fruitless and unproductive. SECNAVINST 5520.3B, para. 6a(2)(a).

4. ***Command action held in abeyance.*** See *Manual of the Judge Advocate General*, § 0126 [hereinafter JAGMAN, § ____]. Upon referral to NCIS, commanding officers receiving information indicating that naval personnel have committed a major Federal offense, including those described in SECNAVINST 5520.3B, 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 NCIS office or his nearest representative for their determination in accordance with SECNAVINST 5520.3B.

5. ***Referral by NCIS to other investigative agencies.*** See JAGMAN, § 0125. If a case is referred by NCIS 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, § 0125.

b. If, following referral of a case to a civilian Federal investigative agency for investigation, the U.S. Attorney declines prosecution, NCIS may resume investigation, and the command may prosecute. JAGMAN, § 0125.

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, § 0125.

d. In the event initial command investigation is necessary, either because immediate referral to NCIS is impossible or because the necessity for such referral is not apparent, steps should be taken to preserve evidence and record changing conditions, and care should be taken not to compromise or impede any subsequent investigation. SECNAVINST 5520.3B, para. 6a(2).

D. ***Fact-finding bodies***

1. Certain types of incidents or offenses may be of such a nature as to require exhaustive scrutiny (e.g., ship groundings; shortages in accounts of ship's stores

or navy exchanges, etc.; extensive fire or explosion; capsizing of a small boat; and other complex or serious incidents). In such cases, a fact-finding body should be convened. The regulations covering fact-finding bodies are contained in the *JAG Manual*. These bodies have thus become known as "*JAG Manual* investigations."

2. The primary function of an administrative fact-finding body is to search out, develop, assemble, analyze, and record all available information about the matter under investigation. JAGMAN, § 0202b. Under appropriate circumstances, they may constitute the ideal method of investigating an alleged or suspected offense. However, a fact-finding body is not to be utilized in lieu of a preliminary inquiry if the only basis for a fact-finding body is to determine disciplinary action. JAGMAN, §§ 0208a & c.

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 NCIS or a fact-finding 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 OFFENSE(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. The Commanding officer should appoint a commissioned officer to serve as the PIO. If none is available, then a senior enlisted should be the PIO.

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. Witnesses usually do not need to be advised of their Art. 31(b) rights.

(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 an 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.

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. This pre-mast screening is commonly used at naval commands, also as "XOI" (XO's inquiry). 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.

G. ***Pre-mast restriction***

- Although Form NAVPERS 1626/7 indicates that such a tool is available, no where in the UCMJ, MCM, or JAGMAN authorizes pre-mast restriction. Pre-mast restriction was previously authorized prior to the 1984 revisions to the MCM, but the forms are still in existence.

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

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

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

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

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

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

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

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

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

PRE-MAST RESTRAINT

☐ PRE TRIAL CONFINEMENT

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

☐ NO RESTRICTIONS

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

INFORMATION CONCERNING ACCUSED

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

-----INFORMATION FROM SERVICE RECORD-----

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

RECORD OF PREVIOUS OFFENSE(S) (Date, type, action taken, etc. Nonjudicial punishment incidents are to be included.)
LIST ALL PRIOR COURTS-MARTIAL AND CAPTAIN'S MASTS. INCLUDE: DATE OF COURT OR MAST; TYPE OF COURT (SPCM, NJP); NATURE OF OFFENSE (ARTICLES OF UCMJ VIOLATED AND DESCRIPTION OF OFFENSE, I.E., DISRESPECT TO SUPERIOR PETTY OFFICER); SENTENCE IMPOSED.

Appendix 2-1

PRELIMINARY INQUIRY REPORT

From: Commanding Officer
To: NAME OF PRELIMINARY INQUIRY OFFICER
Date: _____

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

REMARKS OF DIVISION OFFICER (Performance of duty, etc.)
REMARKS OF DIVISION OFFICER MAY BE SUMMARIZED BY PRELIMINARY INQUIRY OFFICER, OR SECTION MAY BE COMPLETED PERSONALLY BY ACCUSED'S DIVISION OFFICER.

NAME OF WITNESS	RATE/GRADE	DIV/DEPT	NAME OF WITNESS	RATE/GRADE	DIV/DEPT
NAMES OF PERSONS PRELIMINARY INQUIRY OFFICER DETERMINES TO BE MATERIAL WITNESSES. (INCLUDE THOSE REQUESTED BY ACCUSED.)					

RECOMMENDATION AS TO DISPOSITION:

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

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

COMMENT *(Include data regarding availability of witnesses, summary of expected evidence, conflicts in evidence, if expected. Attach statements of witnesses, documentary evidence such as a service record entries 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 NOTICED.

_____
(Signature of Investigation Officer)

ACTION OF EXECUTIVE OFFICER

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

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

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

WITNESS | SIGNATURE OF ACCUSED

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

ACTION OF COMMANDING OFFICER

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

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

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

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

FINAL ADMINISTRATIVE ACTION

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

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

UNIT PUNISHMENT BOOK (5812)
NAVMC 10132 (Rev. 10-81) (*8-75 EDITION WILL BE USED*)
SN 0000-00-002-1305 U/I: PD (*100 sheets per pad*)

← Staple Additional pages here.

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

1. INDIVIDUAL *(Last name, first name, middle initial)*	2. GRADE	3. SSN
4. UNIT 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. t (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. Completed by officer taking action in item 8. (Signature of CO who took disposition in 8 and 9) _____	12. DATE OF NOTICE TO ACCUSED OF FINAL DISPOSITION TAKEN. Date accused informed of NJP awarded.	
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 t (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 (tF 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 command.	
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, as appropriate, has been completed. Initials of immediate CO or "8y direction" upon completion of Admin Action (SR8/Unit Diary)	

Appendix 2-2

CHAPTER III

INFORMAL DISCIPLINARY ACTIONS: NONPUNITIVE MEASURES

PROCEDURE STUDY GUIDE

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, Subj: STANDARD ORGANIZATION AND REGULATIONS OF THE U.S. NAVY, para. 142.2; para. 1300.1b, Marine Corps Manual.

The term "nonpunitive measures" is used to refer to various leadership techniques which can be used to develop acceptable behavioral standards in members of a command. Nonpunitive measures generally fall into three areas: nonpunitive censure, extra military instruction (EMI), and administrative withholding of privileges. Commanding officers and officers in charge are authorized and expected to use nonpunitive measures to further the efficiency of their commands. *See* R.C.M. 306(c)(2), MCM, 1984 [hereinafter R.C.M. ____]; *Manual of the Judge Advocate General*, JAGINST 5800.7C, section 0102 [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, § 0102. Indeed, whatever type of nonpunitive measure is applied, it must further the efficiency of their commands or units. This chapter discusses the various types of nonpunitive measures and provides guidelines for their correct application.

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 0102 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 "nonpunitive letter of caution" (NPLOC).

A sample NPLOC 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 Chief of Naval Personnel (CHNAVPERS) or to Headquarters Marine Corps (HQMC). JAGMAN, § 0105b(2). Additionally, such letters may not be quoted in or appended to fitness reports or evaluations, included as enclosures to *JAG Manual* or other investigative reports, or otherwise included in the official departmental records of the recipient. *Id.* The deficient performance of duty or other facts which led to the issuance of a letter of caution can be mentioned, however, in the recipient's next fitness report or enlisted evaluation. In this regard, the requirements of the *JAG Manual* are met by avoiding any reference to the fact that a nonpunitive letter of caution was issued. There is only one exception to the rule that letters of censure are not forwarded to CHNAVPERS or HQMC: Secretarial letters of censure issued by the Secretary of the Navy are submitted for inclusion in the recipient's service records. JAGMAN, § 0105b(2). Secretarial letters of censure are actually punitive in nature and, although no appeal is authorized, a rebuttal may be submitted. JAGMAN, § 0114(b).

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 behavorial or performance deficiencies for the purpose of correcting those deficiencies through the performance of the assigned tasks. Normally such tasks are performed in addition to normal duties.

Because this kind of leadership technique is more severe than nonpunitive censure, the law has placed some significant restraints on the commander's discretion in this area.

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

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 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, §§ 0103b(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, § 0104a. Denial of privileges is a more severe leadership measure than either censure or EMI because denial of privileges does not necessarily involve or require an instructional purpose. Examples of privileges that may be withheld can be found in section 0104 of the *JAG Manual*. They include such things as special liberty, 72-hour liberty, exchange of duty, special command programs, access to base or ship movies, access to enlisted or officers' clubs, hobby shops, and parking privileges. It may also encompass such things as withholding of special pay and commissary and exchange privileges, provided such withholding complies with applicable rules and regulations and is otherwise in accordance with law.

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.)

0307 LIBERTY RISK

A. ***Basis***. There are two recognized purposes behind a lawful liberty risk program: (1) the essential protection of the foreign relations of the United States, and (2) international legal hold restriction. The commander has substantial discretion in deciding to place a member on liberty risk; however, the decision should generally be limited to cases involving a serious breach of the peace or flagrant discredit to the Navy. Contrary to the beliefs and desires of many commanding officers (COs), the program applies ***only*** overseas, either in a foreign country or in foreign territorial waters. Remember that the deprivation of normal liberty, except as specifically authorized under the UCMJ, is illegal.

B. ***Due Process.*** The commander must afford adequate administrative due process safeguards. After reviewing each case individually, the commander should advise the member in writing of assignment to the program, the basis for the action, and the opportunity to respond (e.g., request mast). The commander should consider whether less restrictive means (e.g., liberty hours) will be effective in a given case before curtailing all liberty. The command should use incremental categories ("A," "B," "C," "D") where possible. The CO must periodically review each assignment to assess whether continued curtailment of liberty is justified.

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

APPENDIX A

INSTRUCTIONS FOR PRELIMINARY INQUIRY OFFICERS (PIOs)

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

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

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

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

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

e. originals or copies of documentary evidence;

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

g. any additional comments by the investigator as desired.

2. ***Objectives***

a. The PIOs primary objective is to collect all available evidence pertaining to the alleged offense(s). As a first step, the PIO should be familiar with those paragraphs in Part IV of the *Manual for Courts-Martial, 1984,* describing the offense(s). Within each paragraph is a section entitled "elements," which lists the elements of proof for that offense. The PIO must be careful to focus on the correct variation. The elements of proof should be copied down to guide the PIO in searching for the relevant evidence. The PIO is to consider everything which tends to prove or disprove an element of proof.

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

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

a. The PIO should not begin by interrogating the accused because, if guilty, the accused is the person with the greatest motive to lie. The interrogator should meet with the accused last, when thoroughly prepared. Even when the accused confesses guilt, the PIO should nevertheless collect independent evidence corroborating the confession.

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

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

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

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

6. ***Rights advisement***

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

PIO should sign the witness line on the front of NAVPERS 1626/7, next to the accused's acknowledgment.

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

7. ***Interrogate the accused.*** The accused may be questioned ***only*** after knowingly and intelligently waiving all constitutional and statutory rights. Such waiver, if made, should be recorded on a copy of the suspect's statement form which follows. If the accused asks questions regarding the waiver of these rights, the PIO must decline to answer or give any advice on that question. The decision must be left to the accused. Other than advising the accused of the rights as stated in paragraph 6b above, the PIO should never give any other form of legal advice to the accused. If the accused wants a lawyer, NLSO judge advocates are available.

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

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

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

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

APPENDIX B

SAMPLE INVESTIGATOR'S REPORT

INVESTIGATOR'S REPORT IN THE CASE OF _____

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

2. Witnesses interviewed (not the accused).

NAME	PHONE	Signed statement	Summary of interview

4. Documentary evidence:

Description	Original or copy	Attached or location

INVESTIGATOR'S REPORT IN THE CASE OF _____

5. Real evidence:

Description	Name of Custodian	Custodian's Phone number

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

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

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

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

10. Accused waived rights. Yes___ No___

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

    Accused's signed statement attached ___

    Summary of interrogation attached ___

APPENDIX C

WITNESS' STATEMENT

Name _____Grade / Rate _____Social Security No._____

Command _____Division _____
TAD from / to _____ until _____

Whereabouts for next 30 days _____ Phone _____

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

_____
_____
_____
_____
_____
_____
_____
_____
_____
_____

(use additional pages if necessary)

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

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

Sworn to before me this date.

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

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

APPENDIX D

SUSPECT'S RIGHTS ACKNOWLEDGEMENT / STATEMENT

(*see* JAGMAN 0170)

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

RIGHTS

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

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

_____

_____ . . . . . _____

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

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

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

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

WAIVER OF RIGHTS

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

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

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

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

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

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

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

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

_____
SIGNATURE (ACCUSED / SUSPECT)

_____

_____

_____

APPENDIX E

REQUEST FOR LEGAL HOLD

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

Subj: REQUEST FOR LEGAL HOLD ICO _____

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

Name	Rank	SSN	Unit	RTD

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

3. The request for legal services in the subject case (was) (will be) forwarded to the Office of the Staff Judge Advocate (on) (not later than) _____, 19__.

SIGNATURE

APPENDIX F

SAMPLE EMI ASSIGNMENT ORDER

(Date)

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

Subj: ASSIGNMENT OF EXTRA MILITARY INSTRUCTION (EMI)

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

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

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

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

4. This EMI shall be performed between 1630 and 1800 from Monday 1 June 19CY through Friday 5 June 19CY. On Monday, 8 June 19CY, you will present a 30-minute class on this subject to your division.

_____
(Signature)

_____
(Date)

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

_____
(Signature)

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

APPENDIX G

SAMPLE NONPUNITIVE LETTER OF CAUTION

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

Subj: NONPUNITIVE LETTER OF CAUTION

Ref: (a) Report of JAG Investigation of 7 Sep 19CY
(b) JAGMAN, § 0105
(c) R.C.M. 306(c)(2), MCM 1984

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

2. The investigation disclosed that, as Assistant Division Officer, on 19 July 19CY, you participated in the writing and printing of a fake message. After reviewing the fake message, you noted that there had been an unauthorized modification to the classification line and directed that it be corrected. Unfortunately, you failed to verify that this correction had been made and, when the correction was not made, the next message still had the error in the classification line. When you realized that this message had been transmitted with an error in the classification line, you took steps to retransmit a corrected copy, but you did not notify your superiors.

3. Your performance and judgment during this incident was substandard. As Assistant Division Officer, it was inappropriate for you to participate in the drafting of a fake message. More critical, however, was your failure to notify your superiors that a message with an improper classification line had been transmitted. You are hereby administratively admonished for your actions on 19 July 19CY.

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

E. D. BRICKELL

APPENDIX H

SAMPLE LETTER OF INSTRUCTION

From: Commanding Officer, USS NEVERSAIL (CV 11)
To: LCDR Mike Rowmanage, USN, 987-65-4321/1300
Aviation Fuels Officer, USS NEVERSAIL (CV 11)

Subj: LETTER OF INSTRUCTION

Ref: (a) MILPERSMAN, art. 3410100

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

2. Since your assumption of duties as aviation fuels officer on board NEVERSAIL, you have allowed unauthorized procedures to exist in the Aviation Fuels Division that resulted in the structural damage to JP-5 storage tank 8-39-02J during underway replenishment on 18 July 19CY. You failed to familiarize yourself with appropriate aviation fuels directives and thus you were unable to verify the proceedings in your division. You also failed to ensure all directives were maintained up-to-date. Generally, you relied totally upon your assistant aviation fuels officer for the day-to-day operation of your division.

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

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

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

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

D. R. PEPPER

CHAPTER IV

NONJUDICIAL PUNISHMENT

(West's Key Number: MILJUS Key Number 525)

PROCEDURE STUDY GUIDE

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,* (MCM, 1995), and Part B of Chapter I of *The Manual of the Judge Advocate General* (JAGMAN) 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.

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 (Arts. 1151 & 0820c, *U.S. Navy Regulations, 1990*) 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 (Art. 0820d, *U.S. Navy Regulations, 1990*) is held for the purpose of publicly and officially commending a member of the command for noteworthy performance of duty.

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 Art. 15, UCMJ, or referring the case to a court-martial.

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

1. They are not a trial, as the term "nonjudicial" implies;

2. a conviction; and

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

0402 NATURE AND REQUISITES OF NONJUDICIAL PUNISHMENT

A. The power to impose nonjudicial punishment

1. Authority under Art. 15, UCMJ, may be exercised by a commanding officer, an officer in charge, or by certain officers to whom the power has been delegated in accordance with regulations of the Secretary of the Navy. Part V, para. 2, MCM, 1995.

a. *A commanding officer*

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

(2) The power to impose NJP is inherent in the office and not in the individual. Thus, the power may be exercised by a person acting as CO, such as when the CO is on leave and the XO succeeds to command. See Articles 1074 - 1087, *U.S. Navy Regulations, 1990*, for complete "succession-to-command" information.

b. *An officer in charge*

Officers in charge exist in the naval service and the Coast Guard. In the Navy and Marine Corps, an officer in charge is a commissioned officer who is designated as officer in charge of a unit by departmental orders, tables of organization, manpower authorizations, orders of a flag or general officer in command or orders of the Senior Officer Present. See JAGMAN, § 0106b; see also Art. 0801, *U.S. Navy Regulations, 1990.*

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

(1) Ordinarily, the power to impose NJP cannot be delegated. One exception is that a flag or general officer in command may delegate all or a portion of his article 15 powers to a "principal assistant" (a senior officer on his staff who is eligible

to succeed to command) with the express approval of the Chief of Naval Personnel or the Commandant of the Marine Corps (CMC). Art. 15(a), UCMJ; JAGMAN, § 0106c.

(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, § 0106d.

2. ***Limitations on power to impose NJP***

No officer may limit or withhold the exercise of any disciplinary authority under article 15 by subordinate commanders without the specific authorization of the Secretary of the Navy. JAGMAN, § 0106e.

3. ***Referral of NJP to higher authority***

a. If a commanding officer determines that his authority under article 15 is insufficient to make a proper disposition of the case, he may refer the case to a superior commander for appropriate disposition. R.C.M. 306(c)(5), 401(c)(2), MCM, 1995.

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

B. ***Persons on whom NJP may be imposed***

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, § 0107a(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, § 0107a(2).

c. ***Personnel of another armed force***

(1) Under present regulations, joint commanders have jurisdication over personnel of Army, Air Force, and Naval Services for nonjudicial punishment purposes; however, there is little guidance with regard to exercising such authority. Until such guidance is received is it recommended that such personnel be punished by their parent service unit for discipline. If this is impractical and the need to discipline is urgent, NJP may be imposed but a report to the Department of the Army or Department of the Air Force is required. See MILPERSMAN, 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 without express permission from the Coast Guard. 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, § 0108a. This policy does not apply to Military Sealift Command (MSC) vessels operating under masters or to organized units embarked on a Navy ship for transportation only. Nevertheless, the commanding officer of a ship may permit a commanding officer or officer in charge of a unit attached to that ship to exercise NJP authority.

The authority of the commanding officer of a vessel to impose NJP on persons embarked on board is further set forth in Arts. 0720-0722, *U.S. Navy Regulations, 1990.*

b. Similar policy provisions apply to the withholding of the exercise of the authority to convene SPCM's or SCM's by the commanding officer of the embarked unit. JAGMAN, § 0122b.

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, §§ 0107b, 0112, and 0112a(2) discuss the exercise of NJP over reservists. A member of a Reserve component who is subject to the UCMJ at the time he / she commits an offense in violation of the UCMJ is not relieved from amenability to NJP or court-martial proceedings solely because of the termination of his / her period of active duty for training or inactive duty training before the allegation is resolved at NJP or court-martial.

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

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

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

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

(d) if the accused waives his right to be present at the NJP hearing, the 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, § 0112a. 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, such punishment cannot be served at any time other than a subsequent active duty training session unless the Secretary of the Navy so approves. Art. 2(d)(5), UCMJ; JAGMAN, §§ 0112a and 0123e.

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

a. Article 15a, UCMJ, and Part V, para. 3, MCM, 1995, 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 *United States v. Edwards*, 43 M.J. 619 (C.C.A. 1995).

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 in a vessel.

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

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 NJP. Article 15, UCMJ, and Part V, para. 1e, MCM, 1995, indicate that the term "minor offense" means misconduct normally not more serious than that usually handled at summary court-martial (where the maximum punishment is thirty days' confinement). These sources also indicate that the nature of the offense and the circumstances surrounding its commission are also factors which should be considered in determining whether an offense is minor in nature. The term "minor offense" ordinarily does not include misconduct which, if tried by general court-martial, could be punished by a dishonorable discharge or confinement for more than one year. The Navy and Marine Corps, however, have taken the position that the final determination as to whether an offense is "minor" is within the sound discretion of the commanding officer.

a. ***Nature of offense.*** The *Manual for Courts-Martial, 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.

b. ***Circumstances.*** The circumstances surrounding the commission of a disciplinary infraction are important to the determination of whether such an infraction is minor. For example, willful disobedience of an order to take ammunition to a unit engaged in combat can have fatal consequences for those engaged in the fight and, hence, is a serious matter. Willful disobedience of an order to report to the barbershop may have much less of an impact on discipline. The offense must provide for both extremes, and it does because of a high maximum punishment limit. When dealing with disciplinary infractions, the commander must be free to consider the impact of circumstance since he is considered the best judge of it; whereas, in disposing of crimes, society at large has an interest coextensive with that of the commander, and criminal defendants are given more extensive safeguards. Hence, the commander's discretion in disposing of disciplinary infractions is much greater than his latitude in dealing with crimes. Where the commander determines the offense to be minor, a statement is recommended on the NAVPERS 1626/7 (Navy) and 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, 1995 and page 4-34, *infra.*

3. ***The statute of limitations is applicable to NJP***

Article 43(b)(2), UCMJ, prohibits the imposition of NJP more than two years after the commission of the offense. This is true even where block 13 of the charge sheet has been completed showing receipt of sworn charges by the officer exercising

summary court-martial jurisdiction. (This action normally tolls the running of the statute of limitations for purposes of trial by court-martial.) For NJP purposes completion of block 13 does not toll the statue of limitations.

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

a. Section 0124 of the *JAG Manual* permits the use of NJP to punish an accused for an offense for which he has been tried by a domestic or foreign civilian court, or whose case has been diverted out of the regular criminal process for a probationary period, or whose case has been adjudicated by juvenile court authorities, if authority is obtained from the officer exercising general court-martial jurisdiction (usually the general or flag officer in command over the command desiring to impose NJP).

b. NJP may not be imposed for an act tried by a court that derives its authority from the United States, such as a Federal district court. JAGMAN, § 0124d. *See also* page 4-34, *infra*.

c. Clearly, cases in which a finding of guilt or innocence has been reached in a trial by court-martial cannot be then taken to NJP. JAGMAN, § 0124d. However, the last point at which cases may be withdrawn from court-martial before findings with a view toward NJP is presently unclear. *See, e.g., Dobzynski v. Green*, 16 M.J. 84 (C.M.A. 1983); and *Jones v. Commander, Naval Air Force, U.S. Atlantic Fleet*, 18 M.J. 198 (C.M.A. 1984).

5. ***Off-base offenses***

a. Commanding officers and officers in charge may dispose of minor disciplinary infractions (which occur on or off-base) at NJP. Unless the off-base offense is a traffic offense (see para. b, *infra*) or one previously adjudicated by civilian authorities (see para. 4a, *supra*), there is no limit on the authority of military authorities to resolve such offenses at NJP.

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

D. ***Hearing procedure***

1. ***Introduction.*** Nonjudicial punishment results from an investigation into unlawful conduct and a subsequent hearing to determine whether and to what extent an accused should be punished. Generally, when a complaint is filed with the commanding officer of an accused, that commander is obligated to cause an inquiry to be made to determine the truth of the matter. When this inquiry is complete, a NAVPERS Form 1626/7

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 NJP case. The Marine Corps NAVMC 10132 is a document used to record NJP only (MCO P5800.8B provides details for the completion of the UPB form). The appropriate report and allied papers are then forwarded to the commander. The ensuing discussion will detail the legal requirements and guidance for conducting an NJP hearing.

2. ***Prehearing advice.*** If, after the preliminary inquiry, the commanding officer determines that disposition by NJP is appropriate, the commanding officer must cause the accused to be given certain advice. Part V, para. 4, MCM, 1995. The commanding officer need not give the advice personally, but may assign this responsibility to the legal officer or another appropriate person. The following advice must be given, however.

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

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

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

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

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

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

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

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

Recordation of the above so-called "*Booker* rights" advice and waivers should be made on page 13 (Navy) or page 12 (Marine Corps) of the accused's service record. The accused's Notification and Election of Rights Form (see JAGMAN appendices a-1-b, A-1-c, or A-1-d, as appropriate) should be attached to the 1026/7 or UPB. A simple, straightforward recordation of the three statements given above was accepted by the Court of Military Appeals in *United States v. Hayes*, 9 M.J. 331 (C.M.A. 1980), as compliance with the *Booker* requirements. In this regard, section 0109 of the *JAG Manual* explains precisely how a command may prepare service record entries which will be admissible at any subsequent trial by court-martial. If an accused waives any or all of the above rights, but refuses to execute such a waiver in writing, the fact that he was properly advised of his rights, waived his rights, but declined to execute a written waiver should be so recorded.

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

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

* **In a recent case, *United States v. Kelly*, 41 M.J. 833 (N.M.C.C.A. 1995), The Navy/Marine Corps Court of Criminal Appeals expressed the opinion that *Booker* warnings were no longer required. Until this case is reviewed by the Court of Appeals for the Armed Forces, the Office of the Judge Advocate General recommends no change in the foregoing policy.**

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

(1) Be informed of his rights under Art. 31, UCMJ;

(2) be accompanied by a spokesperson provided by, or arranged for, the member, and the proceedings need not be unduly delayed to permit the presence of the spokesperson, nor is he entitled to travel or similar expenses;

(3) be informed of the evidence against him relating to the offense;

(4) be allowed to examine all evidence upon which the commanding officer will rely in deciding whether and how much NJP to impose;

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

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

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

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

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

a. ***Personal appearance waived.*** Part V, para. 4c(2), MCM, 1995, provides that, if the accused waives his right to personally appear before the commanding officer, he may choose to submit written matters for consideration by the commanding officer prior to the imposition of NJP. Should the accused make such an election, he should

be informed of his right to remain silent and that any matters so submitted may be used against him in a trial by court-martial. Notwithstanding the accused's expressed desire to waive his right to personally appear at the NJP hearing, he may be ordered to attend the hearing if the officer imposing NJP desires his presence. NAVY JAG MSG 231630Z NOV 84. If the accused waives his personal appearance and NJP is imposed, the commanding officer must ensure that the accused is informed of the punishment as soon as possible.

b. ***Hearing officer.*** Normally, the officer who actually holds the NJP hearing is the commanding officer of the accused. Part V, para. 4c, MCM, 1995, allows the commanding officer or officer in charge to delegate his authority to hold the hearing to another officer under extraordinary circumstances. These circumstances are not detailed, but they must be unusual and significant rather than matters of convenience to the commander. This delegation of authority should be in writing and the reasons for it detailed. It must be emphasized that this delegation does not include the authority to impose punishment. At such a hearing, the officer delegated to hold the hearing will receive all evidence, prepare a summarized record of matters considered, and forward the record to the officer having NJP authority. The commander's decision will then be communicated to the accused personally or in writing as soon as practicable.

c. The record of a formal *JAG Manual* investigation or other fact-finding body (e.g., an article 32 investigation) in which the accused was accorded the rights of a party with respect to an act or omission for which NJP is contemplated may be substituted for the hearing. Part V, para. 4d, MCM, 1995; JAGMAN, § 0110d.

(1) It is possible to impose NJP on the basis of a record of a *JAG Manual* investigation at which the accused was afforded the rights of a party because the rights of a party include all rights to which the accused would have been entitled at the mast hearing plus additional procedural safeguards, such as assistance of counsel. *See* JAGMAN, § 0110d.

(2) If the record of a *JAG Manual* investigation or other fact-finding body discloses that the accused was not accorded all the rights of a party with respect to the act or omission for which NJP is contemplated, the commanding officer must follow the regular NJP procedure or return the record to the fact-finding body for further proceedings to accord the accused all rights of a party. JAGMAN, § 0110d.

d. ***Burden of proof.*** The commanding officer or officer in charge must decide that the accused committed the offenses(s) by a preponderance of the evidence. JAGMAN, § 0110b.

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, 1995. 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, 1995, provides that the accused is entitled to have the hearing open to the public unless the commanding officer determines that the proceedings should be closed for good cause. The commanding officer is not required to make any special arrangements to facilitate the public's access to the proceedings.

i. ***Command observers.*** Section 0110c of the *JAG Manual* encourages the attendance of representative members of the command during all NJP proceedings to dispel erroneous perceptions concerning the fairness and integrity of the proceedings.

j. ***Publication of NJP.*** Commanding officers are authorized to publish the results of NJP under section 0115 of the *JAG Manual*. Within one month following the imposition of NJP, the name of the accused, his rate, offense(s), and their disposition may be published in the plan of the day, posted upon command bulletin boards, and announced at daily formations (Marine Corps) or morning quarters (Navy). If the plan of the day is disseminated to nonmilitary personnel, or the bulletin board is accessible to nonmilitary personnel, the published results may not include the name of the accused.

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

a. ***Dismissal with or without warning***

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

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

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

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

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

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, 1995.

B. ***Maximum limits -- specific***

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

a. By officer exercising general court-martial jurisdiction or a flag/general officer in command, or designated principal assistant. Part V, para. 5b(1)(B), MCM, 1995; JAGMAN, § 0111.

(1) Punitive admonition or reprimand.

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

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

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

b. ***By officers O-4 to O-6.*** Part V, para. 5b(1), MCM, 1995; JAGMAN, § 0111.

(1) Admonition or reprimand.

(2) Restriction: not more than 30 days.

c. ***By officers O-1 to O-3.*** JAGMAN, § 0111.

(1) Admonition or reprimand.

(2) Restriction: not more than 15 days.

d. ***By officer in charge:*** none.

2. ***Enlisted accused.*** Part V, para. 5b(2), MCM, 1995; JAGMAN, § 0111.

a. ***By commanding officers in grades O-4 and above***

(1) Admonition or reprimand.

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

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

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

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

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

(7) Restriction: not more than 60 days.

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

(1) Admonition or reprimand.

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

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

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

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

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

(7) Restriction: not more than 14 days.

C. ***Nature of the punishments***

1. ***Admonition and reprimand.*** Punitive censure for officers must be in writing, although it may be either oral or written for enlisted personnel. Procedures for issuing punitive letters are detailed in section 0114 and app. A-1-g of the *JAG Manual*. *See also* SECNAVINST 1920.6. These procedures must be complied with. It should be noted that reprimand is considered more severe than admonition.

2. ***Arrest in quarters.*** The punishment is imposable only on officers. Part V, para. 5c(3), MCM, 1995. It is a moral restraint, as opposed to a physical restraint. It is similar to restriction, but has much narrower limits. The limits of arrest are set by the officer imposing the punishment and may extend beyond quarters. The term "quarters" includes military and private residences. The officer may be required to perform his regular duties

as long as they do not involve the exercise of authority over subordinates. JAGMAN, § 0111f.

3. ***Restriction.*** Restriction also is a form of moral restraint. Part V, para. 5c(2), MCM, 1995. Its severity depends upon the breadth of the limits as well as the duration of the restriction. If restriction limits are drawn too tightly, there is a real danger that they may amount to either confinement or arrest in quarters, which in the former case cannot be imposed as NJP and in the latter case is not an authorized punishment for enlisted persons. As a practical matter, restriction ashore means that an accused will be restricted to the limits of the command except of course at larger shore stations where the use of recreational facilities might be further restricted. Restriction and arrest are normally imposed by a written order detailing the limits thereof and usually require the accused to log in at certain specified times during the restraint. Article 1103.1 of *U.S. Navy Regulations, 1990,* provides that an officer placed in the status of arrest or restriction shall not be confined to his room unless the safety or the discipline of the ship requires such action.

4. ***Forfeiture.*** A forfeiture applies to basic pay and to sea or foreign duty pay, but not to incentive pay, allowances for subsistence or quarters, etc. "Forfeiture" means that the accused forfeits monies due him in compensation for his military service only; it does not include any private funds. This distinguishes forfeiture from a "fine," which may only be awarded by courts-martial. The amount of forfeiture of pay should be stated in whole dollar amounts, not in fractions, and indicate the number of months affected (e.g., "to forfeit $50.00 pay per month for two months"). Where a reduction is also involved in the punishment, the forfeiture must be premised on the new lower rank, even if the reduction is suspended. Part V, para. 5c(8), MCM, 1995. Forfeitures are effective on the date imposed unless suspended. Where a previous forfeiture is being executed, that forfeiture will be completed before any newly imposed forfeiture will be executed. JAGMAN, § 0112b.

5. ***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, 1995, however, prohibits extra duties which constitute a known safety or health hazard, which constitute cruel and unusual punishment, or which are not sanctioned by the customs of the service involved. Additionally, when imposed upon a petty or noncommissioned officer (E-4 and above), the duties cannot be demeaning to his rank or position. Section 0111d of the *JAG Manual* indicates that the immediate commanding officer of the accused will normally designate the amount and character of extra duty, regardless of who imposed the punishment, and that such duties normally should not extend beyond two (2) hours per day. Guard duty may not be assigned as extra duties and, except in cases of reservists performing inactive training or active duty for training for periods of less than seven (7) days, extra duty shall not be performed on Sunday – although Sunday counts as if such duty was performed.

7. ***Reduction in grade.*** Reduction in pay grade is limited by Part V, para. 5c(7), MCM, 1995, and section 0111e 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, 1995. Specific regulations for conducting correctional custody are found in SECNAVINST 1640.7C and MCO 1626.7B. Time spent in correctional custody is not "lost time." Correctional custody cannot be imposed on grades E-4 and above. *See* JAGMAN, § 0111b. To assist commanders in imposing correctional custody, correctional custody units (CCU's) have been established at major shore installations. The local operating procedures for the nearest CCU should be checked before correctional custody is imposed.

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. *See* Part V, para 5c(5), MCM, 1995. Diminished rations is a restricted diet of 2100 calories per day, and instructions for its use are detailed in SECNAVINST 1640.9. This punishment cannot be imposed upon grades E-4 and above.

D. ***Execution of punishments***

1. ***General rule.*** As a general rule, all punishments, if not suspended, take effect when imposed. Part V, para. 5g, MCM, 1995; JAGMAN, § 0113. This means that the punishment in most cases will take effect when the commanding officer informs the accused of his punishment decision. Thus, if the commanding officer wishes to impose a prospective punishment, one to take effect at a future time, he should simply delay the imposition of NJP altogether. There are, however, several specific rules which authorize the deferral or stay of a punishment already imposed.

a. Deferral of correctional custody or confinement on bread and water or diminished rations. Section 0113b of the *JAG Manual* permits a commanding officer or an officer in charge to defer correctional custody, confinement on bread and water, or confinement on diminished rations for a period of up to 15 days when:

(1) Adequate facilities are not available;

(2) the exigencies of the service so require; or

(3) the accused is found to be not physically fit for the service of these punishments.

b. ***Deferral of restraint punishments pending an appeal from NJP.*** Part V, para. 7d, MCM, 1995, provides that a servicemember who has appealed from NJP may be required to undergo any punishment imposed while the appeal is pending, except that, if action is not taken on the appeal within 5 days after the appeal was submitted, and if the servicemember so requests, any unexecuted punishment involving restraint or extra duties shall be stayed until action on the appeal is taken.

c. ***Interruption of restraint punishments by subsequent NJP's.*** The execution of any nonjudicial (or court-martial) punishment involving restraint will normally be interrupted by a subsequent NJP involving restraint. Thereafter, the unexecuted portion of the prior restraint punishment will be executed. The officer imposing the subsequent punishment, however, may order that the prior punishment be completed prior to the service of the subsequent punishment. JAGMAN, § 0113b. This rule does not apply to forfeiture of pay, which must be completed before any subsequent forfeiture begins to run. JAGMAN, § 0113a.

d. ***Interruption of punishments by unauthorized absence.*** Service of all unexecuted portions of punishment imposed at NJP's will be interrupted during any period that the servicemember is UA.

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

ARTICLE 15 PUNISHMENT LIMITATIONS
Navy and Marine Corps

Imposed By	Imposed On	Bread & Water or DIMRATS (1)	Correctional Custody (2)	Arrest in Quarters (3)	Forfeitures (4 & 5)	Reduction (4 & 6)	Extra Duties (7)	Restriction (7)	Reprimand or Admonition (4)
Flags/Generals in Command	Officers	No	No	30 Days	1/2 of 1 Mo. for 2 Mos.	No	No	60 Days	Yes
	E-4 to E-9	No	No	No	1/2 of 1 Mo. for 2 Mos.	1 Grade	45 Days	60 Days	Yes
	E-1 to E-3	3 Days	30 Days	No	1/2 of 1 Mo. for 2 Mos.	1 Grade	45 Days	60 Days	Yes
O-4 to O-6	Officers	No	No	No	No	No	No	30 Days	Yes
	E-4 to E-9	No	No	No	1/2 of 1 Mo. for 2 Mos.	1 Grade	45 Days	60 Days	Yes
	E-1 to E-3	3 Days	30 Days	No	1/2 of 1 Mo. for 2 Mos.	1 Grade	45 Days	60 Days	Yes
O-3 / Below & OICs (8)	Officers	No	No	No	No	No	No	15 Days (9)	Yes
	E-4 to E-9	No	No	No	7 Days	1 Grade	14 Days	14 Days	Yes
	E-1 to E-3	3 Days	7 Days	No	7 Days	1 Grade	14 Days	14 Days	Yes

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

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

(3) May not be combined with restriction

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

(5) Shall be expressed in whole dollar amounts only

(6) Navy CPOs (E-7 to E-9) may not be reduced at NJP; Marine Corps NCOs (E-6 to E-9) may not be reduced at NJP (Check directives relating to promotion)

(7) Restriction and extra duties may be combined to run concurrently, but the combination may not exceed the maximum possible for extra duties

(8) OICs regardless of rank have NJP authority over enlisted personnel only. Marine CC may only reduce personnel within their promotion authority.

(9) Restriction imposed upon commissioned and warrant officers may not exceed 15 days when imposed by a CO below the grade of MAJ or LCDR (JAGMAN 0111a)

ARTICLE 15 PUNISHMENT LIMITATIONS
Coast Guard

Imposed By	Imposed On	Bread & Water or DIMRATS	Correctional Custody (1)	Arrest in Quarters (2)	Forfeitures (3 & 4)	Reduction (3 & 5)	Extra Duties (6 & 7)	Restriction (7)	Admonition (3)
Flag Officers in Command	Officers	No	No	30 Days	1/2 of 1 Mo. for 2 Mos.	No	No	60 Days	Yes
	E-4 to E-9	No	No	No	1/2 of 1 Mo. for 2 Mos.	1 Grade	45 Days	60 Days	Yes
	E-1 to E-3	No	30 Days	No	1/2 of 1 Mo. for 2 Mos.	1 Grade	45 Days	60 Days	Yes
O-4 to O-6	Officers	No	No	No	No	No	No	30 Days	Yes
	E-4 to E-9	No	No	No	1/2 of 1 Mo. for 2 Mos.	1 Grade	45 Days	60 Days	Yes
	E-1 to E-3	No	30 Days	No	1/2 of 1 Mo. for 2 Mos.	1 Grade	45 Days	60 Days	Yes
O-3 / Below	Officers	No	No	No	No	No	No	15 Days (8)	Yes
	E-4 to E-9	No	No	No	7 Days	1 Grade	14 Days	14 Days	Yes
	E-1 to E-3	No	7 Days	No	7 Days	1 Grade	14 Days	14 Days	Yes
2 OINCs (9)	Officers	No	No	No	No	No	No	No	No
	E-4 to E-9	No	No	No	3 Days	No	14 Days	14 Days	No
	E-1 to E-3	No	No	No	3 Days	No	14 Days	14 Days	No

** ***Note: See footnote information listed on next page***

Coast Guard Art. 15 Punishment Limitations Chart Information

This information goes with the chart on the preceding page

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

(2) May not be combined with restriction

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

(4) Shall be expressed in whole dollar amounts only

(5) USCG CPOs (E-7 to E-9) may not be reduced at NJP

(6) Restriction and extra duties may be combined to run concurrently, but the combination may not exceed the maximum possible for extra duties

(7) May be imposed only upon personnel E-6 and below

(8) Restriction imposed upon commissioned and warrant officers may not exceed 15 days when imposed by a CO below the grade of LCDR (Art. 1-E-2b MJM)

(9) OICs regardless of rank have NJP authority over enlisted personnel only

0404 COMBINATIONS OF PUNISHMENTS

A. ***General rules.*** Part V, para. 5d, MCM, 1995, provides that all authorized NJP's may be imposed in a single case subject to the following limitations:

1. Arrest in quarters may not be imposed in combination with restriction;

2. confinement on bread and water or diminished rations may not be imposed in combination with correctional custody, extra duties, or restriction;

3. correctional custody may not be imposed in combination with restriction or extra duties; or

4. restriction and extra duties may be combined to run concurrently, but the combination may not exceed the maximum imposable for extra duties.

B. ***Examples***

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

a. A punitive letter of reprimand or admonition (or an oral reprimand or adminition);

b. reduction to E-2;

c. forfeiture of one-half pay per month for two months (based upon the reduced rate); and

d. forty-five days restriction and extra duties to be served concurrently.

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

a. A punitive letter of reprimand or admonition (or an oral reprimand or admonition);

b. reduction to E-2 (Marine Corps CO's must have special court-martial convening authority to reduce);

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

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

0405 CLEMENCY AND CORRECTIVE ACTION ON REVIEW

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

B. ***Authority to act.*** Part V, para. 6a, MCM, 1995, and section 0118 of the *JAG Manual* indicate that, after the imposition of NJP, the following officials have authority to take clemency action or remedial corrective action:

1. The officer who initially imposed the NJP;

2. The authority who initially imposed the NJP (the office rather than the officer)

3. the successor in command over the person punished;

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

5. the 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, § 0118b); and

6. 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, 1995. This power has the effect of voiding the punishment (or any part or amount thereof) and restoring the rights, privileges, and property lost to the accused by virtue of the punishment imposed. This action should be reserved for compelling circumstances where the commander feels a clear injustice has occurred. This means, normally, that the commander believes the punishment of the accused was clearly a mistake. If the punishment has been executed, executive action to set it aside should be taken within a reasonable time – normally within four months of its execution. The commanding officer who wishes to reinstate an individual reduced in rate at NJP is not bound by the provisions of MILPERSMAN 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, 1995. This action relates to the unexecuted parts of the punishment; that is, those parts which have not been completed. This action relieves the accused from having to complete his punishment, though he may have partially completed it. Rights, privileges, and property lost by virtue of executed portions of punishment are not restored, nor is the punishment voided as in the case when it is set aside. The expiration of the current enlistment or term of service of the servicemember automatically remits any unexecuted punishment imposed under article 15.

3. ***Mitigation.*** Part V, para. 6b, MCM, 1995. Generally, this action also relates to the unexecuted portions of punishment. Mitigation of punishment is a reduction in the quantity or quality of the punishment imposed; in no event may punishment imposed be increased so as to be more severe.

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

(1) Arrest in quarters to restriction;

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

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

(4) extra duties to restriction.

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

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

d. ***Reduction in grade.*** Reduction in grade, even though executed, may be mitigated to forfeiture of pay. The amount of forfeiture can be no greater than that which could have been imposed by the mitigating commander had he initially imposed punishment. This mitigation may be done only within four months after the date of execution. Part V, para. 6b, MCM, 1995.

4. ***Suspension of punishment.*** Part V, para. 6a, MCM, 1995. This is an action to withhold the execution of the imposed punishment for a stated period of time. This action can be taken with respect to unexecuted portions of the punishment, or, in the

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

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

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

c. An action suspending a punishment includes an implied condition that the servicemember not commit an offense under the UCMJ. The NJP authority who imposed punishment may specify in writing additional conditions on the suspension.

(1) Customized conditions of suspension must be lawful and capable of accomplishment.

(2) Examples include: duty to obey local civilian law(s); refraining from associating with particular individuals (i.e., known drug users); not entering particular establishments or trouble spots; requirement to agree to searches of person, vehicles, or lockers; to successfully graduate from a particular rehabilitation course (i.e., ARS, CAAC); to make specified restitution to a victim; to conduct specified GMT on a topic related to the offense; or any variety of conditions designed to rehabilitate or curtail risk-oriented conduct.

(3) The probationer's acknowledgement should be obtained on the original for the commanding officer's retention, and a copy of the signed conditions should be served on the probationer.

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

(1) Vacation of the suspended punishment may be based only upon a violation of the UCMJ (implied condition) or a violation of the conditions of suspension (express condition) which occurs during the period of suspension.

(2) Before a suspension may be vacated, the servicemember ordinarily should be notified that vacation is being considered and informed of the reasons for the contemplated action and his right to respond. A formal hearing is not required unless the punishment suspended is of the kind set forth in Article 15(e)(1)-(7), UCMJ, in which case the accused should, unless impracticable, be given an opportunity to appear before the officer contemplating vacation to submit any matters in defense, extenuation, or mitigation of the offense on which the vacation action is to be based. MCM Part V, para 6a(5).

(3) Vacation of a suspension is not punishment for the misconduct that triggers the vacation. Accordingly, misconduct may be punished and also serve as the reason for vacating a previously suspended punishment imposed at mast. Vacation proceedings are often handled at NJP. First, the suspended punishment is vacated; then the commanding officer can impose NJP for the new offense, but not for a violation of a condition of suspension unless it is itself a violation of the UCMJ. If NJP is imposed for the new offense, the accused must be afforded all of his hearing rights, etc.

(4) The order vacating a suspension must be issued within ten working days of the commencement of the vacation proceedings and the decision to vacate the suspended punishment is not appealable as an NJP appeal. JAGMAN, § 0118d.

e. The probationary period cannot exceed six months from the date of suspension and terminates automatically upon expiration of current enlistment. Part V, para. 6a(2), MCM, 1995. The running of the period of suspension will be interrupted, however, by the unauthorized absence of the accused or the commencement of any proceeding to vacate the suspended punishment. The running of the period of probation resumes again when the unauthorized absence ends or when the suspension proceedings are terminated without vacation of the suspended punishment. JAGMAN, § 0118c.

0406 APPEAL FROM NONJUDICIAL PUNISHMENT

A. ***Procedure.*** If punishment is imposed at NJP, the commanding officer is required to ensure that the accused is advised of his right to appeal. Part V, para. 4c(4)(B)(iii), MCM, 1995; JAGMAN, § 0110e and app. A-1-f. A person punished under article 15 may appeal the imposition of such punishment through proper channels to the appropriate appeal authority. Art. 15e, UCMJ; JAGMAN, § 0117. If, however, the offender is transferred to a new command prior to filing his appeal, the immediate commanding officer of the offender at the time the appeal is filed should forward the appeal directly to the officer who imposed punishment. JAGMAN, §§ 0116 and 0117.

1. When the officer who imposed the punishment is in the Navy chain of command, the appeal will normally be forwarded to the area coordinator authorized to convene general courts-martial. JAGMAN, § 0117a.

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

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

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

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

2. When the officer who imposed the punishment is in the chain of command of the Commandant of the Marine Corps, the appeal will be made to the officer next superior in the operational chain of command to the officer who imposed the punishment (e.g., an appeal from company office hours should be submitted to the battalion commander). When such review is impractical due to operational commitments, as determined by the officer who imposed the punishment, appeal from NJP shall be made to the Marine officer authorized to convene general courts-martial geographically nearest and senior to the officer who imposed the punishment. JAGMAN, § 0117b.

3. When the officer who imposed the punishment has been designated a commanding officer for naval personnel of a multiservice command pursuant to JAGMAN, § 0106d, the appeal will be made in accordance with JAGMAN, § 0117c.

4. A flag or general officer in command may, with the express prior approval of the Chief of Naval Personnel or the Commandant of the Marine Corps, delegate authority to act on appeals to a principal assistant. JAGMAN, § 0117d.

5. An officer who has delegated his NJP power to a principal assistant under JAGMAN, § 0106c, may not act on an appeal from punishment imposed by that assistant.

B. ***Time.*** Appeals must be submitted in writing within five days of the imposition of NJP, or the right to appeal shall be waived in the absence of good cause shown. Part V, para. 7d, MCM, 1995. The appeal period begins to run from the date of the imposition of NJP, even though all or any part of the punishment imposed is suspended. In computing the 5-day period, allowance must be made for the time required to transmit the notice of imposition of NJP and the appeal itself through the mails. In the case of an appeal submitted more than five days after the imposition of NJP (less any mailing delays), the officer acting on the appeal shall determine whether "good cause" was shown for the delay in the appeal. JAGMAN, § 0116a(1).

1. ***Extension of time.*** If it appears to the accused that good cause may exist which would make it impracticable or extremely difficult to prepare and submit the appeal within the 5-day period, the accused should immediately advise the officer who imposed the punishment of the perceived problems and request an appropriate extension of time. The officer imposing NJP shall determine whether good cause was shown and shall advise the accused whether an extension of time will be permitted. JAGMAN, § 0116a(2).

2. ***Request for stay of restraint punishments or extra duties.*** A servicemember who has appealed may be required to undergo any restraint punishment or extra duties imposed while the appeal is pending, except that, if action is not taken on the appeal by the appeal authority within five days 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, 1995. It is helpful if the accused includes in his written appeal any request for stay of restraint punishment or extra duties; however, a written request for a stay is not specifically required, nor is it required to be submited with the original appeal request.

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

1. ***Appellant's letter (grounds for appeal).*** The letter of appeal from the accused should be addressed to the appropriate appeal authority via the commander who imposed the punishment and other appropriate commanding officers in the chain of command. The letter should set forth the salient features of the NJP (date, offense, who imposed it, and punishment imposed) and detail the specific grounds for relief. There are only two grounds for appeal: the punishment was unjust or the punishment was disproportionate to the offense committed. Unjust punishment exists when the evidence is insufficient to prove the accused committed the offense; when the statute of limitations (Art. 43(b)(2), UCMJ) prohibits lawful punishment; or when any other fact, including a denial of substantial rights, calls into question the validity of the punishment. Punishment is disproportionate if it is, in the judgment of the reviewer, too severe for the offense committed. An offender who believes his punishment is too severe thus appeals on the ground of disproportionate punishment, whether or not his letter artfully states the ground in precise terminology. Note, however, that a punishment may be legal but excessive or unfair considering circumstances such as: the nature of the offense; the absence of aggravating circumstances; the prior record of the offender; and any other circumstances in extenuation and mitigation. The grounds for appeal need not be stated artfully in the accused's appeal letter, and the reviewer may have to deduce the appropriate ground implied in the letter. Inartful draftsmanship or improper addressees or other administrative irregularities are not grounds for refusing to forward the appeal to the reviewing authority. If any commander in the chain of addressees notes administrative mistakes, they should be corrected, if material, in that commander's endorsement which forwards the appeal. Thus, if an accused does not address his letter to all appropriate commanders in the chain of command, the commander who notes the mistake should merely readdress and forward the appeal. He should not send the appeal back to the accused for redrafting since the appeal should be forwarded promptly to the reviewing authority. The appellant's letter begins the review process and is a quasi-legal document. It should be temperate and state the facts and opinions the accused believes entitles him to relief. The offender should avoid unfounded allegations concerning the character or personality of the officer imposing punishment. *See* Article 1108, *U.S. Navy Regulations, 1990.* The accused, however, should state the reasons for his appeal as clearly as possible. Supporting documentation in the form of statements of other persons, personnel records, etc., may be submitted if the accused desires. **In no**

case is the failure to do these things lawful reason for refusing to process the appeal. Finally, should the accused desire that his restraint punishments or extra duties be stayed pending the appeal, he may specifically request this in the letter.

2. ***Contents of the forwarding endorsement.*** All via addressees should use a simple forwarding endorsement normally and should not comment on the validity of the appeal. The exception to this rule is the endorsement of the officer who imposed the punishment. Section 0116c of the *JAG Manual* requires that his endorsement should normally include the following information. (Marine Corps units should also refer to LEGADMINMAN, chapter 2 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 NJP was imposed on the basis of the record of a court of inquiry or other fact-finding body, a copy of that record, including the findings of fact, opinions, and recommendations, together with copies of any endorsements thereon; and

e. as enclosures, copies of the appellant's record of performance as set forth on service record page 9 (Navy) or page Record of Service and NAVM C 118(3) (Marine Corps).

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

by this officer and the corrective action noted in the forwarding endorsement. Even though corrective action is taken, the appeal must still be forwarded to the reviewer.

3. ***Endorsement of the reviewing 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.

D. ***Review guidelines.*** As a preliminary matter, it should be noted that NJP is not a criminal trial, but rather an administrative proceeding, primarily corrective in nature, designed to deal with minor disciplinary infractions without the stigma of a court-martial conviction. As a result, the standard of proof applicable at article 15 hearings is "preponderance of the evidence" vice "beyond reasonable doubt." JAGMAN, § 0110b.

1. ***Procedural errors.*** Errors of procedure do not invalidate punishment unless the error or errors deny a substantial right or do substantial injury to such right. Part V, para. 1h, MCM, 1995. Thus, if an offender was not properly warned of his right to remain silent at the hearing, but made no statement, he has not suffered a substantial injury. If an offender was not informed that he had a right to refuse NJP, and he had such a right, then the error amounts to a denial of a substantial right.

2. ***Evidentiary errors.*** Strict rules of evidence do not apply at NJP hearings. Evidentiary errors not amounting to insufficient evidence, will not normally invalidate punishment. Note that, although the rules of evidence do not apply at NJP, Article 31, UCMJ, should be complied with at the hearing. Part V, para. 4c(3), MCM, 1995.

3. ***Lawyer review.*** Part V, para. 7e, MCM, 1995, requires that, before taking any action on an appeal from any punishment in excess of that which could be given by an O-3 commanding officer, the reviewing authority must refer the appeal to a lawyer for consideration and advice. The advice of the lawyer is a matter between the reviewing authority and the lawyer and does not become a part of the appeal package. Many commands now require that all NJP appeals be reviewed by a lawyer prior to action by the reviewing authority.

4. ***Scope of review.*** The reviewing authority and the lawyer advising him, if applicable, are not limited to the appeal package in completing their actions. Such collateral inquiry as deemed advisable can be made and the appellate decision can lawfully be made on pertinent matters not contained in the appeal package. Part V, para. 7e, MCM, 1995.

5. ***Delegation of authority to action appeals.*** Pursuant to Part V, para. 7f(5), MCM, 1995, and section 0117d 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 0106d 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 some cases, it may be inappropriate for the principal assistant to act on certain appeals (as where an identity of persons or staff may exist with the command which imposed the punishment), and such fact should be noted by the command in the forwarding endorsement. JAGMAN, § 0117d.

E. ***Authorized appellate action.*** Part V, para. 7f, MCM, 1995; JAGMAN, § 0117. In acting on an appeal, or even in cases in which no appeal has been filed, the superior authority may exercise the same power with respect to the punishment imposed as the officer who imposed the punishment. Thus, the reviewing authority may:

1. Approve the punishment in whole;

2. mitigate, remit, or set aside the punishment to correct errors;

3. mitigate, remit, or suspend (in whole or in part) the punishment for reasons of clemency;

4. dismiss the case (If this is done, the reviewer must direct the restoration of all rights, privileges, and property lost by the accused by virtue of the imposition of punishment.); or

5. authorize a rehearing where there are substantial procedural errors not amounting to a finding of insufficient evidence to impose NJP. At the rehearing, however, the punishment imposed may be no more severe than that imposed during the original proceedings, unless other offenses which occurred subsequent to the date of the original proceeding are added to the original offenses. If the accused, while not attached to or embarked in a vessel, waived his right to demand trial by court-martial at the original proceedings, he may not assert this right as to those same offenses at the rehearing but may assert the right as to any new offenses at the rehearing. JAGMAN, § 0117e.

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

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, 1995, 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, 1995 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, 1995. But, a superior may not withhold or limit the exercise of a subordinate's NJP authority without the express authorization of the Secretary of the Navy. *See* JAGMAN, § 0106e.

C. ***Imposition of NJP as a bar to subsequent court-martial***

1. R.C.M. 907(b)(2)(D)(iv), MCM, 1995, 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, 1995, defines "minor" offenses, in part, as "offense(s) for which the maximum sentence imposable would not include a dishonorable discharge or confinement for longer than one year if tried by general court-martial." The rule further provides, however, that the commanding officer imposing punishment has the discretion to consider as "minor" even certain offenses carrying punishments in excess of that provided in the rule. *See, e.g., Capella v. United States*, 624 F.2d 976 (Ct.Cl. 1980) (possession of heroin); *United States v. Rivera*, 45 C.M.R. 582, n.3 (A.C.M.R. 1972) (possession of heroin). Should the court-martial determine that the offense was not "minor," it may go ahead and try the offense notwithstanding the prior imposition of NJP. *See, e.g., Hagarty v. United States*, 449 F.2d 352 (Ct.Cl. 1971); *United States v. Fretwell*, 11 C.M.A. 377, 29 C.M.R. 193 (1960); *United States v. Vaughan*, 3 C.M.A. 121, 11 C.M.R. 121 (1953). See *U.S. v. Hudson*, 39 M.J. 958 (1994).

2. Although it is clear that Congress did not intend for the imposition of NJP to preclude the subsequent court-martial of an individual who has been accused of committing a serious offense, it is also clear that a servicemember cannot be punished for the same offense twice. Therefore, when an accused is convicted at a court-martial for the

same offense for which NJP was received, credit must be given for any and all punishments incurred. *United States v. Pierce*, 27 M.J. 367 (C.M.A.1989).

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

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

C. ***Imposition of NJP after acquittal at court-martial.*** In *Jones v. Commander, Naval Air Force, U.S. Atlantic Fleet*, 18 M.J. 198 (C.M.A. 1984), the accused's motion for a finding of not guilty was granted by the military judge following the presentation of the government's case-in-chief. The convening authority then imposed NJP upon the accused for substantially the same offense. Here, the court again denied the petition for extraordinary relief, but in dicta condemned the imposition of NJP following the earlier court-martial conviction as an "unreasonable abuse of command disciplinary powers which cannot be tolerated in a fundamentally fair military justice system." *Id.* at 198-99.

D. ***Cases arising after 1 August 1984.*** Significantly, both *Dobzynski, supra*, and *Jones, supra*, involved offenses committed and punished prior to 1 August 1984. For cases arising after this date, the provisions of section 0124d of the *JAG Manual* would apply. This section provides that "[P]ersonnel who have been tried by courts that derive their authority from the United States, such as U.S. District Courts, shall not be tried by court-martial ***or be the subject of nonjudicial punishment for the same act or acts***" (emphasis added). Assuming that the term "tried" as used in JAGMAN, § 0124d means that point in the trial after which jeopardy would attach and prevent the referral of charges to a subsequent forum. Thus, NJP would be barred for an offense previously referred to court-martial at which jeopardy had attached and which could not be retried at a subsequent court.

SAMPLE

NAVY APPEAL PACKAGE

OF

NONJUDICIAL PUNISHMENT

Appendix 4-1

5800
27 Jun 19cy

From: RMSN 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, para. 7, MCM, 1995
(c) JAGMAN, § 0116

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

1. As provided by references (a) through (c), appeal is herewith submitted from nonjudicial punishment imposed upon me on 25 June 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 RMSN John P. Williams, USN, on active duty, did, on board USS BENSON (DD-895), on or about 16 June 19cy, unlawfully carry a concealed weapon, to wit: a switchblade knife.

b. Punishment: Forfeiture of $100.00 pay per month for 2 months

c. Grounds of Appeal

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

/s/ John P. Williams

JOHN P. WILLIAMS

SAMPLE

5800
Ser /
29 Jun 19cy

FIRST ENDORSEMENT on RMSN John P. Williams, USN, 434-52-9113 ltr 5800 of 27 Jun 19cy

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

Subj: APPEAL FROM PUNISHMENT ICO RMSN 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/ S. D. Dunn
S. D. DUNN

See JAGMAN 0116c

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

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

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

NAME OF ACCUSED	SERIAL NO.	SSN	RATE/GRADE	BR. & CLASS	DIV/DEPT
WILLIAMS, John P.	**NA**	**434-52-9113**	**RMSN**	**USN**	**OPS**

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

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

Violation of Art. 134, UCMJ. In that RMSN John P. Williams, USN, on active duty, did, on board USS BENSON (DD 895), on or about 16 June 19CY, unlawfully carry a concealed weapon, to wit: a switchblade 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 (Rate/Grade/Title of person submitting report)

/s/ Harold B. Johnson (Signature of person submitting report)

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

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

PRE-MAST RESTRAINT

☐ PRE TRIAL CONFINEMENT

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

■ NO RESTRICTIONS

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

INFORMATION CONCERNING ACCUSED

CURRENT ENL. DATE	EXPIRATION CURRENT ENL. DATE	TOTAL ACTIVE NAVAL SERVICE	TOTAL SERVICE ON BOARD	EDUCATION	GCT	AGE
24 May 19CY	**23 May 19CY+2**	**2yr 1mo**	**10 mos**	**HS**	**57**	**19**

MARITAL STATUS	NO. DEPENDENTS	CONTRIBUTION TO FAMILY OR QTRS ALLOWANCE (Amount required by law)	PAY PER MONTH (Including sea or foreign duty pay, if any)
Single	**none**	**none**	**$965.40**

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

None

PRELIMINARY INQUIRY REPORT

From: Commanding Officer
To: ENS David S. Willis, USNR
Date: 20 June 19CY

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

REMARKS OF DIVISION OFFICER (Performance of duty, etc.)
SN Williams is a good worker who is learning his rate thru on-the-job training. He needs occasional supervision, but works willingly when assigned a job to do. I consider him petty officer material. This is the first time he's been in trouble. */s/ LT G.V. Jones*

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

RECOMMENDATION AS TO DISPOSITION:

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

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

COMMENT (*Include data regarding availability of witnesses, summary of expected evidence, conflicts in evidence, if expected. Attach statements of witnesses, documentary evidence such as a service record entries is UA cases, items of real evidence, etc.*)
SN Williams was discovered to be carrying a switchblade with a 5" blade by QMC 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 Williams was ordered to empty his pockets. All witnesses are available. WO1 Hudson observed the incident.

/s/ D. S. Willis, ENS, USNR
(Signature of Investigation Officer)

ACTION OF EXECUTIVE OFFICER

☐ DISMISSED ■ REFERRED TO CAPTAIN'S MAST

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

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

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

WITNESS
NA

SIGNATURE OF ACCUSED
NA

ACTION OF COMMANDING OFFICER

☐ DISMISSED
☐ DISMISSED WITH WARNING (Not considered NJP)
☐ ADMONITION: ORAL/IN WRITING
☐ REPRIMAND: ORAL/IN WRITING
☐ REST. TO _____ FOR ____ DAYS
☐ REST. TO _____ FOR ____ DAYS WITH SUSP. FROM DUTY
■ FORFEITURE: TO FORFEIT $100.00 PAY PER MO. FOR 2 MO(S)
■ DETENTION: TO HAVE $____ PAY PER
[illegible]

☐ CONF. ON _____ 1, 2, OR 3 DAYS
☐ CORRECTIONAL CUSTODY FOR ___ DAYS
☐ REDUCTION TO NEXT INFERIOR PAY GRADE
☐ REDUCTION TO PAY GRADE OF _____
☐ EXTRA DUTIES FOR ___ DAYS
☐ PUNISHMENT SUSPENDED FOR _____
☐ ART. 32 INVESTIGATION
☐ RECOMMENDED FOR TRIAL BY GCM

☐ AWARDED SPCM ☐ AWARDED SCM

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

It has been explained to me and I understand that if I feel this imposition of nonjudicial punishment to be unjust or disproportionate to the offenses charged against me, I have the right to immediately appeal my conviction to the next higher authority within [illegible] *5* days.

SIGNATURE OF ACCUSED
/s/ J. P. Williams

DATE:
25 Jun 19CY

I have explained the above rights of appeal to the accused.
SIGNATURE OF WITNESS */S/ H.O. Kay*
DATE 25 Jun 19CY

FINAL ADMINISTRATIVE ACTION

APPEAL SUBMITTED BY ACCUSED
DATED: 27 Jun 19CY
FORWARDED FOR DECISION ON 28 Jun 19CY

FINAL RESULT OF APPEAL
DENIED

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

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

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

(CAPTAIN'S MAST) (OFFICE HOURS)
ACCUSED'S NOTIFICATION AND ELECTION OF RIGHTS
ACCUSED ATTACHED TO OR EMBARKED IN A VESSEL
(See JAGMAN 0109)

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

NOTIFICATION

1. In accordance with the requirements of paragraph 4 of Part V, MCM, 1984, you are hereby notified that the commanding officer is considering imposing nonjudicial punishment on you because of the following alleged offenses:
Art. 134: Unlawfully carrying switchblade on board, 16 Jun 19CY
(Note: Here describe the offenses, including the UCMJ article(s) allegedly violated.)

2. The allegations against you are based on the following information: **Statements of QMC Johnson and WO1 Hudson which say you possess the knife when departing the ship at approx. 1630 on 16 Jun 19CY.**
(Note: Here provide a brief summary of that information.)

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

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

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

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

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

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

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

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

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

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

A-1-b(1)

ELECTION OF RIGHTS

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

a. Personal appearance. (Check one)

JPW __X__ I request a personal appearance before the commanding officer.

_____ I waive a personal appearance. (Check one)

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

_____ Written matters are attached.

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

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

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

RMSN Quigley

_____

_____

_____

_____

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

/s/ H. O. Kay
(Signature of witness)

H. O. KAY, ENS, USNR
(Name of witness)

/s/ J. P. Williams
(Signature of accused)

J. P. Williams, RMSN, USN
(Name of accused)

SUSPECT'S RIGHTS ACKNOWLEDGEMENT / STATEMENT
(See JAGMAN 0170)

FULL NAME (ACCUSED/SUSPECT)	SSN	RATE/RANK	SERVICE (BRANCH)
John P. Williams	**434-52-9113**	**RMSN**	**USN**
ACTIVITY/UNIT			DATE OF BIRTH
USS BENSON (DD 895)			**22 May 19xx**
NAME (INTERVIEWER)	SSN	RATE/RANK	SERVICE (BRANCH)
D. S. Willis	**000-00-0000**	**ENS**	**USNR**
ORGANIZATION		BILLET	
USS BENSON (DD 895)		**PIO**	
LOCATION OF INTERVIEW		TIME	DATE
USS BENSON (DD 895)		**1000**	**19 Jun 19cy**

RIGHTS

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

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

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

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

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

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

A-1-m(1)

WAIVER OF RIGHTS

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

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

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

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

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

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

SIGNATURE (ACCUSED / SUSPECT	TIME	DATE
/s/ ***John P. Williams***	**1015**	**19 Jun cy**
SIGNATURE (INTERVIEWER)	TIME	DATE
/s/ ***David S. Willis***	**1015**	**19 Jun cy**
SIGNATURE (WITNESS)	TIME	DATE
attached hereto and		

A-1-m(2)

The statement which I have made (or which has been signed by me), is made freely and voluntarily by me, and without any promises or threats having been made to me or pressure or coercion of any kind having been used against me.

/s/ John P. Williams
SIGNATURE (ACCUSED/SUSPECT)

A-1-m(3)

18 June 19cy

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

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

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

Harold B. Johnson
QMC, USN

WITNESS: David S. Willis
ENS, USNR

[HAND-WRITTEN]

18 June 19cy

I, Robert A. Hudson, WO1, USN, have been asked by ENS D. S. Willis to make the following statement:

On 16 June 19cy, I was the OOD on board USS BENSON. My JOOD was Chief Harold B. Johnson. At approximately 1645, Chief Johnson brought RMSN 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.

Robert A. Hudson
WO1, USN

WITNESS: David S. Willis
ENS, USNR

[HAND-WRITTEN]

19 June 19cy

I, John P. Williams, RMSN, USN, having been advised of my rights by Ensign David S. Willis, which I have acknowledged on the attached rights form, make the following statement freely and voluntarily, understanding my rights to remain silent and to consult a lawyer.

I 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: */s/ David S. Willis*
DAVID S. WILLIS
ENS, USNR

[HAND-WRITTEN]

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

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

assigned or attached to **USS BENSON (DD 895)**, have been informed of the following facts concerning my rights of appeal as a result of (captain's mast) (office hours) held on **25 June 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 5 day period, I should immediately advise the officer imposing punishment of such circumstances, and request an appropriate extension of time in which to file my appeal.

c. The appeal must be in writing.

d. There are only two grounds for appeal; that is:

(1) The punishment was unjust, or

(2) The punishment was disproportionate to the offense(s) for which it was imposed.

e. If the punishment imposed included reduction from the pay grade of E-4 or above, or was in excess of: arrest in quarters for 7 days, correctional custody for 7 days, forfeiture of 7 days' pay, extra duties for 14 days, restriction for 14 days, or detention of 14 days' pay, then the appeal must be referred to a military lawyer for consideration and advice before action is taken on my appeal.

/s/ John P. Williams	*/s/ I. M. Witness*
(Signature of Accused and Date)	(Signature of Witness and Date)
25 June 19cy	25 June 19cy

A-1-f

5800
Ser /
1 Jul 19cy

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

Subj: APPEAL FROM PUNISHMENT ICO RMSN JOHN P. WILLIAMS

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

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

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

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

/s/ M. J. Hughes
M. J. HUGHES

5800
Ser /
6 Jul 19cy

FIRST ENDORSEMENT on Commander, Cruiser-Destroyer Flotilla FIVE ltr 5800
Ser / of 1 Jul 19cy

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

Subj: APPEAL FROM PUNISHMENT ICO RMSN JOHN P. WILLIAMS

1. Returned for delivery.

/s/ S. D. Dunn
S. D. DUNN

5800
Ser /
6 Jul 19cy

SECOND ENDORSEMENT on Commander, Cruiser-Destroyer Flotilla FIVE ltr 5800
Ser / of 1 Jul 19cy

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

Subj: APPEAL FROM NONJUDICIAL PUNISHMENT

1. I acknowledge receipt, and have noted the contents, of the first endorsement on my appeal from nonjudicial punishment.

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

/s/ John P. Williams
JOHN P. WILLIAMS

SAMPLE

MARINE CORPS APPEAL PACKAGE

OF

NONJUDICIAL PUNISHMENT

Appendix 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 USMC
To: Commanding Officer, Schools Battalion, Marine Corps Base, Camp Pendleton, CA 92055
Via: Commanding Officer, Schools Company, Schools Battalion, Marine Corps Base, Camp Pendleton, CA 92055

Subj: APPEAL OF NONJUDICIAL PUNISHMENT

Ref: (a) MCM, 1995

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.

/s/ John Q. Adams
JOHN Q. ADAMS

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

5812
23 Jul 19cy

FIRST ENDORSEMENT on Private John Q. Adams 456 64 5080/0311 USMC ltr 5812 of 21 July 19cy

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

Subj: APPEAL OF NONJUDICIAL PUNISHMENT

Ref: (a) JAGMAN
(b) LEGADMINMAN

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

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

a. Summary of recitation of facts

(1) Private Adams appeared at Company Office Hours on 18 July 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).

Subj: APPEAL OF NONJUDICIAL PUNISHMENT

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

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

b. Summary assertion of facts made by Private Adams:

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

c. Basic record data

(1) Summary of military offenses:

None.

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

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

/s/ Andrew Jackson
ANDREW JACKSON
Major USMC

Copy to:
Private Adams

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

UNIT PUNISHMENT BOOK (5812)
NAVMC 10132 (Rev. 10-81) (*8-75 EDITION WILL BE USED*)
SN 0000-00-002-1305 U/I: PD (*100 sheets per pad*)

← Staple Additional pages here.

1. See Chapter 2, Marine Corps Manual for Legal Administration, MCO P5800.8

2. Form is prepared for each accused enlisted person referred to Commanding Officer's Office Hours.

3. Reverse side may be used to summarize proceedings as required by MCO P5800.8.

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

4. UNIT
ScolsCo, ScolsBn, MCB, CamPen

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

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

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

(Date) 18 Jul cy (Signature of accused) */s/ John Q. Adams*

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

(Date) 18 Jul cy (Signature of immediate CO of accused) */s/ Andrew Jackson*

8. FINAL DISPOSITION TAKEN AND DATE
Reduction to Pvt, restriction to the limits of ScolsCo, ScolsBn, for 7 days, without suspension from duty, and forfeiture of $25.00 per month for 1 month. 18 Jul cy.

9. SUSPENSION OF EXECUTION OF PUNISHMENT, IF ANY.

None.

10. FINAL DISPOSITION TAKEN BY (*Name, grade, title*)
Andrew JACKSON, Major, USMC, Commanding Officer

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

(Signature of CO who took disposition in 8 and 9) */s/ Andrew Jackson*

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

18 Jul cy

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

18 Jul cy */s/ Andrew Jackson*
(Date) (Signature of CO who took final action in 11)

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

18 Jul cy */s/ John Q. Adams*
(Date) (Signature of accused)

15. DATE OF APPEAL, IF ANY.

21 Jul cy

16. DECISION ON APPEAL (IF APPEAL IS MADE), DATE THEREOF, AND SIGNATURE OF CO WHO MADE DECISION.
Appeal granted. See 2d encl on the basic ltr for decision.
24 Jul cy */s/ Martin Van Buren*
(Date) (Signature of CO making decision on appeal)

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

24 Jul cy

18. REMARKS

18 Jul - Intent to appeal indicated. Permission of Rest. for 7 days staved.

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

TBP

18 July 19cy

PVT John Q. Adams 456-64-5080 USMC

Summary of evidence presented.

The accused admitted to the offense contained in item 5. Accordingly, the accused was found guilty of the single offense.

Extenuating or mitigating factor considered.

PVT Adams stated, relating to the JA, that he had received a phone call from his brother stating that his dog was seriously ill and not expected to live. PVT Adams stated that he knows it was wrong to leave without permission and that he was sorry for his actions.

Based on recommendation of his First Sergeant, Platoon Sergeant, and his past record, the punishment appearing in block 8 was imposed.

[HAND-WRITTEN]

(CAPTAIN'S MAST) (OFFICE HOURS)
ACCUSED'S NOTIFICATION AND ELECTION OF RIGHTS
ACCUSED NOT ATTACHED TO OR EMBARKED IN A VESSEL
RECORD MAY BE USED IN AGGRAVATION IN EVENT OF LATER COURT-MARTIAL
(See JAGMAN 0109)

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

NOTIFICATION

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

(Note: Here describe the offenses, including the UCMJ article(s) allegedly violated.)

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

(Note: Here provide a brief summary of that information.)

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

_____

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

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

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

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

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

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

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

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

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

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

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

ELECTION OF RIGHTS

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

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

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

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

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

_____ _____
(Signature of witness) (Signature of accused)

_____
(Date)

(Note: If the accused wishes to talk to a lawyer, the remainder of this form shall not be completed until the accused has been given a reasonable opportunity to do so.)

____ I talked to _____, a lawyer on _____.

_____ _____
(Signature of witness) (Signature of accused)

_____
(Date)

b. Right to refuse nonjudicial punishment. (Check one)

_____ I refuse nonjudicial punishment.

_____ I accept nonjudicial punishment. I am advised that acceptance of nonjudicial punishment does not preclude further administrative action against me. This may include being processed for an administrative discharge which could result in an other than honorable discharge.

(Note: If the accused does not accept nonjudicial punishment, the matter should be submitted to the commanding officer for disposition.)

c. Personal appearance. (Check one)

_____ I request a personal appearance before the commanding officer.

_____ I waive a personal appearance. (Check one)

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

_____ Written matters are attached.

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

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

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

_____

_____

_____

_____

_____

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

_____ _____
(Signature of witness) (Signature of accused)

_____ _____
(Name of witness) (Name of accused)

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

I, **Pvt John Q. Adams**, SSN **456 64 5080**,
(Name and grade of accused)

assigned or attached to **ScolsCo, ScolsBn, MCB CamPen**, have been informed of the following facts concerning my rights of appeal as a result of (captain's mast) (office hours) held on **18 Jul 10cy**:

a. I have the right to appeal to (specify to whom the appeal should be addressed).

b. My appeal must be submitted within a reasonable time. Five days after the punishment is imposed is normally considered a reasonable time, in the absence of unusual circumstances. Any appeal submitted thereafter may be rejected as not timely. If there are unusual circumstances which I believe will make it extremely difficult or not practical to submit an appeal within the 5 day period, I should immediately advise the officer imposing punishment of such circumstances, and request an appropriate extension of time in which to file my appeal.

c. The appeal must be in writing.

d. There are only two grounds for appeal; that is:

(1) The punishment was unjust, or

(2) The punishment was disproportionate to the offense(s) for which it was imposed.

e. If the punishment imposed included reduction from the pay grade of E-4 or above, or was in excess of: arrest in quarters for 7 days, correctional custody for 7 days, forfeiture of 7 days' pay, extra duties for 14 days, restriction for 14 days, or detention of 14 days' pay, then the appeal must be referred to a military lawyer for consideration and advice before action is taken on my appeal.

/s/ JOHN Q. ADAMS
(Signature of Accused and Date)
18 Jul cy

/s/ I. M. WITNESS
(Signature of Witness and Date)
18 Jul cy

A-1-f

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

5812
Ser /
23 Jul 19cy

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

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

Ref: (a) MCM, 1995

Encl: (1) NJP Appeal Package

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

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

/s/ ***Martin Van Buren***
MARTIN VAN BUREN

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

5812
24 Jul 19cy

MEMORANDUM ENDORSEMENT

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

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

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

2. Rejection of the appeal is recommended.

/s/ William H. Harrison
WILLIAM H. HARRISON

NOTE: Once the battalion commander has received a reply from a judge advocate, his letter requesting review and advice and the reply are 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

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

Subj: APPEAL OF NONJUDICIAL PUNISHMENT

1. Returned.

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

/s/ Martin Van Buren
MARTIN VAN BUREN

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

5812
Ser /
25 Jul 19cy

FIRST ENDORSEMENT on Commanding Officer, Schools Battalion ltr 5812 Ser / of 24 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 Commanding Officer, Schools Battalion ltr 5812 of 24 Jul 19cy.

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

/s/ Andrew Jackson
ANDREW JACKSON

Copy to:
Private Adams

NOTE: Once the commanding officer has received the decision, any necessary administrative action should be taken. The Marine is provided with a copy of the entire appeal package, excluding the battalion commander's letter to the SJA and the memorandum endorsement from the SJA.

UNAUTHORIZED ABSENCES / DESERTIONS

0409 NAVY UNAUTHORIZED ABSENCE

A. ***Policy.*** The policies and procedures regarding UAs and desertion of enlisted members are found in MILPERSMAN, arts. 3020220, 3430100, 3430150, 3430200, 3430250, 3430300, 3430350, 3640450. Consult these sections for further amplification of the checklist given below.

B. ***Procedures.*** The procedures for completing the service record entries can be found in the MILPERSMAN sections above and PAYPERSMAN sections 10381, 90419, and 90435.

C. ***Checklist***

1. When a member is reported UA, immediately prepare a page 13 to document inception of UA.

2. When a member has been UA over 24 hours, ensure that the NAVPERS 601-6R is prepared. This will stop the servicemember's pay.

3. If member is absent less than 24 hours, prepare a page 13 to document the termination of absence.

4. If the member is gone 10 days, prepare a letter to the next of kin (NOK) notifying them of the member's absence; his / her personal effects should be collected, inventoried, and placed in safekeeping; prepare NAVCOMPT 3060.

5. Upon return of a member gone less than 30 days, complete the NAVPERS 601-6R and decide what type, if any, disciplinary action will be taken.

6. If the member is gone 30 days, he / she is declared a deserter. This may be done earlier if there is an indication the member has no intention to return. The following documents should be prepared and actions taken:

   a. Deserter message;

   b. DD Form 553 (Absentee Wanted by the Armed Forces);

   c. charge sheet DD Form 458 (charge violation of Article 85, UCMJ; prefer and receive charges only; do not refer);

d. any evidence of desertion should be gathered (such as witness statements, pending incident complaint reports, restriction orders, any relevant message traffic, and any documentation of other pending disciplinary action); and

e. obtain health, dental, and pay records.

7. If member is gone 180 days, send the following to BUPERS:

a. Service record (including the page 601-6R, original charge sheet, and restriction orders);

b. health record;

c. dental record; and

d. pay record.

8. After 180 days, send the personal effects to Naval Supply Center, Oakland, CA, or Supply Annex, Williamsburg, VA.

9. A deserter file should be retained by the command. It should include the following:

a. Certified copy of the charge sheet;

b. certified copy of the restriction order;

c. right side of the service record (SRB);

d. copy of page 601-6R;

e. performance evaluations;

f. last leave and earning statement (LES);

g. copy of DD 553;

h. copy of deserter message; and

i. any other relevant messages.

10. Upon return of a member from UA, prepare page 13 documenting return.

11. Upon return of a member from UA over 24 hours, but less than 10 days, complete page 601-6R—sending fourth copy to disbursing. This starts member's pay.

12. Upon return of a member from UA over 10 days, but less than 30 days, complete page 601-6R; prepare letter to NOK notifying them of member's return.

13. Upon return of a member from UA over 30 days, complete page 601-6R; prepare letter to NOK notifying them of member's return; and prepare return deserter message if not done by an intermediate command.

0410 MARINE CORPS

A. ***References***

1. MCO P5800.8, *Marine Corps Manual for Legal Administration* (LEGADMINMAN), Chapter 5

2. MCO P1080.35 (PRIM)

3. MCO P4050.38, *Marine Corps Personal Effects and Baggage Manual*

4. MCO P1070.12, *Marine Corps Individual Records and Administration Manual* (IRAM)

5. MCO P5512.11, Uniformed Service Identification and Privilege Card, DD Form 1173

6. MCO P11000.17, *Real Property Facilities Manual*, Vol. X

B. ***Checklist***

1. UA entry (in excess of 24 hours) run on unit diary.

2. Page 12 SRB "to UA" entry made (IRAM 4015).

3. Inventory of government and personal property of absentee accomplished within 24 hours.

4. After 48th hour of absence, the CO telephoned NOK (if not in CONUS, only if dependents reside locally).

5. Prior to 10th day of UA, letter mailed to NOK and copy filed on document side of SRB (fig. 5-1, LEGADMINMAN).

6. Prepare charge sheet ***through*** block IV prior to 31st day of absence for violation of article 85 and all other known charges:

a. Charges sworn to, block III;

b. receipted for in block IV; and

c. original placed on document side of SRB.

7. Unit diary entry run declaring deserter status and dropping from roles to desertion on 31st day.

8. SRB pages 3, 12, and 23 completed per IRAM:

a. Chronological record (page 3);

b. offenses and punishments (page 12) administratively declaring deserter status and dropping from rolls; and

c. markings page (page 23).

9. DD 553 prepared and distributed (per para. 5002 of LEG-ADMINMAN):

a. Date published matches that of page 12 entry date (normally 31st day of UA);

b. if insufficient information, priority message sent to MMRB-10;

c. if incomplete information, permission requested from MHL-30; and

d. original sent to CMC (MHL-30) (Report Symbol MC-5800-01) within seven days of administrative declaration of desertion on page 12.

10. DD 553 distributed properly (para. 5002.2e(4) LEGADMINMAN):

a. Copy on document side of SRB;

b. copy to NOK and all known associates;

c. copy to each chief of police and county sheriff in area of civilian addressees of DD 553; and

d. copy to units assigned admin responsibility and appropriate area police (see MCO 5800.10).

11. If deserter has dependents, see para. 5004 of LEGADMINMAN:

a. Retrieved dependent ID cards;

b. if ***not*** surrendered, notify local medical facilities and military activities;

c. a ***terminate*** DD 1172 submitted to DEERS; and

d. dependents directed to vacate quarters.

12. Return of deserter within 91 days:

a. "From UA" entry made in diary;

b. page 12 entry recording date, hour, and circumstances of return to military control (see 4015 of IRAM);

c. page 12 SRB entry made removing mark of desertion (not removed if apprehended and / or convicted by civil authorities except as per LEGADMINMAN); and

d. if mark of desertion removed, notify disbursing office in writing of removal per LEGADMINMAN.

13. If no return by 91st day of absence:

a. Audit of SRB, pages 3, 12, and 23 completed and entries correct; and

b. charge sheet on document side correctly receipts for charge prior to page 12 date accused dropped from rolls (if not, redo).

APPENDIX A

SAMPLE 10-DAY UA NOTIFICATION LETTER FOR NEXT OF KIN

DEPARTMENT OF THE NAVY
USS NEVERSAIL (AS 00)
FPO AE 09501

1610
00
Date

Mr. & Mrs. Ronald Jones
235 Long Street
Los Angeles, CA 14790-9999

Dear Mr. and Mrs. Jones:

I regret the necessity of informing you that your son, Yeoman Third Class Fred Paul Jones, who enlisted in the Navy on June 24, 19CY-2, and was attached to USS NEVERSAIL (AS 00), has been on unauthorized absence since June 25, 19CY. Should you know of his whereabouts, please urge him to surrender to the nearest naval or other military activity immediately since the gravity of the offense increases with each day of absence. At this time, all pay and allowances, including allotments, have been suspended pending return to Navy jurisdiction. Should he remain absent for 30 days, we will declare him a deserter and a federal warrant will be issued. Information will be provided to the National Crime Information Center wanted person's file, which is available to all federal, state, and local law enforcement agencies.

Sincerely,

A. B. SEAWEED
Captain, U.S. Navy
Commanding Officer

Copy to:
(Apply name and address of Reserve chaplain nearest the absentee's home of record, according to NAVMILPERSCOMNOTE 1600)
Example:
Bee U. Humble
LCDR, CHC, USNR
1 Way Street
Upview, CA 12345-6789

APPENDIX B

SAMPLE LETTER NOTIFYING NEXT OF KIN OF RETURN FROM UA

DEPARTMENT OF THE NAVY
USS NEVERSAIL (AS 00)
FPO AE 09501

1610
00
Date

Mr. & Mrs. Ronald Jones
235 Long Street
Los Angeles, CA 14790-9999

Dear Mr. and Mrs. Jones:

Please be advised that your son, Yeoman Third Class Fred Paul Jones, was returned to USS NEVERSAIL (AS 00), on December 24, 19CY. You may write to your son at the above address.

Sincerely,

A. B. SEAWEED
Captain, U.S. Navy
Commanding Officer

Copy to:
(Include name and address of Reserve chaplain who was originally notified in the Letter of Notification sent out on 10th day)
Example:
Bee U. Humble
LCDR, CHC, USNR
1 Way Street
Upview, CA 12345-6789

[UPON RETURN OF ABSENTEE TO PARENT COMMAND, PREPARE A LETTER NOTIFYING NOK OF MEMBER'S RETURN - NO SPECIFIC LANGUAGE IS DICTATED BY MILPERSMAN. LANGUAGE OF LETTER IS LEFT TO DISCRETION OF PARENT COMMAND. WE RECOMMEND THAT THIS LETTER NOT BE SENT UNTIL THE ABSENTEE IS PHYSICALLY BACK ON BOARD THE COMMAND. *SEE* MILPERSMAN 3430200.1.c]

APPENDIX C

SAMPLE ACKNOWLEDGMENT OF NJP NOTIFICATION

1621
17
Date

From: First Lieutenant John J. Jones 123 45 6789/1369 USMC
To: Commanding General, 1st Marine Aircraft Wing

Subj: NOTIFICATION OF OFFICE HOURS HEARING

Ref: (a) CG, 1stMAW ltr 1621 17 of _____

1. I acknowledge receipt of the reference which gave me notification of the intent to conduct office hours and I understand my rights in that regard.

2. I have received a copy of the information to support the allegations.

3. I have had an opportunity to consult with counsel. I (did / did not) consult with counsel.

4. I (will / will not) accept office hours and (do / do not) demand trial by court-martial. At office hours, I (will / will not) plead guilty to the offenses alleged against me.

5. I (do / do not) request a personal appearance. Written matters (are / are not) attached.

6. I request that the following witnesses, if reasonably available, be present to testify at the hearing:

SIGNATURE

APPENDIX D

SAMPLE RECORD OF OFFICER NJP

LETTERHEAD

1621
17
Date

Subj: RECORD OF HEARING UNDER ARTICLE 15, UCMJ ICO, FIRST LIEUTENANT JOHN J. JONES 123 45 6789/1369 USMC

Ref: (a) Article 15, UCMJ
(b) Part V, MCM, 1984
(c) MCO P5800.8B (LEGADMINMAN)

Encl: (1) CG, 1stMAW ltr 1621 17 of [date]
(2) [SNO's] ltr 1621 17 of [date]
(3) Maj Smith's Report of article 32 investigation of [date] 90 w/ encls

1. First Lieutenant Jones received nonjudicial punishment (NJP) from MajGen Smith, Commanding General of the 1st Marine Aircraft Wing, on [date] for conduct unbecoming an officer. He was awarded a punitive letter of reprimand and forfeiture of $500.00 pay per month for two months.

2. The NJP hearing was conducted in substantial compliance with references (a) and (b). As reflected in enclosures (1) and (2), First Lieutenant Jones was notified of his rights prior to the hearing and elected to accept NJP.

3. This report is prepared by the staff judge advocate, who was present throughout the proceedings, per paragraph 4003 of reference (c).

4. During the hearing, First Lieutenant Jones acknowledged his rights and restated his election to accept NJP. He pled guilty to the charge. Details of the allegations are contained in the article 32 investigation report, attached as enclosure (3).

5. Prior to imposing punishment, the Commanding General deliberated and specifically stated that he considered enclosure (3), including the numerous statements of good character, the Officer Qualification Record, and the oral statements of the witness, First Lieutenant Jones, and the command representative. After the punishment was announced, the Commanding General advised First Lieutenant Jones of his right to appeal to the Commanding General, III Marine Expeditionary Force.

Subj: RECORD OF HEARING UNDER ARTICLE 15, UCMJ ICO, FIRST LIEUTENANT JOHN J. JONES 123 45 6789/1369 USMC

6. At the hearing, First Lieutenant Jones and a character witness, Major Johnson, made statements substantially as follows:

a. First Lieutenant Jones: Sir, every day, for the last four months, I have regretted this incident. I believe that alcohol affected my judgment that night. It was totally out of character for me. It will never happen again. My statement at the article 32 hearing was to the best of my recollection. I am responsible for my actions and I am willing to face the consequences. I would love to be able to stay a Marine.

b. Major Johnson, Executive Officer, [unit]. I am First Lieutenant Jones' executive officer, but I have known him since August of 1989 **(or 19CY-??)** when we were both students in the aviation supply school at Athens, Georgia. He did well at school and was well-respected. I believe he just exercised bad judgment on the night in question. It was an isolated incident. While I was at The Basic School, I filled several billets and observed many lieutenants. In my opinion, First Lieutenant Jones rates at the top of the batch. I would not hesitate to have him continue to serve with me.

7. The command representative, Colonel Brown, USMC, CO, [unit], made a statement substantially as follows: After reviewing all the facts in this incident, I do not have confidence in First Lieutenant Jones' judgment or integrity. While the overall incident may have been isolated, he made several separate judgment errors that evening. First Lieutenant Jones does not have the integrity required of Marine Corps officers.

Record Authenticated by:

C. L. VARREC
Lieutenant Colonel, USMC
Staff Judge Advocate

APPENDIX E

SAMPLE OFFICER NJP REPORT

LETTERHEAD

1621
17
Date

FOR OFFICIAL USE ONLY

From: Commanding General, 1st Marine Aircraft Wing
To: Commandant of the Marine Corps (JAM)
Via: (1) Commanding General, III Marine Expeditionary Force
(2) Commanding General, Fleet Marine Force Pacific

Subj: REPORT OF NONJUDICIAL PUNISHMENT ICO FIRST LIEUTENANT JOHN J. JONES 123 45 6789/1369 USMC

Ref: (a) MCO P5800.8B (LEGADMINMAN)
(b) FMFPacO 5810.1L
(c) Art. 15, UCMJ
(d) Part V, MCM, 1984
(e) Ch. 1, Part B, *JAG Manual*
(f) Article 1122, *U.S. Navy Regulations, (1990)*

Encl: (1) Record of hearing under Article 15, UCMJ
(2) Punitive letter of reprimand
(3) First Lieutenant Jones' ltr 1621 17 of [date]
(4) First Lieutenant Jones' statement regarding adverse matter

1. This report is forwarded for inclusion on First Lieutenant Jones' official records per paragraph 4003 of reference (a) via intermediate commanders, as directed by paragraph 3d(2) of reference (b).

2. On [insert date], in accordance with references (c), (d), and (e), nonjudicial punishment (NJP) was imposed on First Lieutenant Jones for conduct unbecoming an officer. As a result, he was awarded a punitive letter of reprimand and a forfeiture of $500.00 pay per month for two months.

3. Details of the hearing and the circumstances of the offenses are set forth in enclosure (1). A copy of the punitive letter of reprimand is attached as enclosure (2).

4. As reflected in enclosure (3), First Lieutenant Jones did not appeal the punishment. Accordingly, the NJP is now final and will be reflected in the fitness report that includes the date it was imposed, [insert date].

5. I recommend that First Lieutenant Jones be retained on active duty until the expiration of his obligated active service.

6. By copy hereof, First Lieutenant Jones is notified of his right, per reference (f), to submit his comments, within 15 days of receipt, concerning this report of NJP and the letter of reprimand which will be included as adverse matter in his official records. His comments, if any, will be attached as enclosure (4).

Copy to:
CO, MAG-32
CO, MALS-32
First Lieutenant Jones

SAMPLE FIRST ENDORSEMENT

LETTERHEAD

FIRST ENDORSEMENT on CG, 1stMAW ltr 1621 17 of [date]

From: Commanding Officer, Marine Wing Aircraft Squadron 1
To: First Lieutenant John J. Jones 123 45 6789/1369 USMC

Subj: PUNITIVE LETTER OF REPRIMAND

1. Delivered.

SIGNATURE
By direction

APPENDIX F

SAMPLE PUNITIVE LETTER OF REPRIMAND

LETTERHEAD

1621
17
Date

From: Commanding General, 1st Marine Aircraft Wing
To: First Lieutenant John J. Jones 123 45 6789/1369 USMC
Via: Commanding Officer, Marine Wing Headquarters Squadron 1

Subj: PUNITIVE LETTER OF REPRIMAND

Ref: (a) UCMJ, Art 15
(b) Part V, MCM, 1984
(c) JAGMAN, § 0114
(d) Record of office hours proceeding

1. On [date], you received nonjudicial punishment (NJP) per references (a), (b), and (c). Prior to the hearing, you were advised of your right to demand trial by court-martial and you elected not to do so. Reference (d) is a summary of the hearing.

2. During July 19CY, you were involved in two separate alcohol-related incidents that resulted in this letter. You were drunk and disorderly on both occasions. On 15 July 19CY, you hosted a party in your BOQ room in Plaza Housing, Okinawa, Japan. At about 0300, a female military policeman asked you to turn down your stereo. In response, you called her a "bitch," told her to "go to hell," threatened her with your fists, and threatened another corporal. At about 0300, 16 July 19CY, you were found asleep in your car near a gangster residence in Okinawa City, Okinawa, Japan. Upon being awakened by Japanese police and asked to leave the area, you got out of your car and became violent, scuffling with the police and Air Force Security Police who were called to the scene, resulting in your being handcuffed and led away.

3. Your misconduct as an officer in dealing with enlisted military police and with Japanese law enforcement personnel brought discredit upon the officer corps. Your conduct reflects adversely on the leadership, judgment, and discipline required of you as an officer of Marines. Accordingly, pursuant to references (a), (b), and (c), you are reprimanded.

4. You are hereby advised of your right to appeal this action within five days of receiving this letter to the next superior authority, the Commanding General, III Marine Expeditionary

Force, via the Commanding General, 1st Marine Aircraft Wing, per references (a), (b), and (c).

5. If you do not desire to appeal this action, you are directed to so inform me in writing within five days after receipt of this letter.

6. If you do desire to appeal this action, you are advised that an appeal must be made within a reasonable time and that, in the absence of unusual circumstances, an appeal made more than five days after receipt of this letter may be considered as not having been made within a reasonable time. If, in your opinion, unusual circumstances exist which make it impractical or extremely difficult for you to prepare and submit your appeal within the five days, you shall immediately advise me of such circumstances and request an appropriate extension of time to submit your appeal. Failure to receive a reply to such request will not, however, constitute a grant of such extension of time to submit your appeal. In all communications concerning an appeal of this letter, you are directed to state the date of your receipt of this letter.

7. Unless withdrawn or set aside by higher authority, a copy of this letter will be placed in your official record at Headquarters, U.S. Marine Corps. You may forward within 15 days after receipt of final denial of your appeal or after the date of notification of your decision not to appeal, whichever may be applicable, a statement concerning this letter for inclusion in your record. If you do not desire to submit a statement, you shall so state, in writing, within 5 days. You are advised that the statement submitted shall be couched in temperate language and shall be confined to the pertinent facts. Opinions shall not be expressed nor the motives of others impugned. Your statement may not contain countercharges.

8. Your reporting senior must note this letter in the next fitness report submitted after this letter becomes final, either by decision of higher authority upon appeal or by your decision not to appeal.

9. A copy of reference (d) has been provided to you for your use in deciding whether to appeal the issuance of this letter.

G. LEVY

APPENDIX G

SAMPLE ADVERSE MATTER STATEMENT

From: First Lieutenant John J. Jones 123 45 6789/1369 USMC
To: Commanding General, 1st Marine Aircraft Wing

Subj: STATEMENT REGARDING ADVERSE MATTER IN OFFICIAL RECORDS

Ref: (a) CG, 1stMAW ltr 1621 17 of [date]
(b) Art. 1122, *U.S. Navy Regulations (1990)*

1. I received a copy of reference (a) on [date].

2. I understand my right per reference (b) to make a statement concerning the report of nonjudicial punishment, with enclosures, including the punitive letter of reprimand.

3. I choose to make (no statement) (the following statement).

APPENDIX H

SAMPLE OFFICER NJP APPEAL

From: First Lieutenant John J. Jones 123 45 6789/1369 USMC
To: Commanding General, III Marine Expeditionary Force
Via: Commanding General, 1st Marine Aircraft Wing

Subj: APPEAL OF NONJUDICIAL PUNISHMENT

Ref: (a) CG, 1stMAW ltr of reprimand 1620 17 of [date]
(b) Record of hearing
(c) Article 15, UCMJ
(d) Part V, MCM, 1984

1. I acknowledge receipt of references (a) and (b) on [date].

2. I further acknowledge that I understand my rights under references (c) and (d) to appeal the imposition of nonjudicial punishment, including the punitive letter of reprimand, to the Commanding General, III Marine Expeditionary Force.

3. I desire to appeal on the ground that the punishment was (unjust, disproportionate to the offenses committed) as follows:

APPENDIX J

MAST / OFFICE HOURS CHECKLIST FOR STAFF JUDGE ADVOCATES

A. Maintain log book tracking each report chit (i.e., report initiated, sent to division for investigation and completion of rights form—have someone in division initial receipt in log book), return to legal (dismissed, EMI, or XO screening), sent to XO (dismissed, XOI, to CO), return to legal (*Booker* if shore command), mast / office hours (dismissed, NJP).

B. Coordinate with division and with MAA to ensure witnesses and division representative will be present.

C. Have CO record NJP and sign.

D. Post mast / office hours:

1. Post-mast yeoman standing by with appellate rights form;

2. know in advance who may need page 13 warning / counseling; and

3. service record entries should be made without delay.

E. Maintain Unit Punishment Book (UPB)

1. Original report chit with NJP signed by CO;

2. record of mast / office hours proceeding;

3. all documents considered by CO;

4. original—signed and dated—rights warning statements;

5. copies of service record entries; and

6. copies of appeals, endorsements, and responses (originals in NJP appeal correspondence file).

CHAPTER V

JURISDICTIONAL LIMITATIONS AS TO PERSONS

(MILJUS Key Number 514-523)

PROCEDURE STUDY GUIDE

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. ***In general.*** Any member who submitted voluntarily to military authority met the mental competence and minimum age qualifications of 10 U.S.C. §§ 504 and 505 when he / she enlisted, received military pay or allowances, and performed military duties is subject to the UCMJ effective upon the taking of the oath of enlistment and continuously until terminated as discussed below.

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 ART. 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, 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 dyslexia. 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) 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 competence 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 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). *See also United States v. Ghiglieri*, 25 M.J. 687 (A.C.M.R. 1987) (proposed enlistment as alternative to civil prosecution was not coercion); *United States v. Hirsch*, 26 M.J. 800 (A.C.M.R. 1988) (recruiter misconduct or intoxication at the time of the oath can be cured by "constructive enlistment"); *United States v. Ernest*, 32 M.J. 135 (C.M.A. 1991) (constructive enlistment applied to reservist on ADT). The court-martial is competent to examine enlistment misrepresentation claims. *Woodrick v. Divich*, 24 M.J. 147 (C.M.A. 1987). Since habeas corpus is the appropriate remedy, military judges should give careful consideration to appropriate demands of comity if related proceedings are ongoing in federal court.

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). *But see also United States v. Laws*, 11 M.J. 475 (C.M.A. 1981).

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), *reh'g denied*, (Jan. 26, 1945); *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), *petition denied*, 34 C.M.R. 480; *United States v. Wagner*, 33 C.M.R. 853 (A.F.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. See the end of this chapter for further information on jurisdiction over reservists.

B. ***Termination of jurisdiction.***

1. ***Continuing jurisdiction beyond the end of active obligated service (EAOS / EAS).*** The general rule for those awaiting discharge after the expiration of their terms of enlistment 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 servicemember, 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). *See also United States v. Batchelder*, 41 M.J. 337 (C.M.A. 1994). In *Murphy v. Garrett*, 29 M.J. 469 (C.M.A. 1989) the Court of Military Appeals held that the release from active duty and immediate transfer to the Reserves does not constitute a discharge that terminates military jurisdiction. The U.S. Marine Corps was allowed to exercise jurisdiction over a Marine, currently on Reserve status, to require him to report for active duty to participate in a formal article 32 investigation of misconduct that allegedly occurred prior to the termination of Regular service. However, in *Murphy v. Dalton*, _ F.3d _, 1996 WL 167913 (3d Cir. April 11, 1996) the 3rd Circuit Court found the moment the discharge became effective his status as a person subject to the Code terminated. This case is a must read for any counsel involved in the prosecution of a reservist!

2. Mere expiration of enlistment, 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 fact, the landmark case, *United States v. Poole*, 30 M.J. 149 (C.M.A. 1990), held that no constructive discharge results when a servicemember is retained on active duty beyond the end of an enlistment; but rather, as Art. 2, UCMJ, states, jurisdiction to court-martial a servicemember exists until that servicemember's military status is terminated by an actual discharge.

In *Poole*, the accused's enlistment expiration date was 15 April 1983. On that date, he went to his legal officer and asked if he was to be discharged that day. He was not discharged on that date. Following 15 April, the accused made several more inquiries about being discharged; however, no discharge was provided. Finally, with his ship preparing to go on an 8-month deployment, the accused, on 11 May 1983, absented himself without authority and remained in that status for a year. After a brief return to the military, the accused absented himself again on 17 May 1984, and remained absent until 14 April 1987. That latter absence was the only charge for which the accused was tried. The accused argued that he was no longer subject to court-martial jurisdiction because the Navy failed to discharge him in 1983 within a reasonable time after the expiration of his enlistment.

The court held that, whether or not the accused requested his discharge during the period of 15 April 1983 until 17 May 1983, was immaterial. Rather, the court stated the significant fact due to the plain and ordinary reading of Art. 2, UCMJ, was that neither on 15 April 1983, nor any time thereafter, did the accused actually receive any kind of discharge form. The court went on to say that delay on the government's part in discharging an individual at the end of an enlistment, even if this delay is unreasonable, does not constitute a constructive discharge. *United States v. Poole, supra*.

The C.M.A., in *Poole*, additionally stated that a servicemember unreasonably held on active duty is not without remedy: He may file a complaint under Art. 138, UCMJ; he may apply to the Board for the Correction of Naval Records; or he may seek extraordinary relief from the military appellate court. Furthermore, the government's unreasonable delay in accomplishing his discharge may affect the servicemember's obligation to perform some military duties (e.g., an accused unreasonably held past the end of an enlistment might challenge the lawfulness of an order that deploys him to a ship with a long scheduled voyage). *United States v. Poole, supra*.

3. In *United States v. Lee*, 43 M.J. 794 (N.M. Ct. Crim. App. 1995) the issue was whether there were sufficient official actions taken by the Government prior to the accused's discharge becoming effective to maintain court-martial jurisdiction. The N.M. Ct. Crim. App. held that although the accused was neither apprehended nor had he charges preferred against him prior to the discharge date on the DD 214, the NCIS investigation was well under way. The list contained in R.C.M. 202(c)(2) is not all inclusive. Investigatory actions can suffice. However, in *Vanderbush v. Smith*, 45 M.J. 590 (A. Ct. Crim. App. 1996), the court found courts-martial jurisdiction was severed when the accused was discharged after arraignment, but before charges were resolved by a lawful authority. Personal jurisdiction over the accused was lost upon discharge from the service. The

accused was arraigned and a trial date was set, but he was out-processed and unconditionally discharged.

4. Retaining jurisdiction by the use of an involuntary extension or Legal Hold requires official action. MILPERSMAN 1050155; LEGADMINMAN 3001. See Appendix A at the end of this chapter for a sample letter.

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, § 0123. *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).

1. 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).

2. Article 3 of the UCMJ was amended by the Military Justice Act of Fiscal Year 1993, effective 23 October 1992. The amendment was designed to eliminate the jurisdictional problem first noted in *United States ex rel. Hirshberg v. Cooke*, 336 U.S. 210 (1949). In *Hirschberg*, the Supreme Court held that the military lacked jurisdiction over a crime committed during a prior period of service that was subsequently discovered after a break in service. The practical effect of the amendment now means that the military, albeit some 40 years after the problem was first identified, has court-martial jurisdiction over all offenses committed during prior periods of service that are discovered before the statute of

limitations has run. A discussion of the practical effect of this amendment can be found in *United States v. Cortte*, 36 M.J. 767 (N.M.C.M.R. 1992).

C. Article 3(b) maintains jurisdiction over individuals who have procured a fraudulent discharge. 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). In *United States v. Reid*, _ M.J. _, No. 9401123 (A. Ct. Crim. App. March 26, 1996) the court held that the plain language of Article 3(b) establishes that a court-martial lacks jurisdiction over offenses committed prior to an alleged fraudulent separation until a predicate conviction for fraudulent discharge has been obtained. (Note: This court also held that there is no "conviction" for purposes of Article 3(b) until an adjudged sentence has been announced based on a finding of guilty to the charge of fraudulent separation.) *United States v. Spradley*, 41 M.J. 827 (N.M. Ct. Crim. App. 1995), reached the same conclusion.

D. A 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 beginning in the 1950's and running until the 1970's, the Court of Military Appeals struggled with the question of whether a discharge of an enlisted man for purposes of immediate reenlistment "interrupted his status" by creating a "hiatus" between enlistments, thereby ending military jurisdiction over him for the offenses he committed during the prior enlistment. The Court of Military Appeals finally put this question to rest when it expressly overruled *United States v. Ginyard*, 16 C.M.A. 512, 37 C.M.R. 132 (1967) in *United States v. Clardy*, 13 M.J. 308 (C.M.A. 1982). In *Clardy*, the court stated that court-martial jurisdiction exists to try a servicemember for an offense occurring during his prior enlistment when he was discharged solely for purposes of reenlistment, and his military status remained uninterrupted. *See also United States v. Kino*, 27 M.J. 327 (C.M.A. 1989) (member who was given a discharge certificate for the purpose of reenlistment and then refused to reenlist is still subject to jurisdiction). The decision in *Clardy* has been further refined by the Court of Military Appeals' holding in *United States*

v. King, 27 M.J. 327 (C.M.A. 1989). In *King*, the court held that the physical transfer of a discharge certificate to an accused for the purposes of effecting an early enlistment did not deprive the military of court-martial jurisdiction over him with respect to subsequent desertion charges. The court, in *King*, said that the following three elements were needed to effect a valid discharge: a final accounting of pay; a delivery of a valid discharge certificate; and the completion of the clearing process as required by service regulations.

0504 JURISDICTION OVER CADETS, AVIATION CADETS, AND MIDSHIPMEN, ART. 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.

0505 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.E, *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.

The Secretary of the Navy recently provided guidance regarding military jurisdiction over offenses committed by reservists during inactive duty training periods. Specifically, the law was unclear on whether the military had jurisdiction over those offenses committed during "muster out" periods (e.g., between a Saturday afternoon drill period and a Sunday morning drill period). By way of SECNAV Memo for CNO / CMC dated 30 Sep 1993, the Secretary directed that reservists were subject to military jurisdiction during such muster out periods. Counsel should be advised, however, that this position is as yet untested by the courts.

C. When jurisdiction is based upon Art. 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, § 0123c.

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

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

MEMBERS OF THE FLEET RESERVE AND FLEET MARINE CORPS RESERVE, ART. 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, supra* ; *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, § 0123c.

0507 PERSONS IN CUSTODY OF THE ARMED FORCES SERVING A SENTENCE IMPOSED BY A COURT-MARTIAL, ART. 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, ART. 2(a)(8), UCMJ

PRISONERS OF WAR IN CUSTODY OF THE ARMED FORCES, ART. 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, ART. 2(a)(10), UCMJ

A number of decisions have upheld the validity of trials by court-martial of civilians performing services for the armed forces in the field during time of war. *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.

A. 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).

B. 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, ART. 2(a)(11), UCMJ

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, ART. 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.

D. In *United States v. Cantrell*, 44 M.J. 711 (A.F. Ct. Crim. App. 1996), the court found courts-martial jurisdiction over an airman for misconduct committed in a previous enlistment with the Army.

0513 OTHER JURISDICTIONAL MATTERS

A. ***The continuing nature of court-martial jurisdiction.***

1. 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.

2. 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.

B. ***Procedural considerations.***

For discussion of the requirement to plead jurisdiction, see *United States v. Alef*, 3 M.J. 414 (C.M.A. 1977). Lack of jurisdiction may be raised by a motion to dismiss under R.C.M. 907 at any stage of the proceeding. The government has the burden of persuasion by a preponderance of the evidence. *United States v. Bailey*, 6 M.J. 965 (N.M.C.M.R. 1979); R.C.M. 905(c); *United States v. Marsh*, 15 M.J. 252 (C.M.A. 1983) (for "peculiarly military" offenses like a UA, an accused's military status is an element of the offense which must be proven beyond a reasonable doubt to the fact-finders).

C. ***Composition of the court.***

In *United States v. Ryder*, 44 M.J. 9 (C.A.A.F. 1996) the Court addressed the issues of whether civilian judges were considered principal or inferior officers, and who has the authority to appoint such civilian appellate judges. The Court held that civilian judges assigned to the C.G. Ct. Crim. App. are "inferior" officers, and are neither required to be appointed by the President nor confirmed by the Senate. The JAG is commanded by Art. 66(a) to establish the Court of Criminal Appeals and assign judges, but is not authorized to appoint judges. The Secretary of Transportation satisfies the Appointments Clause by appointing judges in accordance with the statutory authority of 49 USC § 323(a). In a similar case the U.S. Coast Guard Court of Criminal Appeals held that they did have proper jurisdiction to affirm trial court decisions despite the claim that they were civilian judges who have not been appointed in accordance with the Appointments Clause of the Constitution. *United States v. Washington*, 43 M.J. 84 (C.G. Ct. Crim. App. 1996).

D. ***Properly convened courts & properly referred charges.***

The court must be properly composed (i.e., military judge and members must have proper qualifications). The court must be convened by proper authority. A properly constituted court-martial may try any person subject to the UCMJ, even if the accused is not under the command of the CA. *United States v. Murphy*, 30 M.J. 1040 (A.C.M.R. 1990). The charges must be properly referred. A defective referral where charges were referred to a different court-martial convening order than that actually used to try the accused was not jurisdictional error. *United States v. King*, 28 M.J. 397 (C.M.A. 1989). Referral of an offense punishable by death under the UCMJ to SCM or SPCM requires GCMCA approval. R.C.M. 201(f)(2).

E. ***Jurisdiction over Reservists.***

Under Art. 2(a)(1), (3), UCMJ, and JAGMAN, § 0123, court-martial jurisdiction exists over reservists "while on inactive duty training" without any threshold requirements. Thus, Reserve members are subject to the UCMJ whenever they are in a Title 10 status: Inactive Duty Training (IDT), Active Duty Training (ADT), Annual Training (AT), or Active Duty (AD). *United States v. Cline*, 29 M.J. 83 (C.M.A. 1989).

1. ***Reservists on active duty.*** A reservist on active duty can be extended beyond his / her normal release date if he / she has been apprehended, arrested, confined, is under investigation, or charges have been preferred. R.C.M. 202(c); JAGMAN, § 0123. Proper authority must be obtained to court-martial reservists not on active duty.

2. ***Reservists on IDT.*** Jurisdiction is not lost over reservists upon termination of IDT or AT for an offense committed while subject to the UCMJ. Art. 3(d), UCMJ.

a. ***Recall.*** Regular component general court-martial convening authorities (GCMCA) can recall reservists to active duty involuntarily for an article 32 investigation, trial by court-martial, or imposition of NJP for offenses committed while on IDT or active duty. Art. 2(d), UCMJ; JAGMAN, § 0123. Only a court-martial convening authority can generate a request to a GCMCA to recall a reservist to active duty.

b. ***Pretrial confinement.*** A reservist on IDT can be placed in pretrial confinement in accordance with R.C.M. 304 and 305 with Secretarial approval. JAGMAN, § 0123c.

c. ***Trial by court-martial.*** Before arraignment at a general or special court-martial (SPCM), the reservist must be on active duty. R.C.M. 204(b)(1). Coordination between active and Reserve components is required under Art. 2(d), UCMJ. Summary courts-martial (SCM) can be initiated and tried within the Reserve structure and without active duty involvement. RCM 204(b)(2). The SCM officer must be placed on active duty. Art. 25, UCMJ; R.C.M. 1301. If given during IDT, trial and execution of punishments are limited to "normal" training periods. R.C.M. 204(b)(2). Confinement is not an available punishment during IDT. The recall to active duty must be approved by the Secretary of the Navy (SECNAV) before confinement is adjudged. Art. 2(d)(5), UCMJ.

d. ***Restraints on liberty.*** Restraints on liberty cannot be extended beyond the normal IDT period, but may be carried over to later drill periods. JAGMAN, §§ 0105a(7), 0112. A reservist on inactive duty cannot be ordered to active duty to serve restraint punishment without SECNAV approval. Similarly, a reservist ordered to active duty for disciplinary purposes cannot be extended on duty to serve restraint punishment, nor can he receive confinement as a sentence, unless the order to active duty was with SECNAV approval.

APPENDIX A

REQUEST FOR LEGAL HOLD

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

Subj: REQUEST FOR LEGAL HOLD ICO _____

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

Name	Rank	SSN	Unit	RTD

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

3. The request for legal services in the subject case (was) (will be) forwarded to the Office of the Staff Judge Advocate (on) (not later than) _____, 19__.

SIGNATURE

CHAPTER VI

JURISDICTION OVER THE OFFENSE

(MILJUS Key Number 552)

PROCEDURE STUDY GUIDE

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 nor 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, 1995 [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 nor 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, 1995 [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 n.19.

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 265, 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:
>
> 1. The serviceman's proper absence from the base.
>
> 2. The crime's commission away from the base.
>
> 3. Its commission at a place not under military control.
>
> 4. Its commission within our territorial limits and not in an occupied zone of a foreign country.
>
> 5. Its commission in peacetime and its being unrelated to authority stemming from the war power.
>
> 6. The absence of any connection between the

defendant's military duties and the crime.

7. The victim's not being engaged in the performance of any duty relating to the military.

8. The presence and availability of a civilian court in which the case can be prosecuted.

9. The absence of any flouting of military authority.

10. The absence of any threat to a military post.

11. The absence of any violation of military property.

One might add still another factor implicit in the others:

12. The offenses being among those traditionally prosecuted in civilian courts.

Id. at 365.

5. Justice Blackmun acknowledged that the court was committed to an ad hoc approach when court-martial jurisdiction is challenged. Factors 4, 6, 8, 11, 12, and perhaps 5 and 9, operated in Relford's favor. However, 1, 2, 3, 7, and 10 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: ". . . [W]hen 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. Trottier*, 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."

Solorio, at 467.

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

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. What follows is a historical analysis of 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. Watkins*, 21 M.J. 208 (C.M.A. 1986) overruled *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. Trottier*, 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.), *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.

CHAPTER VII

PROCEDURE STUDY GUIDE

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, 1995 [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, 1995,* (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." *McClaughry 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 GCM's and SPCM's will be discussed in section 0706, *infra*.

0702 QUALIFICATIONS OF MILITARY JUDGE (MILJUS Key Numbers 881-82)

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 assigned to his or her command to the maximum extent possible. JAGINST 5813.4E of 10 March 1986. 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) and *United States v. Curtis*, 44 M.J. 106 (C.A.A.F. 1996).

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 SPCM's and GCM's; 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 SPCM's and GCM's; and

b. only for the trial of an enlisted person; and

c. only if requested by the accused before the conclusion of a pretrial Article 39(a), UCMJ, session or assembly of the court, whichever occurs first; and,

d. only if he is not a member of the same "unit" as the accused. 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. Tagert*, 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). *See also United States v. Berlingeri*, 35 M.J. 794 (N.M.C.M.R. 1992).

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. *See also United States v. Barrios*, 31 M.J. 750 (A.C.M.R. 1990). 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). *See also United States v. Gebhart*, 34 M.J. 189 (C.M.A. 1992).

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-Santini*, 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 (1968); *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). *Distinguish United States v. Dixon*, 8 M.J. 858 (N.C.M.R. 1980).

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. *See United States v. Kosek*, 44 M.J. 579 (A.F. Ct. Crim. App. 1996). 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, § 0136.

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 1235-1245)

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 Navy, Marine Corps, Army, or Air Force, or law specialist of the Coast Guard; who is a member of the bar of a Federal court or the highest court of a state; and is certified as competent to perform such duties by the JAG of the armed force of which he is a member.

Certification by the JAG is an administrative, rather than judicial, decision, and the JAG is not bound by prescribed standards. *In re Taylor*, 12 C.M.A. 427, 31 C.M.R. 13 (1961). At present, Navy and Marine Corps judge advocates and law specialist of the Coast Guard normally are certified upon successful completion of the lawyer course at Naval Justice School.

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 ". . .[a]s 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). *See also United States v. Pruner*, 33 M.J. 272 (C.M.A. 1991). 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 (IMC).*** The *JAG Manual*, in section 0131, addresses the accused's right to request IMC in detail. The following includes *JAG Manual*, section 0131 in its entirety.

a. General. Article 38(b)(3)(B), UCMJ, provides that an accused has the right to be represented before a general or special court-martial or at an investigation under article 32, UCMJ, by military counsel of his own selection if that counsel is reasonably available. Article 38(b)(7), UCMJ, provides that the Secretary concerned shall, by regulation, define "reasonably available" for purposes of paragraph (3)(B) and establish procedures for determining whether the military counsel requested by an accused under that paragraph is "reasonably available." Pursuant to the provisions of article 38(b)(3) and (7), UCMJ, and in accordance with R.C.M. 506, MCM, 1984, the term "reasonably available" is hereafter defined, and the procedures for determining whether a military counsel requested by an accused is "reasonably available" are established. Counsel serving in the Army, Air Force, or Coast Guard, are "reasonably available" to represent a Navy or Marine Corps accused if not otherwise unavailable within the meaning of R.C.M. 506, MCM, 1984, or under regulations of the Secretary concerned for the Department in which such counsel are members. Since an accused has the right to civilian counsel in addition to detailed counsel or individual military counsel, retention of, or representation by, civilian counsel does not extinguish the right to representation by individual military counsel. It is the policy of the Secretary of the Navy that the right to individual military counsel shall be administered so as not to interfere with orderly and efficient trials by court-martial.

b. Definitions

(1) "Proceeding." As used in this section, "proceeding" means a trial-level proceeding by general or special court-martial or an investigation under article 32, UCMJ.

(2) "Commander." For counsel assigned to a Naval Legal Service Office or Detachment, the commander of the requested counsel is defined as the commanding officer of the cognizant Naval Legal Service Office; for counsel assigned to the Naval Civil Law Support Activity, the Commanding Officer, Naval Civil Law Support Activity; for counsel assigned to the Navy-Marine Corps Appellate Review Activity, the Officer in Charge, Navy-Marine Corps Appellate Review Activity; for all other counsel assigned to the Office of the Judge Advocate General, the Assistant Judge Advocate General for Military Justice (Code 02). For all other counsel,

the commander is defined as the commanding officer or head of the organization, activity, or agency with which requested military counsel will be serving at the time of the proceeding. The commander is not disqualified from acting as the commander under this rule solely because the commander is also the convening authority.

(3) "Attorney-client relationship." For purposes of this section, an attorney-client relationship exists between the accused and requested counsel when counsel and the accused have had a privileged conversation relating to a charge pending before the proceeding, and counsel has engaged in active pretrial preparation and strategy with regard to that charge. A counsel will be deemed to have engaged in active pretrial preparation and strategy if that counsel has taken action on the case which materially limits the range of options available to the accused at the proceeding.

(a) Actions by counsel deemed to constitute active pretrial preparation and strategy which materially limit the range of options available to the accused include, but are not limited to: advising the accused to waive or assert a legal right, other than simply asserting the right to remain silent, where the accused has followed such advice by waiving or asserting that right; representing the accused at a pretrial investigation under article 32, UCMJ, dealing with the same subject matter as any charge pending before the proceeding; submitting evidence for testing or analysis; advising the accused to submit to a polygraph examination where the accused has followed such advice by so submitting; offering a pretrial agreement on behalf of the accused; submitting a request for an administrative discharge in lieu of trial on behalf of the accused; or interviewing witnesses relative to any charge pending before the proceeding.

(b) Actions that, in and of themselves, will not be deemed to constitute "active pretrial preparation and strategy" include, but are not limited to: discussing the legal and factual issues in the case with the accused; discussing the legal and factual issues in the case with another person under the protection of the attorney-client privilege, such as another defense counsel; performing legal research dealing with the subject matter of the case; representing the accused in the review of pre-trial

confinement under R.C.M. 305, MCM, 1984; representing the accused in appellate review proceedings under article 70, UCMJ; or providing counseling to the accused concerning article 15, UCMJ. These actions should be appraised under a totality of the circumstances test to determine if they constitute "active pretrial preparation and strategy."

(4) "Reasonably available." All counsel serving on active duty in the Navy or Marine Corps, certified in accordance with article 27(b), UCMJ, and not excluded by subsections b(4)(a) through (d), below, may be determined to be "reasonably available" by the commander of requested counsel. In making this determination, the commander will assess the impact upon the command should the requested counsel be made available. In so doing, the commander may consider, among others, the following factors: the anticipated duties and workload of requested counsel, including authorized leave; the estimated duration of requested counsel's absence from the command, including time for travel, preparation, and participation in the proceeding; any unique or special qualifications relevant to the proceeding possessed by requested counsel; the ability of other counsel to assume the duties of requested counsel; the nature and complexity of the charges or the legal issues involved in the proceeding; the experience level and any special or unique qualifications of the detailed defense counsel; and the information or comments of the accused and the convening authority. Counsel described in subsections b((4)(a) through (d), below, are not "reasonably available:"

(a) Counsel who are flag or general officers;

(b) Counsel who are performing duties as trial counsel; trial or appellate military judge; appellate defense or government counsel; court commissioner; principal legal advisor to a command, organization or agency having general court-martial convening authority, or the principal assistant to such legal advisor; instructor or student at a college, university, service school, or academy; or assigned as a commanding officer, executive officer or officer in charge;

(c) Counsel who are assigned to any of the following commands, activities, organizations, or agencies: Executive Office of the President; Office of the

Secretary of Defense; Office of the Secretary of the Navy; Office of the Joint Chiefs of Staff; Office of the Chief of Naval Operations; Headquarters, U.S. Marine Corps; National Security Agency; Defense Intelligence Agency; Office of the Judge Advocate General; Navy-Marine Corps Appellate Review Activity; Naval Civil Law Support Activity; Office of Legislative Affairs; Office of the Defense Department or Navy Department Inspectors General; or any agency or department outside the Department of Defense; and

(d) Counsel neither assigned to a command or activity located within the Navy-Marine Corps Trial Judiciary Circuit where the proceeding is to be held, nor within 100 miles of where the proceeding is to be held (determined in accordance with the official Tables of Distances).

c. Submission and forwarding of requests.

(1) Submission. A request for individual military counsel shall be made in writing by the accused, or by detailed defense counsel on the accused's behalf, and shall be submitted to the convening authority via the trial counsel. It shall state the location and duties of requested counsel, if known, and shall clearly state whether the accused claims to have an attorney-client relationship with requested counsel regarding one or more charges pending before the proceeding, and the factual basis underlying that assertion. It shall also state any special qualifications of requested counsel that are relevant to the case.

(2) Action by the convening authority.

(a) If requested counsel is not on active duty in the armed forces, the convening authority shall promptly deny the request and so inform the accused, in writing, citing this provision.

(b) If requested counsel is on active duty in the armed forces, the convening authority shall forward the request to the commander of requested counsel, providing the following in the forwarding endorsement: the nature of the charges; the convening authority's estimate of the duration of requested counsel's involvement in the proceeding, including time for travel, preparation and

participation in the proceeding; and any other information or comments deemed appropriate.

d. Action by the commander of requested counsel.

(1) Determining whether an attorney-client relationship exists. Applying the criteria enumerated in subsection b(3), above, the commander shall determine whether requested counsel has an attorney-client relationship with the accused regarding any charge pending before the proceeding. This determination shall be made whether or not the accused claims such a relationship in the request.

(2) When there is an attorney-client relationship. If the commander determines that there is an attorney-client relationship regarding any charge pending before the proceeding, then the requested counsel should ordinarily be made available to act as individual military counsel without regard to whether he or she would otherwise be deemed "reasonably available" as defined in subsection b(4), above, unless there is "good cause" to sever that relationship, and provided that requested counsel is certified in accordance with article 27(b), UCMJ. "Good cause" to sever an attorney-client relationship includes, but is not limited to, requested counsel's release from active duty or terminal leave. If requested counsel is not certified in accordance with article 27(b), UCMJ, the commander shall promptly deny the request and so inform the accused, in writing, citing this provision. If there is "good cause" to sever an attorney-client relationship, the commander shall apply the criteria and procedures in subsection d(3), below.

(3) When there is no attorney-client relationship. If the commander determines that there is no attorney-client relationship regarding any charge pending before the proceeding, the following procedures apply:

(a) If the commander determines that requested counsel is not "reasonably available" as defined in subsection b(4), above, the commander shall promptly deny the request and so inform the accused, in writing, citing this provision.

(b) If the commander determines that requested counsel is "reasonably available," the requested counsel shall be made available to represent the accused at

the proceeding, and the commander shall promptly inform the convening authority and the accused of this determination.

e. Administrative review. The decision whether requested counsel will be made available to act as individual military counsel is an administrative determination within the sole discretion of the commander, except as specifically provided below. If the commander declines to make requested counsel available, the accused may appeal that decision via the commander to the commander's immediate superior in command, but appeals may not be made which require action at the departmental or higher level. The basis for appeal will normally be abuse of discretion, but if the accused claims that the commander making the determination did not have authority to do so, or did so on the basis of inaccurate or incomplete information, the reviewing authority shall consider those allegations and, if warranted, direct corrective action. The appeal shall be promptly reviewed, and the commander of requested counsel, the convening authority and the accused shall be promptly informed of the decision.

f. Approval of associate defense counsel. If individual military counsel has been made available to defend an accused at a proceeding, the detailed defense counsel normally shall be excused from further participation in the case unless the authority who detailed the defense counsel, in his or her sole discretion, approves a request from the accused that detailed defense counsel act as associate defense counsel. The seriousness of the charges, the retention of civilian defense counsel, the complexity of legal or factual issues, and the detailing of additional trial counsel are among the factors that may be considered in the exercise of this discretion. This decision is not subject to administrative review.

4. ***Denial of IMC request***

a. In the event that a request for an IMC is denied, and an administrative appeal to superior authority is also denied, the detailed defense counsel can request that the military judge allow an offer of proof to reveal that the denying authorities have abused their discretion. In no case, however, can the military judge dismiss the charge or abate the proceedings because the IMC request has been denied. *United States v. Redding*, 11 M.J. 100 (C.M.A. 1981). *See* R.C.M. 906(b)(2), and section 0706.C.3.d.

b. N.C.M.R. has held that, once an accused requests and receives individual military counsel in accordance with Article 38(b), UCMJ, he has no right to request IMC a second time. "[N]either the convening authority nor any other cognizant official is obligated to consider or otherwise process in accordance with [paragraph 48b, MCM, 1969 (Rev.), the precursor of R.C.M. 506(b)], any application for the detail of a person requested as individual military counsel by an accused previously granted military counsel of his own selection." *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.

c. ***Appeal from a denial of individual military counsel.*** R.C.M. 506(b)(2) provides:

> (2) *Procedure.* Subject to this subsection, the Secretary concerned shall prescribe procedures for determining whether a requested person is "reasonably available" to act as individual military counsel. Requests for an individual military counsel shall be made by the accused or the detailed defense counsel through the trial counsel to the convening authority. If the requested person is among those not reasonably available under subsection (b)(1) of this rule or under regulations of the Secretary concerned, the convening authority shall deny the request and notify the accused, unless the accused asserts that there is an existing attorney-client relationship regarding a charge in question or that the person requested will not, at the time of the trial or investigation for which requested, be among those so listed as not reasonably available. If the accused's request makes such a claim, or if the person is not among those so listed as not reasonably available, the convening authority shall forward the request to the commander or head of the organization, activity, or agency to which the requested person is assigned. That authority shall make an administrative determination whether the requested person is reasonably available in accordance with the procedure prescribed by the Secretary concerned. This determination is a matter within the sole discretion of that authority. An adverse

> determination may be reviewed upon request of the accused through that authority to the next higher commander or level of supervision, but no administrative review may be made which requires action at the departmental or higher level.

When this provision is applied to the present administrative organization of the JAG Corps, it appears that an appeal by right (and a concomitant right to an interim continuance) will arise in the case of most denials of Navy IMC. The Office of the Judge Advocate General is considered to be at the departmental level and, hence, no appeal by right may lie to the Judge Advocate General per se; however, the 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.

d. ***Judicial review of denial for IMC.*** R.C.M. 906(b)(2) provides as a basis for a motion for appropriate relief:

> (2) Record of denial of individual military counsel or of denial of request to retain detailed counsel when a request for individual military counsel was granted. If a request for military counsel was denied, which denial was upheld on appeal (if available) or if a request to retain detailed counsel was denied when the accused is represented by individual military counsel, and if the accused so requests, the military judge shall ensure that a record of the matter is included in the record of trial, and may make findings. The trial counsel may request a continuance to inform the convening authority of those findings. The military judge may not dismiss the charges or otherwise effectively prevent further proceedings based on

this issue. However, the military judge may grant reasonable continuances until the requested military counsel can be made available if the unavailability results from temporary conditions or if the decision of unavailability is in the process of review in administrative channels.

e. ***Waiver of a denial of IMC.*** Failure to raise the issue at trial may result in a waiver of any defects in processing the request or of an abuse of discretion in denying it. 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).

f. ***Legal qualifications of IMC.*** Individual military counsel must be certified in accordance with Article 27(b), UCMJ; JAGMAN, § 0131.

5. ***Counsel on appeal.*** Article 70, UCMJ, provides that the JAG shall detail Article 27(b), UCMJ, counsel to act as appellate defense counsel when such counsel is requested by the accused; when the government is represented by counsel; or when the JAG has certified a case to the Court of Military Appeals. The accused does not have the right to be represented by his military trial defense counsel on appeal, even though that attorney is both willing and available. *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 1235-1245)

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, 1995*, 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 SPCM's***

– ***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 nonlawyer counsel to both sides. The accused declines Article 27(b), UCMJ, counsel, but obtains the services of a civilian counsel. At many commands, the 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 SPCM's – 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, § 0131(b)(4).

(2) ***Reasonable availability and procedure for obtaining IMC.*** The test and procedure for obtaining IMC are the same as at a GCM. Note that in a non-BCD SPCM, where nonlawyer counsel are detailed, if the accused requests a specific Article 27(b), UCMJ, counsel, two decisions are required:

(a) Is the requested counsel reasonably available?

(b) Are military exigencies such that no Article 27(b), UCMJ, counsel can be obtained?

Where the accused is not represented by Article 27(b), UCMJ, counsel, a request for a specific lawyer, if denied, should be treated as a request for any lawyer. 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) *cert. denied* 493 U.S. 1024 (1990). 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), *and United States v. Hustwit*, 33 M.J. 608 (N.M.C.M.R. 1991).

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. Rushatz*, 31 M.J. 450 (C.M.A. 1990). *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
For 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.B.R. 1963); *United States v. Fowler*, 20 C.M.R. 779 (A.F.B.R.), *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). *See also United States v. Harness*, 44 M.J. 593 (N.M. Ct. Crim. App. 1996).

c. Assistant defense counsel acting as defense counsel – held not jurisdictional in *United States v. Nichelson*, 18 C.M.A 69, 39 C.M.R. 69 (1968); *United States v. JeanBaptiste*, 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. Tavolilla*, 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. 1981). 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 1985). 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, 1995*, 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. Tavolilla*, 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 Stanten 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. *See also United States v. Miller*, 44 M.J. 549 (A.F. Ct. Crim. App. 1996).

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. 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.

g. The C.M.A. found no error in the conduct of a brief Article 39(a), UCMJ, session in the absence of detailed defense counsel for the sole purpose of determining the accused's wishes in view of the unanticipated and emergency absence of his counsel. *United States v. Schmidt*, 7 M.J. 15 (C.M.A. 1979).

h. The C.M.A. has held that, while an existing attorney-client relationship can only be severed for good cause, when court-martial charges are withdrawn, defense counsel for that court-martial need not be detailed to defend the accused at a later trial, even though the same charges are involved, where there has been a considerable time lapse and governing authorities and the place of trial are different. *United States v. Gnibus*, 21 M.J. 1 (C.M.A. 1985).

4. ***Continued participation of detailed defense counsel after detailing of IMC.*** If the accused's request for IMC is granted, detailed defense counsel is normally excused. The Art. 27, UCMJ, authority who detailed the defense counsel, as a matter of sole discretion, may approve a request from the accused that detailed defense counsel shall act as associate counsel. Article 38(b), UCMJ; R.C.M. 506(b)(3); *United States v. Bevacqua*, 37 M.J. 996 (C.G.C.M.R. 1993).

5. ***The problem of multiple counsel.*** A detailing authority should not detail multiple counsel to a particular court as an administrative convenience, leaving the assignment of specific cases later referred to that court to the chief DC or the SJA. Since the accused has a right to the services of all detailed counsel (except in the good cause situation), the C.M.A. has held that the record must disclose the express consent of the accused to the absence of any detailed defense counsel. This rule is applied literally, even though the accused may not want the services of the absent counsel, and even though the absent counsel is totally without knowledge of the accused's case. *United States v. Nichelson*, 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. Tavolilla*, 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).

6. 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).

0711 THE ACCUSED'S RIGHT TO PROCEED PRO SE

A. R.C.M. 506(d) provides that the accused may decline the services of counsel and represent himself. The C.M.A. has upheld a complete waiver of counsel where the accused discharged both individual counsel and detailed defense counsel at trial after a thorough explanation of his right to counsel. *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.B.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. Freeman*, 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). *See also United States v. Streater*, 32 M.J. 337 (C.M.A. 1991).

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 *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.*

0712 ADEQUACY OF COUNSEL AND RELATED PROBLEMS (MILJUS Key Number 1242)

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). *See also United States v. Radford*, 14 M.J. 322 (C.M.A. 1982).

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. *See also United States v. Caritativo*, 37 M.J. 175 (C.M.A. 1993).

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, 378, 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 time saver in that it will enable the accused to focus on relevant facts when consulting with counsel.

2. Initially, defense counsel should explain his general duties and obligation of loyalty. Because of the traditional distinctions between officers and enlisted personnel in the Navy and Marine Corps, particular stress, in the case of an enlisted accused, must be laid upon the confidential relationship between attorney and client and the lawyer's duty as an advocate. As discussed in the preceding section, counsel must explain the accused's right to counsel and ascertain his desires in that respect. 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); *United States v. Volmar,* 15 M.J. 339 (C.M.A. 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, supra; United States v. Connell,* 9 M.J. 758 (N.C.M.R. 1980), *reversed* 13 M.J. 156 (C.M.A. 1982); *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. *See United States v. Meek*, 43 M.J. 456 (C.A.A.F. 1996) for a good discussion on what a TC should not do.

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, § 0138. 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 zealousness of the defense, maintain an attitude of professional courtesy and avoid unseemly wrangling. When it will save time and expense to the government, trial counsel should not hesitate to stipulate to uncontested matters.

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, § 0133. 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.

Trial counsel must serve a copy of the charge sheet on the accused personally, not on the defense counsel. *United States v. Lawson*, 42 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 postage-paid envelope. *See* R.C.M. 703(e)(2); JAGMAN, § 0146; 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.

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

PROCEDURE STUDY GUIDE

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, 1995* (MCM) as "convening" courts-martial, and the officer authorized to convene courts-martial is the "convening authority" (CA). R.C.M. 504(a), MCM, 1995 [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 an SCM. In addition, officers in charge so empowered by the Secretary of the Navy (SECNAV) may convene SCM's. *See* Art. 24, UCMJ; R.C.M. 1302(a); JAGMAN, § 0120c.

2. ***Special courts-martial (SPCM).*** The commanding officers authorized to convene special courts-martial are set forth in Article 23(a) (1) -(6), UCMJ. In addition to these commanding officers, Article 23(a)(7), UCMJ, empowers SECNAV to designate other commanding officers or officers in charge to convene SPCM's. *See* JAGMAN, § 0120b.

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 SPCM's, even though the Secretary had provided that every command so designated by that grade officer could convene SPCM's. The C.M.A. indicated that such a regulation was an unauthorized delegation of the authority that only the Secretary possessed under Article 23(a)(7), UCMJ. *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); *United States v. Almy*, 34 M.J. 1082 (C.G.C.M.R. 1992); *United States v. DeBarrows*, 41 M.J. 710 (C.G.Ct.Crim.App. 1995).

(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 without first obtaining the Secretary's designation of special court-martial authority. *Compare U.S. Navy Regulations, 1990,* art. 0722.

(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 SPCM's by SECNAV are set forth in JAGMAN, § 0120b. 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, § 0121.

3. ***General courts-martial (GCM).*** The categories of persons who have authority to convene GCM's are set forth in Article 22, UCMJ. SECNAV also may designate other specific officers who may convene GCM's and some of these officers are specified in JAGMAN, § 0120a.

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.); *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, 1990*, arts. 1074, 1076.

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.), *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, § 0133 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, § 0122. A specific example of the operation of this authority is set forth in the *JAG Manual*, section 0122b, which restricts the exercise of court-martial jurisdiction by a commanding officer of a unit attached to a ship of the Navy. Even after referral, but before trial, a superior may exercise control by withdrawing the case and referring it to a higher level court. *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, § 0123, which requires authority from SECNAV before exercising jurisdiction over an individual under Article 2(a) (4)-(6) or Article 3, UCMJ; JAGMAN, § 0124, which requires prior approval before trying offenses previously adjudicated in civilian criminal courts; and JAGMAN, § 0126, which withholds jurisdiction to try national security cases and, in certain instances, major felonies where there is reciprocal jurisdiction in the Federal courts. However, with respect to JAGMAN, § 0124, the court decided a special court-martial convening authority can prosecute an accused for a crime which he was previously convicted in state court without JAG approval in accordance with JAGMAN, § 0124. The court held that JAGMAN, § 0124, is merely "policy" that imposes no legal or binding restrictions on the convening authority, nor was it intended to confer additional rights to the accused. *See United States v. Kohut*, 44 M.J. 245 (C.A.A.F. 1996).

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 the 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 1063 of *U.S. Navy Regulations, 1990*. In convening such courts-martial, the commanding officer is performing duties related to the administration of his medical unit. *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 0133 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 an 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.), *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.

7. Section 0133 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 personally sign 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, § 0133.

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, § 0130d(2)(C).

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. Perkinson*, 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 0136 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). Art. 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. Arts. 29b & c, and Art. 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, 1995. 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.

LETTERHEAD

15 Feb 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 James P. Hoar, U.S. Navy
Lieutenant Blair E. Wiegand, U.S. Navy
Lieutenant Junior Grade Christine M. Fantini, U.S. Naval Reserve
Ensign Suzanne F. Simmons, U.S. Naval Reserve
Ensign Andrew B. Tully, U.S. Navy

/s/
BRIAN J. MURPHY
Captain, U.S. Navy
Commanding Officer
Naval Justice School
Newport, Rhode Island

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 CWO3 David T. Campbell, U.S. Navy, is detailed as a member of the general court-martial convened by order number 1-CY, this command, dated 29 January 19CY, vice Lieutenant Kurt B. Larson, U.S. Navy, relieved.

RICHARD J. CLAIRMONT
Rear Admiral, U.S. Navy
Commander, Naval Surface Group
Middle Pacific
Pearl Harbor, Hawaii

NOTE TO STUDENT: ***THIS TYPE OF AMENDING ORDER IS USED TO PERMANENTLY REMOVE AN OFFICER MEMBER FROM A PREVIOUSLY ESTABLISHED GENERAL OR SPECIAL COURT-MARTIAL AND TO REPLACE THAT MEMBER WITH A NEW OFFICER MEMBER.***

Appendix 8-2

COURTS-MARTIAL CHECKLIST FOR STAFF JUDGE ADVOCATES

A. Request for services from NLSO.

B. Convening orders, drafting charges, service record review.

C. Status list.

D. Case file:

1. Copy right side of service record and performance evaluations;

2. ICRs, NCIS reports, miscellaneous writings (such as letter from Mom or from accused while UA), relevant messages, memo to division officer, etc.; and

3. chronology recording when events occurred—such as delivery to NLSO, DC called about sanity issue, you called finance center / BUPERS / or civilian police (with whom you spoke and what was said).

E. Work closely with TC:

1. Serve accused when (s)he is aboard;

2. supply sufficient copies of charge sheet, etc.;

3. ensure that service record entries are accurate; and

4. make DC work through TC.

F. Accused works for command, not for DC:

1. Use check-in / check-out chits for visits to DC, and retain them in case file; and

2. conversely, work with division officer and disbursing office to ensure that command fulfills its responsibilities (e.g., accused is paid if so entitled, personal effects returned, brig visits, accused's family has POC).

G. Work with division officer:

1. Advise that accused is in brig (may be going to brig or may be transferred after trial), will need to get sea bag in order (onboard, not off-base), will need transfer performance evaluation reflecting the SPCM conviction (to be completed after trial, of course);

Appendix 8-3

2. keep division informed of changes in trial date and results of trial; and

3. keep witnesses informed of when needed (work with TC).

H. If accused still attached to command when CA's action taken, ensure service record entries are made (including page 13 warning / counseling if appropriate). If not, ensure promulgating order forwarded to accused's new command.

I. Trial team at sea:

1. Message NLSO to get trial teams—follow format in applicable legal manual, especially noting companion cases and prior attorney-client relationships.

2. Make special efforts to accommodate attorneys

a. For each case, prepare case file folders marked TC, DC, or MJ (which include the charge sheet and convening order). For counsel, include lists of witnesses, LPO, LCPO, division officer, and their phone numbers. TC's folder should include all applicable reports with copies (s)he may provide to DC.

b. Provide temporary work space, a private space (stateroom) where DC may interview clients, and a space for courts-martial (wardroom).

3. Coordinate trial team visit with battle group judge advocate if possible.

4. Ask NLSO / LSSS to provide legal assistance, ADSEP advice, *Booker* advice for SCMs.

J. Notes on SCMs

1. Use good officers and prepare SCM package yourself so that busy officers will be more cooperative;

2. provide a copy of the trial guide with plastic covers and a grease pen;

3. maintain separate case files as with other courts-martial;

4. ensure that service record entries are made, including page 13 *Booker* waivers and page 13 counseling / warnings if appropriate; and

5. inform division officer of trial results.

SERVICE RECORD ACCOUNTABILITY

A. There should be a single service record monitor in your office who should be kept informed of all service records entering or leaving the office. (S)he can prepare an update list daily and should inventory the service records in the office regularly.

B. No service record should leave your office without a record transmittal sheet dated and receipted by the transmittee (disbursing, admin, personnel, division, NLSO, registered mail clerk, etc.) and retained by your service record monitor

CONVENING SPCM CHECKLIST FOR STAFF JUDGE ADVOCATES

A. ***Navy pretrial procedures***

1. Check the service record out from personnel or PSD.

2. Copy the enlistment contract; pages 1, 2, 4, 5, 7, 9; all page 13's relating to NJP or disciplinary matters; and enlisted evaluations. These will be needed for preparation of CA's action if accused is convicted.

3. Establish liaison with the local NLSO regarding the pending charges. Follow their desired procedure regarding the forwarding of the charge sheet to their office.

4. Prepare the charge sheet, DD Form 458.

5. Prepare list of possible members from which the CO may choose the panel. If possible, avoid using members you know should be disqualified, such as accused's division officer or others from his / her same department. Have the CO select the panel and prepare the convening order.

6. After the charges have been preferred by the legal clerk, have the CO sign both the charge sheet and convening order.

7. Make sufficient copies of the charges and convening order. Check with the NLSO, but you will normally need the original and five copies of the charge sheet and six copies of the convening order. They will be distributed as follows: original charge sheet plus one copy to the trial counsel; one to defense counsel; one to the military judge; one to the command files; and one to be served on the accused. Note, the original convening order remains in the command files, therefore the copy for the record of trial (ROT) should be a certified copy.

8. Serve the accused with the charges and note the service on the original charge sheet prior to forwarding the others to the NLSO.

Appendix 8-4

9. Forward appropriate copies of the charge sheet and convening order to the NLSO. Include the service record and copies of the investigation.

10. Make all arrangements necessary for the accused to see his / her lawyer and for the witnesses to be interviewed by counsel.

11. After being notified of the time and date of the trial, inform all witnesses and members (if necessary).

12. Arrange for a bailiff to escort the accused to the trial and to take custody after trial. Bailiff should be indoctrinated by NLSO staff for courtroom duties and by brig staff for any confinement, etc.

13. If confinement is expected, ensure the accused has a full sea bag by the date of the trial. His division officer should do this.

14. If confinement is expected, prepare a confinement order and assemble the pay record, health record, and dental record. Have TEMADD orders prepared prior to trial. If the accused receives more than 30 days effective confinement, or a BCD and any confinement, these must be changed to TEMDU orders later.

B. ***Marine Corps pretrial procedures***

1. Assemble service record book, preliminary inquiry (or NCIS investigation).

2. Audit service record book to assure it is up-to-date and contains no errors.

3. Complete request for legal services. Be sure to list witnesses and any who are pending transfer, discharge, or who will be unavailable within the near future. Also list five (5) approved court-martial officer members by full name, rank, unit, and phone number. Also request telephone notification to the legal officer (LO) when a specific TC is assigned.

4. Make copies of request for legal services and allied papers and forward to Law Center / LSSS. (Be certain to have legal clerk who receives it sign your log as receiving the service record book.)

5. Upon receipt of the convening order and charge sheet upon which charges have been preferred, check to see that first page is completed and signed.

6. Have adjutant / personnel officer receipt for sworn charges and cause unit commander or his / her designee to notify personally the accused of charges and complete the notification block.

7. Have CA sign convening order first, then complete referral block.

8. Return charge sheet and convening order to Law Center / LSSS for service by TC.

9. After reasonable period of time, call TC for a trial date and notify prospective members that, if utilized, they will be needed during a specified time frame.

10. Assign a bailiff (senior to accused) and have them read the bailiff's handbook (NAVMARTRIJUDIC INST 5810.5) to learn their duties. Advise TC who has been selected.

11. Prepare applicable parts of page 13, SRB.

12. If confinement is expected, prepare confinement orders, assemble health and dental records, and secure physical examination immediately before trial (or notify medical people of need).

CHAPTER IX

REFERRAL OF CHARGES TO A COURT-MARTIAL

PROCEDURE STUDY GUIDE

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 all of 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.

0903 TRIAL ON SWORN CHARGES (MILJUS Key Number 951)

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, 1995 [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 section 0902a 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. *See also United States v. Hamilton*, 41 M.J. 32 (C.A.A.F. 1994).

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 United States v. Williams, 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, 1995.*

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. *See also United States v. Curtis*, 44 M.J. 106 (C.A.A.F. 1996).

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*.

0907 AMENDMENT OF CHARGES AND ADDITIONAL CHARGES (MILJUS Key Number 961)

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), *and United States v. Longmire*, 39 M.J. 536 (A.C.M.R. 1994).

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 $500.00 to $1,500.00. 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 $10,000.00, 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. *Rodgers* is somewhat overruled by *United States v. Miller*, 38 M.J. 121 (C.M.A. 1993). In *Miller*, a new charge sheet is prepared with the UA's commencement date and termination date. However, the original charge sheet that tolls the statute of limitations was entered as an appellate exhibit. The court was satisfied that the "sworn charges and specifications" facing the accused had been timely received.

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).

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 that 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(d), 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 re-sworn. 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, 1995.

3. Remember...withdrawal does not stop the speedy trial clock! *See* chapter XIII (Speedy Trial), *infra*.

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 rereferral 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. 947 (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).

2. ***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), and *United States v. English*, 44 M.J. 612 (N.M. Ct. Crim. App. 1996).

(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. Contrast *Wells* with *United States v. Mann*, 32 M.J. 883 (N.M.C.M.R. 1991). In *Mann*, the court said that neither delayed appreciation of the seriousness of the offenses, nor discovery of additional evidence of accused's guilt, was proper reason for withdrawal of charges from a SPCM after arraignment and rereferral of identical charges to a GCM.

(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.

3. 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

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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 [1] _____

_____ _____
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: [2] _____
_____
____ By _____ of _____
Command or Order

_____ _____
Typed Name of Officer *Official Capacity of Officer Signing*

_____
Grade

_____
Signature

15.
On _____, 19 ____, I (caused to be) served a copy hereof on (each of) the above named accused.

_____ _____
Typed Name of Trial Counsel *Grade or Rank of Trial Counsel*

_____
Signature

FOOTNOTES: 1 - *When an appropriate commander signs personally, inapplicable words are stricken*
2 - *See R.C.M. 601(e) concerning instructions. If none, so state.*

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CHAPTER X

THE ACCUSER CONCEPT AND UNLAWFUL COMMAND INFLUENCE

PROCEDURE STUDY GUIDE

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 [hereinafter R.C.M. ___], referring charges to a court-martial (R.C.M. 601(c)), and taking post-trial action [R.C.M. 1107a (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 0129b 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), 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, supra.*

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(c), UCMJ, by ensuring that the facts conformed to the pleading. In other cases, the Court of Military Appeals has stated that the test to be used in deciding these cases is the reasonable person test. If, after considering all of the circumstances, a reasonable person would conclude that the convening authority had a personal interest in the matter, then he would be declared an accuser and disqualified as the convening authority. *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.F.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), *United States v. Drayton*, 39 M.J. 871 (C.MA 1994), and *U.S. v. Hinton*, 2 M.J. 564 (A.F.C.M.R. 1975).

(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:

> . . . [W]e do not believe the true test is the animus of the convening authority. This undoubtedly was the early rule, but as we view it, the test should be whether the appointing authority was so closely connected to the offense that a reasonable person would conclude that he had a personal interest in the matter.

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) and *United States v. Crossley*, 10 M.J. 376 (C.M.A. 1981).

1. ***Convening authority as the "victim"***

– In *United States v. Gordon, supra*, the accused burglarized General Edwards' home and also attempted to burglarize the home of the GCM convening authority. Later, the accused was apprehended and confessed. The case was referred to trial, alleging only the burglary of General Edwards' home. In finding that the GCM convening authority was an accuser, the Court of Military Appeals stated:

> We cannot peer into the mind of a convening authority to determine his mental condition, but we can determine from the facts whether there is a reasonable probability that his being the victim of an offense tended to influence a delicate selection. We are convinced that in this case it is reasonable to assume that tendency present.

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 NCIS agent, his executive officer, and by his legal officer who had the responsibility for drafting the charges and making recommendations as to their disposition. The court did not decide whether ***merely*** witnessing the commission of an offense would be sufficient to disqualify the CA.

e. In *United States v. Deford*, 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, supra*, (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(c)(2) clearly provide that an officer who is subordinate to an accuser will also be disqualified as an accuser. It is for this reason that Articles 22(b) and 23(b), UCMJ, require, in instances where the convening authority has become an accuser, that the charges shall be forwarded to another convening authority who is both superior in grade and in the chain of command. This procedure is mandated in both special and general courts-martial. This "junior accuser" disqualification may occur when the purported convening authority stands in one of the following positions in relation to an accuser:

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. Garcia*, 16 C.M.R. 674 (A.F.B.R. 1954); and *United States v. Blosser*, 11 M.J. 641 (A.F.C.M.R. 1981).

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. Chavers*, 23 C.M.R. 701 (C.G.B.R. 1957) and *United States v. Blosser*, supra;.

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. Kostes*, 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 Norfolk, his subordinate commanders would be precluded from acting as convening authority, even

though CINCLANT would not ordinarily act as convening authority in such a case. *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 22(a) and 23(a), UCMJ (e.g., CO of air wing or vessel) is jurisdictional and cannot be waived. However, it is not jurisdictional whether the convening authority is disqualified as an accuser under Articles 22(b) and 23(b), UCMJ. Therefore, if not raised at trial, such error is waived. *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(b)(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. Danzine*, 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. 635, 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. 1985) (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. Nassey*, 5 C.M.A. 514, 18 C.M.R. 138 (1955).

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 (1955).

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.

c. In *United States v. Jameson*, 33 M.J. 669 (N.M.C.M.R. 1991), two defense witnesses were fired and transferred because of their testimony during the sentencing portion of the trial. In addition, a recruit training battalion commanding officer lectured her Marines that they were encouraged to testify for the defense, but would be held accountable for any testimony which deviated from Marine Corps policy. These post-trial actions could not have affected the findings nor the sentence of the court-martial, but the defense's position was that potential providers of R.C.M. 1105 clemency matters were deterred from providing any information because of the fate of the two defense witnesses and the commanding officer's remarks. The court held that the government did not meet its burden of proving beyond a reasonable doubt that the convening authority's action was unaffected by unlawful command influence and, therefore, returned the case for a new review and action by officers not previously involved in the case.

d. In *United States v. Jones*, 33 M.J. 1040 (N.M.C.M.R. 1991), which was a companion case to *Jameson, supra,* the court ordered a rehearing on sentence because the unlawful influence which arose out of the Jameson trial took place prior to the *Jones* case. That unlawful command influence, it was contended, had eliminated any source of potential defense presentencing witnesses.

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).

In *United States v. Allen*, 33 M.J. 209 (C.M.A. 1991), the convening authority's staff judge advocate telephoned the Deputy Judge Advocate General complaining that the military judge detailed to this national security case was a "light sentencer" and was pro defense. The Deputy JAG then telephoned the Chief Judge of the Trial Judiciary to relay the SJA's concerns. The Chief Judge replaced the originally detailed judge with an out-of-circuit judge specially designated to try national security cases. Due to a conflict with another national security case, the out-of-circuit judge was relieved and the originally detailed judge was restored and presided over the remainder of the trial. The C.M.A. found no prejudice, but denounced the manipulations that had taken place.

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. Yslava*, 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 (1970).

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)], 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 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, supra*. *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

PROCEDURE STUDY GUIDE

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 0137 of the *JAG Manual* details the procedures and rules to be followed in the Navy and Marine Corps and provides, in Appendix A-1-h, 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 0137 of the *JAG Manual* applies this procedure to the Navy and Marine Corps.

1. ***Negotiations.*** Pretrial agreement negotiations may be initiated by the accused, defense counsel, trial counsel, the staff judge advocate, convening authority, or their duly authorized representatives. Either the defense or the government may propose any term or condition not prohibited by law or public policy. Government representatives shall negotiate with defense counsel unless the accused has waived the right to counsel. R.C.M. 705(d)(1)

a. Ordinarily, pretrial agreement negotiations are conducted between the defense counsel and the trial counsel. Although a 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 defense counsel or the trial counsel informally approaching each other to lay a foundation upon which to base later negotiations.

b. Once an 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 has no authority to accept or reject the offer on their own.

c. The defense counsel may choose to approach the convening authority directly without consulting the trial counsel or staff judge advocate. However, counsel should be wary of engaging in "sharp practices."

d. 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. ***Formal submission.*** After negotiation, if any, if the accused elects to propose a pretrial agreement, the defense shall submit a written offer using the general format provided in appendix A-1-h of the *JAG Manual*. R.C.M. 705(d)(2) (*see also* appendix 11-2 herein).

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 also sign the agreement.

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, § 0137.

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).

3. ***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)(3). 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)(3). 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.

4. ***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)(4) 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)(4)(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)(4)(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.)

5. ***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, § 0137(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.

6. ***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. Figueroa*, 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, supra*; *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 0152d 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 0152d 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).

h. A provision to refer a case to special court-martial should be included in the separate sentencing portion of the pretrial agreement. Such a provision is equivalent to a sentence limitation. *United States v. Rondash*, 30 M.J. 686 (A.C.M.R. 1990).

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. 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. 458 (C.M.A. 1977).

In accordance with *Green* and *King*, in *United States v. Hoaglin*, 10 M.J. 769, 770 (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 of sentence.

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 of 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 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.

1104 CASES CONCERNING PRETRIAL AGREEMENTS

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 multiplicious 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.)

Id. at 376.

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 affect 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. ***Prohibited terms or conditions.*** Involuntary PTA terms are unenforceable. The accused must freely and voluntarily agree to each provision.

1. ***Unwaivable rights.*** In addition, the accused cannot be deprived of certain rights. No term will be enforced if it deprives the accused of the right to counsel, the right to due process, the right to challenge the jurisdiction of the court-martial, the right to speedy trial, the right to complete sentencing proceedings, or the complete and effective exercise of post-trial and appellate rights.

2. ***Capital offenses.*** An accused may not plead guilty to a capital offense. R.C.M. 910(a)(1); *United State v. Matthews*, 16 M.J. 354 (C.M.A. 1983). Similarly, guilty pleas may not be entered for noncapital offenses which, taken together, constitute a capital offense (e.g., felony-murder). *United States v. Dock*, 28 M.J. 117 (C.M.A. 1989); Art. 118(4), UCMJ. The accused may, however, offer to plead guilty in exchange for a noncapital referral. *United States v. Partin*, 7 M.J. 409 (C.M.A. 1979).

3. ***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.

4. ***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. 1975), 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. Corriere*, 20 M.J. 905 (A.C.M.R. 1985). *See also United States v. Rivera*, 44 M.J. 527 (A.F. Ct. Crim. App. 1996).

5. ***"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, 1 M.J.* at 264; *United States v. Green, 1 M.J.* 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.*

6. ***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 to accountability for the terms of an agreement which he and his counsel proposed. . . . It did not concern the waiver of a constitutional right or a fundamental principle, but only the accused's agreement to elect one of the 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.

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.

7. ***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 Corps 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).

8. ***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. ***Procedural waivers.*** The accused may promise to waive procedural requirements such as the article 32 investigation. R.C.M. 705(c)(2)(E); *United States v. Schaffer*, 12 M.J. 425 (C.M.A. 1982). *See United States v. Hayes*, 24 M.J. 786 (A.C.M.R. 1987) (Waiver of article 34 advice). Sample PTA provision: "I agree to waive my right to an investigation pursuant to Article 32, UCMJ."

6. ***Waiver of particular forum.*** The accused may waive the right to trial by court-martial composed of members or the right to request trial by military judge alone. R.C.M. 705(c)(2)(E). This provision must originate with the defense. *See United States v. Zelenski*, 24 M.J. 1 (C.M.A. 1987); *United States v. Woodward*, 24 M.J. 514 (A.F.C.M.R. 1987). The military judge should inquire to avoid the implication that the provision is a "standard" demand of the government. *United States v. Ralston*, 24 M.J. 709 (A.C.M.R. 1987). Sample PTA provision: "I agree to request trial by military judge alone. This provision originated with me and my counsel."

7. ***Motions.*** Per R.C.M. 705(c)(1)(B), the accused may agree to waive motions based on evidentiary or constitutional grounds, so long as it truly originates with the defense. *United States v. Jones*, 23 M.J. 305 (C.M.A. 1987) (waiving search and seizure, out-of-court identification motions); *United States v. Gibson*, 29 M.J. 379 (C.M.A. 1990) (waiver of hearsay and confrontation objections to pretrial statements made by accused's children); *United States v. Corriere*, 24 M.J. 701 (A.C.M.R. 1987) (unlawful command influence); *United States v. Kitts*, 23 M.J. 105, 108 (C.M.A. 1986) (close scrutiny to ensure waiver of unlawful command influence issue was not caused by the government's "tactical machinations").

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).

d. In *United States v. Cassity*, 36 M.J. 759 (N.M.C.M.R. 1992), a pretrial agreement which provided that a BCD would be suspended for six months, only if the accused was awarded more than four months confinement, was held to be a violation of public policy when the trial counsel argued for confinement of less than four months in order to be "lenient" to the accused. This disingenuous argument misled the trial judge and was held to be void for public policy reasons.

8. ***Stipulations of fact.*** The accused may promise to enter into a stipulation of fact concerning offenses to which a plea of guilty will be entered. The stipulation should be unequivocal that counsel and the accused agree not only to the truth of the matters stipulated, but that such matters are admissible in evidence against the accused to reflect the full agreement and understanding of the parties. *United States v. Glazier*, 26 M.J. 268 (C.M.A. 1988). Consider the following:

> The government and the defense, with the express consent of the accused, stipulate that the following facts are true, susceptible of proof, and admissible in evidence. These facts may be considered by the military judge, in determining the providence of the accused's pleas, and by the sentencing authority, in determining an appropriate sentence, even if the evidence of such facts is deemed otherwise inadmissible. The accused expressly waives any objection to the admission of these facts into evidence at trial under the Military Rules of Evidence, U.S. Constitution, or applicable case law.

a. Iron out a signed stipulation of fact before sending the PTA to the CA to preserve TC's leverage in dictating the content of the stipulation. *United States v. Vargas*, 29 M.J. 968, 970, 971 (A.C.M.R. 1990) (stipulation carried added

weight because it was presented to the CA as part of the proposed plea agreement; defense's later efforts to redact prejudicial portions were unsuccessful). Using the elements as a working framework, the stipulation should establish the factual basis for the offense, including a description of aggravating factors and any other admissible evidence the government could introduce on the merits.

b. The stipulation may include uncharged misconduct. Judges have no sua sponte duty to determine the admissibility of uncharged misconduct in a stipulation. *United States v. Jackson*, 30 M.J. 565 (A.C.M.R. 1990). The stipulation may also include facts relating to motive, impact on the victim, etc. *United States v. Nellum*, 24 M.J. 693 (A.C.M.R. 1987). Under *Glazier*, the adventurous may also seek to include inadmissible evidence in the stipulation and run the risk of being labeled "overreaching." *United States v. Mullens*, 24 M.J. 745 (A.C.M.R. 1987), *aff'd*, 29 M.J. 398 (C.M.A. 1990).

c. As with any important term, TC should tailor the automatic cancellation paragraph of the PTA to protect the government's interests. Here, the accused should be required to agree that the government will not be bound if the defense withdraws from the stipulation or objects to its contents at trial.

9. ***Stipulations of testimony.*** Under R.C.M. 705(c)(2)(E), the accused may agree to waive the opportunity to request the personal appearance of witnesses at sentencing proceedings (i.e., agree to stipulate to their expected testimony). Such a bargain is not contrary to public policy, does not make a plea improvident, and may reflect foresight and calculation on the part of the defense. *United States v. West*, 13 M.J. 800 (A.C.M.R. 1982); *United States v. McDonagh*, 10 M.J. 698, *aff'd*, 14 M.J. 415 (C.M.A. 1981). Conversely, the government can bargain for stipulations of testimony for its aggravation witnesses. *United States v. Harrod*, 20 M.J. 777 (A.C.M.R. 1985).

D. *Common Sentencing Provisions*

The following list of provisions is to assist you in drafting the sentencing limitations of PTAs. It is not an all-inclusive list; you may be inventive and draft any others which are allowed by the provisions of the *Manual for Courts-Martial* (MCM) and current case law. Plain language is preferred and the terminology should be similar to that used in the CA's action. (See App. 16, MCM.)

1. *Punitive discharge*

a. If awarded, a bad-conduct discharge (dishonorable discharge) (dismissal) will be disapproved.

b. If awarded, a BCD (DD) (dismissal) may be approved; however, it will be suspended for a period of ____ months from the date the sentence is adjudged, at which time, unless sooner vacated, it will be remitted without further action.

c. If awarded, a DD will be mitigated to a BCD. The sentence as mitigated may be approved.

2. ***Confinement or restraint***

a. If awarded, confinement may be approved; however, all confinement in excess of _____ months (years) will be suspended for a period of ____ months from the date the sentence is adjudged, at which time, unless sooner vacated, the suspended portion will be remitted without further action. In this regard, this PTA constitutes a request by the accused for and approval by the CA of deferment of the portion of any confinement to be suspended pursuant to the terms of the agreement. The period of deferment will run from the date the accused is released from confinement pursuant to this agreement until the date the CA acts on the sentence. (This is also known as a "Lamb provision", pursuant to the decision in *United States v. Lamb*, 22 M.J. 518 (N.M.C.C.M.R. 1986)).

b. If awarded, confinement for _____ months (years) may be approved; however, all confinement in excess of ____ months (years) shall be suspended for a period of ____ months from the date the sentence is adjudged, at which time, unless sooner vacated, the suspended portion will be remitted without further action.

c. Conditional language

i. If a BCD (DD) (dismissal) is awarded, confinement, if also awarded, may be approved; however, all confinement in excess of _____ months (years) shall be suspended for a period of _____ months from the date sentence is announced, at which time, unless sooner vacated, the suspended portion will be remitted without further action.

ii. If no BCD (DD) (dismissal) is awarded, confinement, if awarded, may be approved as adjudged.

Note: Both of these provisions would be present in the agreement. Also, the military judge, when examining the agreement, will seek assurances that such conditional terms originated with the defense offer to enter into the agreement.

d. If awarded, all confinement may be approved as adjudged.

e. Other forms of restraint: All other forms of restraint punishment may be approved as adjudged.

Note: This ensures that all parties agree that restriction or hard labor without confinement may be ordered executed in their entirety, notwithstanding limits on confinement approvable.

3. ***Forfeitures and fines (FF)***

a. If awarded, forfeitures may be approved; however, any forfeitures in excess of $____ pay per month for ____ months will be suspended for a period of ___ months from the date the sentence is adjudged, at which time, unless sooner vacated, the suspended portion will be remitted without further action.

b. If awarded, fines will be changed to forfeitures and subject to the limitations of paragraph 2.C.i, above.

c. If awarded, forfeitures and fines may be approved as adjudged.

4. ***Reduction (rate or grade)***

a. If awarded, a reduction to paygrade E-* may be approved; however, any reduction below paygrade E-** will be suspended for a period of ____ months from the date the sentence is adjudged, at which time, unless sooner vacated, the portion of the reduction suspended will be remitted without further action. Any reduction effected under Article 58a, UCMJ, and JAGMAN, § 0152, below paygrade E-** will also be suspended for a period of ____ months from the date the sentence is adjudged, at which time, unless sooner vacated, the portion of the reduction suspended will be remitted without further action.

b. If awarded, any reduction, whether judicially or administratively awarded, may be approved.

5. ***Other lawful punishments:*** All other lawful punishments not specifically mentioned in this agreement may be approved.

NOTE: This category should be added. It could include such punishments as loss of numbers, lineal position, seniority, reprimand, or other punishments listed in R.C.M. 1103(b). If any are anticipated, you may make specific mention of them or you can use the general provision above.

ADDITIONAL PTA CASES

1. Stipulation as to aggravating circumstances: *United States v. Sharper*, 17 M.J. 803 (A.C.M.R. 1984).

2. Conditions of probation: *United States v. Dawson*, 10 M.J. 142 (C.M.A. 1981); *United States v. Lallande*, 46 C.M.R. 170 (C.M.A. 1973).

3. Waive venue motion: *United States v. Kitts*, 23 M.J. 105 (C.M.A. 1986).

4. Waive search and seizure motions: *United States v. Holland*, 1 M.J. 58 (C.M.A. 1975).

5. Waive objections to evidence: *United States v. Robinson*, 25 M.J. 528 (A.F.C.M.R. 1987).

6. Conditional sentence provisions: *United States v. Hollcraft*, 17 M.J. 1111 (A.C.M.R. 1984); *United States v. Cross*, 21 M.J. 88 (C.M.A. 1988).

7. Proceed to trial by date certain: *United States v. Mitchell*, 15 M.J. 238 (C.M.A. 1983).

8. Agreement to refer case to SPCM: *United States v. Rondash*, 30 M.J. 686 (A.C.M.R. 1990); *United States v. Kelly*, 32 M.J. 835 (N.M.C.M.R. 1991).

9. Forward proposals to CA: *United States v. Upchurch*, 23 M.J. 501 (A.F.C.M.R. 1986).

10. Suspended punishments: *United States v. Barraza*, 44 M.J. 622 (N.M. Ct. Crim. App. 1996); *United States v. Albert*, 30 M.J. 331 (C.M.A. 1990); *United States v. Elliot*, 10 M.J. 740 (N.M.C.M.R. 1981); *United States v. Panikowski*, 8 M.J. 781 (A.C.M.R. 1980).

11. Uncovered punishments: *United States v. Edwards*, 20 M.J. 439 (C.M.A. 1985); *United States v. Llewellyn*, 27 M.J. 825 (C.G.C.M.R. 1989).

12. Article 58a automatic reduction: *United States v. Cabral*, 20 M.J. 269 (C.M.A. 1985).

13. Administrative discharge: *United States v. Bedania*, 12 M.J. 373 (C.M.A. 1982).

14. Convening Authority's Actions: *United States v. Perlman*, 44 M.J. 615 (N.M. Ct. Crim. App. 1996).

15. Government's reference to co-actor's PTA: *United States v. Schnitzer*, 44 M.J. 380 (C.A.A.F. 1996).

16. Agreement not to refer additional charges: *United States v. Castro*, 43 M.J. 831 (A.F. Ct. Crim. App. 1996).

17. Approves the use of prospective deferments requests / approvals in PTAs: *United States v. Gacioch*, 33 M.J. 727 (N.M.C.M.R. 1991).

Appendix 11-1(1)

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).

Appendix 11-2(1)

____ 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).

____ 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).

Appendix 11-2(2)

____ 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).

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).

Appendix 11-2(3)

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).

MEMORANDUM FOR PRETRIAL AGREEMENT

UNITED STATES

v.

Place_____

Date_____

_____ _____ _____

(Name) (Grade) (Serial/Service Number)/(Branch of Service)

I,_____, the accused in a (General/Special) court-martial, do hereby certify;

1. That, for good consideration and after consultation with my counsel, I do agree to enter a voluntary plea of GUILTY to the charges and specifications listed below, provided the sentence as approved by the convening authority will not exceed the sentence hereinafter indicated by me;

2. That it is expressly understood that, for purposes of this agreement, the sentence is considered to be in these parts, namely a: a punitive discharge, a period of confinement or restraint, an amount of forfeiture or fine, a reduction in rate or grade, and any other lawful punishment;

3. That should the court award a sentence which is less, or a part thereof is less, than that set forth and approved in this agreement, then the convening authority, according to law, will only approve the lesser sentence;

4. That I am satisfied with my defense counsel in all respects and consider him/her qualified to represent me in this court-martial;

APPELLATE EXHIBIT _____

Appendix 11-3(1)

5. That this offer to plead guilty originated with me and my counsel; that no person or persons whomsoever have made any attempt to force or coerce me into making this offer or pleading guilty;

6. That my counsel has fully advised me of the meaning and effect of my guilty plea and that I fully understand and comprehend the meaning thereof and all of its attendant effects and consequences;

7. That my counsel has advised me that I may be processed for an administrative discharge which may be under other than honorable conditions, and that I may therefore be deprived of virtually all veterans' benefits based upon my current period of active service, and that I may therefore expect to encounter substantial prejudice in civilian life in many situations, even if part or all of the sentence, including a punitive discharge, is suspended or disapproved pursuant to this agreement;

8. That my counsel has fully advised me of, and I understand, the meaning and effect of Articles 57, 58a, 58b of the UCMJ and section 0152 of the JAG Manual. I also understand that if the adjudged sentence is subject to the provisions of one or more of these Articles, this agreement will have no effect on the application of those Articles on the adjudged sentence unless the effect is specifically indicated in Part I or II of this agreement;

9. That my counsel has advised me that I may be placed on appellate leave in a no pay status under the provisions of Article 76a of the UCMJ, notwithstanding any provision regarding forfeitures or fines in the sentencing appendix of this agreement;

10. That I understand that I may withdraw my plea of guilty at any time before my plea is actually accepted by the military judge. I understand further that, once my plea of guilty is accepted by the military judge, I may ask permission to withdraw my plea of guilty at any time before sentence is announced, and that the military judge may, at his discretion, permit me to do so;

11. That I understand this offer and agreement and have been advised that it cannot be used against me in the determination of my guilt on any matters arising from the charges and specifications made against me in this court-martial;

Appendix 11-3(2)

12. That it is expressly understood that the pretrial agreement will become null and void in the event: (1) I fail to plead guilty to each of the charges and specifications as set forth below; (2) the court refuses to accept my plea of guilty to any of the charges and specifications as set forth below; (3) the court accepts each of my pleas but, prior to the time sentence is announced, I ask permission to withdraw any of my pleas, and the court permits me to do so; and (4) the court initially accepts my plea of guilty to each of the charges and specifications set forth below but, prior to the time the sentence is adjudged, the court sets aside any of my guilty pleas and enters a plea of not guilty on my behalf; or (5) I fail to plead guilty to any of the charges and specifications set forth below at a rehearing, should one occur.

13. This agreement and its appendices constitute all the conditions and understandings of both the government and the accused regarding the pleas in this case.

Charges and Specifications Pleas

Additional terms:

Appendix 11-3(3)

MAXIMUM SENTENCE TO BE APPROVED BY CONVENING AUTHORITY

(See maximum sentence appendix to memorandum of pretrial agreement)

_____
Signature of Accused

Place:_____

Date:_____

Counsel:

_____

Place: _____

Date: _____

The foregoing agreement is (approved)(disapproved).

_____
Signature, Grade, Title of
Convening Authority

Appendix 11-3(4)

MAXIMUM SENTENCE APPENDIX TO MEMORANDUM OF PRETRIAL AGREEMENT

UNITED STATES)
)
v.)
)

Date_____

_____ SPECIAL/GENERAL COURT-MARTIAL

_____

_____

Maximum sentence to be approved by convening authority:

1. Punitive discharge (character of and, if suspended, terms thereof)

2. Confinement or restraint (amount and kind)

3. Forfeiture or fine (amount and duration)

APPELLATE EXHIBIT _____

Appendix 11-3(5)

4. Reduction to (rate or grade)

5. Any other Lawful Punishment

This agreement constitutes a request by the accused for, and approval by the convening authority of, deferment of the portion of any confinement to be suspended pursuant to the terms of this agreement. The period of deferment will run from the date the accused is released from confinement pursuant to this agreement until the date the convening authority acts on the sentence.

_____
Signature of Accused

Place: _____

Date: _____

Counsel:

_____

Place: _____

Date: _____

The foregoing agreement is (approved) (disapproved).

_____
Date

_____
Signature, Grade, Title of
Convening Authority

Appendix 11-3(6)

CHAPTER XII

PRETRIAL RESTRAINT OF MILITARY PERSONNEL

PROCEDURE STUDY GUIDE

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. Confinement 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. 1103, *U.S. Navy Regulations*, 14 September 1990. 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 taking of 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. 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. 1977). *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 No. 12,550 of 19 February 1986 (Change 2), conditions on liberty is the only form of pretrial restraint that ***does not*** start the running of the 120-day speedy trial 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. Probable cause for the purpose of imposing pretrial restraint means that: (1) reasonable grounds must exist for believing that an offense triable by court-martial was committed; and, (2) that the person sought to be restrained committed it. Art. 9, UCMJ. In addition to the requirement of probable cause 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. ***Authority for pretrial confinement***

1. Article 10, UCMJ, is the authority for the imposition of pretrial confinement or arrest. Article 10 provides, in part: "Any person subject to this chapter charged with an offense under this chapter 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 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 20-21.

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 534-35.

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 *Naval 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, supra*.

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 1102, *U.S. Navy Regulations*, 14 September 1990.

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.

1206 LIMITATIONS ON PRETRIAL RESTRAINT

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 1640.9 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.

1207 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 48 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 continued pretrial confinement is approved, 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).

4. *United States v. Holloway*, 38 M.J. 302 (CMA 1993); *United States v. Rexroat*, 38 M.J. 292 (CMA 1993). In both *Holloway* and *Rexroat*, the U.S. Court of Military Appeals determined how the U.S. Supreme Court's ruling in *County of Riverside v. McLaughlin*, 500 U.S. 44, 114 L.Ed. 2d (1991) would be applied to the military.

In *County of Riverside v. McLaughlin*, the U.S. Supreme Court held that, in those cases involving pretrial confinement of the defendant, the government was required to hold a hearing within 48 hours of the imposition of such confinement to

determine whether or not it should continue. This 48-hour rule was seemingly inconsistent when compared to R.C.M. 305's three-step process. First, the commanding officer of an accused placed in pretrial confinement must be notified within 24 hours of the name of the accused and the basis for the imposition of such confinement. Second, within 72 hours, the commanding officer must make a determination on whether to continue the pretrial confinement of the accused. If a determination to continue pretrial confinement is made, the commanding officer must memorialize this decision and the basis for it in a memorandum to the Initial Review Officer (IRO). Third, the IRO must hold a hearing to decide whether pretrial confinement is appropriate within 7 days from its imposition. The hearing could be held within 10 days based upon a showing of good cause.

In *Holloway* and *Rexroat*, both N.M.C.M.R. and A.C.M.R held that, under *County of Riverside v. McLaughlin*, the IRO hearing must be held within 48 hours of the imposition of pretrial confinement. C.M.A. disagreed, however, with both of these courts. C.M.A. held that the R.C.M. 305, the 72-hour commanding officer's determination must be held within 48 hours and that the existing R.C.M. 305. 7-day requirement for the IRO hearing under R.C.M. 305 was not subject to the same limitations under *County of Riverside v. McLaughlin*. In *United States v. Bell*, 44 M.J. 677 (N.M. Ct. Crim. App. 1996) the CCA decided that a command duty officer's review within 48 hours satisfied *Rexroat* and *County of Riverside v. McLaughlin* because the CDO was neutral and detached. *See also United States v. Lamb*, 44 M.J. 779 (N.M. Ct. Crim. App. 1996).

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*, 1 M.J. 267, (C.M.A. 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 7-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, § 0127c.

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 an accused 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. Rochardson*, 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. 1977), 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. 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*, 5 M.J. 781 (A.C.M.R), *petition denied*, 6 M.J. 121 (C.M.A.) 1978).

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: (1) 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 (2) information not presented to the IRO establishes that the prisoner should be released; or (3) 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

A. 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:

1. Whether the accused is compelled to work with sentenced prisoners;

2. whether the accused is required to observe the same work schedules and duty hours as sentenced prisoners;

3. whether the type of work normally assigned to him is the same as that performed by persons serving sentences at hard labor;

4. whether the accused is dressed so as to distinguish him from those being punished;

5. whether it is the policy of the brig to have all prisoners governed by one set of instructions; and

6. whether there is any difference in the treatment accorded to the accused from that given to sentenced prisoners.

B. *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); *United States v. Dvonch,* 44 M.J. 531 (A.F. Ct. Crim. App. 1996); *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, U.C.M.J. *United States v. Bruce*, 14 M.J. 254 (C.M.A. 1982); *Thacker v. United States*, 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).

C. Additionally, absent additional evidence from the government of future misconduct or that the prisoners will appear at trial, and that lesser forms of restraint are inadequate, confinement imposed after findings but before sentencing is illegal. *United States v. Tilghman*, 44 M.J. 493 (C.A.A.F. 1996). Likewise, the issue of whether solitary confinement constitutes illegal pretrial restraint was resolved by the court in *United States v. Swan*, _ M.J. _, NMCM 95-00166 (N.M. Ct. Crim. App. Dec. 31, 1996) (if not intended as punishment, did it further a legitimate government objective).

1210 RELIEF FROM ILLEGAL PRETRIAL RESTRAINT

The courts have long recognized that the jailed defendant suffers innumerable hardships while awaiting trial. *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 to 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 Naval Justice School *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. 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, § 0127b. In December 1993, Change 6 to the *Manual* amended R.C.M. 305(f) to provide that, upon a prisoner's request for such counsel, the counsel must be provided to the prisoner within 72 hours of the request being first communicated to military authorities or before the IRO hearing—whichever occurs first.

CONFINEMENT ORDER

NAVPERS 1640/4 (Rev. 7-82) S/N 0106-LF-016-4023

NAME (*Last, first, middle*)	SSN	RATE/GRADE	BRANCH SER
SHIP OR ORGANIZATION		DATE	

STATUS

DETAINED
(Alleged violation of UCMJ Articles)

_____

"I have been informed that I am being confined for the above alleged offense(s)"

_____ _____
Date *Signature of accused*

_____ _____
Date *Signature of witness*

CONFINED AS RESULT OF

☐ NJP ☐ SCM ☐ SPCM ☐ GCM ☐ VACATED SUSPENSION

CHARGES AND SPECIFICATIONS CONVICTED OF

SENTENCE ADJUDGED:	DATE:

IF SENTENCE DEFERRED, DATE DEFERMENT TERMINATED:

SENTENCE APPROVED	APPROVED BY	DATE
	CA	
	SA	
	NCMR	
	COMA	
	OTHER	

PRE-TRIAL CONFINEMENT NECESSARY

☐ TO ENSURE THE PRESENCE OF THE ACCUSED AT THE TRIAL ☐ BECAUSE OF THE SERIOUSNESS OF THE OFFENSE CHARGED

CONFINEMENT DIRECTED AT		TYPED NAME / RANK / TITLE
HOUR	DATE	
		SIGNATURE

MEDICAL CERTIFICATE

The above named individual was examined by me at _____ (HOUR) *on* _____ (DATE) *and found to be*

☐ *fit* ☐ *unfit for confinement. The following irregularities were noted during the examination: (If none, to state)*

☐ *I certify that from an examination of* _____ (*Name* / *Rate* / *SSN*) *and of the place where he/she is to be confined.*

TYPED NAME / RANK / TITLE	SIGNATURE

RECEIPT FOR PRISONER

The above named individual was received at _____ (NAME OF BRIG / CORRECTIONAL FACILITY)

at _____ (HOUR) *on* _____ (DATE)

TYPED NAME / RANK / TITLE	SIGNATURE

DEPARTMENT OF THE NAVY
USS PUGET SOUND (AD 38)
FPO AE 09501

1640
Ser 00/
3 Jan CY

From: Commanding Officer, USS PUGET SOUND (AD 38)
To: Initial Review Officer, Naval Station, Rota, Spain

Subj: PRETRIAL CONFINEMENT ICO YN3 DAVID L. TYPIST, USN, 222-22-2222

Ref: (a) R.C.M. 305, MCM, 1984
(b) SECNAVINST 1640.10

1. Per references (a) and (b), the following information is provided for the purpose of conducting a hearing into the pretrial confinement of YN3 David L. Typist, USN, 222-22-2222.

a. ***Hour, date, and place of pretrial confinement:***

1400, 2 January 19CY, Navy Brig, Naval Station, Rota

b. ***Offenses charged:***

Violation of UCMJ, Article 86—Unauthorized absence from USS PUGET SOUND (AD 38) from 23 October 19CY(-1) until apprehended on 2 January 19CY.

c. ***General circumstances:***

(1) Petty Officer (PO) Typist's absence began over liberty which expired on board at 0700, 23 October 19CY(-1). The circumstances, as related by Petty Officer Typist to his division officer, are that YN3 Typist was dissatisfied working in the admin office, did not like his immediate supervisor, and felt "picked on." He also relates that, at the time of his absence, he was working "undercover" with the Naval Criminal Investigative Service (NCIS) and the ship's master-at-arms (MAA) force in identifying drug abusers on board the Naval Station. He states that a fellow petty officer (whom he identified as a drug user) found out that YN3 Typist was the one responsible for a "bust" in which this petty officer was involved. This unidentified petty officer had threatened YN3 Typist with bodily harm. Apparently becoming scared, Petty Officer Typist fled the area.

(2) These statements are unfounded. I have learned, through conversations with NCIS and my chief master-at-arms, that they have never used Petty Officer Typist in their programs, nor have they ever heard of YN3 Typist.

(3) Petty Officer Typist was apprehended by Shore Patrol at 1300, 2 January 19CY, at a local bar in Palma de Mallorca, Spain. I found it appropriate to place YN3 Typist in confinement due to the duration of the absence (approximately 72 days), and considering the absence was terminated by apprehension.

2. ***Previous disciplinary action:***

a. CO's NJP, USS PUGET SOUND (AD 38) on 3 April 19CY(-1). Violation of UCMJ, Article 86—UA from appointed place of duty. Awarded: 10 days extra duties.

b. CO's NJP, USS PUGET SOUND (AD 38) on 10 June 19CY(-1). Violation of UCMJ, Article 86—UA from unit (approximately 3 days). Awarded: Forfeiture of $100.00 pay per month for one month and 30 day's restriction.

c. CO's NJP, USS PUGET SOUND (AD 38) on 12 July 19CY(-1). Violation of UCMJ, Article 86 (6 specifications)—Failure to go to appointed place of duty, to wit: Restricted men's muster. Awarded: 30 days extra duties and forfeiture of $100.00 pay per month for two months.

3. ***Extenuating or mitigating circumstances:*** None.

4. Due to the aforementioned information, continued pretrial confinement is appropriate in this case. YN3 Typist has a history of Est, which indicates to me the solution to any of his problems is to absent himself without authority. YN3 Typist has shown that a lesser form of restraint would be inadequate as evidenced by paragraph 2.c. above (failure to go to restricted men's musters). Charges have been preferred for trial by special court-martial. No unusual delays are expected in this case. Given the nature of the offense charged and the sentence which could be imposed by court-martial for this offense, I am confident YN3 Typist would again flee to avoid prosecution.

ROBERT R. ROBERTS

From: Initial Review Officer, Naval Station, Rota, Spain
To: Commanding Officer, USS PUGET SOUND (AD 38)

Subj: PRETRIAL CONFINEMENT ICO YN3 DAVID L. TYPIST, USN, 222-22-2222

Ref: (a) R.C.M. 305, MCM, 1984
(b) SECNAVINST 1640.10
(c) CO, USS PUGET SOUND (AD 38) ltr of 3 Jan CY

1. Per the provisions of references (a) and (b), I conducted a hearing concerning the pretrial confinement of YN3 Typist on 4 January 19CY. All information available at the time of the hearing, in addition to the comments and recommendations set forth in reference (c), have been reviewed.

2. At the hearing, YN3 Typist was afforded all rights set forth in reference (a). YN3 Typist was represented by Lieutenant P. T. Pertee, JAGC, USNR, Naval Legal Service Office Detachment, Rota, Spain, who was detailed pursuant to the confinee's request for military counsel. Lieutenant I. O. Ewe, USN, legal officer, USS PUGET SOUND (AD 38) was present, acting in the capacity of command representative.

3. Having waived his right to remain silent, YN3 Typist was willing to discuss his absence with me. His reasons for going UA, as stated in reference (c), remain basically the same. YN3 Typist stands firm on his story concerning his involvement with the Naval Criminal Investigative Service. However, upon advisement of counsel, YN3 Typist terminated the questioning. Lieutenant Ewe, command representative, had nothing further to offer except to reconfirm the command's position that continued confinement is warranted.

4. I find there is probable cause to believe the confinee committed the offense, and that court-martial jurisdiction does exist over the confinee and the offense charged. I find no cause to extend the time limit for completion of this review.

5. Subject to the foregoing, I find continued pretrial confinement appropriate in this case and that lesser forms of restraint would be inadequate to ensure the presence of YN3 Typist at trial. The confinee should be brought to trial as soon hereafter as practicable, barring any unforeseen delays.

6. Pursuant to paragraphs (i)(7) and (j) of reference (a), reconsideration of this decision may be appropriate at a later date.

I. C. LIGHT
Commander, U.S. Navy

SAMPLE RESTRICTION ORDERS

LETTERHEAD

From: Commanding Officer, Naval Air Station
To: (Rate, name, armed force, social security number)

Subj: RESTRICTION ORDER

1. You are hereby placed on ____ days restriction as awarded you at a [_____ court-martial] [CO's nonjudicial punishment] on _____, 19___.

2. You are hereby notified that the restriction limits and additional requirements are as follows:

a. You are required to remain within the perimeter and gates of the Naval Air Station, Wonderful, Florida.

b. You are not permitted in BEQ 999, 998, 997, or 996; Consolidated Package Store, Mini-Mart, bowling alley, Enlisted Mens' Club Complex, or Navy Exchange Cafeteria, or anywhere else on base that sells alcoholic beverages.

c. While you are on restriction, you may not operate a privately owned vehicle. If you have an automobile and desire to leave your automobile parked in the designated parking area, you must turn all of your ignition keys in to the chief master-at-arms who will provide you with a receipt. The chief master-at-arms will take custody of your keys, but not your automobile. You may arrange to have your automobile stored off the Naval Air Station at your own expense.

d. You are to be inside the Discipline Barracks between the hours of 1900 and 0600 daily.

e. You are hereby ordered to muster at the Discipline Barracks at the following times:

Workdays (including Saturday): 0615, 0745, 1130, 1245, 1600, 1800, 2000, 2145.

Non-workdays (Sundays and holidays): 0715, 1000, 1130, 1400, 1600, 1800, 2000, 2145.

Note: You are also required to come to any additional musters that may be prescribed by the duty desk chief. You will also be present for all bunk checks from taps to reveille.

f. You will surrender all civilian clothes (an inventory will be made and you will be given a receipt for all clothing turned in).

g. You are required to be in the complete uniform of the day at all times between reveille and taps. You are not permitted to be in civilian clothes ***at any time***.

h. You are ordered to keep your face clean-shaven for the duration of your restriction.

i. You are required to march in formation to meals if you desire to eat. The formation will depart for the meal from the muster area immediately preceding the meal. There is no requirement to march back from the meal.

j. You are to ensure that you are berthed in the proper bunk. Failure to do so will result in your being considered an unauthorized absentee.

k. If it is necessary for you to go to the Naval Hospital, Naval Air Station, Wonderful, Florida, you will be transported to and from the hospital by the master-at-arms force. You are forbidden to go or return on your own.

l. You are not to consume, or have in your possession, alcoholic beverages of any kind at any time.

3. You are hereby notified that all the above constitute lawful orders and that failure to comply is a violation of the Uniform Code of Military Justice and will subject you to disciplinary action.

By direction of the
Commanding Officer

I acknowledge this restriction order. I have read and understand its content.

(Signature of restricted person)
Grade, title

CHAPTER XIII

SPEEDY TRIAL

PROCEDURE STUDY GUIDE

CHAPTER XIII

SPEEDY TRIAL

(MILJUS Key Number 1170)

1301 INTRODUCTION

This chapter discusses an accused's constitutional and statutory right to a speedy trial. Section 1302 discusses the past and present treatment of the statutory right to a speedy trial as provided by R.C.M. 707, MCM, 1995 [hereinafter R.C.M. ____]. Subsequent sections address the development of the right to speedy trial through case law. There exist several avenues, the products of both statute and case law, through which an 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, 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 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).

C. The remedy for denial of the right to a speedy trial is dismissal of the charges. R.C.M. 707(d) provides for dismissal with or without prejudice. The charge must be dismissed with prejudice if an accused's constitutional right to a speedy trial has been violated.

D. Congress attempted to reinforce the accused's right to a speedy trial by the enactment of Article 98, UCMJ, which makes it an offense to delay unnecessarily the disposition of any case of a person charged with an offense.

1302 THE SPEEDY TRIAL RULE IN THE *MANUAL FOR COURTS-MARTIAL*

R.C.M. 707 was drastically revised in 1991. The amended rule applies to all cases in which arraignment occurs on or after 6 July 1991. The rule is based on ABA Standards For Criminal Justice, Speedy Trial (1986) and The Federal Speedy Trial Act, 18 U.S.C. Sec. 3161.

A. ***Starting the clock.*** R.C.M. 707(a) provides that the accused shall be brought to trial within 120 days after the earlier of:

1. Preferral of charges;

2. the imposition of restraint under R.C.M. 304(a) (2)-(4); or

3. entry on active duty under R.C.M. 204.

These three constitute the "triggering events" that start the 120-day clock. **"ON DAY NUMBER 1, EVERYONE ASSOCIATED WITH A CASE SHOULD KNOW WHAT DAY WILL BE NUMBER 120."** *United States v. Carlisle*, 25 M.J. 426 (C.M.A. 1988). 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). In contrast to the old rule, notice of preferral is irrelevant. Actual preferral, when the accuser signs the charges and specifications under oath before a commissioned officer, is the "trigger." R.C.M. 307(b). In addition, the new rule (coupled with *United States v. Kossman*, 38 M.J. 258 (C.M.A. 1993)) eliminates the application of a 90-day clock when the accused is in pretrial confinement. *Kossman* expressly overruled *United States v. Burton*, 21 C.M.A. 112, 44 C.M.R. 166 (1971).

B. ***Accountability.*** R.C.M. 707(b)(1). The date of preferral of charges, the date on which pretrial restraint is imposed, or the date of entry on active duty under R.C.M. 204, does not count for purposes of computing the 120-day period, but the date on which the accused is brought to trial does count. *United States v. Tebsherany*, 30 M.J. 608 (N.M.C.M.R. 1990), affirmed 32 M.J. 351 (C.M.A. 1991). An accused is "brought to trial" under this rule at the time of arraignment (when the accused is asked, "How do you plead?") under R.C.M. 904. *See United States v. Stokes*, 39 M.J. 771 (A.C.M.R. 1994). This is a major change from the old rule which defined "brought to trial" as the time the government presents evidence. If the accused is an adjudged prisoner serving the sentence of another court-martial, he is not considered to be in pretrial confinement. *United States v. Gettz*, 49 C.M.R. 79 (N.C.M.R. 1974).

C. ***Multiple clocks.*** When charges are preferred at different times, accountability for each charge is determined from the date on which the charge was preferred or on which pretrial restraint was imposed on the basis of that offense. R.C.M. 707(b)(2). Even when charges are preferred at the same time, earlier imposition of pretrial restraint will only start the clock for the charged offenses that were the bases for imposing pretrial restraint. *United States v. Robinson*, 28 M.J. 481 (C.M.A. 1989).

D. ***Events which affect time periods.*** R.C.M. 707(b)(3) addresses four events which may affect time periods of the speedy trial clock.

1. ***Dismissal or mistrial.*** When charges are dismissed, or if a mistrial is granted, a new 120-day clock begins to run only from the date on which charges are preferred or restraint is reimposed. R.C.M. 707(b)(3)(A). Withdrawal of charges from court-martial is not tantamount to a "dismissal" within the meaning of the rule. *United States v. Mucthison*, 28 M.J. 1113 (N.M.C.M.R. 1989). (Withdrawal is essentially an "unreferring" of the charges, whereas, dismissal is akin to an "unpreferring" of the charges.) *See United States v. Weatherspoon*, 39 M.J. 762 (A.C.M.R. 1994). The true intent behind the convening authority's actions determines whether the dismissal was genuine. *See also United States v. Lorenc*, 30 M.J. 619 (N.M.C.M.R. 1990). In *United State v. Britton*, 26 M.J. 24 (C.M.A. 1988), the Court of Military Appeals defines an intent to dismiss:

> Dismissal, mistrial, and a break in pretrial restraint all contemplate that the accused no longer faces charges, that conditions on liberty and pretrial restraint are lifted, and that he is returned to full-time duty with full rights as accorded to all other servicemembers. Reinstitution of charges requires

> the command to start over. The charges must be re-preferred, investigated, and referred in accordance with the Rules for Courts Martial, as though there were no previous charges or proceedings.

Id. at 26.

Furthermore, a convening authority cannot attempt to "withdraw" charges in an attempt to create a limbo status for the charges until such time as the prosecution is prepared to present its case. *United States v. Mucthison*, 28 M.J. at 1115. However, in *United States v. Bolado*, 34 M.J. 732 (N.M.C.M.R. 1991), affirmed 36 M.J. 2 (C.M.A. 1992), cert. denied 113 S.Ct. 321 (1992), the Navy-Marine Corps Court of Military Review concluded that charges can only be withdrawn when they have been referred, otherwise they have been dismissed. Therefore, even if a convening authority may intend to reinstate charges in the future, an otherwise clear dismissal will not be treated as a withdrawal.

2. ***Release from pretrial restraint.*** Release from pretrial restraint for a significant period of time stops the clock when the pretrial restraint is the only event to trigger the speedy trial clock. A "significant period" of time is not specifically defined, but has been found to be as short as five days. *United States v. Hulsey*, 21 M.J. 717 (A.F.C.M.R. 1985). *See also United States v. Smith*, 32 M.J. 586 (A.C.M.R. 1991), where the accused was not allowed to claim the benefit of a tolling speedy trial clock caused by his own misconduct (a two day UA was deemed a "significant break" in time). The clock will restart on the date of preferral of charges or the date that restraint is reimposed. *United States v. Facey*, 26 M.J. 421 (C.M.A. 1988).

3. ***Government appeals.*** R.C.M. 707(b)(3)(C) grants the government a new 120-day clock upon proper government appeal. Once the parties are given notice of either the government's decision not to appeal under R.C.M. 908(b)(8), or the decision of the Court of Military Review under R.C.M. 908(c)(3), a new 120-day period begins (unless it is determined that the appeal was filed solely for the purpose of delay with the knowledge that it was totally frivolous and without merit). The new clock applies to all charges being tried together, whether or not the subject of the appeal. *See United States v. Ramsey*, 28 M.J. 370 (C.M.A. 1989).

4. ***Rehearings.*** If a rehearing is ordered or authorized by an appellate court, a new 120-day time period under this rule shall begin on the date that the responsible convening authority receives the record of trial and the opinion authorizing or directing a rehearing. R.C.M. 707(b)(3)(D). This section was added to the amended rule and codifies the decision in *United States v. Moreno*, 24 M.J. 752 (A.C.M.R. 1987).

E. ***Excludable delay.*** Any pretrial delay approved by the convening authority or by the military judge shall be excluded when determining whether the speedy trial clock has run. R.C.M. 707(c). Requests for delay before referral will be submitted to the convening authority and requests after referral will be submitted to the military judge. R.C.M. 707(c)(1). In addition, all periods of time covered by stays issued by appellate

courts shall be excluded. R.C.M. 707(c). A list of specific circumstances are now listed in the discussion following R.C.M. 707(c)(1) as possible reasons for a convening authority or military judge to grant a reasonable delay. They include:

> [T]ime to enable counsel to prepare for trial in complex cases; time to allow examination into the mental capacity of the accused; time to process a member of the reserve component to active duty for disciplinary action; time to complete other proceedings related to the case; time requested by the defense; time to secure the availability of the accused, substantial witnesses, or other evidence; time to obtain appropriate security clearances for access to classified information or time to declassify evidence; or additional time for other good cause.

Id.

The purpose of R.C.M. 707 is to provide guidance for granting pretrial delays and to eliminate after-the-fact determinations as to whether certain periods of delay are excludable. The government is accountable for all time prior to trial unless a competent authority grants a delay. *United States v. Longhofer*, 29 M.J. 22 (C.M.A. 1989). Under the rule, decisions granting or denying pretrial delays will be subject to review for both abuse of discretion and the reasonableness of the period of delay granted. *United States v. Maresca*, 28 M.J. 328 (C.M.A. 1989). The court in *United States v. Dies*, 42 M.J. 847 (N.M.Ct.Crim.App. 1995), advises that written requests for delay be made contemporaneously with the event upon which the request for a delay is based. In *United States v. Thompson*, 44 M.J. 598 (N.M. Ct. Crim. App. 1996) the court held an Article 32 Investigating Officer does not have the power to exclude delay under R.C.M. 707 for speedy trial purposes. The I.O. has no inherent, independent power to exclude such delay. (The I.O. does however, have the power to grant a continuance, but that is different from excluding delay under R.C.M. 707 for speedy trial purposes). The court in *Thompson* also held that a competent authority (in accordance with R.C.M. 707, i.e., convening authority) cannot retroactively exclude delay from the speedy trial clock. R.C.M. 707 (c) is quite clear in it's requirement that exclusion decisions are to be made **before the delay occurs**. The court in *United States v. Bright*, __ M.J. __, No. 94-01138 (N.M. Ct. Crim. App. June 14, 1996) also made a point of stating that a mere defense request for an R.C.M. 706 board does not result in an automatic exclusion from the R.C.M. 707 speedy trial clock. *See also United States v. Duncan*, 38 M.J. 476 (C.M.A. 1993), *United States v. Patterson*, 39 M.J. 678 (N.M.C.M.R. 1993), and *United States v. Nichols*, 42 M.J. 715 (A.F.Ct.Crim.App. 1995).

F. ***Motions.*** The accused must make a timely motion to the military judge under R.C.M. 905 for speedy trial relief. Counsel should provide the court with a chronology detailing the processing of the case to be made a part of the appellate record. R.C.M. 707(c)(2). Once the issue of speedy trial has been raised by the defense, the burden is upon the government to show by a preponderance of the evidence that the accused was brought to trial within 120 days. R.C.M. 905(c)(2)(B). *See United States v.*

Laminman, 41 M.J. 518 (C.G.Ct.Crim.App. 1994). *See also United States v. Swan*, _ M.J. __, NMCM 95-00166 (N.M. Ct. Crim. App. Dec. 31, 1996) (in order to raise the issue, defense counsel needed to show evidence of the government's negligence or spitefulness which caused the delay).

G. ***Remedy.*** A failure to comply with the right to a speedy trial will result in dismissal of the affected charges. The dismissal may be with or without prejudice to the government's right to reinstitute charges for the same offense at a later date. The charges must be dismissed with prejudice where the accused has been deprived of his or her constitutional right to a speedy trial. R.C.M. 707(d). The military judge has the discretion to dismiss with or without prejudice. The court shall consider, among others, each of the following factors in determining whether to dismiss with or without prejudice: the seriousness of the offense; the facts and circumstances of the case that lead to dismissal; the impact of a reprosecution on the administration of justice; and any prejudice to the accused resulting from the denial of a speedy trial. R.C.M. 707(d).

H. ***Waiver.*** Under R.C.M. 707(e), a plea of guilty which results in a finding of guilty generally waives any speedy trial issue as to that offense. The issue is preserved if the accused is allowed to enter a conditional plea under R.C.M. 910(a)(2). This rule apparently reverses case law that preserved speedy trial issues for appeal despite a guilty plea. *See United States v. Angel*, 28 M.J. 600 (N.M.C.M.R. 1989). However, the accused cannot waive a speedy trial motion as a provision in a pretrial agreement. *United States v. Pruitt*, 41 M.J. 736 (N.M.Ct.Crim.App. 1994).

1303 THE RIGHT TO SPEEDY TRIAL IN PRETRIAL CONFINEMENT CASES

In general, R.C.M. 707 provides that the accused be brought to trial within 120 days. This clock could be triggered by several events: (1) preferral of charges; (2) the imposition of pretrial restraint (excluding conditions on liberty); (3) entry on active duty pursuant to R.C.M. 204; (4) notice of government appeal; or (5) the responsible CA's receipt of record of trial and appellate notice directing rehearing.

A. ***The law.*** *United States v. Burton*, 44 C.M.R. 166 (C.M.A. 1971) provided for the 90-day speedy trial clock that was applicable in cases involving pretrial confinement. In *United States v. Kossman*, 38 M.J. 258 (C.M.A. 1993) the court threw out the concept of a set speedy trial clock, whether it be 120 or 90 days, and employed the Article 10, UCMJ, standard of **"reasonable diligence"**. Failure by the government to exercise reasonable diligence in bringing a case to trial in a timely fashion would serve as the basis for denial of the accused's right to a speedy trial, and dismissal with prejudice is the only available remedy. *But see United States v. Edmond*, 41 M.J. 419 (C.A.A.F. 1995). This now means that government prosecutors could be faced with defense motions to dismiss in cases well under the 120-day rule based upon allegations of failure to exercise reasonable diligence in bringing the case to trial in a timely fashion. Conversely, prosecutors may now successfully defend against such motions to dismiss in cases well over the 120-day or the old 90-day rules if they can show that they were in

fact exercising such reasonable diligence. However, we feel that R.C.M. 707's 120-day clock applies to all cases, and Article 10 is an **additional** requirement.

B. ***Speedy trial attacks.*** A confined accused has three avenues of attack based on speedy trial. First, there is the Sixth Amendment claim, which as Judge Wiss' dissent in *Kossman*, notes, is largely illusory. Second, there is the protection afforded by R.C.M. 707; and, third, even if a confined accused is brought to trial within the 120-day requirement of that rule, the accused may still gain dismissal of the charges under Article 10, if he establishes that the Government could readily have gone to trial much sooner but negligently or spitefully chose not to.

C. ***Kossman.*** As a practical matter, the *Burton* presumption proved to be virtually irrebuttable, resulting in dismissal of the affected charges with prejudice. R.C.M. 707 purported to establish a 120-day period for the government to bring an accused (including a confined accused) to trial and allow a military judge discretion to dismiss charges with or without prejudice for a violation of the rule. In *Kossman*, the Court of Military Appeals expressly overruled the *Burton* presumption, holding that the decision in *Burton* was not a binding interpretation of Article 10, but rather an attempt by the Court to enforce Congress' mandate in the face of the procedural vacuum existing at the time. Moreover, the Court acknowledged that R.C.M. 707 was a proper exercise by the President of his power to prescribe procedural rules for courts-martial and thus, has the force of law. According to the Court, however, the President's regulation cannot overrule the greater speedy trial protection afforded an accused by Congress under Article 10. Thus, even where the Government complies with the 120-day requirement of R.C.M. 707, a confined accused may still bring a motion to dismiss charges with prejudice under Article 10. If the military judge finds an Article 10 violation in the case of a confined accused, the judge should dismiss with prejudice. If it is determined that there is no Article 10 violation, it should be dismissed without prejudice. In nonconfinement cases, the military judge has discretion to dismiss with or without prejudice.

By overruling *Burton*, the Court did away with the bright-line presumption and returned instead to the pre-Burton standard of reasonable diligence. In evaluating the merits of such a motion, the Court determined that military judges should resort to the pre-Burton standard of "reasonable diligence."

> It suffices to note that the touch stone for measurement of compliance with the provisions of the Uniform Code is not constant motion, but reasonable diligence in bringing the charges to trial. Brief periods of inactivity in an otherwise active prosecution are not unreasonable or oppressive.

Kossman, at 262 (quoting *United States v. Tibbs*, 35 C.M.R. 322, 325 (C.M.A. 1965)). The Court also noted that R.C.M. 707, although not dispositive on the issue, provides good guidance to the both the Bench and Bar in resolving such motions. In *United States v. Hatfield*, 44 M.J. 22 (C.A.A.F. 1996) the Court held that the military judge did not abuse his discretion by dismissing the charges and specifications for want of a

speedy trial. The trial judge was well within his discretion when he concluded that it had taken the government "an excessively long time to shepherd this uncomplicated and unproblematic case to trial." The accused was in pretrial confinement (charged with articles 107, 123, and 134 - adultery and bigamy) for nearly one month before a defense counsel was identified by the NLSO. (The accused was in pretrial confinement for 106 days total). Counsel should review *Hatfield* for a quick lesson in how vitally important it is for parent and tenant commands to communicate with each other.

The *Kossman* court noted that some of the relevant factors in determining whether the Government proceeded with reasonable diligence include (1) the complex nature of the case; (2) logistical impediments and operational considerations; and, (3) ordinary judicial impediments, such as crowded dockets, unavailability of judges and attorney caseloads. Counsel should also review *United States v. Tibbs* and its progeny for other relevant considerations in proving " reasonable diligence." *See United States v. Hester*, 37 C.M.R. 652 (C.M.A. 1967) and *United States v. Mladjen*, 41 C.M.R. 159 (C.M.A. 1969).

D. ***A practical trial tip.*** Keep a chronology of the Government's movement toward trial. Each step in the court-martial process should be documented in your chronology to present to the court to refute an Article 10 speedy trial motion. With your chronology, you can establish that the Government proceeded with an "active prosecution," and exercised "reasonable diligence" in getting the accused into court at the earliest possible time.

E. ***Additional charges.*** When an accused is charged with offenses in addition to those for which he was confined, those offenses may have different inception dates for speedy trial purposes. *E.g., United States v. Talavera*, 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). It is possible that government accountability for these additional offenses begins when the government has in its possession substantial information on which to base preferral of charges. *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, an argument could be made that if an accused goes into pretrial confinement on 1 January on Charge I, on 15 January the government learns he has committed an additional offense, and on 25 January prefers this as Charge II, the inception date for speedy trial purposes for Charge II could arguably be 15 January—not 25 January when the charge was preferred.

F. ***Accused in the hands of civilian authorities.*** If the accused is confined by civilian authorities and is "immediately available" for pickup by military authorities, the government has a reasonable time to arrange for his transportation and arrival at his ultimate destination before the speedy trial period begins to run. *United States v. Cummings*, 21 M.J. 987 (N.M.C.M.R. 1986). 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. Bramer*, 43 M.J. 538 (N.M.Ct.Crim.App. 1995), *United States v. Garner*, 39 M.J. 721 (N.M.C.M.R. 1993), *United States v. Bragg*, 30 M.J. 1147 (A.F.C.M.R. 1990), *United States v. Asbury*, 28 M.J. 595 (N.M.C.M.R. 1989), review denied 28 M.J. 356 (C.M.A. 1989), *United States v. McCallister*, 24 M.J. 881 (A.C.M.R. 1987). 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*.

1304 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.

CHAPTER XIV

THE SUMMARY COURT-MARTIAL

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THE SUMMARY COURT-MARTIAL

(West's Key Number: MILJUS Key Number 1210)

1401 INTRODUCTION. A summary court-martial (SCM) is the least formal of the three types of courts-martial and the least protective of individual rights. The SCM is a streamlined trial process involving only one officer who theoretically performs the prosecutorial, defense counsel, judicial, and member functions. The purpose of this type of court-martial is to dispose promptly of relatively minor offenses. The one officer assigned to perform the various roles incumbent on the SCM must inquire thoroughly and impartially into the matter concerned to ensure that both the United States and the accused receive a fair hearing. Since the SCM is a streamlined procedure providing somewhat less protection for the rights of the parties than other forms of court-martial, the maximum punishment which may be imposed is very limited. Furthermore, it may try only enlisted personnel who consent to be tried by SCM.

As the SCM has no "civilian equivalent," but is strictly a creature of statute within the military system, persons unfamiliar with the military justice system may find the procedure something of a paradox at first blush. While it is a criminal proceeding at which the technical rules of evidence apply, and at which a finding of guilty can result in loss of liberty and property, there is no constitutional right to representation by counsel and it, therefore, is not a true adversary proceeding. The United States Supreme Court examined the SCM procedure in *Middendorf v. Henry*, 425 U.S. 25 (1976). Holding that an accused at SCM was not a "criminal prosecution" within the meaning of the sixth amendment, the Supreme Court cited its rationale previously expressed in *Toth v. Quarles*, 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.

Id. at 17.

1402 CREATION OF THE SUMMARY COURT-MARTIAL

A. ***Authority to convene.*** An SCM is convened (created) by an individual authorized by law to convene SCMs. Article 24, UCMJ, R.C.M. 1302a, MCM, 1995, and JAGMAN, § 0120c indicate those persons who have the power to convene an SCM. Commanding officers authorized to convene GCMs or SPCMs are also empowered to convene SCMs. Thus, the commanding officer of a naval vessel, base, or station, all commanders and commanding officers of Navy units or activities, commanding officers of Marine Corps battalions, regiments, aircraft squadrons, air groups, barracks, etc., have this authority.

The authority to convene SCMs is vested in the office of the authorized command and not in the person of its commander. Thus, Captain Jones, U.S. Navy, has SCM convening authority while actually performing his duty as Commanding Officer, USS *Brownson*, but loses his authority when he goes on leave or is absent from his command for other reasons. The power to convene SCMs is nondelegable and in no event can a subordinate exercise such authority "by direction." When Captain Jones is on leave from his ship, his authority to convene SCMs devolves upon his temporary successor in command (usually the executive officer) who, in the eyes of the law, becomes the commanding officer.

Commanding officers or officers in charge not empowered to convene SCMs may request such authority by following the procedures contained in JAGMAN, § 0121b.

B. ***Restrictions on authority to convene.*** Unlike the authority to impose nonjudicial punishment, the power to convene SCMs and SPCMs may be restricted by a competent superior commander. JAGMAN, § 0122a(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 SCM or SPCM convening powers and should refer such cases to the commanding officer of the ship for disposition. JAGMAN, § 0122b. This policy does not apply to commanders of units which are embarked for transportation only. Finally, JAGMAN, § 0124c(2) requires that the permission of the officer exercising general court-martial jurisdiction over the command be obtained before imposing nonjudicial punishment or referring a case to SCM for an offense which has already been tried in a state or foreign court. Offenses which have already been tried in a court deriving its authority from the United States may not be tried by court-martial. JAGMAN, § 0124d.

It is important to note that, even if the convening authority or the SCM officer is the accuser, the jurisdiction of the SCM is not affected and it is discretionary with the convening authority whether to forward the charges to a superior authority or to simply convene the court himself. R.C.M. 1302(b).

C. ***Mechanics of convening.*** Before any case can be brought before a SCM, the court must be properly convened (created). It is created by the order of the

convening authority detailing the SCM officer to the court. R.C.M. 504(d)(2) requires that the convening order specify that it is an SCM and designate the SCM officer. Additionally, the convening order may designate where the court-martial will meet. If the convening authority derives his power from designation by SECNAV, this should also be stated in the order. JAGMAN § 0133 requires that the convening order be assigned a court-martial convening order number; be personally signed by the convening authority; and show his name, grade, and title – including organization and unit.

While R.C.M. 1302(c) authorizes the convening authority to convene a SCM by a notation on the charge sheet signed by the convening authority, the better practice is to use a separate convening order for this purpose. Appendix 6b of *The Manual for Courts-Martial (MCM)*, 1995, contains a suggested format for the SCM 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 SCM officer. The issuance of such an order creates the SCM which can then dispose of any cases referred to it. Confusion can be avoided by maintaining a standing SCM convening order to insure that a court-martial exists before a case is referred to it. The basic rule is that a court-martial must be created first and only then may a case be referred to that court.

D. ***Summary court-martial officer.*** A SCM is a one-officer court-martial. As a jurisdictional prerequisite, this officer must be a commissioned officer, on active duty, and of the same armed force as the accused. (The Navy and Marine Corps are part of the same armed force: the naval service.) R.C.M. 1301(a). Where practicable, the officer's grade should not be below O-3. As a practical matter, the SCM should be qualified by reason of age, education, experience, and judicial temperament as his performance will have a direct impact upon the morale and discipline of the command. Where more than one commissioned officer is present within the command or unit, the convening authority may not serve as SCM. When the convening authority is the only commissioned officer in the unit, however, he may serve as SCM and this fact should be noted in the convening order attached to the record of trial. In such a situation, the better practice would be to appoint an SCM officer from outside the command, as the SCM officer need not be from the same command as the accused.

The SCM officer assumes the burden of prosecution, defense, judge, and jury as he must thoroughly and impartially inquire into both sides of the matter and ensure that the interests of both the government and the accused are safeguarded and that justice is done. While he may seek advice from a judge advocate or legal officer on questions of law, he may not seek advice from anyone on questions of fact since he has an independent duty to make these determinations. R.C.M. 1301(b).

E. ***Jurisdictional limitations: persons.*** Article 20, UCMJ, and R.C.M. 1301(c) provide that an SCM has the power (jurisdiction) to try only those enlisted persons who consent to trial by SCM. The right of an enlisted accused to refuse trial by SCM is absolute and is not related to any corresponding right at nonjudicial punishment. No

commissioned officer, warrant officer, cadet, aviation cadet and midshipman, or person not subject to the UCMJ (Article 2, UCMJ) may be tried by SCM. The forms at pages 14-17 to 14-19, *infra*, may be used to document the accused's election regarding his right to refuse trial by SCM.

The accused must be subject to the UCMJ at the time of the offense and at the time of trial; otherwise, the court-martial lacks jurisdiction over the person of the accused. *See* Chapter V, *supra*.

F. ***Jurisdictional limitations: offenses.*** An SCM has the power to try all offenses described in the UCMJ except those for which a mandatory punishment beyond the maximum which may be imposed at a SCM is prescribed by the UCMJ. Cases which involve the death penalty are capital offenses and cannot be tried by SCM. *See* R.C.M. 1004 for a discussion of capital offenses. Any minor offense can be disposed of by SCM. 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 SCMs is limited to "disciplinary actions concerned solely with minor military offenses unknown in the civilian society." *United States v. Booker*, 3 M.J. 443 (C.M.A. 1977). Read literally, this would have precluded SCM's from trying civilian crimes such as assault, larceny, drug offenses, etc. Following a reconsideration of that decision, the court rescinded that ruling and affirmed that "'with the exception of capital crimes, nothing whatever precludes the exercise of summary court-martial jurisdiction over serious offenses' in violation of the Uniform Code of Military Justice." *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
Commander, U.S. Navy
Commanding Officer, USS FOX
FPO New York 09501

NOTE: This format may be used for convening all SCMs. Of particular importance are the date, the convening order number, and the signature and title of the convening authority (which demonstrates his authority to convene the court-martial).

DOCUMENTING COMPLIANCE WITH "*BOOKER*" AT SCM (SRB page 13/11)

[Date of SCM]: SNM consulted with independent military counsel prior to deciding whether to accept or refuse the summary court-martial held on this date. SNM accepted trial by summary court-martial.

NAME
RANK, SERVICE
POSITION
BY DIRECTION

1403 REFERRAL TO SUMMARY COURT-MARTIAL

A. ***Introduction.*** In this section, attention will be focused on the mechanism for properly getting a particular case to trial before an SCM. 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, 1995, 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, 1995, 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, § 0902a(1) further authorizes officers certified by the Judge Advocate General of the Navy as counsel under Article 27, UCMJ, all officers in pay grade 0-4 and above, executive officers, and administrative officers of Marine Corps aircraft squadrons to administer oaths. No one can be ordered to prefer charges to which he cannot truthfully swear. Often, the legal officer will administer the oath regardless of who conducted the preliminary inquiry. When the charges are signed and sworn to, they are "preferred" against the accused. For example:

III. PREFERRAL		
11a. NAME OF ACCUSER (*Last, First, MI*) HOOVER, Jay E.	b. GRADE PN1	c. ORGANIZATION OF ACCUSER USS FOX (DD 983)
d. SIGNATURE OF ACCUSER /s/ ***Jay E. Hoover***		e. DATE 5 Jul CY

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 5th day of July, 19 CY, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

John Mitchell *Typed Name of Officer*	USS FOX (DD 983) *Organization of Officer*
Lieutenant *Grade*	Legal Officer *Official Capacity to Administer Oath* *(See R.C.M. 307(b) - must be commissioned officer)*
/s/ ***John Mitchell*** *Signature*	

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 SCM convening authority (commanding officer of a ship, base, or station, etc.). In the Marine Corps, the company commander is normally the immediate commander for Article 15, UCMJ cases, and he does not possess SCM convening authority. Thus, the remaining discussion is premised on the assumption that the Marine Corps company commander has forwarded the charges to the battalion commander (who has convening authority) recommending trial by SCM.

Assuming that the legal / discipline officer of the SCM convening authority has the formal charges and the preliminary inquiry report, the first step which must be taken is to inform the accused of the charges against him. The purpose of this requirement is to provide an accused with reasonable notice of impending criminal prosecution in compliance with criminal due process of law standards. R.C.M. 308 requires the immediate commander of the accused to have the accused informed as soon as practicable of the charges preferred against him, the name of the person who preferred them, and the person who ordered them to be preferred.

The important aspect of this requirement is that notice must be given from official sources. The accused should appear before the immediate commander or other designated person giving notice and should be told of the existence of formal charges, the general nature of the charges, and the name of the person who signed the charges as accuser. A copy of the charges can also be given to the accused, although not required by law at this time. No attempt should be made to interrogate the accused. After notice has been given, the person who gave notice to the accused will execute item 12 at the top of page 2 of the charge sheet. If not the immediate commander of the accused, the person signing on the "signature" line should state their rank, component, and authority. The law does not require a formal hearing to provide notice to the accused, but the charge sheet must indicate that notice has been given. A failure to properly record the notice to the accused will not necessarily void subsequent processing steps or trial, but care should be taken to avoid such possibilities. For example:

12.
On 5 July, 19 CY, the accused was informed of the charges against him/her and of the name(s) of the accuser(s) known to me (See R.C.M. 308(a)). (See R.C.M. 308 if notification cannot be made.)

Able B. Seaweed — *Typed Name of Immediate Commander*

USS FOX (DD 983) — *Organization of Immediate Commander*

Commander, USN — *Grade*

/s/ ***M. B. Jenks*** — *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 SCM jurisdiction. Often this receipt certification and the notice certification will be executed at the same time, although it is not unusual for the notice certification to be executed prior to the receipt certification – especially in Marine Corps organizations. The purpose of the receipt certification is to establish that sworn charges were preferred before the statute of limitations operated to bar prosecution.

Article 43, UCMJ, states that "[e]xcept as otherwise provided in this section (article), a person charged with an offense is not liable to be tried by a court-martial if the offense was committed more than five years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command." A couple of notable exceptions are: (a) no limitation for trying and punishing a person charged with absence without leave or missing movement in time of war, or with any offense punishable by death; (b) the time limit for punishing a person under Article 15, UCMJ is two years; and, (c) periods in which an accused is absent without authority or fleeing from justice shall be excluded in computing the period of limitation.

Periods of time during which the accused was in the hands of the enemy, in the hands of civilian authorities for reasons relating to civilian matters, or absent without authority in territory where the United States could not apprehend him do not

count in computing the limitations set forth in Article 43, UCMJ. Thus, the receipt certification is extremely important and must be completed in exacting detail to preserve the right to prosecute the accused.

Where the accused is absent without leave at the time charges are sworn, it is permissible and proper to execute the receipt certification even though the accused has not been advised of the existence of the charges. In such cases, a statement indicating the reason for the lack of notice should be attached to the case file. When the accused returns to military control, notice should then be given to him. The receipt certification need not be executed personally by the SCM convening authority and is often completed for him by the legal officer, discipline officer, or adjutant. For example:

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13.
The sworn charges were received at 1300 hours, 5 July 19 CY at USS FOX (DD 983)
Designation of Command or

Officer Exercising Summary Court-Martial Jurisdiction (See R.C.M. 403)

FOR THE [1] Commanding Officer

John Mitchell — *Typed Name of Officer*

Legal Officer — *Official Capacity of Officer Signing*

Lieutenant, USN — *Grade*

/s/ ***John Mitchell*** — *Signature*

F. ***The act of referral.*** Once the charge sheet and supporting materials are presented to the SCM convening authority and he makes his decision to refer the case to an SCM, he must send the case to one of the SCM's previously convened. This procedure is accomplished by means of completing item 14 in block V on page 2 of the charge sheet. The referral is executed personally by the convening authority and explicitly details the type of court to which the case is being referred (summary, special, general) and the specific court to which the case is being referred.

At this point, the importance of serializing convening orders becomes clear. A court-martial can only hear a case properly referred to it. The simplest and most accurate way to describe the correct court is to use the serial number and date of the order creating that court. Thus, the referral might read "referred for trial to the summary court-martial appointed by my summary court-martial convening order 1-CY dated 15 January 19CY." This language precisely identifies a particular kind of court-martial and the particular SCM to try the case.

In addition, the referral on page 2 of the charge sheet should indicate any particular instructions applicable to the case such as "confinement at hard labor is not an

authorized punishment in this case" or other instructions desired by the convening authority. If no instructions are applicable to the case, the referral should so indicate by use of the word "none" in the appropriate blank. Once the referral is properly executed, the case is "referred" to trial and the case file forwarded to the proper SCM officer. For example:

V. REFERRAL : SERVICE OF CHARGES		
14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY USS FOX (DD 983)	b. PLACE At sea	c. DATE 5 Jul CY

Referred for trial to the summary court-martial convened by my summary court-martial convening order number 1-CY dated

1 July 19 CY, subject to the following instructions: [2] none

By _____ of _____
Command or Order

Able B. Seaweed — *Typed Name of Officer*

Commanding Officer — *Official Capacity of Officer Signing*

Commander, USN — *Grade*

/s/ *Able B. Seaweed* — *Signature*

1404 PRETRIAL PREPARATION

A. ***General.*** After charges have been referred to trial by SCM, all case materials are forwarded to the proper SCM officer, who is responsible for thoroughly preparing the case for trial.

B. ***Preliminary preparation.*** The charge sheet should be carefully examined, and all obvious administrative, clerical, and typographical errors corrected. R.C.M. 1304. The SCM officer should initial each correction he makes on the charge sheet. If the errors are so numerous as to require preparation of a new charge sheet then, the charges must be resworn and rereferred. In this connection, Article 30, UCMJ, requires that the person who swears to the charges be subject to the UCMJ. In addition, the accuser must either have knowledge of or have investigated the charges and swear that the charges are true in fact to the best of his/her knowledge and belief. The accuser may rely upon the results of an investigation conducted by others in preferring charges. The oath that the accuser takes must be administered by a commissioned officer authorized to administer such oaths [the form of the oath is found in R.C.M. 307(b)]. If the SCM officer changes an existing specification to include any new person, offense, or matter not fairly included in the original specification, R.C.M. 603 requires the new specification to be resworn and rereferred. The SCM officer should continue his

examination of the charge sheet to determine the correctness and completeness of the information on pages 1 and 2 thereof:

1. The accused's name, social security number, rate, unit, and pay grade;

2. pay per month;

3. initial date and term of current service;

4. data as to restraint, including the correct type and duration of pretrial restraint;

5. signature, rank or rate, and armed force of the accuser;

6. signature and authority of the officer who administered the oath to the accuser;

7. date of receipt of sworn charges by the officer exercising SCM jurisdiction (important, as it stops the running of the statute of limitations);

8. block V, referring charge(s) to a specific SCM for trial (compare with convening order to ensure proper referral); and

9. the charge(s) and specification(s). Check for proper form and determine the elements of the offense. "Elements" are facts which must be proved in order to convict the accused of an offense. Part IV, MCM, 1995, contains some guidance in this respect, but for more detailed guidance consult the *Military Judge's Benchbook,* DA Pam. 27-9. The SCM officer should also review the evidence relating to the charges. Problems in connection with proof of the charges should be brought to the attention of the convening authority.

C. ***Pretrial conference with accused.*** After initial review of the court-martial file, the SCM officer shall hold a preliminary proceeding with the accused. The accused's right to counsel is discussed later in this chapter. If the accused is represented by counsel, all dealings with the accused should be conducted through his counsel. Thus, the accused's counsel, if any, should be invited to attend the pretrial conference. At the pretrial conference, the SCM officer should follow the suggested guide found in appendix 9, MCM, 1995, and should document the fact that all applicable rights were explained to the accused by completing blocks 1, 2, and 3 of the form for the record of trial by SCM found at appendix 15, MCM, 1995.

1. ***Purpose.*** The purpose of the pretrial conference is to provide the accused with information concerning the nature of the court-martial, the procedure to be used, and his rights with respect to that procedure. It cannot be overemphasized that no attempt should be made to interrogate the accused or otherwise discuss the merits of the

charges. The proper time to deal with the merits of the accusations against the accused is at trial. The SCM officer should provide the accused with a meaningful and thorough briefing in order that the accused fully understands the court-martial process and his rights pertaining thereto. This effort will greatly reduce the chances of post-trial complaints, inquiries, and misunderstandings.

2. ***Advice to accused – rights.*** R.C.M. 1304(b) requires the SCM to serve on the accused a copy of the charge sheet and inform the accused of the following:

a. the general nature of the charges;to conduct an SCM;

b. that the charges have been referred to a summary court for trial and the date of referral (the SCM officer should complete the last block on page 2 of the charge sheet noting service on the accused); For example:

15.
On 8 July, 19 CY, I (caused to be) served a copy hereof on (~~XXXX XX~~) the above named accused.

John H. Smith — Lieutenant, JAGC, USN
Typed Name of Trial Counsel — *Grade or Rank of Trial Counsel*

/s/ ***John H. Smith***
Signature

FOOTNOTES: 1 - *When an appropriate commander signs personally, inapplicable words are stricken*
2 - *See R.C.M. 601(e) concerning instructions. If none, so state.*

c. the identity of the convening authority;

d. the names of the accuser;

e. the names of any witnesses who may be called to testify against the accused at trial and the description of any real or documentary evidence to be used and the right of the accused to inspect the allied papers and immediately available personnel records;

f. that during the trial the summary court-martial will not consider any matters, including statements made by the accused to the SCM officer unless admitted in accordance with the Military Rules of Evidence;

g. the accused's right to plead guilty or not guilty;

h. the accused's right to cross-examine witnesses and have the SCM officer cross-examine witnesses on the accused's behalf;

i. the accused's right to call witnesses and produce evidence with the assistance of the SCM officer as necessary;

j. the accused's right to testify or to remain silent with the assurance that no adverse inference will be drawn by the SCM officer from such silence;

k. if any findings of guilty are announced, the accused's rights to remain silent, to make an unsworn statement, oral or written or both, and to testify, and to introduce evidence in extenuation or mitigation;

l. the accused's right to object to trial by summary court-martial; and,

m. the maximum sentence which the summary court-martial may adjudge.

(a) ***E-4 and below.*** The jurisdictional maximum sentence which an SCM may adjudge in the case of an accused who, at the time of trial, is in pay-grade E-4 or below extends to reduction to the lowest pay-grade (E-1); forfeiture of two-thirds of one-month's pay [convening authority may apportion collection over three months; JAGMAN, § 0152a(2)] 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. 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 an SCM could impose in the case of an accused who, at the time of trial, is in paygrade E-5 or above extends to reduction to the next inferior paygrade, restriction to specified limits for two months, and forfeiture of two-thirds of one month's pay. R.C.M. 1301(d)(2). Unlike NJP, where an E-5 may be reduced to E-4 and then awarded restraint punishments which may be imposed only upon an E-4 or below, at SCM an E-5 cannot be sentenced to confinement or hard labor without confinement even if a reduction to E-4 has also been adjudged. See the discussion following R.C.M. 1301(d)(2).

3. ***Advice to accused regarding counsel***

a. In 1972, the Supreme Court held, with respect to "criminal prosecutions," that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor or felony, unless he was represented by counsel at this trial." *Argersinger v. Hamlin*, 407 U.S. 25, 37, 92 S.Ct. 2006, 2007, 32 L.Ed.2d 530 (1972).

b. The Supreme Court, in *Middendorf v. Henry*, 425 U.S. 25, 96 S.Ct. 1281, 47 L.Ed.2d 556 (1976), held that an SCM was ***not*** a "criminal prosecution" within the meaning of the sixth amendment, reasoning that the possibility of loss of liberty does not, in and of itself, create a proceeding at which counsel must be afforded. Rather, it reasoned that an SCM was a brief, non-adversarial proceeding, the nature of which would be wholly changed by the presence of counsel. It found no factors that were so extraordinarily weighty as to invalidate the balance of expediency that has been struck by Congress.

c. In *United States v. Booker*, 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 an SCM.

d. The discussion to R.C.M. 1301 states the following: "Neither the Constitution nor any statute establishes any right to counsel at summary courts-martial. Therefore, it is not error to deny an accused the opportunity to be represented by counsel at a summary court-martial. However, appearance of counsel is not prohibited. The detailing authority may, as a matter of discretion, detail, or otherwise make available, a military attorney to represent the accused at a summary court-martial. R.C.M. 1301(e) provides that an accused may be represented by civilian counsel at his own expense if an appearance by such counsel will not unreasonably delay the proceedings and if military exigencies do not preclude it.

e. ***Booker warnings***

(1) Although holding that an accused had no right to counsel at an SCM, the C.M.A. ruled in *Booker, supra*, that, if an accused was not given an opportunity to consult with independent counsel before accepting an SCM, the SCM will be inadmissible at a subsequent trial by court-martial. The term "independent counsel" has been interpreted to mean a lawyer qualified in the sense of Article 27(b), UCMJ, who, in the course of regular duties, does not act as the principle legal advisor to the convening authority. (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 SCM;

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

(c) the accused voluntarily, knowingly, and intelligently waived his right to refuse an SCM.

(3) If an accused has been properly advised of his right to consult with counsel and to refuse trial by SCM, as well as the legal ramifications of these decisions, his elections and / or waivers in this regard should be made in writing and should be signed by the accused. Recordation of the advice / waiver should be made on page 13 (Navy) or page 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 used 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 SCM. The "Waiver of Right to Counsel" may be used to establish a voluntary, knowing, and intelligent waiver of counsel at an SCM. Should the accused elect to waive his rights, but refuse to sign these forms, this fact should be recorded on page 13/page 11 of the service record with a copy attached to the record of trial.

(4) Assuming that the requirements of *Booker* have been complied with (proper advice and recordation of election / waivers), evidence of the prior SCM will be admissible at a later trial by court-martial as evidence of the character of the accused's prior service pursuant to R.C.M. 1001(b)(2). Unless the accused was actually represented by counsel at his SCM or affirmatively rejected an offer to provide counsel, however, the SCM would not be considered a "criminal conviction" and would not be admissible as a prior conviction under R.C.M. 1001(b)(3), nor for purposes of impeachment under Mil.R.Evid. 609, MCM, 1995. *See United States v. Booker*, 3 M.J. 443, 448 (C.M.A. 1977). *See also United States v. Rivera*, 6 M.J. 535 (N.C.M.R. 1978); *United States v. Kuehl*, 9 M.J. 850 (N.C.M.R. 1980); *United States v. Cofield*, 11 M.J. 422 (C.M.A. 1981). While these cases would seem to allow a prior SCM's use as a "conviction" to trigger the increased punishment provisions of R.C.M. 1003(d) if the accused had been actually represented by counsel or had rejected the services of counsel provided to him, the discussion following R.C.M. 1003(d) opines that convictions by SCM may not be used for this purpose. As the discussion and analysis sections of MCM, 1995, have no binding effect and represent only the drafters' opinions, this issue remains unresolved.

SUMMARY COURT-MARTIAL
ACKNOWLEDGMENT OF RIGHTS AND WAIVER

I, _____, assigned to _____, acknowledge the following facts and rights regarding summary courts-martial:

1. I have the right to consult with a lawyer prior to deciding whether to accept or refuse trial by summary court-martial. Should I desire to consult with counsel, I understand that a military lawyer may be made available to advise me, free of charge, or, in the alternative, I may consult with a civilian lawyer at my own expense.

2. I realize that I may refuse trial by summary court-martial, in which event the commanding officer may refer the charge(s) to a special court-martial. My rights at a summary court-martial would include:

a. The right to confront and cross-examine all witnesses against me;

b. the right to plead not guilty and the right to remain silent, thus placing upon the government the burden of proving my guilt beyond a reasonable doubt;

c. the right to have the summary court-martial call, or subpoena, witnesses to testify in my behalf;

d. the right, if found guilty, to present matters which may mitigate the offense or demonstrate extenuating circumstances as to why I committed the offense; and

e. the right to be represented at trial by a civilian lawyer provided by me at my own expense, if such appearance will not unreasonably delay the proceedings and if military exigencies do not preclude it.

3. I understand that the maximum punishment which may be imposed at a summary court-martial is:

On E-4 and below

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.

_____
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 SCM officer shall give the accused a reasonable period of time to decide whether to object to trial by summary court-martial. The SCM officer should obtain from the accused the names of any witnesses or the description of other evidence which the accused wishes presented at the trial if the case is to proceed. He should also arrange for a time and place to hold the open sessions of the trial. These arrangements should be made through the legal officer, and the SCM officer should insure that the accused and all witnesses are notified of the time and place of the first meeting.

An orderly trial procedure should be planned to include a chronological presentation of the facts. The admissibility and authenticity of all known evidentiary matters should be determined and numbers assigned all exhibits to be offered at trial. These exhibits, when received at trial, should be marked "received in evidence" and numbered (prosecution exhibits) or lettered (defense exhibits). The evidence reviewed should include not only that contained in the file as originally received, but also any other relevant evidence discovered by other means. The SCM officer has the duty of insuring that all relevant and competent evidence in the case, both for and against the accused, is presented. It is the responsibility of the SCM officer to insure that only legal and competent evidence is received and considered at the trial. The Military Rules of Evidence apply to the SCM and must be followed.

2. ***Subpoena of witnesses.*** The SCM is authorized by Article 46, UCMJ, and R.C.M.'s 703(e)(2)(C) and 1301(f) to issue subpoenas to compel the appearance at trial of civilian witnesses. In such a case, the SCM officer will follow the same procedure detailed for an SPCM or GCM trial counsel in R.C.M. 703(c) and JAGMAN, § 0146. Appendix 7 of the MCM, 1995, contains an illustration of a completed subpoena, while JAGMAN, § 0146 details procedures for payment of witness fees. Depositions may also be used, but the advice of a lawyer should be first obtained. *See* Article 49, UCMJ; R.C.M. 702.

1405 TRIAL PROCEDURE. *See* app. 9, MCM, 1995.

1406 POST-TRIAL RESPONSIBILITIES OF THE SCM

After the SCM officer has deliberated and announced findings and, where appropriate, sentence, he then must fulfill certain post-trial duties. The nature and extent of these post-trial responsibilities depend upon whether the accused was found guilty or innocent of the offenses charged.

A. ***Accused acquitted on all charges.*** In cases in which the accused has been found not guilty as to all charges and specifications, the SCM must:

1. Announce the findings to the accused in open session [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, 1995;

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 SCM 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 SCM by the Judge Advocate General in accordance with R.C.M. 1201(b)(3).

3. if the sentence includes confinement, inform the accused of his right to apply to the convening authority for deferment of confinement [R.C.M. 1304(b)(2)(F)(iii)];

4. inform the convening authority of the results of trial as soon as practicable [such information should include the findings, sentence, recommendations for suspension of the sentence, and any deferment request (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, 1995;

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 SCM's 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 19CY.)

SCM: What, if anything, did you advise the accused concerning his right to remain silent?

WIT: (I informed the accused that he need not make any statement and that he had the right to remain silent.)

SCM: What, if anything, did you advise the accused of the use that could be made of a statement if he made one?

WIT: (I advised the accused that, if he elected to make a statement, it could be used as evidence against him at a court-martial or other proceeding.)

SCM: Did you ask the accused if he desired to consult with a lawyer or to have a lawyer present?

WIT: (Yes.) (No.)

SCM: (If answer to previous question was affirmative) What was his reply?

WIT: (He stated he did (not) wish to consult with a lawyer (or to have a lawyer present).)

NOTE: If the interrogator was aware that the accused had retained or appointed counsel in connection with the charge(s), then such counsel was required to be given notice of the time and place of the interrogation.

SCM: To your knowledge, did the accused have counsel in connection with the charge(s)?

WIT: (Yes.) (No.)

SCM: (If answer to previous question was affirmative) Did you notify the accused's counsel of the time and place of your interview with the accused?

WIT: (Yes.) (No.)

SCM: What, if anything, did you advise the accused of his rights concerning counsel?

WIT: (I advised the accused that he had the right to consult with a lawyer counsel and have that lawyer present at the interrogation. I also informed him that he could retain a civilian lawyer at his own expense and additionally a military lawyer would be provided for him. I further advised him that any detailed military lawyer, if the accused desired such counsel, would be provided at no expense to him.)

SCM: Did you provide all of this advice prior to the accused making any statement to you?

WIT: (Yes.)

SCM: What, if anything, did the accused say or do to indicate that he understood your advice?

WIT: (After advising him of each of his rights, I asked him if he understood what I had told him and he said he did. (Also, I had him read a printed form containing a statement of these rights and sign the statement acknowledging his understanding of these rights.))

SCM: (If accused has signed a statement of his rights) I show you Prosecution Exhibit #2 for identification, which purports to be a form containing advice of a suspect's rights and ask if you can identify it?

WIT: (Yes. This is the form executed by the accused on _____ 19___. I recognize it because my signature appears on the bottom as a witness, and I recognize the accused's signature, which was placed on the document in my presence.)

SCM: Did the accused subsequently make a statement?

WIT: (Yes.)

SCM: Was the statement reduced to writing?

WIT: (Yes.) (No.)

SCM: Prior to the accused's making the statement, did you, or anyone else to your knowledge, threaten the accused in any way?

WIT: (Yes.) (No.)

SCM: Prior to the accused's making the statement, did you, or anyone else to your knowledge, make any promises of reward, favor, or advantage to the accused in return for his statement?

WIT: (Yes.) (No.)

SCM: Prior to the accused's making the statement, did you, or anyone else to your knowledge, strike or otherwise offer violence to the accused should he not make a statement?

WIT: (Yes.) (No.)

SCM: (If the accused's statement was reduced to writing) Describe in detail the procedure used to reduce the statement in writing.

WIT: _____.

SCM: Did the accused at any time during the interrogation request to exercise any of his rights?

WIT: (Yes.) (No.)

NOTE: If the witness indicates that the accused did invoke any of his rights at any stage of the interrogation, it must be shown that the

interrogation ceased at that time and was not continued until such time as there had been compliance with the request of the accused concerning the rights invoked. If the witness testifies that he obtained a written statement from the accused, he should be asked if and how he can identify it as a written statement of the accused. When a number of persons have participated in obtaining a statement, you may find it necessary to call several or all of them as witnesses in order to inquire adequately into the circumstances under which the statement was taken.

SCM: I now show you Prosecution Exhibit 3 for identification, which purports to be a statement of the accused, and ask if you can identify it?

WIT: (Yes. I recognize my signature and handwriting on the witness blank at the bottom of the page. I also recognize the accused's signature on the page.)

SCM: (To accused, after permitting him to examine the statement when it is in writing) The Uniform Code of Military Justice provides that no person subject to the Code may compel you to incriminate yourself or answer any question which may tend to incriminate you. In this regard, no person subject to the Code may interrogate or request any statement from you if you are accused or suspected of an offense without first informing you of the nature of the offense of which you are suspected and advising you that you need not make any statement regarding the offense of which you are accused or suspected; that any statement you do make may be used as evidence against you in a trial by court-martial; that you have the right to consult with lawyer counsel and have lawyer counsel with you during the interrogation; and that lawyer counsel can be civilian counsel provided by you or military counsel appointed for you at no expense to you. Finally, any statement obtained from you through the use of coercion, unlawful influence, or unlawful inducement, may not be used in evidence against you in a trial by court-martial. In addition, any statement made by you that was actually the result of any promise of reward or advantage, or that was made by you after you had invoked any of your rights at any time during the interrogation, and your request to exercise those rights was denied, is inadmissible and cannot be used against you. Before I consider receiving this statement in evidence, you have the right at this time to introduce any evidence you desire concerning the circumstances under which the statement was obtained or concerning whether the statement was in fact made by you. You also have the right to take the stand at this time as a witness for the limited purpose of testifying as to these matters. If you do that, whatever you say will be considered and weighed as evidence by me just as is the testimony of other witnesses on this subject. I will have the right to question you upon your testimony, but if you limit your testimony to the circumstances surrounding the taking of the statement or as to whether the statement was in fact made by you, I may not question you on

the subject of your guilt or innocence, nor may I ask you whether the statement is true or false. In other words, you can only be questioned upon the issues concerning which you testify and upon your worthiness of belief, but not upon anything else. On the other hand, you need not take the witness stand at all. You have a perfect right to remain silent, and the fact that you do not take the stand yourself will not be considered as an admission by you that the statement was made by you under circumstances which would make it admissible or that it was in fact made by you. You also have the right to cross-examine this witness concerning his testimony, just as you have that right with other witnesses, or, if you prefer, I will cross-examine him for you along any line of inquiry you indicate. Do you understand your rights?

ACC: _____.

SCM: Do you wish to cross-examine this witness?

ACC: _____.

SCM: Do you wish to introduce any evidence concerning the taking of the statement or concerning whether you in fact made the statement?

ACC: _____.

SCM: Do you wish to testify yourself concerning these matters?

ACC: _____.

SCM: Do you have any objection to my receiving Prosecution Exhibits 2 and 3 for identification into evidence?

ACC: (Yes, sir (stating reasons).) (No, sir.)

SCM: (Your objection is sustained.)

–

(Your objection is overruled. These documents are admitted into evidence as Prosecution Exhibits 2 and 3.)

–

(There being no objection, these documents are admitted into evidence as Prosecution Exhibits 2 and 3.)

NOTE: If the accused's statement was given orally, rather than in writing, anyone who heard the statement may testify as to its content if all requirements for admissibility have been met.

SAMPLE INQUIRY INTO THE FACTUAL BASIS OF A PLEA OF GUILTY TO THE OFFENSE OF UNAUTHORIZED ABSENCE

1. **Assumption.** Assume the accused has entered pleas of guilty to the following charge and specification:

   Charge: Violation of the 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

PROCEDURE STUDY GUIDE

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 article 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 article 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; and

3. anticipated issues or problems likely to arise at trial, such as unusual motions or objections.

In addition, the parties may agree to resolve triable issues. A witness request, for example, if litigated and approved at trial, could delay the proceedings and involve expense and inconvenience. Such an issue could be resolved at a pretrial conference by an agreement between the parties. R.C.M. 802 makes clear, however, that the military judge may not issue a binding ruling at the conference. Any resolution must be by mutual agreement. As stated in R.C.M. 802(c), "No party may be prevented under this rule from presenting evidence or from making any argument, objection, or motion at trial."

B. There is no particular procedure or method prescribed for a conference under R.C.M. 802. It may be conducted by radio or telephone, for that matter, and the presence of the accused is neither required nor prohibited. The conference need not be made a part of the record of trial, but matters agreed upon at the conference shall be included in the record either orally or in writing. No admissions made by the accused or counsel shall be used against the defense unless reduced in writing and signed by both the accused and counsel. 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 article 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 article 39(a) session.*** The persons involved include counsel, military judge, members, and the accused. If the orders

detailing the military judge and counsel have not been reduced to writing, an oral announcement of such detailing is required. The convening order will detail the members.

4. ***Swearing of the reporter, if not previously sworn.*** Art. 42(a), UCMJ, sets forth the requirement for swearing the reporter. Section 0130d(3)(a) 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 not certified in accordance with Art. 27(b), UCMJ, and / or civilian counsel, must be sworn in each case. JAGMAN, § 0130.

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 article 39(a) session.*** If a request for trial by military judge alone is granted, the military judge will declare that the court is assembled. If there is no request, or if a request is disapproved, assembly will occur at the first session of court with members present.

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 (LIO), 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 article 39(a) session to expedite the subsequent trial on the merits.

C. ***Convening the court with members at the conclusion of the article 39(a) session***

1. Once the members are seated, certain preliminaries are repeated (calling of the court to order, announcement of convening of the court, and persons present, etc.).

2. Swearing of the members of the court.

3. Announcement of the assembly of the court. 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)(1)(A).

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)(3). 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. Christensen*, 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 ARTICLE 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 article 39(a) session is a part of the trial and not a pretrial conference as is provided for in R.C.M. 802. The following sections will deal primarily with article 39(a) sessions called by the military judge to dispose of matters prior to assembly of the court. However, the military judge may call article 39(a) sessions at any stage of the trial to hear motions or other matters out of the presence of the court members. For example, arguments on objections and challenges, the giving of the allocution rights, and the preparation of instructions for the members normally take place during specially called article 39(a) sessions. Further, R.C.M. 803 and 1102 provide that article 39(a) sessions may be held after the announcement of sentence in order to dispose of matters raised by reviewing authorities—such as questions of jurisdiction or allegations of misconduct by trial participants. Recently, a court held in *United States v. Reynolds*, 44 M.J. 726 (A. Ct. Crim. App. 1996) that a military judge erred in conducting an Article 39(a) session over the telephone, however footnote 4 of the opinion leads us to believe that video-teleconferencing may very well be permissable.

1505 PRESENCE OF THE ACCUSED AND PUBLIC TRIAL
(West Key Number: MILJUS Key Number 1227)

A. Article 39(a) requires that all proceedings of the court, except the deliberations and voting by the members, be conducted in the presence of the accused. The right of the accused to be present, however, may be waived. 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. Bystrzycki*, 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 can be accomplished by appropriate service record entry [*United States v. Day*, 48 C.M.R. 627 (N.C.M.R. 1974)] or by witness testimony establishing efforts made to locate an accused [*United States v. Jones*, 34 M.J. 899 (N.M.C.M.R. 1992)]; however, the record must establish sufficient government evidence as to the voluntary nature of the absence. The court cannot rely on defense counsel's assertions in an 802 conference that the accused was notified of the proper trial date. *United States v. Sanders*, 31 M.J. 834 (N.M.C.M.R. 1991). Likewise, mere assertions by the defense counsel that the absence is authorized or involuntary are insufficient to rebut a proper showing by the government. *United States v. Baker*, No. 74-0550 (N.C.M.R. 7 May 1974).

f. In *United States v. Mixon*, No. 79-0908 (N.C.M.R. 15 Sept. 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*, 223 U.S. 442 (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. . .; (2) cite him for contempt; (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. 604(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. Czarnecki*, 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 article 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 the military judge;

b. personal acknowledgement of understanding by the accused; and

c. personal indication of waiver or nonwaiver by the accused.

The C.M.A. has condemned the practice of conducting a *Donohew* inquiry "en masse." *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 article 16, trial by military judge alone is permitted if:

a. A military judge has been detailed to the court; and

b. before the end of the initial article 39(a) session, or, in the absence of such a session, before assembly, the accused, knowing the identity of the military judge and having consulted with defense counsel, makes written or oral request for trial by military judge alone (see *United States v. Turner*, _ M.J. _, 1996 WL 727153 (N.M. Ct. Crim. App. Dec. 10, 1996) which held that said request by the accused for trial by military judge alone must be put on the record.); 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 article 39(a) session held prior to assembly, or at trial after the military judge has called the court to order but prior to announcement of assembly. If the accused has not made a request for trial by military judge alone prior to trial, the military judge should inform the accused of this right prior to assembly. 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, 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 fact-finder. The military judge may hear argument from either counsel on the issue. The discussion also indicates that, if the request is denied, the basis for the denial must be stated on the record. *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. Shackleford*, 2 M.J. 17 (C.M.A. 1976); *United States v. Schaffner*, 16 M.J. 903 (A.C.M.R. 1983); *United States v. Stiner*, 30 M.J. 860 (N.M.C.M.R. 1990).

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 article 39(a) session proceeds.

3. If the accused desires enlisted representation, the court may not be assembled unless at least one-third of the members actually sitting on the court are enlisted persons or unless the convening authority has directed that the trial proceed in the absence of enlisted members. 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 GCM's and SPCM's for the trial of any enlisted accused provided he is not a member of the same unit as the accused and provided the accused has personally requested, prior to assembly, that enlisted members serve on the court. R.C.M. 912(f)(4) indicates that the requirement that enlisted members be from a unit other than that of the accused may be waived by a failure to object. *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. Article 25(c)(1) provides that the right of the accused to request enlisted representation may be cut off if there has been no request before the conclusion of an article 39(a) session held prior to trial or, in the absence of such a session, before the court is assembled.

7. As a matter of right, the accused may withdraw a request for enlisted members anytime before the end of the initial article 39(a) session, or, in the absence of such a session, before assembly. 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.*** Generally, the accused may plead as follows: guilty; not guilty to an offense as charged, but guilty of a named LIO; guilty with exceptions, with or without substitutions, not guilty of the exceptions, but guilty of the substitutions, if any; or not guilty. Art 45(a), UCMJ; R.C.M. 910(a)(i).

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 (1971), 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 article 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. R.C.M. 910(a)(2).

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)(1), discussion.

3. ***Where guilty plea constitutes waiver.*** A voluntary plea of guilty waives nonjurisdictional defects occurring in earlier stages of the trial.

a. 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 (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. 1982) (incorrect assurance by MJ that issue would be preserved). *But see* para. 1507.C (conditional pleas), *supra*, and para. 1507.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. R.C.M. 707(e) reads, "except as provided in R.C.M. 910(a)(2), a plea of guilty which results in a finding of guilty waives any speedy trial issue as to that offense." This change overturned a line of cases where the C.M.A. held that a guilty plea

did not waive an erroneous denial of speedy trial. *United States v. Davis*, 11 C.M.A. 410, 29 C.M.R. 226 (1960); *United States v. Cummings*, 17 C.M.A. 376, 38 C.M.R. 174 (1968).

4. ***Where guilty plea is not waiver.*** A guilty plea does not waive an objection to the validity of findings not predicated upon a plea of guilty or as to the sentence. *United States v. Engle, supra.*

5. ***Withdrawal of plea.*** After a plea of guilty has been entered, but before it has been accepted, the accused has a right to change his plea to not guilty. After the plea has been accepted, the accused may withdraw his plea up until the time sentence is announced if the military judge, in his discretion, permits him to do so. R.C.M. 910(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 an SPCM without military judge or SCM) must determine, by personal inquiry of the accused, whether the plea is provident (i.e., voluntary and intelligent).

1. The inquiry must be personally conducted by the military judge. *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. Luebs*, 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. 458 (C.M.A. 1977)] and *United States v. Steck*, 8 M.J. 688 (N.C.M.R. 1980);

k. whether the decision to negotiate a plea originated with the accused (was also a requirement of the case inquiry, R.C.M. 705 now allows pretrial agreement negotiations to be initiated by the accused, the defense counsel, the trial counsel, the staff judge advocate, the convening authority, or their duly appointed representative);

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.

The C.M.A. held, in *United States v. Richardson*, 6 M.J. 654 (C.M.A. 1978), that it was prejudicial error for a military judge to consider information elicited from the accused during the Care inquiry in assessing a punishment. Without expressly overruling *Richardson*, the court held, in *United States v. Holt*, 27 M.J. 57 (C.M.A. 1988), that an accused's sworn testimony during providency can be offered by the government in sentencing as evidence "directly relating to the offenses" under R.C.M. 1001(b)(4). Testimony by the accused as to uncharged misconduct can be objected to by the defense counsel and should properly be disallowed.

For a verbatim example of a Care inquiry, see MCM, 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. 656 (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. 973 (N.M.C.M.R. 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 multiplicious 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. See also *United States v. Reed*, 1 M.J. 1114 (N.M.M.R. 1977)

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. Saulter*, 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. 88 (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 multiplicious offenses, the C.M.A. found the pleas provident since the accused was still willing to plead guilty regardless of the ultimate decision as to the legal maximum. (There was a pretrial agreement limiting confinement to 1 year, with provision for part of the year to be suspended.)

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). However, a military judge may not arbitrarily reject a guilty plea. In *United States v. Penister*, 25 M.J. 148 (C.M.A. 1987), the accused was found to have raised no inconsistency when he pleaded a lack of recollection of key events, but was convinced as to their reliability by other evidence.

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, § 0135. Where the accused has pleaded guilty to a LIO and the prosecution intends to try to prove his guilt of the greater offense, the military judge should not enter a finding as to the LIO; rather, he should inform the members of the accused's plea and instruct them that the plea of guilty establishes all elements of the LIO without the necessity of further proof. 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. 1507.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). See also *United States v. Lawrence*, 43 M.J. 677 (A.F.C.C.A, 1995).

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

PROCEDURE STUDY GUIDE

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.

A. ***The military judge***

1. ***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.

2. ***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 accused 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*.

3. Thus, the ruling of the military judge is final with respect to:

   a. Challenges;

   b. all interlocutory questions, objections, and motions generally;

   c. questions of the defendant's mental capacity to stand trial;

d. instructions; and

e. continuances.

B. ***President of special court-martial without military judge***

1. 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*.

2. The president rules on all other questions arising at trial as follows:

a. The president's rulings on questions 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.

b. 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.

c. 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.

3. 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 multiplicious 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 which 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. Prior to referral, all requests for pretrial delay, together with supporting reasons, will be submitted to the convening authority or, if authorized by secretarial regulations, the military judge for resolution. After referral, all requests for delay will be submitted to the military judge. R.C.M. 707(c)(1), 906(b)(1).

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. R.C.M. 906(b)(3).

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). However, a charge or specification may not be ameded over the accused's objection unless the amendment is minor. R.C.M. 906(b)(4).

e. Severance of a duplicitous specification into two or more specifications. A duplicitous specification is one which alleges two or more separate offenses. R.C.M. 906(b)(5), 307(c)(4).

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. A bill of particulars is not a substitute tool of discovery. R.C.M. 906(b)(6).

g. Discovery and production of evidence and witnesses. R.C.M. 906(b)(7), 701, 703, 914 and 1001(e).

h. Relief from illegal pretrial confinement. *See* chapter XII, *supra*. R.C.M. 305.

i. Severance of multiple accused. R.C.M. 906(b)(9).

j. Severance of offenses. R.C.M. 906(b)(10).

k. Change of place of trial. R.C.M. 906(b)(11).

l. Determination of multiplicity of offenses for sentencing purposes. R.C.M. 906(b)(12), 907(b)(3)(B), and 1003.

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. R.C.M. 906(b)(13), M.R.E. 104(c).

n. Motions relating to mental capacity or responsibility of the accused. R.C.M. 906(b)(14), 706, 909, and 916(k).

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" synonomously; 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, 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. The new *JAG Manual* (Rev. 3 Oct 90) does not contain any language indicating that motions not presented in accordance with Rule 34 will not be entertained except for good cause shown. An earlier version of the *JAG Manual* contained such language. 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). *See also United States v. Miller*, 31 M.J. 247 (C.M.A. 1990).

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, by clear and positive evidence, no command influence and / or prejudice. *United States v. Jones*, 30 M.J. 849 (N.M.C.M.R. 1990). If command influence is found, the government must show beyond a reasonable doubt that the error was harmless. *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. 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; and

b. an appeal substantially in the form provided in the Rules of Practice and Procedure of the Court of Military Review (see 22 M.J.).

5. ***Appellate proceedings.*** Both parties will be represented by appellate counsel before the Navy-Marine Corps Court of Criminal Appeal (N.M.C.C.C.A.). The appeal will have priority over all other proceedings before the court. Unlike its normal scope of review, N.M.C.C.C.A. may take action on the appeal only with respect to matters of law. The accused may petition a contrary ruling of N.M.C.C.C.A. to the Court of Appeals for the Armed Forces (C.A.A.F.) within 60 days of receiving notification of the ruling. The Judge Advocate General may certify a contrary ruling to the C.A.A.F. R.C.M. 908(c). However, in *United States v. Curtin*, 44 M.J. 439 (C.A.A.F. 1996) the court held that final action by an intermediate appellate court on conditions of extraordinary relief is a "case" within the meaning of the statute requiring C.A.A.F. to review all cases reviewed by the Court of Criminal Appeals, thereby allowing C.A.A.F. to review with or without an appeal by either side.

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. Respess*, 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 the 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. *But see United States v. Mayhugh*, 44 M.J. 363 (C.A.A.F. 1996). 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 by delaying referral of the case to trial. This is inadvisable except upon written application of the defense. This time may be charged to the government, creating a question of due diligence on the part of the government. *See* R.C.M. 707; Art. 10, UCMJ; and *generally United States v. Kossman*, 38 M.J. 258 (C.M.A. 1993).

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). If the accused's request for continuance is grounded on substantial right and prosecution's singular basis for opposition is administrative convenience, denial of continuance request may constitute abuse of discretion. *United States v. Wilson*, 28 M.J. 1054 (N.M.C.M.R. 1989).

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. See *United States v. Curtis*, 44 M.J. 106 (C.A.A.F. 1996). 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, *supra*.

1609 MENTAL CAPACITY AND RESPONSIBILITY (MILJUS Key Numbers 843-846)

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 fact-finder 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 fact-finder 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 a severe mental disease or defect, was unable to appreciate the nature and quality or the 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 factfinders 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 proceedings." *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 *Unites States 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 prosecutional 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 article 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 article 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

GROUNDS	TIME/WAIVER	BURDEN OF PROOF	ISSUE PRESENTED	CASES
1. Speedy trial 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 not survive a guilty plea	Accused to raise/ government to establish no denial by preponderance	Unreasonable delay; exceeding time periods established by R.C.M. 707	*U.S. v. Burton* 21 C.M.A. 112, 44 C.M.R. 166 (1971) *U.S. v. Nelson,* 5 M.J. 189 (C.M.A. 1978) *Barker v. Wingo* 407 U.S. 514 (1972)
2. Statute of limitations 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.S. v. Burkey* 49 C.M.R. 204 (A.C.M.R. 1974)
3. Lack of jurisdiction over person R.C.M. 201, 202, 907(b)(1)	Anytime/not waived	Anyone raises/ government established by preponderance	Existence of valid enlistment; termination of enlistment	*In re Grimley* 137 U.S. 147 (1890)

GROUNDS	TIME/WAIVER	BURDEN OF PROOF	ISSUE PRESENTED	CASES
4. Lack of jurisdiction over the offense R.C.M. 201, 203, 907(b)(1)	Anytime/not waived	Anyone raises/ government proves by preponderance	Military status of the accused	*Solorio v. U.S.* 107 S.Ct. 2924 (1987) *U.S. v. Avila* 27 M.J. 62 (C.M.A. 1988)
5. Failure to allege an offense R.C.M. 907(b)(1)	Any time/not waived	Anyone raises/ question of law	Does specification fail to state offense or give notice of an essential element of the offense?	*U.S. v. Suggs* 20 C.M.A. 196, 43 C.M.R. 36 (1970) *U.S. v. Fleig* 16 U.S.C.M.A. 444, 37 C.M.R. 64 (1966)
6. Former jeopardy 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?	*Yates v. U.S.* 355 U.S. 66 (1957) *Crist v. Bretz* 437 U.S. 28 (1978)
7. Transactional immunity 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	*Cooke v. Orser* 12 M.J. 335 (C.M.A. 1982)

GROUNDS	TIME/WAIVER	BURDEN OF PROOF	ISSUE PRESENTED	CASES
8. Testimonial immunity 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.S. v. Rivera* 1 M.J. 107 (C.M.A. 1975) *U.S. v. Whitehead* 5 M.J. 294 (C.M.A. 1978) *Kastigar v. U.S.* 406 U.S. 441 (1972)
9. Former punishment 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.S. v. Fretwell* 11 C.M.A. 377, 29 C.M.R. 193 (1960)

B. Motions to Grant Appropriate Relief

GROUNDS	TIME/WAIVER	BURDEN OF PROOF	ISSUE PRESENTED	CASES
1. Lack of mental capacity to stand trial 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.S. v. Williams* 5 C.M.A. 197, 17 C.M.R. 197 (1954)
2. Lack of mental responsibility 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 evidence on the merits.)	*U.S. v. Massey* 27 M.J. 371 (C.M.A. 1989)
3. Illegal pretrial confinement 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, *supra*. 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	*Courtney v. Williams* 1 M.J. 267 (C.M.A. 1976) *U.S. v. Heard* 3 M.J. 14 (C.M.A. 1977) *U.S. v. Malia* 6 M.J. 65 (C.M.A. 1978)

GROUNDS	TIME/WAIVER	BURDEN OF PROOF	ISSUE PRESENTED	CASES
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.S. v. Ledbetter* 2 M.J. 37 (C.M.A. 1976) *U.S. v. Chestnut* 2 M.J. 84 (C.M.A. 1976) *U.S. v. Collins* 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.S. v. Donaldson* 23 C.M.A. 293 49 C.M.R. 542 (1975) *U.S. v. Engle* 1 M.J. 387 (C.M.A. 1976) *U.S. v. Collins* 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) Mislaid or hampered in preparation	*U.S. Whyte* 1 M.J. 163 (C.M.A. 1975)

GROUNDS	TIME/WAIVER	BURDEN OF PROOF	ISSUE PRESENTED	CASES
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 trials: More stringent showing - movant must show prejudice by joint trial	*U.S. v. Respess* 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)

GROUNDS	TIME/WAIVER	BURDEN OF PROOF	ISSUE PRESENTED	CASES
10. Request for witnesses 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.S. v. Carpenter* 1 M.J. 384 (C.M.A. 1976) *U.S. v. Williams* 3 M.J. 239 (C.M.A. 1977) *U.S. v. Tangpuz* 5 M.J. 426 (C.M.A. 1978)
11. Continuance	When needed/waived	Movant/preponderance	Prejudice to movant's substantial rights unless continuance granted	*U.S. v. Dunks* 1 M.J. 254 (C.M.A. 1976)
12. Improper referral R.C.M. 905(b)(1)	Before plea/not waived	Accused/preponderance	1) Accuser 2) Improper referral date	*U.S. v. Conn* 6 M.J. 351 (C.M.A. 1979)
13. Improper withdrawal	Before plea/not waived	Accused raises; government must prove by preponderance	Good cause	*U.S. v. Jackson* 1 M.J. 242 (C.M.A. 1976) *U.S. v. Hardy* 4 M.J. 20 (C.M.A. 1977) *U.S. v. Blaylock* 15 M.J. 190 (C.M.A. 1983)

GROUNDS	TIME/WAIVER	BURDEN OF PROOF	ISSUE PRESENTED	CASES
14. Mistrial R.C.M. 915	Anytime; waived except for plain error	Movant	Manifest necessity; interests of justice	*U.S. v. Rosser* 6 M.J. 267 (C.M.A. 1979) *U.S. v. Evans* 27 M.J. 34 (C.M.A. 1988)
15. Discovery 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; *Jencks* material (R.C.M. 914); *Brady* material	18 U.S.C. § 3500 *Goldberg v. U.S.* 425 U.S. 94 (1976) *U.S. v. Lucas* 5 M.J. 167 (C.M.A. 1978) *U.S. v. Agurs* 427 U.S. 97 (1976) *Weatherford v. Bursey* 429 U.S. 545 (1977) *Brady v. Maryland* 373 U.S. 83 (1963)

C. Motions to Suppress

GROUNDS	TIME/WAIVER	BURDEN OF PROOF	ISSUE PRESENTED	CASES
1. Confession or admission 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. Search and seizure 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. Identification 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

PROCEDURE STUDY GUIDE

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, 1995 [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 an additional peremptory challenge. *United States v. Carter*, 25 M.J. 471 (C.M.A. 1988). This additional peremptory challenge, however, can only be exercised upon the new members. *United States v. Miller*, 30 M.J. 960 (N.M.C.M.R. 1990).

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 pursuant to R.C.M. 505(c)(2)(B) 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***

1. ***Controlling U.S. Supreme Court decisions.*** In *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the United States Supreme Court held that, under the Equal Protection Clause of the fourteenth amendment, a defendant at a state court trial has the right to be tried by a jury from which no "cognizable racial group" has been excluded. *Batson* involved an African-American defendant; therefore, it was violative of the fourteenth amendment for the state prosecutor to "challenge potential jurors solely on account of their race or on the assumption that blacks as a group [would] be unable impartially to consider the State's case against an black defendant." *Id.* at 89. The Court held that "a defendant may establish a prima facie case of purposeful discrimination in selection of the . . . jury based solely on the prosecutor's exercise of peremptory challenges at the defendant's trial." *Id.* at 87. "Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors." *Id.* at 97.

In *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364 (1991), the Court held that, in a trial of a white criminal defendant, a prosecutor is prohibited from excluding African-American jurors on the basis of race. The Court reasoned that, while "an individual juror does not possess the right to sit on any particular . . . jury, . . . he or she does possess the right not be excluded from one on account of race."

In *Georgia v. McCollum*, 505 U.S. 42, 112 S.Ct. 2948, 120 L.Ed.2d 33 (1992), the Court, relying upon *Batson* and *Powers*, prohibited a defendant's exercise of peremptory challenges in a racially discriminatory manner. "Regardless of who invokes the discriminatory challenge, there can be no doubt that the harm is the same – in all cases, the juror is subjected to open and public racial discrimination." *McCollum, supra* at 12.

The latest Supreme Court decision in this area is *Purkett v. Elem*, _ U.S. __, 115 S.Ct. 1769 (1995). Here the Court may have softened *Batson* by allowing a prosecutor's implausible facially neutral reason to be sufficient. (The prosecutor said he dismissed a potential black juror because he had "long, curly, ... unkempt hair" and a "mustache and a goatee.")

2. ***The military standard.*** In *United States v. Santiago-Davila*, 26 M.J. 380 (C.M.A. 1988), the court officially held that *Batson* applied to the exercise of government

peremptory challenges in trials by courts-martial. Noting that "Hispanics" and "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. The court cautioned that the trial counsel could not rebut the accused's prima facie case merely by denying a discriminatory purpose. The trial counsel would have to articulate a neutral explanation related to the subject case in order to justify the use of the peremptory challenge. *Id.* Thereafter, the trial judge would determine whether purposeful discrimination had been established by the accused. *Id.*

The Court of Military Appeals in 1989 reaffirmed its holding in *Santiago-Davila*. In *United States v. Moore*, 28 M.J. 366 (C.M.A. 1989), the court stated that every peremptory challenge made by the government to a member of the accused's own race must be explained by trial counsel upon timely objection by defense counsel. Under *Moore*, trial counsel, as an officer of the court, would explain the reasons for the peremptory challenge. This means that the trial counsel would not be a witness subject to cross-examination by the defense. The military judge would then determine whether the trial counsel articulated a neutral explanation (i.e., a clear and reasonably specific explanation of legitimate reasons to challenge this member). 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), *review denied* 27 M.J. 476 (C.M.A. 1988).

3. ***An unresolved issue.*** The Court of Military Appeals has not yet expressly adopted *Powers v. Ohio* or *Georgia v. McCollum*. Therefore, in the military, are the standards articulated in *Santiago-Davila* and its progeny only applicable to government trial counsel? Counsel confronted with this issue should carefully read the court's historical analysis of *Batson* and *Santiago-Davila*. Set forth in *United States v. Curtis*, 33 M.J. 101 (C.M.A. 1991): "Since equal protection is a component of Fifth Amendment due process, *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954), the requirements imposed by *Batson* are applicable to federal trials." *Curtis* at 102. This appears to indicate that both *Powers* and *McCollum* are applicable at courts-martial since they too concern equal protection.

D. ***Rebutting the inference of discriminatory purpose.*** In *United States v. Curtis, supra*, the court followed the U.S. Supreme Court's lead in resolving issues concerning the adequacy of the trial counsel's neutral explanation in satisfying *Batson*. In *Curtis*, a capital murder case involving an African-American accused, trial counsel peremptorily challenged an African-American court member solely on the grounds that the member answered during voir dire that he would consider service as a court-martial member to be a "learning experience." The trial court noted that this answer might seem especially incongruous to a prosecutor in a death penalty case where many prospective members might have been more concerned with the awesome responsibility confronting them. *Id.* at 105. In rejecting

the defense's *Batson* challenge, the Court of Military Appeals cited to *Hernandez v. New York*, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991), ruling that the "trial counsel's reason for the peremptory challenge–although . . . not an adequate basis for a challenge for cause–[did] not appear to be a mere pretext used by the prosecutor to conceal a racially motivated purpose." *Id.* The court concluded that a race-neutral explanation, even one that could not be used as a basis for a challenge for cause, has no independent significance and is only important as evidence that the prosecutor's peremptory challenge was not racially motivated. *Id.* at 106. *See also United States v. Cooper*, 30 M.J. 201 (C.M.A. 1990); *United States v. Tulloch*, 44 M.J. 571 (A.Ct.Crim.App. 1996); *United States v. Shelby*, 26 M.J. 921 (N.M.C.M.R. 1988); and *United States v. St. Fort*, 26 M.J. 764 (A.C.M.R. 1988).

E. ***Gender-based peremptory challenges.*** In *J.E.B. v. T.B.*, 114 S.Ct. 1419 (1994), the U.S. Supreme Court decided the government and the defense must state gender-neutral reasons when exercising peremptory challenges against potential women jury members. In *United States v. Whitman*, 44 M.J. 664 (N.M.Ct.Crim.App. 1996) the court held that gender cannot be the motivation for the peremptory challenge. Therefore the military judge did not err by refusing to allow the defense to exercise its peremptory challenge against the only female member of the court-martial panel when the defense stated that his motivation for the peremptory challenge was in fact gender.

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 following and are discussed in more detail thereafter. Prosecutors and defense counsel should be aware that the Court of Military Appeals has mandated that military judges shall be liberal in granting challenges for cause. *United States v. Jobson*, 31 M.J. 117 (C.M.A. 1990). *See also United States v. Thomas*, 43 M.J. 550 (N.M. Ct. Crim. App. 1995); *and United States v. Napolean*, 44 M.J. 537 (A.F. Ct. Crim. App. 1996).

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 (SJA) 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 SJA to same	Not addressed by MCM	** R.C.M. 912(f)(1)(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	See R.C.M. 902(a)	** R.C.M. 912(f)(1)(L)
Junior to accused	See 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)

TYPE OF DISQUALIFICATION	AS TO THE MILITARY JUDGE	AS TO A MEMBER
Personal bias or prejudice toward a party	* R.C.M. 902(b)(1)	See R.C.M. 912(f)(1)(N)
Personal knowledge of disputed evidentiary fact	* R.C.M. 902(b)(1)	See 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: (a) Is a party; (b) is known by military judge to have an interest that could be substantially affected; or (c) is, to the military judge's knowledge, likely to be a material witness.	* R.C.M. 902(b)(5)	See R.C.M. 912(f)(1)(N)

* 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) *affirmed* 21 M.J. 193 (C.M.A. 1986); *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 (A.F.C.M.R. 1978). *See also United States v. McKee*, 2 M.J. 981 (A.C.M.R. 1976), and *United States v. Rushatz*, 31 M.J. 450 (C.M.A. 1990).

5. ***Investigating officer.*** Generally, one is an investigating officer if detailed as a preliminary inquiry officer, pretrial investigating officer, or if conducting 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 (1952) (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). A court-martial member reviewed a sanity board report on the accused in her capacity as chief of hospital services was not disqualified. *United States v. Dinatale*, 44 M.J. 325 (C.A.A.F. 1996).

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 (1954) 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. In *United States v. Lattimore*, 44 M.J. 793 (A.F.Ct.Crim.App. 1996), a member in a drug case was allowed to remain on the panel even though he had preferred drug charges in the past as a convening authority. The court said, "If commanders and prior commanders who have preferred drug charges were disqualified from serving on courts-martial, the pool of court

members would shrink considerably, and the military justice system would be deprived of a valuable bank of experience."

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. Lackey*, 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 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 (1965).

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. 5 (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, 47 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. 1977) 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, supra*; *United States v. Watson*, 47 C.M.R. 990 (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. 1052 (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). *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). Also in a split opinion, the Court of Military Appeals found that the military judge did not abuse his discretion when he denied a defense challenge for cause to a member who had read about a pretrial agreement in the subject case in a daily newspaper. *United States v. Jobson*, 31 M.J. 117 (C.M.A. 1990). *See also United States v. Ovando-Moran*, 44 M.J. 753 (N.M. Ct. Crim. App. 1996).

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. *See United States v. Napolean*, 44 M.J. 537 (A.F. Ct. Crim. App. 1996).

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 test to determine whether or not the member should be excused should not focus on whether or not the member has an unfavorable inclination toward a particular punishment option. Rather, the test is whether the member's personal bias is such that it will not yield to the evidence prescribed and the judge's instructions. *United States v. Blevins*, 27 M.J. 678 (A.C.M.R. 1988) and *United States v. Reynolds*, 23 M.J. 292 (C.M.A. 1987). *See also United States v. Dale*, 42 M.J. 384 (C.A.A.F. 1995)(Mere distaste for a given offense or an opinion about a particular punishment does not, by itself, disqualify a member from service on a court-martial. There must be an inelastic attitude toward sentencing.);and *United States v. Mosqueda*, 43 M.J. 491 (C.A.A.F. 1996)(A military judge must grant challenges for cause liberally, but a MJ's determination not to grant a challenge will not be overturned except for a clear abuse of discretion. The senior member created substantial doubts about the fairness and impartiality of the court-martial by disobeying the MJ's instructions and making improper contacts with a third-party regarding the specifics of the court-martial. The MJ abused his discretion by failing to liberally grant the challenge for cause.)

The disqualification may work in favor of the government as well. *See United States v. Sumter*, 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.

16. ***Potential member is a past victim of a similarly charged offense.*** In *United States v. Smart*, 21 M.J. 15 (C.M.A. 1985), the accused pled guilty to committing two robberies and then elected to be sentenced by a court-martial composed of officer and enlisted members. Two of the members stated they had been victims of robbery. They also stated that they could be impartial. Based on these general assertions of impartiality, the military judge denied the defense's challenges for cause. The court held that a member's perfunctory disclaimer of personal interest or impartiality will not be held conclusive. The court further stated that, in the interest and appearance of fairness, the challenges should have been granted. The court, in *Smart*, also unequivocally stated that victims of robbery are not automatically excluded from sitting as members in robbery trials.

The decision in *Smart* was recently fine-tuned by the Court of Military Appeals in *United States v. Reichardt*, 28 M.J. 113 (C.M.A. 1989). The court, in *Reichardt*, reasserted the position that simply because a member had been the victim of a type of crime similar to what an accused was charged with did not per se disqualify that member from sitting on the accused's court-martial. Rather, the critical question that must be answered by the military judge concerns whether a member possessed an inflexible or biased attitude as a result of being a victim of a similar crime. The point is that a military judge must conduct a proper voir dire of a potential member who is a victim of a similar crime to erase any doubts of partiality rather than solely relying upon a perfunctory claim of impartiality made by the member. *Id.* at 116. *See United States v. Fulton*, 44 M.J. 100 (C.A.A.F. 1996), and *United States v. Travels*, 44 M.J. 654 (A.F. Ct. Crim. App. 1996). *See also United States v. Brown*, 34 M.J. 105 (C.M.A. 1992), and *United States v. Hopkins*, __ M.J. __, No. ACM 31034 (A.F.Ct.Crim.App. Oct. 12, 1995) [1995 CCA Lexis 271].

17. ***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. In *United States v. Modesto*, 43 M.J. 315 (C.A.A.F. 1995), the SJA told the ATC to withhold information from the defense counsel regarding a panel member. The accused, an Army Dental Corps Colonel was convicted of 8 specifications of Article 133 (dressing as a woman in order to expose himself to unsuspecting male victims; performing as a female impersonator at a gay club; homosexual sodomy and mutual male masturbation et al). A Brigadier General (male) member had dressed up as a woman at a Halloween party three years prior. The ATC was present and had pictures of the good General in all his glorious femininity (no evidence as to how the ATC dressed for the party). DC claimed newly discovered evidence after trial, and alleged that SJA advised ATC not to share these pictures with the defense. This information did not violate R.C.M. 912(c) because the one time cross-dressing of the BG would not have constituted grounds for challenge for cause or preclude effective voir dire of the member. **Warning:** If you get carried away on Halloween, make sure there are no pictures... you just never know how it may come back to haunt you. *See also United States v. Smith*, 43 M.J. 390 (C.A.A.F. 1996)(Trial counsel's conversation with a court-member 20 minutes before trial concerning a previous court-martial created a presumption of prejudice and should therefore have been the basis to sustain the defense's challenge for cause against the member.) *and United States v. Taylor*, 44 M.J. 475 (C.A.A.F. 1996)(president of court-martial subsequently found guilty of numerous heinous crimes contemporaneously with accused's alleged misconduct and was under investigation for those crimes at the time of accused's trial.)

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, 1995.*** The *Manual for Courts-Martial, 1995*, 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, 1995*, 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. This is commonly referred to as the "but for" rule.

In *United States v. Eby*, 44 M.J. 425 (C.A.A.F. 1996), the court ruled that failure to recite the "but for" rule did constitute a waiver of the issue on appeal. In *Eby*, the defense peremptorily challenged a member after a challenge for cause on that same member was denied. The defense, however, in issuing the peremptory challenge, failed to recite that another member would have been peremptorily challenged "but for" the judge's denial of the causal challenge. The defense must state that they intended to exercise a right before they can complain of being deprived of one.

1704 CHALLENGES TO THE SELECTION PROCESS

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 article 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*, 32 M.J. 439 (C.M.A. 1991).

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 Art. 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 Art. 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 military judge may also require counsel to submit written voir dire questions to him for approval. *United States v. Torres*, 25 M.J. 555 (A.C.M.R. 1987) *review denied* 27 M.J. 466 (C.M.A. 1988).

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). *See United States v. DeNoyer*, 44 M.J. 619 (A. Ct. Crim. App. 1996), *United States v. Thomas*, 44 M.J. 667 (N.M. Ct. Crim. App. 1996), and *United States v. Jefferson*, 44 M.J. 312 (C.A.A.F. 1996). For a discussion of certain questions that can be disallowed by the military judge, see *United States v. Smith*, 27 M.J. 25 (C.M.A. 1988). *See also United States v. Adams*, 36 M.J. 1201 (N.M.C.M.R. 1993).

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. 100 (1973), *United States v. Williams*, 44 M.J. 485 (C.A.A.F. 1996).

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

PROCEDURE STUDY GUIDE

CHAPTER XVIII

THE DELIBERATIONS PROCESS AND PUNISHMENTS

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 "Court-Martial Punishments," describes the process employed to determine the maximum sentence that can be imposed at court-martial and examines the nature of court-martial punishments.

PART A: THE DELIBERATIONS PROCESS

1802 FINDINGS

A. ***Deliberations.*** R.C.M. 921, MCM, 1995, 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. R.C.M. 921(b).

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, 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). 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).

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***

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)(6)(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)(6)(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. 1004(a)(2). In all other cases, two-thirds of the members present must concur in any finding of guilty. R.C.M. 921(c)(2)(B). 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. *See* R.C.M. 921(c)(4).

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, 1995) 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. 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(d), any error in the formal announcement of the findings may be corrected before the final adjournment of the court. 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, 1995. *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 only 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 could then 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, 1995) 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, 1995* (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 45 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 servicemember 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, 1995. These punishments are summarized in the maximum punishment chart found at appendix 12, MCM, 1995. (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, 1995, 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 1806, *infra*.

2. While Part IV, MCM, 1995, 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, hard labor without confinement, fines, loss of lineal numbers, reprimand, and restriction. These punishments are discussed in section 1805, *infra*.

3. Article 58a, UCMJ, and JAGMAN, § 0152(c), 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 1805, *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 multiplicious 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. For a complete discussion of multiplicity as it is applied in the military, see Chapter 2 of the Criminal Law Study Guide.

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, 1995, to ascertain the maximum authorized punishment for each offense;

2. determine whether any of the offenses are multiplicious 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 child under the age of 12 or 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 a 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)(9)(A)];

b. dishonorable discharge [R.C.M. 1003(b)(9)(B)]; and

c. bad-conduct discharge [R.C.M. 1003(b)(9)(C)].

2. Punitive discharges are not to be confused with the three types of administrative discharges: honorable, under honorable conditions (general), and 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 Department of Veteran Affairs) 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)(9)(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). In *United States v. Stockman*, 43 M.J. 856 (N.M. Ct. Crim. App. 1996) a Marine Reserve Warrant-1 was awarded a dismissal and the court converted it to a dishonorable discharge because the accused was not a commissioned officer.

(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, supra. 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, 1995.

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)(9)(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)(9)(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)(9)(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, 1995. 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)(9)(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)(9)(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 Department of Veteran Affairs 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(6)(9)(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 three types of punishment under this category:

a. confinement;

b. restriction to limits; and

c. 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. 19, UCMJ.

(c) SCM - may not adjudge more than one month of confinement. Art. 19, UCMJ.

(2) Part IV, MCM, 1995, may further limit the confinement power of any particular court as to a particular offense.

d. ***Effect of Article 58(b), U.C.M.J.***

(1) Article 58(b) reads, in part, as follows: "(a)(1) A court-martial sentence described in paragraph (2) shall result in the forfeiture or pay and allowances due that member during any period of confinement... the pay and allowances forfeited, in the case of a GCM, shall be all pay and allowances... and, in the case of a SPCM, shall be two-thirds of all pay... "; paragraph (2) reads: "(2) A sentence covered by this section is any sentence that includes (A) confinement for more than six months or death; or (B) confinement for six months or less and a [punitive discharge or dismissal]." *Note:* Paragraph (2) above means Article 58(b) has no effect on sentences adjudged in SCM and non-BCD SPCM.

(2) An accused who receives a sentence described in paragraph (2) above will *automatically* forfeit pay and allowances when serving confinement adjudged at a GCM and two-thirds pay when confined at a SPCM regardless of whether forfeitures were adjudged.

(3) Article 58(b) refers to Article 57(a) for the date the automatic forfeitures take effect (14 days after sentence is announced - "day 15", counting the date the sentence is announced as day 1). CAs are usually unable to act earlier than 14 days in the case of a SPCM or GCM because of the delays necessary for preparation and authentication of records of trial.

(4) *Deferment.* On application by the accused the CA may defer the effective date of the automatic forfeitures until the date the sentence is approved

by the CA (the CA takes action). The CA may rescind the deferment at any time. The CA *may not defer* either *without a request* from the accused.

(5) *Suspension / Disapproval.* The CA has *no authority* to suspend or disapprove automatic forfeitures (unlike Article 58(a), the automatic reduction provision). The CA is limited to deferring and/or waiving (as discussed below) pursuant to the terms of Article 58(b).

(6) *Waiver.* In the case of an accused with dependents, the convening authority, at his discretion and without a request from the accused, may waive any portion or all of the automatic forfeitures *for up to 6 months.* If waived, however, the money "shall be paid" to the dependents, not to the accused. The intent of the waiver provision is to lessen the impact of automatic forfeitures on families. We recommend that verifiable documentation of dependent status (Page 2 / Dependency Certification, marriage certificate, birth certificate, etc. - a definition of "dependent" can be found at 37 U.S.C.) be secured from either the member or the dependent before executing a waiver. *Note:* There is no requirement that any dependent be a victim of the accused's offenses in order to be eligible for the waiver provision. Waiver is only available if there is a qualifying dependent to receive the waived forfeitures. Therefore, in situations involving married service members make sure the dependents are listed on the accused's Page 2 or they will not be eligible for any waived forfeitures.

e. ***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. ***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. 1102.3, *U.S. Navy Regulations, 1990.*

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, § 0152a(2).

d. ***Effect of Article 57, U.C.M.J.***

(1) Subsection (a)(1) of Article 57 reads: "Any forfeiture of pay or allowances or reduction in grade that is included in a sentence of a court-martial takes

effect on the earlier of (A) the date that is 14 days after the date on which the sentence is adjudged, or (B) the date on which the sentence is approved by the convening authority."

(2) 14 days after sentence is announced ("day 15", counting the date the sentence is announced as day 1), the adjudged reduction and forfeitures go into effect. CAs are usually unable to act earlier than 14 days in the case of a SPCM or GCM because of the delays necessary for preparation and authentication of records of trial.

(3) *Deferment.* Pursuant to Article 57(a)(2), on application by the accused the CA may defer the effective date of adjudged forfeitures and adjudged reduction (either or both) until the date the sentence is approved by the CA. The CA may rescind the deferment at any time. The CA *may not defer* either *without a request* from the accused.

(4) *Suspension / Disapproval.* The CA may still suspend or disapprove adjudged forfeitures, but since the CA can only suspend or disapprove when he takes his action, the portion of adjudged forfeitures which is to be suspended or disapproved must be deferred until the CA acts. If suspended or disapproved pursuant to a PTA, the intended suspension/disapproval must be considered and the appropriate deferments included in the PTA.

e. ***Effect of Article 58(b), U.C.M.J.*** *See page 18-15 supra.*

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). Before the OEGCMJ can execute confinement, the accused must be given notice and an opportunity to be heard with the benefit of counsel. *United States v. Roscoe*, 31 M.J. 544 (N.M.C.M.R. 1990); *see also* R.C.M. 1113(d)(3). If the accused demonstrates he has made good faith efforts to pay, but cannot because of indigence, he cannot be confined unless the government's interest in appropriate punishment outweighs alternative measures to confinement. The alternatives are presumed to be adequate. *Roscoe, supra*.

(a) ***Caveat:*** The total period of confinement (i.e., the punitive confinement and the coercive confinement) cannot exceed the jurisdictional maximum of the court. R.C.M. 1003(b)(3).

(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." (Emphasis added.) *See also Tate v. Short*, 401 U.S. 395 (1971), *and United States v. Smith*, 44 M.J. 720 (A. Ct. Crim. App. 1996).

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* Art. 48, UCMJ; R.C.M. 809; *United States v. Finlay*, 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 year's 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.) *See also United States v. Smith*, 44 M.J. 720 (A. Ct. Crim. App. 1996).

(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) SPCM's and SCM's 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 0152(c) of the *JAG Manual*. JAGMAN, § 0152(c), 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.

e. ***Effect of Article 57, U.C.M.J.*** *See page 18-19 supra.*

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 the officer's precedence for all purposes, except that the officer retains his/her 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, 1995.

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, § 0105b; 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, 1995; 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, 1995. 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, § 0152(b).

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 1804, *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, 1995) 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, 1995***

1. The punishment set forth for any offense listed in Part IV, MCM, 1995, 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, 1995***

1. ***What is a "lesser included offense (LIO)"?*** A general discussion of LIO's is set forth in Part IV, para. 2b, MCM, 1995. 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, 1995, 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, 1995, 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, 1995, 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—(1) commits an offense punishable by this chapter, or aids, abets, counsels, commands, or procures its commission; or (2) 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, 1995.

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 assists the offender in order to hinder or prevent his apprehension, trial, or punishment shall be punished as a court-martial may 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, 1995.

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, 1995.

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." 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, 1995.

5. ***Solicitation.*** "Any person subject to this chapter who solicits or advises another or 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 another or 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, 1995, 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, 1995, 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. 355 (C.M.A. 1984); *United States v. Pettersen*, 17 M.J. 69 (C.M.A. 1983).

F. ***Equivalent punishments.*** Part IV, MCM, 1995, 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 and restriction).

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 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: 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.

G. ***Circumstances permitting increased punishments.*** There are three situations in which the maximum punishments of Part IV, MCM, 1995, 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, 1995, 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. 1003(d)(1). For example:

Trial (1 Jun cy)	1 Feb cy	1 Sep cy-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	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, 1995, 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, 1995, 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).

5. For a good discussion of the escalator clause and its effect, see *United States v. Clemons* (N.M.C.M.R. 93-02279, 18 Feb 94).

CHAPTER XIX

REVIEW OF COURTS-MARTIAL

PROCEDURE STUDY GUIDE

CHAPTER XIX

REVIEW OF COURTS-MARTIAL

1901 INTRODUCTION

The review of courts-martial can be divided into two distinct areas: post-trial processing and appellate review. Post-trial processing includes such functions as: recording the results of trial; promulgation, authentication and distribution of the record of trial; clemency submissions by the accused; recommendations by the staff judge advocate and/or legal officer; and, the convening authority's action. Appellate review includes such functions as: judge advocate review; review in the Office of the Judge Advocate General; review by the Courts of Criminal Appeal; review by the United States Court of Appeals for the Armed Forces; and, review by the United States Supreme Court. This chapter will cover both areas and highlight the rules and case law impacting on the subject matter in each area. The nature and extent of the review of a case depends on such factors as the type of court-martial [i.e., summary (SCM), special (SPCM), or general court-martial (GCM)], the findings, the sentence, and the accused's inclination to petition for discretionary appellate review. This chapter does not concern government appeal (Chapter XVI, *supra*) or petitions for extraordinary relief (Chapter XXI, *infra*).

1902 REPORT OF RESULTS OF TRIAL

A. General. Immediately following the final adjournment of a court-martial, the trial counsel (TC) must notify the accused's immediate commander, the convening authority (CA) or the convening authority's designee and, if appropriate, the officer in charge of the confinement facility of the results of trial. R.C.M. 1101(a), Manual for Courts-Martial (MCM), United States (1995 Edition), JAGMAN, § 0149. Appendix A-1-j(1) of the JAGMAN contains the prescribed form for the results of trial.

B. Necessity. The report of the results of trial is important for several reasons: first, it is the only evidence that the trial actually took place and what the outcome of the trial was until the record of trial is produced; second, the convening authority is required to consider the results of trial before taking his action; and third, it is the only official document that can be used to execute forfeitures and/or reduction in rate in accordance with the provisions of the Military Justice Amendments of 1995 to the Uniform Code of Military Justice (UCMJ).

1903 RECORD OF TRIAL

A. Types of records of trial. When proceedings at the trial-court level are completed, a record of trial **must** be prepared. If the accused has been acquitted, found not guilty only by reason of lack of mental responsibility, or if the charges were withdrawn or dismissed prior to findings, the record of trial consists only of the original charge sheet, a copy of the convening order, and sufficient information to establish jurisdiction over the person and the offense(s)—if not shown on the charge sheet. R.C.M. 1103(e), (MCM), 1995 Edition [hereinafter R.C.M. ____]. When the trial has resulted in conviction, the contents of the record of trial are dictated by the type of court-martial and the adjudged sentence. R.C.M. 1103; JAGMAN, § 0150. The record of trial by a Special Court-Martial (SPCM) which did not adjudge a bad-conduct discharge (BCD) need contain only a summarized report of the proceedings and testimony. *See* MCM, 1995 Edition, app. 13. The record of trial for all other courts-martial must be verbatim if, in the case of a General Court-Martial (GCM), the sentence exceeds that which could be adjudged at an SPCM or, in the case of either a GCM or SPCM, the sentence includes a bad-conduct discharge. *See* MCM, 1995 Edition, 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).

B. Verbatim. The contents of a "verbatim" record of trial are listed in the discussion following R.C.M. 1103(b)(2)(B), in R.C.M. 1103(D) and in R.C.M. 1103(b)(3). Like most terms of art, the term "verbatim" has been the subject of considerable judicial interpretation. In *United States v. Boxdale*, 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. Gray*, 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.

C. Authentication. Article 54(a), UCMJ, dictates that the record be authenticated by the signature of the military judge except when that signature cannot be obtained by reason of the judge's death, disability, or absence; and only in these exceptional cases will it be authenticated by the 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, § 0150. Except when extraordinary delay would result, defense counsel shall be permitted to examine the record before authentication. R.C.M. 1104(i)(1)(B).

The Court of Military Appeals has narrowly interpreted the term "absence." 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 431, 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.

1904 SERVICE OF THE RECORD ON THE ACCUSED

A. R.C.M. 1104(b). R.C.M. 1104(b) requires that a copy of the record of trial be served on the accused as soon as the record has been authenticated. This is to provide him with the opportunity to submit any written "matters" which may reasonably tend to affect the convening authority's decision whether to approve the trial results. The content of such "matters" is not subject to the Military Rules of Evidence.

B. R.C.M. 1107. R.C.M. 1107 requires the convening authority to consider any "matters" submitted by the accused under R.C.M. 1105 prior to acting on the findings and sentence. Appellate courts "will not guess" as to whether or not the convening authority considered these "matters." Absent some tangible proof that these "matters" were, in fact, presented to the convening authority, remand will be ordered to obtain a new convening authority's action. *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. Time periods. The option of the accused to submit matters to the convening authority must be exercised within specifically defined time periods:

1. For a GCM and an SPCM, the accused must submit matters within 10 days after the authenticated record of trial or, if applicable, the recommendation of the staff judge advocate or legal officer has been served upon him, whichever is later. The 10-day time period may be extended for good cause by the convening authority or the staff judge advocate for not more than 20 additional days. A request for an extension of time may only be denied by the convening authority.

2. The accused at an SCM must submit matters within 7 days after sentence is announced, but this period, for good cause, may be extended for up to 20 additional days.

1905 CLEMENCY MATTERS

A. Matters submitted by accused. R.C.M. 1105 states that "the accused may submit to the convening authority any written matters which may reasonably tend to affect the convening authority's decision whether to disapprove any findings of guilty or to approve the sentence." To emphasize the importance of this right, Judge Crawford stated in *United States v. Bono*, 26 M.J. 240 (CMA 1988) that "one of the last best chances an appellant has is to argue for clemency by the convening authority." In most cases, the defense counsel will be active in drafting the clemency petition and seeking favorable

endorsements. Art. 38(c), UCMJ. In *United States v. Titsworth*, 13 M.J. 147 (CMA 1982), the court stated that "the duties of a defense counsel do not end with the conclusion of the trial. He is responsible for preparing the *Goode* response; and when in his professional judgment a petition for clemency may lead to a more favorable sentence for the accused, he has the obligation to prepare such a petition."

B. Examples. The following is a list of potential items which can and/or should be raised in the clemency petition along with a recommendation by the sentencing authority if one has been offered. This is, of course, a non-exclusive list. What actually goes into a clemency petition is going to be case specific.

1. Allegations of legal error. Neither the SJA not the convening authority are required to check the record of trial for legal error. However, if such allegations are raised by the trial defense counsel, the SJA is required to comment on those allegations. This may be a good opportunity to get relief for the accused at the early stages of review. Such allegations, if not raised by the trial defense counsel, are not waived on appeal.

2. Recommendations by the sentencing authority. It is not uncommon for the defense to approach the military judge, members, or other persons to inquire of their willingness to recommend clemency in a particular case. Such a recommendation should be specific as to the amount and character of the clemency recommended and should state the reasons for the recommendation. The Staff Judge Advocate Recommendation to the convening authority must include any recommendations made by the sentencing authority whether the recommendation comes from the military judge or the members. R.C.M. 1106(d)(3)B).

3. Portions of the ROT/documents submitted at trial. The convening authority is not required to look at the record of trial before taking his or her action and, in most cases, probably will not. However, the SJA must state in his recommendation to the CA that the CA must consider any matters submitted by the accused and the convening authority must state that he has considered any matters submitted by the accused. *U.S. v. Komorous*, 33 M.J. 907 (AFCMR 1991). A trial defense counsel should not rely on the SJA recommendation as a means of getting favorable information either from the accused's service record or about the accused to the convening authority – raise it in your clemency petition. R.C.M. 1105(b)(2).

4. Matters in mitigation raised at trial. For the same reasons as stated above, the trial defense counsel should include these matters in the clemency petition because this is the only way that he or she can be certain the convening authority will see them. R.C.M. 1105(b).

5. Matters in mitigation not available at trial. Such things as: exemplary conduct in confinement; attending Alcoholics Anonymous meetings, stress management classes or drug awareness classes; voluntary restitution to victims; willingness

to testify in a related court-martial; and, similar positive behavior can strengthen an accused's chances for clemency. R.C.M. 1105(b)(3).

– Although the convening authority is only required to consider written clemency matters, that does not mean that you cannot submit matters in other forms. Such things as day-in-the-life type videotapes, which place the accused in a favorable light, or photographs of family members may have an effect on a convening authority. The types of matters that can be submitted are only limited by your imagination and the accused's particular situation. Also, there is no rule that says you can't go to the convening authority in person and plead your client's case.

C. Caveat. A few words of caution in the area of post-trial representation of an accused can be gleaned from two Court of Military Appeals cases, *MacCulloch, supra* and *United States v. Lewis*, 42 M.J. 1 (1995). In *MacCulloch*, the trial defense counsel submitted a clemency package he had received from the mother of the accused to the convening authority without screening the contents of the package. Included in the package was a letter from the civilian defense counsel that contained information that severely jeopardized the accused's chances for clemency. The court held that the defense counsel did not exercise reasonable diligence which resulted in substantial prejudice to the accused. In *Lewis*, the trial defense counsel refused to submit a letter from the accused because he felt it was "inappropriate". The court found that even if defense counsel's judgment was correct, he did not have the authority unilaterally to refuse to submit matters which the client desired to have submitted. Counsel's duty is to advise, but the final decision as to what, if anything, to submit rests with the accused.

D. Appellate brief of trial defense counsel. In addition to matters of clemency, Art. 38(c), UCMJ, provides that defense counsel may prepare and have forwarded with the record of trial a brief setting forth an assignment of errors committed at the trial, as well as other matters that should be considered by reviewing authorities. The Art. 38 brief is an often overlooked tool at the trial defense counsel's disposal and can be a very effective device for securing post-trial relief for an accused.

E. Post-trial advice.

1. *Trial Defense Counsel.* A convicted accused is entitled to representation by counsel until completion of the appellate review of his case. JAG Instruction 5810.2 [hereinafter JAGINST 5810.2] 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)(iv). The form listed as Enclosure (1) to JAGINST 5810.2 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.

2. *Appellate Defense Counsel.* The accused is entitled to be represented before NMCCA, CAAF or the Supreme Court by civilian counsel provided by him or by military counsel detailed by the military. Art. 70, UCMJ; R.C.M. 1202. If the accused desires representation by detailed counsel before NMCCA, he will so indicate in the Appellate Rights Statement. If the accused petitions CAAF for a grant of review, the petition will reflect his desires regarding counsel. *See also United States v. Dupas*, 14 M.J. 28 (CMA 1982), which states that a "trial defense counsel must provide reasonable assistance to the appellate defense counsel, if requested." A trial defense counsel "may be obligated to obtain information or affidavits needed by the client in connection with the appellate review."

3. *Relief from Post-trial Representation.* In an effort to ensure uninterrupted post-trial representation, the Court of Military Appeals, in *United States v. Palenius*, 2 M.J. 86 (CMA 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* JAGINST 5810.2. 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 where a punitive discharge has been approved.

1906 STAFF JUDGE ADVOCATE OR LEGAL OFFICER RECOMMENDATION

A. In general. In addition to the input from the accused, the convening authority must receive a written recommendation from his staff judge advocate (SJA) or legal officer (LO) prior to taking action on a GCM or a SPCM case involving a bad-conduct discharge. R.C.M. 1106; JAGMAN, § 0151(c).

B. Commissioned officer. The staff judge advocate or legal officer must be a commissioned officer. *See United States v. Cunningham*, 44 M.J. 758 (N.M.Ct.Crim.App., 1996) in which the court ruled that in light of the unique importance of the post-trial action and the broad power Congress has vested in the convening authority, and the related importance of the recommendation, submission of a post-trial recommendation by an enlisted person is error that presumptively affects the substantial rights of the accused without a showing of prejudice. If, under other circumstamces, 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 (NMCMR 1989).

C. Disqualification. Care must be taken to ensure that the SJA or LO is not disqualified from submitting the recommendation. Disqualification will result when the SJA/LO acted as a member, military judge, trial counsel, assistant trial counsel, or, more commonly, the investigating officer in the same case. R.C.M. 1106(b). The discussion to R.C.M. 1106(b) states that an SJA or legal officer may also be ineligible when they have

served as the defense counsel in a companion case; testified as to a contested matter; has other than an official interest in the same case; or, must review that officer's own pretrial action (such as the pretrial advice under Article 34) when the sufficiency or correctness of the earlier action has been placed in issue. If the SJA or LO is disqualified, or if the convening authority in his discretion would prefer an SJA recommendation instead of one from his legal officer, the convening authority may request that another SJA be designated to prepare the recommendation. R.C.M. 1106(c). *See United States v. Edwards*, 45 M.J. 114 (1996); *United States v. Curry*, 28 M.J. 419 (CMA 1989); *United States v. Sparks*, 20 M.J. 985 (NMCMR 1985).

D. Purpose. The purpose of the recommendation is simply to assist the convening authority in deciding what action to take on the case. The recommendation is intended to be a concise written communication summarizing:

1. The findings and sentence adjudged;

2. a recommendation for clemency by the sentencing authority, if any;

3. the accused's service record, including length and character of service, awards and decorations, and any records of nonjudicial punishment and previous convictions;

4. the nature and duration of pretrial restraint, if any;

5. obligations imposed upon the convening authority because of a pretrial agreement; and,

6. a specific recommendation as to the action to be taken by the convening authority on the sentence.

E. Legal error. Identifying legal error is not one of the required goals of this recommendation. Nevertheless, an SJA must respond to an allegation of legal error by the accused or 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-k(1).

In cases of acquittal of all charges and specifications, and cases where the proceedings were terminated prior to findings with no further action contemplated, the SJA or LO recommendation is not required.

F. Service on the accused. Prior to forwarding the recommendation to the convening authority, the SJA or LO must serve a copy on the accused's defense counsel. R.C.M. 1106(f); *United States v. Goode*, 1 M.J. 3 (C.M.A. 1975). A separate copy of the recommendation must also be served on the accused. If such service on the accused is impractical or the accused so requests in writing or on the record, the accused's copy shall be forwarded to the accused's counsel. An explanatory statement shall be attached to the record.

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). *United States v. Demerse*, 37 M.J. 488 (C.M.A. 1993). R.C.M. 1106(f)(7) provides that the SJA / LO may supplement his recommendation based upon defense counsel's response. However, 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. Heirs*, 29 M.J. 68 (C.M.A. 1989); *United States v. Morgan*, 37 M.J. 407 (C.M.A. 1993).

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.

G. Corrective action. R.C.M. 1106(d)(6) states that, in the case of any error in the recommendation not otherwise waived, appropriate corrective action shall be taken by appellate authorities without returning the case for further action by a convening authority.

SJA'S / LEGAL OFFICER'S RECOMMENDATION CHECKLIST
R.C.M. 1106; JAGMAN, § 0151c

SJA's / LO's RECOMMENDATION ICO _____

____ Offenses, pleas, findings, and adjudged sentence set out.

____ Clemency recommendations by any member, military judge, or any other person, if any.

____ Summary of accused's service record.
- ____ Length of service.
- ____ Character of service (average pros and cons, average evaluation traits).
- ____ Decorations / awards.
- ____ Records of prior nonjudicial punishments.
- ____ Previous convictions.
- ____ Other matters of significance.

____ Nature and duration of pretrial restraint, if any.
- ____ Judicially ordered credit to be applied to confinement if any.

____ Current confinement status.

____ Existence of pretrial agreement noted, if any.
- ____ Terms and obligations CA is obligated to take or reasons why CA is not obligated to take specific action under the agreement.

____ All R.C.M. 1105 matters and other clemency submitted prior to recommendations with all matters submitted attached as enclosures.

____ All claims of legal error addressed and statement whether corrective action on the findings or sentence is appropriate when an allegation of error is raised under R.C.M. 1105 or when deemed appropriate by the SJA. [***Note***: For SJA's only, legal officers do not address legal error.]
- ____ All R.C.M. 1105 or other clemency matters noted and statement that they were taken into consideration.

____ Specific recommendation concerning action to be taken by CA on adjudged sentence after considering any clemency matters, any claims of legal error, and any pretrial agreement.

____ Optional matters, if any.
- ____ Accused notified and given opportunity to rebut adverse matters which are not part of the record and with knowledge of which the accused is not chargeable.

____ Recommendation signed by SJA or commissioned officer acting as legal officer.

____ Served on accused and counsel.
- ____ Statement stating why accused not personally served.
- ____ Date to accused: _____; counsel: _____.

____ If R.C.M. 1105 or R.C.M. 1106 matters or other matters are raised after original recommendation, addendum to recommendation noting these issues completed. [***Note***: Only SJA may respond to legal errors.]
- ____ If addendum raises new matter, has accused and counsel been served and given opportunity to respond prior to CA taking action.

1907 CONVENING AUTHORITY'S ACTION

A. Responsibility. The first official action to be taken with respect to the results of a trial is the convening authority's action (CA's action). All materials submitted by the accused, SJA/LO, and defense counsel are preparatory to this official review. Art. 60, UCMJ, and JAGMAN, § 0151, 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, § 0151 acknowledge the fact that circumstances may exist making it impracticable for the convening authority to act. Situations of impracticability might arise:

1. When the command has been decommissioned or inactivated before the convening authority could act;

2. when the command has been alerted for immediate overseas movement;

3. when the convening authority is disqualified because he has other than an official interest in the case; or

4. because a member of the court-martial which tried the accused has become the convening authority.

B. Forwarding. If any of these situations exist, the convening authority must forward the case to an officer exercising general court-martial jurisdiction with a statement of the reasons why the convening authority did not act. A Navy command should send the case to the area coordinator or his designee, unless a GCM convening authority in the convening authority's chain of command has directed otherwise. A Marine command should send the case to an officer exercising general court-martial jurisdiction over the command.

C. Scope and Content. The CA's action is a legal document attached to the record of trial setting forth, in prescribed language, the convening authority's decisions and orders with respect to the sentence, the confinement of the accused, and further disposition. The convening authority is required to take action taken with respect to the sentence and this is a matter falling within the convening authority's sole discretion. He may, for any reason or no reason, disapprove a legal sentence in whole or in part, mitigate it, suspend it, or change (commute) a punishment to one of a different nature as long as the severity of sentence is not increased. *See U.S. v. Lee*, 43 M.J. 794 (N.M.Ct.Crim.App. 1995). His decision is a matter of command prerogative and is to be made in the interests of justice, discipline, mission requirements, clemency, and other appropriate reasons. The convening authority is not required to take action upon the findings however, the convening authority may, as a matter within his discretion, disapprove such findings or approve a

finding of guilty to a lesser included offense. The CA may not change a finding of not guilty to a finding of guilty.

D. Considerations. In taking his action, the convening authority is required to consider the results of trial, the SJA/LO recommendation when required, and any matter submitted by the accused as previously discussed. Additionally, the convening authority may consider the record of trial, personnel records of the accused, and such other matters as he/she deems appropriate. Any adverse matters considered from outside the record of trial, of which the accused is not reasonably aware, must be disclosed to the accused to provide an opportunity for his rebuttal. R.C.M. 1107(b)(3)(B)(iii).

E. SJA/LO responsibility. The SJA or LO, who usually drafts the CA's action pursuant to the convening authority's wishes, must take care to insure that it expresses the convening authority's intent and complies with applicable R.C.M.s and *JAG Manual* provisions. See JAGMAN § 0152 (Change 1). Incompleteness or ambiguity may result in return of the record for completion or clarification by a higher reviewing authority, or simply construction of the ambiguous action in favor of the accused. *See Appendix 16, MCM, 1995 Edition* for sample forms of actions.

F. Action. In taking action on the sentence, the convening authority must observe certain rules. R.C.M. 1107(d)(1) and Discussion.

1. When mitigating forfeitures, the duration and amount of forfeitures may be changed as long as the total amount forfeited is not increased and neither the amount nor duration of the forfeitures exceeds the jurisdiction of the court-martial.

2. When mitigating confinement or hard labor without confinement, the convening authority should use the equivalencies at R.C.M 1003(b)(6) & (7) as appropriate.

3. The sentence may not be increased in severity or duration.

4. No part of the sentence may be changed to a punishment of a more severe type.

5. The sentence as approved must be one which the court-martial could have adjudged.

6. The convening authority has no authority to approve a punitive discharge when one is not adjudged by a court-martial. A convening authority cannot "commute" any sentence to a bad-conduct discharge, even with the accused's consent. A bad-conduct discharge is a more severe punishment and can only be approved when included in the sentence of the court-martial. *U.S. v. Johnson*, 12 C.M.A. 640, 31 C.M.R. 226 (1962), *U.S. v. Barratt*, 42 M.J. 734 (Army Ct.Crim.App. 1995).

7. A CA may commute a punitive discharge to confinement and/or forfeitures and there is no set amount of confinement or forfeitures that is equivalent to a punitive discharge. *See U.S. v. Carter*, 42 M.J. 745 (A.F.Ct.Crim.App. 1995) in which the court approved a convening authority's commutation of a bad-conduct discharge to 24 additional months of confinement and 35 months of additional forfeitures.

8. A sentence of death can be commuted to a DD, confinement 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).

9. 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 (NBR 1955). *United States v. Williams*, 6 M.J. 803 (NCMR 1979).

G. Administrative discharge. A punitive discharge cannot be commuted to an administrative discharge, as the latter could not have been adjudged by the court-martial. R.C.M. 1003(b)(9).

H. Suspension. R.C.M. 1108 states: "Suspension of a sentence grants the accused a probationary period during which the suspended part of an approved sentence is not executed, and upon the accused's successful completion of which the suspended part of the sentence shall be remitted." The accused receives an opportunity to show by his good conduct during the probationary period that he is entitled to have the suspended portion of his sentence remitted. In this context, "suspend" means to withhold conditionally the execution, and "remit" means to cancel the unexecuted sentence.

1. The conditions of the suspension must be in writing and served on the accused in accordance with R.C.M. 1108. Unless otherwise stated, an action suspending a sentence includes as a condition that the probationer not violate any punitive article of the UCMJ. The suspension period must be for a definite period of time which is not unreasonably long. This period shall be stated in the CA's action.

2. Two provisions must be included in the CA's action in regard to suspension of sentence: for the suspension to be remitted at the end of the suspension period without further action; and, for permitting the suspension to be vacated prior to the end of the suspension period.

I. Vacation. "Vacating" means to do away with the suspension and impose that part of the sentence that was suspended. In order to serve as the basis for vacation of the suspension of a sentence, an act of misconduct must occur within the period of suspension. *See U.S. v. Englert*, 42 M.J. 827. 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.

J. Effect of PTA. When all or part of the sentence has been suspended as a result of a pretrial agreement, case law indicates that the suspension may be vacated for violation of any of the lawful requirements of the probation, including the duty to obey local civilian law (as well as military law), to refrain from associating with known drug users or dealers, and to consent to searches of his person, quarters, and vehicle at any time. *United States v. Lallande*, 22 C.M.A. 170, 46 C.M.R. 170 (1973).

K. Hearings. 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 vacation hearing is similar in form to a formal pretrial investigation (Art. 32, UCMJ) and shall follow the procedure prescribed in R.C.M. 405(g), (h)(1), and (i). The accused has the right to counsel at the hearing, but does not have the right to request individual military counsel. The record of the hearing and the recommendations of the SPCM authority are forwarded to the officer exercising GCM jurisdiction, who may vacate the suspension. Art. 72, UCMJ; R.C.M. 1109. *U.S. v. Englert*, 42 M.J. 827 (N.M.Ct.Crim.App. 1995). Appendix 18, MCM, 1995 Edition, 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 and shall follow the rules prescribed in R.C.M. 405(g), (h)(1), and (i). The probationer must be accorded the same right to counsel at the hearing that he was entitled to at the court-martial which imposed the sentence. Such counsel need not be the same counsel who originally represented the probationer, and the probationer does not have the right to request individual military counsel. If the officer having SPCM jurisdiction over the probationer decides to vacate all or a portion of the suspended sentence, he must record the evidence upon which he relied and the reasons for vacating the suspension in his action. Art. 72, UCMJ; R.C.M. 1109.

L. Execution. An order executing the sentence directs that the sentence be carried out. In the case of confinement, it directs that it be served; in the case of a punitive discharge, that it be delivered. The decision as to execution of the sentence is closely related to other post-trial decisions involving suspension, deferment of confinement, and imposition of post-trial restraint. No sentence may be executed by the convening

authority unless and until it is approved by him. 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.

1. A punitive discharge may only be executed by:

(a) The officer exercising general court-martial jurisdiction who reviews a case when appellate review has been waived under R.C.M. 1112(f); or

(b) the officer then exercising general court-martial jurisdiction over the accused after appellate review is final under R.C.M. 1209. Note: An accused on involuntary appellate leave will be administratively transferred to the Navy-Marine Corps Appellate Leave Activity and the commanding officer of that activity will be the GCM authority for that servicemember. If more than six months has passed since the approval of the sentence by the convening authority, the officer exercising general court-martial jurisdiction over the accused shall consider the advice of his staff judge advocate as to whether retention of the accused would be in the best interest of the service. The advice shall include:

- The findings and sentence as finally approved;

- an indication as to whether the servicemember has been on active duty since the trial and, if so, the nature of that duty; and

- a recommendation whether the discharge should be executed. R.C.M. 1113(c)(1).

2. Dismissal may be ordered executed only by the Secretary of the Navy or by such Under Secretary or Assistant Secretary as the Secretary may designate. R.C.M. 1113(c)(2).

3. Death may be ordered executed only by the President. R.C.M. 1113(c)(3).

4. Though a punitive discharge may have been ordered executed, it shall not in fact be executed until all provisions of SECNAVINST 5815.3, concerning Naval Clemency and Parole Board action, have been complied with. JAGMAN, § 0157.

M. Pertinent cases. There have been several cases where the action of the convening authority on a particular sentence has been called into question. In many of the cases the action has been found to be correct or, if error has occurred, it can be attributable to the convening authority's reliance on the staff judge advocate recommendation which were discussed in a previous chapter. The following cases highlight errors made in the convening authority action where appellate action was required.

1. *U.S. v. Dvonch*, 44 M.J. 531 (A.F.Ct.Crim.App. 1996) - the convening authority (CA) in this case improperly failed to consider two letters submitted by the accused's trial defense counsel that appellate government counsel conceded were not included in the materials forwarded to the convening authority by staff judge advocate before CA took action. The court set aside the action of the convening authority and returned the record to the convening authority for a new action.

2. *U.S. v Thompson*, 43 M.J. 703 (A.F.Ct.Crim.App. 1995) - the SJA recommendation erroneously stated the amount of forfeiture as $400 per month even though the defense counsel correctly stated the amount as $200 per month in his reply to the SJA recommendation. In his action in this case, the convening authority merely stated "the sentence is approved." The question then arose what monthly forfeiture did the CA approve? The court held that the CA approved the amount stated in the SJA recommendation in the absence of compelling evidence to the contrary. The court disapproved the forfeiture in its entirety rather than return the record for a new action.

3. *U.S. v. Smith*, 44 M.J. 788 (N.M.Ct.Crim.App. 1996) - a general court-martial adjudged a dishonorable discharge to the accused in conjunction with the rest of his sentence. The convening authority (CA) stated in his action "... the sentence is approved and, except for the sentence extending to bad conduct discharge, will be executed." Seven months after the CA acted, he stated in a signed affidavit that it was always his intention to approve the adjudged dishonorable discharge and a corrected action was attached to the affidavit. However, the affidavit was prepared long after the record was forwarded to the United States Navy-Marine Corps Court of Criminal Appeals for review. The issue then became was the purported corrective action effective? The court answered in the negative stating that the CA retains the power to correct administrative errors during the 10-day period following service of the action on the accused or his defense counsel. In the instant case, by the time the CA attempted to correct the action he was without power to act absent direction by higher authority. The record was returned for a new action.

CONVENING AUTHORITY'S ACTION CHECKLIST
R.C.M. 1107; JAGMAN, § 0151a and b

CONVENING AUTHORITY'S ACTION ICO _____

____ R.C.M. 706 hearing ordered if accused lacks mental capacity.

____ Action taken not earlier than 10 days after the later of service of the record of trial or staff judge advocate's/legal officer's recommendation.
- ____ Waiver of right to submit matters, in writing, by accused.
- ____ Time period extended.

____ Optional: offenses, pleas, findings, and adjudged sentence properly promulgated.

____ Action states CA considered:
- ____ Result of trial.
- ____ SJA's/LO's recommendation.
- ____ Members' or military judge's clemency recommendation, if any.
- ____ Clemency matters submitted by anyone, if any.
- ____ Legal errors raised, if any.
- ____ Other matters raised under R.C.M. 1105 and R.C.M. 1106, if any. [***Note***: Indicate that no matters were received if that is the case; also indicate a failure of accused or counsel to respond to SJA's/LO's recommendation.]

____ Optional additional matters considered, if any.
- ____ Record of trial.
- ____ Personnel records of accused.
- ____ Other matters deemed appropriate by CA.
  - ____ Notification to accused and opportunity to rebut, if matters adverse to accused from outside record, with knowledge of which the accused is not chargeable are considered.

____ Specific action with regard to findings, if applicable.
- ____ Rehearing on findings ordered.
  - ____ If rehearing or new trial ordered, reasons for disapproval set forth.
- ____ If no rehearing ordered on disapproved charges and specifications, statement of dismissal.
- ____ If "other" trial ordered, reasons for declaring the proceedings invalid stated.

____ Specific action with regard to sentence adjudged.
- ____ Sentence consistent with pretrial agreement, if any.
- ____ CA executed portions of sentence not suspended, except for punitive discharge.
- ____ If sentence mitigated, equivalencies under R.C.M. 1003 complied with.
- ____ Sentence limited if record of trial does not meet requirements of R.C.M. 1103(b)(2)(B) or (c)(1).

____ Rehearing on sentence ordered.

____ Automatic reduction addressed (Article 58a, UCMJ), if accused not reduced to E-1 as part of adjudged sentence.

____ If portion of sentence suspended, accused has been informed of conditions in writing.

____ Place of confinement noted, if approved by CA.

____ Deferment date noted, if granted.
____ Deferment rescinded.

____ Credit for illegal pretrial confinement directed.

____ Any reprimand ordered executed included in action.

____ Companion cases noted, if any.

____ Signed by CA with authority to sign stated below.

____ If substitute CA, action notes CA is acting pursuant to a specific request.

____ If action on rehearing or new trial, limitations of R.C.M. 810(d) complied with.

____ Served on accused and/or counsel.

1908 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.*, Art. 1102, *U.S. Navy Regulations, 1990.*

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.

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, now eliminates the former distinction between post-conviction prisoners whose sentences have not been ordered executed (adjudged prisoners) and those whose sentences to confinement have been ordered executed (sentenced prisoners). The result is that, under the provisions of article 404.30D, personnel sentenced to confinement by a court-martial may be assigned to work (i.e., to perform hard labor) and to participate in other aspects of the corrections program on an unrestricted basis.

1909 DEFERMENT OF THE CONFINEMENT PORTION OF THE SENTENCE

A. Definition. As indicated in the previous section, the confinement portion of a sentence runs from the date the sentence is adjudged. Art. 57(b), UCMJ. Deferment of a sentence to confinement is a postponement of the running and service of the confinement portion of the sentence, 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 interests in confinement." The factors to consider are basically the same as for a decision to impose post-trial restraint. They include:

1. The probability of the accused's flight to avoid service of the sentence;

2. the probability of the accused's commission of other offenses, intimidation of witnesses, or interference with the administration of justice;

3. the nature of the offenses (including the effect on the victim) of which the accused was convicted;

4. the sentence adjudged;

5. the effect of deferment on good order and discipline in the command; and,

6. the accused's character, mental condition, family situation, and service record.

Although the decision to grant or deny the deferment request falls within the convening authority's sole discretion, that decision can be tested on review for abuse of discretion.

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. Browndl*, 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.

1910 PROMULGATING 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 record-keeping and informing all those officially interested in the progress of the case. R.C.M. 1114; JAGMAN, § 0155. Promulgating orders are issued for every SPCM and GCM, including those resulting in acquittal. The results of a summary court-martial need only be promulgated to the accused. R.C.M. 1114(a)(4); JAGMAN, § 0156.

B. 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, § 0155. Where the findings and sentence set forth in the initial promulgating order are affirmed without modification upon subsequent review, no further order need be issued. JAGMAN, § 0155.

C. Form and Content. The form for the initial promulgating order is set out in Appendix 17, MCM, 1995 Edition. 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__.

1. Authority section. The next section of the court-martial order is called the "authority" section. It indicates the place where the trial was held, the command and organization of the convening authority, and the serial number and date of the convening order.

2. Arraignment section. The authority section is followed by the "arraignment and the accused" section of the order. The arraignment section simply contains a statement that the accused was arraigned and tried. The accused section contains the grade, name, social security number, branch of service, and unit of the accused.

3. Charges section. The court-martial order next sets forth the "charge(s) and specification(s)" upon which the accused was arraigned. The specifications should be summarized indicating specific factors such as value, amount, duration, and other circumstances which affect the maximum punishment. The specification may be photographically reproduced from the charge sheet if necessary. Findings should be indicated in parentheses after each charge and specification.

4. Pleas section. The "plea(s)" section follows the "charge(s) and specification(s)" section of the court-martial order.

– If the accused was acquitted of all charges and specifications, the date of the acquittal should be shown: "The findings were announced on _____ 19__."

– If the accused was convicted of one or more specifications, it is necessary to include the sentence in the court-martial order.

5. Action section. The "action" section contains the CA's action verbatim including the heading, date, and signature or evidence of signature. It may be photographically reproduced from the actual CA's action.

6. Authentication section. At the end of the court-martial order is the "authentication" section. This section simply contains the signature of the authority issuing the court-martial order or the signature of a subordinate officer designated by him to sign "by direction." The name, rank, title, and organization of the officer actually signing

the court-martial order must be shown. If signed "by direction," such fact must be shown together with the name, rank, title, and organization of the person issuing the order.

D. Distribution.

1. The original goes in the record of trial.

2. A duplicate original is placed in the accused's service record only if the accused has been convicted.

3. Certified or plain copies go to many places. See JAGMAN, § 0155.

E. Supplemental orders. Action on the case occurring after the initial promulgating order has been published will be published by issuing a supplementary promulgating order. See JAGMAN, § 0155. Appendix 17, MCM, 1995 Edition, provides the necessary forms.

1911 WAIVER/WITHDRAWAL OF APPELLATE REVIEW

A. In general. In accordance with Article 61 and R.C.M. 1110, an accused may waive or withdraw appellate review after any general court-martial, except one in which the approved sentence includes death, and after any special court-martial in which the approved sentence includes a bad-conduct discharge.

B. Form. In accordance with R.C.M. 1110(d), a waiver or withdrawal of appellate review shall:

1. be in writing;

2. state that the accused and defense counsel have discussed the accused's right to appellate review, the effect that waiver or withdrawal will have on that review and that the accused understands these matters;

3. state that the waiver or withdrawal is submitted voluntarily; and,

4. be signed by the accused and defense counsel.

C. To whom submitted. A *waiver* shall be submitted to the convening authority and shall be attached to the record of trial. A *withdrawal* may be filed with the officer exercising general court-martial jurisdiction over the accused, who shall promptly forward it to the Judge Advocate General, or directly with the Judge Advocate General.

D. Time limits. An accused may sign a *waiver* any time after sentence is announced however, a waiver must be filed within 10 days after an accused or defense counsel has been served a copy of the CA's action, unless an extension is granted. The convening authority or other person taking such action, for good cause, may extend the period for filing by not more than 30 days. A waiver of appellate review is ineffective if filed prior to the time convening authority's action is served on the accused and defense counsel. *See, U.S. v. Hernandez*, 33 M.J. 145 (CMA 1991) and *U.S. v. Smith*, 44 M.J. 387 (CAAF 1996). A *withdrawal* may be submitted any time before appellate review is completed. In either case, however, once appellate review is waived or withdrawn, it is irrevocable and the case will thereafter be reviewed locally in the same manner as an SCM or an SPCM not involving a bad-conduct discharge. Appendices 19 and 20 of the *Manual for Courts-Martial, 1995 Edition*, provide forms for waiver or withdrawal. A sample waiver/withdrawal is also included below.

E. Right to counsel.

1. In general. An accused shall have the right to consult with counsel qualified under R.C.M. 502(d)(1) before submitting a waiver or withdrawal of appellate review.

2. Waiver. An accused may consult with any civilian, individual military or detailed defense counsel who represented the accused at the court-martial concerning whether to waive the appellate review unless such counsel has been excused. If counsel who represented the accused has not been excused, but is not immediately available to consult with the accused, associate counsel shall be detailed to advise the accused upon request by the accused. Such counsel shall communicate with the counsel who represented the accused at the court martial. If counsel who represented the accused at the court-martial has been excused, substitute counsel shall be detailed to advise the accused concerning waiver of appellate rights.

3. Withdrawal. The accused shall have the right to consult with appellate defense counsel concerning withdrawal of appellate review. An accused also has the right, upon request by the accused, to have an associate defense counsel detailed if appellate defense counsel is assigned but is not immediately available to consult with the accused concerning withdrawal of appellate review. Such counsel shall communicate with appellate defense counsel. If no appellate defense counsel has been assigned, defense counsel shall be detailed for the accused. An accused may also consult with civilian counsel, at no expense to the government, even if the accused was not represented by civilian counsel at the court-martial.

F. Benefits of Waiver/Withdrawal. The following are some of the reasons an accused may find it beneficial to waive/withdraw appellate review:

1. discharge (DD 214) will be expedited;

2. no longer required to keep command/NAMALA informed of changes of address;

3. no longer subject to the UCMJ;

4. easier to obtain employment; and,

5. very few cases (<1%) are set aside.

1912 MANDATORY REVIEW

A. Judge advocate review. Art. 64, UCMJ, and R.C.M. 1112 require that all Summary Courts-Martial (SCM), non-BCD Special-Courts-Martial (SPCM) and all other noncapital courts-martial where appellate review has been waived or withdrawn by the accused be reviewed by a judge advocate who has not been disqualified by acting in the same case as an accuser, investigating officer, member of the court-martial, military judge, or counsel, or otherwise on behalf of the prosecution or defense. Section 0153(a)(1) of the *JAG Manual* states that records requiring review under R.C.M. 1112 shall be forwarded to the SJA of an officer who exercises general court-martial jurisdiction (OEGCMJ) and who, at the time of trial, could have exercised such jurisdiction over the accused. For Navy commands, this would be the SJA of the area coordinator (or the area coordinator's qualified designee), unless otherwise directed by an OEGCMJ superior in the convening authority's chain of command. For Marine Corps commands, this would be the SJA of the OEGCMJ who exercised such jurisdiction over the accused at the time the court-martial was held. In all cases, the action of the convening authority in forwarding the record for judge advocate review shall identify the judge advocate to whom the record is forwarded by stating his official title. *JAG Manual*, § 0153(a0(3). 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.

1. Contents. The judge advocate's review is a written document containing the following:

(a) Conclusions as to:

– whether the court-martial had jurisdiction over the accused and over each offense for which there is a finding of guilty which has not been disapproved by the convening authority;

– whether each specification, for which there is a finding of guilty which has not been disapproved by the convening authority, stated an offense;

– whether the sentence was legal;

(b) a response to each allegation of error made in writing by the accused; and,

(c) in cases requiring action by the OEGCMJ, as noted below, a recommendation as to appropriate action and an opinion as to whether corrective action is required as a matter of law.

2. Finality of review. After the judge advocate has completed his review, most cases will have reached the end of mandatory review and will be considered final within the meaning of 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, however, and a further step is required if:

(a) The judge advocate recommends corrective action; or

(b) the sentence as approved by the convening authority includes a dismissal, a dishonorable or bad-conduct discharge, or confinement for more than six months.

3. Action by the OEGCMCA. The existence of either of these two situations will require the SJA to forward the record of trial to the OEGCMJ. With the SJA's review in hand, the OEGCMJ will take action on the record of trial in a document similar to CA's action. He will promulgate it in a similar fashion as well. He may disapprove or approve the findings or sentence in whole or in part; remit, commute, or suspend the sentence in whole or in part; order a rehearing on the findings or sentence, or both; or dismiss the charges.

4. Action by the JAG. If, in his review, the judge advocate stated that corrective action was required as a matter of law, and the OEGCMJ did not take action that was at least as favorable to the accused as that recommended by the judge advocate, the record of trial must be sent to the JAG for resolution. Art. 64(b)(3). In all other cases, however, the review is now final within the meaning of Art. 76, UCMJ.

B. Special courts-martial involving a bad-conduct discharge. Assuming that appellate review has not been waived or withdrawn by the accused, a special court-martial (SPCM) which includes a sentence to a bad-conduct discharge, whether or not suspended, will be sent directly to the Judge Advocate General. R.C.M. 1111; JAGMAN, § 0154.

1. Action by the JAG. After detailing appellate defense and government counsel, the JAG shall refer the case to the Navy-Marine Corps Court of Criminal Appeals (NMCCA). Art.66(b), UCMJ; R.C.M. 1201, 1202. NMCCA has review authority similar to that of the convening authority, except that it may not suspend any part

of the sentence. It is also limited to reviewing only those findings and sentence which have been approved by the convening authority.

2. Action by NMCCA. In considering the record of trial, NMCCA 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. Parker*, 36 M.J. 269 (CMA 1993), *United States v. Cole*, 31 M.J. 270 (CMA 1991). Finally, NMCCA may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact, and which NMCCA concludes should be approved on the basis of the entire record. A finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused. Art. 59, UCMJ.

3. Effect of a set aside by NMCCA. If the Court of Criminal Appeals sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed. Art. 66(d), UCMJ.

4. Action by the convening authority. The Judge Advocate General shall, unless there is to be further action by the President, the Secretary concerned, the Court of Appeals for the Armed Forces, or the Supreme Court, instruct the convening authority to take action in accordance with the decision of the Court of Criminal Appeals. If the Court of Criminal Appeals has ordered a rehearing but the convening authority finds a rehearing impracticable, he may dismiss the charges. Art. 66(e), UCMJ.

5. Review by CAAF. After review by NMCCA, the case will go to the Court of Appeals for the Armed Forces (CAAF) for review in the following two instances:

(a) If certified to CAAF by JAG; or,

(b) if CAAF grants the accused's petition for review. R.C.M. 1204.

6. Action by CAAF. In any case reviewed by it, CAAF may act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by NMCCA.

7. Review by the Supreme Court. Finally, review by the Supreme Court of the United States is possible under 28 U.S.C. § 1259 and Art. 67(a), UCMJ.

C. General courts-martial. All General Court-Martial (GCM) cases in which the sentence, as approved, includes:

(1) death;

(2) dismissal of a commissioned officer, cadet, or midshipman;

(3) dishonorable or bad-conduct discharge; or,

(4) confinement for one year or more will be reviewed in precisely the same way as an SPCM involving a bad-conduct discharge. Cases involving death must be reviewed by the Court of Appeals for the Armed Forces.

D. Review in the Office of the Judge Advocate General (JAG). The record of trial in each general court-martial case that is not otherwise reviewed under Article 66, i.e., those not involving death, dismissal, punitive discharge, or confinement of one year or more where appellate review has not been waived or withdrawn, shall be examined in the Office of the Judge Advocate General under Art. 69(a), UCMJ, and R.C.M. 1201(b). If any part of the findings or sentence is found to be unsupported in law or if reassessment of the sentence is appropriate, the JAG may modify or set aside the findings or sentence or both. As an alternative measure, JAG may forward the case for review to NMCCA.

1. Action by the JAG. The findings or sentence, or both, in a court-martial case not reviewed under subsection (a) of Article 69 or under Article 66, i.e. special court-martial cases in which a bad-conduct discharge was not approved, may be modified or set aside, in whole or in part, by the JAG on the ground of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence. The accused has a two year time limit in which to file an application in the Office of the Judge Advocate General under this subsection. Art. 69(b), UCMJ.

2. Effect of a set aside by JAG. If the JAG sets aside the findings or sentence, he may, except when the setting aside is based on lack of sufficient evidence to support the findings, order a rehearing. If he sets aside the findings and sentence and does not order a rehearing, he shall order that the charges be dismissed. If the JAG orders a rehearing but the convening authority finds a rehearing impractical, the convening authority shall dismiss the charges. Article 69(c), UCMJ.

1913 DISCRETIONARY REVIEW

A. Court of Appeals for the Armed Forces (CAAF). In cases reviewed by it, CAAF has authority to act only in regard to matters of law. Art. 67(d), UCMJ; *United States v. McCrary*, 1 C.M.A. 1, 1 C.M.R. 1 (1951). CAAF does not have the authority to:

- weigh the evidence;

– judge the credibility of witnesses; or,

– make new findings of fact. In *United States v. Lowry*, 2 M.J. 55 (CMA 1976), CMA held, *inter alia*, that CMA has no authority to review questions of fact, even when a constitutional question is involved and, absent specific findings of fact, all conflicts in the evidence are regarded as having been decided in the light most favorable to the government.

1. Whether there is sufficient evidence to sustain a finding of guilty, however, is a matter of law. *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 (CMA 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 CMA is without jurisdiction to review the issue.

2. Other evidentiary matters which CAAF may decide as a matter of law are:

(a) Whether an affirmative defense has been reasonably raised by the evidence so that an instruction must be given thereon [*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 (CMA 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).

3. *See also United States v. Dukes*, 5 M.J. 71 (CMA 1978), in which CMA reviewed, as a matter of law, a sentence affirmation resulting from a legal determination by the Court of Military Review.

4. Certification by JAG. In a case certified by JAG to CAAF, action by CAAF need only be taken with respect to the issues raised by him. In a case reviewed by CAAF upon petition of an accused, the court need only take action with respect to the issues specified in the grant of review. Art. 67(c), UCMJ. *See United States v. Schoof*, 37 M.J. 96 (CMA 1993) for a discussion of JAG-certified questions.

5. Petition by accused. The accused may petition the Court of Appeals for the Armed Forces for a review of a decision of the Court of Criminal Appeals within sixty days from the earlier of:

(a) the date on which the accused is notified of the decision of the CCA; or,

(b) the date on which a copy of the decision of the CCA, after being served on appellate counsel of record for the accused, is deposited in the United States mails for delivery by first class certified mail to the accused at an address provided by the accused or, if no such address was provided, at the latest address listed for the accused in his official service record. Art. 67(b)(1) & (2), UCMJ; R.C.M. 1203(d).

6. Procedure. The procedure for appeal is as follows (see JAGMAN, § 0164):

(a) JAG sends to the accused by certified mail a "promulgation package" consisting of a copy of the NMCCA decision, with an endorsement notifying him of his right to appeal and a form petition with instructions telling the accused, step-by-step, what should be done with regard to the matter of appealing to C.A.A.F.; and

(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.

B. 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 in the following instances:

1. cases reviewed by CAAF;

2. cases certified to CAAF by the JAG;

3. cases in which CAAF granted a petition for review; and,

4. cases other than those described above in which CAAF granted relief.

5. 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.

1914 NAVY/MARINE CORPS APPELLATE LEAVE ACTIVITY

A. In general. The Navy-Marine Corps Appellate Leave Activity (NAMALA) is the command tasked with the primary responsibility for Navy and Marine Corps personnel awaiting appellate review of courts-martial. It is located at the Washington Navy Yard,

Building 111, Washington, D.C. The commanding officer is a Navy lieutenant commander and the executive officer is a Marine Corps captain.

B. Mission. The mission of NAMALA is the centralized administration of Navy and Marine Corps personnel awaiting appellate review of court-martial convictions. NAMALA does not take cognizance over those individuals who are in confinement or on voluntary appellate leave. Service records will be sent to NAMALA when all of the following have been completed: a punitive discharge has been approved; all confinement has been served; the convening authority (CA) has acted; and, voluntary appellate leave has become mandatory appellate leave (which occurs automatically once the CA has acted).

C. Function. NAMALA is a "one-stop shopping for appellate leave" activity in that they are responsible for virtually any issue involving an appellant. NAMALA is responsible for: monitoring the status of appeals; maintaining service records; coordinating the payment of medical claims; disseminating information; implementing decisions of the Court of Criminal Appeals and the Clemency and Parole Board; promulgating supplemental court-martial orders; and, processing discharges and closing out records.

D. Action.

1. Navy personnel. As per BUPERSINST 1900.9, the following actions should be taken.

(a) Commands.

– transfer enlisted members awarded a punitive discharge to the Transient Personnel Unit per MILPERSMAN 1850300.4b regardless of the duration of confinement, including no confinement, in the sentence.

– if drug/alcohol related incidents are involved, ensure member receives medical evaluation and is offered inpatient treatment if applicable.

– ensure personal property and/or household goods are shipped to the member's home of record or location requested by the member. Property should not be transferred to a Navy storage facility.

– forward a copy of the CA's action to the member's assigned command and the Personnel Support Detachment (PSD) servicing that command. If the punitive discharge is suspended, remitted or disapproved, include a recommendation on action to take in the member's case, i.e., process for administrative separation or return to duty.

(b) TPUs/Brigs.

– initiate tracer action via message to the CA with follow-up tracers every 30 days thereafter on any CA action not received within 60 days of court-martial. Include Immediate Superior in Command (ISIC) and Office of the Judge Advocate General (OJAG) on second and subsequent tracer actions.

– complete appellate leave/separation processing in accordance with Enclosures (2) and (3) of BUPERSINST 1900.9 prior to the member beginning voluntary/mandatory appellate leave.

– ensure the member completes a separation physical and has a blood sample for Human Immune Virus (HIV) testing drawn no more than 90 days prior to beginning voluntary or mandatory appellate leave.

(c) PSDs.

– execute any pay matters or reduction in rate approved in the CA's action. Ensure all service record entries are completed prior to transferring said records to NAMALA.

– administratively drop the member from Navy strength accounts when the CA approves the unsuspended punitive discharge.

– administratively transfer the member to NAMALA per enclosure (2) of BUPERSINST 1900.9.

2. Marine Corps personnel. As per MCO 1050.16, the following actions will be taken prior to directing involuntary appellate leave or approving voluntary appellate leave.

– recover all government property, including uniform clothing required by MCO P10120.28F.

– complete a DD Form 214 (Certification of Release or Discharge from Active Duty) to the fullest possible extent and place the completed form in the service record prior to transfer to the NAMALA.

– mail certified true copies of the appellate leave orders, court-martial orders, and pages 3 and 12 of the service record to the DFAS, Kansas City Center (FBJRA), Kansas City, MO 64197.

– ensure a separation physical and HIV testing has been completed no later than 90 days prior to the Marine beginning appellate leave.

– ensure Marines undergoing treatment for infectious/contagious disease are not placed in a leave status except under the conditions outlined in MCO P1050.3G.

– if drug/alcohol related incidents are involved, ensure medical evaluation and inpatient treatment are completed if recommended by a medical doctor or elected by the Marine.

– ship personal property and/or household goods to the home of record or location requested by the Marine.

– transportation in-kind is authorized for Marines ordered on involuntary appellate leave. Neither a mileage allowance nor transportation in-kind is authorized for Marines requesting voluntary appellate leave. Marines assigned overseas with their dependents who become eligible for appellate leave are authorized transportation for their dependents to a designated place in the United States, Puerto Rico, or a territory or possession of the United States.

– Marines shall surrender their identification cards and those of their dependents prior to being placed on appellate leave. Identification cards will be issued to Marines and their dependents to expire 6 months from the date of issue. Personnel on appellate leave may have identification cards reissued by any command authorized to issue identification cards. The command should contact NAMALA to update the Marine's current status.

– after entering an involuntary appellate leave status, transfer the Marine by service record to the NAMALA.

E. Appellant Status.

1. Pay and Benefits. A military member on appellate leave will be in a no-pay status. The member and dependents are, however, entitled to full medical and dental benefits. If the member gets married or otherwise gains dependents while on appellate leave, those dependents will be entitled to medical benefits.

2. Death of member. If a member on appellate leave dies prior to final review of his/her court-martial, then the court-martial will automatically be set aside and all rights/benefits would be afforded to the member's survivors.

3. Leave. The member is entitled to be paid for any accrued leave until such leave is exhausted prior to going on appellate leave unless the member's end of current contract (ECC) has expired.

4. Further Misconduct. The appellee is subject to the Uniform Code of Military Justice (UCMJ) until his/her review is finally completed and may be subject to further disciplinary action.

5. Termination of Involuntary Appellate Leave.

(a) For rehearing/suspension. Appellate leave will be terminated if a rehearing of any portion of the member's court-martial has been directed or if an approved punitive discharge or dismissal is suspended for a probationary period. Prior to terminating appellate leave, NAMALA will transfer the member by service record to the CA.

(b) For set aside of punitive discharge/dismissal.

– Beyond obligated service – Marine Corps members will be separated as per MCO P1900.16E if the jurisdiction provisions of R.C.M. 202, MCM, 1995 do not apply. Navy enlisted personnel will be separated for either expiration of enlistment or convenience of the government and characterization will be the type warranted by service record. Navy officer personnel will be eligible for administrative separation processing under SECNAVINST 1920.6A.

– Remaining obligated service – Marine Corps enlisted members may be separated for the convenience of the government pursuant to MCO P1900.16E without terminating appellate leave. Marine Corps officer members, upon notification of the results of the court-martial, are required to either terminate appellate leave or resign. Navy personnel will be separated in the same manner as described in subparagraph above.

6. Upon Final Review.

(a) Enlisted personnel. If the sentence of the court-martial as approved by the convening authority is affirmed upon final review, enlisted personnel will be separated with a bad conduct/dishonorable discharge.

(b) Officer personnel. If the sentence of the court-martial as approved by the convening authority is affirmed upon final review, officers will be dismissed from the Naval service.

7. Executing final decisions. The commanding officer, Navy and Marine Corps Appellate Leave Activity is the GCMCA who executes any punitive discharges that have been finally approved by the appellate court. Supplemental promulgating orders will also be issued by NAMALA.

1915 NEW TRIAL UNDER ART. 73; R.C.M. 1210; JAGMAN, § 0163

A. In general. Article 73, UCMJ, provides that, under certain limited conditions, an accused can petition JAG to have his case tried again even after his conviction has become final by completion of appellate review. The trial authorized by article 73 is not a rehearing such as is ordered where prejudicial error has occurred. It is

not another trial such as that ordered to cure jurisdictional defects. It is a trial de novo as if the accused had never been tried at all.

B. Grounds for petition. There are only two grounds for petition:

1. Newly discovered evidence; or,

2. fraud on the court.

3. Sufficient grounds will be found to exist only if it is established that an injustice has resulted from the findings or sentence and that a new trial would probably produce a result substantially more favorable to the accused. 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.

C. Newly discovered evidence. The evidence, to be considered newly discovered, must have been discovered since the first trial; also, petitioner must have exercised due diligence to discover it if its existence could have been known at the time of the first trial. The evidence must, of course, be admissible and of such probative weight as to probably produce a substantially more favorable result for the accused. *See United States v. Day*, 14 C.M.A. 186, 33 C.M.R. 398 (1963); *United States v. Malumphy*, 13 C.M.A. 60, 32 C.M.R. 60 (1962); *United States v. Petersen*, 7 M.J. 981 (A.C.M.R. 1979); *United States v. Thomas*, 11 M.J. 135 (C.M.A. 1981).

D. Fraud. The fraud must have had a substantial contributing effect on the findings of guilty or on the sentence as originally adjudged. Some examples are: confessed or proven perjury or forgery; willful concealment by the prosecution from the defense of exculpatory evidence; or disqualifying grounds for challenge of any member or military judge. 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, supra*.

E. 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.

F. 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).

1916 TYPES OF ERROR AND THEIR EFFECT

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. Others involve improper or inconsistent action by the court, but which can be corrected without material prejudice to the accused. Still others are of such a substantial nature that they affect the propriety of the trial itself, in whole or in part, and will result in a declaration of disapproval or nullity. This section addresses this latter type of error. Three broad areas will be covered: lack of jurisdiction, denial of military due process, and all other errors which may prejudice the substantial rights of the accused.

It merits repeating that a convening authority is not required to identify errors when he takes action. Appellate authorities, however, are tasked with this responsibility and they may ultimately direct the convening authority to correct error anyway. In order to avoid this from happening after a lengthy passage of time, a convening authority may choose, in his discretion, to identify and correct errors early and before his own CA's action.

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).

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 article 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 article 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 article 32 investigation, with the same result. In commenting on the need for reversal in such cases, Judge Fletcher has written:

> This Court once again must emphasize that an accused is entitled to the enforcement of his pretrial rights without regard to whether such enforcement will benefit him at trial. Thus, Government arguments of "if error, no prejudice" cannot be persuasive. *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 reacted

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*, 4 M.J. 879 (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, supra*;

(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*.

1917 POST-TRIAL SESSIONS

A. In general. This section discusses the means to resolve various court-martial errors. In some cases, the error can be corrected without overturning the trial results. If so, a certificate of correction, proceeding in revision, or article 39(a) hearing may apply. Other errors are more substantial and may require overturning the case because of material prejudicial to the substantial rights of the accused (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.

1. In examining the record, the convening authority may find that it is incomplete in some material respect. The court may have performed its duties properly but, due to clerical error or inadvertence, the record does not reflect what actually occurred at the trial. Before he takes action, the convening authority may return the record to the military judge, president of an SPCM without a military judge, or the SCM for a certificate of correction. Notice shall be given to all parties with an opportunity to examine and respond to the proposed correction. 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 revision. (Art. 60, UCMJ; R.C.M. 1102).

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.

(d) A court-martial may also be reconvened for revision proceedings on the initiative of the military judge. R.C.M. 1102(a).

2. To summarize, three conditions must exist before revision proceedings may be used:

(a) There is an apparent error or omission in the record, or improper or inconsistent action by the court; and

(b) such defect affects the findings or sentence; and

(c) the defect can be corrected without material prejudice to the substantial rights of the accused.

(d) Note: the error or omission referred to is not a reporter's error or omission whereby the record does not correctly reflect what actually occurred. See section 1914B, *supra*. Instead, this action is taken when the record correctly shows what happened, but what happened amounts to a defect.

3. Examples where revision is proper

(a) The findings are inconsistent, such as guilty of the specification but not guilty of the charge.

(b) The court failed to announce a finding as to a specification.

(c) The military judge failed to ascertain that the accused was aware of his rights concerning military counsel. *United States v. Barnes*, 21 C.M.A. 169, 44 C.M.R. 223 (1972); *United States v. Giffith*, 27 M.J. 42 (C.M.A. 1988).

(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); *United States v. Williams*, 17 M.J. 207 (C.M.A. 1984).

4. Examples where revision is improper

(a) The convening authority wishes the court to reconsider a finding of not guilty.

(b) The convening authority wishes the court to increase the severity of the sentence. Exception: A revision is proper for such action if a more severe sentence is mandatory (i.e., spying in time of war (article 106) has a mandatory sentence of death). 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); *United States v. Griffith*, 27 M.J. 42 (C.M.A. 1988).

(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).

5. 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 an SPCM without a military judge should give the court any instructions necessary for the accomplishment of the revision action.

(e) If necessary, the court immediately closes to reconsider the findings or sentence (as the case may be) so as to cure the defect.

(f) As soon as it has determined its action, the court will announce that action in the presence of counsel, the accused, and the military judge, if any.

(g) A record of the proceedings in revision is prepared and authenticated in the same manner as the original record of trial.

D. Article 39(a) sessions. R.C.M. 1102 authorizes a post-trial article 39(a) hearing for the purpose of inquiring into and resolving any matter which may arise after trial and which may substantially affect the legal sufficiency of any finding of guilty or sentence. Basically, it is intended to be a fact-finding mechanism. For example, such a session may be called to examine allegations of misconduct by a member or by counsel. Prior to the adoption of R.C.M. 1102, this type of hearing was called a *Dubay* hearing, based on the case of *United States v. Dubay*, 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) and *United States v. McFarlin*, 24 M.J. 631 (A.C.M.R. 1987).

E. Rehearings. The convening authority may order a rehearing on the findings and sentence whenever the findings and sentence are disapproved because of

prejudicial error occurring at the trial. The convening authority must determine, however, that there will be sufficient admissible evidence available to support a finding of guilty at the rehearing. A rehearing may also be ordered only as to the sentence where, for example, some findings of guilty have been dismissed and the sentence is no longer appropriate for the remaining findings, or where prejudicial error occurred at the sentencing stage of the trial.

1. A rehearing cannot be ordered as to any offense of which the accused was acquitted, nor may a rehearing be ordered if any part of the sentence is approved. The sentence is always disapproved when any rehearing is ordered. R.C.M. 1107.

2. 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).

F. Rules relating to rehearing.

1. Steps in accomplishing a rehearing. The convening authority takes action, disapproving the entire sentence and ordering trial before a court to be designated later. A statement of the reasons for disapproval is included in the convening authority's action. R.C.M. 1107.

2. The convening authority designates the court and forwards to the trial counsel:

(a) The charges and specifications upon which the rehearing shall be held;

(b) the record of the first trial;

(c) all pertinent papers accompanying the record of the original trial; and,

(d) a statement 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.

3. The rehearing may be held as to any offense of which the accused was found guilty at the first trial or a lesser included offense (LIO) thereof. If the accused was found guilty at the first trial of only an LIO of an offense charged, the rehearing can only be ordered as to such LIO or an even lower LIO. Additional charges may also be referred to trial with the offenses for which a rehearing has been ordered.

G. 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).

H. The sentence at a rehearing. The court at the rehearing cannot adjudge a greater sentence than that adjudged at the original trial as properly reduced by reviewing authorities (Art. 63, UCMJ), except:

1. Where additional charges are referred to the rehearing (To compute the maximum punishment in such a case, add the punishment imposable for the additional charges to the original sentence adjudged as reduced on review. Be aware, however, of the situation where the first court finds the accused guilty of two charges but, on rehearing, a not guilty finding was entered on one of these. The maximum must be reduced accordingly. Also, be aware of the jurisdictional maximum of the court.);

2. where a mandatory sentence is prescribed by the UCMJ; and

3. where the convening authority reduced the adjudged sentence in compliance with a pretrial agreement and where the accused at the rehearing fails to plead guilty in compliance with the agreement. In such a case, the sentence at the rehearing is not limited by the CA's action but by the adjudged sentence. Art. 63, UCMJ; R.C.M. 810(d).

The court members should not be aware of the basis for the sentence limitation. Upon rehearing, the members are not to be told of the prior sentence nor are they limited by the prior sentence. The convening authority, however, ***may not*** approve any sentence in excess of the first court-martial. The members are not instructed about this. Art. 63, UCMJ, as amended by the Defense Authorization Act of 1993. 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.

I. 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.

J. 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 _____ 19_ to _____ 19_ under the sentence adjudged at the former trial of this case." MCM, 1984, app. 16, form 21.

K. "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.

1918 SPEEDY REVIEW

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 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. 17 (C.M.A. 1982). In this case, the accused was sentenced to a bad-conduct discharge, confinement at hard labor, and forfeitures for three months for two specifications of failing to go to his appointed place of duty, one specification of disrespect, and four specifications of failure to obey lawful orders. The accused spent 77 days in post-trial confinement and thereafter was given appellate leave. The record of trial was not authenticated by the military judge, however, until 200 days after the sentence was adjudged. Moreover, the supervisory authority's action was not accomplished for an additional 113 days. In reversing the accused's conviction, C.M.A. stated:

> We are reluctant to dismiss charges because of errors on the Government's part and we would especially hesitate to do so if the case involved more serious offenses. However, it seems clear that unless we register our emphatic disapproval of such "inordinate and unexplained" delay in a case like this, we may

> be faced in the near future with a situation that would induce a return to the draconian rule of *Dunlap*.
>
> . . .
>
> Since it appears that under the circumstances of this case, the delay in post-trial review was prejudicial to Clevidence and since we are sure that, in the exercise of our supervisory authority over military justice, we must halt the erosion in prompt post-trial review of courts-martial, we reverse the decision . . . , set aside the findings and sentence, and dismiss the charges against appellant.

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. Henry*, 40 M.J. 722 (NMCMR 1994), the Navy-Marine Corps Court of Military Review refused to find "prejudice per se" stating instead that "appellant must plead and demonstrate some real harm or legal prejudice flowing from the

delay." However, the court also stated "we are troubled and frustrated by the frequency that this occurs in spite of repeated condemnations from this Court and the U.S. Court of Military Appeals." The same court in *U.S. v. Thomas*, 41 M.J. 873 (NMCCA 1995), adopted the speedy trial standard set out in *U.S. v. Kossman*, 38 M.J. 258 (C.M.A. 1993) in which the court stated that the "touch stone for compliance with the provisions of the Uniform Code is not constant motion, but reasonable diligence ..." as the standard for speedy review. In *Thomas*, there was a delay of 22 months total, but the court focused on the SJA's lack of diligence (14 months) in preparing his recommendation and addendum when they decided to set aside the bad conduct discharge.

COURT-MARTIAL CHECKLISTS

GENERAL COURT-MARTIAL POST-TRIAL CHECKLIST
ICO _____

____ Prepare report of results of trial form, if required; attach to ROT. JAGMAN, § 0149, A-1-j. Post-trial checklist not required if court-martial results in an acquittal.

____ Art. 32 appointing order inserted in ROT. R.C.M. 1103(b)(3).
- ____ Report of investigation (DD Form 457).
- ____ Art. 34 advice.
- ____ Waiver of Art. 32.

____ Convening order inserted in ROT. R.C.M. 1103(b)(2)(D).
- ____ Modifications inserted, if any.

____ Charge sheet inserted in ROT. R.C.M. 1103(b)(2)(D).

____ ROT examined by TC. R.C.M. 1103(i)(1)(A).

____ ROT examined by DC, when unreasonable delay will not result. R.C.M. 1103(i)(-1)(B).

____ Original verbatim ROT and 4 copies prepared or original summarized ROT and 1 copy if verbatim not required. R.C.M. 1103(b)(2), (3), (g).

All exhibits included:
- ____ Prosecution.
- ____ Defense.
- ____ Appellate.
  - ____ Pretrial agreement.
  - ____ Motions.
  - ____ MJ alone request, if any.
  - ____ Written continuance requests with ruling.
  - ____ Written special findings by military judge.
  - ____ Enlisted members request.
  - ____ Members questionnaires.
  - ____ Voir dire questions submitted.
  - ____ Members' questions.
  - ____ Appellate rights statement.
    - ____ Special power of attorney.
  - ____ Waiver of appellate review.
  - ____ Other _____.

____ Page check: sequential; # of pages: _____.

____ Index sheet.

____ Copy of ROT served on accused; attach receipt in ROT (or explanation in lieu of). R.C.M. 1104(b).

____ ROT and copies delivered to staff judge advocate/legal officer.

____ Staff judge advocate's/legal officer's recommendation prepared; inserted in ROT. R.C.M. 1103(b)(3)(G); R.C.M. 1106; JAGMAN, § 0151c.
____ SJA's/LO's recommendation checklist complied with.

____ Staff judge advocate's/legal officer's recommendation served on DC and accused; receipt in ROT (or explanation in lieu of). R.C.M. 1106(f). Date to: accused,____ _____; counsel, _____.

____ Accused's response to staff judge advocate's/legal officer's recommendation inserted in ROT, if provided. R.C.M. 1106.

____ Forward all responses and recommendations (including supplementary responses and recommendations) to CA for review. R.C.M. 1107.
____ Allegations of legal error raised by accused in response addressed in an addendum to the recommendation. R.C.M. 1106(d)(4). [SJA only.]
____ All other R.C.M. 1105, 1106, or other clemency matters addressed.
____ All supplementary recommendations raising new matter served on DC or accused; receipt in ROT (or explanation in lieu of). R.C.M. 1106(f)(7).

____ Attach other matters submitted by accused or DC, and any action on same, to ROT. R.C.M. 1105; R.C.M. 1106 (f)(4); R.C.M. 1110; JAGMAN, § 0161.
____ Deferment requests.
____ All clemency requests.
____ Other matters.

____ Prepare CA's action using CA's input. R.C.M. 1107.
____ CA's action checklist complied with.

____ Attach CA's action or statement as to why he/she cannot take action; include letter of reprimand, if any. R.C.M. 1107.

____ Prepare promulgating order and appropriate copies for distribution. JAGMAN, §§ 0153, 0155; R.C.M. 1114(c)(3).
____ Promulgating order checklist complied with.

____ Complete time sheet and the back of the cover of the ROT.

____ Forward ROT to appropriate authority. JAGMAN, §§ 0153, 0154; R.C.M. 1111; R.C.M. 1112. [***Note***: If case assigned an NMCM number, it must always be forwarded to Navy and Marine Corps Appellate Review Activity, Code 40.31.]

____ Waiver of appellate review in writing.

____ Forward ROT to a judge advocate for review, this may be the SJA for CA. JAGMAN, §§ 0153, 0154; R.C.M. 1111.

[***Note***: Appellate review with sentence to death may not be waived.]

____ Judge advocate's review inserted in original ROT and all copies. R.C.M. 1103(b)(3)(G); R.C.M. 1112.

____ Copy of review to accused.

____ Forward ROT and copies to the Navy and Marine Corps Appellate Review Activity, Code 40.31.

____ Forward one copy of the ROT to the President, Naval Clemency and Parole Board, if sentence includes an unsuspended punitive discharge or confinement for 8 months or more.

____ Prepare appropriate service record entries (usually pages 4, 7, 9, and 13).

____ Optional: retain copy of ROT, CA's action, and promulgating order.

____ Conditions on suspension, proof of service on probationer, and any records of procedures in connection with vacation of suspension. R.C.M. 1108; R.C.M. 1109.

____ Appellate court directives (i.e. orders to conduct a rehearing, supplemental orders, etc.).

____ Records of former trial of the same case if case was a rehearing or new or other trial of the same case. R.C.M. 1103(b)(3)(A).

____ Compliance with requirements for National Security and classified information. JAGMAN, §§ 0125, 0144, 0166; OPNAVINST 5510.1H; R.C.M. 407(b); R.C.M. 1104(b)(1)(D).

BCD SPECIAL COURT-MARTIAL POST-TRIAL CHECKLIST

ICO _____

____ Prepare report of results of trial form, if required; attach to ROT. JAGMAN, § 0149, App. A-1-j. Post-trial checklist not required if court-martial results in an acquittal.

____ Convening order inserted in ROT. R.C.M. 1103(b)(2)(D).
____ Modifications inserted, if any.

____ Charge sheet inserted in ROT. R.C.M. 1103(b)(2)(D).

____ ROT examined by TC. R.C.M. 1103(i)(1)(A).

____ ROT examined by DC, when unreasonable delay will not result. R.C.M. 1103(i)(-1)(B).

____ ROT authenticated by each military judge participating in proceedings or substitute authentication. R.C.M. 1104(a)(2).

____ Original verbatim ROT and 4 copies prepared. R.C.M. 1103(b)(2), (3), and (g).
All exhibits included:
____ Prosecution.
____ Defense.
____ Appellate.
____ Pretrial agreement.
____ Motions.
____ MJ alone request, if any.
____ Written continuance requests with ruling.
____ Written special findings by military judge.
____ Enlisted members request.
____ Members' questionnaires.
____ Voir dire questions submitted.
____ Members' questions.
____ Appellate rights statement.
____ Special power of attorney.
____ Waiver of appellate review.
____ Other _____.

____ Page check: sequential; # of pages: _____.

____ Index sheet.

____ Copy of ROT served on accused; attach receipt in ROT (or explanation in lieu of). R.C.M. 1104(b).

____ ROT and copies delivered to staff judge advocate/legal officer.

____ Staff judge advocate's/legal officer's recommendation prepared; inserted in ROT. R.C.M. 1103(b)(3)(G); R.C.M. 1106; JAGMAN, § 0151c.
____ SJA's / LO's recommendation checklist complied with.

____ Staff judge advocate's/legal officer's recommendation served on DC and accused; receipt in ROT (or explanation in lieu of). R.C.M. 1106(f). Date to accused _____ _____; counsel _____.

____ Accused's response to staff judge advocate's/legal officer's recommendation inserted in ROT, if provided. R.C.M. 1106.

____ Forward all responses and recommendations (including supplementary responses and recommendations) to CA for review. R.C.M. 1107.
____ Allegations of legal error raised by accused in response addressed in supplementary recommendation. R.C.M. 1106(d)(4). [SJA only.]
____ All other R.C.M. 1105, 1106, or other clemency matters addressed.
____ All supplementary recommendations raising new matter served on DC or accused; receipt in ROT (or explanation in lieu of). R.C.M. 1106(f)(7).

____ Attach other matters submitted by accused or DC, and any action on same, to ROT. R.C.M. 1105; R.C.M. 1106(f)(4); R.C.M. 1110; JAGMAN, § 0161.
____ Deferment requests.
____ All clemency requests.
____ Other matters.

____ Prepare CA's action using CA's input. R.C.M. 1107.
____ CA's order checklist complied with.

____ Attach CA's action or statement as to why he/she cannot take action; include letter of reprimand, if any. R.C.M. 1107.

____ Prepare promulgating order and appropriate copies for distribution. JAGMAN, §§ 0153, 0155; R.C.M. 1114(c)(3).
____ Promulgating order checklist complied with.

____ Complete time sheet and the back of the cover of the ROT.

____ Forward ROT to appropriate authority. JAGMAN, §§ 0153, 0154; R.C.M. 1111; R.C.M. 1112. [***Note***: If case assigned an NMCM number, it must always be forwarded to Navy and Marine Corps Appellate Review Activity, Code 40.31.]
____ Waiver of appellate review in writing.
____ Forward ROT to SJA of OEGCMA for review. R.C.M. 1111; JAG-MAN, §§ 0153, 0154. [***Note***: ROT may have to be forwarded to OEGCMA for action or the Judge Advocate General for action. R.C.M. 1112; R.C.M. 1201.]

____ Judge advocate's review inserted in original ROT and all copies. R.C.M. 1103(b)(3)(G); R.C.M. 1112.
____ Copy of review to accused.
____ Forward ROT to Office of the Judge Advocate General, Code 40.31.
____ Forward one copy of the ROT to the President, Naval Clemency and Parole Board if sentence includes an unsuspended punitive discharge.

____ No waiver of appellate review.
____ Send ROT and two copies to the Navy and Marine Corps Appellate Review Activity, Code 40.31.
____ Forward one copy of the ROT to the President, Naval Clemency and Parole Board if sentence includes an unsuspended punitive discharge.

____ Prepare appropriate service record entries (usually pages 4, 7, 9, and 13).

____ Optional: retain copy of ROT, CA's action, and promulgating order.

____ If initiated as Art. 32, appointing order inserted in ROT. R.C.M. 1103(b)(3).
____ Report of investigation (DD Form 457).
____ Art. 34 advice.
____ Waiver of Art. 32.

____ Conditions on suspension, proof of service on probationer, and any records of procedures in connection with vacation of suspension. R.C.M. 1108; R.C.M. 1109.

____ Appellate court directives (i.e. orders to conduct a rehearing, supplemental orders, etc.).

____ Records of former trial of the same case if case was a rehearing or new or other trial of the same case. R.C.M. 1103(b)(3)(A).

____ Compliance with requirements for National Security and classified information. JAGMAN, §§ 0125, 0144, 0166; OPNAVINST 5510.1H; R.C.M. 407(b); R.C.M. 1104(b)(1)(D).

NON-BCD SPECIAL COURT-MARTIAL POST-TRIAL CHECKLIST
ICO _____

____ Prepare report of results of trial form, if required; attach to ROT. JAGMAN, § 0149, App. A-1-j. Post-trial checklist not required if court-martial results in an acquittal.

____ Convening order inserted in ROT. R.C.M. 1103(b)(2)(D).
____ Modifications inserted, if any.

____ Charge sheet inserted in ROT. R.C.M. 1103(b)(2)(D).

____ ROT examined by TC. R.C.M. 1103(i)(1)(A).

____ ROT examined by DC, when unreasonable delay will not result. R.C.M. 1103(i)(-1)(B).

____ ROT authenticated by each military judge participating in proceedings or substitute authentication. JAGMAN, § 0150a; R.C.M. 1104(a)(2).

____ Original summarized ROT and 1 copy prepared. R.C.M. 1103(b)(2), (3), (g).
All exhibits included:
____ Prosecution.
____ Defense.
____ Appellate.
____ Pretrial agreement.
____ Motions.
____ MJ alone request, if any.
____ Written continuance requests with ruling.
____ Written special findings by military judge.
____ Enlisted members request.
____ Members' questionnaires.
____ Voir dire questions submitted.
____ Members' questions.
____ Appellate rights statement.
____ Other _____.

____ Page check: sequential; # of pages: ____.

____ Index sheet.

____ Copy of ROT served on accused; attach receipt in ROT (or explanation in lieu of). R.C.M. 1104(b).

____ ROT and copies delivered to staff judge advocate / legal officer.

____ Attach accused's response to ROT, if provided. R.C.M. 1105.

____ Attach other matters submitted by accused or DC, and any action on same, to ROT. R.C.M. 1105.
- ____ Deferment requests.
- ____ Clemency requests.
- ____ Other matters.

____ Comment to CA on all matters raised under R.C.M. 1105 and any other clemency matter. [Only SJA's may respond to legal error.]

____ Forward all responses and recommendations to CA for review. R.C.M. 1107.

____ Prepare CA's action using CA's input. R.C.M. 1107.
- ____ CA's action checklist complied with.

____ Attach CA's action or statement as to why he/she cannot take action; include letter of reprimand, if any. R.C.M. 1107.

____ Prepare promulgating order and appropriate copies for distribution. JAGMAN, §§ 0153, 0155; R.C.M. 1114(c)(3).
- ____ Promulgating order checklist complied with.

____ Complete time sheet and the back of the cover of the ROT.

____ Forward ROT to SJA of OEGCMA for review. JAGMAN, §§ 0153, 0154; R.C.M. 1111. [***Note***: ROT may have to be forwarded to OEGCMA for action or the Judge Advocate General for action. R.C.M. 1112; R.C.M. 1201.

____ Judge advocate's review inserted in original ROT and all copies. R.C.M. 1112.

____ Copy of review to accused. Date to accused _____.

____ Maintain and distribute ROT in accordance with JAGMAN, § 0154b(2) and (3).
- ____ Shore activities: maintain 2 years after final action.
- ____ Fleet activities: maintain 3 months after final action.

____ Prepare appropriate service record entries (usually pages 4, 7, 9, and 13).

____ If initiated as Art. 32, appointing order inserted in ROT. R.C.M. 1103(b)(3).
- ____ Record of investigation (DD Form 457).
- ____ Art. 34 advice.
- ____ Waiver of Art. 32.

____ Conditions on suspension, proof of service on probationer, and any records of procedures in connection with vacation of suspension. R.C.M. 1108; R.C.M. 1109.

____ Appellate court directives (i.e. orders to conduct a rehearing, supplemental orders, etc.).

____ Records of former trial of the same case if case was a rehearing or new or other trial of the same case. R.C.M. 1103(b)(3)(A).

____ Compliance with requirements for National Security and classified information. JAGMAN, §§ 0126, 0144, 0166; OPNAVINST 5510.1H; R.C.M. 407(b); R.C.M. 1104(b)(1)(D).

CHAPTER XX

ART. 32 INVESTIGATIONS AND ART. 34 ADVICE: THE REFERRAL PROCESS IN A GENERAL COURT-MARTIAL

APPENDIX B

PROCEDURE STUDY GUIDE

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 GCM.

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 article 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 article 32 investigation where the convening authority, an officer in charge, lacked even NJP power over a particular accused, a Marine Corps major. Thus, *Donaldson* seemed to require that the accused be within the disciplinary authority of the officer ordering the investigation. *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.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 was resolved, however, by the *Manual for Courts-Martial, 1984*. It and current versions state, 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 article 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 article 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 ARTICLE 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 article 32 investigation because he lacked a clearance. This conclusion was reached despite the fact that military counsel was appointed to represent the accused at the pretrial investigation; however, no witnesses were called, and the only evidence considered was the file prepared by the Army's Criminal Investigations Division. The next day, the pretrial investigating officer (PTIO) submitted his report recommending trial by GCM. *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 (IO).*** R.C.M. 405(d), discussion, indicates that an IO should be a lieutenant commander or major, or above, or be an officer with legal training. The accuser should not be appointed as an IO. 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 IO; 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 IO 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 IO of his prior connection with the case with no objection by the accused will waive a subsequent challenge to the qualifications of the IO. *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 IO 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 IO did not actually prefer any additional charges, but was directed by the appointing authority to determine by additional investigation proceedings whether the facts were supportive of the charge and to recommend disposition. Upon examination of the *ABA Standards, The Function of the Trial Judge* (1972) (and, in particular, the sections dealing with witness protection, disruptive behavior, and criminal contempt) and, upon concluding that no higher standard should apply to an investigative judicial officer, the court determined that it could not, as a matter of law or fact, find the IO manifested a lack of impartiality or that either investigation was improperly conducted. Adopting the criteria from the *ABA Standards*, the court held that nothing in the record demonstrated that the actions of the IO were so integrated with the conduct of the accused that he contributed to such conduct, or became otherwise involved, or that his objectivity could reasonably be questioned.

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. 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 IO's ex parte conversations with the prosecuting attorney, declaring that the IO owes the accused the same duty of neutrality, detachment, and independence as does the trial judge. *See also United States v. Grimm*, 6 M.J. 890 (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 article 27(b) 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, 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 be present and the right to confront and to cross-examine witnesses [Availability of military witnesses is initially determined by the IO. This decision is subject to that of the immediate commanding officer of the witness, which, in turn, is subject to review by the military judge as a pretrial motion. 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. Willis*, 43 M.J. 889 (A.F. Ct. Crim. App. 1996), and *United States v. Chestnut*, 2 M.J. 84 (C.M.A. 1976), wherein the C.M.A. ordered a new article 32 investigation after the court determined that the trial court was in error when it upheld the IO'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 article 32 investigation. The court reversed *Ledbetter's* conviction, but provided for a rehearing after a new article 32 investigation and pretrial advice. In *United States v. Jackson*, 3 M.J. 597 (N.C.M.R. 1977), the accused's co-actor was called as a witness for the government at the article 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.C.M.R. reversed, citing *Ledbetter* and *Chestnut*, both *supra*. The C.M.A. affirmed N.C.M.R.'s disposition of the case without opinion. *United States v. Jackson*, 3 M.J. 260 (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 article 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 IO and to have produced those documents or physical evidence, under the control of the government, relevant to the investigation and not cumulative, which are reasonably available [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 IO 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 his 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)]. *But see also San Antonio Express v. Morrow*, 44 M.J. 706 (A.F. Ct. Crim. App. 1996);

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 IO 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, 412 and section V (privileges), do not apply. R.C.M. 405(i). The IO is not required to rule on objections. Upon request, the IO 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 IO over defense objection except in time of war. 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 IO has discretion to close the investigation to the public, even over the objection of the accused, where public disclosure of evidence not admissible at trial might prejudice the accused. *MacDonald v. Hodson*, 19 C.M.A. 582, 42 C.M.R. 184 (1970); R.C.M. 405(h)(3). *See also San Antonio Express v. Morrow*, 44 M.J. 706 (A.F. Ct. Crim. App. 1996). The place of the hearing may be moved from time-to-time, to the end that all available evidence be received. For example, where a civilian witness refuses to travel at his own expense, the IO, 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 IO reduces the substance of the testimony to writing. An alternative to this procedure, used at many commands, is to detail a reporter to make a verbatim transcript of the pretrial investigation. This procedure provides a means of preserving pretrial investigation testimony for possible use at trial. *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 IO to submit a written report of the investigation to the officer who directed the investigation. This report should include the following elements:

a. A statement of names, organizations, or addresses of 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, including any stipulated testimony;

c. any other statements, documents, or matters considered by the IO, or recitals of the substance or nature of such evidence;

d. a statement of any reasonable grounds for belief that the accused was not mentally responsible for the offense or was not competent to participate in the defense during the investigation;

e. a statement whether the essential witnesses will be available at the time anticipated for trial and the reasons why an essential witness may not be then available;

f. an explanation of any delays in the investigation;

g. the IO's conclusion whether the charges and specifications are in proper form;

h. the IO's conclusion whether reasonable grounds exist to believe that the accused committed the offenses alleged; and

i. the recommendations of the IO, including disposition.

2. The report may be made using appendix 5 of the *Manual for Courts-Martial*. In addition, the IO may prefer charges and attach a charge sheet, if appropriate.

3. ***Distribution of the report.*** The IO will ensure that the report is forwarded to the commander who ordered the investigation. That commander shall promptly cause a copy of the report to be delivered to each accused. R.C.M. 405(j)(3).

F. ***Defects in the article 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 of the proceedings." Upon a showing of prejudice, the military judge may adjourn the trial to permit additional pretrial investigation to cure the defect or may grant other appropriate relief. Objections based on inadequacy of the pretrial investigation must ordinarily be made prior to pleas, or are waived. 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). *See also United States v. Stockman*, 43 M.J. 856 (N.M. Ct. Crim. App. 1996), *and United States v. Burfitt*, 43 M.J. 815 (A.F. Ct. Crim. App. 1996).

1. ***Time of objection.*** The accused may preserve the right to gain relief from any error at the pretrial investigation by making an objection to the IO promptly upon discovery of the alleged 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 IO by failure to object at the investigation); *United States v. Mickel*, 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 IO'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 IO during the investigation, notations of such objections should be in the IO's report if a party so requests. 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, supra*, (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 article 32 investigation concerning his alleged offenses. Thus, it was error to proceed over the defense objection to this substantial defect despite the fact that there was no substantial prejudice. The court also held that failure to object to the fact that two additional charges were never investigated constituted waiver. Note also that, if timely objection is made, the accused is entitled to relief without regard to whether prejudice has been shown. "This Court again must emphasize that an accused is entitled to enforcement of his pretrial rights without regard to whether such enforcement will benefit him at trial." *United States v. Chestnut, supra*, at 85 n.4.

2003 THE ARTICLE 34 STAFF JUDGE ADVOCATE'S ADVICE (MILJUS Key Number 927-930)

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 IO, 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. 399 (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 discussion portion of R.C.M. 406(b) states:

> The advice need not set forth the underlying analysis or rationale for its conclusions. Ordinarily, the charge sheet, forwarding letter and indorsements, and reports of investigation are forwarded with the pretrial advice. In addition, the pretrial advice should include when appropriate: a brief summary of the evidence; discussion of significant aggravating, extenuating, or mitigating factors; and any previous recommendations, by commanders or others who have forwarded the charges, for disposition of the case. However, there is no legal requirement to include such information and failure to do so is not error.

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. See also R.C.M. 905 (b)(1).

3. ***Standard.*** The standard used to determine the sufficiency of the evidence is probable cause. R.C.M. 406. This standard was set out in *United States v. Engle*, 1 M.J. 387 (C.M.A. 1976) before it was set forth in the MCM. In *Engle*, supra, the court concluded that the appropriate standard is that degree of proof which would

convince a reasonable, prudent person that there is probable cause to believe a crime was committed and the accused committed it. *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)(2)(B). *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 article 34 advice, such objection is normally waived by a subsequent plea of guilty. This is in accordance with the rule that a plea of guilty waives all defects that relate to the accused's guilt or innocence. *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 article 34 advice on the ground that the one upon which the convening authority had already referred the matter to trial by GCM contained a material misstatement of the evidence and omitted mention of other matters that could have affected the judgment of the convening authority in making his decision to refer the case to court-martial. When the motion was denied, the accused entered a plea of guilty on all charges and specifications. The Navy-Marine Corps Court of Military Review did not address the matter of alleged waiver of the defect by virtue of the guilty plea. Reversing the N.M.C.M.R., the C.M.A. stated:

> [t]he doctrine [of waiver of the defect in the art. 34 advice]] is inapplicable. The inadequacies the defense perceived . . . related not only to the question of accused's guilt, but also to whether the convening authority should refer the charges to trial before a general court-martial, with its extensive sentencing power. . . . A plea of guilty may indicate a willingness to disregard an error in the proceedings that might otherwise have affected findings of guilty as to offenses covered by the pleas, but it does not signify surrender of an objection to the validity of findings not predicated upon a plea of guilty or as to sentence. . . . Consequently, the accused's plea . . . did not foreclose

review of all material aspects of accused's assignment of error.

United States v. Engle, supra, at 388. See also *United States v. Collins,* 3 M.J. 518 (A.F.C.M.R. 1977) limiting *Engle, supra.*

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.

2004 ARTICLE 32 / 34 CHECKLIST

– ***Article 32 investigation.*** (See R.C.M. 405, 406; JAGMAN § 0908; and UCMJ, Arts. 32-34.)

1. Obtain service record from personnel or PSD.

2. Establish liaison with local NLSO regarding pending charges and obtain name of article 32 investigating officer.

3. Draft charges on DD Form 458. Complete charge sheet through block IV only; ***do not*** refer charges.

4. Prepare the appointing order for the article 32 investigating officer.

5. Make sufficient copies of charge sheet and appointing order for distribution to all necessary parties and one copy for the command files. The original appointing order will be attached to the investigation; it is not kept in the command files.

6. Forward the charge sheet, appointing order (and the copies of each), plus the service record and any investigative reports, to the NLSO.

7. After receipt of the completed article 32 investigation and the IO's report, forward to your CO for a determination as to disposition.

8. If a GCM is desired, forward service record, the investigation, and IO's report to the GCM authority requesting the appropriate action.

2005 CHECKLIST FOR ARTICLE 34 ADVICE / REFERRAL OF CHARGES

A. Upon receipt of a request for a GCM by a summary or SPCMCA, review the service record and investigation.

B. Prepare the advice and recommendation concerning the charges for the flag officer per Article 34, UCMJ, and R.C.M. 406, MCM, 1984.

C. If the flag officer agrees to refer the charge(s) to a GCM, then prepare block V of the charge sheet (DD Form 458).

D. Prepare a list of possible members, so the CA may pick the panel, and prepare the convening order for signature.

E. After referral, serve the accused with a copy of the charges and note this on the charge sheet.

F. Prepare sufficient copies of the charge sheet and convening order for distribution to all parties. Retain the original convening order and send a certified copy with the original charge sheet for inclusion in the record of trial.

G. Copy the enlistment contract and pages 1, 2, 4, 5, 7, 9 (and any page 13's relating to NJP's or disciplinary matters) and enlisted evaluations. These may be needed for preparation of the CA's action if the accused is convicted.

H. Forward the service record, charge sheet, article 34 advice, IO's report with the investigation, and any other investigative reports to the NLSO for action.

I. Contact the accused's command for a bailiff and other requirements for the accused in case he / she is confined (sea bag, pay record, health record, etc.).

J. Prepare a confinement order and TEMADD orders in case the accused is confined.

APPENDIX A

SAMPLE APPOINTING ORDER FOR ARTICLE 32 PRETRIAL INVESTIGATION

DEPARTMENT OF THE NAVY
Naval Justice School
360 Elliot St.
Newport, Rhode Island 02841-1523

22 Aug 19CY

In accordance with R.C.M. 405, MCM, 1984, Lieutenant Commander Pretrial I. Officer, JAGC, U.S. Navy, is hereby appointed to investigate the attached charges preferred against Seaman Watt A. Accused, U.S. Navy. The charge sheet and allied papers are appended hereto. The investigating officer will be guided by the provisions of R.C.M. 405, MCM, 1984, and current case law relating to the conduct of pretrial investigations. In addition to the investigating officer hereby appointed, the following personnel are detailed to the investigation for the purposes indicated:

COUNSEL FOR THE GOVERNMENT

Lieutenant I. Will Convictim, JAGC, U.S. Navy, certified in accordance with Article 27(b), Uniform Code of Military Justice;

DEFENSE COUNSEL

Lieutenant I. Gettum Off, JAGC, U.S. Naval Reserve, certified in accordance with Article 27(b), Uniform Code of Military Justice.

CONVENING T. AUTHORITY
Captain, JAGC, U.S. Navy
Commanding Officer
Naval Justice School
Newport, Rhode Island

DEPARTMENT OF THE NAVY
Naval Justice School
360 Elliot St
Newport, Rhode Island 02841-1523

2 Sep 19CY

FIRST ENDORSEMENT on LCDR Pretrial I. Officer, JAGC, USN, Investigating Officer's Report of 30 Aug CY

From: Commanding Officer, Naval Justice School
To: Commander, Naval Education and Training Center, Newport

Subj: ARTICLE 32 INVESTIGATION ICO SEAMAN WATT A. ACCUSED, U.S. NAVY, 123-45-6789

1. Forwarded.

2. Recommend trial by general court-martial.

CONVENING T. AUTHORITY

APPENDIX B

SAMPLE ARTICLE 34 LETTER

MEMORANDUM

From: Staff Judge Advocate
To: Commander, Naval Education and Training Center, Newport

Subj: ADVICE AND RECOMMENDATIONS CONCERNING THE CHARGES AGAINST SEAMAN WATT A. ACCUSED, U.S. NAVY, 123-45-6789

Ref: (a) Article 32, UCMJ
(b) R.C.M. 406, MCM, 1984

Encl: (1) Charge sheet
(2) Article 32 investigation w/ fwd ltr CO, NAVJUSTSCOL

1. Per reference (a), an investigation has been conducted into the following charge and specification against Seaman Watt A. Accused, U.S. Navy, 123-45-6789.

Charge and Specification: See enclosure (1).

2. The charge and specification have been forwarded with a recommendation for trial by general court-martial by Commanding Officer, Naval Justice School, Newport, Rhode Island. The investigating officer, Lieutenant Commander Pretrial I. Officer, JAGC, U.S. Navy, recommended trial by general court-martial of the charge and specification. The investigation was conducted on 30 August 19CY. The pretrial investigation report and forwarding letter, dated 2 September 19CY, are attached [enclosure (2)].

3. Per reference (b), the following advice concerning the charge and specification is furnished:

a. The investigation was conducted in substantial compliance with reference (a). The evidence consisted of one government exhibit received into evidence.

b. The specification alleges an offense under the UCMJ.

c. The allegations in the specification are warranted by the evidence adduced at the investigation.

d. Court-martial jurisdiction has been established over the accused and the offense.

Subj: ADVICE AND RECOMMENDATIONS CONCERNING THE CHARGES AGAINST SEAMAN WATT A. ACCUSED, U.S. NAVY, 123-45-67894.

Discussion of the charge and specification:

a. Elements:

(1) That the accused, on or about 1 June 19CY, absented himself from his organization, that is, Naval Justice School, Newport, Rhode Island;

(2) that he remained so absent until 18 August 19CY;

(3) that the absence was without authority from anyone competent to give him leave;

(4) that the accused intended at the time of absenting himself, or at some time during his absence, to remain away permanently from his organization; and

(5) that the accused's absence was terminated by apprehension.

b. Discussion of proof:

(1) IO Exhibit (2), a true copy of a NAVPERS 1070/606 (Record of Unauthorized Absence) from the service record of the accused, provides evidence which establishes probable cause to believe that, on or about 1 June 19CY, the accused absented himself from his organization, to wit: Naval Justice School, Newport, Rhode Island; that he remained so absent until 18 August 19CY; that the absence was without authority from anyone competent to give him leave; and that the absence was terminated by apprehension. The intent of the accused to remain away permanently can be inferred from the length of the absence (78 days), and the accused's apprehension in Tucson, Arizona, some distance from Newport, Rhode Island.

(2) If the intent of the accused to remain away permanently is not proved beyond a reasonable doubt, the accused may be found guilty of a lesser included offense of unauthorized absence in violation of Article 86, UCMJ.

(3) The statute of limitations, for both article 85 and article 86, is five years. The receipt of the preferred charges by Commanding Officer, Naval Justice School, Newport, Rhode Island, on 20 August 19CY, has tolled the running of the statute of limitations and this issue is moot.

4. Maximum authorized punishment:

a. Dishonorable Discharge, confinement for 3 years, forfeiture of all pay and allowances, and reduction to E-1, in the event the accused is convicted of a violation of Article 85, UCMJ.

Subj: ADVICE AND RECOMMENDATIONS CONCERNING THE CHARGES AGAINST SEAMAN WATT A. ACCUSED, U.S. NAVY, 123-45-6789

b. Dishonorable Discharge, confinement for 1 year 6 months, forfeiture of all pay and allowances, and reduction to E-1, in the event the accused is convicted of a violation of Article 86, UCMJ.

5. Additional information relative to case:

a. A review of the accused's service record reflects the following misconduct resulting in disciplinary action:

CO's NJP - 14 Jan CY - Violation of Article 86, UCMJ, UA from 15 Oct CY(-1) to 23 Dec CY(-1).

AWARDED: 15 days restriction, 15 days extra duty, and forfeiture of $50.00 pay per month for one month.

b. The accused is 24 years of age, single, and enlisted in the U.S. Navy on 1 January 19CY(-1), for a period of 4 years. His GCT is 45, his ARI is 53, and he completed the 12th grade of school. His average performance marks are 3.4. He is entitled to no awards, medals, or decorations.

6. In summary, my advice is that there has been substantial compliance with reference (a), the specification alleges an offense under the Code and the allegations in the offense are warranted by the evidence contained in the investigation. I recommend the charge and specification be referred to trial by general court-martial.

7. You may indicate your agreement or disagreement with the foregoing in the place provided below. If you agree with the advice and recommendation herein, you should sign the referral to trial on page two of the Charge Sheet (DD Form 458) [enclosure (1)].

R. U. GUILTY

APPROVED / DISAPPROVED

PROCEDURE STUDY GUIDE

INDEX

THE NAVY LAWYER

The Judge Advocate General's Corps was formed 8 December 1967 and is the newest of the Navy's Staff Corps. The distinctive insignia of the JAG Corps is shown above.

SYMBOLISM

The oak leaf, denoting a corps, symbolizes strength, particularly the strength of the hulls of ships of the early American Navy which were oak timbered. Such ships were often referred to as having "hearts of oak."

In this device the two counterbalancing oak leaves are identical and connote the scales upon which justice is weighed.

Surmounted between these two oak leaves is a "Mill Rinde" sometimes referred to as a fer-de-molline. The "Mill Rinde" is an instrument which over the centuries has been centered in the lower of the two mill stones. Its purpose is to bear and guide the upper mill stone equally and directly in its course — to prevent it from inclining too much on either side to minister to every part equally. Bossewell in 1572 in his "Works of Armorie" writes that a form of this device "might conveniently be assigned and given to Judges, Justices and to such others, who have jurisdiction of the law, as a sign, or token for them to bear in their arms. That is to say, as the aforesaid instrument is there placed, to direct the mill stone equally, and without guile, so all judges are 'bounden' and 'tied in conscience', to give equally to every man, that which is his right". Other heraldry authorities universally support this concept.

Fifteen such mill rindes are inscribed on the shield of Lincoln's Inn in allusion to the allegory of equal justice. Lincoln's Inn is one of the four Inns of Court to which members of the legal profession in England are admitted. The mill rinde thus acquired the connotation of advocacy at least six centuries ago.