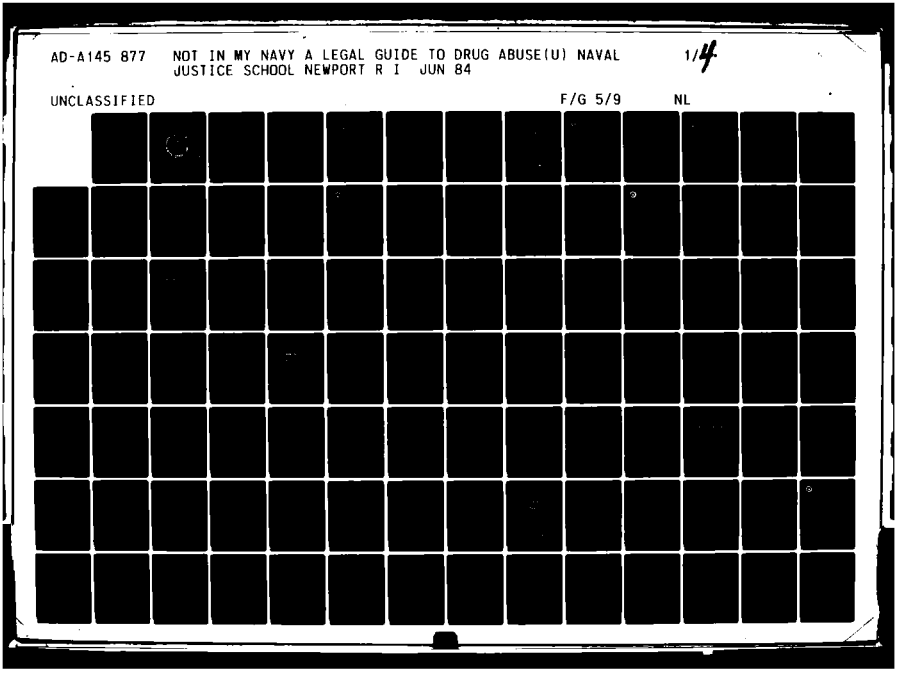
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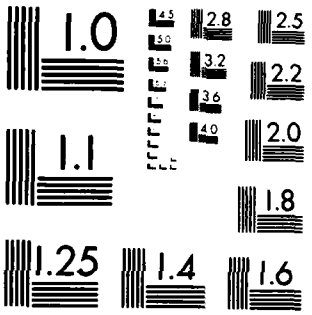

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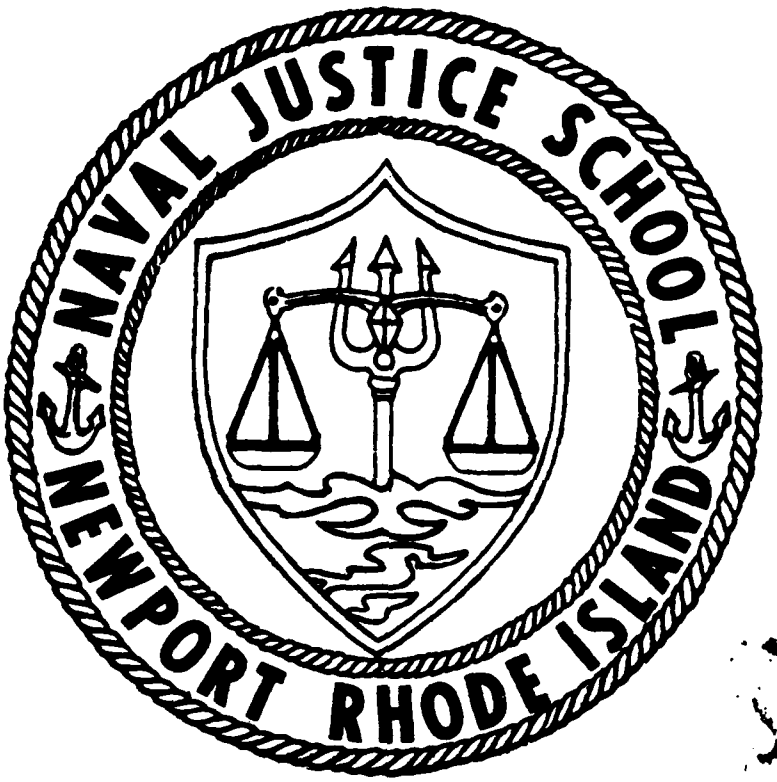
NOT IN MY NAVY



A LEGAL GUIDE TO DRUG ABUSE

Supersedes 6/84

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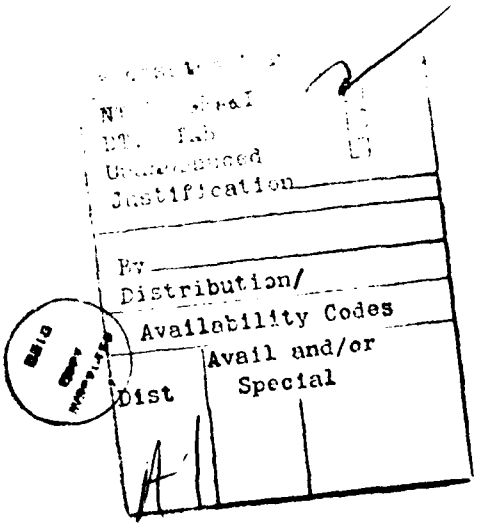

INTRODUCTION

INTRODUCTION

"Not in My Navy" are the words used by the Chief of Naval Operations to describe the Navy policy on drug abuse. "Standby" is used by the Commandant of the Marine Corps. These succinct statements do not reflect a new direction for the naval service, since the elimination of illicit drugs and drug abusers from the naval establishment has always been the goal of Navy and Marine commanders. What is new is the emphasis on deterrence, command involvement, and expeditious action. This realignment of priorities places the commander in a somewhat difficult position, for, although the commander must expeditiously implement the many new directives aimed at resolving the "drug problem," he must simultaneously comply with the myriad of legal rules and regulations that govern each of them. This publication is designed to aid the commander in that task. Overall, it is believed that the new policy emphasis is as consistent with good order and discipline as it is with "pride and professionalism." Adherence to the one will do no violence to the other.

There are thirteen sections and one appendix in this handbook. The first contains a list of recently issued policy directives that provide the basis for an understanding of the Navy and Marine Corps drug programs. The second provides a brief analysis of the various options available to commanders when handling drug problems. Section three identifies the common drugs with which servicemembers become involved and describes the short and long-term effects each drug has on the abuser. At the end of the section is a chart which is a compendium of the common drugs and their effects. The fourth section describes the enigma who is a drug abuser by explaining the common symptoms manifested in the drug abuser by the drug. The fifth section introduces the reader to a simplified discussion of drug chemistry and the common tests utilized to identify the particular type of drug. The sixth section presents an overview of the substantive law of drug offenses under the Uniform Code of Military Justice and the theories of prosecution and defense. Jurisdiction, the power of courts to hear and decide cases, is the subject covered in section seven. Section eight sets forth the considerations that must be taken into account when pleading drug offenses (i.e., drafting charges and specifications). The section also gives several samples of the various ways by which drug offenses can be properly plead. The ninth section deals with the specifics of the urinalysis programs utilized by the naval service to identify and deter drug abusers. Within this section is a chart setting forth the uses to which the results of urinalysis can be put. Section ten summarizes the law of search and seizure as it relates to drug enforcement and provides some checklists/forms for use during any practical application of the law. Section eleven discusses Self-Referral Rehabilitation. Section twelve discusses the administrative procedures by which the commander can dispose of drug abuse problems outside the disciplinary/judicial system. Section thirteen is a chart which summarizes command options in connection with the urinalysis program. The appendix consists of an excerpt from the Army Publication Trial Forum that explains laboratory drug standards. Additionally, a short list of persons who are experts in drug cases is provided in the appendix.

It is extremely important that the user of this handbook recognize that the policy directives contained herein are current only as of the date of the distribution of the handbook. Additionally, it should be recognized that the other matters, particularly the analysis of the law and its interrelationship with the various policies and directives, are subject to constant change by the courts and the military departments. Therefore, while this handbook will provide a basis for the beginning of the decision-making process, it should be supplemented with up-to-date advice from your local Naval Legal Service Office and Staff Judge Advocate.

POLICY AND REFERENCES

SECTION I

March 16, 1983
NUMBER 1010.1

ASD(HA)

Department of Defense Directive

SUBJECT: Drug Abuse Testing Program

REFERENCES: (a) DoD Instruction 1010.1, "Department of Defense Drug Abuse Testing Program," April 4, 1974 (hereby canceled)
(b) DoD Directive 1010.4, "Alcohol and Drug Abuse by DoD Personnel," August 25, 1980
(c) through (ee) see enclosure 1

A. PURPOSE

1. This Directive replaces reference (a) and, consistent with reference (b), establishes policy for drug abuse urinalysis programs for military personnel; provides guidelines for the use of urinalysis results; outlines testing methodologies, laboratory operation, and quality control; establishes the DoD Biochemical Testing Advisory Committee; assigns responsibilities, and prescribes procedures.

2. This Directive cancels references (c) through (z).

B. APPLICABILITY

This Directive applies to the Office of the Secretary of Defense and the Military Departments. The term "Military Services," as used herein, refers to the Army, Navy, Air Force, and Marine Corps.

C. POLICY

It is DoD policy to use the drug abuse testing program to:

1. Preserve the health of members of the Military Services by identifying drug abusers in order to provide appropriate counseling, rehabilitation, or other medical treatment.

2. Permit commanders to assess the security, military fitness, and good order and discipline of their commands, and to take appropriate action based upon such an assessment.

D. RESPONSIBILITIES

1. The Secretaries of the Military Departments shall:

a. Operate or contract for the operation of drug testing laboratories with enough capacity to meet their drug testing requirements.

b. Arrange for interservice regional use of testing facilities to the maximum extent feasible.

2. The Assistant Secretary of Defense (Health Affairs) (ASD(HA)) shall oversee testing methodology and quality control of the drug abuse screening laboratories.

3. The Secretary of the Army shall coordinate the quality control functions of each laboratory, through the Armed Forces Institute of Pathology (AFIP).

E. PROCEDURES

1. Guidelines for Use of Urinalysis

a. Mandatory urinalysis testing for controlled substances may be conducted in the following circumstances:

(1) Inspection. During inspections performed under Military Rule of Evidence 313 (reference (bb)).

(2) Search or Seizure. During a search or seizure action under Military Rules of Evidence 311-317.

(3) As part of one of the following examinations:

(a) A command-directed examination or referral of a specific servicemember to determine the servicemember's competency for duty and the need for counseling, rehabilitation, or other medical treatment when there is a reasonable suspicion of drug abuse. Such examinations are permissible under Military Rule of Evidence 312(f).

(b) An examination in conjuction with a servicemember's participation in a DoD drug treatment and rehabilitation program. Such examinations are permissible under Military Rules of Evidence 312(f) and 313.

(c) An examination authorized by a rule of the Department of Defense or a Military Department regarding a mishap or safety investigation undertaken for the purpose of accident analysis and the development of countermeasures. Such examinations are permissible under Military Rules of Evidence 312(f) and 313.

(4) Any other examination ordered by medical personnel for a valid medical purpose under Military Rules of Evidence 312(f) including emergency medical treatment, periodic physical examinations, and such other medical examinations as are necessary for diagnostic or treatment purposes.

b. Although the DoD drug testing program is designed for specific administrative purposes, the use of urinalysis results in disciplinary or administrative proceedings is permitted except as otherwise limited in the Military Rules of Evidence, this Directive, or rules issued by the Department of Defense or the Military Departments.

2. Limitations on Use of Urinalysis Results

a. Results obtained from urinalysis performed under subparagraph [redacted], above, may not be used against the servicemember in actions under [redacted] (reference (aa)) or on the issue of characterization of service in separation proceedings.

b. A servicemember's voluntary submission to a DoD treatment and rehabilitation program, and voluntarily disclosed evidence of prior personal drug use by the member as part of a course of treatment in such a program, may not be used against the member in an action under reference (aa) or on the issue of characterization of service in a separation proceeding.

c. Records of the identity, diagnosis, prognosis, or treatment of any rehabilitee that are maintained in connection with the performance of any drug abuse rehabilitation program conducted, regulated, or directly or indirectly assisted by any department or agency of the United States may not be introduced against the rehabilitee in a court-martial except as authorized by a court order issued under the standards set forth in 21 U.S.C. 1175(b)(2)(c) (reference (ee)).

d. The limitations in paragraphs 2.a., b., and c., above, do not apply to:

(1) The introduction of evidence for impeachment or rebuttal purposes in any proceeding in which the evidence of drug abuse (or lack thereof) has been first introduced by the servicemember.

(2) Disciplinary or other action based on independently derived evidence, including evidence of continued drug abuse after initial entry into a treatment and rehabilitation program.

3. Collection and Transportation of Urine Specimens. All urinalysis specimens shall be collected and transported under the chain of custody procedures outlined in enclosure 2.

4. Portable Urinalysis Equipment. All positive drug screening results from portable urine testing equipment shall be considered preliminary until confirmed by gas liquid chromatography or gas chromatography/mass spectrometry at a drug testing laboratory or by admission of the servicemember. Preliminary results that are not confirmed as positive may not be used against a servicemember in disciplinary proceedings or as the basis for administrative separation.

5. Laboratory Procedures. The policy pertaining to the operation of drug urinalysis laboratories is described in enclosure 3.

6. Laboratory Certification. Certification of an individual laboratory is dependent on maintaining AFIP quality control standards and on submitting required reports in a timely manner. Failure to meet either of these two requirements may result in decertification.

7. Contract Laboratories. Contractual arrangements with civilian drug testing laboratories are permitted, providing such laboratories become incorporated into the AFIP quality control program, meet and maintain DoD certification and quality control standards, and conform to the chain of custody requirements for all specimens analyzed (see enclosure 2).

F. DoD BIOCHEMICAL TESTING ADVISORY COMMITTEE

1. Organization and Management

a. The DoD Biochemical Testing Advisory Committee is hereby established to advise the Deputy Assistant Secretary of Defense (Drug and Alcohol Abuse Prevention) (DASD(DAAP)) on technical matters pertaining to the DoD biochemical testing program for drug and alcohol abuse.

b. The Committee shall be composed of one member each from the Army, Navy, and Air Force, preferably from the staffs of the Surgeons General, one member from the DoD Office of Drug and Alcohol Abuse Prevention who shall serve as committee chairman, one member from the AFIP, and any other members as designated by the DASD(DAAP).

2. Functions. The Committee shall make recommendations to the DAS' 'P) on the following:

a. Standardized laboratory methodology for screening and con' ation testing.

b. New technology for the identification of drug and alcohol abusers.

c. Appropriate quality control procedures for drug testing laboratories.

d. Procedures and standards for the certification, decertification, and recertification of laboratories.

e. Applied research projects to improve the effectiveness of the DoD drug and alcohol abuse biochemical testing program.

G. EFFECTIVE DATE AND IMPLEMENTATION

1. This Directive is effective immediately. Forward two copies of implementing documents to the Assistant Secretary of Defense (Health Affairs) within 120 days.

Paul Thayer
PAUL THAYER
Deputy Secretary of Defense

Enclosures - 3
1. References
2. Chain of Custody Procedures for Collecting, Handling, and Testing Urine Samples for Drug Detection Urinalysis
3. Laboratory Procedures

REFERENCES, continued

(c) Assistant Secretary of Defense (Health and Environment)(ASD(H&E)) Memorandum "Forensic Use of DoD Drug Testing Laboratories," February 5, 1973 (hereby canceled)
(d) ASD(H&E) Memorandum, "Statistical Comparability of Drug Testing Laboratory Results," May 10, 1974 (hereby canceled)
(e) Deputy Assistant Secretary of Defense (Drug and Alcohol Abuse) Memorandum, "Drug Testing Laboratories Cutoff Levels," May 30, 1974 (hereby canceled)
(f) ASD(H&E) Memorandum, "Authority to Direct Urinalysis for Drug Abuse Detection," November 18, 1975 (hereby canceled)
(g) Assistant Secretary of Defense (Health Affairs)(ASD(HA)) Memorandum, "Forensic Use of the Department of Defense Drug Testing Laboratories," June 16, 1976 (hereby canceled)
(h) ASD(HA) Memorandum, "Department of Defense Drug Abuse Testing Program," August 30, 1976 (hereby canceled)
(i) ASD(HA) Memorandum, "Radioimmunoassay Cutoff Levels for Urinalyses Conducted in Drug Testing Laboratories," May 2, 1977 (hereby canceled)
(j) ASD(HA) Memorandum, "Radioimmunoassay Cutoff Levels for Urinalyses Conducted in Drug Testing Laboratories," June 14, 1978 (hereby canceled)
(k) ASD(HA) Memorandum, "Discontinuance of Urine Test Screening of Officer Accessions," December 20, 1978 (one version to Army and Navy, and one version to Air Force) (both hereby canceled)
(l) ASD(HA) Memorandum, "Drug Detection Urinalysis Laboratory Points of Contact," January 10, 1979 (hereby canceled)
(m) ASD(HA) Memorandum, "Radioimmunoassay Cutoff levels for Urinalyses Conducted in Drug Testing Laboratories," September 21, 1979 (hereby canceled)
(n) Deputy Secretary of Defense (DEPSECDEF) Memorandum, "DoD Policy Regarding Cannabis Use," November 5, 1979 (hereby canceled)
(o) ASD(HA) Memorandum, "Confirmation of Drug Abuse," December 28, 1979 (hereby canceled)
(p) ASD(HA) Memorandum, "Urinalysis for Drug Abuse Detection," January 7, 1980 (hereby canceled)
(q) ASD(HA) Memorandum, "Exempting Commissioned Officers Assigned to Alcohol and Drug Abuse Treatment Staffs from Mandatory Urine Testing," April 1, 1980 (hereby canceled)
(r) ASD(HA) Memorandum, "Cocaine Abuse," April 21, 1980 (hereby canceled)
(s) ASD(HA) Memorandum, "Entry on Active Duty (EAD) Urinalysis," July 11, 1980 (hereby canceled)
(t) ASD(HA) Memorandum, "Entry on Active Duty (EAD) Urinalysis," July 31, 1980 (hereby canceled)
(u) ASD(HA) Memorandum, "Drug Testing for Cocaine," April 9, 1981 (hereby canceled)
(v) ASD(HA) Memorandum, "Urine Testing for Cannabis in the Department of Defense," August 28, 1981 (hereby canceled)
(w) DEPSECDEF Memorandum, "Alcohol and Drug Abuse," December 28, 1981 (hereby canceled)
(x) ASD(HA) Memorandum, "Chain of Custody Procedures," April 19, 1982 (hereby canceled)
(y) DEPSECDEF Memorandum, "Drug Testing in the Department of Defense," August 6, 1982 (hereby canceled)
(z) ASD(HA) Memorandum, "Department of Defense Laboratory Committee for Drug Abuse Testing," August 11, 1982 (hereby canceled)

(aa) Title 10, United States Code, Chapter 47 (Uniform Code of Military Justice)
(bb) Manual for Courts-Martial, Military Rules of Evidence, 311-317
(cc) DoD Directive 1332.14, "Enlisted Administrative Separations," January 28, 1982
(dd) DoD Directive 1332.30, "Separation of Regular Commissioned Officers for Cause," October 15, 1981
(ee) Title 21, United States Code, 1175(b)(2)(c)

CHAIN OF CUSTODY PROCEDURES FOR COLLECTING, HANDLING, AND TESTING URINE SAMPLES FOR DRUG DETECTION URINALYSIS

A. GENERAL

1. Chain of custody procedures are designed to ensure accuracy in referral of servicemembers for counseling and rehabilitation programs, and to ensure that commanders are provided with an accurate assessment of the military fitness of the command. Such procedures also ensure that any incidental use of urinalysis results in other proceedings will be based upon reliable procedures.

2. The individual directing that a urine test be conducted shall identify, as appropriate, the servicemember, work group, unit (or part thereof) to be tested. A responsible individual, such as the alcohol and drug coordinator or the base or unit urine test program monitor, shall be assigned to coordinate urine collection.

B. PREPARATION OF SPECIMEN BOTTLES

1. The urinalysis program coordinator shall:

a. Ensure that appropriate specimen bottles are used and that each is properly prepared.

b. Ensure that each bottle has a gummed label affixed to it on which the coordinator shall record the date, specimen number, and any additional identifying information required by each Military Service.

c. Maintain a ledger documenting the above identifying information and the servicemember's name and social security number, and the name of the designated observer (subsection C.2., below).

2. The servicemember submitting the specimen shall verify all identifying information by signing the ledger and initialing the label on the bottle.

C. COLLECTION OF SPECIMENS

1. The urinalysis program coordinator shall:

a. Ensure that each specimen is collected under the direct observation of a designated individual of the same sex as the servicemember providing the specimen.

b. Ensure that a minimum volume of 60 milliliters is collected.

c. Initial the label on the bottle as verification of receipt and shall annotate appropriate chain of custody documents.

2. The observer shall ensure that the specimen is not contaminated or altered in any way.

D. TRANSPORTATION OF SPECIMENS

1. The urinalysis coordinator shall:

a. Ensure that specimens are shipped in appropriate specimen boxes or padded mailers.

b. Ensure that each container is securely sealed.

c. Sign and date each container across the tape sealing the top and bottom.

d. Ensure that chain of custody documentation is attached to each sealed container.

e. Ensure that an outer mailing wrapper is placed around each sealed container.

2. Containers shall be shipped expeditiously by registered mail, Military Airlift Command transportation system, commercial air freight or air express. Specimens also may be handcarried.

E. LABORATORY HANDLING

1. Each Military Department shall ensure that each of its drug testing laboratories establishes internal laboratory chain of custody procedures.

2. Testing results shall be annotated on appropriate forms. Completed laboratory results forms, chain of custody documents, intralaboratory chain of custody documents, and the gas chromatograph tracings of all reported positive specimens, or copies of the above, shall remain on file in the drug testing laboratory for a minimum of 1 year.

3. Military Service regulations may provide for the prompt forwarding of the completed original (or certified copy of) chain of custody and laboratory results documents, intralaboratory chain of custody documents, or alternatively, retention of this documentation by the drug testing laboratory for a period of at least 1 year, to be promptly forwarded to the originating command or other proper authority, upon request, when required for administrative or disciplinary action.

LABORATORY PROCEDURES

A. GENERAL

1. Standardized drug testing methodologies, procedures, and criteria shall be maintained in all drug testing laboratories operated by or for the Department of Defense.

2. In all cases two independent methodologies are required to confirm the presence of a drug, or its metabolite, in a urine specimen before a report of a positive finding is released to the originating unit.

B. DRUGS TESTED

The determination of which drugs shall be tested by each laboratory shall be made on the basis of drug use patterns. Since this will change periodically, requirements shall be established by ASD(HA) memoranda.

C. CHAIN OF CUSTODY

All urine specimens shall be processed under chain of custody procedures. Each laboratory shall establish specific internal laboratory procedures which shall be subject to ASD(HA) approval as specified in enclosure 2.

D. SCREENING

All urine specimens shall be screened by either a radioimmunoassay or an enzyme immunoassay process. Screening sensitivity levels shall be established by ASD(HA) memoranda.

E. CONFIRMATION

All specimens screened positive by an immunoassay process shall be tested by gas liquid chromatography for confirmation. Either flame ionization, nitrogen phosphate, or mass spectrometer detection systems may be used.

F. REPORTING

Confirmed positive results shall be reported either by message or telephone to the originating unit within 5 working days of receipt of a batch of specimens. This report shall state that the balance of the specimens in the batch were negative. Service regulations may require written followup reporting.

G. DISPOSITION OF SPECIMENS

1. Urine specimens which test negative shall be discarded.

2. Urine specimens that are not consumed in the testing proces and that are confirmed positive shall be retained in a frozen state for a period of 60 days following the report required in section F., above. If the urinalysis result is used in a court-martial or administrative proceeding, the unit shall request that the specimen be retained at least until the trial or hearing is

complete. This does not require retention during review proceedings, but such additional retention requirements may be established by the the Military Departments.

H. QUALITY CONTROL

1. At intervals set by the Secretary of the Army, acting as executive agent for quality control, the Director, AFIP, shall provide laboratory quality control reports for the use of the Military Departments and the Office of the DASD(DAAP) in determining laboratory proficiency.

2. Each of the other Military Departments shall support, as necessary, the Army's function of quality control agent for the Military Departments' testing programs.

August 25, 1980
NUMBER 1010.4

Department of Defense Directive

ASD(HA)

SUBJECT: Alcohol and Drug Abuse by DoD Personnel

References: (a) Public Law 92-255 (86 Stat 65), as amended
(b) Public Law 91-616 (84 Stat 1848), as amended
(c) Public Law 92-129 (85 Stat 361), as amended
(d) Federal Personnel Manual Supplement 792-2, Feb 1980
(e) through (i), see enclosure 1

A. PURPOSE

1. This Directive states the DoD alcohol and drug abuse prevention policy, and implements the standards contained in references (a) through (d).

2. In addition, this Directive establishes policy concerning drug abuse paraphernalia.

B. APPLICABILITY

The provisions of this Directive apply to the Office of the Secretary of Defense, the Military Departments, the Organization of the Joint Chiefs of Staff, the Unified and Specified Commands, and the Defense Agencies. The term "Military Services" includes the Army, Navy, Air Force, and Marine Corps.

C. DEFINITIONS

The following definitions are for operational use within the Department of Defense. They do not change definitions in statutory provisions and those regulations and directives that are concerned with determination of misconduct and criminal or civil responsibilities for persons' acts or omissions.

1. Alcohol and Drug Abuse. The use of alcohol and/or other drugs to an extent that it has an adverse effect on the user's health or behavior, family, community, or the Department of Defense and/or the illegal use of such substances.

2. Drug Trafficking. The illegal or wrongful introduction of drugs into a military installation, with the intent of selling or transferring the drugs; or the illegal or wrongful sale, transfer, or distribution of drugs as they are listed in current schedules of the Controlled Substances Act (reference (e)).

3. Alcohol and Drug Dependence. The reliance on alcohol and/or other drugs following administration on a periodic or continuing basis. Dependence may be psychological or physical, or both.

a. Psychological Dependence. The craving for the mental or emotional effects of a drug that manifests itself in repeated use and leads to a state of impaired capability to perform normal functions.

b. Physical Dependence. An alteration or state of adaptation to a drug after repeated use that results in withdrawal symptoms when the drug is discontinued abruptly and/or the development of tolerance.

4. Drug Abuse Paraphernalia. All equipment, products, and materials of any kind that are used, intended for use, or designed for use, in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of the Controlled Substances Act (reference (e)).

D. POLICY

1. It is the goal of the Department of Defense to be free of the effects of alcohol and drug abuse; of the possession of and trafficking in illicit drugs by military and civilian members of the Department of Defense; and of the possession, use, sale, or promotion of drug abuse paraphernalia. Alcohol and drug abuse is incompatible with the maintenance of high standards of performance, military discipline, and readiness. Therefore, it is the policy of the Department of Defense to:

a. Assess the alcohol and drug abuse and drug trafficking situation in or influencing the Department of Defense.

b. Not induct persons into the Military Services who are alcohol or drug dependent and not hire persons who are alcohol or drug dependent if that dependency impairs job performance.

c. Deter and detect alcohol and drug abuse within the Armed Forces and defense community and drug trafficking on installations and facilities under the control of the Department of Defense.

d. Provide continuing education and training to commanders, supervisors, program personnel, and other military members and civilian employees and their families concerning this policy and effective measures to alleviate problems associated with alcohol and drug abuse.

e. Treat or counsel alcohol and drug abusers and rehabilitate the maximum feasible number of them.

f. Discipline and/or discharge drug traffickers and those alcohol and drug abusers who cannot or will not be rehabilitated, in accordance with appropriate laws, regulations, and instructions.

g. Work in concert with national alcohol and drug abuse prevention programs, maintaining appropriate relationships with governmental and non-governmental agencies.

h. Prohibit members of the Armed Forces, and DoD civilians while on the job, to possess, sell, or use drug abuse paraphernalia.

i. Prohibit the possession or sale of drug abuse paraphernalia by DoD resale outlets to include military exchanges, open messes, and commissaries, and by private organizations and concessions located on DoD installations.

2. The Department of Defense encourages DoD Components to use, as guidance and as a legal background in addressing paraphernalia issues, the Model Drug Paraphernalia Act prepared by the Drug Enforcement Administration, at the request of the President (reference (f)).

3. Programs and standards of care promulgated in execution of this policy for military personnel shall be in compliance with P.L. 92-129 (reference (c)).

4. Programs and standards of care promulgated in execution of this policy for civilian employees shall be in compliance with P.L. 92-255, P.L. 91-616, and FPM Supplement 792-2 (references (a), (b), and (d)).

E. RESPONSIBILITIES

1. The Assistant Secretary of Defense (Health Affairs) (ASD(HA)), or designated representative, is responsible for the development, coordination, and supervision of the DoD alcohol and drug abuse prevention program, in accordance with this Directive and shall:

a. In coordination with the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics) (ASD(MRA&L)), develop and promulgate policies designed to ensure that the DoD alcohol and drug abuse prevention programs reach military members, their families, DoD civilian employees and, to the extent feasible, their families. Programs and standards of care for family members shall be consistent with those for the military and civilian components, with accepted practice in the alcohol and drug abuse area, and with applicable laws and jurisdictional limitations.

b. In coordination with the ASD(MRA&L), issue DoD instructions to implement the DoD alcohol and drug abuse prevention program, with specific attention to the functional areas of assessment, deterrence and detection, treatment and rehabilitation, and education and training.

c. Act as focal point for the Department of Defense for interagency and nongovernmental coordination of national alcohol and drug abuse prevention programs.

d. Evaluate and report upon the effectiveness and efficiency of the DoD alcohol and drug abuse prevention program.

e. Establish a DoD Alcohol and Drug Abuse Advisory Committee to advise on policy and program matters. The Committee shall include representatives of each Military Service, designated by the Military Department concerned, and such other advisors as the ASD(HA), or designated representative, considers appropriate. The Committee charter shall be approved by the ASD(HA).

2. The Secretaries of the Military Departments and Directors of Defense Agencies shall establish and operate programs prescribed by this Directive and supporting DoD instructions. They may make exceptions to the policy contained in this Directive only for legitimate medical, educational, and operational purposes. This authority shall not be delegated.

3. In addition, the Secretaries of the Military Departments shall require appropriate commanders to assess the availability of drug abuse paraphernalia in the vicinity of DoD installations through their Armed Forces Disciplinary Control Boards and in conformity with the Armed Forces Disciplinary Control Boards and Off-Installation Military Enforcement Guidance (reference (g)), and take appropriate action, as prescribed in reference (g), when the availability of drug abuse papaphernalia reveals a threat to the discipline, health, welfare, or morals of the Armed Forces.

F. EFFECTIVE DATE AND IMPLEMENTATION

This Directive is effective immediately. Forward two copies of implementing documents to the Assistant Secretary of Defense (Health Affairs) within 120 days.

W. Graham Claytor

W. Graham Claytor, Jr.
Deputy Secretary of Defense

Enclosures - 1
References

REFERENCES, continued

(e) The Controlled Substances Act, Title II, Comprehensive Drug Abuse and Control Act of 1970 (P.L. 91-513) (21 CFR 1300-1316)
(f) Modal Drug Paraphernalia Act, Drug Enforcement, March 1980, Vol 7, No 1
(g) Armed Forces Disciplinary Control Boards and Off-Installation Military Enforcement (AR 190-24, BUPERSINST 1620-4A, AFR 125-11, MCO 1620-2A, COMDINST 1620.1B)
(h) DoD Directive 1300.11, "Illegal or Improper Use of Drugs by Members of the Department of Defense," October 23, 1970 (hereby canceled)
(i) DoD Directive 1010.2, "Alcohol Abuse by Personnel of the Department of Defense," March 1, 1972 (hereby canceled)

December 5, 1980
NUMBER 1010.5

Department of Defense Instruction

ASD(HA)

SUBJECT: Education and Training in Alcohol and Drug Abuse Prevention

Reference: (a) DoD Directive 1010.4, "Alcohol and Drug Abuse by DoD Personnel," August 25, 1980

A. PURPOSE

This Instruction states the DoD education and training policy in execution of reference (a).

B. APPLICABILITY

The provisions of this Instruction apply to the Office of the Secretary of Defense, the Military Departments, the Organization of the Joint Chiefs of Staff, the Unified and Specified Commands, and the Defense Agencies. The term "Military Service" refers to the Army, Navy, Air Force, and Marine Corps.

C. DEFINITIONS

1. Training. Those teaching and learning functions that develop or improve the competence of health care professionals and paraprofessionals and those DoD personnel responsible for supervision or execution of alcohol and drug abuse prevention programs.

2. Education. Those teaching and learning functions that indoctrinate, orient, or inform personnel about the DoD alcohol and drug abuse prevention programs and resources.

3. DoD Civilian Employee. A permanent employee of the Department of Defense who is a U.S. citizen and who is paid from appropriated or nonappropriated funds.

D. POLICY

1. The Department of Defense shall educate and/or train all military commanders, military and civilian supervisors, and program personnel concerning DoD alcohol and drug abuse prevention policy and effective measures to alleviate problems associated with alcohol and drug abuse. Other military and civilian members shall also be provided appropriate alcohol and drug abuse education. To the extent feasible, education shall be offered to family members on a voluntary basis.

2. Specific education or training shall be developed for each of the following groups and shall include references to both the military and civilian aspects of the program.

a. Military Personnel

(1) At Initial Entry

(a) Enlisted Personnel. The emphasis of initial entry alcohol and drug abuse education shall be on prevention. Desired behavior, credible role models, and healthy alternatives shall be presented as well as the disciplinary, career, and health consequences of abuse. Recruits shall also be made aware of counseling and treatment resources and procedures and their responsibilities, not only to themselves but to their peers. Alcohol and drug abuse instruction shall be compatible with the indoctrination of recruits in the standards of discipline, performance, and behavior required by their particular Military Service. This education shall be completed before the recruit reports to the first permanent duty station.

(b) Officer and Warrant Officer Candidates. Education for cadets, midshipmen, and other officer and warrant officer candiates shall, in addition to (a), above, emphasize the duties and responsibilities of junior leaders in the alcohol and drug abuse prevention effort, to include their responsibilities in creating and maintaining military discipline and enforcement of the law. The causes, symptoms and prevalence of abuse, intervention and referral techniques, and post-treatment responsibilities of junior leaders shall also be addressed. Education shall be completed before commissioning or within 90 days after entry on active duty.

(c) Health Care Professionals. During initial orientation classes, training shall be conducted in the diagnosis, counseling, treatment, and referral of alcohol and drug abusers, as appropriate, and in the DoD policy regarding abuse.

(d) Program Staff. Training shall normally be conducted and completed not more than 60 days after assignment for professionals and paraprofessionals assigned to alcohol and drug abuse program staffs in those areas relevant to their specific duties.

(2) At Permanent Change of Station (PCS)

(a) Service Members (E-1 through E-4). Education shall be conducted within 60 days after each PCS and shall emphasize the legal consequences of abuse under both the Uniform Code of Military Justice and the local laws, and the alternatives to abuse available at the local installation and neighboring community.

(b) Leaders (E-5 through E-9 and Officers). Education shall be conducted within 60 days after each PCS and shall emphasize the command-unique elements of the alcohol and drug abuse program, the scope of the local alcohol and drug abuse problem, local military and civilian resources, opportunities for continuing education and training, and their responsibilities for the maintenance of military discipline and the enforcement of the Uniform Code of Military Justice.

(3) During Professional or Military Education

(a) Junior Officers (O-1 through O-3) and Noncommissioned Officers (E-5 through E-7). Education shall emphasize the responsibilities of junior leaders in the alcohol and drug abuse prevention program, with particular emphasis on deterrence and detection methods, enforcement, counseling, motivation skills, intervention and referral techniques, and methods for monitoring the progress of identified abusers in the unit.

(b) Middle Grade Officers (O-4 and O-5) and Senior Noncommissioned Officers (E-8 and E-9). Education shall emphasize the role and responsibilities of senior leaders in the function of their installation or major command's alcohol and drug abuse prevention program. Areas of particular focus shall be the influence of the senior leader's attitude about alcohol and drug abuse on subordinates, the reasons for and benefits derived from the DoD alcohol and drug abuse program, and the problem of stigma and strategies for diminishing it.

(c) Senior Grade Officers (O-6 and above). Education shall emphasize the need for vigorous command support for the alcohol and drug abuse program, the law enforcement, prevention, and performance aspects of the problem, the federal response, and the intervention techniques for senior and executive-level personnel.

(d) Health Care Personnel. Continuing education and training shall be provided for health care professionals in those areas of alcohol and drug abuse relevant to their duties. Areas of particular focus shall be intervention, diagnosis, counseling, treatment, and referral.

(e) Program Staff. Continuing education and training shall be made available for the program staff, especially for those involved in the rehabilitation process. Areas of particular focus shall be intervention, counseling, and educational techniques.

(4) After an Alcohol or Drug-Related Incident. Motivational education shall be provided for identified abusers who are not physically or psychologically dependent. Normally, education shall be conducted after duty hours and shall focus on the influence of the peer group on behavior, the identification and clarification of the attendee's attitudes and values, the impact and consequences of continued abuse, and the application of decision-making skills to resolution of the attendee's alcohol and/or drug abuse problem.

b. DoD Civilian Employees

(1) Nonsupervisors. Orientation shall be conducted on DoD policy and Military Service or DoD Component programs regarding alcohol and drug abuse within the first 6 months of initial employment by the Department of Defense. Orientation shall emphasize the legal, career, and health consequences of abuse and the counseling, treatment, and rehabilitation opportunities available.

(2) Supervisors. Orientation shall be conducted within the first 6 months after designation of supervisory responsibilities. Orientation shall emphasize the role of the supervisor in the alcohol and drug abuse prevention program, the symptoms of abuse, especially as they relate to job performance, intervention and referral techniques, and the post-treatment responsibilities of the supervisor. Continuing education shall also be made available on a regular basis by local commands, with the focus on the command-unique elements of the program and local prevention and treatment resources.

(3) Program Staff. Training shall be conducted for professionals and paraprofessionals assigned to alcohol and drug abuse program staffs in those areas relevant to their specific duties. Training shall be completed not more than 60 days after assignment. Continuing education and training shall also be made available for the program staff, especially for those involved in the rehabilitation process. Areas of particular focus shall be intervention, counseling, and educational techniques.

c. Family Members, Military and Civilian

(1) DoD Dependents School Students. Education shall be conducted annually as part of the overall health curriculum for those in grades 1 through 12.

(2) Family Members (Outside the United States). Education shall be provided on a voluntary basis and shall emphasize the local alcohol and drug abuse situation, local alcohol and drug abuse laws, counseling, treatment, and rehabilitation opportunities and procedures, and alternatives to abuse available at the local installation and neighboring community.

(3) Family Members in U.S. Locations. Education shall be offered on a voluntary basis to the extent feasible.

E. RESPONSIBILITIES

The Secretaries of the Military Departments and other Heads of DoD Components shall implement the policy in this Instruction.

F. EFFECTIVE DATE AND IMPLEMENTATION

This Instruction is effective immediately. Forward two copies of implementing documents to the Assistant Secretary of Defense (Health Affairs) within 120 days.

John H. Moxley III
Assistant Secretary of Defense
(Health Affairs)

DRUG ABUSE DIRECTIVES BIBLIOGRAPHY

DOD

DOD DIR 1010.1 of March 16, 1983

DOD DIR 1010.4 of August 25, 1980

DOD DIR 1010.5 of December 5, 1980

SECNAV

SECNAVINST 5300.28 (with ALNAV 15/82 Interim Change)	Alcohol and Drug Abuse Control
SECNAVINST 1920.6	Officer Administrative Separations
SECNAVNOTE 1920 of 30 Mar 1982	" " "
SECNAVINST 1910.4	Enlisted Administrative Separations

NAVY

OPNAVINST 5350.4	Substance Abuse Prevention and Control
BUMEDINST 6120.20	Competence for Duty Examinations
NAVMILPERSCOMINST 1910.1B	Administrative Separations Guide
MILPERSMAN 3630500	Separation of Enlisted Personnel by reason of Drug Abuse Rehabilitation Failure
MILPERSMAN 3630620	Separation of Enlisted Personnel by reason of Misconduct-Drug Abuse

MARINE CORPS

MCO 5355.1	Drug Abuse Program
MCO 5355.2	Urinalysis Testing
MCO 5355.3	Drug Exemption Program
ALMAR 246/81	Illegal Drug Use
ALMAR 32/82	Evidentiary Use of Urinalysis

MARCORSEPMAN 6208	Drug Abuse Rehabilitation Failure
MARCORSEPMAN 6210	Misconduct - Drug Abuse
MCBul 1210 of 3 Aug 82	Officer Separations - Drugs
MCBul 5355 of 28 Dec 82	Urinalysis Sample Submission Procedures
MCO P5300. - (Draft)	The Marine Corps Substance Abuse Program

Coast Guard

PERSMAN 12-B-18	Misconduct - Drug Abuse
PERSMAN 20	Drug and Alcohol Abuse Program
COMDTNOTE 5810 (ALDIST 287/82)	Drug Offenses; Amendments to MCM and MJM

Army

AR 600-85	Alcohol and Drug Abuse Prevention and Control Program

COMMAND OPTIONS

SECTION II

COMMAND OPTIONS

I. General:

The options available to commanders in combating drug abuse are many and varied. Some are purely administrative, others are strictly disciplinary. A few have overtones of both. Most of these options are not new. Rather they are tools with which the commander is already familiar. It is only the emphasis upon their utilization that is new. This emphasis has naturally focused on the disciplinary or semi-disciplinary aspects of command options. The non-disciplinary command options, however, should also be employed when appropriate. For example, the new "Drug Abuse Self-Referral Rehabilitation Procedure" should not be ignored. (See Section XI.) Nonetheless, it is not the intent of this publication to explore every avenue open to the commander but to focus upon those with "legal" overtones. To that end, a command options memorandum is offered as a brief discussion of the legal alternatives available for command selection. Although prepared by a Marine Staff Judge Advocate, most, if not all of the points made in the memorandum apply equally well to Navy activities. As thorough as this memorandum is, it is not exhaustive. (See, e.g., the following article on seizure of vehicles used to transport drugs, the JAG opinion on suspension and revocation of driving privileges for drug abuse, and the chart in section XIII.) All commanders are urged to contact their local legal advisers whenever any question about "options" arise.

UNITED STATES MARINE CORPS
MARINE CORPS BASE
CAMP PENDLETON, CALIFORNIA 92055

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MEMORANDUM OF LAW

From: Assistant Chief of Staff, Staff Judge Advocate
To: Distribution List

Subj: Commanding Officers' options with respect to the illegal use of drugs by members of their commands

Ref: (a) SECNAVINST 5300.28
(b) AC/S, SJA, Memo dtd 4Nov81
(c) MCO 5355.2
(d) MCO 5110.1B
(e) BO 5101.30
(f) SECNAVINST 1920.6
(g) BO 11101.33
(h) MCO P11000.15
(i) BO 5510.8A

Encl: (1) MRE 315
(2) Excerpts from Base Legal SOP (Draft)
(3) Request for Authorization to Search (Form)
(4) Authorization to Search (Form)

1. Introduction. This memorandum discusses the options available to commanders in combating illegal drug use and responding to cases of illegal drug use within their commands. It must be emphasized at the outset that until restrictive regulations issued by CMC, SECNAV and SECDEF are changed, evidence attributed to urinalysis tests administered for the purpose of identifying drug users (e.g., unit-sweeps) may not be used in disciplinary proceedings or a basis for characterizing a discharge as anything less than an honorable discharge. See reference (a).

2. Background. This memorandum was, of course, prompted by ALMAR 246/81. It is not the purpose of this memorandum to attempt to analyze all aspects of the ALMAR; instead, this memorandum offers some specific suggestions to commanders in combating illegal drug use and an analysis of the legal issues involved in illegal drug use.

3. Inspections and Searches

a. Inspections. As noted in the ALMAR, a vigorous inspection program should be an integral part of the commander's program. The subject of inspections and the use of detector dogs has been addressed in an earlier memorandum, reference (b).

b. Searches. Probable cause searches for drugs are, conceptually, no different than any other searches based on probable cause. While a complete exposition of the requirements for probable cause searches is beyond the scope of this memorandum, enclosed for your review are excerpts from MRE 315, and portions of the draft revision to the Base Legal SOP, both of which address probable cause searches. Commanders should insure that their duty personnel understand that in the event a search and seizure question arises after working hours, they may contact a judge advocate for advice by calling the PMO Desk Sergeant at 3888. The use of enclosures (3) and (4) to request and grant authority to search is strongly suggested.

4. Urinalysis

a. Command Urinalysis Identification Programs. References (a) and (c) and ALMAR 246/81 address the urinalysis program. Your attention is invited to paragraphs 3b and c of enclosure (3) of reference (a) and the suggestions which appear there to the effect that urinalysis

> tests will ordinarily be ordered for individuals who exhibit some identifiable trait of alcohol or drug abuse and;
>
> (1) Behave in bizarre or irregular ways.
>
> (2) Return from unauthorized absences.
>
> (3) Are involved in serious accidents, violate safety precautions or perform other unusually careless acts.
>
> (4) Are being investigated for drug offenses.
>
> (5) Are involved in fights, confrontations or similar activities.
>
> (6) Are involved in any incident indicating drunkenness.

b. Involuntary seizure of blood and urine samples for use as evidence in courts-martial. Distinct from unit-sweep urinalysis (which is a form of inspection not involving the concept of probable cause) are seizures of body fluids based on probable cause, pursuant to Rule 315 of the Military Rules of Evidence. When a seizure of bodily fluids is authorized under Rule 315, evidence obtained normally will be admissible at a trial by court-martial assuming, of course, that there is a good chain of custody and that scientifically valid tests were performed by a qualified person. Seizure of a body fluid involves the same probable cause concepts as a search for and seizure of any other form of evidence, although the execution of the authorization is somewhat different. Probable cause might exist, for example, when a Marine who is know to be reliable approaches his commanding officer and says in substance, "I was just in the barracks and I

heard PFC Miller brag about using PCP and he 'popped' some while I was standing there." The use of enclosures (3) and (4) to document the probable cause is urged. Note that under MRE 312(d), the involuntary seizure of body fluids must be done in a reasonable fashion by a person with reasonable medical qualifications. Note also that reference (d) forbids the involuntary seizure of body fluids in motor vehicle accident cases. (At the urging of this command, reference (d) is under revision to eliminate that restriction).

Finally, it must be borne in mind that while it is expected that the DoD limitations on the use of urinalysis results will soon be lifted, for the present, the results of urinalysis tests, absent probable cause, may not be used in disciplinary proceedings. See enclosure (3), paragraph 3 of reference (a), and paragraph 3 of reference (c). In this regard, the "fruit of the poisoned tree" doctrine presently applies to the Urinalysis Testing Program and precludes the use of such urinalysis test results as the basis for establishing probable cause for the nonconsensual seizure of bodily fluids. See paragraph 3 of reference (c).

5. Administrative Separation. I am constrained to observe that even after the restrictions on the use of urinalysis tests in administrative discharge proceedings are relaxed, the burden of proof will remain with the government, i.e., the government will still have to prove its case in contested proceedings. To take the dramatic example, if it is reported that a field grade officer's urine sample was positive, but the officer denies drug use and insists that his case be heard by a board of officers, it will be necessary for the government to establish the chain of custody of the urine sample, that the sample was contaminated, that the tests conducted were scientifically valid and that the person who administered the tests was qualified to do so (and was not a "cocaine snortin', nose pickin'" Hospitalman Apprentice). Defenses attacking the testing procedure, and offering extensive character evidence (and raising the possibility of "fragging" by "Alice B. Toklas" brownies) can be anticipated. In short, even under liberalized rules, a positive urinalysis test will not necessarily produce a "slam-dunk" discharge case, especially when the respondent is represented by an alert, aggressive counsel. (Alert, aggressive counsel are the only kind Major General Robinson, to say nothing of respondents in discharge cases, expects Base Legal to have). The message that commanders can draw from all of this is that they must insure that Marine Corps Orders regarding the urine testing procedure are strictly followed and that the integrity of the testing process is preserved. With that premise, the following provisions, inter alia, apply to administrative separations:

a. Enlisted Personnel. The use of illegal drugs is a specific ground for discharge under the provisions of paragraph 6017 of reference (a). Respondents processed for discharge under other than honorable conditions must be afforded the right to a board hearing, and other attendant rights. For the present, results of urinalysis testing may not be sued as a basis for characterizing a discharge as less than an honorable discharge.

b. Commissioned officers and warrant officers. The procedures for the separation of commissioned officers and warrant officers are addressed in reference (f) which is currently under revision. Publication of the revised version, which will incorporate changes brought about by the enactment of DOPMA, is expected in January. These new procedures will be made the subject of a separate memorandum.

6. Disciplinary Action. The possession, use, etc. of illegal drugs of course may be the subject of disciplinary action. Illegal drug cases are charged under Article 92 as a violation of U.S. Navy Regulations, Article 1151, and may be referred to trial by court-martial, or be made the subject of NJP. The possession of drug paraphernalia may be charged as a violation of BO 5355.2. I add a practical observation: The "Full Court Press" vehicle inspections directed by the Commanding General turn up substantial quantities of illegal drugs, PMO sends a report of each to the Marine's commanding officer, on an Incident/Complaint Report. Commanders should make periodic checks with the Provost Marshal to insure that all PMO Incident/Complaint Reports sent to their units are being received and that each is referred to the officer who exercises disciplinary authority over the accused in accordance with paragraph 32, Manual for Courts-Martial, for prompt and appropriate disposition. (Diversion/destruction of I/CRs by clerks is not an unknown phenomenon). The determination of an appropriate forum for the resolution of any alleged violation of the UCMJ is a matter which rests within the sound discretion of the commander. (The maximum punishment for a violation of Article 92 extends to a DD, confinement at hard labor for two years, total forfeitures, and reduction to E-1). ALMAR 246/81 should not be construed as directing referral of a given case to a particular court or to any court at all, or to NJP. However, in view of the widespread publicity given ALMAR 246/81, it is forseeable that allegations of command influence may arise. Commanders must anticipate the possibility that they may have to testify regarding the factors which went into the decision to refer a given case to a particular forum. Similarly, prospective court members must understand and appreciate that, subject to instruction by the military judge, they and they alone, in the exercise of their discretion and in accordance with the law, determine guilt and innocence and the appropriate sentence, if any, in the case before them. In short, ALMAR 246/81 should not be construed as an attempt to reach into the jury room.

7. Administrative Measures. As noted in ALMAR 246/81, a number of administrative actions may be taken in cases involving the illegal use of drugs. The following additional information is provided with respect to these measures:

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a. Revocation of on-Base driving privileges. The subject is governed by reference (c). Paragraph 2b(3) of enclosure (1) of that order specifically notes that the commission of any felony in which a motor vehicle is used provides the basis for revocation of on-Base driving privileges. Illegal use of possession of drugs falls within the category of "felony" and therefore provides the basis for revocation of on-Base driving privileges, when the use of an automobile is involved, e.g., to transport or store a "stash." Under reference (b) the authority to revoke on-Base driving privileges is vested in the installation commander; at Camp Pendleton, the Commanding General has delegated his authority to the Base Magistrate. Commanders should forward their recommendations for revocation to the Base Magistrate. The Magistrate is prepared to act expeditiously on these cases.

b. Eviction from Family Quarters. This subject is addressed in reference (g). Recommendations for termination of assignments to family quarters should be addressed to the Housing Director, via the Assistant Chief of Staff, Facilities. It should be noted that when the government terminates a quarters assignment, the government is required to pay drayage and/or storage costs for moving the household goods. See paragraph 1503 of reference (h). In illegal drug use or possession cases involving dependents, it may be appropriate to simply bar the offending dependent from the Base. Procedures for "Bar Orders" at Camp Pendleton are set forth in reference (i).

c. Forfeiture of pay during absence from duty due to use of habit-forming drugs. A Marine on active duty who is absent from regular duties for a continuous period of more than one day because of disease that is directly caused by and results from habit forming drugs is not entitled to pay for the period of that absence. 37 U.S.C. §802. See JAGMAN §0805 and 0817g-i for guidance regarding investigations.

8. Conclusion. In the event of further questions, please call me or my deputy, Lieutenant Colonel Campbell, at 5943 or 5571, or Major Rachow (Military Justice Officer) at 5125/5163. For advice on search and seizure questions, you may also call Captain Newton (Chief Trial Counsel) at 5755/5756.

RUFUS C. YOUNG, JR.

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The following is a reprint of an article that appeared in the Trial Counsel Forum, Vol. II, No. 9, September 1983. The Trial Counsel Forum is a United States Army Legal Services Agency publication - but does not necessarily represent the views or opinions of the Judge Advocate General of the Army or the Department of the Army.

FORFEITURE OF ASSETS - ANOTHER WEAPON IN THE WAR AGAINST DRUGS

I. INTRODUCTION

There is wide recognition that drug abuse in the military poses a serious threat to our readiness capability. The DOD mandated urinalysis program, as well as the expanded assumption of jurisdiction over off-post drug offenses, are two examples of the military's determined efforts to combat drug abuse. This article will address the potential use of another weapon in the war on drugs.

In the past several years, the Drug Enforcement Administration (DEA) has achieved remarkable results in its campaign against drug traffickers. One tool utilized by DEA with great effect has been the forfeiture provision authorized in 21 U.S.C. §881. DEA's use of §881 has resulted in the forfeiture of hundreds of cars and numerous boats and airplanes, worth millions of dollars, all because they were used in furtherance of the illicit drug trade. The obvious intent of §881 is to make drug traffickers pay a substantial price for their participation in the commerce of drugs. DEA has been so successful in utilizing §881 that major drug dealers are now factoring in the probable loss of cars, boats, and airplanes, as the current cost of "doing business."

Military drug sellers, with a few rare exceptions, are hardly in the same league as the major traffickers mentioned above. It should be apparent, therefore, that while the forfeiture of a boat or airplane will achieve some of its intended effect upon a major drug trafficker, the forfeiture of a young soldier's customized van, for example, will have a devastating effect. The forfeiture provisions are available for use by the military and have been specifically noted as a legitimate law enforcement tool. See para. 3-5, AR 190-22 (1 Jan 1983); and Letter from BG Lloyd K. Rector, Assistant Judge Advocate General for Military Law to Command and Staff Judge Advocates, DAJA-CL 1983/5413 (20 May 83).

II. The Forfeiture Provision

21 U.S.C. §881(a)(4) authorizes the forfeiture of any conveyance, including aircraft and vessels, "which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of" a controlled substance or raw material used in the manufacture of a controlled substance. 21 U.S.C. §881(a)(4); United States v. 1964 Beechcraft Baron Aircraft, 691 F.2d 725, 727 (5th Cir. 1982). The courts have been liberal in applying the terms of §881. For example, under the authority of §881, the Government has acquired an airplane which carried P2p, an ingredient used in the manufacture of amphetamines, United States v. One 1974 Cadillac Eldorado Sedan, 548 F.2d 421 (2nd Cir. 1977). Section 881 has also allowed for the forfeiture of a car containing only .226 grams of marijuana, even where there was no suggestion of an intent to sell or distribute. United States v. One 1976 Porsche 911S, 670 F.2d 810 (9th Dir. 1979). But see United States v. One 1981 Cadillac Eldorado, 535 F.Supp. 65, 66-67 (N.D. Ill. 1982)(§881 should be strictly construed).

Section 881, moreover, is not limited to vehicles. Section 881(a)(6) also authorizes the Government to seize and forfeit "all moneys, negotiable instruments, securities, or other things of value" which are (1) furnished or "intended to be used to facilitate" any illegal drug transaction." United States v. United States Currency Totaling $87,279, 546 F.Supp. 1120, 1125-26 (S.D. Ga. 1982).

In either instance, to establish the basis for forfeiture, the Government need only show that probable cause exists to believe that a vehicle was used in some manner to facilitate the sale or transportation of illegal drugs, see §881(a)(4); and in the case of money, that there was a "substantial connection" between the money and the criminal activity defined by the statute (i.e., the exchange of a controlled substance), see §881(a)(6). See also United States v. 1964 Beechcraft Baron Aircraft, 691 F.2d at 727-28; United States v. $364,960.00 in United States Currency, 661 F.2d 319, 323 (5th Cir. 1981). Probable cause is met if "'reasonable grounds exist for the belief of guilt supported by less than prima facie proof but more than mere suspicion' under all the circumstances of a particular case." United States v. One 1981 Cadillac Eldorado, 535 F.Supp. at 66. The Government may rely upon hearsay in demonstrating probable cause. United States v. 1964 Beechcraft Baron Aircraft, 691 F.2d at 728; United States v. One 1974 Porsche 911-S, 682 F.2d 283, 286 (1st Cir. 1982). Although there is a split of authority on this issue, the Government may also rely upon "tainted" evidence, obtained in violation of search and seizure law. Compare United States v. United States Currency Totaling $87,279, 546 F.Supp. at 1126, with United States v. One 1979 Mercury Cougar, 666 F.2d 228, 230 (5th Cir. 1982).

The lower standard to be met for forfeiture actions means that wholly unlike the high burden the Government must meet in criminal trials, "'ties go in favor of the runner'--the government." United States v. $10,000 U.S. Currency, 521 F.Supp. 1253, 1255 (N.D. Ill. 1981). For that reason, even the acquittal of an accused may not save his vehicle from forfeiture to the Government. United States v. One 1977 Chevrolet Pickup, 503 F.Supp. 1027 (D. Colo. 1980).

III. Applicability to Military Law Enforcement Agencies

Agents of DEA have been for many years authorized to seize and dispose of property subject to forfeiture under §881.21 C.F.R. 1316.72 (1 October 1982). Very recently the FBI received this same authorization. Id. Your local military law enforcement agents may request that either one of these two agencies initiate forfeiture action. See para. 3-5, AR 190-22 (1 Jan 1983) (note, however, that this provision does not mention the FBI; probably because their authority to seize and forfeit is so recent). It is vital, therefore, that your law enforcement agents establish communication and an ongoing relationship with agents from the local DEA or FBI field offices.

You must ensure, however, that your military law enforcement agents never seize property solely with the intent of a future forfeiture action. See para. 3-5, AR 190-22. The rationale is that a seizure undertaken solely for forfeiture purposes could amount to a violation of the Posse Comitatus Act, 18 U.S.C. §1385 (1976). Seizing property, however, for a legitimate military purpose, (e.g., evidence of a crime), and later informing federal agents that the property might be subject to forfeiture, would not be in violation of the Posse Comitatus Act. See Opinion letter from Chief, General Law Branch, Administrative Law Division to DARE, DAJA-AL 1980/2106 (17 Jul 80).

Nor would there be a violation of the Posse Comitatus Act by informing federal agents of the location of property not seized but which also might be subject to forfeiture. Id. See generally Hilton, "Recent Developments Relating to the Posse Comitatus Act," The Army Lawyer, January 1983 at 1. Military law enforcement agents who seize money, other proceeds, or vehicles, involved with drug trafficking in accordance with MRE 316 (seizures), have seized the property pursuant to a legitimate military purpose.

IV. Adoption Policy

Both DEA and the FBI have instituted policies under which they are allowed to "adopt," i.e., undertake, forfeiture actions that other law enforcement agencies, including the military, are not authorized to initiate. Once military agents have seized property which they believe is subject to forfeiture, or have information concerning such property, they should contact a field office of either agency to determine if the agency will "adopt" forfeiture proceedings on the military's behalf.

TCAP has spoken with representatives of both agencies. The similarities between their respective adoption policies are greater than any differences. One clear difference, at the outset, however, is that DEA field offices are given freedom of action in deciding whether to adopt a forfeiture whereas an FBI office must first receive approval from their headquarters in Washington, D.C.

When an agent from either DEA or the FBI determines, in the course of his or her independent investigation, that there is probable cause to connect one "dosage unit" or more of a controlled substance with some property, the agent is authorized to institute a forfeiture action. However, when another agency is involved, such as the Army, DEA requires that the amount be "substantial." DEA has not defined the term "substantial" but instead looks to the circumstances of each case. Obviously the definition of "substantial" will vary depending on the locale of the field office. The FBI, on the other hand, continues to apply the "dosage unit" test but is uninterested in adopting forfeitures which involve small amounts of drugs intended for personal use. Both representatives stressed, however, that their guidelines are designed for flexible application so that, for example, they might adopt the case of a major dealer, caught only with a small amount of drugs in his vehicle.

Neither agency will adopt a forfeiture action if the property has little monetary value. Nor will either agency adopt if liens upon the property by innocent third parties are substantial.[1] This is because the cost of the forfeiture action, plus the cost of storage, makes a forfeiture action unprofitable for less than a "net equity" of $3,000 for the FBI, and $1,000 for DEA.[2] For example, the FBI would adopt if a car's value was $13,000 but had a lien of $9,000, because the net equity would equal $4,000.

When your law enforcement agents call the local field office of either agency, they should have the following information readily available:

(1) The facts which provide probable cause to believe that a vehicle was in "any manner" used to facilitate the transportation, sale, receipt, or concealment of controlled substances (§881(a)(4)); or, in the case of money or other property, probable cause to believe that there is "substantial connection" between that property and the "exchange of a controlled substance" (§881(a)(6)). Be sure that the DEA or FBI agent receives sufficient specific facts to support a finding of probable cause and avoid statements amounting to conclusions of law.

(2) The amount(s) and kind(s) of drugs involved.

(3) The value of the property and the amount of any liens upon it. These can be "ballpark" figures. Either federal agency has the authority to obtain the specific information concerning liens and lienholders that your agents might be unable to obtain without violating applicable privacy statutes.

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1. Banks and loan companies are examples of such innocent third parties. However, if there is reason to believe the lienholder was aware, or should have been aware, of the car owner's drug activities, the agencies might still attempt a forfeiture. It should also be noted that if there is an innocent owner (e.g., father, sister, etc.) either agency has the authority to release the car to the innocent owner. Furthermore, either agency has the authority to release a car to an innocent lienholder, while still forfeiting the possessory interest of the drug seller.

2. "Net equity" equals the value of the property after subtracting any liens or money owed upon the property. The net equity standard for DEA will soon rise to $2,000.

(4) The names of the registered owner and titleholder/lienholder, if different from the accused, and any evidence of their involvement or knowledge of the drug operation. Also the relationship, if any between the accused and the registered owner and/or titleholder.

In all cases, military criminal investigators should contact either agency as soon as possible after a seizure because each federal district court may apply a different standard for allowing a forfeiture action based upon the timeliness of the action. See United States v. United States Currency Totaling $87,279, 546 F.Supp. at 1127.

The DEA or FBI agents, authorized to seize and initiate forfeiture of the property, will come to your installation to seize the property, and at some later point, give notice through the newspaper to the property holder, of their intent to forfeit the property. 21 CFR §1316.75. If your military law enforcement agents have not seized the vehicle as evidence, but nevertheless have obtained the specific information detailed above and know of the location of the vehicle, the military law enforcement agents should still contact the FBI or DEA because either agency may still choose to seize the vehicle. If the property is worth less than $10,000, the property owner may file a claim disputing the right to forfeit (i.e., show that he or she was not involved in drugs or was an innocent owner). 21 CFR §1316.76. The case will then proceed to the United States Attorney's office for the district wherein the car was seized, for eventual decision by a judge of a United States District Court. If no claim is made within 20 days of the first notification in the newspaper, the property will be summarily forfeited. 21 CFR §1316.77. If the property is worth more than $10,000 the case will be automatically referred to the United States Attorney for disposition by the district court. 21 CFR §1316.78.

V. Extraterritorial Reach of Forfeiture Actions

Section 881, unfortunately, has limited application outside the jurisdiction of the United States. Property is subject to forfeiture only if there has been a violation of the "Control and Enforcement" subchapter of Chapter 13 of Title 21, USC. In cases where there is intent to import drugs to the United States or when property is used with the knowledge that the drugs will be imported to the United States, such property may still be subject to forfeiture. Yet, even if this were so, it would obviously be very difficult to initiate a forfeiture to the United States of a vehicle located in Germany or Korea. In any event, coordination would have to be made with DEA or FBI officials (this might be best accomplished through the local overseas consulate or embassy).

However, where large amounts of money have been seized by your agents as evidence of a crime, there may still be action available to you. The Internal Revenue Service (IRS) may have an interest in seizing property impounded by military law enforcement authorities (unlawfully earned money, whether through drug dealing, fraud, or theft, may in some cases constitute unreported income subject to Federal income tax). Additionally, overseas, if your law enforcement agencies seize currency in excess of $10,000, they are required to notify the IRS office serving their geographical area. Para. 2-8(i)(18), AR 195-5 (15 October 1981) (of course, it may still be appropriate to contact the local IRS office in cases involving the seizure of less than $10,000 to determine if there is IRS interest in the seized money). The IRS may then issue a jeopardy assessment for back taxes, interest, and penalties gained through illegal drug trafficking. If the IRS makes such an assessment, it may seize that portion of the money equal to the tax assessment after first serving a Notice of Levy upon the military law enforcement office holding the funds.

VI. Conclusion

The deterrent effect achieved by use of the forfeiture provision, with its broad application and simple procedures, should be great. The effect, even upon a large post, after a few forfeitures of soldiers' cars, should be dramatic. It is an available tool and should be considered in appropriate cases.

CPT Mike Child
TCAP

SUSPENSION AND REVOCATION OF DRIVING PRIVILEGES FOR DRUG ABUSE (13)

Ref: (a) Commanding officer's ltr Code 00000 of 4 Feb 1982
(b) OPNAVINST 11200.5b of 1 Aug 1973, Subj: Military Police Motor Vehicle Traffic Supervision
(c) U.S. Navy Regulations, 1973
(d) MCM, 1969 (Rev.)
(e) JAG ltr JAG:131.4:JMT:cck Ser 5652 of 9 Jul 1973; Subj: Revocation of base driving privileges for drug possessors; legality of

Reference (a) requested advice from the Judge Advocate General concerning the effect of certain provisions of reference (b) on the authority of the commanding officer of a military installation to take administrative action to suspend or revoke on-base driving privileges or to terminate the installation registration of motor vehicles in several situations where the owner or operator of the vehicle is implicated in the commission of drug-related offenses under the UCMJ. The situations described range from instances where the owner of a motor vehicle or the holder of on-base driving privileges is implicated in drug abuse involving neither the use nor operation of a vehicle to instances where the particular owner or operator is implicated in the actual operation of the vehicle while under the influence of illegal drugs.

In addition to the inherent authority of a military commander to provide for the health, welfare, safety, and security of the command, 10 U.S.C. §5947 and article 0702 of reference (c) provide a commanding officer in the naval service with the authority to regulate activities within his/her command, including the implicit authority of an installation commander to regulate the operation of motor vehicles on that installation. That authority may be affected, however, by the class or category of the person involved, e.g., servicemember, dependent, civilian employee, or civilian visitor, and the nature of the installation, e.g., controlled or limited access or open to the general public. At a controlled access installation, paragraph 129c of reference (d) would recognize the authority of the commanding officer to administratively withhold the privilege of operating a motor vehicle on the installation as a valid nonpunitive measure against those subject to the UCMJ. The exercise of that authority to withhold a privilege must not be arbitrary or capricious, and the privilege to be withheld should be logically related to the conduct or behavior to be corrected or prevented. The military commander must also have a legitimate interest in controlling or preventing that conduct or behavior.

Article 0731 of reference (c) imposes the responsibility on commanding officers to "conduct a rigorous program to prevent the illegal introduction, transfer, possession, or use of marijuana, narcotics, or other controlled substances . . . [and to] exercise utmost diligence in preventing illegal importation of . . . [those] substances on board his command." This article articulates the legitimate interest of an installation commander in preventing introduction/use of drugs and controlled substances on that installation. Consequently, the use of a

motor vehicle on a military installation either as a means or as a place where prohibited substances may be transferred, possessed, or used on the installation may legitimately result in that vehicle being barred through the exercise of the commanding officer's authority to withhold or rescind the privilege of registering the vehicle and allowing access to the installation. Whether the privilege should be withheld or rescinded in any particular case may depend upon the vehicle owner's actual involvement in or knowledge of the use of his or her vehicle for the illegal purpose as well as other variable factors.

Additional action involving the vehicle may be taken in some cases by referral of the matter to the appropriate office of the Drug Enforcement Administration (DEA). Regional Administrators of that agency have been designated as custodians to receive and maintain in storage all property seized pursuant to the Controlled Substances Act, specifically, 21 U.S.C. §881 [21 C.F.R. §1316.73 (1981)]. That section provides, generally, for the forfeiture of all vehicles, subject to certain exceptions, that are used to transport or to facilitate the transportation, sale, receipt, possession, or concealment of controlled substances that have been acquired in violation of the Controlled Substances Act (21 U.S.C. §§801-904). The rules implementing 21 U.S.C. §881 indicate that any special agent of the DEA may adopt "a seizure initially made by any other officer or by a private person." 21 C.F.R. §1316.71(d) (1981). Informal contact with the Chief Counsel's Office of the DEA indicates that, as a practical matter, adoption seizures are governed by several case-by-case considerations, such as the quantity and identity of the controlled substances, the value of the vehicle, and a basis to believe that the vehicle will be used illegally again. Although forfeiture may not be available in every instance, the DEA Resident Agent-in-Charge should be consulted if the other alternatives are deemed inadequate.

Suspending or revoking the privilege of a servicemember to operate a motor vehicle on the installation may also be a valid exercise of command authority where the particular circumstances involve the actual operation of a vehicle by that servicemember in furtherance of the introduction, transfer, use, or possession of a prohibited substance on the installation. To the extent that any vehicle owner or passenger may be involved in the introduction, transfer, use or possession of illegal substances without actually operating the vehicle, no logical relationship between that activity and holding of an operator's permit is apparent on those facts alone, and withholding or rescinding that privilege would not be supportable as a valid nonpunitive measure under those circumstances. Likewise, withholding or rescinding either the registration of a motor vehicle or an individual's authorization to operate a motor vehicle on the installation would be improper when there is no factual or logical connection between the motor vehicle or its operation and the commission of drug-related offenses. A bar order or a limited bar order under the authority of 18 U.S.C. §1382 may be a more appropriate remedy in such cases depending on the status of the person (e.g., visitor, etc.) and the legitimate reasons he or she may have to be on the installation.

As to the extent reference (b) affects the authority of an installation commander to withhold or rescind either on-base driving privileges or motor vehicle access to the installation, it should be noted that reference (b) was intended to implement "applicable National Highway Safety Program Standards promulgated under the National Highway Safety Act of 1966." [Page i of reference (b).] The purpose of reference (b) is to establish "policy, responsibilities, and procedures for motor vehicle traffic supervision . . . ." [Paragraph 1-1 of reference (b).] "The principal objective in supervising motor vehicle traffic is to assure safe and efficient movement of vehicles, material, and personnel . . . ." [Paragraph 1-3a of reference (b).] "The goal of motor vehicle traffic supervision is to reduce traffic accidents and deaths, injuries, and property damage resulting therefrom." [Paragraph 1-3b of reference(b).] Since a motor vehicle may be used in a variety of ways to facilitate the commission of a crime, many of which may never affect the safe operation of the vehicle, it is the opinion of the Judge Advocate General that reference (b) was not intended tc limit the authority of the installation commander to suspend or revoke vehicle registration or operating privileges in furtherance of some other legitimate objective (e.g., crime prevention) which may be unrelated to the safe and efficient flow of traffic on the installation.

Consequently, it is not a meaningful exercise to attempt to distinguish between apprehending someone at a gate trying to come onboard the installation with controlled substances in a vehicle and the discovery of such substances in a parked vehicle already on the installation on the theory that the former may be a "moving" violation (permitting revocation of the vehicle registration) and that the latter, without additional facts, may be a "nonmoving" violation (not permitting revocation). Neither incident on those facts alone is a "traffic" related offense within the scope or meaning of reference (b).

The Judge Advocate General has previously stated in reference (e) that revocation of base driving privileges under circumstances similar to those discussed above would be legally objectionable without providing adequate due-process protections. As noted in that earlier opinion, reference (b) could be used as a model for the procedures to be used in satisfying due-process requirements in revoking such privileges for drug-related offenses. That is still a valid concern, and the suggested remedy is still applicable.

JAG ltr JAG:131.2:JEO:slb Ser 13/5227 of 25 Mar 1982

COMMON DRUGS AND THEIR EFFECTS

SECTION III

COMMON DRUGS AND THEIR EFFECTS

I. INTRODUCTION:

Substances with abuse potential range from simple kitchen spices e.g., nutmeg, a hallucinogen, through common flowers and weeds to highly sophisticated drugs. All these substances may be divided into five categories: (1) narcotics, (2) sedatives, (3) tranquilizers, (4) stimulants, and (5) hallucinogens.

Medically defined, narcotics are drugs which produce insensibility or stupor due to their depressant effect on the central nervous system. Included in this definition are opium, opium derivatives (morphine, codeine, heroin), and synthetic opiates (merperidine, oxycodone, methadone). As regulated by Federal narcotic laws, however, the term "narcotics" also embraces the coca leaf and its derivative, cocaine. Pharmacologically, this drug is a stimulant, not a depressant, but for law enforcement purposes it is considered a narcotic. All other drugs susceptible to abuse are non-narcotics.

Whatever their classification, most of these drugs have important legitimate applications. Narcotic, sedative, tranquilizing, and stimulant drugs are essential to the practice of modern medicine. Hallucinogens are used in medical research. To the abuser, though, these same medically useful drugs have a compelling attribute: They affect the nervous system, producing a change in his emotional responses or reactions. The abuser may feel intoxicated, relaxed, happy, or detached from a world that is painful and unacceptable to him.

With repeated use, many drugs cause physical dependence. This is an adaptation whereby the body learns to live with the drug, tolerates ever-increasing doses, and reacts with certain withdrawal symptoms when deprived of it. The total reaction to deprivation is known clinically as an abstinence syndrome. The symptoms that appear depend on the amount and kind of drug used. Withdrawal symptoms disappear as the body once again adjusts to being without the drug - or if the drug is reintroduced.

With many drugs, the chronic user finds he must constantly increase the dose in order to obtain an effect equal to that from the initial dose. This phenomenon, called tolerance, represents the body's ability to adapt to the presence of a foreign substance. Tolerance does not develop for all drugs or in all individuals; but with drugs such as morphine, addicts have been known to build up great tolerance very quickly. It is interesting to note, however, that tolerance does not develop for all the possible effects of a given drug. For example, tolerance develops to the euphoric-like effects (feeling of well-being) of heroin, but only slightly to the constructing effects on the pupil of the eye. Complete tolerance may not develop to a drug's toxic effects; accordingly, no matter how high his tolerance, an addict may still administer a lethal dose to himself. Tolerance can occur without physical dependence.

A more important factor in keeping the abuser enslaved by his habit is the psychic or psychological dependence present in most cases of drug abuse. Psychic dependence is an emotional or mental adaptation to the effects of the drug. The abuser not only likes the feeling for the drug and wants to reexperience it - he feels he cannot function normally without the drug. It enables him to escape from reality - from his problems and frustrations. The drug and its effects seem to provide the answer to everything, including disenchantment and boredom. With the drug, all seems well. It is the psychological factor which causes an addict who has been withdrawn from his physical dependence to return to drug abuse.

All substances with abuse potential can produce changes in behavior, particularly when large amounts are improperly used. The abuser may be withdrawn and solitary, or sociable and talkative. He may be easily moved to tears or laughter. He may be quick to argue or believe that "someone is out to get him." These changes in behavior may be harmless or may constitute a danger to both the abuser and society. Much of the public concern about drug abuse stems from wide publicity given the changes in behavior that may accompany the use of drugs, e.g., LSD has been particularly noteworthy in this regard.

II. The Common Drugs:

A. Morphinelike Narcotics (Opiates)

Medical Use - Natural and synthetic morphinelike drugs are the most effective pain relievers in existence and are among the most valuable drugs available to the physician. They are widely used for short-term acute pain resulting from surgery, fractures, burns, etc., and in the latter stages of terminal illnesses such as cancer. Morphine is the standard of pain relief by which other narcotic analgesics are evaluated.

The depressant effect of opiates produces drowsiness, sleep, and a reduction in physical activity. Side effects can include nausea and vomiting, constipation, itching, flushing, constriction of pupils and respiratory depression.

Manufacture and distribution of medicinal opiates are stringently controlled by the Federal Government through laws designed to keep these products available only for legitimate medical use. One aspect of the controls is that those who distribute these products are registered with Federal authorities and must comply with specific record-keeping and drug securit requirements.

Abuse - The appeal of morphine-like drugs lies in their ability to reduce sensitivity to both psychological and physical stimuli and to produce a sense of well-being. These drugs dull fear, tension, or anxiety. Under the influence of morphine-like narcotics, the addict is usually lethargic and indifferent to this environment and personal situation. For example, a pregnant addict will usually continue drug abuse despite the fact that her baby will likewise be addicted - and probably die shortly after birth unless medical treatment is undertaken at once.

The price tag on the abuse of these drugs is high. Chronic use may lead to both physical and psychological dependence. Psychological dependence is the more serious of the two, since it is still operative after drug use has been discontinued. With chronic use, tolerance develops and ever-increasing doses are required in order to achieve a desired effect. As the need for the drug increases, the addict's activities become increasingly drug-centered. When drug supplies are cut off, characteristic withdrawal symptoms may develop.

Symptoms of withdrawal from narcotic analgesics include:

* Nervousness, anxiety, sleeplessness

* Yawning, running eyes and nose, sweating

* Enlargement of the pupils, "gooseflesh," muscle twitching

* Severe aches of back and legs, hot and cold flashes

* Vomiting and diarrhea

* Increase in breathing rate, blood pressure, and temperature

* A feeling of desperation and an obsessional desire to secure a "fix"

The intensity of withdrawal symptoms varies with the degree of physical dependence. This, in turn, is related to the amount of drug customarily used. Typically, the onset of symptoms occurs about 8 to 12 hours after the last dose. Thereafter, symptoms increase in intensity, reach a peak between 36 to 72 hours, and then gradually diminish over the next 5 to 10 days. However, weakness, insomnia, nervousness, and muscle aches and pains may persist for several weeks. In extreme cases, death may result.

Because increasing pressure by law enforcement authorities has made traffic in heroin more difficult, "street" supplies have tended to contain increasingly low percentages of active ingredient (The heroin content of a "bag" now ranges between 3 and 10 percent. Pure heroin is "cut" - diluted with milk sugar.). As a consequence, many present-day narcotic addicts experience relatively mild withdrawal symptoms unless they are consuming many bags per day. On the other hand, narcotic addicts can die from overdosage when the supplies they buy in the "street" contain more than the customary low percentage of heroin (Addict deaths from overdosage at a rate of one a day have been reported in New York City.).

B. Exempt Narcotic Preparations

Under Federal law, some preparations containing small amounts of narcotics are exempt from the prescription requirement. The reason for their exemption lies in the fact that very large quantities of such preparations would have to be consumed regularly for a considerable time to produce significant dependence. These products include certain cough medicines and paregoric remedies which may be sold in pharmacies without a doctor's prescription. Pharmacists selling exempt preparations must be registered with the Federal Government.

Paregoric: Medical Use - Paregoric, a liquid preparation containing an extract of opium, is used to counteract diarrhea and to relieve abdominal pain.

Cough Syrup: Medical Use - Exempt cough formulas which contain codeine are used to combat the symptoms of respiratory disorders. Codeine is an effective cough suppressant when taken in small doses.

Abuse - Although these preparations are reasonably safe and free of addiction liability when used as directed, they can be abused. Addicts will sometime turn to paregoric or cough syrups - as well as other drugs - when heroin is in short supply (Very large quantities of these exempt preparations are consumed by addicts when abused as inferior substitutes for more potent drugs.).

In some areas, high school students and others are known to abuse paregoric medicines and codeine cough remedies. Of the formulas which have been abused, a number have a high alcohol content - which very probably has much to do with their popularity (The alcohol content in some of these products is as high as 40 percent.).

C. Depressants (Sedatives)

This group includes a variety of old and new drugs which have a depressant effect on the nervous system. Within this group, the most commonly abused products are the barbiturates. The "street" term for this type of product is "goofball."

Medical Use - The first barbituric acid derivative, barbital, was introduced to medicine shortly after the turn of the century. Since that time, over 2,500 barbiturates have been synthesized. Today, only about 30 are widely used medically. The barbiturates are among the most versatile depressant drugs available. They are used for epilepsy, high blood pressure, insomnia, and in the treatment and diagnosis of mental disorders. They are used before and during surgery. Alone, or in combination with other drugs, they are prescribed for almost every kind of illness or special situation requiring sedation. Used under medical supervision, barbiturates are impressive and effective.

Abuse - The abuser takes barbiturates orally, intravenously, or rectally. Although barbiturate intoxication closely resembles alcoholic intoxication, barbiturate abuse is far more dangerous than alcohol abuse or even narcotic abuse. Unintentional overdosage can easily occur. Convulsions, which may follow withdrawal, can be fatal. The combination of alcohol and barbiturates may result in fatal depression of respiratory and cardiovascular systems. The barbiturate abuser exhibits slurred speech and staggering gait. His reactions are sluggish. He is emotionally erratic and may be easily moved to tears or laughter. Frequently, he is irritable and antagonistic. Sometimes, he has impressions of euphoria. Because he is prone to stumble or drop objects, he often is bruised and has cigarette burns.

Chronic misuse of barbiturates is accompanied by the development of tolerance and both psychological and physical dependence. Physical dependence appears to develop only with continued use of doses much greater than those customarily used in the practice of medicine. In a physically dependent barbiturate abuser, abrupt withdrawal is extremely dangerous. Withdrawal from the drug should always be supervised by a physician.

In withdrawal, during the first 8 to 12 hours after the last dose, the barbiturate abuser who has become physically dependent appears to improve. After this, there are signs of increasing nervousness, headache, anxiety, muscle twitching, tremor, weakness, insomnia, nausea, and a sudden drop in blood pressure when the person stands abruptly (he often faints). These symptoms are quite severe at about 24 hours. There are changes in the electroencephalographic readings and, within 36 to 72 hours, convulsions resembling epileptic seizures may develop. Such convulsions occasionally occur as early as the 16th hour of withdrawal or as late as the eighth day.

Convulsions, which can be fatal, are an ever-present danger with barbiturate withdrawal and distinguish barbiturate from narcotic withdrawal (Narcotic addiction is not characterized by a failure of muscular coordination or by convulsions upon drug withdrawal.). Whether or not convulsions occur, there may be a period of mental confusion. Delirium and hallucinations similar to the delirium tremens (DT's) of alcoholism may develop. Delirium may be accompanied by an extreme agitation that contributes to exhaustion. The delirium may persist for several days followed by a long period of sleep (Delirium may also develop early in the course of withdrawal.).

D. Miscellaneous Depressants

A number of nonbarbiturate depressants used medically to induce sleep and for sedation are also capable of being abused. With chronic use of high doses, tolerance, physical dependence and psychological dependence can develop. Withdrawal phenomena occur following abrupt discontinuation of drug abuse. Clinical symptoms and patterns of abuse resemble those observed for barbiturates.

Because of their abuse potential, several of these drugs have become subject to the Controlled Substance Act of 1970. Glutethimide, ethchlorvynol, ethinamate, and methprylon are examples of the newer sedatives which are now controlled.

E. Tranquilizers

The term "tranquilizer" refers to a rather large group of drugs introduced since the early 1950's. Unlike barbiturate-type sedatives, tranquilizers are generally used to counteract tension and anxiety without significantly impairing mental and physical function.

All tranquilizers are not alike. In general, they may be divided into two groups - "major" or "minor" - based on their usefulness in severe mental disorders (psychoses). "Major" tranquilizers are those with anti-psychotic activity. These include primarily the phenothiazine and reserpine-type drugs. Reserpine also is used to treat high blood pressure. The anti-psychotic tranquilizers are not known to produce physical dependence. Abuse of this type of tranquilizer is practically nonexistent.

The "minor" group of tranquilizers includes a number of chemically quite different drugs. For the most part, they are not effective in psychotic conditions. They are widely used, however, in the treatment of emotional disorders characterized by anxiety and tension. Many are useful as muscle relaxants.

Through the years, it has been found that some members of this second group of tranquilizers occasionally have been abused. The two drugs most often reported have been meprobamate and chlordiazepoxide. Chronic abuse of these drugs, involving increasingly larger daily doses, may result in the development of physical and/or psychological dependence. Symptoms during misuse and following abrupt withdrawal closely resemble those seen with barbiturates. Chronic use of high doses can result in convulsions if the drugs are suddenly withdrawn. In order to combat abuse of this category of tranquilizers, the Food and Drug Administration and the Bureau of Narcotics and Dangerous Drugs have both requested more stringent controls on chlordiazepoxide and diazepam. To date, abuse of tranquilizers has been infrequent and has not become a "street" problem. Abuse supplies usually are obtained by having prescriptions refilled in excess of normal needs.

F. Stimulants

This group includes drugs which directly stimulate the central nervous system. The most widely known stimulant in this country is caffeine, an ingredient of coffee, tea, cola, and other beverages. Since the effects of caffeine are relatively mild, its usage is socially acceptable and not an abuse problem. The synthetic stimulants such as amphetamine and other closely related drugs are more potent and can be abused. Another dangerous stimulant is cocaine.

G. Cocaine

Cocaine is obtained from the leaves of the coca bush found in certain South American countries. It is an odorless, white crystalline powder with a bitter taste, producing numbness of the tongue (The word "coca" is often confused with "cacao." The two are not related. Cacao is the name of a tree from which cocoa and chocolate are derived.).

Medical Use - Cocaine was once widely used as a local anesthetic. Its place in medicine, however, has been largely taken by newer, less toxic drugs.

The stimulant effect of cocaine results in excitability, talkativeness, and a reduction in the feeling of fatigue. Cocaine may produce a sense of euphoria, a sense of increased muscular strength, anxiety, fear, and hallucinations. Cocaine dilates the pupils and increases the heartbeat and blood pressure. Stimulation is followed by a period of depression. In overdosage, cocaine may so depress respiratory and heart function that death results.

Abuse - International control measures have greatly reduced the abuse of cocaine, although the chewing of coca leaves in some South American countries is still common. Cocaine is either sniffed or injected directly into a vein. The abuse of cocaine tends to be more sporadic than the abuse of heroin. The intense stimulatory effects usually result in the abuser voluntarily seeking a sedation. This need for sedation has given rise to a practice of combining a depressant drug such as heroin with a drug such as cocaine ("speedball") or alternating a drug such as cocaine with a depressant. In some persons, cocaine produces violent behavior. Cocaine does not produce physical dependence. Tolerance does not develop and abusers seldom increase their customary dose. When drug supplies are cut off, the cocaine user does not experience withdrawal symptoms, but he does feel deeply depressed and hallucinations may persist for some time. Strong psychological dependence on the drug and a desire to reexperience the intense stimulation and hallucinations cocaine produces lead to its chronic misuse.

H. Amphetamine

Medical Use - Amphetamine has been available since the early 1930's. First used medically as a nasal vasoconstrictor in treatment of colds and hay fever, amphetamine was later found to stimulate the nervous system. This stimulating activity is the primary basis for its uses in medicine today. Amphetamine is used for barcopelsy (a disease characterized by involuntary attacks of sleep) and to counteract excessive drowsiness caused by sedative drugs. But in the main, amphetamine is used in obesity, where the drug exerts an anti-appetite effect, and to relieve mild depression such as that accompanying menopause, convalescence, grief, and senility. Paradoxically, this drug tends to calm hyperactive, noisy, aggressive children, thus producing more normal behavior.

Amphetamine may produce a temporary rise in blood pressure, palpitations, dry mouth, sweating, headache, diarrhea, pallor, and dilation of the pupils. Such effects are generally seen only with high doses or as occasional side effects with therapeutic doses. Amphetamine drugs seldom cause death, even in acute overdosage.

Abuse - Amphetamine is a stimulant. It increases alertness, dispels depression and superimposes excitability over feelings of fatigue. It also produces an elevation of mood and a feeling of well-being. All these are factors underlying amphetamine abuse - and explain its popular name, "pep pill."

Amphetamine usually is taken orally in the form of tablets or capsules. However, there have been reports of intravenous use in which amphetamine is dissolved in water and then injected. With this route of administration, the effects of the drug are felt almost immediately.

Most medical authorities agree that amphetamine does not produce physical dependence, and there is no characteristic abstinence syndrome upon abrupt discontinuance of drug use. Mental depression and fatigue, however, are frequently experienced after the drug has been withdrawn. Psychological dependence is common and is an important factor in continuance of and relapse to amphetamine abuse. The development of tolerance permits the use of many times the usual therapeutic dose.

An acute psychotic episode may occur with intravenous use, or a drug psychosis may develop with the chronic use of large doses. Symptoms include extreme hyperactivity, hallucinations, and feelings of persecution. These bizarre mental effects usually disappear after withdrawal of the drug. Generally, misuse is associated with milder symptoms. The abuser is talkative, excitable and restless, and experiences a "high." He suffers from insomnia, perspires profusely, has urinary frequency and exhibits a tremor of the hands.

The abuse of one type of amphetamine drug - methamphetamine ("Speed") - is a problem in some areas. Abusers produce highly intensified effects by "mainlining" the drug through injection.

I. Miscellaneous Stimulants

There are a number of other stimulant drugs which, while not closely related to amphetamine chemically, do have similar uses and effects (A typical drug of this type is phenmetrazine, used medically in the treatment of obesity.).

When abused, such drugs can produce all of the effects associated with the abuse of amphetamine, including hallucinations. Nevertheless, such drugs are not as widely misused as amphetamine drugs, and only phenmetrazine has been placed under the same controls imposed upon amphetamine.

J. Hallucinogens

Distortions of perception, dream images and hallucinations are characteristic effects of a group of drugs variously called hallucinogens, psychotomimetics, dysleptics or psychedelics. These drugs include mescaline, peyote, lysergic acid diethylamide (LSD), psilocybin, dimethyltryptamine (DMT) and STP. At present, they have no general clinical medical use - except for research applications. However, they are being encountered with increasing frequency as drugs of abuse.

Marijuana, while chemically distinct from the foregoing, is also considered a hallucinogen. Pharmacologically, it is not a narcotic, although its control under the Controlled Substance Act of 1970 is somewhat similar to the control imposed on narcotics. Also, like narcotic law enforcement, marijuana law enforcement is handled by the Bureau of Narcotics and Dangerous Drugs as well as certain State and local law enforcement agencies.

K. Mescaline, Peyote, Psilocybin, DMT, STP

For centuries, various Indian tribes have used mescaline (derived from the Mexican cactus, peyote) in religious ceremonies. Mescaline is available on the illicit market as a crystalline powder in capsules or as a liquid in ampules or vials. It may also be obtained as whole cactus "buttons" (peyote), chopped "buttons" in capsules, or as a brownish-gray cloudy liquid. The drug is generally taken orally, but may be injected. Because of its bitter taste, the drug is often ingested with tea, coffee, milk, orange juice, or some other common beverage.

Psilocybin is derived from certain mushrooms found in Mexico. It has been used in Indian religious rites as far back as pre-Columbian times. It is not nearly as potent as LSD, but with adequate doses, similar hallucinogenic effects are produced. Psilocybin is available in crystalline, powdered, or liquid form.

DMT (dimethyltryptamine) is a more recent addition to the list of presently abused hallucinogenic agents. Although prepared synthetically, it is a natural constituent of the seeds of certain plants found in the West Indies and South America. Powder made from these seeds is known to have been used as a snuff as far back as the arrival of Columbus in the New World - and is still used by some Indian tribes of South America. DMT produces effects similar to those of LSD, but much larger doses are required.

Some varieties of morning glory seeds are also abused for their hallucinogenic effects. The bizarre behavioral effects produced upon ingestion are probably attributable to LSD-like components.

STP - a "new" hallucinogenic drug, called STP, began to be abused by the "hippies." Reportedly, the effects of STP were similar to those of LSD but were much longer lasting, even up to 72 hours. Because of several severe adverse reactions to STP, its abuse rapidly declined. It is now subject to the same legal controls as LSD.

L. LSD

LSD (lysergic acid diethylamide) was synthesized in 1938 from lysergic acid. This acid is present in ergot, a fungus that grows on rye. LSD is the most potent of the hallucinogens. On the illicit market the drug may be obtained as a small white pill, as a crystalline powder in capsules, or as a tasteless, colorless, or odorless liquid in ampules.

Frequently, it is offered in the form of impregnated sugar cubes, cookies, or crackers. LSD is usually taken orally, but may be injected.

LSD primarily affects the central nervous system, producing changes in mood and behavior. The user may also exhibit dilated pupils, tremors, elevated temperature and blood pressure, and hyperactive reflexes.

Tolerance to the behavioral effects of LSD may develop with several days of continued use, but physical dependence does not occur. Although psychic dependence may develop, it is seldom intense. Accordingly, most LSD devotees will use the drug when available, but do not seem to experience a serious craving when LSD cannot be obtained.

In general, the LSD experience consists of changes in perception, thought, mood, and activity. Perceptual changes involve senses of sight, hearing, touch, body image, and time. Colors seem to intensify or change, shape and space relation appear distorted, objects seem to pulsate, two dimensional objects appear to become three dimensional and inanimate objects seem to assume emotional import. Sensitivity to sound increases but the source of the sound is elusive. Conversations can be heard but may not be comprehended. There may be auditory hallucinations of music and voices. There may be changes in taste and food may feel gritty. Cloth

seems to change texture, becoming coarse and dry or fine and velvety. The subject may feel cold or sweaty. There are sensations of lightheadedness, emptiness, shaking, vibrations, fogginess. Subjects lose awareness of their bodies with a resultant floating feeling. Arms or legs may be held in one position for extended periods of time. Time seems to race, stop, slow down, or even go backwards. Changes in thought include a free flow of bizarre ideas including notions of persecution. Trivial events assume unusual significance and importance. An inspiration or insight phenomenon is claimed by some LSD adherents.

The mood effects of LSD run the gamut. There may be bursts of tears, of laughter, or the subject may feel no emotion at all. A state of complete relaxation and happiness, not apparent to an observer, may be experienced. A feeling of being alone and cut off from the world may lead to anxiety, fear, and panic. Accordingly, the LSD session is frequently monitored by an abstaining LSD-experienced friend to prevent flight, suicidal attempts, dangerous reaction to panic states, and impulsive behavior, such as disrobing. There may be a feeling of enhanced creativity, but this subjective feeling rarely seems to produce objective results.

After a number of hours, the effects of LSD begin to wear off. Waves of the LSD experience, diminishing in intensity, alternate with periods of no effects at all, until all symptoms disappear. Some fatigue, tension, and recurrent hallucinations may persist long after ingestion of the drug. Psychological changes induced by the drug can persist for indefinite periods.

There is, at present, no approved general medical use for LSD. Some interesting results have been obtained with the drug in certain medically supervised research programs - particularly in the treatment of chronic alcoholism and terminal illness. However, the Food and Drug Administration now takes the position that LSD has insufficient clinical utility to warrant either prescription or nonprescription use. Consequently, LSD is now subject to controls similar to those for any unproved investigational drug.

Medical warnings notwithstanding, large quantities of the drug have become available on an illicit basis for use in "mind expansion" - an application not even contemplated in medical research programs undertaken to date. Those using LSD for this purpose advocate unrestricted use of the product. They state that the drug is not inherently dangerous, claiming either personal use without complication or citing safe use by various notables from many fields. Although it may be true that some individuals have had LSD experiences without apparent ill effect, growing medical evidence shows the drug can cause very serious, and often damaging reactions in many. Bizarre behavior in public, panic, fear, and homicidal and suicidal urges have been reported. Psychotic states have been induced through use of the drug - both with emotionally unstable individuals and with persons in whom no sign of emotional instability had been evident. Although most LSD-induced psychotic episodes have occurred in persons initially experimenting with the drug, untoward results have also occurred with "experienced" abusers. What's more, "casualties" have happened even when the drug has been taken under supervision, both medical and nonmedical. LSD also cal produce delayed psychotic reactions in some individuals. In some instances, hallucinations have recurred for weeks

after the drug was taken. There is substantial evidence that LSD can cause genetic damage. In the opinion of Dr. James L. Goddard, former Commissioner of Food and Drugs, medically unsupervised use of LSD is analogous to playing "chemical Russian roulette."

M. Solvents

Among nondrug substances frequently encountered in drug abuse situations are various solvents. For example, the inhalation of solvent fumes from glue, gasoline, paint thinner, and lighter fluid will produce a form of intoxication. Inhalation is practiced most frequently by youngsters between 10 and 15 and occasionally up to 18 year. Glue usually is squeezed into a handkerchief or bag which is placed over the nose and mouth. Gasoline and paint thinner fumes may be inhaled directly from tanks and cans.

After a number of "drags," the individual experiences excitation, exhilaration, and excitement resembling the initial effects of alcoholic intoxication. Blurring of vision, ringing ears, slurred speech, and staggering are common, as are hallucinations. This phase of intoxication lasts from 30 to 45 minutes after inhalation, followed by drowsiness, stupor, and even unconsciousness of about an hour's duration. Upon recovery, the individual usually does not recall what happened during the period of intoxication.

Present knowledge concerning solvent inhalation indicates that physical dependence does not develop with the abuse of these agents, although a tendency to increase the amount inhaled suggests tolerance. Repeated use and relapse to use indicate the development of psychic dependence.

Some medical problems can attend solvent inhalation. The chief dangers of inhaling these substances are death by suffocation (i.e., through the overwhelming presence of fumes in a small room or through the use of a plastic bag), the development of psychotic behavior, and the state of intoxication these substances produce. Additionally, a severe type of anemia has been observed in glue-sniffers who have an inherited defect of blood cells (sickle-cell disease). It is known that many solvents and the ingredients of some types of glue damage the kidneys, liver, heart, blood, and nervous system. Although such adverse effects as a result of inhalation are rare, they remain a distinct possibility.

N. Marijuana

The technical name of the plant from which all marijuana preparations are derived is Cannabis sativa (L.), sometimes called Cannabis indica, Indian hemp, or simply hemp. The cannabis plant is native to large areas of the world and its fibers have been used for the manufacture of twine, rope, bags, clothing, and paper. The sterilized seeds are occasionally used in various feed mixtures and particularly for bird seed. Marijuana has also been used in the treatment of a variety of clinical disorders as an analgesic, a poultice for corns and in other ways. All of these medical uses were found to be either unsound, inefficient, or without predictable effect. Hence, the drug has been removed from the U.S. Pharmacopeia as well as the official drug lists of nearly all other countries. However, legitimate medical research into marijuana's possible utilization in a

range of useful therapeutic functions continues. Such research has never been prohibited by Federal l :/s.

Under the Federal law, "marijuana" is defined to mean all parts of the cannabis plant except for the stalks and sterilized seeds. All other preparations of the plant, whether of leaves, flowers, resins (hashish), or chemical extracts, are various forms of marijuana. In this country, the term "marijuana" usually refers to a preparation of pulverized leaves, resins, flowers, or combination of these, also called "pot," or "grass," for smoking in pipes or homemade cigarettes (called "reefers,""sticks," or "joints"). We now know that marijuana contains a number of potent compounds called tetrahydrocannabinols which affect the mind and body in various ways.

The strength of any given preparation of marijuana depends upon the amount of tetrahydrocannabinol which is contained in it. Medical research during 1967 has been successful in isolating or synthesizing the active ingredients found in raw marijuana. If we are to take a lesson from history, we should be willing for those actively engaged in research into chronic use of marijuana to establish or disprove definitely any harmful effects. One will note that even the analogues of opium and morphine when first discovered were proclaimed as "cures" for narcotic addiction.

The strongest preparations, such as hashish, are made in certain areas of the world, particularly India and the Near East. A substantial quantity of hashish finds its way into this country's illicit traffic; however, most marijuana users customarily must settle for more adulterated forms. This is primarily due to State and Federal policing activity plus the general air of social condemnation, all of which result in making it difficult, expensive, and dangerous to acquire and possess marijuana. Thus, American users accept whatever grade of marijuana they can get at whatever price it is offered and whenever it is available.

Marijuana is not a single, simple substance of uniform type. It consists of varying mixtures of different parts of the plant Cannabis Sativa, with psychoactive properties ranging from virtually nonexistent to decidedly hallucinogenic in its stronger forms and at high doses. Unfortunately, much of the discussion in lay and sometimes scientific forums ignores this very basic and important fact.

1. Effects on the Mind and Body

The consumption of marijuana or hashish produces a variety of mental and physical effects which become more pronounced with chronic use. The 1065 report on Drug Dependence for the World Health Organization describes the nature of the intoxication as follows:

"Among the more prominent subjective effects of cannabis . . . are: hilarity . . . carelessness; loquacious euphoria . . . distortion of sensation and perception . . . impairment of judgment and memory; distortion of emotional responsiveness; irritability; and confusion. Other effects, which appear after repeated administration . . . include: lowering of the sensory threshold, especially for optical and acoustical stimuli . . illusions, and delusions that predispose to antisocial behavior; anxiety and aggressiveness as a possible result of various intellectual and sensory derangements; and sleep disturbances."

Psychological changes accompanying marijuana use at low levels of usage are generally relatively few. One of the most consistent is an increase in pulse rate. Another is reddening of the eyes at the time of use. Dryness of the mouth and throat are uniformly reported. Although enlargement of the pupils was an earlier impression, more careful study has indicated that this does not occur. Death directly attributable to the drug's effects is extremely rare even at very high doses.

In the past several decades a number of observers have noted the confused speech, spurious thinking and paranoid or catatonic reactions that are sometimes associated with marijuana use, but rarely in a subject who uses it for the first time.

Acute psychotic episodes precipitated by marijuana intoxication have been reported by a number of investigators. These appear to occur infrequently, usually at high dosages, but may occur, even at levels of social usage. Heightened susceptibility appears to be more likely in those who have previously had a marginal psychological adjustment especially in the presence of excessive strain.

The effects of the drug on the nervous system and brain are undoubtedly the most profound and constitute the greatest problem for the user and the persons around him. These include the possible precipitation of psychotic episodes during which the user becomes mentally unbalanced for varying periods of time.

A study describing the effect of the most active of tetrahydrocannabinols (abbreviated as THCO) reported as follows:

"It has long been known that marijuana and hashish can cause psychotic reaction, but usually such reactions are ascribed to individual idiosyncrasies rather than being usual or common reactions to the drug. The data in these experiments, however, definitely indicate that the psychotomimetic effects of delta 1-THC are dependent on dosage and that sufficiently high doses can cause psychotic reactions in almost any individual. Psychotic reactions after smoking marijuana under the usual conditions in the United States appear to be rare but the low incidence of such psychotic breaks may reflect nothing more than the low tetrahydrocannabinol content of most of the marijuana available in the United States."

Recent scientific studies have noted the disturbance of immediate memory which induces gaps in the stream of thought and aberrations of speech content in marijuana users. In January 1970, Dr. Reese Jones of the Langley Porter Clinic presented before the Salk Institute findings which demonstrated an alteration of sequential thought in marijuana subjects. Other medical researchers have confirmed speech impairment due to loss of immediate recall and the difficulty in retrieval of recently acquired information, instances of spontaneous recurring "flashbacks" in the case of marijuana users, and toxic psychotic reactions lasting one to 11 days in individuals who smoked the stronger Vietnamese marijuana. Among chronic marijuana users there is also a tendency toward sustained disinclination to become involved in logical, rational thinking.

A sufficient dose of the active substance in marijuana is capable of producing all of the effects of the more concentrated hashish and even of LSD. For certain individuals, a small dose, and for all individuals, a large dose of marijuana's active ingredients may cause temporary psychosis. What each individual does while in a psychotic state will vary with the individual and his circumstances at the time of the psychosis. The use of marijuana may precipitate psychotic episodes or cause impulsive behavior in reaction to fear or panic.

Continuing research is being carried out to determine whether chronic marijuana use may have detrimental effects on physical health, including possible brain and genetic damage. Psychic dependence and the drug's effects, however, may lead to extreme lethargy, self-neglect, and preoccupation with use of marijuana to a degree that precludes constructive activity.

One researcher has noted the subtle but ominous changes among such marijuana users characterized by: decreased drive, apathy, distractability, poor judgment, introversion, depersonalization, diminished capacity to carry out complex plans or prepare realistically for the future, magical thinking, a peculiar fragmentation of thought, and progressive loss of insight.

MAJOR DRUGS: Their characteristics and effects

DEPRESSANTS

Drug Type	Name	Street Name	Origin	Average Amount Taken	How Taken
Alcohol	Beer	Suds	Grain	12 ozs.	Swallowed
	Distilled liquor	Booze	Grain	1.5 ozs.	Swallowed
	Wine	Vino	Grain	3 ozs.	Swallowed
Barbiturates	Chloral Hydrate		Synthetic	500 mg.	Swallowed
	Doriden	Barbs	Synthetic	400 mg.	Swallowed
	Nembutal	Downers	Synthetic	400 mg.	Swallowed
	Phenobarbital	Reds	Synthetic	50-100 mg.	Swallowed
	Seconal		Synthetic	50-100 mg.	Swallowed
Inhalants	Aerosols (frozen)		Synthetic	Varies	Inhaled
	"Model" Glue		Synthetic	Varies	Inhaled
	Amyl Nitrite		Synthetic	Varies	Inhaled
	Nitrous Oxide		Synthetic	Varies	Inhaled
Narcotics	Codeine	↑	Opium poppy	15-50 mg.	Swallowed
	Demerol	Smack	Synthetic	50-150 mg.	Injected
	Heroin	Junk	Opium poppy	Varies	Sniffed/injec
	Methadone	Joy-powder	Synthetic	5-15 mg.	Swallowed/inj
	Morphine		Opium poppy	10 mg.	Injected
	Opium		Opium poppy	Varies	Inhaled/swall
	Percodan	↓	Synthetic	15-50 mg.	Swallowed
Tranquillizers	Librium		Synthetic	5-25 mg.	Swallowed
	Mildown/Equanil	Downers	Synthetic	300/400 mg.	Swallowed
	Thorazine	Reds	Synthetic	5-25 mg.	Swallowed

ge Amount aken	How Taken	Short-Term Effects of Average Amount Description	Duration	Short-Term Effects of Large Amount	Risk of Dependence Psychological Habituation	Physical Addiction
ozs. .5 bzs. ozs.	Swallowed Swallowed Swallowed	Relaxation, breakdown of inhibitions, euphoria, depression, decreased alertness	2-4 hrs.	Stupor, nausea, unconsciousness, hangover, death	High	Moderate
mg. mg. mg. 00 mg. 00 mg.	Swallowed Swallowed Swallowed Swallowed Swallowed	Relaxation, euphoria, decreased alertness, drowsiness, impaired coordination sleep	4-8 hrs.	Slurred speech, stupor, hangover, death	High	High
ies ies ies ies	Inhaled Inhaled Inhaled Inhaled	Relaxation, euphoria, impaired coordination	1-3 hrs.	Stupor, death	High	None
50 mg. 150 mg. ies 5 mg. mg. ies 50 mg.	Swallowed Injected Sniffed/injected Swallowed/injected Injected Inhaled/swallowed Swallowed	Relaxation, relief of pain and anxiety, decreased alertness, euphoria, hallucination	4 hrs.	Stupor, death	High	High
5 mg. /400 mg. 5 mg.	Swallowed Swallowed Swallowed	Relief of anxiety and tensions, sleep, suppression	12-24 hrs.	Drowsiness, blurred vision, dizziness, slurred speech, allergic reaction, stupor	Moderate	Moderate

2

Risk of Dependence			Long-Term Effects
Psychological Habituation	Physical Addiction	Tolerance Buildup	
High	Moderate	Yes	Obesity, impotence, psychosis, ulcers, malnutrition, liver and brain damage, "dt's", death
High	High	Yes	Excessive sleepiness, confusion, irritability, severe withdrawal sickness
High	None	Possibly	Hallucinations; liver, kidney, bone-marrow, and brain damage; death
High	High	Yes	Lethargy, constipation, weight loss, temporary sterility and impotence, withdrawal sickness
Moderate	Moderate	No	Destruction of blood cells, jaundice, coma, death

MAJOR DRUGS: Their characteristics and effects (Chart continuation)

PSYCHEDELICS	Cannabis	Hashish Marijuana THC	Dope Grass Pot	Cannabis plant Cannabis plant Synthetic	Varies Varies Varies	Inhaled/swallowed Inhaled/swallowed Swallowed/injected
	Hallucinogens	DMT LSD Mescaline Phencyclidine Scopolamine STP	Acid "Hog" Angel-dust Crystal joints	Synthetic Synthetic Cactus Synthetic Hembane plant Synthetic	Varies 150-200 mg. 350 mg. 25 mg. .5 mg. 5. mg.	Inhaled Swallowed/injected Swallowed Swallowed Swallowed Swallowed
STIMULANTS	Amphetamines	Benzedrine Dexedrine Methedrine Preludin	"Whites" Uppers Speed	Synthetic Synthetic Synthetic Synthetic	2.5-5 mg. 2.5-5 mg. 2.5-5 mg. 2.5-5 mg.	Swallowed/injected Swallowed/injected Swallowed/injected Swallowed/injected
	Anti-depressants	Elavil Ritalin Tofranil		Synthetic Synthetic Synthetic	10-25 mg. 10-25 mg. 10-25 mg.	Swallowed/injected Swallowed/injected Swallowed/injected
	Cocaine		Coke	Coca leaves	Varies	Sniffed/injected

	Inhaled/swallowed Inhaled/swallowed Swallowed/injected	Relaxation, lowered inhibitions, euphoria, appetite increase	2-4 hrs.	Panic, stupor	Moderate	None to Moderate
ng.	Inhaled Swallowed/injected Swallowed Swallowed Swallowed Swallowed	Perceptual canges, increased energy, hallucinations, panic	1/2 jr. 10-12 hrs. 12-14 hrs. Varies 6-8 hrs. 12-14 hrs.	Anxiety, hallucinations, psychosis, exhaustion, tremors, vomiting, panic	Low	None
. . . .	Swallowed/injected Swallowed/injected Swallowed/injected Swallowed/injected	Increased alertness, excitation, euphoria, decreased appetite	4-8 hrs.	Restlessness, rapid speech, irritability, insomnia, stomach disorders, convulsions	High	None
. . .	Swallowed/injected Swallowed/injected Swallowed/injected	Relief of anxiety and depression, temporary impotence	12-24 hrs.	Nausea, hypertension, weight loss insomnia	Low	None
	Sniffed/injected	Self-confidence, intense exhilaration	4 hrs.	Irritability, depression, psychosis	High	Arguable

2

1

Moderate	None to Moderate	Yes, but slight	Fatigue, psychosis	
Low	None	Yes	Increased delusions and panic, psychosis	
High	None	Yes	Insomnia, excitability, skin disorders, malnutrition, delusions, psychosis	
Low	None	Yes	Stupor, coma, convulsions, congestive heart failure, damage liver, death	
High	Arguable	Yes	Damage to nasal septum and blood vessels, psychosis	

THE DRUG ABUSER

SECTION IV

THE DRUG ABUSER

I. Introduction

Although much is known about the effects of illicit drugs, the abuser himself remains an enigma. Even though as many as 59% of USN E-1 through E-5's have used "nonmedically" some form of drug in the last 12 months (see NADAP Information Service Memo of Mar. 81 below), identifying which ones have done so is no easy matter. A quick glance at the "long term effects" section of the chart contained in Section III of this publication convinces most reasonable people that using illicit drugs is inherently dangerous.

Drug abusers are not reasonable as the following survey reveals:

PERCEIVED DANGERS AND ACTUAL USE OF LEGAL AND ILLEGAL DRUGS

On March 2, 1978, Louis Harris and Associates released the findings of a nationwide poll on drug use. They found that most Americans perceive prescription drugs such as pep pills, tranquilizers and painkillers as more dangerous than marijuana. Saccharine, which has been linked to cancer, is not considered as being particularly dangerous. Harris then projected the number of users based on 145,000,000 adults 18 years and older in the U.S. He found that perceived danger had a limiting effect on the number of users but that temptation far exceeds education. People know what they like and take it, regardless of danger.

DRUGS	% FEEL DANGEROUS TO USE	PROJECTED NUMBER OF USERS
Heroin	91	2,900,000
Pep pills	75	11,500,000
Cocaine	70	11,500,000
Diet pills	67	22,000,000
Sleeping pills	55	27,500,000
Birth-control pills	55	29,500,000
Tranquilizers	52	51,000,000
Painkillers	44	52,000,000
Marijuana	37	33,500,000
Saccharine	22	65,000,000

This unreasonableness makes them all the more difficult to identify, counsel and discipline.

II. General:

Slum conditions, easy access to drugs, peddlers, and organized crime have all been blamed for the drug problem. But while any of these factors may contribute, no single cause nor single set of conditions clearly leads to drug dependency - for it occurs in all social and economic classes. The key to the riddle lies within the abuser. True, drug dependency cannot develop without a chemical agent. Yet, while millions are exposed to drugs by reason of medical need, relatively few turn to a life of drugs. Even in metropolitan areas, where drugs may be available on street corners, only a small percentage of the individuals exposed join the ranks of the abusers.

For the most part, the hard-core abuser suffers from certain types of emotional instability which may or may not have been apparent prior to his initial drug abuse experience. Occasional cases may have a background (often undiagnosed) of psychiatric disorder.

Some psychiatrists have said that addicts have an inherent inability to develop meaningful interpersonal relationships. Others have said that addicts are persons who are unwilling to face the responsibility of maturity. Adolescent addicts may have suffered childhood deprivation or overprotectiveness. Or, they simply may not be able to cope with the physical and emotional changes accompanying this period. It is significant that many addicts have their first drug experience in their teens.

The transition from childhood to adulthood is seldom smooth, and many individuals are not emotionally equipped to meet the demands they face. The early and middle teens bring a loosening of family ties, a diminution of parental authority, increasing responsibility, and sexual maturing. Beset with anxiety, frustration, fear of failure, inner conflicts and doubts, the adolescent may find that amphetamines and marijuana promote conversation and friendship, barbiturates loosen inhibitions, hallucinogens heighten sensations, and narcotics provide relief and escape. Drug abuse may provide the entree to an "in group" or be a way of affirming independence by defying authority and convention.

In general, drug abusers fall into three main groups. The first group employs drugs for a specific or "situational" purpose. Examples: the student who uses amphetamines to keep awake at exam time; the housewife who uses anti-obesity pills for additional energy to get through household chores; the serviceman who uses amphetamines to keep awake while driving all night to reach home on a 72-hour pass.

The second group consists of "spree" users, usually of college or high school age. Drugs are used for "kicks," or just the experience. There may be some degree of psychological dependence, but little or no physical dependence because of the sporadic and mixed pattern of use. Drug sprees constitute a defiance of convention, an adventurous, daring experience, or a means of having fun. Unlike hard-core abusers, who often pursue their habit alone or in pairs, spree users take drugs only in group or social situations.

The third is the "hard-core" addict. The abuser's activities revolve almost entirely around drug experiences and securing supplies. He exhibits strong psychological dependence on the drug, often reinforced by physical dependence when certain drugs are being used. Typically, the hard-core addict began drug abuse on a spree basis. The abuser has been on drugs for some time and presently feels that he cannot function without drug support.

Obviously, there is much overlapping between these groups, and a "spree" user or "situational" user may deteriorate to the "hard-core" group. The transition occurs when the interaction between drug effects and personality causes a loss of control over drug use. The drug becomes a means of solving or avoiding life's problems.

Slum sections of large metropolitan areas still account for the largest number of known drug abusers. But frustration, immaturity, and emotional deprivation are not peculiar to depressed neighborhoods, and the misuse of drugs by middle and upper economic class individuals is being recognized with increasing frequency. Drug dependency is not discriminating. A drug, an individual, an environment which predisposes use, and a personality deficiency are the key factors in its development. Department of Defense personnel are no exception. The military certainly does not create drug abusers, but it does have many within its ranks. Just how many is alarming, as the study at the end of this section shows.

III. Problems of Abuser Identification

Although drug abuse in its various forms can produce identifiable effects, almost all such manifestations are, at their onset, identical to those produced by conditions having nothing whatever to do with drug abuse.

Many people use legitimate drugs in accordance with physicians' instructions - but without the knowledge of their associates. For example, such disorders as epilepsy, diabetes, or asthma may require maintenance drug therapy that will produce low-level side effects. Or, a person might be drowsy from ingesting a nonprescription product - such as an antihistamine.

A clue to the possibility of drug abuse comes with persistence of symptoms which might otherwise appear "routine." When tablets, capsules, or other forms of drugs are found on a person suspected of being an abuser, they are not necessarily narcotics or any other dangerous drug.

There are no instant tests for identification of most drugs. The only way many drugs can be identified is through a series of complicated laboratory procedures performed by a trained technician. Simple visual inspection cannot be relied upon for drug identification. Many potent drugs which are misused are identical in appearance to relatively harmless drugs - many of which may be readily obtained without a prescription.

IV. Common Symptoms of Drug Abuse

Not all drug abuse-related character changes appear detrimental, at least in the initial stages. For example, a usually bored, sleepy person may - while using amphetamines - be more alert and thereby improve performance. A nervous, high-strung individual may, on barbiturates, be more cooperative and easier to manage. What must be observed,

consequently, are not simply changes for the worse, but any sudden changes in behavior, which are at odds with an individual's previous conduct. When such behavioral expressions of the individual become typical as opposed to the exceptional, a casual factor exists. That factor may be drug abuse.

A. Signs:

Signs which may suggest drug abuse include sudden and dramatic changes in discipline or performance. Drug abusers may also display unusual degrees of activity or inactivity, as well as sudden displays of emotion. Significant changes in personal appearance (usually for the worse) may also be cause for concern because the drug abuser often becomes indifferent to his appearance, nutrition, and general health. A much more subjective sign of drug abuse can include "furtive" behavior. (like obscenity, you may not be able to describe it, but you know it when you see it.)

Association with known drug abusers is, of course, a sign of potential trouble. As is the secreting of one's person at odd times in odd places (Why do five grown men stay inside a single BEQ room on a summer day?).

V. Specific Manifestations

A. Glue Sniffers

The glue or solvent sniffer usually retains the odor of the substance which he has inhaled on his breath and clothes. The irritation of the mucous membranes in the mouth and nose that this type of abuse causes may result in excessive nasal secretions. Redness and watering of the eyes are also commonly observed. (Notice these are also symptomatic of the common cold.) The glue abuser may appear intoxicated or lack muscular control, and may complain of double vision, ringing in the ears, vivid dreams, and even hallucinations. Drowsiness, stupor and unconsciousness may follow excessive use. Discovery of plastic or paper bags and rags or handkerchiefs containing dried plastic cement is also a good clue that this form of drug abuse is being practiced.

B. The Depressant Abuser

The abuser of a depressant drug, such as the barbiturates and certain tranquilizers, exhibits most of the symptoms of alcohol intoxication with one important exception: there is no odor of alcohol on his breath. Persons taking depressants may stagger or stumble. The depressant abuser frequently falls into a deep sleep. In general, the depressant abuser lacks interest in activity, is drowsy, and may appear to be disoriented.

C. The Stimulant Abuser

The behavior of the abuser of stimulants, such as amphetamines and related drugs, is characterized by excessive activity. The stimulant abuser is irritable, argumentative, appears extremely nervous, and has difficulty sitting. In some cases, the pupils of his eyes will be dilated even in a brightly lit place.

Amphetamine has a drying effect on the mucous membranes of the mouth and nose with resultant bad breath that is identifiable as to specific odor such as onion, garlic, alcohol, etc. Because of the dryness of the mouth, the amphetamine abuser licks his lips to keep them moist. This often results in chapped and reddened lips which, in severe cases, may be cracked and raw.

Other observable effects: dryness of the mucous membrane in the nose causing the abuser to rub and scratch his nose vigorously and frequently to relieve the itching sensation, incessant talking about any subject at hand, and, often, chainsmoking.

Finally, the person who is abusing stimulant drugs often goes for long periods of time without sleeping or eating and usually cannot resist letting others know about it.

D. The Narcotic Abuser

Narcotic abusers are relatively uncommon in the Armed Forces because they usually cannot function in the required situations. However, some individuals may drink paregoric or cough medicines containing narcotics. The presence of such bottles in wastebaskets or trash containers is a clue to this form of abuse. The medicinal odor of these preparations is often detectable on the breath.

Other "beginner" narcotic abusers inhale narcotic drugs such as heroin in powder form. Sometimes traces of this white powder can be seen around the nostrils. Constant inhaling of narcotic drugs makes nostrils red and raw.

For maximal effect, narcotics usually are injected directly into a vein. The most common site of the injection is the inner surface of the arm at the elbow. After repeated injections, scar tissue ("tracks") develops along the course of such veins. Because of the easy identification of these marks, such narcotic abusers usually wear long sleeves at odd times. Females sometime use makeup to cover marks. Some males get tattooed at injection sites. Associated with the injection of any drugs under unsterile conditions is the hazard of transmitting malaria and other tropical diseases, hepatitis, and blood poisoning.

The presence of paraphernalia ("works" or "outfit") used in injecting narcotics is another way to spot the narcotic abuser. Since anyone injecting drugs must keep his equipment handy, it may be found on his person or hidden nearby in a locker, rack, or some place where temporary privacy may be found. The characteristic instruments and accessories are a bent spoon or bottle cap, small ball of cotton, syringe or eyedropper, and a hypodermic needle. All are used in the injection process: the spoon or cap holds the narcotic in a little water for heating over a match or lighter and the cotton acts as a filter as the narcotic is drawn through the needle into the syringe or eyedropper.

The small ball of cotton ("satch cotton") is usually kept after use because it retains a small amount of narcotic that can be extracted if the abuser is unable to obtain additional drugs. The bent spoon or bottle cap used to heat the narcotic is easily identifiable because it becomes blackened by the heating process.

A drug abuser deeply under the influence of narcotics usually appears lethargic, drowsy ("on the nod") or displays symptoms of deep intoxication. Pupils of the eye are often constricted and fail to respond to light.

E. The Marijuana User

The marijuana user is unlikely to be recognized unless he is heavily under the influence at that time. In the early stages of the drug effect, when the drug acts as a stimulant, the user may be very animated and appear almost hysterical. Loud and rapid talking with great bursts of laughter are common at this stage. In the later stages of the drug's effect, the user may seem in a stupor or sleepy.

Marijuana smokers may also be identified by their possession of such cigarettes, often called "sticks," "reefers," or "joints." A marijuana cigarette is often rolled in a double thickness of brownish or off-white cigarette paper. Smaller than a regular cigarette, with the paper twisted or tucked in on both ends, the marijuana cigarette often contains seeds and stems and is greener in color than regular tobacco.

Another clue to the presence of "reefers" is the way in which they are often smoked. Typically, such smoking occurs in a group situation. But because of the rapid burning and harshness of the marijuana cigarette, it is generally passed rapidly, after one or two puffs, to another person. The smoke is deeply inhaled and held in the lungs as long as possible. The cigarette is often cupped in the palms of both hands when inhaling to save all the smoke possible. Military personnel using this drug aboard ship or in the barracks often attempt to mask this odor by "sealing" the space in which it is being used. Rolled up blankets are used at the bottom of doors, incense is burned to mask the odor and windows are opened wide, even in the dead of winter.

F. The Hallucinogen Abuser

It is highly unlikely that persons who use hallucinogenic drugs (such as LSD) will do so while on duty. Such drugs are usually used in a group situation under special conditions designed to enhance their effect. Persons under the influence of hallucinogens usually sit or recline quietly in a dream or trance-like state. However, the effect of such drugs is not always euphoric. On occasion, users become fearful and experience a degree of terror which may cause them to attempt to escape from the group.

Hallucinogenic drugs are usually taken orally. They are found as tablets, capsules, or liquids. Users put drops of the liquid in beverages, on sugar cubes, crackers, or even on small paper wads or cloth. It is important to remember that the effects of LSD may recur days - or even months - after the drug has been taken.

VI. The Extent of the Problem

It is a problem as shown by the following memorandum.

March, 1981

NADAP INFORMATION SERVICE

Department of Defense Worldwide Drug and Alcohol Abuse Survey

A recent Department of Defense worldwide alcohol and drug abuse survey indicates that in all categories of drugs, except cannabis, drug use in the U.S. military has generally declined since 1975. Drug abuse in the military approximates that of the civilian population.

The survey indicates that misuse of alcohol has been the services' number one problem, is now the services' number one problem, and will continue to be the services' number one problem. Following alcohol, drugs most commonly used are marijuana, amphetamines, and cocaine. The drugs least used are heroin and phencyclidine (PCP).

A Defense Department statement, in response to the survey, said the military has been making progress in providing medical and advisory attention to users of alcohol and drugs. However, DOD expressed concern about this continuing problem, and pledged to take additional measures to help those individuals in need. Although alcohol and drug use may be comparable to that in the civil sector, DOD pledged to take measures to reduce such abuse among military populations.

One such measure already under way is "Project Navy Counterpush."

Based upon a continuing assessment of the Navy Alcohol and Drug Abuse Program (NADAP) and an analysis of the DOD survey, the Navy has implemented several new initiatives to combat drug abuse.

The Navy's major point of emphasis is on the individual who is "on the fence" with respect to alcohol abuse and drug use. The largest concerns are increased command involvement in education programs, counseling and rehabilitation, and law enforcement action. These concerns, being dealt with through a program involving the [illegible] of over [illegible] million dollars to the drug program in FY 81 and [illegible] million dollars in FY 82, which constitutes a 30 percent increase over the current budget. Resources for this program have already been identified and program expansion initiatives are in the process of being implemented. For FYs 81 and 82 the program consists of:

(1) Acceleration of the Navy's Drug Safety Action Program (DSAP) to full-scale implementation in FY 81, rather than Fy 82. DSAP is an approved 36-hour education and counseling program for identified drug abusers. It is patterned after the highly successful Navy Alcohol Safety Action Program (NASAP), which has an 89 percent success rate in rehabilitation of identified alcohol abusers. DSAP will provide program facilities serving major Navy population centers at San Diego, Norfolk, and Jacksonville in FY 81, increasing incrementaliy to 28 sites by FY 85.

ADMINISTRATIVE PROCEDURES FOR DRUG ABUSERS

[illegible] leaders for [illegible] Abuse [illegible] for [illegible] TEXCOM. In addition [illegible] greater clarity and ease of use and the [illegible] Report (DD[illegible] format [illegible] NADS compatible. Commands should [illegible] BUPERSMAN change sometime in early February 1981.

(2) The purchase of 20 portable urinalysis kits with the capability of conducting 100,000 urinalysis tests annually, thereby enhancing fleet drug abuse identification.

(3) The establishment and placement of nine additional Warrant Officer law enforcement specialist billets in FY 81 on the commander-in-chief and type-commander staffs. This initiative will provide the expertise to administer all law enforcement aspects of an aggressive drug enforcement program.

(4) The expansion of the drug detection dog program, phasing in an additional 50 dog teams at fleet locations, essentially doubling the Navy effort in this activity.

(5) The establishment of an inspection and assistance team at the NMPC level.

In addition to these initiatives, the Navy is conducting selective follow-on studies aimed at producing more refined data on specific segments of the Navy community. These studies, in conjunction with the DOD survey analysis, will provide the Navy with further guidance in the development of future policies, plans, and programs.

The 1980 Survey of Drug and Alcohol Use Among Military Personnel was to provide DOD with estimates of the prevalence and consequences of nonmedical drug use and alcohol use among the active duty military population. It focused on the nonmedical use of nine types of drugs and on the use of three types of alcoholic beverage.

Budgetary and time constraints did not allow the administration of the survey to every service member at each location throughout the world. A stratified multistage probability sample was developed and 81 installations and 19,582 personnel from pay grades E1 through 06 were randomly selected; actual respondents totaled 15,268. The sample was representative of all DOD military personnel worldwide, with respect to sex, race/ethnic origin, marital status, and age. Differential personnel sampling rates were used to obtain sufficient sample sizes in the various respondent subgroups and sample weighting procedures were applied to put the complete respondent sample into balance. The survey was administered from February through April 1980 and proctored by a study team from a private organization. The Navy accounts for approximately 26 percent of the total DOD military population and 30 percent of the total military population sampled in the survey. Navy respondents by paygrade were:

• E1 - E5	3161
• E6 - E9	1077
• W1 - W4	43
• 01 - 03	253
• 04 - 06	137
Total	4671

For the purpose of this survey, "nonmedical drug use" was defined as the use of drugs for nonmedical purposes, that is, for highs, for thrills, to seek a relaxed state, to give what was interpreted as insight, or for pleasure. The nine drug types used for prevalence estimates (listed in rank order of prevalence of use) are marijuana/hashish, amphetamines or other uppers, cocaine, hallucinogens (other than PCP), tranquilizers, barbiturates or other downers, opiates, PCP, and heroin. Over one-fourth (27 percent) of the total DOD military population used some type of drug or drugs nonmedically in the 30 days preceding the survey and 36 percent reported such use within the 12 months prior to the survey. Navy figures for the same time periods were: 33 percent in the preceding 30 days and 43 percent within the preceding 12 months. The figures for marijuana/hashish were much the same as those for "any drug use," indicating that nearly all users of nonmedical drugs used at least marijuana or hashish. None of the other drug types approached marijuana or hashish in popularity.

The survey indicated that nonmedical drug use is most prevalent among personnel in pay grades E1 through E5, a phenomenon that may be attributable to the comparatively younger age of junior enlisted personnel. Table 1 shows the percentage (with extrapolated numbers of members in parenthesis) of Navy E1 through E5 using each drug. The most reported consequences of nonmedical drug use reported by Navy E1 through E5 were "high more than one day at a time" (22 percent) and "used more drugs than planned" (13 percent). The survey estimated that 4 percent of Navy personnel in pay grades E1 through E5 were physiologically or psychologically drug dependent at some time during the preceding 12 months.

Table 1

Population of USN E1 - E5 Using Each Drug 329269 E1 - E5

Drug Type/Use Period	Percentage/Number*
Any Drug Use	
PAST 30 DAYS	48(158,049)
PAST 12 MONTHS	59(190,976)
Marijuana/Hashish	
PAST 30 DAYS	47(154,756)
PAST 12 MONTHS	58(194,268)
Amphetamines or other uppers	
PAST 30 DAYS	15(49,390)
PAST 12 MONTHS	28(92,195)
Cocaine	
PAST 30 DAYS	11(36,220)
PAST 12 MONTHS	25(82,317)
Hallucinogens (other than PCP)	
PAST 30 DAYS	7(23,048)
PAST 12 MONTHS	18(59,268)
Tranquilizers	
PAST 30 DAYS	4(13,170)
PAST 12 MONTHS	13(42,805)
Barbiturates or other downers	
PAST 30 DAYS	5 (16,463)
PAST 12 MONTHS	12 (39,512)
Opiates (other than Heroin)	
PAST 30 DAYS	2(6,585)
PAST 12 MONTHS	7(23,048)
PCP	
PAST 30 DAYS	2(6,585)
PAST 12 MONTHS	7(23,048)
Heroin	
PAST 30 DAYS	1(3,292)
PAST 12 MONTHS	2(6,585)

*"Number" is an extrapolation of percentage in sample over numbers of members in entire pay grade group

ur types of work impairment because of drug use were ported by Navy junior enlisted personnel: (1) "lowered performance," (2) "late for work or left early," (3) "did not come to work," and (4) "high while working." The type of work impairment reported most frequently by most E1 through E5 was "high while working." Table 2 shows the percentages (with extrapolated numbers in parenthesis) of Navy E1 - E5 reporting work impairment during the preceding year because of drug usage. Nearly half of those under "high while working" reported experiencing this work impairment on 40 or more days during the preceding 12 months.

The survey found that most (86 percent) Navy personnel drank at least occasionally. A "drink" was defined as one 12-ounce can, bottle, or glass of beer, one 4-ounce glass of wine, or one mixed drink or straight shot of hard liquor. In general, the highest prevalence of drinking any alcohol within the preceding 30 days was recorded, in order of prevalence, by senior officers (04-06), junior officers (01-03), junior enlisted (E1-E5), senior enlisted (E6-E9), and Warrant Officers. Beer was the most commonly consumed beverage, followed by hard liquor (including mixed drinks) and wine.

The survey defined a heavy drinker as a person who consumed eight or more "drinks" in a single day at least once a month during the preceding 12 months. The survey found that 25 percent of Navy personnel did engage in heavy beer drinking and 14 percent did engage in heavy drinking of hard liquor during the preceding 12 months. The most frequently reported consequences of heavy drinking were "became drunk without planning to" and "drunk more than one day at a time." The survey estimated that 9 percent of Navy personnel worldwide were alcohol dependent during the preceding 12 months. Estimates by pay grade were:

Pay Grade Group	Percent/ Number Dependent*
E1 - E5	12(39512)
E6 - E9	5(12941)
W1 - W4	0
01 - 03	less than half of one percent
04 - 06	1(232)

*"Number Dependent" is an extrapolation of percentage in sample over numbers of members in entire pay grade group.

The survey defined an "alcohol dependent" person as someone who, during the preceding 12 months, experienced one or more of the following symptoms during at least 48 of the 52 weeks: (1) tremors (shakes), (2) morning drinking, (3) impaired control, and (4) blackouts.

Table 2

Work Impairment Due to Drug Use USN E1 - E5 Population (329,269 Total)

Type Impairment	Percent/Number*
Lowered Performance	15(49,390)
Late for Work/Left Early	8(26,341)
Did Not Come to Work	4(13,170)
High While Working	26(85,609)

*[illegible] sample over numbers not [illegible]

The percentage of the Navy population reporting work impairment because of alcohol use during the preceding 12 months is shown on Table 3.

Table 3

Work Impairment Due to Alcohol Use During Past 12 Months Total USN 498,335

Impairment/Pay Grade	Percentage/Number*
Lowered Performance	
Total	30(147,975)
E1 - E5	34(111,[illegible])
E6 - E9	23(29,[illegible])
W1 - W4	12(59[illegible])
01 - 03	23(9,6[illegible]2)
04 - 06	8(1,6[illegible]2)
Late for Work or Left Early	
Total	17(74,939)
E1 - E5	21(69,146)
E6 - E9	10(1,070)
W1 - W4	0
01 - 03	9(3,102)
04 - 06	7(1,621)
Did Not Come to Work	
Total	5(26,259)
E1 - E5	7(23,049)
E6 - E9	3(3,210)
W1 - W4	0
01 - 03	0
04 - 06	0
Drunk/High While Working	
Total	16(80,236)
E1 - E5	21(69,146)
E6 - E9	7(7,491)
W1 - W4	0
01 - 03	6(2,068)
04 - 06	7(1,621)

*"Number" is an extrapolation of percentage in sample over numbers of members in entire pay grade group.

Alcohol and drug abuse in the Navy has been cause for serious concern for some time. The DOD survey, and ongoing programs of the Navy's own, will help further define why levels of abuse in the Navy are unacceptable. Contributing factors to abuse levels are believed to include:

(1) Naval installations located in large metropolitan areas, and frequent visit to foreign ports where drugs are more readily available and drug/alcohol abuse more prevalent among civilian peers.

(2) Arduous, restricted living conditions at sea creating perceived need for adult [illegible] outlets while ashore.

(3) Greater family separation, reducing stabilizing influences.

(4) Deficiency of enlisted "peer group leaders" brought about by the Navy's critical shortage of more than 20,000 petty officers.

The Navy's plans for future activity include the development of follow-on programs to the five basic initiatives previously described, and six more initiatives including

The establishment of a motivational drug abuse education program aimed at changing behavior during early years of a member's service. In FY 83 this initiative will provide affective drug abuse education at major accession points Navy-wide.

(2) The assignment of additional drug abuse specialists at each Human Resource Management Center and Human Resource Management Detachment to assist commands in the development of viable drug prevention programs.

(3) The establishment of Master at Arms (MAA) mobile training teams on each coast to provide technical assistance visits and instruction in implementing an effective drug enforcement program afloat.

(4) The assignment of a senior drug enforcement specialist to the Inspector General's staff.

(5) The expansion and improvement of the Navy alcohol and drug management information systems to include the addition of identification and law enforcement information to the data base and maintain the system in the out years following FY 83.

(6) The establishment of an officer billet on the three commanders-in-chief and six type-commander staffs in FY 83. These officers will be responsible to the commander for all elements of the drug abuse program including detection, deterrence, identification, treatment, education, and training.

The total program for Navy will add some $7 million to the drug budget in FY 83, expanding to $10 million when totally implemented in FY 86.

In summary, the Navy is continuing to analyze the voluminous quantity of data developed through the Department of Defense survey on alcohol and drug abuse among military personnel. Arrangements are also being made to obtain the data tapes of Navy information from the DOD contractor in order to conduct more detailed analysis and pinpoint possible additional problem areas.

Individual commands, in the meantime, have well-defined responsibilities of their own in the matter of alcohol abuse and other drug use. In fact, the success of the Navy Alcohol and Drug Abuse Program depends to a large extent on the acceptance of these responsibilities by individual commands and their utilization of alcohol and drug program resources.

Every Navy command, for example, should have a Collateral Duty Alcoholism Advisor (CODAA) and/or a Drug and Alcohol Program Advisor (DAPA) available for consultation with the commanding officer. The CODAAs and DAPAs are trained in targeting alcohol and drug prevalence within the command and initiating programming to ease the impact of alcohol and drug abuse, as well as in identification of alcohol abusers and drug users and ways of facilitating their entry into treatment.

The Navy operates more than 100 facilities for treatment of alcohol abusers and other drug users, including Counseling and Assistance Centers, Navy Alcohol Safety Action Program Detachments, the new Navy Drug Safety Action Program, Alcohol Rehabilitation Services and Alcohol Rehabilitation Centers, and the Naval Drug Rehabilitation Center.

Some of these activities are outpatient services, others are inpatient; some are therapeutic in design, others are designed to deliver motivational education aimed at behavioral change. To a significant degree, all of these programs work. And the cost benefits of the program overall are outstanding — up to $5 return to the Navy for every $1 spent on treating the involved member.

But perhaps the greater success of the programs is that they take a Navy member who is effectively nonfunctional because of the great distress caused by alcohol abuse and other drug use, and they treat that person at whatever level is required, ultimately returning to the fleet a responsible individual ready to resume his or her Navy career.

STATEMENT OF RESPONSIBILITY

The NADAP Information Service is published regularly under the authority of the Commander, Naval Military Personnel Command in accordance with the provisions of NPPR p-35 (Rev. Jan 74). It provides dissemination of unofficial information regarding the Navy Alcohol and Drug Abuse Program. *Opinions expressed herein are* not necessarily those of the Navy or the Department of Defense.

Navy Department
Naval Military Personnel Command
Navy Alcohol and Drug Abuse Program (NMPC-63)
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DRUG CHEMISTRY FOR COMMANDERS

SECTION V

DRUG CHEMISTRY

I. Introduction

All drugs are chemical compounds and since literally hundreds of thousands of such compounds exist, it is incumbent upon the government in a drug case to identify the substance in question as an illicit drug. This is usually, but not always, done through the use of a forensic laboratory. The laboratory employs a rather basic science to do its task: chemistry. The language of drugs becomes a function of chemistry. In order to understand drugs then, it is necessary to have a basic understanding of the chemistry involved. This chapter's purpose is to provide such insight. It is, however, not intended to be all inclusive or a substitute for the "expert." It is, rather, an introduction.

II. General

There are two general categories of drug analysis: (1) "field tests," and (2) laboratory tests. The line dividing the two is not a solid one; tests employed in the field are often performed in the lab and vice versa. For purposes of this analysis, the distinctions between the two categories will not be analyzed although the various test procedures will be described.

III. The Tests

A. Field Tests:

As suggested by their name, these tests are methods employed "in the field," i.e., outside the laboratory, to screen many of the commonly abused substances. The actual procedures employed vary with the manufacturer of the particular kit being used, although most employ a variety of color test (see below). The capability of any given kit also varies; for example, some kits may be capable of screening heroin, others may not. As an example, one such kit is manufactured by Becton-Dickinson and contains the elements necessary to perform color tests for six major narcotic and controlled substances. The kit contains a variety of test packages (plastic bags) containing an assortment of glass ampules of test chemicals. The suspected substance is placed in the bag and the glass ampules are crushed. The resultant color (produced by the reaction between the substance and the chemicals) is then compared with the color standard sheet provided in the kit. A "match" means the substance is probably the drug noted on the standard sheet. Field tests are extremely reliable as negative tests (no drug present), but not infallible as positive tests. Their reliability is sufficiently suspect in this regard that they should not be used as proof of the identity of a questioned substance in any disciplinary proceeding.

B. Color Tests:

A color test is basically a chemical reaction between two agents to produce a characteristic color. Most chemists use color tests to determine whether certain groups of atoms are present in organic molecules, but few could say that they can "identify" a compound on the basis of a color test alone. This is so because there are approximately two million

known organic compounds, most of which have not been subjected to a color test, thus the probability that one or more of them (other than a controlled substance) will produce the same color reaction, is high. On the other hand, if a chemist knows the substance in question is one of two compounds, he will rely on a color test to distinguish between them. Color tests should be considered as screening tests only; i.e., the color reaction may be consistent with the presence of a given substance, but it does not identify it. As an example of a color test, the following common procedure is discussed:

1. Duquenois-Levine Test: This is a color test commonly used to "identify" marijuana. An extract of the sample (30 to 100 mg.) is combined with 15 to 25 ml. of petroleum ether. The filtrate is then evaporated on a white disk, to which is added the Duquenois reagent. One ml. of concentrated hydrochloric acid is added, the solution stirred and then left to stand for 10 minutes. A violet color should result. If so, the solution is transferred to a test tube to which 1 to 2 ml. of chloroform is added. If marijuana is present, the voilet color should be transferred to the chloroform layer. A "modified" Duquenois test is often used, whereby some dry marijuana is put in a test tube with 2 ml. of reagent for one minute. An equal volume of concentrated hydrochloric acid is added. A violet shade should be noted, chloroform is added and the violet color should transfer as before.

C. Microcrystalline Tests:

In principle, microcrystalline tests are similar to color tests. The suspected drug is allowed to react with a reagent and a positive response is manifested by the precipitation of crystals of "characteristic" shape and color. The reliability of these tests is about the same as color tests for the same reasons. They are slightly more reliable, however, since they provide two responses per test, viz., shape and color.

D. Chromatography:

All the forms of chromatography are methods of separating mixtures of compounds but can also be used to help identify them as well. All of the chromatographic techniques work on the same principle and that principle is based on the affinity of the substance to be separated to another substance -- the so-called "stationary phase." The substance being separated is allowed to pass through the stationary phase and will do so in a given amount of time. A substance that has a great affinity for the stationary phase will pass through it more slowly than one which has little affinity for it. The two most commonly employed chromatographic techniques are "thin-layer" and "gas":

1. "Thin-layer" chromatography employs a plate which has the stationary phase (usually a silica gel) spread on one of its surfaces. The substance to be analyzed is dissolved and a small amount of the resulting solution is applied to the bottom of the covered side of the plate. The solvent is allowed to evaporate, the plate is placed in a container which contains the so-called developing solvent (at a level below the substance being tested) and the latter is allowed to be absorbed by the stationary phase. Capillary action causes the developing solvent to rise up the plate. The combination of the nature of the developing solvent and the

test material's affinity determines how far up the plate the substance will travel. A comparative analysis is made against a "known" sample. Thus, if alleged heroin is being tested, it should rise just as far as the "known" sample.

2. Gas chromatography employs a heatable tube (or column) which contains the stationary phase. The substance to be separated is dissolved in a solvent and then injected in solution into the column. The substance is pushed through the column by a flow of inert gas and ultimately emerges at the other end. This emergence is detected electronically and recorded on a chart. The time required is compared to a "known" sample.

Because of the variables that may affect the outcome, it is good practice to perform several tests or employ a chromatographic technique in combination with other tests, e.g., a color test.

E. Spectrophatometry.

Spectrophatometric techniques are additional tests that may be used to help identify drug samples. They include:

1. Ultraviolet spectrophatometry,
2. Infrared spectrophatometry, and
3. Mass spectrophatometry.

F. Microscopic Examinations

Microscopes are used to examine substances in one of two ways: (1) to observe the shapes of crystals in microcrystalline tests (see above) and (2) to observe the features of plant material, e.g., marijuana. Such examinations are simply visual determinations of gross characteristics of the material in question. Cannabis (marijuana) leaves have characteristic cystolithic hairs, which are readily observable under the microscope. Other plants have similar hairs, but cannabis hairs have a crystal of calcium carbonate at their base. If hydrochloric acid is placed on the slide, an effervescence will result and be observed under the microscope.

IV. Drugs and Related Tests:

A. Heroin:

The most common analysis of heroin usually involves 3 color tests and thin-layer chromatography. The color tests are (1) the Marquis test (purple), (2) the Froehde test (purple changing to green), and (3) the Nitric Acid test (yellow to green). Morphine analysis is similar.

B. Amphetamines:

Color tests (usually the Marquis test), a microcrystalline test and thin-layer chromatography.

C. LSD:

One color test (Marquis) and thin-layer chromatography are usually performed.

D. Cocaine:

Since cocaine is usually "cut" by drug pushers, it often contains a host of additives which may interfere with the color tests, thus thin-layer chromatography is employed.

E. Marijuana:

A microscopic analysis is often employed, followed by a Duquenois color test. Occasionally thin-layer chromatography is used.

V. NIS Laboratories:

NAVOP 159/81 provides guidance in seeking NIS laboratory assistance.

DEPARTMENT OF THE ARMY
UNITED STATES ARMY CRIMINAL INVESTIGATION LABORATORY–CONUS
FORT GORDON, GEORGIA 30905

CIRCL-ZA

3 April 1982

MEMORANDUM FOR MILITARY JUDGES

SUBJECT: USACIL-CONUS Notes

1. Laboratory examiners - both military and civilian - go through a lengthy training program (up to two years) prior to certification as a forensic examiner (i.e., expert witness).

2. All labs desire at least 10 days notification prior to court appearance. Message format with fund cite is preferable. Need time to prepare, make court charts, coordinate travel and lodging, etc.

3. If foreseeable, please stay clear of Mondays and Fridays for trial days. Also, if a three day holiday, Tuesday should be out. Best day of the week is usually a Tuesday or Wednesday. Courts on Monday and Friday invariably involve pre-trial conferences and travelling on weekends. Civilian examiners get no overtime but must take comp time.

4. Expert lab witnesses should be billeted separately from other trial or defense witnesses.

5. Transportation for examiners in and around installation is usually a big problem; rental cars are usually not authorized.

6. During trial, when expert witness has finished testifying, Judges can "permanently" excuse a witness, rather than merely "excusing" a witness. Because lab examiners generally incur a great deal of travel and because our Atlanta/Augusta flights are very limited, the faster an examiner is able to testify and be "permanently excused," the faster he will be back at his bench and the lower his travel expenses.

7. During pre-trial sessions, trial counsels must specify whether court charts can be photographed and handed to members of the court to facilitate reading and seeing them; some counsels allow court charts, others do not.

8. Requests for examiners should come by message direct to lab, not to Fort Gordon SJA. If short fuse, send using precedence "PRIORITY". Messages must include fund cite or we cannot make travel arrangements. Very acute for overseas flights.

CIRCL-ZA 8 April 1982
SUBJECT: USACIL-CONUS Notes

9. Many times there is no requirement for expert witnesses to attend Article 32 sessions; most of what transpires can be done over the phone or by reading a laboratory report.

10. Expert witnesses frequently attend yearly conferences hosted by the American Academy of Forensic Sciences, the Southern Association of Forensic Scientists, the Federal Bureau of Investigation, the Association of Firearms and Tool Mark Examiners, the International Association of Identification, the American Society of Questioned Documents Examiners, the US Secret Service and others.

11. In marihuana examinations, if there is a strong presumption of cross contamination, evidence is commingled, however, the chain is intact and specific. For example, one large sealed bag contains 20 small baggies loosely sealed, with marihuana debris throughout - a random sample of the 20 bags is taken.

12. We would appreciate any feedback or comments regarding our examiners at court, and any suggestions that can increase their effectiveness as witnesses. Please feel free to call me at AV 780-5616/5617.

ARNOLD DAKE, JR.
LTC, MP
Commanding

SPECIFIC ASPECTS OF URINE TESTING FOR TETRAHYDROCANNABINOL
(THC--MARIJUANA)

INFORMATION OUTLINE

I. Introduction. This informational outline has been adopted with some modifications from an outline of instruction prepared by Criminal Law Division of the Judge Advocate General's School, U.S. Army, Charlottesville, Virginia. The cooperation and contribution of the school is appreciated.

II. *Marijuana Smoke; Metabolism of Psychoactive Ingredients in the Body.*

A. Principal Psychoactive Ingredient is delta 9 tetrahydrocannabinol (short name: delta 9-THC)

B. The principal metabolite of delta 9-THC is 11-nor-delta 9-tetrahydrocannabinol-9 carbolic acid (short name: 9-carboxy THC)

III. Metabolism of THC into Urine.

A. THC moves from lungs into plasma.

B. Some absorbed into the fatty tissues (the brain contains fatty tissues).

C. THC metabolites are released through liver into urine.

IV. Retention Time.

A. THC has a half life in the body of 72 hours. In the first 72 hours 30-35% is excreted in the feces and 10-15% is excreted in the urine.

B. Detectable up to ten days with DOD tests.

C. Detection Times of Other Drugs with DOD Tests

1. Opiates -- 48 hours.

2. PCP -- 7 days.

3. Amphetamines -- 48 hours.

4. Barbituates -- 72 hours.

V. Testing for THC.

A. Screening tests.

1. Types commonly in use.

a. EMIT-st (Syva Co.) -- portable kit for field testing.

b. EMIT-d.a.u. (Syva Co.) -- for laboratory testing.

c. RIA (Radioimmunoassay) (Hoffman-LaRoche) -- for lab testing.

2. Screening tests detect many THC metabolites in addition to 9-Carboxy THC.

a. 9-carboxy THC is about 25% of the THC detected.

b. Reports a positive at 100 ng/ml to eliminate passive inhalers. See generally Perez-Reyes and Davis, Passive Inhalation of Marijuana Smoke and Urinary Excretion of Cannabinoids (submitted for publication to Clinical Pharmacology and Therapeutics). See Article at V-9 of this chapter.

c. Screening tests must be confirmed by DOD labs. See list of Navy, DOD approved labs in this chapter. See Article at V-20 of this chapter.

B. Confirming test.

1. Test currently used is gas chromatography. See Whiting and Manders, Confirmation of a Tetrahydrocannabinol Metabolite in Urine by Gas Chromatography, 6 J. Analytical Toxicology 49 (Jan-Feb 1982). See Article at V-20 of this chapter.

2. Confirms presence of 11-nor-delta 9-tetrahydrocannabinol-9-carboxylic acid (short name: 9-carboxy THC).

3. The best test, gas chromatography/mass spectroscopy (GC/MS) is soon to replace gas chromatography as the confirmation test at Naval Drug Screening labs certified by DOD. These labs presently have the GC/MS equipment. Personnel are being trained in use of the equipment, and test should be fully employed by early 1984.

VI. Interpreting Lab Results.

A. Will only say THC, or tetrahydrocannabinol, or 11-nor-delta 9-tetrahydrocannabinol-9-carboxylic acid (short name: 9-carboxy THC) is present.

B. Results will not state the amount of THC in a person's system. Amount depends on the quality of marijuana; higher quality has higher percentage of THC content.

C. Does not prove intoxication or amount used.

D. At most proves that marijuana was used during approximately ten-day period preceeding test, and presence of the metabolite in the person's system at the time the urine sample was taken.

6 and 7 October 1982
1430-1520 hours

PASSIVE INHALATION OF MARIJUANA SMOKE AND URINARY EXCRETION OF CANNABINOIDS

Mario Perez-Reyes, M.D.
Stephanie Di Guiseppi, B.S.
Department of Psychiatry
University of North Carolina
School of Medicine
Chapel Hill, North Carolina 27514

and

Kenneth H. Davis, B.S.
Research Triangle Institute
Research Triangle Park, North Carolina 27709

Address correspondence and reprint requests to:

Dr. Mario Perez-Reyes
Department of Psychiatry
University of North Carolina
School of Medicine
Chapel Hill, NC 27514

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Enclosure 3

6 and 7 October 1982
1430-1520 hours

Marihuana is commonly smoked in social situations in which not all or the individuals present smoke the drug. It is therefore possible that the non-smoking individuals could passively inhale enough of the cannabinoids present in marihuana smoke, i.e., Δ^9-tetrahydrocannabinol (THC), cannabinol, cannabidiol, etc., to excrete their metabolic products in urine in detectable amounts. Thus, it might be inferred by urine analysis that these individuals engaged in the use of an illicit drug, when, in reality, they passively and inadvertedly inhaled its constituents.

We wish to report the results of controlled experiments in which non-smoking subjects were exposed to high concentrations of marihuana smoke. The urine they excreted during the 24 hours following exposure was analyzed for its cannabinoid content by the EMIT cannabinoid assay.

METHODS

Six young, paid, experienced marihuana users (3 men and 3 women), and six young, paid, volunteers that had never used marihuana (3 men and 3 women) participated in the experiments. All of the subjects were healthy and of normal weight and height in relation to their age and sex. They were thoroughly informed about the nature of the experiments, and they signed appropriate informed consents.

STUDY I: Initially, four subjects smoked two 2.5% THC NIDA marihuana cigarettes simultaneously in the presence of two non-smoking subjects. Several weeks later, the same experiment was repeated but the potency of the marihuana cigarettes was increased to 2.8% THC content (the highest potency marihuana cigarettes available from NIDA). On both occasions, the smokers were instructed to smoke the cigarettes in their customary way. The smoking took place in a small, closed room,

8' x 8' x 10', with a total volume of 15,500 liters of air (the volume of the solid furniture present in the room was subtracted from the total room volume). The volunteers were confined in this room for one hour after the beginning of marihuana smoking. All urines voided by the non-smoking subjects were collected separatedly for 24 hours following marihuana smoke exposure, and the times of each voiding recorded on the collection bottles.

STUDY II: The setting of this experiment was changed to a more confined space to maximize the exposure to marihuana smoke and the likelihood of its passive inhalation. The smoking took place in a closed, medium-sized station wagon with an approximate volume of 3,500 liters of air. On two occasions separated by several weeks, four subjects smoked two 2.8% THC content marihuana cigarettes simultaneously in the presence of two non-smoking subjects. As before, the smoking subjects were instructed to smoke the cigarettes in their customary way. The volunteers were confined in the car for one hour after the beginning of marihuana smoking. The urine excreted by the non-smokers was collected as described above.

STUDY III: To investigate the possible cumulative effects of the daily passive exposure to marihuana smoke on the urinary excretion of cannabinoids, a more exhaustive experiment was conducted. Four subjects smoked simultaneously four 2.8% THC content marihuana cigarettes (one cigarette each) daily for three consecutive days in the presence of two non-smoking subjects. The subjects were instructed to smoke the cigarettes as little as possible to increase the amount of side-stream smoke diffusing in the room's atmosphere, and hence, the amount of THC

available for passive inhalation. Each day the subjects were confined in the closed small room described above for one hour after the beginning of marihuana smoking. The unsmoked portions of the cigarettes were collected and analyzed for their THC content by gas liquid chromatography [1]. The urine excreted by the non-smoking subjects was collected for three consecutive days in the manner described above. During the second day of the study, a third non-smoking subject participated from whom blood samples were drawn at frequent intervals. The plasma concentration of THC in these samples was determined by radioimmunoassay [2].

In this study, the THC present in the air of the room during and after smoking was measured. To perform this determination, the air of the room was continuously suctioned at the rate of 5.5 l/min by a pressure-vacuum pump through two cambridge filters (69 mm in diameter) that trapped the THC present in the air. The filters were changed at 15 minute intervals after the beginning of smoking. Smoke components were eluted from each filter by exhaustive extraction with absolute ethanol. After volume reduction under vacuum, the extract of each filter was analyzed for THC by gas liquid chromatography [1].

For all the studies, the volumes of the urines collected were measured and a 15 ml aliquot of each urine was coded, immediately frozen, and sent to the Syva Co. (Palo Alto, CA) for detection of the presence of cannabinoids by their EMIT cannabinoid assay. Pooled 24 hour urines obtained during the second room and car studies were sent to the Research Triangle Institute (Research Triangle Park, N.C.) for determination of the content of the predominant urinary metabolite of THC, 11-nor-Δ^9-THC-9-carboxylic acid (9-carboxy-THC), by gas liquid chromatography - mass spectrometry [3].

RESULTS

STUDY I: Twenty six urines were voided by the non-smoking subjects in the two room experiments. The urines were found to be below the 20 ng/ml calibrator of the EMIT assay (Figure 1).

STUDY II: Twenty three urines were voided by the non-smoking subjects in the two car experiments, and only the urine voided six hours after marihuana smoke exposure by male subject #1 in the 1st car experiment was slightly above the 20 ng/ml calibrator of the EMIT assay (Figure 2). Gas liquid chromatography - mass spectrometric analysis of the extracts of 3 ml aliquots of pooled 24 hr urine excreted by the non-smoking subjects for the presence of 9-carboxy-THC were negative. However, extraction of 1,000 ml of the urine excreted by male subject #1 showed a concentration of 60 picograms per ml of 9-carboxy-THC.

STUDY III: Four marihuana cigarettes weighing 942 mg and containing 26.2 mg of THC each were smoked simultaneously once a day for three consecutive days. Thus, theoretically, 104.8 mg of THC were smoked each day. However, measurement of the THC content of the butts of the cigarettes collected in the first, second, and third day of the study was 2.7 mg, 5.7 mg, and 2.3 mg, respectively. Hence, the amount of THC smoked each day was 102.1 mg, 99.1 mg, and 101,2 mg, respectively.

Twenty seven urines were collected from the non-smoking subjects during the three days of the study. Only one urine voided 5 hours after exposure to marihuana smoke in the third day of the study by female subject #2 was barely above the 20 ng/ml calibrator of the EMIT assay (Figure 3).

The amount of THC from the room's air trapped by the filters for each of the three experimental days is illustrated in Table I. The amount of THC recovered (average of the two filters) varied for each interval of time sampled within each day, and among the three experimental days. Thus, during the first two 15 minute periods of each day, the largest amount of THC was recovered which then decreased progressively during the third and fourth 15 minute periods (Figure 4). Likewise, the largest amount of THC was recovered on the first day (191.5 ug), followed by the third day (128 ug), and then by the second day (77.8 ug). These differences are probably due to variation in the amount of marihuana smoke that was inhaled by the smokers, causing changes in the amount of side-stream smoke that diffused into the air when the marihuana was smoked.

In these experiments, marihuana cigarette smoking lasted approximately 15 minutes. While the cigarettes were being smoked, the amount of THC diffusing into the room's air must have varied from minute to minute to an unknown extent, and we only know the total amount of THC trapped by the filters contained in 5.5 liters of air suctioned from the room every minute at 15 minute intervals. Assuming an uniform distribution of THC in the air during the 15 minutes of sampling, it is possible to make an approximate estimation of the amount of THC present per liter of air/per minute. From this amount, and assuming a rate of 14 respirations per minute and a ventilation volume of 500 ml per respiration, it is possible to calculate the amount of THC that could have been passively inhaled per minute and the total amount inhaled during the 60 minutes of exposure. The results of these calculations are illustrated in Table I.

Measurable amounts of THC were present in the plasma of the non-smoking subjects who participated during the second day of the study. However, the THC plasma concentrations were minute and only reached a maximal level of 2.2 ng/ml. It is to be noted that the four urines voided by this subject during the 24 hours following exposure to marihuana smoke were found to be below the 20 ng/ml calibrator of the EMIT assay (Figure 3).

To determine the amount of THC passively inhaled by this subject that produced the plasma concentrations observed, a microsuspension of THC in human serum albumin [4] was intravenously infused to the same subject. The rate of infusion of the drug was estimated based on the results of the calculations illustrated in Table I. They indicate that the average inhalation of THC during the first 30 minutes was approximately 5 ug/min. However, since 20-30% of the THC inhaled is trapped in the mucosas of the respiratory tract and does not reach the blood immediately, the amount of THC infused intravenously was reduced accordingly. We found that a THC infusion rate of 3.2 ug/min during a 60 minute period produced identical plasma concentrations of the drug to those obtained during its passive inhalation (the details and results of this experiment are reported elsewhere).

DISCUSSION

Our studies were designed to investigate whether the breathing of high concentrations of marihuana smoke by non-smoking subjects (passive inhalation) could result in the urinary excretion of detectable amounts of cannabinoid material, which could produce positive results by the EMIT cannabinoid assay. We selected this assay method because it is frequently used to screen urine samples of individuals to determine

if they have smoked marihuana.

The results of our studies indicate that, under the rather strenuous experimental conditions used, none of the non-smoking subjects reported feeling "high", and that no significant amounts of cannabinoids were present in the urine excreted by them during the 24 hours following exposure. Thus, out of 80 urines collected from these subjects in the three different studies conducted, only two urines barely exceeded the response of the 20 ng/ml calibrator of the EMIT assay. To have a 95% level of confidence, the amount of cannabinoid material present in the urine should equal or exceed 50 ng/ml. Therefore, all of the urines collected in our studies, excluding the two that were above the 20 ng/ml calibrator, were considered negative (i.e., not containing detectable amounts of cannabinoids). Semiquantitation of the cannabinoid content of the urines that produced positive responses indicate a concentration of less than 50 ng/ml and, thus, would not be expected to produce positive responses with 95% confidence.

The results of our studies also indicate that THC can be inhaled by non-smoking subjects in amounts so small that its major urinary metabolite (9-carboxy-THC) can only be detected by the extraction of large volumes of urine and analyzed by highly sophisticated techniques (gas liquid chromatography - mass spectrometry). Further evidence that THC can be inhaled by non-smoking subjects was the determination of minute but detectable concentrations of THC in the plasma of one of our subjects. Since similar THC plasma concentrations were obtained by the intravenous infusion of 3.2 ug/min of the drug, it follows that this amount of THC reached the subject's blood during his passive

inhalation of the heavy concentrations of marihuana smoke to which he was exposed.

In view of the findings of our studies, allegations that urines containing more than 50 ng/ml of cannabinoids by the EMIT assay are the result of the passive inhalation of marihuana smoke are untenable or, at best, highly questionable. However, it is possible that urines with a cannabinoid content exceeding the 20 ng/ml calibrator of this test could be produced by the passive inhalation of air containing high concentrations of marihuana smoke. Whether these concentrations can be obtained in real life situations where marihuana cigarettes are usually smoked sequentially and not simultaneously in larger and more ventilated environs appears highly unlikely.

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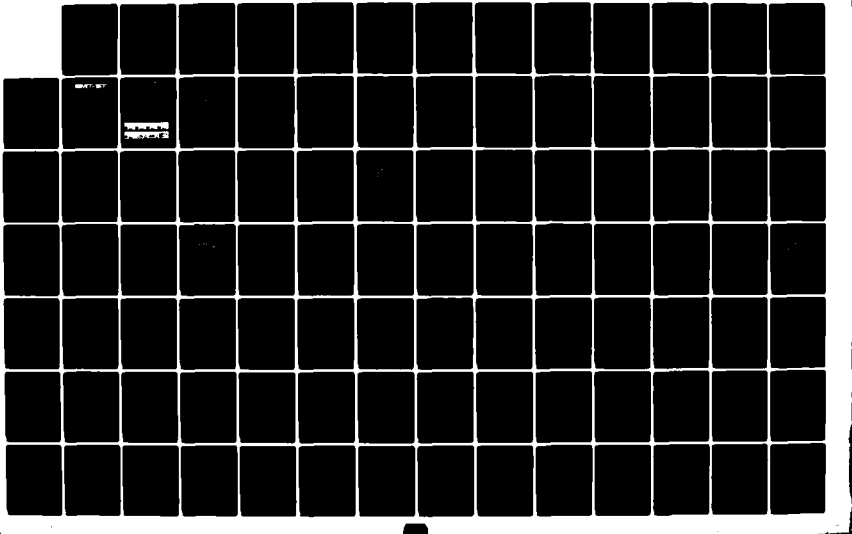

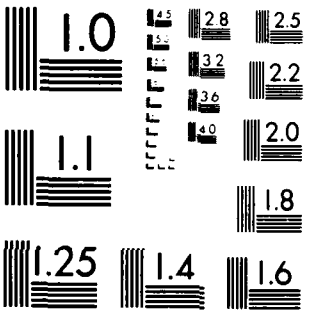

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Confirmation of a Tetrahydrocannabinol Metabolite in Urine by Gas Chromatography

John D. Whiting* and William W. Manders
Division of Toxicology, Armed Forces Institute of Pathology, Washington, D.C. 20306

Abstract

A new method for confirming urinary 11-nor-Δ^9-tetrahydrocannabinol-9-carboxylic acid, the major metabolite of tetrahydrocannabinol, has been developed. The metabolite is extracted, derivatized to the methyl ester, methyl ether, and analyzed on a gas chromatograph equipped with a flame ionization detector. In spiked urine specimens, metabolite concentrations as low as 20 ng/mL have been detected by this procedure. In a random sampling of urines, greater than 95% correlation was obtained between confirmation by this method and confirmation by gas chromatography/mass spectrometry in those specimens producing an immunological response greater than 75 ng/mL.

Introduction

Growing concern over the abuse of Δ^9-tetrahydrocannabinol (THC), the psychomimetic agent of marihuana and hashish, has led to the development of a number of immunological screening tests that can detect the presence of THC metabolites in urine (1-3). Most of these tests, such as radioimmunoassay and homogeneous enzyme immunoassay, detect the major urine metabolite of THC, 11-nor-Δ^9-tetrahydrocannabinol-9-carboxylic acid (THC-COOH) (4). The major advantages of these immunological screening procedures are the ease with which samples can be assayed and the high sensitivity that allows detection of the THC metabolites in the low nanogram range. A major disadvantage of the immunological assays, however, is their lack of specificity or susceptibility to cross-reaction with endogenous or non-cannabinoid-related urine compounds, which may yield false-positive results. For this reason, it is desirable that the presence of THC metabolites, such as THC-COOH, be confirmed by some other chemical method. This confirmation may be mandatory in some cases, particularly those with forensic implications.

Even though THC-COOH is the primary urinary metabolite of THC, it is normally present only in amounts ranging from a few nanograms to several hundred nanograms in each milliliter of urine (2). Experimental methods employing thin-layer chromatography (TLC) and gas chromatography (GC) have not been satisfactory for confirming this compound. The gas chromatograph/mass spectrometer (GC/MS), which has high sensitivity and selectivity, has become the instrument of choice for the detection of THC-COOH in urine and other body fluids (5, 6). Unfortunately, because of the high cost and the need for specially trained operators, most laboratories either do not have or are not able to commit a GC/MS system to routine urine analysis. We have developed a simple and rapid procedure with adequate sensitivity to confirm THC-COOH in urine using a gas chromatograph equipped with a flame ionization detector (GC/FID).

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*Send reprint requests to Dr. Whiting.

Materials

Drugs and Reagents

Authentic 11-nor-Δ^9-tetrahydrocannabinol-9-carboxlic acid was obtained from the Research Triangle Institute (Research Triangle, North Carolina) through the National Institute of Drug Abuse. Oxyphenbutazone was obtained from Geigy Pharmaceuticals (Ardsley, New York). Iodomethane and 25% aqueous tetramethylammonium hydroxide were purchased from Aldrich (Milwaukee, Wisconsin) and Matheson, Coleman and Bell (Norwood, Ohio), respectively. All solvents were HPLC grade, and all other chemicals were reagent grade.

Instrumentation

All gas chromatographic analyses were performed on either a Model 5880 or 5840 Hewlett-Packard (Avondale, Pennsylvania) gas chromatograph equipped with a flame ionization detector. The column was a 6 ft x 2 mm i.d. silanized glass column packed with 3% OV-17 on 100/120 mesh Gas-Chrom Q, Applied Science Laboratories (State College, Pennsylvania). The injector and detector were maintained at a temperature of 260° C and 275° C, respectively. The column oven temperature was 255° C with helium as the carrier gas at a flow rate of 30 mL/min.

Mass spectral analyses were performed on a Model 5985B Hewlett-Packard (Palo Alto, California) gas chromatograph/mass spectrometer equipped with a molecular jet separator.

C.

The GC column was a 3 ft. x 2 mm i.d. silanized glass column packed with 3% OV-101, 100/120 mesh Gas-Chrom Q, Applied Science. The oven temperature was 230° C with helium as the carrier gas at a flow rate of 30 mL/min. All data were collected and analyzed with the use of software supplied by Hewlett-Packard.

Procedure

Urine Screening

Urine specimens were screened for the presence of cannabinoids by the EMIT-dau Cannabinoid Urine Assay (Syva Co., Palo Alto, California). The analyses were performed on a Model 25 Beckman (Irvine, California) spectrophotometer equipped with a heated sipper, using the procedure recommended in the product literature. The EMIT assay procedure utilizes a negative control, a low calibrator (20 ng/mL), and a medium calibrator (75 ng/mL) as references to quantitate the drug content in the assayed sample. Those urine samples producing an EMIT response of less than 20 ng/mL were negative as calculated by this procedure. The urine samples giving a response greater than 20 ng/mL were divided into two groups, one including specimens having a 20- to 75-ng/mL response and the other, those with a response greater than 75 ng/mL. Samples that were positive (*i.e.* with a response ≥20 ng/mL) did not have blanks run on them as required in the manufacturer's procedure (7). The policy of this laboratory is to confirm by GC/MS all specimens that are positive by immunoassay.

Extraction and Derivatization

A 10-mL sample of urine (blank, spiked, or unknown) was added to a 50-mL screw-cap test tube containing 8 mL of methanol and 2 mL of 10 *N* potassium hydroxide. After thorough mixing, the sample was incubated at 50° C in a water bath for 15 minutes. Following removal from the water bath, 2 mL of 1 *M* potassium phosphate buffer, pH 2.5, was added and with concentrated hydrochloric acid, the pH of each sample was adjusted so that it ranged from 2 to 2.5. Twenty milliliters of hexane:ethyl acetate (7:1) containing 0.5 μg/mL of oxyphenbutazone as the internal standard was added, and the sample was shaken by hand for 4 minutes. After the phases had separated (centrifugation may be necessary), the organic (upper) phase was transferred to a second 50-mL test tube containing 5 mL of 0.5 *N* potassium hydroxide, and the sample was again shaken for 4 minutes. Following the separation of the phases, the organic phase was aspirated to waste. One milliliter of 1 *M* potassium phosphate buffer, pH 2.5, and concentrated hydrochloric acid sufficient to adjust the pH from 2 to 2.5, were added to the sample. Fifteen milliliters of hexane:ethyl acetate (7:1) without internal standard was added, and the sample was again shaken for 4 minutes. The organic layer was transferred to a 15-mL conical test tube, and the solvent was evaporated under a stream of nitrogen at 50° C.

The residue was dissolved in 0.07 mL of 25% tetramethylammonium hydroxide:dimethyl sulfoxide (1:20). After 2 minutes at room temperature, 0.005 mL of iodomethane was added, and the sample was mixed. After an additional 5 minutes, the reaction was terminated by the addition of 0.2 mL of 0.1 *N* hydrochloric acid. One milliliter of *iso*-octane was added and the resulting mixture was vortexed for 1 minute. The *iso*-octane (upper) layer was then transferred to a 5 mL conical test tube, and the solvent was again removed under a stream of nitrogen at 50° C. The residue was dissolved in 0.02 mL of *iso*-octane, and 0.005 mL was injected into the column of the gas chromatograph.

Results and Discussion

This extraction procedure for THC-COOH is a modification of one by Hidy and Foltz (8). Samples subjected to the single hexane-ethyl acetate extraction described in their procedure produced unsatisfactory chromatograms when the FID was used. The extremely high backgrounds almost completely masked the presence of any dimethyl THC-COOH. Adding an aqueous alkaline back-extrcation step, however, resulted in elimination of substantial amounts of interfering endogenous urine compounds from the chromatograms.

This derivatization procedure is an adaptation of a phase-transfer alkylation method for the methylation of THC (9). The alyklation of THC-COOH by iodomethane in dimethyl sulfoxide proceeded rapidly when tetramethylammonium hydroxide was used as a catalyst. The resulting product was readily analyzed by gas chromatography and was identified as the 1-0-methyl ether, 11-carboxylic acid methyl ester of THC-COOH by mass spectrometry (10).

Oxyphenbutazone, which has extraction, derivatization, and chromatographic properties similar to those of THC-COOH and its derivative, was selected as the internal standard compound may be used as a reference for quantitating COOH and for calculating a relative retention time.

Typical chromatograms of urine specimens subjected to the extraction and derivatization procedure are shown in Figure 1. Figure 1 (A) is the chromatogram of a 10 mL sample of blank urine, while Figure 1 (B) is a chromatogram of urine spiked with THC-COOH at a concentration of 200 ng/mL. The 6 ft OV-17 column gave excellent separation between the internal standard

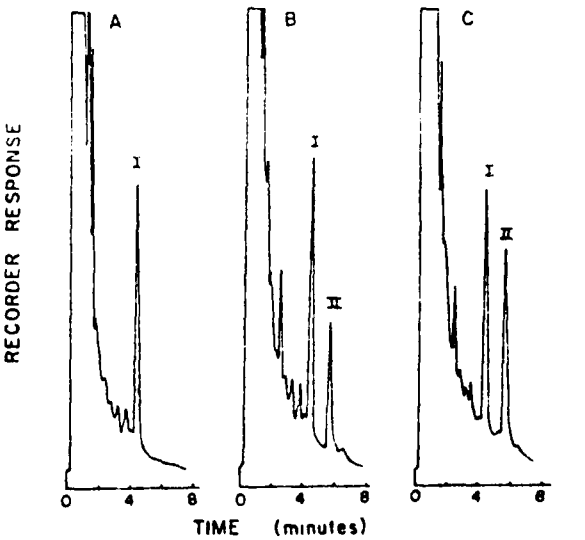

Figure 1. Typical gas chromatograms of extracts of: A) blank urine; B) blank urine spiked with 200 ng/mL of THC-COOH. C) unknown urine that produced an EMIT response greater than 75 ng/mL. I: Internal standard (oxyphenbutazone), II. THC-COOH (AFIP negative 81-15054).

and the THC-COOH in a region of the chromatogram that was relatively free of any interfering endogenous urinary compounds. Figure 1 (C) is the chromatogram of an unknown urine that gave an EMIT response greater than 75 ng/mL.

Figure 2 is a linear regression curve fit of the concentration of THC-COOH to the ratio of the peak areas of THC-COOH and oxyphenbutazone in spiked urine specimens. The curve is linear to concentrations as high as 500 ng/mL, although the usual working range employed in this laboratory is 20 to 200 ng/mL. Recoveries from five determinations on urine samples spiked at 50 and 200 ng/mL were found to be 76% ± 5.8% and 66% ± 4.6%, respectively.

In order to test this confirmation procedure on physiological samples, 62 urine specimens were screened for cannabinoids using the EMIT assay and for THC-COOH using this GC procedure. All specimens producing an EMIT response greater than 20 ng/mL were additionally analyzed on the GC/MS. Mass spectral confirmation was accomplished by monitoring three characteristic ions (313 base peak, 357, 372 molecular ion). Table I shows the results of these analyses.

Of the 62 specimens tested, 29 gave responses less than 20 ng/mL by EMIT, and all 29 were found to be negative by GC. Six samples were in the 20- to 75-ng/mL range and these had EMIT values very close to the 20-ng/mL calibrator. No THC-COOH could be identified in these samples by GC or GC/MS. In the remaining 27 samples which produced EMIT values greater than 75 ng/mL, confirmation was accomplished by the GC method 21 times and by GC/MS 22 times. Five of the 27 samples were negative by both confirmatory procedures. The single specimen that was negative by the GC procedure gave a very low response on the mass spectrometer. Comparison of results between this new GC procedure and those from the GC/MS shows a greater than 95% correlation.

Williams and Moffat (11) postulated that the major immunologically reactive component in the urine from an individual using cannabinoids was a conjugated carboxylic acid ester of THC-COOH. Their evidence was supported by the fact that

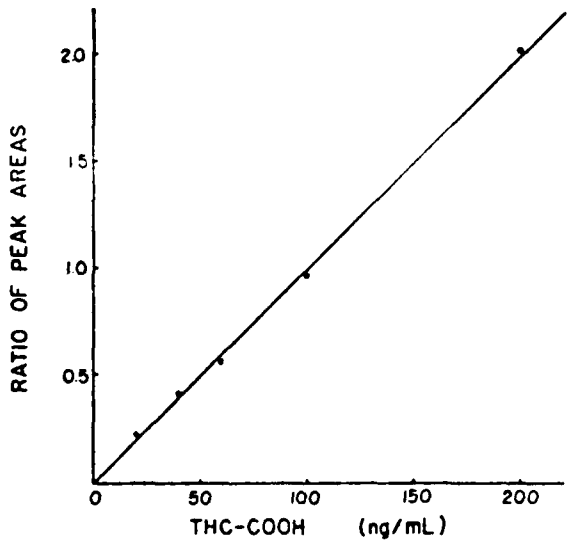

Figure 2. Standard curve of the concentration of THC-COOH-spiked urine versus the ratio of the peak areas of THC-COOH and internal standard (oxyphenbutazone). (AFIP negative 81-15055).

Table I. Comparison of the Confirmation of THC-COOH by Gas Chromatography and Gas Chromatography/Mass Spectrometry

EMIT Range (ng/mL)	Total Specimens	Confirmed by GC	Confirmed by GC/MS
<20	29	0	*
20-75	6	0	0
>75	27	21	22

*Not run

alkaline hydrolysis of the conjugate in the presence of a short-chain alcohol transesterified this compound to its corresponding ester, while enzymatic hydrolysis did not change the properties of this compound. This procedure employs a mixture of methanol and potassium hydroxide to convert the conjugated THC-COOH to a methyl ester. While unconjugated THC-COOH is unaffected by the alkaline hydrolysis, it too is converted to the methyl ester during the derivatization reaction; thus, the end products of the conjugated and free THC-COOH are identical. Preliminary studies on the recovery of THC-COOH from physiological urine specimens have indicated that up to five times more THC-COOH is recovered from certain hydrolyzed urine specimens. In the absence of authentic conjugated THC-COOH, however, no determination of hydrolytic efficiency can be made at this time.

It is important to note that an EMIT immunological assay may react with endogenous substances and a number of other THC metabolites present in the urine. These other metabolites, which may be products of allylic or pentyl side-chain oxidation, may be present and contribute to the immunological response. The actual amount of THC-COOH measured in the urine is usually lower than that expected from the immunological results.

The method presented here for the confirmation of the carboxylic acid metabolite of THC in urine is relatively rapid and utilizes instrumentation commonly available in the forensic or clinical laboratory. Although not as sensitive as methods employing GC/MS, this procedure can be used to confirm the presence of THC-COOH in most urine specimens which produce immunological responses greater than 75 ng/mL. At this level, the results from this gas chromatographic procedure correlate well with those obtained from gas chromatography/mass spectrometry.

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9. J. Rosenfeld. A general approach to the analysis of cannabinoids from physiological sources. In *Cannabinoid Analysis in Physiological Fluids.* ACS Symposium Series No. 98, J.A. Vinson (Ed), American Chemical Society, Washington, D.C., 1979, pp. 81-92.
10. J.D. Whiting and W.W. Manders. The confirmation of THC-9-carboxylic acid in urine by gas chromatography/mass spectrometry. Manuscript in preparation.
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Manuscript received August 14, 1981;
revision received November 30, 1981.

ISSUE: To provide a background paper on drug abuse urinalysis testing.

BACKGROUND: Recent advances in state-of-the-art biochemical testing for drugs now enable the Navy to test for a wide range of drugs, including cannabis, through urine testing. The tests may be conducted by DOD drug testing laboratories or by portable urinalysis testing kits currently under procurement by the Navy. This paper provides general information and "dos" and "don'ts" regarding urinalysis testing.

DOD Drug Testing Laboratories

- There are currently five (5) DOD drug testing labs operated by the Navy.
- DOD drug testing labs can confirm the presence of many drugs. They routinely test for the following: amphetamines, barbiturates, opiates (morphine, heroin, codeine), cocaine, PCP and cannabinoids.
- Positive results from screening tests must have been confirmed by a DOD approved lab, unless accompanied by a confession (which must be preceeded by Article 31 warnings).
- DOD drug testing labs use Radioimmunoassay (RIA) screening tests as a means for detecting drugs in the urine. The confirmation test currently being used is gas chromatography (GC), although by early 1984 the Navy-operated DOD labs will use gas chromatography - mass spectroscopy (GC/MC) as the confirmation test for cannabinoids. The Armed Forces Institute of Pathology (AFIP) closely monitors the quality of output of each lab.
- If a portable urinalysis test kit screens a sample as negative, the sample will not be sent to the DOD lab for further testing.
- If no screening has been done utilizing a portable test kit, the sample will be sent to the appropriate DOD lab which will conduct the RIA screening test. If positive, the confirmation test will be done.
- Samples positive by portable urinalysis test kit for cannabinoids will be sent for confirmation testing to the Navy's contract laboratory, Mead Compuchem, located at Triangle Park, NC. Mead confirms using the GC/MS test.

Portable Urinalysis Testing Kits

° The portable test equipment being purchased by the Navy is the SYVA Emit st. (For further details see the EMIT literature in this chapter.)

° Portable testing equipment currently tests for classes of drugs including opiates, PCP, amphetamines, barbiturates, benzodiazepines and cannabis. It can also be used to test for alcohol.

° The results of portable test kits that show positive for a drug must be forwarded to a DOD drug testing laboratory (or to Mead Compuchem is positive for cannabinoids) for confirmation.

° Portable test kit results shall not themselves be used in any disciplinary proceedings unless accompanied by a confession (which must be preceeded by Article 31 warnings).

° Positive results from portable test kits may initiate treatment counselling and rehabilitation actions including urine surveillance.

Chain of Custody

° Maintenance of proper chain of custody over urine samples is essential for the admissibility of the results in disciplinary action.

° Use of Forms

-- OPNAV 5355/2(5-82) to be used by all Navy and Marine Corps commands. See sample form in this chapter.

-- NIS and Marine Corps chain of custody forms found in Chapter X are not to be used as chain of custody documents for urine samples sent to DOD labs. These forms are used for other physical evidence including the actual drug or drugs seized.

NAVAL HOSPITALS WITH DRUG SCREENING LABS

Address	Telephone/Message Address
Commanding Officer Naval Hospital Naval Air Station Jacksonville, Florida 32214	Autovon: 942-2214 Commercial: (904) 772-2214 NAVREGMEDCEN JACKSONVILLE FL
Commanding Officer Naval Hospital Portsmouth, VA 23708	Autovon: 690-0111 Commercial: (804) 398-5111 NAVREGMEDCEN PORTSMOUTH VA
Commanding Officer Naval Hospital Oakland, California 94627	Autovon: 855-2111 Commercial: (415) 639-2111 NAVREGMEDCEN OAKLAND CA
Commanding Officer Naval Hospital San Diego, California 92134	Autovon: 957-2011 Commercial: (714) 233-2411 NAVREGMEDCEN SAN DIEGO CA
Commanding Officer Naval Hospital Great Lakes, Illinois 60088	Autovon: 792-2492 Commercial: (312) 688-2492 NAVREGMEDCEN GREAT LAKES IL

GEOGRAPHIC AREAS OF RESPONSIBILITY

NRMC Portsmouth: Those units under the administrative control of and designated by CINCLANTFLT, all overseas units permanently attached to CINCUSNAVEUR, other CONUS Navy units according to geographic location east of the Mississippi River and north of Tennessee and North Carolina, all OUTCONUS Navy units not otherwise designated, and USMC units as designated by CMC.

NRMC Jacksonville: Those units under the administrative control of and designated by CINCINLANTFLT, other CONUS Navy units according to geographic location east of the Mississippi River and south of Kentucky and Virginia, and USMC units as designated by CMC. Process all positive samples produced by NRMC Great Lakes requiring confirmation testing until about 1 April 1983. At that time NRMC Great Lakes is scheduled to achieve confirmation capability.

NRMC San Diego: Those units designated by CINCPACFLT, other CONUS Navy units according to geographic location west of the Mississippi River and south of the 39th parallel, all OUTCONUS Navy units not otherwise designated, and USMC units as designated by CMC.

NRMC Oakland: Those units designated by CINCPACFLT, other CONUS Navy units according to geographic location west of the Mississippi River and north of the 39th parallel, including the San Francisco Bay area, and USMC units as designated by CMC.

NRMC Great Lakes: The three Navy recruit training centers and all USMC accession points as designated by CMC, naval activities located in the Great Lakes area, and CNET activities.

DOD APPROVED LABS FOR OTHER SERVICES

1. U.S. Army Testing Laboratory - Wiesbaden
   Department of the Army
   U.S. Army Testing Laboratory
   APO New York 09457

2. Drug Testing Service
   Medical Laboratory
   Fort Meade, MD 20755

3. U.S. Army Drug Screening Lab
   Schofield Bks
   HI 96438

4. USAF - SAM/ES
   Brooks AFB, TX 78235

URINE SAMPLE CUSTODY DOCUMENT

OPNAVNOTE 5355
15 OCT 1982

Read Instructions on Reverse Before Completion

1. SUBMITTING UNIT MESSAGE ADDRESS	A. DSL CONDUCTING TESTING
2. SECOND ECHELON COMMANDER MESSAGE ADDRESS	B. RECEIVED FROM SHIPMENT / C. CONDITION OF SHIP. CONTAINER ☐ UNDAMAGED ☐ DAMAGED *(Describe in K)*
3. DATE SAMPLE(S) OBTAINED / 4. GEOGRAPHIC LOCATION OF UNIT AT TIME OF COLLECTION	D. NAME, GRADE/TITLE & SIGNATURE OF RECEIVING OFFICIAL / DATE
5. LOCALLY ASSIGNED BATCH NUMBER / 6. DATE PREPARED FOR SHIPMENT	E. DSL BATCH NUMBER / F. ASSIGNED INTRA-LAB CHAIN-OF-CUSTODY DOCUMENT NUMBER

7. SPECIMEN NUMBER	8. SSN OF PERSON PROVIDING SPECIMEN	9 TESTING PREMISE	10 PTK/DAU POSITIVE	G. DSL ACCESSION NUMBER	H. DSL FINDINGS *(Results Negative Unless Marked)*
01					
02					
03					
04					
05					
06					
07					
08					
09					
10					
11					
12					

11. CHAIN OF CUSTODY *(Continue on reverse if necessary)*	I. REPORT OF RESULTS *(Date-Time-Group)*
(a) *I certify that I received all specimens, verified for accuracy both the identification on each sample bottle & this chain-of-custody document, & properly packaged & sealed the specimens for shipment.*	J. *I certify that the findings noted above are correct and have been accurately reported to the submitting unit.*
NAME, GRADE & SIGNATURE OF UNIT COORDINATOR / DATE	NAME, GRADE/TITLE & SIGNATURE OF CERTIFYING OFFICIAL / DATE
(b) RELEASED FOR SHIPMENT BY THE FOLLOWING MODE:	K. DAMAGE TO SHIPPING CONTAINER
NAME, GRADE & SIGNATURE OF RELEASER / DATE	

OPNAV 5355/2 (5-82) SN 0107-LF-053-5510

URINE SAMPLE CUSTODY DOCUMENT

11(c) CONTINUATION OF CHAIN OF CUSTODY

PURPOSE OF CHANGE OF CUSTODY	RELEASED BY *(Name, Grade/Title, Activity & Signature)*	RECEIVED BY *(Name, Grade/Title, Activity & Signature)*	DATE

General Instructions

1. Forward original and one copy with the urine specimens (original in envelope attached to inner sealed box or container and copy in waterproof mailer inside box or container).
2. Submitting unit shall retain one copy.
3. Testing laboratory shall retain the completed original for a minimum of one year.
4. All unshaded entries are to be completed by the submitting unit. All shaded areas are to be completed by the laboratory.

SUBMITTING UNIT INSTRUCTIONS

Block Number

1 **SUBMITTING UNIT MESSAGE ADDRESS**
Message address of unit submitting urine samples

2 **SECOND ECHELON COMMANDER MESSAGE ADDRESS**
Message address of second echelon commander to whom submitting unit reports administratively.

3 **DATE SAMPLE(S) OBTAINED**
Timeframe in which sample(s) provided.

4 **GEOGRAPHIC LOCATION OF UNIT AT TIME OF COLLECTION**
Geographic location of unit when sample(s) are obtained *(i.e., Jacksonville, FL; inport Naples, IT; at sea, etc.)*.

5 **LOCALLY ASSIGNED BATCH NUMBER**
Each batch of 12 samples, or portion thereof, shall be assigned a separate number by the submitting unit.

6 **DATE PREPARED FOR SHIPMENT**
Date shipping container sealed and prepared for transportation to laboratory.

7 **SPECIMEN NUMBER**
Preprinted on form.

8 **SSN OF PERSON PROVIDING SPECIMEN**
Full social security number of person from whom sample obtained.

9 **TESTING PREMISE**
Indicate the letter designation of the reason for conducting testing. The following abbreviations are authorized:

A = Accessions
F = Fitness for Duty
M = Medical
PC = Probable Cause/Search/Seizure
PRP = Personnel Reliability Program
R = Random Sample
RP = Rehabilitation Program/Urine Surveillance
S = Safety/Accident/Mishap
U = Unit Sweep
Additionally, if the results of the test may affect a court-martial proceeding, also mark CM.

10 *PTK/DAU POSITIVE*
If screened positive by EMIT-st portable kit or EMIT-DAU in the field, indicate for which drug(s) screened positive. Leave blank if not screened prior to submission to lab. The following abbreviations are authorized:

AMP = Amphetamine **BAR = Barbiturate** **OPI = Opiate**
PCP = Phencyclidine **QUA = Methaqualude** **COC = Cocaine**
THC = Marijuana/Hashish

11 **CHAIN OF CUSTODY**
(a) Certification of Coordinator.
(b) Specify the mode of accountable transportation utilized to ship specimens to the lab.
(c) If/when custody of specimens changes other than for shipment *(unless hand carried)*, each change of custody must be documented in this block *(if a continuation sheet is necessary, continuation sheet must contain the information of blocks 1, 3 and 5)*.

LABORATORY IN. AF /S

Block Number

A DSL CONDUCTING TESTING
Message address of NRMC drug screening lab which will report out the findings.

B RECEIVED FROM SHIPMENT
Identify the accountable mode of transportation utilized in shipping the samples to the lab.

C CONDITION OF SHIPPING CONTAINER
Indicate undamaged/damaged. Describe damage in block K.

D RECEIVING OFFICIAL
Name, grade/title & signature of official receiving the shipment for the lab and date received.

E DSL BATCH NUMBER
If used by the lab, indicate batch number assigned to the samples listed on this form.

F ASSIGNED INTRA-LAB CHAIN OF CUSTODY DOCUMENT NUMBER
If used by the lab, identify the chain of custody document which tracks samples through the lab.

G DSL ACCESSION NUMBER
Sequential number assigned to each sample.

H DSL FINDINGS
Indicate for which drug(s) confirmed positive *(leave blank if negative or affix stamp indicating results negative)*.

I REPORT OF RESULTS
Date-time-group of message informing submitting command of results of lab testing.

J DSL CERTIFYING OFFICIAL
Certification of certifying official and date.

K DAMAGE TO SHIPPING CONTAINER
Describe damage to container if "damaged" marked in C.

OPNAV 5355/2 (5-82) BACK

RCS OPNAV 5355-2

URINE SAMPLE CUSTODY DOCUMENT

Read Instructions on Reverse Before Completion

1. SUBMITTING UNIT MESSAGE ADDRESS	A. DSL CONDUCTING TESTING
USS JOHN F. KENNEDY	NAVREGMEDCEN PORTSMOUTH VA
2. SECOND ECHELON COMMANDER MESSAGE ADDRESS	**B. RECEIVED FROM SHIPMENT** / **C. CONDITION OF SHIP CONTAINER**
CINCLANTFLT NORFOLK VA	Registered Mail #601539 / ☐ UNDAMAGED ☒ DAMAGED (Describe in K)
3. DATE SAMPLE(S) OBTAINED / **4. GEOGRAPHIC LOCATION OF UNIT AT TIME OF COLLECTION**	**D. NAME, GRADE/TITLE & SIGNATURE OF RECEIVING OFFICIAL** / **DATE**
4 OCT 82 / INPORT MALAGA SP	JERRY C. PENNY, SK2, Receiving Clerk / 8 OCT 1982
5. LOCALLY ASSIGNED BATCH NUMBER / **6. DATE PREPARED FOR SHIPMENT**	**E. DSL BATCH NUMBER** / **F. ASSIGNED INTRA-LAB CHAIN-OF-CUSTODY DOCUMENT NUMBER**
2062 / 4 OCT 82	2432

7. SPECIMEN NUMBER	8. SSN OF PERSON PROVIDING SPECIMEN	9. TESTING PREMISE	10. PTK/DAU POSITIVE	G. DSL ACCESSION NUMBER	H. DSL FINDINGS (Results Negative Unless Marked)
01	263-42-6183	PRP		0387933	COC
02	310-28-5378	PRP		0387934	
03	345-99-4971	PRP		0387935	
04	112-58-3720	PRP		0387936	
05	296-37-2185	F		0387937	THC
06	328-16-2250	PC/CM		0387938	THC, QUA
07	225-22-2186	PRP		0387939	
08	119-46-7689	S		0387940	
09	250-72-8362	PRP		0387941	
10	283-19-1972	PRP		0387942	THC
11	310-51-9327	PRP		0387943	QNS
12	253-68-1297	PRP		0387944	QNS

11. CHAIN OF CUSTODY (Continue on reverse if necessary)	I. REPORT OF RESULTS (Date-Time Group)
	1216042 OCT 82
(a) *I certify that I received all specimens, verified for accuracy both the identification on each sample bottle & this chain-of custody document, & properly packaged & sealed the specimens for shipment*	J. *I certify that the findings noted above are correct and have been accurately reported to the submitting unit*
NAME, GRADE & SIGNATURE OF UNIT COORDINATOR / DATE	NAME, GRADE/TITLE & SIGNATURE OF CERTIFYING OFFICIAL / DATE
Fred C. Thomas FRED C. THOMAS, RMC 4 OCT 82	G. B. SCHWARTZ, LCDR, Director 13 OCT 1982
(b) RELEASED FOR SHIPMENT BY THE FOLLOWING MODE	K. DAMAGE TO SHIPPING CONTAINER
Registered Mail #601539	Seals and integrity of box intact. Box dented and fluid soaked. Specimens 11 & 12 contain only a small amount of fluid (QNS).
NAME, GRADE & SIGNATURE OF RELEASER / DATE	
Larry Hunt, YN2 5 Oct 82	

OPNAV 5355/2 (5-82) SN 0107-LF-053-5510

URINE SAMPLE CUSTODY DOCUMENT

11(c) CONTINUATION OF CHAIN OF CUSTODY

PURPOSE OF CHANGE OF CUSTODY	RELEASED BY (Name, Grade/Title, Activity & Signature)	RECEIVED BY (Name, Grade/Title, Activity & Signature)	DATE
DELIVER TO POST OFFICE	[illegible] Rm, COORDINATOR, USS JOHN F. KENNEDY	LARRY AUFN, VN2, REGISTERED MAIL CLERK, USS JOHN F. KENNEDY	506882

SAMPLE

General Instructions

1. Forward original and one copy with the urine specimens (original in envelope attached to inner sealed box or container and copy in a waterproof mailer inside box or container).
2. Submitting unit shall retain one copy.
3. Testing laboratory shall retain the completed original for a minimum of one year.
4. All unshaded entries are to be completed by the submitting unit. All shaded areas are to be completed by the laboratory.

SUBMITTING UNIT INSTRUCTIONS

Block Number

1 *SUBMITTING UNIT* MESSAGE ADDRESS
Message address of unit submitting urine samples

2 SECOND ECHELON COMMANDER MESSAGE ADDRESS
Message address of second echelon commander to whom submitting unit reports administratively

3 DATE SAMPLE(S) OBTAINED
Timeframe in which sample(s) provided

4 GEOGRAPHIC LOCATION OF UNIT AT TIME OF COLLECTION
Geographic location of unit when sample(s) are obtained *(i.e., Jacksonville, FL, inport Naples, IT, at sea, etc.)*.

5 LOCALLY ASSIGNED BATCH NUMBER
Each batch of 12 samples, or portion thereof, shall be assigned a separate number by the submitting unit.

6 DATE PREPARED FOR SHIPMENT
Date shipping container sealed and prepared for transportation to laboratory.

7 SPECIMEN NUMBER
Preprinted on form.

8 SSN OF PERSON PROVIDING SPECIMEN
Full social security number of person from whom sample obtained.

9 *TESTING PREMISE*
Indicate the letter designation of the reason for conducting testing.
The following abbreviations are authorized:

A = Accessions
F = Fitness for Duty
M = Medical
PC = Probable Cause/Search/Seizure
PRP = Personnel Reliability Program
R = Random Sample
RP = Rehabilitation Program/Urine Surveillance
S = Safety/Accident/Mishap
U = Unit Sweep

Additionally, if the results of the test may affect a court-martial proceeding, also mark CM.

10 PTK/DAU POSTIVE
If screened positive by EMIT-st portable kit or EMIT-DAU in the field indicate for which drug(s) screened positive. Leave blank if not screened prior to submission to lab. The following abbreviations are authorized

AMP = Amphetamine
BAR = Barbiturate
OPI = Opiate
PCP = Phencyclidine
QUA = Methaqualude
COC = Cocaine
THC = Marijuana/Hashish

11 CHAIN OF CUSTODY
(a) Certification of Coordinator
(b) Specify the mode of accountable transportation utilized to ship specimens to the lab
(c) If when custody of specimens changes other than for shipment (unless hand carried) each change of custody must be documented in this block (if a continuation sheet is necessary, continuation sheet must contain the information of blocks 1, 3 and 5)

LABORATORY INSTRUCTIONS

Block Number

A DSL CONDUCTING TESTING
Message address of NRMC drug screening lab which will report out the findings.

B RECEIVED FROM SHIPMENT
Identify the accountable mode of transportation utilized in shipping the samples to the lab.

C CONDITION OF SHIPPING CONTAINER
Indicate *undamaged/damaged*. Describe damage in block K.

D RECEIVING OFFICIAL
Name, grade/title & signature of official receiving the shipment for the lab and date received.

E DSL BATCH NUMBER
If used by the lab, indicate batch number assigned to the samples listed on this form.

F ASSIGNED INTRA-LAB CHAIN OF CUSTODY DOCUMENT NUMBER
If used by the lab, identify the chain of custody document which tracks samples through the lab

G DSL ACCESSION NUMBER
Sequential number assigned to each sample.

H DSL FINDINGS
Indicate for which drug(s) confirmed positive *(leave blank if negative or affix stamp indicating results negative)*.

I REPORT OF RESULTS
Date-time-group of message informing submitting command of results of lab testing

J DSL CERTIFYING OFFICIAL
Certification of certifying official and date.

K DAMAGE TO SHIPPING CONTAINER
Describe damage to container if "damaged" marked in C

OPNAV 5511/2 (5-82) BACK

EMIT®-ST™

Drug Detection System

Expands stat toxicology capabilities accurately, reliably, and with little capital investment

The Emit®-st™ Drug Detection System is a technological innovation in toxicology testing. A complete system, the Emit-st system combines a unique, single reagent procedure with sophisticated instrumentation for rapid, accurate, and reliable test results based on familiar Emit methodology.

Serum tests are available for barbiturates, phencyclidine (PCP), ethyl alcohol, benzodiazepines, and phenobarbital. Urine tests are available for amphetamines, barbiturates, phencyclidine (PCP), ethyl alcohol, benzodiazepines, opiates, and cannabinoids. Additional assays including cocaine metabolite, methadone, and methaqualone in urine, are under development.

With the Emit-st system stat toxicology service can be expanded dramatically, providing round-the-clock results in any hospital or laboratory.

And all for less than $3,500.

Features of the Emit-st system:

- ☐ **Rapid**—just 90 seconds for qualitative (positive/negative) results...automatically printed on Result Card.
- ☐ **Easy to use and maintain**—needs no special personnel, can be run on any shift (see reverse side for procedure).
- ☐ **Accurate, sensitive**—Distinguishes positive and negative samples with at least 95% confidence.
- ☐ **Complete**—the Emit-st system includes a microprocessor-controlled UV photometer; a single-stroke, bottle-top diluter; calibrators; controls; and reagent kits.
- ☐ **Convenient**—premeasured, unit-packaged reagents.
- ☐ **Reliable**—long reagent shelf stability (12 weeks at room temperature, longer if refrigerated; phencyclidine 6 weeks).
- ☐ **Portable**—the Emit-st system may be moved easily...plugs into any electrical outlet. (Optional attache carrying case available.)
- ☐ **Versatile**—dramatically expands toxicology testing capabilities...may be used for stat results, and as a backup to the toxicology system you currently use.

Emit®-st™ Drug Detection System

Technical Data

Method Description:

Assays for the Emit-st system are homogeneous enzyme immunoassays designed to detect the presence of drugs in body fluid (serum or urine). In the performance of a typical assay with the Emit-st system, serum or urine is dispensed with distilled water into a glass vial containing premeasured, dry-powder reagents. (These vials also serve as the optical cells for photometric determination of results.) The reagents consist of antibodies to a particular drug, substrates for the particular enzyme label being used, and enzyme-labeled drug. Drug in the sample and enzyme-labeled drug compete for binding sites on the antibodies. The amount of enzyme-labeled drug which becomes bound is dependent upon the amount of drug present in the sample. Since enzyme activity decreases upon binding, the concentration of drug in a sample can be measured in terms of enzyme activity. Active enzyme converts NAD to NADH, resulting in an absorbance change that is measured photometrically.

Instrument Description

The Emit-st system employs a manual diluter designed to pick up 50 µl of patient sample or calibrator,* and dispense it into reagent vials with 3 ml distilled water. A dual-channel photometer simultaneously measures the reaction in each vial: the one containing reagent/calibrator (on the left), and the other, containing reagent/patient sample (on the right).

The optical system uses a quartz halogen lamp as a light source. A narrow-band interference filter, which passes only ultraviolet light at a fixed wavelength of 340 nm is utilized in each channel.

Lenses focus the energy onto silicon photodetectors, and electrical signals are then amplified and converted to digital outputs. A microprocessor processes the data and controls the printer and instrument-panel lamps.

An initial absorbance reading is made 30 seconds after insertion of the vials, and a second reading of each vial is taken 1 minute later. For each vial, the instrument subtracts the first absorbance reading from the second. The absorbance difference is then printed on the Result Card. The enzyme activity in the sample mixture is compared against the activity in the calibrator and the result (positive "+" or negative "−") is printed on the Result Card.

Performance Characteristics:

Emit-st assays are designed to detect classes of drugs (rather than specific drugs) and to distinguish a positive from a negative sample (with at least 95% confidence).

Minimum Detection Limits:

Urine Assays

Ethyl Alcohol	0.05%
Opiates	0.5 µg/ml morphine
Phencyclidine (PCP)	150 ng/ml
Amphetamine	0.7 µg/ml
Barbiturates	0.5 µg/ml secobarbital
Benzodiazepines	0.5 µg/ml oxazepam
Cannabinoids	200 ng/ml 11-nor-Δ^8-THC-9-carboxylic acid**

Serum Assays

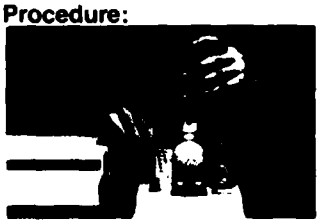
Barbiturates	6.0 µg/ml secobarbital
Benzodiazepines	0.5 µg/ml diazepam
Ethyl Alcohol	0.05%
Phenobarbital	40.0 µg/ml
Phencyclidine	50 ng/ml

Note: Because there are many variables that affect urinary drug levels (drug usage pattern, amount ingested, route of ingestion) an Emit-st test result is useful only as an indication of recent use of the drug in question — not as a measure of intoxication. Results should be confirmed by client interview or by an alternative, equally sensitive, analytical method when loss of rights or other corrective action is contemplated.

*The Emit-st Cannabinoid Assay requires 100 µl of sample, necessitating the use of the Emit-st 100 µl Diluter, which is available through Syva.

**Performance of the 11-nor-Δ^8-THC-9-carboxylic acid employed in the Emit-st Cannabinoid Assay Calibrator and Positive Control has been shown to produce a response equivalent to that of the 11-nor-Δ^9-THC-9-carboxylic acid metabolite.

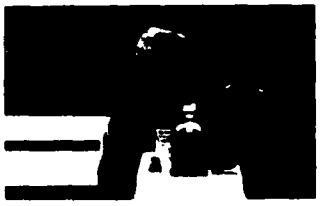
Procedure:



1 [illegible] a pre-measured amount of calibrator

2 Press plunger to release calibrator into left test vial

3 With diluter, pick up a pre-measured amount of sample

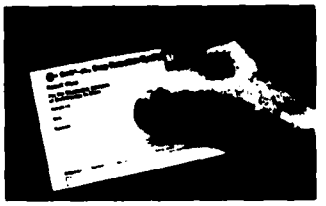


4 Dispense this sample into right test vial

5 [illegible] holder for 15 seconds

6 Insert vial holder into instrument well

7 Insert test card into slot on instrument



8 In 90 seconds the instrument sees if the subject's sample has more or less drug than the calibrator and a positive (+) or negative (−) result will be automatically printed on test card.

Syva Company, PO Box 10058
Palo Alto, CA 94303-0847
Telephone: Toll Free (800) 227 9948
In California (800) 982 6135
or (415) 493 2200
Telex: 334 450 SYVA PLA

Syva, a Syntex company in U.S.A., Australia, Canada, Denmark, France, Japan, New Zealand, Spain, Sweden, the United Kingdom and West Germany

THE MILITARY LAW OF DRUGS

SECTION VI

THE MILITARY LAW OF DRUGS

I. Background

A. Before 1 October 1982. Prior to this time, military law had not prosecuted drug offenses under a single, comprehensive drug offense statute. Traditionally, military drug offenses had been prosecuted under Article 134, UCMJ, under either of the following rationales: (1) Conduct prejudicial to good order and discipline and/or service discrediting conduct, or (2) violation of non-capital federal drug offenses (including assimilated state offenses). Following the promulgation of Article 1151, U.S. Navy Regulations, on 23 February 2973, drug offenses in the Navy and Marine Corps could also be charged under Article 92, UCMJ, as violations of a general regulation. Similar options existed in the other military services under their own general regulations. The selection of options lacked uniformity among the services and even within each service, being largely left to the discretion of the accuser. And since the consequences varied significantly depending upon the charge alleged (e.g., a narcotics seller faced 10 years confinement under Article 134, but only 2 years under Article 92), the potential punishment for a particular act was also largely within the accuser's discretion.

In United States v. Courtney, 1 M.J. 438 (C.M.A. 1976), the Court of Military Appeals held that such unbridled discretion was readily subject to abuse and constituted a denial of equal protection, the remedy for which would be to limit the maximum punishment to the least of those available. The Army and Air Force reacted to Courtney by amending their drug abuse general regulations to require that offenses involving habit-forming narcotics or marijuana be charged only under Article 134, thereby subjecting an accused to the possibility of only one, albeit hefty, punishment. However, because the Navy and Coast Guard made no such amendments, drug offenders in these services were subject to significantly less punishment. This interservice (as opposed to intraservice) inequality passed judicial muster, United States v. Hoesing, 5 M.J. 355 (C.M.A. 1978), and continued until 1 October 1982.

B. 1 October 1982 to 1 August 1984. By Executive Order 12383 of 23 September 1982, the President provided for a single, comprehensive treatment of drug offenses to be followed by all services beginning 1 October 1982. The Executive Order amended the MCM by adding a new paragraph, 213g, establishing under Article 134 the offenses of "possession, use, introduction into a military unit, base, station, post, ship, or aircraft, manufacture, distribution, and possession, manufacture or introduction with intent to distribute, of a controlled substance." The term "distribution" was defined to encompass both sale and transfer, eliminating technical distinctions between the two terms which previously had been successfully exploited by some accused. Definitions were also provided for "possession," "manufacture," "wrongfulness," and "intent to distribute," and new sample specifications were provided in Forms 144-146 of Appendix 6. The Table of Maximum Punishments was substantially modified to provide for a wider range of standardized punishments based upon the relative severity of each offense. A corresponding change to Article 1151,

U.S. Navy Regulations, confirmed that the Navy Department would rely exclusively on Article 134 to prosecute drug offenses addressed therein. (Offenses not addressed were still subject to prosecution under any other applicable article.)

C. From 1 August 1984. In the Military Justice Act of 1983, Congress enacted a new punitive article of the UCMJ, Article 112a, effective 1 August 1984, which superceded Article 134 as the sole vehicle for prosecuting applicable drug offenses. Article 112a did little more than provide a statutory basis for the offenses previously identified by Executive Order 12383. (Although Article 112a did eliminate the need to prove in each case that drug abuse is either prejudicial to good order and discipline or service discrediting - a necessary element under Article 134 - in practice, this additional element was virtually self-proving.) Thus, Article 112a did not significantly alter the military law of drugs which immediately preceded it.

II. Article 112a

A. Offenses Prohibited. Article 112a, as implemented in Part IV, par. 37, MCM, 1984, prohibits the wrongful use, possession, manufacture, distribution, importing, exporting, introduction into a military installation, vessel, vehicle, or aircraft, or possession, manufacture, or introduction with intent to distribute, of any controlled substance. The following paragraphs list the elements of each of these offenses:

1. Wrongful possession of controlled substance

a. That the accused possessed a certain amount of a controlled substance; and

b. that the possession by the accused was wrongful

2. Wrongful use of controlled substance

a. That the accused used a controlled substance; and

b. that the use by the accused was wrongful.

3. Wrongful distribution of controlled substance

a. That the accused distributed a certain amount of a controlled substance; and

b. that the distribution by the accused was wrongful.

4. Wrongful introduction of a controlled substance

a. That the accused introduced onto a vessel, aircraft, vehicle, or installation used by the armed forces or under the control of the armed forces a certain amount of a controlled substance; and

b. that the introduction was wrongful.

5. Wrongful manufacture of a controlled substance

a. That the accused manufactured a certain amount of a controlled substance; and

b. that the manufacture was wrongful.

6. Wrongful possession, manufacture, or introduction of a controlled substance with intent to distribute

a. That the accused possessed, manufactured, or introduced a certain amount of a controlled substance;

b. that the possession, manufacture, or introduction was wrongful; and

c. that the possession, manufacture, or introduction was with the intent to distribute.

7. Wrongful importation or exportation of a controlled substance

a. That the accused (imported into the customs territory of) (exported from) the United States a certain amount of a controlled substance; and

b. that the (importation) (exportation) was wrongful.

B. Definition and Discussion of Words. The following paragraphs define the key terms utilized in the criminal offenses listed above. They also mention relevant case decisions which have been helpful in the past in explaining some of the concepts.

1. Controlled substance. "Controlled substance" means amphetamine, cocaine, heroin, lysergic acid diethlamide (LSD), marijuana, methamphetamine, opium, phencyclidine, phenobarbital, and secobarbital. "Controlled substance" also means any substance that is included in Schedules I through V established by the Controlled Substances Act of 1970 (title 21 U.S.C. sec. 812). In addition to those drugs included in the text of the act, the Attorney General may add other substances, or may transfer a substance from one schedule to another. Updated schedules are initially published in the Federal Register, and later in the Code of Federal Regulations. (For the purposes of Article 112a, the President also may add other substances.) The characteristics of substances in each schedule are briefly summarized as follow [The most dangerous (and most strictly regulated) drugs are in Schedule I, the least dangerous in Schedule V]:

a. Schedule I: 21 U.S.C. sec. 812(b)(1)

(1) Characteristics:

(a) High potential for abuse; and

(b) no currently accepted medical use in the United States; and

(c) unsafe even under medical supervision.

(2) Examples: heroin, LSD, marijuana. (Note: Classification of marijuana as a Schedule I substance is currently being challenged on the grounds that marijuana can be used effectively to treat glaucoma. Reclassification of marijuana as a Schedule II substance may occur in the future.)

b. Schedule II: 21 U.S.C. sec. 812(b)(2)

(1) Characteristics:

(a) High potential for abuse; and

(b) currently accepted medical use in the United States; and

(c) potential for severe psychological or physical dependence.

(2) Examples: opium, cocaine, methadone.

c. Schedule III: 21 U.S.C. sec. 812(b)(3)

(1) Characteristics:

(a) Less abuse potential than that of drugs in Schedules I and II; and

(b) currently accepted medical use in the United States; and

(c) potential for high degree of psychological dependence, or for low to moderate degree of physical dependence.

(2) Examples: Nalorphine, secobarbital.

d. Schedule IV: 21 U.S.C. sec. 812(b)(4)

(1) Characteristics:

(a) Less abuse potential than that of drugs in Schedules I, II, and III; and

(b) currently accepted medical use in the United States; and

(c) less potential for limited physical or psychological dependence than that of Schedule III drugs.

(2) Examples: phenobarbital, meprobamate (Milltown), chloral hydrate.

e. Schedule V: 21 U.S.C. sec. 812(b)(5)

(1) Characteristics:

(a) Less abuse potential than that of drugs in Schedules I, II, III, and IV; and

(b) currently accepted medical use in the United States; and

(c) less potential for limited physical or psychological dependence than that of Schedule IV drugs.

(2) Examples: compounds containing small quantities of narcotics, such as codeine, combined with non-narcotic ingredients.

2. Marijuana. Marijuana is defined at title 21 U.S.C. sec. 802(15) as "all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds, or resin . . . ." Although it might be argued that there are more than one species of marijuana, e.g., Cannabis indica Lam., and that not all marijuana is therefore prohibited, this "species argument" has been almost universally rejected. See United States v. Dinapoli, 519 F.2d 104 (6th Cir. 1975) (no valid defense, even though statute refers solely to Cannabis sativa L. and evidence showed presence of three species); United States v. Gavic, 520 F.2d 1346 (8th Cir. 1975); United States v. Walton, 514 F.2d 201 (D.C. Cir. 1975). Although the Court of Military Appeals has never squarely ruled on the issue, in United States v. Lee, 1 M.J. 15 (C.M.A. 1975) (no fatal variance where specification alleged possession of marijuana in hashish form, but evidence showed possession of growing marijuana plants), Judge Cook clearly indicated in the opinion of the court that C.M.A. would reject the "species argument." The Air Force Court of Military Review has specifically rejected this defense. United States v. Carrier, 50 C.M.R. 135 (A.F.C.M.R. 1975) (statutory definition of marijuana sufficient to cover all species).

3. Wrongfulness. To be punishable under Article 112a, possession, use, distribution, introduction, importation, exportation, or manufacture of a controlled substance must be wrongful. Such acts are wrongful if done without legal justification or authorization. Such acts are not wrongful if (the following list is not exhaustive): (1) Done pursuant to legitimate law enforcement activities (for example, an informant who receives drugs as part of an undercover operation is not in wrongful possession); (2) done by authorized personnel in the performance

of medical duties; or (3) without knowledge of the contraband nature of the substance (for example, a person who possesses cocaine, but actually believes it to be sugar, is not guilty of wrongful possession of cocaine). Possession, use, distribution, introduction, exportation, importation, or manufacture of a controlled substance may be inferred to be wrongful in the absence of evidence to the contrary. The burden of going forward with evidence with respect to any such exception in any court-martial or other proceeding under the code shall be upon the person claiming its benefit. If such an issue is raised by the evidence presented, then the burden of proof is upon the United States to establish beyond reasonable doubt that the act in question was wrongful. United States v. Cuffee, 10 M.J. 381 (C.M.A. 1981).

a. Lack of knowledge

(1) Lack of knowledge of substance's presence. An act is not wrongful unless an accused has actual knowledge that a controlled substance is present; mere suspicion is not enough. United States v. Lampkins, 4 U.S.C.M.A. 31, 15 C.M.A. 31 (1954) [lack of knowledge need only be honest (i.e., not feigned); and need not also be reasonable]; United States v. Whitehead, 48 C.M.R. 344 (N.C.M.R. 1973) (no possession when accused suspected the locker to which he had been given the key contained drugs, but he had no direct knowledge); United States v. Heicksen, 40 C.M.R. 475 (A.B.R. 1969) (SJA incorrectly advised convening authority he could uphold a possession conviction on the basis of constructive knowledge of the presence of marijuana). But see, United States v. Newman, 14 M.J. 474 (C.M.A. 1983) (apparently agreeing that actual knowledge not necessary if accused aware of high probability of a crucial fact, coupled with a deliberate avoidance of that probability in an effort to remain ignorant).

(2) Lack of knowledge of substance's composition. As with ignorance of a controlled substance's presence, when the accused honestly does not have actual knowledge of the substance's composition, such ignorance or mistake of fact is a defense. United States v. Greenwood, 6 U.S.C.M.A. 209, 19 C.M.R. 335 (1955) (girlfriend laced accused's food with drugs after a quarrel); United States v. Ashworth, 47 C.M.R. 702 (A.F.C.M.R. 1973) (Insufficient evidence to establish knowledge where government could only show accused acted nervous when questioned about a box of "better brownies" he received through the mails). Knowledge of the name of a substance will not necessarily defeat this defense. To be guilty, the accused must know the illicit or "narcotic quality" of the substance. United States v. Crawford, 6 U.S.C.M.A. 517, 20 C.M.R. 233 (1955) (accused unaware that the medicine paregoric given him by a friend contained morphine).

(3) Lack of knowledge that conduct is unlawful. This is simply ignorance of the law, which is no defense.

(4) Proving knowledge. The accused's knowledge is usually proven, despite his or her assertions of ignorance, by circumstantial evidence. See, e.g., United States v. Griggs, 13 U.S.C.M.A. 57, 32 C.M.R. 57 (1962) (evidence, although of dubious weight, that accused

frequented a bar that had a reputation as a place where marijuana was offered for sale was admissible to show accused's knowledge); United States v. Alvarez, 10 U.S.C.M.A. 24, 27 C.M.R. 98 (1958) (pretrial statement by accused that he had possessed and smoked marijuana for a period of time ending several months prior to the charged offense admissible as to knowledge); United States v. Young, 5 M.J. 797 (N.C.M.R. 1978) (after accused had stipulated that drugs and marijuana were found in his jacket but had testified that he didn't know that marijuana was in his pocket, it was not prejudicial error for trial counsel to ask why he had water pipe and cigarette papers in his locker). Note the subtle distinction between the necessity to prove actual knowledge and the permissibility of proving actual knowledge by circumstantial evidence. While criminal liability can't be imposed upon one who actually did not know even though he/she should have, proof of knowledge by circumstantial evidence is nothing more than piecing together enough "should have known" factors to demonstrate beyond a reasonable doubt that the accused did in fact know. The answer as to exactly where "should have known" ends and "knew" begins cannot be defined with precision in the abstract, but will turn on the facts presented in each case.

b. Other examples. See, e.g., United States v. West, 15 U.S.C.M.A. 3, 34 C.M.R. 449 (1964) (not wrongful when pharmacist who took narcotics from his pharmacy only to safeguard them); United States v. Grier, 6 U.S.C.M.A. 218, 19 C.M.R. 344 (1955) (accused testified he had not used heroin, and the only way it could have entered his body was through penicillin injections he had been receiving for venereal disease); United States v. Russell, 2 M.J. 433 (A.C.M.R. 1975) (accused acted on commander's suggestion and bought drugs in order to further a drug investigation); United States v. Rowe, 11 M.J. 11 (C.M.A. 1981) (military judge committed prejudicial error in failing to give instruction on "innocent" possession despite evidence that the accused therein possessed "planted" drugs with intention to rid himself of them by returning them to their "suspected owners").

-- The holding of United States v. Rowe, supra, was questioned in United States v. Neely, 15 M.J. 505 (A.F.C.M.R. 1982), where the court determined that an Air Force officer who had been found in possession of cocaine for one day could not utilize the defense of innocent possession since he did not immediately divest himself of the cocaine when he originally discovered it in his scuba diving bag. The court also stated that there is no innocent possession if the individual who discovers drugs intends to return them to a prior possessor instead of to proper authority, and opined that C.M.A. would agree if again faced with the issue.

4. Possess. "Possess" means to exercise control of something. Possession may be direct physical custody like holding an item in one's hand, or it may be constructive, as in the case of a person who hides an item in a locker or car to which that person may return to retrieve it. Possession must be exclusive; as used here, exclusive means having power or authority to preclude control by others. It is possible, however, for more than one person to possess an item simultaneously, as when several people share control of an item. An accused may not be convicted of possession of

a controlled substance if the accused did not know that the substance was present under the accused's control. (See paragraph 3a, supra.) Awareness of the presence of a controlled substance may be inferred from circumstantial evidence.

a. Examples. United States v. Aloyian, 16 U.S.C.M.A. 333, 36, C.M.R. 489 (1966) (sufficient evidence to find possession of marijuana stored in accused's roommate's locker where evidence showed accused had access to the locker and the container in which the marijuana was found was like one accused had earlier possessed); United States v. Courts, 4 M.J. 518 (C.G.C.M.R. 1977) (one who assists others in weighing and packaging drug has possession of drug). But see, United States v. McMurry, 6 M.J. 348 (C.M.A. 1979) (accused's possession of heroin not shown by evidence that he initially knew of heroin's location, and that later, without knowledge of heroin's location, accused indicated his willingness to help his roommate sell it and feigned a transfer of some of it); United States v. Burus, 4 M.J. 572 (A.C.M.R. 1977) (no possession where a third party held the marijuana at accused's request while accused was deciding whether or not to accept it in payment for a car he sold); See also United States v. Wilson, 7 M.J. 290 (C.M.A. 1979) (where a person is in nonexclusive possession of premises, it cannot be inferred that he knows of presence of drugs or had control of them unless there are other *incriminating* statements or circumstances; however, presence, proximity, or association may establish a prima facie case of drug possession when colored by evidence linking accused to an ongoing criminal operation of which that possession is a part); United States v. Keithan, 1 M.J. 1056 (N.C.M.R. 1976) (evidence that accused was driving an automobile and knew that one of the passengers was in possession of marijuana was insufficient to sustain accused's conviction for possession).

5. Distribute. "Distribute" means to deliver to the possession of another. "Deliver" means the actual, constructive, or attempted transfer of an item, whether or not there exists an agency relationship. "Distribution" replaces the concepts of "sale" and "transfer." This conforms with federal practice and will simplify military practice by reducing pleading, proof, and associated multiplicity problems in drug offenses. Evidence of sale is not necessary to prove the offense of distributing a controlled substance. Thus, the defense of agency no longer applies in the military. The agency defense incorporated the concept that one who acted merely as a procuring agent for another was not guilty of sale of drugs to that person (although he/she might well have been guilty of transfer).

6. Manufacture. "Manufacture" means the production, preparation, propagation, compounding, or processing of a drug or other substance, either directly or indirectly or by extraction from substances of natural origin, or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of such substance or labeling or relabeling of its container. "Production" includes planting, cultivating, growing, or harvesting.

7. Intent to distribute. Intent to distribute may be inferred from circumstantial evidence. Examples of evidence which may tend to support an inference of intent to distribute are: Possession of a quantity of a substance in excess of that which one would be likely to have for personal use; market value of the substance; the manner in which the substance is packaged; and that the accused is not a user of the substance. On the other hand, evidence that the accused is addicted to or is a heavy user of the substance may tend to negate an inference of intent to distribute.

8. Certain amount. When a specific amount of a controlled substance is believed to have been possessed, distributed, introduced, or manufactured by an accused, the specific amount should ordinarily be alleged in the specification. This ensures that the accused's record will reflect the relative seriousness of the offense, and is a mandatory prerequisite to invoking any increased punishments for marijuana offenses based on quantity. For negligible amounts, however, it is not necessary to allege the specific amount, and a specification is sufficient if it alleges "some", "traces of", or "an unknown quantity of" a controlled substance.

9. Use. Neither the U.S. Code nor the case law defines "use." In the context of drug offenses, "use" means the voluntary introduction of the drug into the body for the purpose of obtaining the substance's chemical or pharmacological effects. "Use", therefore, would include ingestion, injection, and inhalation.

C. Maximum Punishment. The key effect of prosecuting drug offenses under Article 112a (as under Article 134 from 1 October 1982 to 1 August 1984) is to provide the standardized maximum punishments indicated in Part IV, paragraph 37e, MCM, 1984, as follows:

1. Wrongful use, possession, manufacture, or introduction of amphetamine, cocaine, heroin, lysergic acid diethylamide, marijuana (except possession of less than 30 grams or use), methamphetamine, opium, phencyclidine, secobarbital, and Schedule I, II, and III controlled substances: Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

2. Wrongful possession of less than 30 grams or use of marijuana, and wrongful use, possession, manufacture, or introduction of phenobarbital and Schedule IV and V controlled substances: Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

3. Wrongful distribution of, or possession, manufacture, or introduction of with intent to distribute, or wrongful importation or exportation of amphetamine, cocaine, heroin, lysergic acid diethylamide, marijuana, methamphetamine, opium, phencyclidine, secobarbital, and Schedule I, II, and III controlled substances: Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 15 years.

4. Wrongful distribution of or possession, manufacture, or introduction of with intent to distribute, or wrongful importation or exportation of phenobarbital and Schedule IV and V controlled substances: Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

5. When any offense described above is committed while the accused is: serving as a sentinel or lookout, on board a vessel or aircraft or in or at a missile launch facility used by or under the control of the armed forces, in a hostile fire pay zone, or in time of war, the maximum period of confinement and forfeiture of pay and allowances authorized for such offense shall be increased by 5 years.

III. Drug Paraphernalia

A. Basis for Prosecution. Article 112a does not address drug paraphernalia, and resort must therefore be made to any applicable orders or regulations (or to Article 134). For the Navy and Marine Corps, a service-wide drug paraphernalia regulation was promulgated in SECNAVINST 5300.28, dated 12 June 1982, which provides:

> Except for authorized medicinal purposes, the use for the purpose of injecting, ingesting, inhaling, or otherwise introducing into the human body marijuana, narcotic substances, or other controlled substances, or the possession with the intent to so use, or the sale or other transfer with the intent that it be so used, of drug abuse paraphernalia by persons in the naval service is prohibited.

Enclosure (1) to the instruction defines drug abuse paraphernalia in greater detail, and notes that it is the intent of the person in possession of the paraphernalia that separates innocent possession from a criminal offense. For example, under the instruction cigarette papers may be safely possessed if the intent of the possession is to roll tobacco cigarettes, but their possession constitutes an offense if they are to be used to roll marijuana cigarettes. The enclosure lists "evidentiary factors" to consider in making a determination as to intent; such factors include statements by the person in possession of the paraphernalia, proximity of the paraphernalia to a controlled substance, and whether instructions might be provided with the paraphernalia concerning its intended use, existence of legitimate uses for the item, and expert testimony.

B. Constitutionality. The model for the paraphernalia sections of SECNAVINST 5300.28 was the "Model Drug Paraphernalia Act" promulgated by the Drug Enforcement Administration, which has also served as the model for many state paraphernalia statutes. The language of the Model Act, "used, intended for use, or designed for use", which appears in SECNAVINST 5300.28, has come under attack as being unconstitutionally vague and

overbroad. However, the Supreme Court rejected these challenges in Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982). Although Flipside dealt only with the prospective application of a licensing ordinance, it has been used as authority for sustaining criminal convictions for paraphernalia possession. United States v. Hester, 17 M.J. 1094 (A.F.C.M.R. 1984).

IV. Failure to report drug offenses

A. Bases for Prosecution

1. U.S. Navy Regulations. Article 1139, U.S. Navy Regulations states:

> Persons in the Department of the Navy shall report to proper authority offenses committed by persons in the Department of the Navy which come under their observation.

Navy and Marine Corps personnel who fail to report drug offenses committed by fellow servicemembers could be charged under Article 92(1), UCMJ, with violation of a lawful general order. (Note that whether or not the accused was aware of the existence of Article 1139 would be irrelevant in any such prosecution. Part IV, par. 16c(1)(d), MCM, 1984.)

2. Dereliction of Duty. A person who willfully or negligently fails to perform a known duty imposed by regulation, lawful order, or custom of the service may be guilty of dereliction of duty in violation of Article 92(3), UCMJ. Although there would appear no reason in the Navy or Marine Corps to charge dereliction of duty instead of violation of Article 1139, U.S. Navy Regulations, such an approach may be useful in those services without applicable punitive regulations. See, e.g., United States v. Heyward, 17 M.J. 942 (A.F.C.M.R. 1984) (NCO derelict in failing to report drug use).

V. Article 134

Drug violations which are not addressed by Article 112a nor by applicable regulations might potentially be prosecuted under clause 3 of Article 134, "crimes or offenses not capital." A clause 3 prosecution could be accomplished under two theories. First, another federal criminal statute could be the basis for prosecution. Second, state criminal statutes might be assimilated into federal law through the use of the Federal Assimilated Crimes Act (provided the offense occurs in an area subject to exclusive or concurrent federal jurisdiction).

VI. Relationships among drug offenses

A. Multiplicity. Particularly in drug cases, two questions often arise: (1) With just how many offenses may an accused be charged and found guilty, and (2) of those offenses charged, for how many may separate punishments be imposed? As a general rule, an accused may properly be charged with, convicted of, and separately punished for each offense committed. In the military, however, an accused may not be separately punished for closely related offenses arising from the same transaction. Such offenses which are sufficiently different as to permit separate convictions, but so closely linked in their factual setting as to preclude separate punishments, are said to be multiplicious for sentencing. Moreover, a military accused may not even be separately charged and convicted, much less separately sentenced, where what is in essence one offense has been unreasonably charged as several offenses. Such charges which describe essentially the same offense, or in which one is fairly embraced in the other, are said to be multiplicious for findings, and separate convictions are improper.

B. Illustrative cases. The lines separating drug offenses which are separately punishable from those multiplicious for sentencing from those also multiplicious for findings are sometimes far from clear, and military law in this area is still evolving. The following are examples of recent decisions in this area:

1. Use of drug and sale of same drug can be separately punished, but possession and sale of same drug are multiplicious for sentencing, as are possession and use of same drug. United States v. Smith, 14 M.J. 430 (C.M.A. 1983).

2. Focus should be on the time and proximity between possession offenses, not the location nor time or place of acquisition. Hence, simultaneous possession of different kinds of drugs can not be separately punished. United States v. Hughes, 1 M.J. 346 (C.M.A. 1976)

3. Possession and possession with intent to distribute same drug are multiplicious for findings. United States v. Truman, 16 M.J. 138 (C.M.A. 1983).

4. Possession and introduction of same drug are multiplicious for findings. United States v. Hendrickson, 16 M.J. 62 (C.M.A. 1983).

5. Possession of paraphernalia is multiplicious only for sentencing with the simultaneous possession of drugs. United States v. Bell, 16 M.J. 204 (C.M.A. 1983) (summary disposition) citing United States v. Hughes, 1 M.J. 346 (C.M.A. 1976).

6. Still apparently unresolved, however, is the issue of whether separate drug distributions to two or more persons at the same time and place are multiplicious. In United States v. Rodriguez, 45 C.M.R. 839 (A.C.M.R. 1972), pet. denied, 45 C.M.R. 928 (C.M.A. 1972), the Army Court

of Military Review held that separate but simultaneous distributions of heroin to two government informers were not multiplicious; but the court expressed its concern about the potential for abuse in such use of multiple agents and purchases. The court also cautioned military judges to be alert to such potential abuse and to "accordingly treat what might appear to be separate offenses as multiplicious for sentencing purposes where there is no apparent reason for multiple purchases by government agents or informants." Id. at 840, n.

UNITED STATES MARINE CORPS
MARINE CORPS BASE
CAMP PENDLETON, CALIFORNIA 92055

IN REPLY REFER TO:
B17:JEO:cw
5800

14 DEC 1981

MEMORANDUM OF LAW FOR THE COMMANDING GENERAL

Subj: The law of command influence as it relates to the new Marine Corps policy concerning illegal drugs

1. The Commandant's recently announced "no toleration" policy concerning illegal drugs in the United States Marine Corps raises the possibility of allegations of unlawful command influence in administrative and judicial processes. The purpose of this memorandum is to briefly discuss certain particularly relevant aspects of the law of unlawful command influence, analyze the Commandant's policy directive in light of this law, and propose an approach by which this command can fully implement the Commandant's policy without violating either the letter or the spirit of the law.

2. Article 37, UCMJ prohibits any attempt to unlawfully influence the military judicial process. Violations of this article are punishable under Article 98, UCMJ. Although no one has ever been convicted for engaging in the conduct proscribed by Article 37, UCMJ, the significance of the article as it applies to the Commandant's recent directive is apparent in Article 37's general prohibition:

> 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. The foregoing provisions of the subsection shall not apply with respect to (1) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of courts-martial,...

3. The "evil" of unlawful command influence is the attempt to substitute the judgment of a superior for what should be the independent decision of the individual convening authority, court member, or any other subordinate involved in the military judicial process. The pivotal issue of the unlawful command influence problem is the attempt to:

> differentiate between the virtues of command responsibility and the vices of command control. It is just as important to both military justice and discipline that we permit commanders to exploit their command functions as it is that we stamp out any attempt to control the judicial processes. United States v. Hawthorne, 7 U.S.C.M.A. 293, 300, 22 CMR 83, 90 (Latimer, J., concurring in the result).

It seems clear that the publication of general command policies regarding military justice matters is not only proper, it is an obligation of command, particularly when the directive is informational in nature and receives wide distribution within the command. See United States v. Isbell, 3 U.S.C.M.A. 782, 14 C.M.R. 200 (1954) (USAEUR policy directive concerning "Retention [or separation] of Thieves in the Army" was proper where there was a general distribution, the directive was informational in nature, and the directive was not issued or promulgated with any apparent intent to influence the court-martial of a particular accused). Cf. United States v. Littrice, 3 U.S.C.M.A. 487, 13 C.M.R. 43 (1953) (However, when the same directive was read to court members immediately prior to trial, improper command influence did exist). Policy declarations which are generally conceded to be necessary to discipline and order are proper. With regard to convening authorities, specifically, the important question is not whether the convening authority gave consideration to the policy but rather whether he understood fully that he had a choice to accept or reject it. United States v. Betts, 12 U.S.C.M.A. 214, 30 C.M.R. 214 (1961) (SECNAV directive concerning elimination of homosexuals from the military service was not unlawful command influence where the convening authority understood that he was not required to deny the probation of or approve the bad-conduct discharge of an accused convicted of an attempted sodomy); United States v. Rivera, 12 U.S.C.M.A. 507, 31 C.M.R. 93 (1961) (SECNAV directive concerning elimination of homosexuals from the military service was not unlawful command influence where the convening authority understood that he was not required to refer such cases to trial). The view of the Court of Military Appeals concerning unlawful command influence seemed to coalesce somewhat in United States v. Hardy, 4 M.J. 20 (C.M.A. 1977). In Hardy, the officer exercising general court-martial jurisdiction was held to have acted improperly in ordering the officer exercising special court-martial jurisdiction to withdraw charges from a special court-martial and re-refer them to a general court-martial. The Court wrote:

> Where, as here, the superior commander seeks to affect a particular case by countermanding a discretionary judicial decision of a subordinate commander which the latter made pursuant to his then existing powers under the Uniform Code of Military Justice, the superior has injected the spectre of unlawful command control over the judicial act of the subordinate. This contravenes the intent of Article 37(a), UCMJ. Hardy, supra, at 24.

The Court rather strongly implied, however, that it may be permissible for the superior commander to take such an action if he does so "before the subordinate takes action pursuant to the Code on any specific case." Hardy, supra, at 24. Note that JAGMAN, section 0101a(5) provides that:

> Unless specifically authorized by the Secretary of the Navy, commanding officers of the Navy and Marine Corps shall not limit or withhold the exercise by subordinate commanders of any disciplinary authority they might otherwise have under Article 15, UCMJ.

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4. Many of the policy changes incorporated in the Commandant's policy directive are administrative in nature and, as a result, are not directly prohibited by Article 37, UCMJ, which concerns itself with the military judicial process. Nonetheless, the principles of the law of unlawful command influence are equally valid with respect to administrative discharge proceedings. If this were not the case, then the primary objective of such proceedings (the presentation to the discharge authority of a well-considered, consensus opinion of the board members, based solely upon the evidence before them, after application of only those rules promulgated pursuant to the authority delegated by the Congress) could never be achieved. The erroneous assumption that administrative discharge proceedings are fair game for command influence has resulted in extensive litigation and considerable high-level embarassment.

5. If challenged as a matter of unlawful command influence, the Commandant's policy directive concerning illegal drugs in the Marine Corps can be defended as a proper exercise of "command responsibility." Hawthorne, supra. First, because it has been issued as an ALMAR, the new policy will achieve maximum dissemination throughout the Marine Corps. The ALMAR itself requires that:

> A concerted effort will be made in the time available prior to implementation to ensure that all Marines are made aware of the standards inherent in these policies, and the responsibility of each Marine to comply with these standards.

Second, because the new policy has an implementation date of 1 February 1982, it is clear that this directive is being issued before any subordinate acts in a specific case, without reference to the case of any particular accused, and in a timely fashion intended to give full, fair and complete notice to all Marines of the standards of conduct expected of them. Certain portions of the ALMAR are, of course, strongly worded. For example, paragraph 5.A., reads, in part, "There should be no question in anyone's mind that those who do not meet these standards will be separated from the Marine Corps." I anticipate that words such as these will be interpreted by some as an attempt to fetter the exercise of independent judgment by convening authorities, court members, military judges, counsel, administrative discharge board members or other persons involved in the military administrative or judicial processes. There is sure to be litigation on these points in courts-martial and in the United States District Courts. As a precaution, I suggest that you include in your policy statements your opinion that the Commandant's directive is not intended to infringe upon the obligation of all Marines involved in the military administrative or judicial processes to exercise their own independent judgment and decision-making powers with regard to the proper disposition of cases involving the distribution, possession or use of illegal drugs in the Marine Corps. This, coupled with widespread promulgation of the new policy prior to its implementation date, could do much to defuse potential unlawful command influence allegations and reassure Marines that they can expect firm, but fair treatment.

V/R

RUFUS C. YOUNG, JR.
Assistant Chief of Staff,
Staff Judge Advocate

A WORD ABOUT JURISDICTION

SECTION VII

JURISDICTION

I. General. Jurisdiction is the power to hear and to decide a case. In a criminal prosecution in state and federal courts, the jurisdiction of these courts is specified by statutes which generally focus upon the geographical area within which the offense must occur. In the military, however, jurisdiction of the court is established by four unique prerequisites which are peculiar to the military. (See R.C.M. 201):

A. The court must be properly convened, i.e., a convening order must be properly executed and the case must be properly referred for trial to the court convened by that convening order.

B. The court must be properly constituted, i.e., all necessary parties must be properly appointed and present or their absence accounted for.

C. The court must have jurisdiction over the person of the accused, i.e., the accused must be a person amenable to trial by courts-martial.

D. The court must have jurisdiction over the offense, i.e., the offense must be one which has a service connection.

II. Jurisdiction over drug offenses

A. Lack of jurisdiction over the offense proved to be a stumbling block in Navy-Marine Corps efforts to prosecute drug offenses committed by military personnel off-base since the Court of Military Appeals announced in 1976 that it would apply a case-by-case, offense-by-offense analysis to determine whether military jurisdiction existed in such cases. This situation changed dramatically in 1980 when the court decided the case of United States v. Trottier, 9 M.J. 337 (C.M.A. 1980). The Court held that ". . . almost every involvement of service personnel with the commerce in drugs is 'service connected.'" (The attached memorandum from the Judge Advocate General discusses the impact of the Trottier case more fully.)

B. Two decisions of the Navy-Marine Corps Court of Military Review reflect that the court has now adopted a very expansive interpretation of Trottier:

1. In United States v. Stookey, 14 M.J. 975 (N.M.C.M.R. 1982), the court found that specifications alleging use and possession of marijuana at a party held at a serviceman's off base residence and attended by naval service personnel (some of whom were from appellant's command), and specifications alleging possession and use of marijuana in the presence of other naval service personnel off base during a trip to another state were sufficient to allege service connection. The court stated that the Trottier holding is not limited just to sale of controlled or prohibited substances. Rather, the reach of Trottier extends to any illegal conduct which touches marijuana, narcotic substances, or other controlled substances, -- sale, transfer, possession, use or possession with intent to distribute. The court further noted that it is the impact of the servicemember's conduct on the military community and its mission that is

controlling, not the geographical consideration, and that the term "military community" should be given "the most expansive of readings," Id. at 976, so that a servicemember on leave or liberty near the location of his/her unit would not be able to avoid prosecution.

2. In United States v. Labella, 14 M.J. 976 (N.M.C.M.R. 1982), the court reiterated its expansive interpretation of Trottier and stated:

> We believe that the participation, off base in a sort of floating-crap-game, drug-centered subculture perpetrated by members . . . of a military organization falls easily within the scope of Trottier. This is so regardless of whether the party was advertised on base or the member was on leave or liberty status at the time.

Id. at 977-78.

C. Murray v. Haldeman, 16 M.J. 74 (C.M.A. 1983), is the Court of Military Appeals' most recent (and enigmatic) decision on the issue of service connection. The court provides a brief background analysis of "the disastrous effects occasioned by the wrongful use of narcotics on the health, morale, and fitness for duty of persons in the armed forces." Id. at 78. The court cites with approval language from Committee for GI Rights v. Callaway, 518 F.2d 466, 476-77 (D.C. Cir. 1975), and notes that its Trottier decision extended to drug offenses other than sale offenses. Id. at 79. The court once again uses language as it did in its earlier decisions indicating that "the military community is unique in many respects and . . . its system of justice must be responsive to needs not present in the civil society." Id. at 79. The court goes on to note that "no matter how long [the servicemember's] period of leave or how distant he may be from military installations while on leave, a servicemember is responsible to be fit for duty when he returns from leave." Id. at 80. It then cites the language from Trottier which recognizes that "indeed, in many instances, the drugs will enter the military installation in their most lethal form -- namely, when they are coursing through the body of a user." Id. at 80. The court then offers the most significant language of the opinion:

> We are convinced that, even when a servicemember uses a psychoactive drug in private while he is on extended leave far away from any military installation, that use is service-connected, if he later enters a military installation while subject to any physiological or psychological effects of the drug. (Footnote omitted; emphasis added).
>
> According to the evidence received during the Article 39(a) session, a trace of THC was present in Murray's urine specimen when he reported to the Philadelphia Naval Base. The record does not make clear what are the physiological or psychological effects, if any, of the presence of this metabolite in his body; and we cannot take judicial notice of those effects. (Emphasis added).

> After trial on the merits, there may be more extensive evidence in the record as to the presence or absence of service-connection of any use of marijuana by petitioner.

Id. at 80 (emphasis added). The foregoing decision involved resolution of a pretrial matter, and the final outcome in Murray (as well as clarification of the question of service-connection) must await further court action.

III. "Civilian" cases

The commander is often faced with a member whose drug offense has been adjudicated in a "civilian" court (either foreign or domestic) but who has not received adequate discipline given the military interest in the case. While it is an unusual procedure, a person in the naval service who has been tried in a domestic or foreign court (except federal courts), whether convicted or acquitted, or whose case has been "diverted out" of the regular criminal process, or whose case has been adjudicated by juvenile authorities may be tried by court-martial or awarded nonjudicial punishment if:

A. The concerned officer exercising general court-martial authority gives prior permission in the case of a summary court-martial or nonjudicial punishment, or

B. The Judge Advocate General of the Navy gives permission in the case of a special or general court-martial. See JAGMAN 0116d for more details.

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DRAFTING CHARGES IN DRUG CASES

SECTION VIII

PLEADING

I. Introduction. Drafting criminal charges in drug cases is much like drafting charges in any other case. Few, if any, specialized rules apply. All pleadings in military criminal prosecutions must meet five tests:

A. Does the specification notify the accused of the nature of the allegation against him or her?

B. Does the specification provide enough information about the alleged offense to allow the accused and his counsel to prepare a defense?

C. Is the specification specific enough to protect the accused against double jeopardy?

D. Does the specification allege the basis for the government's assertion of personal jurisdiction over the accused?

E. Does the specification allege the basis for the government's assertion of subject-matter jurisdiction over the accused?

II. General

A. Meeting the above mentioned tests is usually an easy matter. The first three are answered by specifying the basic facts about the alleged offense, i.e., stating with sufficient particularity where, when, and what occurred. The last two tests are usually addressed by adding other averments as needed. For example, in a typical drug case, here is how the tests would be satisfied:

1. Does the specification notify the accused of the nature of the charge against him? Yes, it specifies that he used (or distributed, possessed, etc.) a named controlled substance in violation of Article 112a.

2. Does the specification provide enough information about the alleged offense to allow the accused and his counsel to prepare a defense? Yes, it tells him where the offense took place (e.g., aboard ship, base, etc.,) and when. It may also tell him what amount of drug was involved and who else was present (e.g., ". . . distributed 10 grams, more or less, of marijuana to Seaman John P. Drugger, U.S. Navy").

3. Is the specification specific enough to protect the accused from double jeopardy? Yes, by specifying which offense is involved as described in 1 and 2 above, the accused may not be prosecuted again for the same transaction.

4. Does the specification allege the basis for the government's assertion of personal jurisdiction over the accused? Yes, it states that he is on active duty in a named armed force and is attached to a particular military unit.

5. Does the specification allege the basis for the government's assertion of subject matter jurisdiction? Yes, it alleges that the accused used a controlled substance while aboard a military vessel or installation, distributed a controlled substance to another servicemember, etc.

B. Problem areas. Occasionally, an otherwise sufficient specification will not prove adequate because the paucity of known facts about the accused's misconduct will require specialized procedures. [The assistance of a Judge Advocate should be sought in such cases.] For example:

1. When or where the accused's misconduct occurred is not known. To satisfy the "five tests", other facts that particularize the offense should be alleged. Thus, the names of others present could be added: ". . . did wrongfully use marijuana in the presence of Seaman John R. Drugger, U.S. Navy."

2. The accused's misconduct occurred over a period of time. To remedy this problem, simply allege the outer time limits in which the misconduct occurred. E.g., " . . . did use marijuana on divers occasions from on or about 1 October 1979 to on or about 31 December 1979." Note that such use will be punished as one offense, and the accused will be protected from future jeopardy for all "use" offenses during the charged period.

3. The accused possessed more than one controlled substance at the same time. If the accused is caught with more than one type of controlled substance on her person or in her locker, simply charge both in a single specification. E.g., " . . . did wrongfully possess marijuana and a narcotic, to wit: heroin . . . . " If the substances are not found in the same location, however, separate specifications should be used.

4. It is not unusual for some uncertainty to exist about what will actually be shown in the courtroom. Since the prosecution cannot interview the accused, it is unlikely that the trial counsel will know in advance exactly what the accused's version of the events will be. Since none of the drug offenses are necessarily related to one another, and few, if any, are lesser included offenses of each other, this uncertainty could prove fatal to the government. For example, if the accused is charged with distribution, but the proof shows mere possession, he could avoid conviction. For this reason it is strongly suggested that all drug transactions should be charged in the alternative to cover all reasonable contingencies. For example, if the accused is suspected of a sale, she should be charged with both distribution and possession. (Any excess charges will be dismissed at trial.) "Use" cases should be charged as "use" and also "possession." It has been determined, however, that possession is a lesser included offense of possession with intent to distribute, and these offenses need not be separately charged.

III. Specification Format

A. MCM, 1984, now contains sample specifications for most drug offenses in paragraph 37f of Part IV.

1. Wrongful possession, manufacture, or distribution

In that _____ (personal jurisdiction data) did, (at/on board--location) (subject-matter jurisdiction data, if required) on or about _____ 19__, wrongfully (possess) (distribute) (manufacture) ____ (grams) (ounces) (pounds) (_____) of _____ [a Schedule _____ controlled substance], [with the intent to distribute the said controlled substance] [while on duty as a sentinel or lookout] [while (onboard a vessel/aircraft) (in or at a missile launch facility) used by the armed forces or under the control of the armed forces, to wit: _____] [while receiving special pay under 37 U.S.C. § 310] [during time of war].

2. Wrongful use

In that _____ (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about _____ 19__, wrongfully use _____ [a schedule _____ controlled substance], [while on duty as a sentinel or lookout] [while (onboard a vessel/aircraft) (in or at a missile launch facility) used by the armed forces or under the control of the armed forces, to wit: _____] [while receiving special pay under 37 U.S.C. § 310] [during time of war].

3. Wrongful introduction

In that _____ (personal jurisdiction data), did, on or about _____ 19__, (at/on board--location) wrongfully introduce ___ (grams) (ounces) (pounds) (_____) of _____ [a Schedule ___ controlled substance], onto a (vessel) (aircraft) (vehicle) (installation) used by the armed forces or under control of the armed forces, to wit: _____ [with the intent to distribute the said controlled substance] [while on duty as a sentinel or lookout] [while receiving special pay under 37 U.S.C. § 301] [during a time of war].

4. Wrongful importation or exportation

In that _____ (personal jurisdiction data) did, (at/on board--location) on or about _____ 19__, wrongfully (import) (export) (grams) (ounces) (pounds) (_____) of _____ [a Schedule ___ controlled substance] (into the customs territory of) (from) the United States [while on board a vessel/aircraft used by the armed forces or under the control of the armed forces, to wit: _____] [during time of war].

IV. Sample Specifications for Drug-Related Offenses

A. Article 112a, UCMJ:

1. Possession. (Note that alleging 30 or more grams of marijuana increases the maximum punishment from two years to five.)

> Specification 1: In that Seaman Pushin D. Snow, U.S. Navy, USS ANGELDUST, on active duty, did, on board the USS ANGELDUST, at sea, on or about 25 November 1984, wrongfully possess 30 grams of marijuana, a Schedule I controlled substance.

2. Use

> Specification 2: In that Seaman Pushin D. Snow, U.S. Navy, USS ANGELDUST, on active duty, did on board the USS ANGELDUST, at sea, on or about 25 November 1984, wrongfully use diazepam, a Schedule IV controlled substance.

3. Wrongful introduction

> Specification 3: In that Seaman Pushin D. Snow, U.S. Navy, USS ANGELDUST, on active duty, on or about 1 December 1984, on board the USS ANGELDUST, located at Bogota, Columbia, wrongfully introduce 10 grams, more or less, of meprobamate, a Schedule IV controlled substance, onto a vessel used by the armed forces or under the control of the armed forces, to wit: the USS ANGELDUST.

4. Distribution

> Specification 4: In that Seaman Pushin D. Snow, U.S. Navy, USS ANGELDUST, on active duty, did on board USS ANGELDUST, at sea, on or about 1 January 1985, wrongfully distribute 32 grams, more or less, of marijuana, a Schedule I controlled substance, to Seaman I. M. High, U.S. Navy, USS ANGELDUST.

5. Introduction with intent to distribute

> Specification 5: In that Seaman Pushin D. Snow, U.S. Navy, USS ANGELDUST, on active duty, on or about 1 December 1984, on board the USS ANGELDUST, located at Newport, Rhode Island, wrongfully introduce 10 grams, more or less, of meprobamate, a Schedule IV

controlled substance, onto a vessel used by the armed forces or under the control of the armed forces, to wit: the USS ANGELDUST, with the intent to distribute the said controlled substance.

B. Article 92, UCMJ

1. Paraphernalia Possession

Specification 1: In that Seaman Pushin D. Snow, U.S. Navy, USS ANGELDUST, on active duty, did on board USS ANGELDUST, at sea, on or about 15 December 1984, violate a lawful general regulation, to wit: Paragraph 7b, Secretary of the Navy Instruction 5300.28 dated 12 June 1982, by wrongfully possessing, with the intent to use for the purpose of injecting into the human body a narcotic substance, to wit: heroin, drug abuse paraphernalia, to wit: one hyperdermic syringe.

2. Failure to report the drug offense of another

Specification 2: In that Seaman Pushin D. Snow, U.S. Navy, USS ANGELDUST, on active duty, did on or about 31 December 1984, aboard USS ANGELDUST, at sea, violate a lawful general regulation, to wit: Article 1139, U.S. Navy Regulations, dated 26 February 1973, by wrongfully failing to report to proper authority an offense committed by a person in the Department of the Navy which came under his observation, to wit: the wrongful use of marijuana by Staff Sergeant Harold R. Tote, U.S. Marine Corps, aboard USS ANGELDUST, at sea, on about 31 December 1982.

URINALYSIS PROGRAMS

SECTION IX

URINALYSIS PROGRAMS

I. Introduction. The urinalysis programs of the Navy and Marine Corps were established primarily to provide a means for the detection of drug abuse and to serve as a deterrent against drug abuse. Current directives concerning the program are listed in Section I. Those directives contain detailed guidelines for the collection, analysis, and use of urine samples.

II. Background. The enactment of the Military Rules of Evidence, changes in case law provided by the U.S. Court of Military Appeals, and the promulgation of a new DOD policy have resulted in a substantially revised drug abuse control program. The effect of these recent changes is summarized in an extract from OFF THE RECORD at page IX-3.

III. Use of Urinalysis Results. Of particular importance to the commander is whether or not a positive urinalysis result may be used in disciplinary proceedings or for less than honorable administrative discharge characterization. A chart which summarizes the possible uses of the results of urinalysis is included as page IX-2. The chart is based upon the Military Rules of Evidence and DOD policy limitations contained in SECNAVINST 5300.28, which has been implemented in the Navy by OPNAVINST 5350.4 and in the Marine Corps by ALMAR 32/82. A "flow chart" summarizing the commander's administrative and disciplinary options in connection with the urinalysis program is included in Section XIII.

IV. Consent Urinalysis. Any servicemember, but particularly a servicemember suspected of having unlawfully used drugs, may be requested to submit a urine sample for testing on a consensual basis. Under Military Rule of Evidence 314(f), a positive test would be admissible if the sample was given voluntarily. While current case law does not require that the member be advised that he or she has the right to refuse to provide a urine sample, the giving of such advice would be an indication of a voluntary consent. OPNAVINST 5350.4, however, now requires that the member be advised "that he or she may decline to provide the sample and that, if a sample is provided, any evidence of drug use resulting from the test may be used against the member in a court-martial." A suggested form for documenting the advisement is included at page IX-9.

USE OF DRUG URINALYSIS RESULTS

Rationale for ordering urinalysis	Usable in disciplinary proceedings or for less than honorable administrative discharge characterization?
1. Search and Seizure - M.R.E. 312, 314, 315	
- member's consent (warning required by OPNAVINST 5350.4)	YES
- probable cause plus command authorization	
- "clear indication" of a crime and possible evidence destruction (exigent circumstances)	
2. Inspection - M.R.E. 313	
- random sample (Navy requires second echelon commander or designee approval if more than 20% or 200)	YES
- unit sweep (Navy requires second echelon commander or designee approval)	
- service-directed testing (e.g., accession, reenlistment)	
- rehabilitation facility staff testing	
3. Valid Medical Purpose - M.R.E. 312(f) - except "Fitness for Duty"	
- medical test for diagnostic and treatment purposes (e.g., annual physical, treatment for injuries)	YES
4. "Fitness for Duty"	
- command-directed tests (no probable cause; e.g., fight, UA, drunk, bizzare behavior)	NO (based on DOD policy limitations; See also SECNAVINST 5300.28, OPNAVINST 5350.4 and ALMAR 32/182)
- "competence for duty" exams (no probable cause; BUMEDINST 6120.20B)	
- drug rehabilitation and after-care testing	

The following is extracted from Volume 89 of OFF THE RECORD, a publication of the Judge Advocate General of the Navy:

NAVY'S DRUG ABUSE CONTROL PROGRAM (13)

. . . .

A. DOD Policy Guidance

By memorandum of 28 December 1981, the Deputy Secretary of Defense promulgated a new DOD policy on mandatory urinalysis tests for controlled substances. That policy provides for mandatory urinalysis tests under four circumstances:

(1) As an inspection under MRE 313. Tests under this category include both unit sweeps and random sampling. Because urinalysis tests for controlled substances may be analogized to an inspection to locate contraband, it is recommended that urinalysis tests under MRE 313 be ordered only (a) when there is reasonable suspicion that the tests will disclose drug use within the command or (b) when the tests have been previously scheduled. While an inspection under MRE 313 may be of "a whole or a part of a unit," the singling out of specific individuals or small groups of individuals is to be avoided. Otherwise the inspection (urinalysis testing) takes on the appearance of a subterfuge search.

(2) As a search of seizure under MRE 311-316. a urine test may be ordered under these rules when there is probable cause to believe that (a) the member has unlawfully ingested drugs, is drunk on duty or on station or ship, or has committed some other drug-related offense; and (b) the urine test will disclose evidence of such offense.

(3) As an examination for a valid medical purpose under M.R.E. 312(f). Testing may be used to determine a member's fitness for duty; to ascertain whether a member requires counseling, treatment, or rehabilitation for drug abuse; or in conjunction with a member's participation in a DOD drug treatment and rehabilitation program. This category of testing includes all command-directed tests of specific individuals ordered on a suspicion (less than probable cause) basis; i.e., when the member's conduct, behavior, or involvement in an accident or other incident gives rise to an inference of possible drug use. Specifically included are competence for duty exams conducted under BUMEDINST 6120.20B and urine surveillance tests ordered for members who have previously tested positive.

(4) As part of any other examination for a valid medical purpose under MRE 312(f). This category covers tests ordered by medical personnel for purely medical (diagnostic) reasons--not examinations to determine a member's fitness for duty.

The DEPSECDEF memorandum of 28 December 1981 further provides that the results of tests ordered under categories (1) through (4) above, may be used (a) to refer a member to a DOD treatment and rehabilitation program, (b) to establish the basis for separation in a separation proceeding, and (c) in other administrative determinations except as otherwise limited by DOD or a military department. Additionally, the results of tests ordered under categories (1), (2), and (4) above, may be used to take appropriate disciplinary action and to characterize a discharge. Test results under category (3), above, may not be used for disciplinary purposes or to characterize a discharge. The reason for the limitation on the use of category (3) test results is to underscore the policy that such tests are undertaken for a valid medical purpose and not as a subterfuge to avoid fourth amendment requirements.

The DEPSECDEF memorandum also sets forth the following limitations on the use of evidence relating to a member's treatment in a DOD drug treatment and rehabilitation program:

> A member's voluntary submission to a DOD treatment and rehabilitation program, and evidence provided voluntarily by the member as part of initial entry into such a program, may not be used against the member in an action under the Uniform Code of Military Justice or on the issue of characterization in a separation proceeding.
>
> Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any drug abuse prevention function conducted, regulated, or directly or indirectly assisted by any department or agency of the United States may not be introduced against the patient in a court-martial except as authorized by a court order issued under the standards set forth in 21 U.S.C. 1175(b)(2)(C).

Neither the limitations quoted above nor the prohibition of the use of category (3) tests for disciplinary and discharge characterization purposes precludes the introduction of evidence for impeachment or rebuttal purposes in any proceeding in which the evidence of drug abuse (or lack thereof) has been first introduced by the member; nor does either preclude disciplinary or administrative action based on independently derived evidence [i.e., the results of urine tests ordered under categories (1), (2) or (4)].

B. Navy Instructions and Policy Guidance

SECNAVINST 5300.28 contains the basic policy guidance regarding the Navy's drug abuse control program. As modified by ALNAV 15/82 (SECNAV msg 041528Z FEB 82), paragraph 3 of enclosure (3) to SECNAVINST 5300.28 implements the DOD policies discussed above. Paragraph 4 of enclosure (3) to the instruction discusses the Navy's self-referral for treatment program (which replaced the earlier "exemption" program). The new self-referral program ensures that a member with a drug problem may seek and obtain treatment for drug use without risk that his or her disclosures will be used as a basis for disciplinary action. The major distinction between the old exemption program and the new self-referral program is that under the old program a member who was granted exemption normally received general amnesty for past drug offenses. Under the new program, there is no amnesty. Rather, a member is provided a degree of protection equivalent to a testimonial grant of immunity. Information provided by the member relating to past drug use may not be used against the member, either directly or indirectly, in any disciplinary proceeding against the member as the basis for characterizing a discharge . . . .

. . . . .

C. Admissibility of Urinalysis Results

(The following is extracted from a 28 September 1981 JAG opinion and is set forth here for information.)

When the DOD drug abuse testing program was instituted in the early 1970's, military law clearly provided that military authorities could not legally order a servicemember to furnish a urine specimen for chemical analysis if the urinalysis results could later be used against the servicemember at a court-martial. United States v. Jordan, 7 C.M.A. 452, 22 C.M.R. 242 (1957). In United States v. Ruiz, 23 C.M.A. 181, 48 C.M.R. 797 (1974), the U.S. Court of Military Appeals expanded this holding to apply to the involuntary production of urine specimens where urinalysis results were to be used in administrative discharge proceedings leading to less than an honorable discharge. Ruiz, however, was interpreted as not precluding a compulsory urinalysis program as long as urinalysis results obtained thereunder were not usable in disciplinary proceedings and could not result in less than an honorable discharge.

The DOD drug abuse testing program in effect between 1974 and 1979 [see DOD Inst. 1010.1 of 4 Apr 1974, Subj: DOD Drug Abuse Testing Program] provided for urine testing on a random basis of a defined segment of military personnel. This policy was changed by the DEPSECDEF memo of 24 July 1979 [Subj: Improved Measures for Drug Abuse Identification] to provide also

for urine testing "when certain incidents occur which indicate the probable involvement of drugs or alcohol." Although command use of unit sweeps continued to be authorized, the focus of the drug abuse testing program shifted from a random-testing basis to testing ordered on the basis of a suspicion of drug use. Because military law and DOD policy clearly provided that urinalysis results could not be used either for disciplinary purposes or for purposes of awarding less than honorable discharge, it is probable that little consideration was given to the fourth amendment implications of the 1979 policy change.

In 1980, the U.S. Court of Military Appeals rejected the rationale of the Jordan and Ruiz cases and held that Article 31, UCMJ, did not apply to the extraction of body fluids. United States v. Armstrong, 9 M.J. 374 (C.M.A. 1980). Cf. United States v. Lloyd, 10 M.J. 172 (C.M.A. 1981). Thus, Ruiz no longer stands as a bar to the admissibility of urinalysis results obtained under a compulsory urinalysis program. As a result of this development, it is now clear that the fourth amendment, and not Article 31 (or the fifth amendment), defines the constitutional limitations on the scope of any DOD urinalysis program as well as the admissibility of the results of compulsory urinalysis. Applying current fourth amendment case law and the new Military Rules of Evidence to the issue of the admissibility of urinalysis results, it is concluded that urinalysis results will be admissible in courts-martial if the DOD drug abuse testing program is properly structured to comport with the Military Rules of Evidence relating to search and seizure and inspections.

Rule 312(d) provides for the nonconsensual extraction of body fluids, including blood and urine, pursuant to a search authorization supported by probable cause, or without such authorization where there is a clear indication that evidence of a crime will be found and there is reason to believe that delay could result in destruction of the evidence. Rule 312(d) is silent, however, as to the legality of nonconsensual urine testing in the absence of probable cause.

Rule 312(f) provides:

> Nothing in this rule shall be deemed to interfere with the lawful authority of the armed forces to take whatever action may be necessary to preserve the health of a servicemember. Evidence or contraband obtained from an examination or intrusion conducted for a valid medical purpose may be seized and is not evidence obtained from an unlawful search or seizure within the meaning of Rule 311.

Although Rule 312(d) fails to address compulsory urinalysis where probable cause is lacking, the analysis of that rule specifically addresses the admissibility of compulsory urinalysis results: "Rule 312 does not prohibit compulsory urinalysis, whether random or not, made for appropriate medical purposes, see Rule 312(f), and the product of such a procedure if otherwise admissible may be used in evidence at a court-martial." Since Article 31 can no longer be viewed as barring the admissibility of compulsory urinalysis results, it is considered that, under Rule 312(f), the results of urine testing would be admissible as evidence in a court-martial as long as such testing is conducted (1) for a valid medical purpose and (2) in such a manner as to ensure that it is not a subterfuge for an otherwise unlawful search. It is considered that the "valid medical purpose" requirement is met where the purpose of urine testing is to identify servicemembers who are drug abusers so that members so identified may receive necessary treatment or rehabilitation. With respect to the second requirement--that testing be conducted in such a manner as search--it is considered that the administration of a compulsory urinalysis program in accordance with the provisions of Rule 313(b) (relating to inspections) will satisfy the requirements of the law.

* Rule 313(b) defines an "inspection" as an examination conducted as an incident of command, the primary purpose of which is to determine and ensure security, military fitness, or good order and discipline, including an examination to ensure that personnel are fit and ready for duty or to locate and confiscate contraband drugs. The key to a lawful inspection, the results of which are admissible at trial, is that its primary purpose is not to obtain criminal evidence, but to discover, correct, and deter conditions which adversely affect military fitness and efficiency. United States v. Middleton, 10 M.J. 123 (C.M.A. 1982), Rule 313(b) provides explicit authority for inspections, makes clear that they are primarily preventive and corrective in nature, rather than prosecutorial, and establishes standards to preclude their use as a subterfuge for a search.

Special rules are provided in Rule 313(b) with respect to inspections to locate and confiscate contraband. Since compulsory urinalysis may be viewed an analogous to an inspection for contraband drugs, these special rules are considered to be applicable. First, an inspection for contraband drugs requires a prior determination that the presence of the drug(s) to be detected would adversely affect the fitness of the command to accomplish its assigned mission. Second, there must be either a "reasonable suspicion that [the drugs are] present in the command" or the inspection must be a "previously scheduled examination of the command," i.e., scheduled sufficiently in advance as to eliminate any reasonable probability that the inspection is being used as a subterfuge for a search.

Applying these rules to compulsory urinalysis, it is concluded that, if compulsory urinalysis results are to be admissible in evidence, urinalysis testing should be ordered only when based on a finding that the use of the drug(s) tested for would adversely affect the fitness of the command and where there is a "reasonable suspicion" that such drug use will be disclosed or where the testing is "previously scheduled." It must be emphasized, however, that such testing must relate to command fitness generally and must not be ordered as a subterfuge for a search, i.e., testing a given individual or individuals for evidence of a crime when probable cause is lacking.

* NJS Editorial Comment:

Since the publication of this OTR Article, the Court of Military Appeals in the extraordinary writ case of Murray v. Haldeman, 16 M.J. 74 (C.M.A. 1983) has addressed the issue of the legal basis for the Navy's compulsory urinalysis program. The appellate government counsel urged the court to consider the mandatory urinalysis program of all those entering A School as a proper inspection under M.R.E. 313(b). The Court stated, however, that "it is not necessary - or even profitable - to try to fit compulsory urinalysis within the specific terms of the rule" (M.R.E. 313(b)). Murray v. Haldeman, 16 M.J. at 82. The court said that the urinalysis program involved in the case fits most properly under M.R.E. 314(k) as a search of a type not otherwise included under M.R.E. 314 or based upon probable cause under M.R.E. 315 since the ordering of a person to give a urine sample as part of an admission program to a school would be otherwise constitutionally permissible. The court, however, in the same breath stated that "compulsory urinalysis under circumstances of the present case is justified by the same considerations that permit health and welfare inspections". Murray v. Haldeman, at 82.

It appears that the court is not willing to state that unit sweeps and random urinalysis sampling programs are fully justified by labelling them as "inspections" under M.R.E. 313(b). The court, however, will apparently accept these types of urinalysis programs as lawful searches and seizures under M.R.E. 314(k) if under the circumstances they are carried out with the same justification inherent in M.R.E. 313(b) health and welfare inspections.

URINALYSIS CONSENT FORM

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

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

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

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

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

_____
Signature

_____
Date

_____
Witness' Signature

_____
Date

SEARCH AND SEIZURE CONSIDERATIONS

SECTION X

SEARCH AND SEIZURE CONSIDERATIONS

I. Introduction

Since many, if not most, drug offenders are identified through the use of command searches, seizures and inspections, a separate discussion of these tools is warranted even tough a thorough analysis of the law of search and seizure is beyond the scope of this publication (For a more complete examination of the subject, one should consult Chapter IV of the Basic Military Justice Handbook).

II. General

The Fourth Amendment to the Constitution prohibits evidence gained from unreasonable searches and seizures from being used against a citizen in a criminal prosecution. While this rule is easy enough to state, its application in any given situation is another matter entirely. Among those actions which have been described as reasonable and which are commonly employed in drug abuse cases are the following:

A. Probable Cause Searches

B. Inspections

C. Gate and Brow Searches

D. Consent Searches

E. Searches Incident to Lawful Apprehension

For some of these situations, the commander's neutrality and detachment may be questioned. He must not get so involved in the investigation that he abandons his position as a commander for that of policeman. In this regard, it is suggested that the commander avoid being personally present at the scene of a search or inspection unless absolutely necessary. The commander must also remember that haste often leads to inadmissible evidence. A Navy or Marine lawyer is no farther away than the telephone. When in doubt, call. Finally, the commander cannot delegate his authority to authorize searches and seizures. The decision whether to order a search or inspection is the commander's to make.

III. The above list is by no means a complete one. A commander may encounter "search" situations that do not fit within the scope of the types mentioned. For example, mail and postal facilities are often a target of desired examination. Certain regulations controlling a commanding officer's options with regard to mail searches are found in NAVOP 138/82 on page X-48 of this chapter. What does follow is a kind of "checklist" for each of the areas noted. While this approach will not lead to a thorough understanding of the law, it will, hopefully, prove to be useful in the command's efforts to deter drug abuse.

A. The Probable Cause Search

This type of search requires the commander to exercise his sound discretion in determining the existence of probable cause. The following materials are offered as aids to that process (Also see Military Rule of Evidence 315, a copy of which appears at the end of this section.).

1. Finding the Existence of Probable Cause to Order a Search

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

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

b. Administer an oath to the person requesting authorization (Recommended but not required.).

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

c. What is the location and description of the premises, object, or person to be searched?

-- Ask yourself: Is the person or area one over which I have jurisdiction?

Is the person or place described with particularity?

d. What facts do you have which indicate the property to be searched (and seized) is actually located on the person or in the place information indicates it is?

e. Who is the source of this information?

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

-- If the source is the person you are questioning, proceed to question immediately. If an informant, proceed to question after completing the procedure in subparagraph 2 below.

f. Ask the person requesting the search authorization:

(1) What training have you had in investigating offenses of this type/identifying this type of contraband?

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

(3) Are you withholding any information you possess in this case which may affect this request to authorize the search?

g. If you are satisfied as to the reliability of the information and that of the person from whom you receive it, and you then entertain a reasonable belief that the items are where they are said to be, then you may authorize the search and/or seizure. It should be done along these lines:

"(Applicant's name), I find that probable cause exists for the issuance of authorization to search (location or person) for the following items: (description of items sought)"

2. The Informant

a. First Inquiry: What forms the basis of his/her knowledge?

-- You must find what facts (not mere conclusions) were given by the informant to indicate that the items sought will be in the place described.

b. Then you must find that either:

(1) The informant is a reliable one

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

(b) Has this person provided information in the past?

(c) Has the provided information always proven correct in the past? Almost always? Never?

(d) Has the person ever provided false or misleading information?

(e) (If drug case) Has the person ever identified drugs in the presence of the applicant?

(f) Has any prior information resulted in conviction? Acquittal? Are there any cases still awaiting trial?

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

(2) The information provided is reliable

(a) Does the applicant possess other information from known reliable sources (e.g., the authorization official's own knowledge) which indicates what the informant says is true?

3. Describe What To Look For and Where To Look

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

a. Description of the place to be searched (or the person):

(1) Persons: Always include all known facts about the individual, such as name, rank, SSN, and unit. If name is unknown, include personal description, places frequented, known associates, make of auto driven, usual attire, etc.

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

b. What can be seized: Types of property and sample descriptions:

(1) Contraband: Something which is illegal to possess

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

(2) Unlawful Weapons: Weapons made illegal by some law or regulation.

Example: Firearms and explosives including, but not limited to, one M60 machine gun, M16 rifles, and fragmentation grenades.

(3) Evidence of Crimes: Which may include:

(a) Fruits of a crime: Usually the stolen property

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

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

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

(c) Evidence which may aid in a particular crime solution: Helps catch criminal.

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

B. Inspections

Evidence, including illicit drugs, obtained from inspections and inventories conducted in accordance with Military Rule of Evidence 313 (see end of section for text of M.R.E. 313) may be used in disciplinary proceedings. To ensure compliance with M.R.E. 313, the following procedures should be employed:

1. Specify the general purpose of the inspection. It must be to determine and to ensure the

a. Security;

b. Military fitness; or

c. Good order and discipline of a military

(1) Unit,

(2) Organization,

(3) Installation,

(4) Vessel,

(5) Aircraft, or

(6) Vehicle.

2. Specify the specific purpose of the inspection. It must be to determine and to ensure that the command is

a. Properly equipped;

b. Functioning properly;

c. Maintaining proper standards of

(1) Readiness,

(2) Seaworthiness,

(3) Airworthiness, or

(4) Sanitation and cleanliness.

d. Has its personnel present, fit and ready for duty, or

e. The inspection may be conducted to locate and confiscate unlawful weapons and other contraband (including drugs) when such property could affect adversely the unit's

(1) Security,

(2) Military fitness, or

(3) Good order and discipline.

3. If the specific purpose listed in 2.e above is applicable, then the inspection may be conducted when either

a. There is a reasonable suspicion that such property is present in the command, or

b. The examination is previously scheduled.

4. Most drug related inspections will fall into the category of 2.e above. The following considerations are noteworthy:

a. "Reasonable suspicion" does not equate to "probable cause." "Reasonable suspicion" is more than "mere hunch" but is a lesser standard than "probable cause." "Reasonable suspicion" must, however, be based upon articulable facts, not just "gut reaction." The test to be applied is whether or not a reasonable person with similar experience as the one ordering the inspection has a real suspicion, based upon identifiable facts, that drugs are located within the command.

b. A "previously scheduled" inspection does not have to be preannounced. Previously scheduled inspections also include inspections held on a regular basis although not always at the same time and day each week, month, etc.

5. An inspection is not lawful under M.R.E. 313 if the primary purpose of the inspection is to seek evidence for the sake of prosecution. If the primary purpose of the inspection is to maintain unit fitness, security, etc., the inspection will not be invalid merely because there existed a secondary purpose of prosecuting those found in possession of drugs.

6. The following considerations pertaining to that type of inspection should also be noted.

a. Is the inspection previously scheduled? If so, a procedure similar to that outlined in the following sample instruction should be followed to ensure compliance with M.R.E. 313.

b. Is the inspection based on a "reasonable suspicion" that drugs (or other contraband) will be present in the command? If so, what is the basis for that suspicion? It need not amount to probable cause but it must be for more than mere suspicion. Ask yourself the following:

(1) Who or what is the source of your information?

(2) If the source is a person, how does he know? Is he reliable? Why?

(3) If the source is a process (e.g., urinalysis, pattern of drug related incidents, etc.), is it reliable? Why?

(4) Can you articulate the basis for your "reasonable suspicion?" If not, you probably don't have one.

C. Gate and Brow Searches

Properly performed, these types of "searches" are merely variations of inspections discussed above in subparagraph B. See that section of analysis. See M.R.E. 314, a copy of which appears at the end of this section.

D. Consent Searches

Consent searches are probably the most reasonable types of search since the person being searched agrees to the intrusion. To ensure the "consent" is free from challenge, it is suggested that the following form be used. This form is found in Appendix A-1-m of the JAGMAN.

CONSENT TO SEARCH

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

I have been advised of my right to not consent to a search of (my person) (the premises mentioned below).

I hereby authorize _____ (and) _____, who (has) (have) been identified to me as _____ (Positions) _____, to conduct a complete search of my (person) (residence) (automobile) (wall locker) ( ) ( ) located at _____ _____.

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

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

_____
Signature

WITNESSES

_____

_____

E. Body Fluids

Since evidence of drug use is often obtained by the seizure of body fluids, a discussion of Military Rule of Evidence 312, which covers the subject, is warranted. Body fluids may be seized:

1. With the consent of the servicemember, or

2. When necessary to preserve the health of the servicemember, or

3. When the seizure is based on probable cause, or

4. There is a clear indication that evidence will be found and there is reason to believe that delay could result in destruction of the evidence.

In all cases, the seizure must be done in a reasonable fashion by a person with appropriate medical qualifications.

F. "Drug Dogs"

The use of specially trained dogs to ferret out evidence of illegal drug activity is appropriate in executing any of the types of searches or inspections described above. Prior to employing the dog (and his handler), the commander should ensure that the handler understands the limitations upon his animal's use (as set by the commander) and that he (the commander) is confident of the animal's reliability. For example, if the dog is to be used as a basis for obtaining "probable cause," the commander should:

1. Be briefed by the handler concerning the dog's (and handler's) training and effectiveness.

2. Be briefed of the dog's past record of reliability.

3. Have a demonstration of how the dog alerts.

4. "Test" the dog and handler with a known drug hidden out of handler's sight (Many handlers carry a "sample" just for this purpose.).

5. Explain the nature of the desired action to the handler.

6. Authorize a search based upon both

   a. The handler's opinion that the dog alerted on a particular area, and

   b. A description of the "alert" in order to compare it to the information derived from (3) and (4) above.

IV. Evidence Handling

All evidence must be carefully handled from its initial seizure to ultimate use in order to prevent tampering and ensure acceptability in the courtroom. Personnel conducting searches, seizures and inspections should be instructed to mark all evidence seized with their initials, and time, date, and place of seizure (Containers in which drugs are stored should be similarly marked.). A sample chain of custody forms appear in this section. See Section V for sample urinalysis chain of custody forms.

APPENDIX I

SAMPLE SEARCH AND SEIZURE INSTRUCTION

NAVBALCOM INSTRUCTION 5510.3A

Subj: Searches and Seizures

Ref: (a) Rule 315, Military Rules of Evidence

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

2. Cancellation. NAVBALCOM Instruction 5510.3 is hereby cancelled.

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

4. Authority.

(a) Reference (a), as modified by court decision, authorizes a Commanding Officer to order searches of

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

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

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

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

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

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

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

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

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

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

5. Criteria.

(a) When so acting, the individual empowered to authorize searches will exercise discretion in deciding whether or not to order a search in accordance with the general criteria set forth above. No search will be ordered without a thorough review of the information to determine that probable cause, where required, exists. Due consideration will be given to the advisability of posting a guard or securing a space to prevent the tampering with or alteration of spaces while a further inquiry is conducted to effect a more complete development of the facts and circumstances giving rise to the request for a search.

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

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

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

Category (3): Will normally include such items as automobiles, suitcases, civilian clothing, privately-owned parcels, etc., physically located on or in a military installation, encampment, etc., and owned or used by a servicemember or a civilian.

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

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

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

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

7. Instructions.

(a) If the circumstances permit, an oath or affirmation should be administered to the person requesting the authorization to search prior to giving such authorization. This oath or affirmation should be substantially in accordance with the one suggested in JAGMAN Appendix A-1-1(3), paragraph 2.

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

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

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

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

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

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

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

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

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

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

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

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

(1) Date and time of the search;

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

(3) Location of the seized article when discovered;

(4) Name of person ordering the search; and

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

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

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

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

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

(signed) COMMANDING OFFICER

CUSTODY DOCUMENT

1. Name of Suspect: _____

2. Location where property seized: _____

_____

3. Date and time of seizure: _____

4. Unit of suspect: _____

5. Name, Unit, Phone # of person making seizure: _____

_____

6. Description of property seized: _____

_____

_____

_____

CHAIN OF CUSTODY

Date & Time	Released by	Received by	Remarks
	Name Org Signature	Name Org Signature	
	Name Org Signature	Name Org Signature	
	Name Org Signature	Name Org Signature	

CUSTODY DOCUMENT

1. Name of suspect: I. R. DOPER, 123 45 6789

2. Location where property seized: Doper's foot locker located in Room A, BLDG 123, 27 Area, Camp Mainz, USA.

3. Date and time of seizure: 0700, 6 OCT 80

4. Unit of suspect: Hq. Co, Hq. BN, 1ST MAR DIV

5. Name, unit, Phone # of person making seizure: SGT I. M. COP Hq Co. Hq. BN Ph # 1234

6. Description of seized property: Clear plastic sandwich bag containing green vegetable matter

CHAIN OF CUSTODY

Date & Time	Released by	Received by	Remarks
0715 6OCT80	Name SGT I. M. COP Org Hq Co. Hq BN Signature I.M. Cop	Name 1STSGT H.R. Rose Org Hq Co. Hq. Bn Signature H.R. Rose	Placed in sealed envelop and locked in safe
0800 6OCT80	Name 1STSGT H.R. Rose Org Hq. Co. Hq Bn. Signature H.R. Rose	Name Cpl. M.P. Patrol Org M.P. Bn. Signature M.P. Patrol	Transferred to CID for analysis
0815 6OCT80	Name Cpl M.P. Patrol Org MP Bn Signature M.P. Patrol	Name Gy Sgt I. M. Agent Org MP Bn Signature I.M. Agent	Tested and locked in vault
0830 1NOV80	Name Gy Sgt I.M. Agent Org MP Bn Signature I.M. Agent	Name Capt. I. L. Gekon Org OSJA MCB, USA Signature I.L. Gekon	Evidence For trial

U.S. NAVAL INVESTIGATIVE SERVICE EVIDENCE CUSTODY DOCUMENT

CODE	CONTROL	LOG NUMBER	DATE AND TIME OF SEIZURE

NAME OF PERSON FROM WHOM PROPERTY SEIZED	LOCATION WHERE PROPERTY SEIZED

NI TITLE

ITEM	QUANTITY	DISPOSAL ACTION	DESCRIPTION OF ARTICLE - MODEL NUMBER, SERIAL NUMBER, IDENTIFYING MARKS, CONDITION, AND VALUE WHEN APPROPRIATE.

NAME AND SIGNATURE OF WITNESS (IF AVAILABLE)	NAME AND SIGNATURE OF RECEIVING S/A

CHAIN OF CUSTODY

ITEM	DATE & TIME	RELEASED BY	RECEIVED BY	PURPOSE
		NAME	NAME	
		ORGANIZATION	ORGANIZATION	
		SIGNATURE	SIGNATURE	
		NAME	NAME	
		ORGANIZATION	ORGANIZATION	
		SIGNATURE	SIGNATURE	
		NAME	NAME	
		ORGANIZATION	ORGANIZATION	
		SIGNATURE	SIGNATURE	
		NAME	NAME	
		ORGANIZATION	ORGANIZATION	
		SIGNATURE	SIGNATURE	

NIS FORM 5520/118 (NEW 10/72) CHAIN OF CUSTODY CONTINUED ON REVERSE 0108-LF-800-8820

CHAIN OF CUSTODY (Continued)

ITEM	DATE & TIME	RELEASED BY	RECEIVED BY	PURPOSE
		NAME	NAME	
		ORGANIZATION	ORGANIZATION	
		SIGNATURE	SIGNATURE	
		NAME	NAME	
		ORGANIZATION	ORGANIZATION	
		SIGNATURE	SIGNATURE	
		NAME	NAME	
		ORGANIZATION	ORGANIZATION	
		SIGNATURE	SIGNATURE	

REMARKS

FINAL DISPOSAL ACTION

FINAL DISPOSAL AUTHORITY

NAME (PRINTED) _____ RANK/TITLE _____ ORGANIZATION _____

PERSON(S) RECEIVING ITEM(S)/WITNESSING DESTRUCTION

	NAME	ORGANIZATION	SIGNATURE/DATE
1.			
2.			
3.			
4.			

MAY BE CONTINUED IN REMARKS IF NECESSARY

INDICATE IN DISPOSAL ACTION COLUMN (ON FRONT) BY NUMBER AND LETTER CODE PERSON(S) RECEIVING OR WITNESSING ACTION AND TYPE OF ACTION RETURNED TO INDIVIDUAL OWNER (I), RETURNED TO COMMAND (C), TURNED INTO SUPPLY (S), TO ANOTHER AGENCY (A), TO NIS (N), DESTROYED (D), OTHER METHOD (M) (EXPLAIN IN REMARKS ABOVE)

NIS FORM 9520/118 (10/72) BACK

Rule 311. Evidence Obtained From Unlawful Searches and Seizures

(a) *General rule.* Evidence obtained as a result of an unlawful search or seizure made by a person acting in a governmental capacity is inadmissible against the accused if:

(1) *Objection.* The accused makes a timely motion to suppress or an objection to the evidence under this rule; and

(2) *Adequate interest.* The accused had a reasonable expectation of privacy in the person, place or property searched; the accused had a legitimate interest in the property or evidence seized when challenging a seizure; or the accused would otherwise have grounds to object to the search or seizure under the Constitution of the United States as applied to members of the armed forces.

(b) *Exception.* Evidence that was obtained as a result of an unlawful search or seizure may be used to impeach by contradiction the in-court testimony of the accused.

(c) *Nature of search or seizure.* A search or seizure is "unlawful" if it was conducted, instigated, or participated in by:

(1) *Military personnel.* Military personnel or their agents and was in violation of the Constitution of the United States as applied to members of the armed forces, an Act of Congress applicable to trials by court-martial that requires exclusion of evidence obtained in violation thereof, or rules 312–317;

(2) *Other officials.* Other officials or agents of the United States, of the District of Columbia, or of a State, Commonwealth, or possession of the United States or any political subdivision of such a State, Commonwealth, or possession and was in violation of the Constitution of the United States, or is unlawful under the principles of law generally applied in the trial of criminal cases in the United States district courts involving a similar search or seizure; or

(3) *Officials of a foreign government.* Officials of a foreign government or their agents and was obtained as a result of a foreign search or seizure which subjected the accused to gross and brutal maltreatment.

A search or seizure is not "participated in" merely because a person is present at a search or seizure conducted in a foreign nation by officials of a foreign government or their agents, or because a person acted as an interpreter or took steps to mitigate damage to property or physical harm during the foreign search or seizure.

(d) *Motions to suppress and objections.*

(1) *Disclosure.* Prior to arraignment, the prosecution shall disclose to the defense all evidence seized from the person or property of the accused, or believed to be owned by the accused, that it intends to offer into evidence against the accused at trial.

(2) *Motion or objection.*

(A) When evidence has been disclosed under subdivision (d)(1), any motion to suppress or objection under this rule shall be made by the defense prior to submission of a plea. In the absence of such motion or objection, the defense may not raise the issue at a later time except as permitted by the military judge for good cause shown. Failure to so move or object constitutes a waiver of the motion or objection.

(B) If the prosecution intends to offer evidence seized from the person or property of the accused that was not disclosed prior to arraignment, the prosecution shall provide timely notice to the military judge and to counsel for the accused. The defense may enter an objection at that time and the military judge may make such orders as are required in the interest of justice.

(C) If evidence is disclosed as derivative evidence under this subdivision prior to arraignment, any motion to suppress or objection under this rule shall be made in accordance with the procedure for challenging evidence under (A). If such evidence has not been so disclosed prior to arraignment, the requirements of (B) apply.

(3) *Specificity.* The military judge may require the defense to specify the grounds upon which the defense moves to suppress or object to evidence. If defense counsel, despite the exercise of due diligence, has been unable to interview adequately those persons involved in the search or seizure, the military judge may enter any order required by the interests of justice, including authorization for the defense to make a general motion to suppress or a general objection.

(4) *Rulings.* A motion to suppress or an objection to evidence made prior to plea shall be ruled upon prior to plea unless the military judge, for good cause, orders that it be deferred for determination at the trial of the general issue or until after findings, but no such determination shall be deferred if a party's right to appeal the ruling is affected adversely. Where factual issues are involved in ruling upon such motion or objection, the military judge shall state essential findings of fact on the record.

(e) *Burden of proof.*

(1) *In general.* When an appropriate motion or objection has been made by the defense under subdivision (d), the prosecution has the burden of proving by a preponderance of the evidence that evidence was not obtained as a result of an unlawful search or seizure.

(2) *Derivative evidence.* Evidence that is challenged under this rule as derivative evidence may be admitted against the accused if the military judge finds by a preponderance of the evidence that the evidence was not obtained as a result of an unlawful search or seizure.

(3) *Specific motions or objections.* When a specific motion or objection has been required under subdivision (d)(3), the burden on the prosecution extends only to the grounds upon which the defense moved to suppress or object to the evidence.

(f) *Defense evidence.* The defense may present evidence relevant to the admissibility of evidence as to which there has been an appropriate motion or objection under this rule. An accused may testify for the limited purpose of contesting the legality of the search or seizure giving rise to the challenged evidence. Prior to the introduction of such testimony by the accused, the defense shall inform the military judge that the testimony is offered under this subdivision. When the accused testifies under this subdivision, the accused may be cross-examined only as to the matter on which he or she testifies. Nothing said by the accused on either direct or cross-examination may be used against the accused for any purpose other than in a prosecution for perjury, false swearing, or the making of a false official statement.

(g) *Scope of motions and objections challenging probable cause.*

(1) *Generally.* If the defense challenges evidence seized pursuant to a search warrant or search authorization on the grounds that the warrant or authorization was not based upon probable cause, the evidence relevant to the motion is limited to evidence concerning the information actually presented to or otherwise known by the authorizing officer, except as provided in paragraph (2).

(2) *False statements.* If the defense makes a substantial preliminary showing that a government agent included a false statement knowingly and intentionally or with reckless disregard for the truth in the information presented to the authorizing officer, and if the allegedly false statement is necessary to the finding of probable cause, the defense, upon request, shall be entitled to a hearing. At the hearing, the defense has the burden of establishing by a preponderance of the evidence the allegation of falsity or reckless disregard for the truth. If the defense meets its burden, the prosecution has the burden of proving by a preponderance of the evidence, with the false information set aside, that the remaining information presented to the authorizing officer is sufficient to establish probable cause. If the prosecution does not meets its burden, the objection or motion shall be granted unless the search is otherwise lawful under these rules.

(h) *Objections to evidence seized unlawfully.* If a defense motion or objection under this rule is sustained in whole or in part, the members may not be informed of that fact except insofar as the military judge must instruct the members to disregard evidence.

(i) *Effect of guilty plea.* A plea of guilty to an offense that results in a finding of guilty waives all issues under the Fourth Amendment to the Constitution of the United States and rules 311-317 with respect to that offense whether or not raised prior to plea.

ANALYSIS

Rules 311-317 express the manner in which the Fourth Amendment to the Constitution of the United States applies to trials by court-martial. *Cf. Parker* v. *Levy*, 417 U.S. 733 (1974).

(a) *General rule.* Rule 311(a) restates the basic exclusionary rule for evidence obtained from an unlawful search or seizure and is taken generally from ¶ 152 of the present Manual although much of the language of ¶ 152 has been deleted for purposes of both clarity and brevity. The Rule requires suppression of derivative as well as primary evidence and follows the present Manual rule by expressly limiting exclusion of evidence to that resulting from unlawful searches and seizures involving governmental activity. Those persons whose actions may thus give rise to exclusion are listed in Rule 311(c) and are taken generally from ¶ 152 with some expansion for purposes of clarity. Rule 311 recognizes that discovery of evidence may be so unrelated to an unlawful search or seizure as to escape exclusion because it was not "obtained as a result" of that search or seizure.

The Rule recognizes that searches and seizures are distinct acts the legality of which must be determined independently. Although a seizure will usually be unlawful if it follows an unlawful search, a

seizure may be unlawful even if preceded by a lawful search. Thus, adequate cause to seize may be distinct from legality of the search or observations which preceded it. Note in this respect Rule 316(d)(4)(c), Plain View.

(1) *Objection.* Rule 311(a)(1) requires that a motion to suppress or, as appropriate, an objection be made before evidence can be suppressed. Absent such motion or objection, the issue is waived. Rule 311(i).

(2) *Adequate interest.* Rule 311(a)(2) represents a complete redrafting of the standing requirements now found in ¶ 152 of the present Manual. The Committee viewed the Supreme Court decision in *Rakas* v. *Illinois*, 439 U.S. 128 (1978) as substantially modifying the Manual language. Indeed, the very use of the term "standing" was considered obsolete by a majority of the Committee. The Rule distinguishes between searches and seizures. To have sufficient interest to challenge a search, a person must have "a reasonable expectation of privacy in the person, place, or property searched." "Reasonable expectation of privacy" was used in lieu of "legitimate expectation of privacy," often used in *Rakas, supra*, as the Committee believed the two expressions to be identical. The Committee also considered that the expression "reasonable expectation" has a more settled meaning. Unlike the case of a search, an individual must have an interest distinct from an expectation of privacy to challenge a seizure. When a seizure is involved rather than a search the only invasion of one's rights is the removal of the property in question. Thus, there must be some recognizable right to the property seized. Consequently, the Rule requires a "legitimate interest in the property or evidence seized." This will normally mean some form of possessory interest. Adequate interest to challenge a seizure does not per se give adequate interest to challenge a prior search that may have resulted in the seizure.

The Rule also recognizes an accused's right to challenge a search or seizure when the right to do so would exist under the Constitution. Among other reasons, this provision was included because of the Supreme Court's decision in *Jones* v. *United States*, 302 U.S. 257 (1960) which created what has been termed the "automatic standing rule." The viability of *Jones* after *Rakas* and other cases is unclear, and the Rule will apply *Jones* only to the extent that *Jones* is constitutionally mandated.

(b) *Exception.* Rule 311(b) states the holding of *Walder* v. *United States*, 347 U.S. 62 (1954), and restates with minor change the rule as found in ¶ 152 of the present Manual.

(c) *Nature of search or seizure.* Rule 311(c) defines "unlawful" searches and seizures and makes it clear that the treatment of a search or seizure varies depending on the status of the individual or group conducting the search or seizure.

(1) *Military personnel.* Rule 311(c)(1) generally restates present law. A violation of a military regulation alone will not require exclusion of any resulting evidence. However, a violation of such a regulation that gives rise to a reasonable expectation of privacy may require exclusion. *Compare United States* v. *Dillard*, 8 M.J. 213 (C.M.A. 1980) *with United States* v. *Caceres*, 440 U.S. 741 (1979).

(2) *Other officials.* Rule 311(c)(2) requires that the legality of a search or seizure performed by officials of the United States, of the District of Columbia, or of a state, commonwealth, or possession or political subdivision thereof, be determined by the principles of law applied by the United States district courts when resolving the legality of such a search or seizure.

(3) *Officials of a foreign government or their agents.* This provision is taken in part from *United States* v. *Jordan*, 1 M.J. 334 (C.M.A. 1976). After careful analysis, a majority of the Committee concluded that that portion of the *Jordan* opinion which purported to require that such foreign searches be shown to have complied with foreign law is dicta and lacks any specific legal authority to support it. Further the Committee noted the fact that most foreign nations lack any law of search and seizure and that in some cases, *e.g.* Germany, such law as may exist is purely theoretical and not subject to determination. The *Jordan* requirement thus unduly complicates trial without supplying any protection to the accused. Consequently, the Rule omits this requirement in favor of a basic due process test. In determining which version of the various due process phrasings to utilize, a majority of the Committee chose to use the language now found in ¶ 150*b* of the present Manual rather than the language found in *Jordan* (which requires that the evidence not shock the conscience of the court) believing the Manual language is more appropriate to the circumstances involved.

Rule 311(c) also indicates that persons who are present at a foreign search or seizure conducted in a foreign nation have "not participated in" that search or seizure due either to their mere presence or because of any actions taken to mitigate possible damage to property or person. The Rule thus clarifies *United States* v. *Jordan*, 1 M.J. 334 (C.M.A. 1976) which stated that the Fourth Amendment would be applicable to searches and seizures conducted abroad by foreign police when United States personnel participate in them. The Court's intent in *Jordan* was to prevent American au-

thorities from sidestepping Constitutional protections by using foreign personnel to conduct a search or seizure that would have been unlawful if conducted by Americans. That intention is safeguarded by the Rule, which applies the Rules and the Fourth Amendment when military personnel or their agents conduct, instigate, or participate in a search or seizure. The Rule only clarifies the circumstances in which a United States official will be deemed to have participated in a foreign search or seizure. This follows dicta in *United States* v. *Jones*, 6 M.J. 226, 230 (C.M.A. 1979) which would require an "element of causation," rather than mere presence. It seems apparent that an American servicemember is far more likely to be well served by United States presence—which might mitigate foreign conduct—than by its absence. Further, international treaties frequently require United States cooperation with foreign law enforcement. Thus, the Rule serves all purposes by prohibiting conduct by United States officials which might improperly support a search or seizure which would be unlawful if conducted in the United States while protecting both the accused and international relations.

The Rule also permits use of United States personnel as interpreters viewing such action as a neutral activity normally of potential advantage to the accused. Similarly the Rule permits personnel to take steps to protect the person or property of the accused because such actions are clearly in the best interests of the accused.

(d) *Motion to suppress and objections.* Rule 311(d) provides for challenging evidence obtained as a result of an allegedly unlawful search or seizure. The procedure, normally that of a motion to suppress, is intended with a small difference in the disclosure requirements to duplicate that required by Rule 304(d) for confessions and admissions, the Analysis of which is equally applicable here.

Rule 311(d)(1) differs from Rule 304(c)(1) in that it is applicable only to evidence that the prosecution intends to offer against the accused. The broader disclosure provision for statements by the accused was considered unnecessary. Like Rule 304(d)(2)(C), Rule 311(d)(2)(C) provides expressly for derivative evidence disclosure of which is not mandatory as it may be unclear to the prosecution exactly what is derivative of a search or seizure. The Rule thus clarifies the situation.

(e) *Burden of proof.* Rule 311(e) requires that a preponderance of the evidence standard be used in determining search and seizure questions, *Lego* v. *Twomey*, 404 U.S. 477 (1972). Where the validity of a consent to search or seize is involved, a higher standard of "clear and convincing," is applied by Rule 314(e). This restates present law.

(f) *Defense evidence.* Rule 311(f) restates present law and makes it clear that although an accused is sheltered from any use at trial of a statement made while challenging a search or seizure, such statement may be used in a subsequent "prosecution for perjury, false swearing or the making of a false official statement."

(g) *Scope of motions and objections challenging probable cause.* Rule 311(g)(2) follows the Supreme Court decision in *Franks* v. *Delaware*, 422 U.S. 928 (1978), *see also United States* v. *Turck*, 49 C.M.R. 49, 53 (A.F.C.M.R. 1974), with minor modifications made to adopt the decision to military procedures. Although *Franks* involved perjured affidavits by police, Rule 311(a) is made applicable to information given by government agents because of the governmental status of members of the armed services. The Rule is not intended to reach misrepresentations made by informants without any official connection.

(h) *Objections to evidence seized unlawfully.* Rule 311(h) is new and is included for reasons of clarity.

(i) *Effect of guilty plea.* Rule 311(i) restates present law. *See e.g. United States* v. *Hamil*, 15 C.M.A. 110, 35 C.M.R. 82 (1964).

Rule 312. Bodily Views and Intrusions

(a) *General rule.* Evidence obtained from bodily views and intrusions conducted in accordance with this rule is admissible at trial when relevant and not otherwise inadmissible under the rules.

(b) *Visual examination of the body.*

(1) *Consensual.* Visual examination of the unclothed body may be made with the consent of the individual subject to the inspection in accordance with rule 314(e).

(2) *Involuntary.* An involuntary display of the unclothed body including a visual examination of body cavities, may be required only if conducted in reasonable fashion and authorized under the following provisions of these rules: inspections and inventories under rule 313; searches under 314(b) and 314(c) if there is a real suspicion that weapons, contraband or evidence of crime is concealed on the body of the person to be searched; searches within jails and similar facilities under rule 314(h) if reasonably necessary to maintain the security of the institution or its personnel; searches incident to lawful apprehension under rule 314(g); emergency searches under rule 314(i); and probable cause searches under rule 315. An examination of the unclothed body under this paragraph should be conducted whenever practicable by a person of the same sex as that of the person being examined; provided, however, that failure to comply with this requirement does not make an examination an unlawful search within the meaning of rule 311.

(c) *Intrusion into body cavities.* A reasonable nonconsensual physical instrusion into the mouth, nose, and ears may be made when a visual examination of the body under subdivision (b) is permissible. Nonconsensual intrusions into other body cavities may be made:

(1) *For purposes of seizure.* To remove weapons, contraband, or evidence of crime discovered under subdivisions (b) and (c)(2) of this rule or under rule 316(d)(4)(C) if such intrusion is made in a reasonable fashion by a person with appropriate medical qualification; or

(2) *For purposes of search.* To search for weapons, contraband, or evidence of crime; if authorized by a search warrant or search authorization under rule 315 and conducted by a person with appropriate medical qualifications.

Notwithstanding this paragraph, a search under rule 314(h) may be made without a search warrant or authorization if such search is based upon a real suspicion that the individual is concealing weapons, contraband, or evidence of crime.

(d) *Seizure of bodily fluids.* Nonconsensual extraction of bodily fluids, including blood and urine, may be made from the body of an individual pursuant to a search warrant or a search authorization under rule 315. Nonconsensual extraction of bodily fluids may be made without such warrant or authorization, notwithstanding rule 315(g), only when there is a clear indication that evidence of crime will be found and that there is reason to believe that the delay that would result if a warrant or authorization were sought could result in the destruction of the evidence. Involuntary extraction of bodily fluids under this rule must be done in a reasonable fashion by a person with appropriate medical qualifications.

(e) *Other intrusive searches.* Nonconsensual intrusive searches of the body made to locate or obtain weapons, contraband, or evidence of crime and not within the scope of subdivision (b) or (c) be made only upon search warrant or search authorization under rule 315 and only if such search is conducted in a reasonable fashion by a person with appropriate medical qualifications and does not endanger the health of the person to be searched. Compelling a person to ingest substances for the purposes of locating the property described above or to compel the bodily elimination of such property is a search within the meaning of this section. Notwithstanding this rule, a person who is neither a suspect nor an accused may not be compelled to submit to an intrusive search of the body for the sole purpose of obtaining evidence of crime.

(f) *Intrusions for valid medical purposes.* Nothing in this rule shall be deemed to interfere with the lawful authority of the armed forces to take whatever action may be necessary to preserve the health of a service member. Evidence or contraband obtained from an examination or intrusion conducted for a valid medical purpose may be seized and is not evidence obtained from an unlawful search or seizure within the meaning of rule 311.

(g) *Medical qualifications.* The Secretary concerned may prescribe appropriate medical qualifications for persons who conduct searches and seizures under this rule.

ANALYSIS

(a) *General Rule.* Rule 312(a) limits all nonconsensual inspections, searches, or seizures by providing standards for examinations of the naked body and bodily intrusions. An inspection, search, or seizure that would be lawful but for noncompliance with this Rule is unlawful within the meaning of Rule 311.

(b) *Visual examination of the body.* Rule 312(b) governs searches and examinations of the naked body and thus controls what has often been loosely termed, "strip searches." Rule 312(b) permits visual examinations of the naked body in a wide but finite range of circumstances. In doing so, the Rule strictly distinguishes between visual examination of body cavities and actual intrusion into them. Intrusion is governed by Rule 312(c) and (e). Visual examination of the male genitals is permitted when a visual examination is permissible under this subdivision. Examination of cavities may include, when otherwise proper under the Rule, requiring the individual being viewed to assist in the examination.

Examination of body cavities within the prison setting has been vexatious. *See, e.g., Hanley* v. *Ward*, 584 F.2d 609 (2d cir. 1978); *Wolfish* v. *Levi*, 573 F.2d 118, 131 (2d Cir. 1978), *reversed sub nom Bell* v. *Wolfish*, 441 U.S. 520 (1979); *Daughtry* v. *Harris*, 476 F.2d 292 (10th Cir. 1973), *cert. denied* 414 U.S. 872 (1973); *Frazier* v. *Ward*, 426 F. Supp. 1354, 1362-67 (N.D.N.Y. 1977); *Hodges* v. *Klein*, 412 F. Supp. 896 (D.N.J. 1976). Institutional security must be protected while at the same time only privacy intrusions necessary should be imposed on the individual. The problem is particularly acute in this area of inspection of body cavities as such strong social taboos are involved. Rule 312(b)(2) allows examination of body cavities when reasonably necessary to maintain the security of the institution or its personnel. *See, e.g., Bell* v. *Wolfish*, 441 U.S. 520 (1979). Examinations likely to be reasonably necessary include examination upon entry or exit from the institution, examination subsequent to a personal visit, or examination pursuant to a reasonably clear indication that the individual is concealing property within a body cavity. *Frazier* v. *Ward*, 426 F. Supp. 1354 (N.D.N.Y. 1977); *Hodges* v. *Klein*, 412 F. Supp. 896 (D.N.J. 1976). Great deference should be given to the decisions of the commanders and staff of military confinement facilities. The concerns voiced by the Court of Appeals for the Tenth

Circuit in *Daughtry* v. *Harris*, 476 F.2d 292 (10th Cir. 1973) about escape and related risks are likely to be particularly applicable to military prisoners because of their training in weapons and escape and evasion tactics.

As required throughout Rule 312, examination of body cavities must be accomplished in a reasonable fashion. This incorporates *Rochin* v. *California*, 342 U.S. 165 (1952), and recognizes society's particularly sensitive attitude in this area. Where possible, examination should be made in private and by members of the same sex as the person being examined.

(c) *Intrusion Into Body Cavities.* Actual intrusion into body cavities, *e.g.*, the anus and vagina, may represent both a significant invasion of the individual's privacy and a possible risk to the health of the individual. Rule 312(c) allows seizure of property discovered in accordance with Rules 312(b), 312(c)(2), or 316(d)(4)(c) but requires that intrusion into such cavities be accomplished by personnel with appropriate medical qualifications. The Rule thus does not specifically require that the intrusion be made by a doctor, nurse, or other similar medical personnel although Rule 312(g) allows the Secretary concerned to prescribe who may perform such procedures. It is presumed that an object easily located by sight can normally be easily extracted. The requirements for appropriate medical qualifications, however, recognizes that circumstances may require more qualified personnel. This may be particularly true, for example, for extraction of foreign matter from a pregnant woman's vagina. Intrusion should normally be made either by medical personnel or by persons with appropriate medical qualifications who are members of the same sex as the person involved.

The Rule distinguishes between seizure of property previously located and intrusive searches of body cavities by requiring the Rule 312(c)(2) that such searches be made only pursuant to a search warrant or authorization, based upon probable cause, and conducted by persons with appropriate medical qualifications. Exigencies do not permit such searches without warrant or authorization unless Rule 312(f) is applicable. In the absence of express regulations issued by the Secretary concerned pursuant to Rule 312(g), the determination as to which personnel are qualified to conduct an intrusion should be made in accordance with the normal procedures of the applicable medical facility.

Recognizing the peculiar needs of confinement facilities and related institutions, *see, e.g., Bell* v. *Wolfish*, 441 U.S. 520 (1979), Rule 312(c) authorizes body cavity searches without prior search warrant or authorization when there is a "real suspicion that the individual is concealing weapons, contraband, or evidence of crime."

(d) *Seizure of Bodily Fluids.* Seizure of fluids from the body may involve self-incrimination questions pursuant to Article 31 of the Uniform Code of Military Justice, and appropriate case law should be consulted prior to involuntary seizure. *See generally* Rule 301(a) and its Analysis. The Committee does not intend an individual's expelled breath to be within the definition of "bodily fluids."

The present Manual ¶ 152 authorization for seizure of bodily fluids when there has been inadequate time to obtain a warrant or authorization has been slightly modified. The present language that there be "clear indication that evidence of crime will be found and that there is reason to believe that delay will threaten the destruction of evidence" has been modified to authorize such a seizure if there is reason to believe that the delay "could result in the destruction of the evidence." Personnel involuntarily extracting bodily fluids must have appropriate medical qualifications.

Rule 312 does not prohibit compulsory urinalysis, whether random or not, made for appropriate medical purposes, *see* Rule 312(f), and the product of such a procedure if otherwise admissible may be used in evidence at a court-martial.

(e) *Other Intrusive Searches.* The intrusive searches governed by Rule 312(e) will normally involve significant medical procedures including surgery and include any intrusion into the body including x-rays. Applicable civilian cases lack a unified approach to surgical intrusions, *see, e.g., United States* v. *Crowder*, 513 F.2d 395 (D.C. Cir. 1976); *Adams* v. *State*, 299 N.E. 2d 834 (Ind. 1973); *Creamer* v. *State*, 299 Ga. 511, 192 S.E. 2d 350 (1972), Note, *Search and Seizure: Compelled Surgical Intrusion*, 27 Baylor L. Rev. 305 (1975) and cases cited therein, other than to rule out those intrusions which are clearly health threatening. Rule 312(e) balances the government's need for evidence with the individual's privacy interest by allowing intrusion into the body of an accused or suspect upon search authorization or warrant when conducted by persons with "appropriate medical qualification," and by prohibiting intrusion when it will endanger the health of the individual. This allows, however, considerable flexibility and leaves the ultimate issue to be determined under a due process standard of reasonableness. As the public's interest in obtaining evidence from an individual other than an accused or suspect is substantially less than the person's right to privacy in is or her body, the Rule prohibits the involuntary intrusion altogether if its purpose is to obtain evidence of crime.

(f) *Intrusions for Valid Medical Purposes.* Rule 312(f) makes it clear that the Armed Forces retain their power to ensure the health of their members. A procedure conducted for valid medical purposes

may yield admissible evidence. Similarly, Rule 312 does not affect in any way any procedure necessary for diagnostic or treatment purposes.

(g) *Medical Qualifications.* Rule 312(g) permits but does not require the Secretaries concerned to prescribe the medical qualifications necessary for persons to conduct the procedures and examinations specified in the Rule.

Rule 313. Inspections and Inventories in the Armed Forces

(a) *General rule.* Evidence obtained from inspections and inventories in the armed forces conducted in accordance with this rule is admissible at trial when relevant and not otherwise inadmissible under these rules.

(b) *Inspections.* An "inspection" is an examination of the whole or part of a unit, organization, installation, vessel, aircraft, or vehicle, including an examination conducted at entrance and exit points, conducted as an incident of command, the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the unit, organization, installation, vessel, aircraft, or vehicle. An inspection may include but is not limited to an examination to determine and to ensure that any or all of the following requirements are met: that the command is properly equipped, functioning properly, maintaining proper standards of readiness, sea or airworthiness, sanitation and cleanliness, and that personnel are present, fit, and ready for duty. An inspection also includes an examination to locate and confiscate unlawful weapons and other contraband when such property would affect adversely the security, military fitness, or good order and discipline of the command and when (1) there is a reasonable suspicion that such property is present in the command or (2) the examination is a previously scheduled examination of the command. An examination made for the primary purposes of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings is not an inspection within the meaning of this rule. Inspections shall be conducted in a reasonable fashion and shall comply with rule 312, if applicable. Inspections may utilize any reasonable natural or technological aid and may be conducted with or without notice to those inspected. Unlawful weapons, contraband, or other evidence of crime located during an inspection may be seized.

(c) *Inventories.* Unlawful weapons, contraband, or other evidence of crime discovered in the process of an inventory, the primary purpose of which is administrative in nature, may be seized. Inventories shall be conducted in a reasonable fashion and shall comply with rule 312, if applicable. An examination made for the primary purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings is not an inventory within the meaning of this rule.

ANALYSIS

Although inspections have long been recognized as being necessary and legitimate exercises of a commander's powers and responsibilities, *see, e.g. United States* v. *Gebhart*, 10 C.M.A. 606, 610 n.2, 28 C.M.R. 172, 176 n.2 (1959), the present Manual for Courts-Martial omits discussion of inspections except to note that the ¶ 152 restriction on seizures is not applicable to "administrative inspections." The reason for the omission is likely that military inspections per se have traditionally been considered administrative in nature and free of probable cause requirements: Cf. *Frank* v. *Maryland*, 359 U.S. 360 (1959). Inspections that have been utilized as subterfuge searches have been condemned. *See, e.g. United States* v. *Lange*, 15 C.M.A. 486, 35 C.M.R. 458 (1965). Recent decisions of the United States Court of Military Appeals have attempted, generally without success, to define "inspection" for Fourth Amendment evidentiary purposes, *see, e.g. United States* v. *Thomas*, 1 M.J. 397 (C.M.A. 1976) [three separate opinions], and have been concerned with the intent, scope, and method of conducting inspections. *See, e.g., United States* v. *Harris*, 5 M.J. 44 (C.M.A. 1978).

(a) *General rule.*

Rule 313 codifies the law of military inspections and inventories. Traditional terms used to describe various inspections, *e.g.* "shakedown inspection" or "gate search," have been abandoned as being conducive to confusion.

Rule 313 does not govern inspections or inventories not conducted within the armed forces. These civilian procedures must be evaluated under Rule 311(c)(2). In general, this means that such inspections and inventories need only be permissible under the Fourth Amendment in order to yield evidence admissible at a court-martial.

Seizure of property located pursuant to a proper inspection or inventory must meet the requirements of Rule 316.

(b) *Inspections.* Rule 313(b) defines "inspection" as an "examination . . . conducted as an incident of command the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the unit, organization, installation, vessel, aircraft, or vehicle." Thus, an inspection is conducted for the primary function of ensuring mission readiness, and is a function of the

inherent duties and responsibilities of those in the military chain of command. Because inspections are intended to discover, correct, and deter conditions detrimental to military efficiency and safety, they must be considered as a condition precedent to the existence of any effective armed force and inherent in the very concept of a military unit. Inspections as a general legal concept have their constitutional origins in the very provisions of the Constitution which authorize the armed forces of the United States. Explicit authorization for inspections has thus been viewed in the past as unnecessary, but in light of the present ambiguous state of the law; *see, e.g. United States* v. *Thomas, supra; United States* v. *Roberts*, 2 M.J. 31 (C.M.A. 1976), such authorization appears desirable. Rule 313 is thus, in addition to its status as a rule of evidence authorized by Congress under Article 36, an express Presidential authorization for inspections with such authorization being grounded in the President's powers as Commander-in-Chief.

The interrelationship of inspections and the Fourth Amendment is complex. The constitutionality of inspections is apparent and has been well recognized; *see, e.g., United States* v. *Gebhart*, 10 C.M.A. 606, 610 n.2, 28 C.M.R. 172, 176 n.2 (1959). There are three distinct rationales which support the constitutionality of inspections.

The first such rationale is that inspections are not technically "searches" within the meaning of the Fourth Amendment. *Cf. Air Pollution Variance Board* v. *Western Alfalfa Corps*, 416 U.S. 861 (1974); *Hester* v. *United States*, 265 U.S. 57 (1924). The intent of the framers, the language of the amendment itself, and the nature of military life render the application of the Fourth Amendment to a normal inspection questionable. As the Supreme Court has often recognized, the "Military is, 'by necessity, a specialized society separate from civilian society.' " *Brown* v. *Glines*, 444 U.S. 348, 354 (1980) *citing Parker* v. *Levy*, 417 U.S. 733, 743 (1974). As the Supreme Court noted in *Glines, supra*, "Military personnel must be ready to perform their duty whenever the occasion arises. To ensure that they always are capable of performing their mission promptly and reliably, the military services 'must insist upon a respect for duty and a discipline without counterpart in civilian life.' " 444 U.S. at 354 [citations omitted]. An effective armed force without inspections is impossible—a fact amply illustrated by the unfettered right to inspect vested in commanders throughout the armed forces of the world. As recognized in *Glines, supra*, and *Greer* v. *Spock*, 424 U.S. 828 (1976), the way that the Bill of Rights applies to military personnel may be different from the way it applies to civilians. Consequently, although the Fourth Amendment is applicable to members of the armed forces, inspections may well not be "searches" within the meaning of the Fourth Amendment by reason of history, necessity, and constitutional interpretation. If they are "searches," they are surely reasonable ones, and are constitutional on either or both of two rationales.

As recognized by the Supreme Court, highly regulated industries are subject to inspection without warrant, *United States* v. *Biswell*, 406 U.S. 311 (1972); *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72 (1970), both because of the necessity for such inspections and because of the "limited threats to . . . justifiable expectation of privacy." *United States* v. *Biswell, supra*, at 316. The court in *Biswell, supra*, found that regulations of firearms traffic involved "large interests"; that "inspection is a crucial part of the regulatory scheme"; and that when a firearms dealer enters the business "he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection," 406 U.S. 315, 316. It is clear that inspections within the armed forces are at least as important as regulation of firearms; that without such inspections effective regulation of the armed forces is impossible; and that all personnel entering the armed forces can be presumed to know that the reasonable expectation of privacy within the armed forces is exceedingly limited by comparison with civilian expectations. *See, e.g., Committee for G.I. Rights* v. *Callaway*, 518 F.2d 466 (D.C. Cir. 1975). Under *Colonnade Catering, supra*, and *Biswell, supra*, inspections are thus reasonable searches and may be made without warrant.

An additional rationale for military inspections is found within the Supreme Court's other administrative inspection cases. *See Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978); *Camara* v. *Municipal Court*, 387 U.S. 541 (1967); *See* v. *City of Seattle*, 387 U.S. 541 (1967). Under these precedents an administrative inspection is constitutionally acceptable for health and safety purposes so long as such an inspection is first authorized by warrant. The warrant involved, however, need not be upon probable cause in the traditional sense, rather the warrant may be issued "if reasonable legislative or administrative standards for conducting an area inspection are satisfied . . ." *Camara, supra*, 387 U.S. at 538. Military inspections are intended for health and safety reasons in a twofold sense: they protect the health and safety of the personnel in peacetime in a fashion somewhat analagous to that which protects the health of those in a civilian environment, and, by ensuring the presence and proper condition of armed forces personnel, equipment, and environment, they protect those personnel from becoming unnecessary casualties in the event of combat. Although *Marshall* v. *Barlow's Inc.*, *Camara*, and *See, supra*, require warrants, the intent behind the warrant requirement is to ensure that the person whose

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property is inspected is adequately notified that local law requires inspection, that the person is notified of the limits of the inspection, and that the person is adequately notified that the inspector is acting with proper authority. *Camara* v. *Municipal Court,* 387 U.S. 523, 532 (1967). Within the armed forces, the warrant requirement is met automatically if an inspection is ordered by a commander, as commanders are empowered to grant warrants. *United States* v. *Ezell,* 6 M.J. 307 (C.M.A. 1979). More importantly, the concerns voiced by the court are met automatically within the military environment in any event as the rank and assignment of those inspecting and their right to do so are known to all. To the extent that the search warrant requirement is intended to prohibit inspectors from utilizing inspections as subterfuge searches, a normal inspection fully meets the concern, and Rule 313(b) expressly prevents such subterfuges. The fact that an inspection that is primarily administrative in nature may result in a criminal prosecution is unimportant. *Camara* v. *Municipal Court,* 387 U.S. 523, 530-31 (1967). Indeed, administrative inspections may inherently result in prosecutions because such inspections are often intended to discover health and safety defects the presence of which are criminal offenses. *Id.* at 531. What is important, to the extent that the Fourth Amendment is applicable, is protection from unreasonable violations of privacy. Consequently, Rule 313(b) makes it clear that an otherwise valid inspection is not rendered invalid solely because the inspector has as his or her purpose a *secondary* "purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings . . ." An examination made, however, with a *primary* purpose of prosecution is no longer an administrative inspection. Inspections are, as has been previously discussed, lawful acceptable measures to ensure the survival of the American armed forces and the accomplishment of their mission. They do not infringe upon the limited reasonable expectation of privacy held by service personnel. It should be noted, however, that it is possible for military personnel to be granted a reasonable expectation of privacy greater than the minimum inherently recognized by the Constitution. An installation commander might, for example, declare a BOQ sacrosanct and off limits to inspections. In such a rare case the reasonable expectation of privacy held by the relevant personnel could prevent or substantially limit the power to inspect under the Rule. *See* Rule 311(c). Such extended expectations of privacy may, however, be negated with adequate notice.

An inspection "may be made 'of the whole or part' of a unit, organization, installation, vessel, aircraft, or vehicle . . . [and is] conducted as an incident of command." Inspections are usually quantitative examinations insofar as they do not normally single out specific individuals or small groups of individuals. There is, however, no requirement that the entirety of a unit or organization be inspected. Unless authority to do so has been withheld by competent superior authority, any individual placed in a command or appropriate supervisory position may inspect the personnel and property within his or her control.

Inspections for contraband such as drugs have posed a major problem. Initially, such inspections were viewed simply as a form of health and welfare inspection, *see, e.g. United States* v. *Unrue,* 22 C.M.A. 466, 47 C.M.R. 556 (1973). More recently, however, the Court of Military Appeals has tended to view them solely as searches for evidence of crime. *See, e.g. United States* v. *Roberts,* 2 M.J. 31 (C.M.A. 1976); *but see United States* v. *Harris,* 5 M.J. 44, 58 (C.M.A. 1978). Illicit drugs, like unlawful weapons, represent, however, a potential threat to military efficiency of disastrous proportions. Consequently, it is entirely appropriate to treat ispections intended to rid units of contraband that would adversely affect military fitness as being health and welfare inspections, *see, e.g. Committee for G.I. Rights* v. *Callaway,* 518 F.2d 466 (D.C. Cir. 1975), and the Rule does so.

A careful analysis of the applicable case law, military and civilian, easily supports this conclusion. Military cases have long recognized the legitimacy of "health and welfare" inspections and have defined those inspections as examinations intended to ascertain and ensure the readiness of personnel and equipment. *See, e.g., United States* v. *Gebhart,* 10 C.M.A. 606, 610 n. 2, 28 C.M.R. 172, 176 n. 2 (1959): "[these] types of searches are not to be confused with inspections of military personnel . . . conducted by a commander in furtherance of the security of his command"; *United States* v. *Brashears,* 45 C.M.R. 438 (A.C.M.R. 1972), *rev'd on other grounds,* 21 C.M.A. 522, 45 C.M.R. 326 (1972). Among the legitimate intents of a proper inspection is the location and confiscation of unauthorized weapons. *See, e.g., United States* v. *Grace,* 19 C.M.A. 409, 410, 42 C.M.R. 11, 12 (1970). The justification for this conclusion is clear; unauthorized weapons are a serious danger to the health of military personnel and therefore to mission readiness. Contraband that "would affect adversely the security, military fitness, or good order and discipline" is thus identical with unauthorized weapons insofar as their effects can be predicted. Rule 313(b) authorizes inspections for contraband, and is expressly intended to authorize inspections for unlawful drugs. As recognized by the Court of Military Appeals in *United States* v. *Unrue,* 22 C.M.A. 466, 469-70, 47 C.M.R. 556, 559-60 (1973), unlawful drugs pose unique problems. If uncontrolled, they may create an "epidemic," 47 C.M.R. at 559. Their use is not only contagious as peer pressure in barracks, aboard ship, and in units, tends to impel the spread of improper drug use, but the

effects are known to render units unfit to accomplish their missions. Viewed in this light, it is apparent that inspection for those drugs which would "affect adversely the security, military fitness, or good order and discipline of the command" is a proper administrative intent well within the decisions of the United States Supreme Court *See, e.g., Camara* v. *Municipal Court,* 387 U.S. 523 (1967); *United States* v. *Unrue,* 22 C.M.A. 446, 471, 47 C.M.R. 556, 561 (1973) [Judge Duncan dissenting]. This conclusion is buttressed by the fact that members of the military have a diminished expectation of privacy, and that inspections for such contraband are "reasonable" within the meaning of the Fourth Amendment. *See, e.g., Committee for G.I. Rights* v. *Callaway,* 518 F.2d 466 (D.C. Cir. 1975). Although there are a number of decisions of the Court of Military Appeals that have called the legality of inspections for unlawful drugs into question, *see United States* v. *Thomas, supra; United States* v. *Roberts,* 2 M.J. 31 (C.M.A. 1977), those decisions with their multiple opinions are not dispositive. Particularly important to this conclusion is the opinion of Judge Perry in *United States* v. *Roberts, supra.* Three significant themes are present in the opinion: lack of express authority for such inspections, the perception that unlawful drugs are merely evidence of crime, and the high risk that inspections may be used for subterfuge searches. The new Rule is intended to resolve these matters fully. The Rule, as part of an express Executive Order, supplies the explicit authorization for inspections then lacking. Secondly, the Rule is intended to make plain the fact that an inspection that has as its object the prevention and correction of conditions harmful to readiness is far more than a hunt for evidence. Indeed, it is the express judgment of the Committee that the uncontrolled use of unlawful drugs within the armed forces creates a readiness crisis and that continued use of such drugs is totally incompatible with the possibility of effectivly fielding military forces capable of accomplishing their assigned mission. Thirdly, Rule 313(b) specifically deals with the subterfuge question in order to prevent improper use of inspections.

Rule 313(b) requires that before an inspection intended "to locate and confiscate unlawful weapons or other contraband, that would affect adversely the . . . command" may take place, there must be either "a reasonable suspicion that such property is present in the command" or the inspection must be "a previously scheduled examination of the command." The former requirement requires than an inspection not previously scheduled be justified by "reasonable suspicion that such property is present in the command." This standard is intentionally minimal and requires only that the person ordering the inspection have a suspicion that is, under the circumstances, reasonable in nature. Probable cause is not required. Under the latter requirement, an inspection shall be scheduled sufficiently far enough in advance as to eliminate any reasonable probability that the inspection is being used as a subterfuge, *i.e.*, that it is being used to search a given individual for evidence of crime when probable cause is lacking. Such scheduling may be made as a matter of date or event. In other words, inspections may be scheduled to take place on any specific date, *e.g.*, a commander may decide on the first of a month to inspect on the 7th, 9th, and 21st, or on the occurrence of a specific event beyond the usual control of the commander, *e.g.*, whenever an alert is ordered, forces are deployed, a ship sails, the stock market reaches a certain level of activity, etc. It should be noted that "previously scheduled" inspections that vest discretion in the inspector are permissible when otherwise lawful.

So long as the examination, *e.g.*, an entrance gate inspection, has been previously scheduled, the fact that reasonable exercise of discretion is involved in singling out individuals to be inspected is not improper; such inspection must not be in violation of the Equal Protection clause of the 5th Amendment or be used as a subterfuge intended to allow search of certain specific individuals.

The Rule applies special restrictions to contraband inspections because of the inherent possibility that such inspections may be used as subterfuge searches. Although a lawful inspection may be conducted with a secondary motive to prosecute those found in possession of contraband, the primary motive must be administrative in nature. The Rule recognizes the fact that commanders are ordinarily more concerned with removal of contraband from units—thereby eliminating its negative effects on unit readiness—than with prosecution of those found in possession of it. The fact that possession of contraband is itself unlawful renders the probability that an inspection may be a subterfuge somewhat higher than that for an inspection not intended to locate such material.

An inspection which has as its intent, or one of its intents, in whole or in part, the discovery of contraband, however slight, must comply with the specific requirements set out in the Rule for inspections for contraband. An inspection which does not have such an intent need not so comply and will yield admissible evidence if contraband is found incidentally by the inspection. Contraband is defined as material the possession of which is by its very nature unlawful. Material may be declared to be unlawful by appropriate statute, regulation, or order. For example, if liquor is prohibited aboard ship, a shipboard inspection for liquor must comply with the rules for inspections for contraband.

Before unlawful weapons or other contraband may be the subject of an inspection under Rule 313(b), there must be a determination that "such property would affect adversely the security, military fitness, or good order and discipline of the command." In the event of an adequate defense challenge under Rule 311 to an inspection for contraband, the prosecution must establish by a preponderance that such property would in fact so adversely affect the command. Although the question is an objective one, its resolution depends heavily on factors unique to the personnel or location inspected. If such contraband would adversely affect the ability of the command to complete its assigned mission in any significant way, the burden is met. The nature of the assigned mission is unimportant for that is a matter within the prerogative of the chain of command only. The expert testimony of those within the chain of command of a given unit is worthy of great weight as the only purpose for permitting such an inspection is to ensure military readiness. The physiological or psychological effects of a given drug on an individual are normally irrelevant except insofar as such evidence is relevant to the question of the user's ability to perform duties without impaired efficiency. As inspections are generally quantitative examinations, the nature and amount of contraband sought is relevant to the question of the government's burden. The existence of five unlawful drug users in an Army division, for example, is unlikely to meet the Rule's test involving adverse effect, but five users in an Army platoon may well do so.

The Rule does not require that personnel to be inspected be given preliminary notice of the inspection although such advance notice may well be desirable as a matter of policy or in the interests, as perhaps in gate inspections, of establishing an alternative basis, such as consent, for the examination.

Rule 313(b) requires that inspections be conducted in a "reasonable fashion." The timing of an inspection and its nature may be of importance. Inspections conducted at a highly unusual time are not inherently unreasonable—especially when a legitimate reason for such timing is present. However, a 0200 inspection, for example, may be unreasonable depending upon the surrounding circumstances.

The Rule expressly permits the use of "any reasonable or natural technological aid." Thus, dogs may be used to detect contraband in an otherwise valid inspection for contraband. This conclusion follows directly from the fact that inspections for contraband conducted in compliance with Rule 313 are lawful. Consequently, the technique of inspection is generally unimportant under the new rules. The Committee did, however, as a matter of policy require that the natural or technological aid be "reasonable."

Rule 313(b) recognizes and affirms the commander's power to conduct administrative examinations which are primarily non-prosecutorial in purpose. Personnel directing inspections for contraband must take special care to ensure that such inspections comply with Rule 313(b) and thus do not constitute improper general searches or subterfuges.

(c) *Inventories.* Rule 313(c) codifies current law by recognizing the admissibility of evidence seized via bona fide inventory. The rationale behind this exception to the usual probable cause requirement is that such an inventory is not prosecutorial in nature and is a reasonable intrusion. *See, e.g., South Dakota* v. *Opperman*, 428 U.S. 364 (1976).

An inventory may not be used as a subterfuge search, *United States* v. *Mossbauer*, 20 C.M.A. 584, 44 C.M.R. (1971), and the basis for an inventory and the procedure utilized may be subject to challenge in any specific case. Inventories of the property of detained individuals have usually been sustained. *See, e.g., United States* v. *Brashears*, 21 C.M.A. 552, 45 C.M.R. 326 (1972).

The Committee does not, however, express an opinion as to the lawful scope of an inventory. *See, e.g., South Dakota* v. *Opperman*, 428 U.S. 364 (1976), in which the court did not determine the propriety of opening the locked trunk or glovebox during the inventory of a properly impounded automobile.

Inventories will often be governed by regulation.

Rule 314. Searches Not Requiring Probable Cause

(a) *General Rule.* Evidence obtained from reasonable searches not requiring probable cause conducted pursuant to this rule is admissible at trial when relevant and not otherwise inadmissible under these rules.

(b) *Border Searches.* Border searches for customs or immigration purposes may be conducted when authorized by Act of Congress.

(c) *Searches upon entry to United States installation, aircraft, and vessels abroad.* In addition to the authority to conduct inspections under rule 313(b), a commander of a United States military installation, enclave, or aircraft on foreign soil, or in foreign or international airspace, or a United States vessel in foreign or international waters, may authorize appropriate personnel to search persons or the property of such persons upon entry to the installation, enclave, aircraft, or vessel to ensure the security, military fitness or good order and discipline of the command. Such searches may not be conducted at a time or in a manner contrary to an express provision of a treaty or agreement to which the United States is a party. *Failure to comply with a treaty or agreement*, however, does not render a search unlawful within the meaning of rule 311. A search made for the primary purpose of obtaining evidence for use in a trial by court-martial or other disciplinary proceeding is not authorized by this subdivision.

(d) *Searches of government property.* Government property may be searched under this rule unless the person to whom the property is issued or assigned has a reasonable expectation of privacy therein at the time of the search. Under normal circumstances, a person does not have a reasonable expectation of privacy in government property that is not issued for personal use. Wall or floor lockers in living quarters issued for the purpose of storing personal possessions normally are issued for personal use; but the determination as to whether a person has a reasonable expectation of privacy in government property issued for personal use depends on the facts and circumstances at the time of the search.

(e) *Consent searches.*

(1) *General rule.* Searches may be conducted of any person or property with lawful consent.

(2) *Who may consent.* A person may consent to a search of his or her person or property, or both, unless control over such property has been given to another. A person may grant consent to search property when the person exercises control over that property.

(3) *Scope of consent.* Consent may be limited in any way by the person granting consent, including limitations in terms of time, place, or property and may be withdrawn at any time.

(4) *Voluntariness.* To be valid, consent must be given voluntarily. Voluntariness is a question to be determined from all the circumstances. Although a person's knowledge of the right to refuse to give consent is a factor to be considered in determining voluntariness, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent. Mere submission to the color of authority of personnel performing law enforcement duties or acquiescence in an announced or indicated purpose to search is not a voluntary consent.

(5) *Burden of proof.* Consent must be shown by clear and convincing evidence. The fact that a person was in custody while granting consent is a factor to be considered in determining the voluntariness of the consent, but it does not affect the burden of proof.

(f) *Frisks incident to a lawful stop.*

(1) *Stops.* A person authorized to apprehend by paragraph 19*a* of this Manual and others performing law enforcement duties may stop another person temporarily when the person making the stop has information or observes unusual conduct that leads him or her reasonably to conclude in light of his or her experience that criminal activity may be afoot. The purpose of the stop must be investigatory in nature.

(2) *Frisks.* When a lawful stop is performed, the person stopped may be frisked for weapons when that person is reasonably believed to be armed and presently dangerous. Contraband or evidence located in the process of a lawful frisk may be seized.

(g) *Searches incident to a lawful apprehension.*

(1) *General rule.* A person who has been lawfully apprehended may be searched.

(2) *Search for weapons and destructible evidence.* A search may be conducted for weapons or destructible evidence in the area within the immediate control of a person who has been apprehended. The area within the person's "immediate control" is the area which the individual searching could reasonably believe that the person apprehended could reach with a sudden movement to obtain such property.

(3) *Examination for other persons.* When an apprehension takes place at a location in which other persons reasonably might be present who might interfere with the apprehension or endanger those apprehending, a reasonable examination may be made of the general area in which such other persons might be located.

(h) *Searches within jails, confinement facilities, or similar facilities.* Searches within jails, confinement facilities, or similar facilities may be authorized by persons with authority over the institution.

(i) *Emergency searches to save life or for related purposes.* In emergency circumstances to save life or for a related purpose, a search may be conducted of persons or property in a good faith effort to render immediate medical aid, to obtain information that will assist in the rendering of such aid, or to prevent immediate or ongoing personal injury.

(j) *Searches of open fields or woodlands.* A search of open fields or woodlands is not an unlawful search within the meaning of rule 311.

(k) *Other searches.* A search of a type not otherwise included in this rule and not requiring probable cause under rule 315 may be conducted when permissible under the Constitution of the United States as applied to members of the armed forces.

ANALYSIS

The list of non-probable cause searches contained within Rule 314 is intended to encompass most of the non-probable cause searches common in the military environment. The term "search" is used in Rule 314 in its broadest non-technical sense. Consequently, a "search" for purposes of Rule 314 may include examinations that are not "searches" within the narrow technical sense of the Fourth Amendment. *See, e.g., Rule 314(j).*

Insofar as Rule 314 expressly deals with a given type of search, the Rule pre-empts the area in that the Rule must be followed even should the Supreme Court issue a decision more favorable to the Government. If such a decision involves a non-probable cause search of a *type* not addressed in Rule 314, it will be fully applicable to the Armed Forces under Rule 314(k) unless other authority prohibits such application.

(a) *General Rule.* Rule 314(a) provides that evidence obtained from a search conducted pursuant to Rule 314 and not in violation of another Rule, *e.g.*, Rule 312, Bodily Views and Intrusions, is admissible when relevant and not otherwise inadmissible.

(b) *Border Searches.* Rule 314(b) recognizes that military personnel may perform border searches when authorized to do so by Congress.

(c) *Searches upon entry to United States installations, aircraft, and vessels abroad.* Rule 314(c) follows the opinion of Chief Judge Fletcher in *United States* v. *Rivera*, 4 M.J. 215 (C.M.A. 1978), in which he applied, 4 M.J. 215, 216 n.2, the border search doctrine to entry

searches of United States installations or enclaves on foreign soil. The search must be reasonable and its intent, in line with all border searches, must be primarily prophylactic. This authority is additional to any other powers to search or inspect that a commander may hold.

Although Rule 314(c) is similar to Rule 313(b), it is distinct in terms of its legal basis. Consequently, a search performed pursuant to Rule 314(c) need not comply with the burden of proof requirement found in Rule 313(b) for contraband inspections even though the purpose of the 314(c) examination is to prevent introduction of contraband into the installation, aircraft or vessel.

A Rule 314(c) examination must, however, be for a purpose denominated in the rule and must be rationally related to such purpose. A search pursuant to Rule 314(c) is possible only upon entry to the installation, aircraft or vessel, and an individual who chooses not to enter removes any basis for search pursuant to Rule 314(c). The Rule does not indicate whether discretion may be vested in the person conducting a properly authorized Rule 314(c) search. It was the opinion of members of the Committee, however, that such discretion is proper considering the Rule's underlying basis.

(d) *Searches of government property.* Rule 314(d) restates present law, *see, e.g., United States* v. *Weshenfelder*, 20 C.M.A. 416, 43 C.M.R. 256 (1971), and recognizes that personnel normally do not have sufficient interest in government property to have a reasonable expectation of privacy in it. Although the Rule could be equally well denominated as a lack of adequate interest, *see, e.g.*, Rule 311(a)(2), it is more usually expressed as a nonprobable cause search. The Rule recognizes that certain government property may take on aspects of private property allowing an individual to develop a reasonable expectation of privacy surrounding it. Wall or floor lockers in living quarters issued for the purpose of storing personal property will normally, although not necessarily, involve a reasonable expectation of privacy. It was the intent of the Committee that such lockers give rise to a rebuttable presumption that they do have an expectation of privacy, and that insofar as other government property is concerned such property gives rise to a rebuttable presumption that such an expectation is absent.

Public property, such as streets, parade grounds, parks, and office buildings rarely if ever involves any limitations upon the ability to search.

(e) *Consent Searches.*

(1) *General Rule.* The present Manual Rule is found in paragraph 152, the relevant sections of which state:

> A search of one's person with his freely given consent, or of property with the freely given consent of a person entitled in the situation involved to waive the right to immunity from an unreasonable search, such as an owner, bailee, tenant, or occupant as the case may be under the circumstances [is lawful].
>
> If the justification for using evidence obtained as a result of a search is that there was a freely given consent to the search, that consent must be shown by clear and positive evidence.

Although Rule 314(e) generally restates the present law without substantive change, the language has been recast. The basic rule for consent searches is taken from *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973).

(2) *Who may consent.* The Manual language illustrating when third parties may consent to searches has been omitted as being insufficient and potentially misleading and has been replaced by Rule 314(e)(2). The Rule emphasizes the degree of control that an individual has over property and is intended to deal with circumstances in which third parties may be asked to grant consent. *See e.g., Frazier* v. *Cupp*, 394 U.S. 731 (1969); *Stoner* v. *California*, 376 U.S. 483 (1964); *United States* v. *Mathis*, 16 C.M.A. 511, 37 C.M.R. 142 (1967). It was the Committee's intent to restate current law in this provision and not to modify it in any degree. Consequently, whether an individual may grant consent to a search of property not his own is a matter to be determined on a case by case basis.

(3) *Scope of consent.* Rule 314(e)(3) restates present law. *See e.g., United States* v. *Castro*, 23 C.M.A. 166, 48 C.M.R. 782 (1974); *United States* v. *Cady*, 22 C.M.A. 408, 47 C.M.R. 345 (1973).

(4) *Voluntariness.* Rule 314(e)(3) requires that a consent be voluntary to be valid. The second sentence is taken in substance from *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 248-49 (1973).

The specific inapplicability of Article 31(b) warnings follows *Schneckloth* and complies with *United States* v. *Morris*, 1 M.J. 352 (C.M.A. 1976) (opinion by Chief Judge Fletcher with Judge Cook concurring in the result). Although not required, such warnings are, however, a valuable indication of a voluntary consent. The Committee does not express an opinion as to whether rights warnings are required prior to obtaining an admissible statement as to ownership or possession of property from a suspect when that admission is obtained via a request for consent to search.

(5) *Burden of proof.* Although not constitutionally required, the burden of proof in ¶ 152 of the present Manual for consent searches has been retained in a slightly different form—"clear and convincing" in place of "clear and positive"—on the presumption that the basic nature of the military structure renders consent more suspect than in the civilian community: "Clear and convincing evidence" is intended to create a burden of proof between the preponderance and beyond a reasonable doubt standards. The Rule expressly rejects a different burden for custodial consents. The law in this area evidences substantial confusion stemming initially from language used in *United States* v. *Justice*, 13 C.M.A. 31, 34, 32 C.M.R. 31, 34 (1962): "It [the burden of proof] is an especially heavy obligation if the accused was in custody . . .", which was taken in turn from a number of civilian federal court decisions. While custody should be a factor resulting in an especially careful scrutiny of the circumstances surrounding a possible consent, there appears to be no legal or policy reason to require a higher burden of proof.

(f) *Frisks incident to a lawful stop.* Rule 314(f) recognizes a frisk as a lawful search when performed pursuant to a lawful stop. The primary authority for the stop and frisk doctrine is *Terry* v. *Ohio*, 392 U.S. 1 (1968), and the present Manual lacks any reference to either stops or frisks. Hearsay may be used in deciding to stop and frisk. *See, e.g., Adams* v. *Williams*, 407 U.S. 143 (1972).

The Rule recognizes the necessity for assisting police or law enforcement personnel in their investigations but specifically does not address the issue of the lawful duration of a stop nor of the nature of the questioning, if any, that may be involuntarily addressed to the individual stopped. *See, Brown* v. *Texas*, 440 U.S. 903 (1979) generally prohibiting such questioning in civilian life. Generally, it would appear that any individual who can be lawfully stopped is likely to be a suspect for the purposes of Article 31(b). Whether identification can be demanded of a military suspect without Article 31(b) warnings is an open question and may be dependent upon whether the identification of the suspect is relevant to the offense possibly involved. *See* Lederer, *Rights Warnings in the Armed Services*, 72 Mil.L.Rev. 1, 40-41 (1976).

(g) *Searches incident to a lawful apprehension.* The present Manual Rule is found in paragraph 152 and states:

> A search conducted as an incident of lawfully apprehending a person, which may include a search of his person, of the clothing he is wearing, and of property which, at the time of apprehension, is in his immediate possession or control, or of an area from within which he might gain possession of weapons or destructible evidence; and a search of the place where the apprehension is made [is lawful];

Rule 314(g) restates the principle found within the Manual text but utilizes new and clarifying language. The Rule expressly requires that an apprehension be lawful.

(1) *General Rule.* Rule 314(g)(1) expressly authorizes the search of a person of a lawfully apprehended individual without further justification.

(2) *Search for weapons and destructible evidence.* Rule 314(g)(2) delimits the area that can be searched pursuant to an apprehension and specifies that the purpose of the search is only to locate weapons and destructible evidence. This is a variation of the authority presently in the Manual and is based upon the Supreme Court's decision in *Chimel* v. *California*, 395 U.S. 752 (1969). It is clear from the Court's decision in *United States* v. *Chadwick*, 438 U.S. 1 (1977) that the scope of a search pursuant to a lawful apprehension must be limited to those areas which an individual could reasonably reach and utilize. The search of the area within the immediate control of the person apprehended is thus properly viewed as a search based upon necessity—whether one based upon the safety of those persons apprehending or upon the necessity to safeguard evidence. *Chadwick*, holding that police could not search a sealed footlocker pursuant to an arrest, stands for the proposition that the *Chimel* search must be limited by its rationale.

That portion of the present Manual subparagraph dealing with intrusive body searches has been incorporated into Rule 312. Similarly that portion of the Manual dealing with search incident to hot pursuit of a person has been incorporated into that portion of Rule 315 dealing with exceptions to the need for search warrants or authorizations.

(3) *Examination for other persons.* Rule 314(g)(3) is intended to protect personnel performing apprehensions. Consequently, it is extremely limited in scope and requires a good faith and reasonable belief that persons may be present who might interfere with the apprehension or apprehending individuals. Any search must be directed towards the finding of such persons and not evidence.

An unlawful apprehension of the accused may make any subsequent statement by the accused inadmissible, *Dunaway* v. *New York*, 442 U.S. 200 (1979).

(h) *Searches within jails, confinement facilities, or similar facilities.* Personnel confined in a military confinement facility or housed in a facility serving a generally similar purpose will normally yield any normal Fourth Amendment protections to the reasonable needs of the facility. *See, e.g., United States* v. *Magluto*, 20 C.M.A. 456, 43 C.M.R. 296 (1971). *See also* Rule 312.

(i) *Emergency searches to save life or for related purpose.* This type of search is not found within the present Manual provision but is in accord with prevailing civilian and military case law. *See e.g., United States* v. *Yarborough*, 50 C.M.R. 149, 155 (A.F.C.M.R. 1975). Such a search must be conducted in good faith and may not be a subterfuge in order to circumvent an individual's Fourth Amendment protections.

(j) *Searches of open fields or woodlands.* This type of search is taken from present Manual paragraph 152. Originally recognized in *Hester* v. *United States*, 265 U.S. 57 (1924), this doctrine was revived by the Supreme Court in *Air Pollution Variance Board* v. *Western Alfalfa Corp.*, 416 U.S. 861 (1974). Arguably, such a search is not a search within the meaning of the Fourth Amendment. In *Hester*, Mr. Justice Holmes simply concluded that "the special protection accorded by the 4th Amendment to the people in their 'persons, houses, papers, and effects' is not extended to the open fields." 265 U.S. at 59. In relying on *Hester*, the Court in *Air Pollution Variance Board* noted that it was "not advised that he [the air pollution investigator] was on premises from which the public was excluded." 416 U.S. 865. This suggests that the doctrine of open fields is subject to the caveat that a reasonable expectation of privacy may result in application of the Fourth Amendment to open fields.

(k) *Other searches.* Rule 314(k) recognizes that searches of a *type* not specified within the Rule but proper under the Constitution are also lawful.

Rule 315. Probable Cause Searches

(a) *General rule.* Evidence obtained from searches requiring probable cause conducted in accordance with this rule is admissible at trial when relevant and not otherwise inadmissible under these rules.

(b) *Definitions.* As used in these rules:

(1) *Authorization to search.* An "authorization to search" is an express permission, written or oral, issued by competent military authority to search a person or an area for specified property or evidence or for a specific person and to seize such property, evidence, or person. It may contain an order directing subordinate personnel to conduct a search in a specified manner.

(2) *Search warrant.* A "search warrant" is an express permission to search and seize issued by competent civilian authority.

(c) *Scope of authorization.* A search authorization may be issued under this rule for a search of:

(1) *Persons.* The person of anyone subject to military law or the law of war wherever found;

(2) *Military property.* Military property of the United States or of nonappropriated fund activities of an armed force of the United States wherever located.

(3) *Persons and property within military control.* Persons or property situated on or in a military installation, encampment, vessel, aircraft, vehicle, or any other location under military control, wherever located; or

(4) *Nonmilitary property within a foreign country.*

(A) Property owned, used, occupied by, or in the possession of an agency of the United States other than the Department of Defense when situated in a foreign country. A search of such property may not be conducted without the concurrence of an appropriate representative of the agency concerned. Failure to obtain such concurrence, however, does not render a search unlawful within the meaning of rule 311.

(B) Other property situated in a foreign country.

If the United States is a party to a treaty or agreement that governs a search in a foreign country, the search shall be conducted in accordance with the treaty or agreement. If there is no treaty or agreement, concurrence should be obtained from an appropriate representative of the foreign country with respect to a search under paragraph (4)(B) of this subdivision. Failure to obtain such concurrence or noncompliance with a treaty or agreement, however, does not render a search unlawful within the meaning of rule 311.

(d) *Power to authorize.* Authorization to search pursuant to this rule may be granted by an impartial individual in the following categories:

(1) *Commander.* A commanding officer, officer in charge, or other person serving in a position designated by the Secretary concerned as either a position analogous to an officer in charge or a position of command, who has control over the place where the property or person to be searched is situated or found, or, if that place is not under military control, having control over persons subject to military law or the law of war.

(2) *Delegee.* An impartial person to whom the authority has been delegated by a person empowered to authorize a search under (1) except insofar as the power to delegate is restricted by the Secretary concerned; or

(3) *Military judge.* A military judge or magistrate if authorized under regulations prescribed by the Secretary of Defense or the Secretary concerned.

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

(e) *Power to search.* Any commissioned officer, warrant officer, petty officer, noncommissioned officer, and, when in the execution of guard or police duties, any criminal investigator, member of the Air Force security police, military police, or shore patrol, or person designated by proper authority to perform guard or police duties, or any agent of any such person, may conduct or authorize a search when a search authorization has been granted under this rule or a search would otherwise be proper under subdivision (g).

(f) *Basis for search authorizations.*

(1) *Probable cause requirement.* A search authorization issued under this rule must be based upon probable cause.

(2) *Probable cause determination.* Probable cause to search exists when there is a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched. Before a person may conclude that probable cause to search exists, he or she must first have a reasonable belief that the information giving rise to the intent to search is believeable and has a factual basis. A search authorization may be based upon hearsay evidence in whole or in part. A determination of probable cause under this rule shall be based upon any or all of the following:

(1) Written statements communicated to the authorizing officer;

(2) Oral statements communicated to the authorizing official in person, via telephone, or by other appropriate means of communication; or

(3) Such information as may be known by the authorizing official that would not preclude the officer from acting in an impartial fashion.

The Secretary of Defense or the Secretary concerned may prescribe additional requirements.

(g) *Exigencies.* A search warrant or search authorization is not required under this rule for search based upon probable cause when:

(1) *Insufficient time.* There is a reasonable belief that the delay necessary to obtain a search warrant or search authorization would result in the removal, destruction, or concealment of the property or evidence sought;

(2) *Lack of communications.* There is a reasonable military operational necessity that is reasonably believed to prohibit or prevent communication with a person empowered to grant a search warrant or authorization and there is a reasonable belief that the delay necessary to obtain a search warrant or search authorization would result in the removal, destruction, or concealment of the property or evidence sought;

(3) *Search of operable vehicle.* An operable vehicle is to be searched, except in circumstances where a search warrant or authorization is required by the Constitution of the United States, this Manual or these rules; or

(4) *Not required by Constitution.* A search warrant or authorization is not otherwise required by the Constitution of the United States as applied to members of the armed forces.

For purposes of this rule, a vehicle is presumed to be "operable" unless a reasonable person would have known at the time of search that the vehicle was not functional for purposes of transportation.

(h) *Execution.*

(1) *Notice.* If the person whose property is to be searched is present during a search conducted pursuant to a search authorization granted under this rule, the person conducting the search should when possible notify him or her of the act of authorization and the general substance of the authorization. Such notice may be made prior to or contemporaneously with the search. Failure to provide such notice does not make a search unlawful within the meaning of rule 311.

(2) *Inventory.* Under regulations prescribed by the Secretary concerned, and with such excep-

tions as may be authorized by the Secretary, an inventory of the property seized shall be made at the time of a seizure under this rule or as soon as practicable thereafter. At an appropriate time, a copy of the inventory shall be given to a person from whose possession or premises the property was taken. Failure to make an inventory, furnish a copy thereof, or otherwise comply with this paragraph does not render a search or seizure unlawful within the meaning of rule 311.

(3) *Foreign searches.* Execution of a search authorization outside the United States and within the jurisdiction of a foreign nation should be in conformity with existing agreements between the United States and the foreign nation. Noncompliance with such an agreement does not make an otherwise lawful search unlawful.

(4) *Search warrants.* The execution of a search warrant affects admissibility only insofar as exclusion of evidence is required by the Constitution of the United States or an applicable Act of Congress.

ANALYSIS

(a) *General Rule*—Rule 315 states that evidence obtained pursuant to the Rule is admissible when relevant and not otherwise inadmissible under the Rules.

(b) *Definitions.*

(1) *Authorization to search.* Rule 315(b)(1) defines an "authorization to search" as an express permission to search issued by proper military authority whether commander or judge. As such, it replaces the term "search warrant" which is used in the Rules only when referring to a permission to search given by proper civilian authority. The change in terminology reflects the unique nature of the armed forces and of the role played by commanders.

(2) *Search warrant.* The expression "search warrant" refers only to the authority to search issued by proper civilian authority.

(c) *Scope of authorization.*—Rule 315(c) is taken generally from ¶ 152(1)-(3) of the present Manual except that military jurisdiction to search upon military installations or in military aircraft, vessels, or vehicles has been clarified. Although civilians and civilian institutions on military installations are subject to a search pursuant to a proper search authorization, the effect of any applicable federal statute or regulation must be considered. *E.g.* the Right to Financial Privacy Act of 1978, 12 U.S.C. §§ 3401-3422, and DOD Directive 5400.12 (Obtaining Information From Financial Institutions).

Rule 315(c)(4) is a modification of present law. Subdivision (c)(4)(A) is intended to ensure cooperation between Department of Defense agencies and other government agencies by requiring prior consent to DOD searches involving such other agencies. Although Rule 315(c)(4)(B) follows the present Manual in permitting searches of "other property in a foreign country" to be authorized pursuant to subdivision (d), subdivision (c) requires that all applicable treaties be complied with or that prior concurrence with an appropriate representative of the foreign nation be obtained if no treaty or agreement exists. The Rule is intended to foster cooperation with host nations and compliance with all existing international agreements. The Rule does not require specific approval by foreign authority of each search (unless, of course, applicable treaty requires such approval); rather the Rule permits prior blanket or categorical approvals. Because Rule 315(c)(4) is designed to govern intra-governmental and international relationships rather than relationships between the United States and its citizens, a violation of these provisions does not render a search unlawful.

(d) *Power to authorize*—Rule 315(d) grants power to authorize searches to impartial individuals of the included classifications. The closing portion of the subdivision clarifies the decision of the Court of Military Appeals in *United States* v. *Ezell*, 6 M.J. 307 (C.M.A. 1979) by stating that the mere presence of an authorizing officer at a search does not deprive the individual of an otherwise neutral character. This is in conformity with the decision of the United States Supreme Court in *Lo-Ji Sales* v. *New York*, 442 U.S. 319 (1979) from which the first portion of the language has been taken. The subdivision also recognizes the propriety of a commander granting a search authorization after taking a pretrial action equivalent to that which may be taken by a federal district judge. For example, a commander might authorize use of a drug detector dog, an action arguably similar to the granting of wiretap order by a federal judge, without necessarily depriving himself or herself of the ability to later issue a search authorization. The question would be whether the commander has acted in the first instance in an impartial judicial capacity.

(1) *Commander.* Rule 315(d)(1) restates the present rule by recognizing the power of commanders to issue search authorizations upon probable cause. The Rule explicitly allows non-officers serving in a position designated by the Secretary concerned as a position of command to issue search authorizations. If a non-officer assumes command of a unit, vessel, or aircraft, and the command position is one recognized by regulations issued by the Secretary concerned, *e.g.* command of a company, squadron, vessel, or aircraft, the non-officer commander is empowered to grant search authorizations under this subdivision whether the assumption of command is pursuant to express

appointment or devolution of command. The power to do so is thus a function of position rather than rank.

The Rule also allows persons serving as officers-in-charge or in a position designated by the Secretary as a position analogous to an officer-in-charge to grant search authorizations. The term "officer-in-charge" is statutorily defined, Article 1(4), as pertaining only to the Navy, Coast Guard, and Marine Corps, and the change will allow the Army and Air Force to establish an analogous position should they desire to do so in which case the power to authorize searches would exist although such individuals would not be "officers in charge" as that term is used in the U.C.M.J.

(2) *Delegee*—Rule 315(d)(2) restates present law and explicitly permits the power to issue search authorizations to be delegated to non-officers. Delegees should be mature experienced impartial individuals possessing judicial temperament. Delegation normally should be made to an officer, but delegation to senior non-commissioned or petty officers may be made in appropriate cases.

Rule 315(d)(2) permits a commander to delegate the power to authorize searches to a military judge. This power is distinct from the power of the Secretary concerned under subdivision (d)(3) to authorize military judges, normally as a group, to authorize searches. Although a lawful delegation may be made across service lines, a commander may not require an individual receiving such a delegation to function as an authorizing officer unless that individual is under the command of the commander delegating the power.

(3) *Military judge*—Rule 315(d)(3) permits military judges to issue search authorizations when authorized to do so by the Secretary concerned. MILITARY MAGISTRATES MAY ALSO BE EMPOWERED TO GRANT SEARCH AUTHORIZATIONS. This recognizes the practice now in use in the Army but makes such practice discretionary with the specific Service involved.

(e) *Power to search.* Rule 315(e) specifically denominates those persons who may conduct or authorize a search upon probable cause either pursuant to a search authorization or when such an authorization is not required for reasons of exigencies. The Rule recognizes, for example, that all officers and non-commissioned officers have inherent power to perform a probable cause search without obtaining of a search authorization under the circumstances set forth in Rule 315(g). The expression "criminal investigator" within Rule 315(e) includes members of the Army Criminal Investigation Command, the Marine Corps Criminal Investigation Division, the Naval Investigative Service, the Air Force Office of Special Investigations, and Coast Guard special agents.

(f) *Basis for search authorizations.* Rule 315(f) requires that probable cause be present before a search can be conducted under the Rule and uttilizes the basic definition of probable cause found in present Manual ¶ 152.

For reasons of clarity the Rule sets forth a simple and general test to be used in all probable cause determinations: probable cause can exist only if the authorizing individual has a "reasonable belief that the information giving rise to the intent to search is believable and has a factual basis." This test is taken from the "two prong test" of *Aguilar* v. *Texas*, 378 U.S. 108 (1964), which was incorporated in ¶ 152 of the present Manual. The Rule expands the test beyond the hearsay and informant area. The "factual basis" requirement is satisfied when an individual reasonably concludes that the information, if reliable, adequately apprises the individual that the property in question is what it is alleged to be and is where it is alleged to be. Information is "believable" when an individual reasonably concludes that it is sufficiently reliable to be believed.

The twin test of "believability" and "basis in fact" must be met in all probable cause situations. The method of application of the tests will differ, however, depending upon circumstances. The following examples are illustrative:

(1) An individual making a probable cause determination who observes an incident first hand is only required to determine if the observation is reliable and that the property is likely to be what it appears to be.

For example, an officer who believes that she sees an individual in possession of heroin must first conclude that the observation was reliable (*i.e.*, if her eyesight was adequate—should glasses have been worn—and if there was sufficient time for adequate observation) and that she has sufficient knowledge and experience to be able to reasonably believe that the substance in question was in fact heroin.

(2) An individual making a probable cause determination who relies upon the in person report of an informant must determine both that the informant is believable and that the property observed is likely to be what the observer believes it to be. The determining individual may rely upon the demeanor of the informant in order to determine whether the observer is believable. An individual known to have a "clean record" and no bias against the individual to be affected by the search is likely to be credible.

(3) An individual making a probable cause determination who relies upon the report of an informant not present before the authorizing individual must determine both that the informant is credible and that the property observed is likely to be what the informant believed it to be. The determining individual may utilize one or more of the following factors, among others, in order to determine whether the informant is believable:

(A) *Prior record as a reliable informant*—Has the informant given information in the past which proved to be accurate?

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

(C) *Statement against interest*—Is the information given by the informant sufficiently adverse to the fiscal or penal interest of the informant to imply that the information may reasonably be presumed to be accurate?

(D) *Good citizen*—Is the character of the informant, as known by the individual making the probable cause determination, such as to make it reasonable to presume that the information is accurate?

Mere allegations may not be relied upon. For example, an individual may not reasonably conclude that an informant is reliable simply because the informant is so named by a law enforcement agent. The individual making the probable cause determination must be supplied with specific details of the informant's past actions to allow that individual to personally and reasonably conclude that the informant is reliable.

Information transmitted through law enforcement or command channels is presumed to have been reliably transmitted. This presumption may be rebutted by an affirmative showing that the information was transmitted with intentional error.

The Rule permits a search authorization to be issued based upon information transmitted by telephone or other means of communication.

The Rule also permits the Secretaries concerned to impose additional procedural requirements for the issuance of search authorizations.

In *United States* v. *Fimmano*, 8 M.J. 197 (C.M.A. 1980) the Court of Military Appeals held that individuals presenting information to an authorizing officer in the course of requesting a search authorization must present that information under oath or affirmation. The decision was not codified in Rule 315 because of its late date and the fact that a petition for reconsideration had been filed in the case. Notwithstanding its absence from Rule 315, compliance is required. Subsequent to *Fimmano* a number of the armed forces further implemented *Fimmano* by regulation. Such regulations are authorized under subdivision (f).

(g) *Exigencies.* Rule 315(g) restates present law and delimits those circumstances in which a search warrant or authorization is unnecessary despite the ordinary requirement for one. In all such cases probable cause is required.

Rule 315(g)(1) deals with the case in which the time necessary to obtain a proper authorization would threaten the destruction or concealment of the property or evidence sought.

Rule 315(g)(2) recognizes that military necessity may make it tactically impossible to attempt to communicate with a person who could grant a search authorization. Should a nuclear submarine on radio silence, for example, lack a proper authorizing individual, (perhaps for reasons of disqualification), no search could be conducted if the Rule were otherwise unless the ship broke radio silence and imperiled the vessel or its mission. Under the Rule this would constitute an "exigency." "Military operational necessity" includes similar necessity incident to the Coast Guard's performance of its maritime police mission.

The Rule also recognizes in subdivision (g)(3) the "automobile exception" created by the Supreme Court. *See, e.g., United States* v. *Chadwick*, 433 U.S. 1 (1977); *South Dakota* v. *Opperman*, 428 U.S. 364 (1976); *Texas* v. *White*, 423 U.S. 67 (1975), and, subject to the constraints of the Constitution, the Manual, or the Rules, applies it to all vehicles. While the exception will thus apply to vessels and aircraft as well as to automobiles, trucks, et al, it must be applied with great care. In view of the Supreme Court's reasoning that vehicles are both mobile and involve a diminished expectation of privacy, the larger a vehicle is, the more unlikely it is that the exception will apply. The exception has no application to government vehicles as they may be searched without formal warrant or authorization under Rule 314(d).

(h) *Execution.* Rule 314(h)(1) provides for service of a search warrant or search authorization upon a person whose property is to be searched when possible. Noncompliance with the Rule does not, however, result in exclusion of the evidence. Similarly, Rule 314(h)(2) provides for the inventory of seized property and provision of a copy of the inventory to the person from whom the property was seized. Noncompliance with the subdivision does not, however, make the search or seizure unlawful. Under

Rule 315(h)(3) compliance with foreign law is required when executing a search authorization outside the United States, but noncompliance does not trigger the exclusionary rule.

Rule 316. Seizures

(a) *General rule.* Evidence obtained from seizures conducted in accordance with this rule is admissible at trial if the evidence was not obtained as a result of an unlawful search and if the evidence is relevant and not otherwise inadmissible under these rules.

(b) *Seizure of property.* Probable cause to seize property or evidence exists when there is a reasonable belief that the property or evidence is an unlawful weapon, contraband, evidence of crime, or might be used to resist apprehension or to escape. Before a person may conclude that probable cause to seize property is present, the person must first have a reasonable belief that the information giving rise to the intent to seize is believable and has a factual basis.

(c) *Apprehension.* Apprehension is governed by paragraph 19 of this Manual.

(d) *Seizure of property or evidence.*

(1) *Abandoned property.* Abandoned property may be seized without probable cause and without a search warrant or search authorization. Such seizure may be made by any person.

(2) *Consent.* Property or evidence may be seized with consent consistent with the requirements applicable to consensual searches under rule 314.

(3) *Government property.* Government property may be seized without probable cause and without a search warrant or search authorization by any person listed in subdivision (e), unless the person to whom the property is issued or assigned has a reasonable expectation of privacy therein, as provided in Rule 314(d), at the time of the seizure.

(4) *Other property.* Property or evidence not included in paragraph (1)-(3) may be seized for use in evidence by any person listed in subdivision (e) if:

(A) *Authorization.* The person is authorized to seize the property or evidence by a search warrant or a search authorization under rule 315;

(B) *Exigent circumstances.* The person has probable cause to seize the property or evidence and under rule 315(g) a search warrant or search authorization is not required; or

(C) *Plain view.* The person while in the course of otherwise lawful activity observes in a reasonable fashion property or evidence that the person has probable cause to seize.

(e) *Power to seize.* Any commissioned officer, warrant officer, petty officer, noncommissioned officer, and, when in the execution of guard or police duties, any criminal investigator, member of the Air Force security police, military police, or shore patrol, or individual designated by proper authority to perform guard or police duties, or any agent of any such person, may seize property pursuant to this rule.

ANALYSIS

(a) *General Rule.* Rule 316(a) provides that evidence obtained pursuant to the Rule is admissible when relevant and not otherwise inadmissible under the Rules. Rule 316 recognizes that searches are distinct from seizures. Although rare, a seizure need not be preceded by a search. Property may, for example, be seized after being located pursuant to plain view, *see* subdivision (d)(4)(C). Consequently, the propriety of a seizure must be considered independently of any preceding search.

(b) *Seizure of property.* Rule 316(b) defines probable cause in the same fashion as defined by Rule 315 for probable cause searches. *See* the Analysis of Rule 315(f)(2). The justifications for seizing property are taken from present Manual ¶ 152. Their number has, however, been reduced for reason of brevity. No distinction is made between "evidence of crime" and "instrumentalities or fruits of crime." Similarly the proceeds of crime are also "evidence of crime."

(c) *Apprehension.* Apprehensions are, of course, seizures of the person and unlawful apprehensions may be challenged as an unlawful seizure. *See, e.g. Dunaway* v. *New York,* 442 U.S. 200 (1979); *United States* v. *Texidor-Perez,* 7 M.J. 356 (C.M.A. 1979). *See generally,* paragraph 19 of the Manual.

(d) *Seizure of property or evidence.*

(1) *Abandoned property.* Rule 316(d) restates present law, not addressed specifically by the present Manual chapter, by providing that abandoned property may be seized by anyone at any time.

(2) *Consent.* Rule 316(d)(2) permits seizure of property with appropriate consent pursuant to Rule 314(e). The prosecution must demonstrate a voluntary consent by clear and convincing evidence.

(3) *Government property.* Rule 316(d)(3) permits seizure of government property without probable cause unless the person to whom the property is issued or assigned has a reasonable expectation of privacy therein at the time of seizure. In this regard note Rule 314(d) and its analysis

(4) *Other property.* Rule 316(d)(4) provides for seizure of property or evidence not otherwise addressed by the Rule. There must be justification to exercise control over the property. Although property may have been lawfully located, it may not be seized for use at trial unless there is a reasonable belief that the property is of a type discussed in Rule 316(b). Because the Rule is inapplicable to seizures unconnected with law enforcement, it does not limit the seizure of property for a valid administrative purpose such as safety.

Property or evidence may be seized upon probable cause when seizure is authorized or directed by a search warrant or authorization, Rule 316(d)(4)(A); when exigent circumstances pursuant to Rule 315(g) permit proceeding without such a warrant or authorization; or when the property or evidence is in plain view or smell, Rule 316(d)(4)(C).

Although most plain view seizures are inadvertent, there is no necessity that a plain view discovery be inadvertent—notwithstanding dicta, in some court cases; *see e.g., Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971). The Rule allows a seizure pursuant to probable cause when made as a result of plain view. The language used in Rule 316(d)(4)(C) is taken from the ALI MODEL CODE OF PREARRAIGNMENT PROCEDURE § SS 260.6 (1975). The Rule requires that the observation making up the alleged plain view be "reasonable." Whether intentional observation from outside a window, via flashlight or binocular, for example, is observation in a "reasonable fashion" is a question to be considered on a case by case basis. Whether a person may properly enter upon private property in order to effect a seizure of matter located via plain view is not resolved by the Rule and is left to future case development.

(e) *Power to seize.* Rule 316(e) conforms with Rule 315(e) and has its origins in Manual ¶ 19.

Rule 317. Interception of Wire and Oral Communication

(a) *General rule.* Wire or oral communications contribute evidence obtained as a result of an unlawful search or seizure within the meaning of Rule 311 when such evidence must be excluded under the Fourth Amendment to the Constitution of the United States as applied to members of the armed forces or if such evidence must be excluded under a statute applicable to members of the armed forces.

(b) *Authorization for judicial applications in the United States.* Under section 2516(1) of title 18, United States Code, the Attorney General, or any Assistant Attorney General specially designated by the Attorney General may authorize an application to a federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of title 18, United States Code, an order authorizing or approving the interception of wire or oral communications by the Department of Defense, the Department of Transportation, or any Military Department for purposes of obtaining evidence concerning the offenses enumerated in section 2516(1) of title 18, United States Code, to the extent such offenses are punishable under the Uniform Code of Military Justice.

(c) *Regulations.* Notwithstanding any other provision of these rules, members of the armed forces or their agents may not intercept wire or oral communications for law enforcement purposes unless such interception:

(1) takes place in the United States and is authorized under subdivision(b);

(2) takes place outside the United States and is authorized under regulations issued by the Secretary of Defense or the Secretary concerned; or

(3) is authorized under regulations issued by the Secretary of Defense or the Secretary concerned and is not unlawful under section 2511 of title 18, United States Code.

ANALYSIS

(a) *General Rule.* The area of interception of wire and oral communications is unusually complex and fluid. At present, the area is governed by the Fourth Amendment, applicable federal statute, DOD directive, and regulations prescribed by the Service Secretaries. In view of this situation, it is preferable to refrain from codification and to vest authority for the area primarily in the Department of Defense or Secretary concerned. Rule 317(c) thus prohibits interception of wire and oral communications for law enforcement purposes by members of the armed forces except as authorized by 18 U.S.C. § 2516, Rule 317(b), and when applicable, by regulations issued by the Secretary of Defense or the Secretary concerned. Rule 317(a), however, specifically requires exclusion of evidence resulting from noncompliance with Rule 317(c) only when exclusion is required by the Constitution or by an applicable statute. Insofar as a violation of a regulation is concerned, *compare United States* v. *Dillard*, 8 M.J. 213 (C.M.A. 1980) *with United States* v. *Caceres*, 440 U.S. 741 (1979).

(b) *Authorization for Judicial Applications in the United States.* Rule 317(b) is intended to clarify the scope of 18 U.S.C. § 2516 by expressly recognizing the Attorney General's authority to authorize applications to a federal court by the Department of Defense, Department of Transportation, or the military departments for authority to intercept wire or oral communications.

UNITED STATES MARINE CORPS
MARINE CORPS BASE
CAMP PENDLETON, CALIFORNIA 92055

IN REPLY REFER TO:
BI4:JLN:cw
5800
4 November 1981

From: Assistant Chief of Staff, Staff Judge Advocate
To: Distribution List

Subj: Inspections and the use of marijuana detection dogs

Ref: (a) Military Rules of Evidence

Encl: (1) Guidelines for Use of Drug Detection Dogs

1. Information This memorandum addresses the use of marijuana dogs in inspections and distinguishes between inspections and searches.

2. Background Inspections of bachelor enlisted quarters are primarily designed to ensure that the command is properly equipped, functioning properly, and that personnel maintain their living spaces in a clean and sanitary condition. The ultimate goal is to preserve the morale of our enlisted Marines, and to ensure that they are present, fit and ready for duty. This, of course, is a necessary and legitimate exercise of a commander's powers and responsibilities. If, during the course of such a valid inspection, evidence or contraband is discovered, it may be lawfully seized. See Committee for GI Rights v. Calloway, 518 F. 2d 466 (D.C. Cir. 1975). If, however, the primary purpose of the "inspection" is to gather evidence for use at courts-martial, then the "inspection" will be characterized as a search. Likewise, if at some point during an inspection the inspector develops probable cause to believe that contraband is located in a specific place beyond the scope of the inspection, then he must satisfy certain requirements before exceeding the scope of the inspection and commencing a search for contraband.

3. Discussion Included within the regulations governing inspections is explicit authorization for the inspector to use reasonable natural or technological aids. See reference (a) at Rule 313. Just as a voltmeter may be used to check for electrical hazards, drug detection dogs may be used when inspecting for drugs. Although these dogs typically are trained to detect only contraband, their presence will not, by itself, contaminate an otherwise valid inspection or turn it into a search. Information provided by drug detection dogs and their handlers to the commander during an inspection may provide the commander with information on which to base his probable cause decision.

4. Example The above principles may best be illustrated by the following hypothetical: A commanding officer orders weekly inspections of the bachelor enlisted quarters' rooms of the Marines within his command. These inspections are designed specifically to promote and insure the cleanliness and sanitary conditions of the living spaces and the serviceability of Government property, and in broader terms, to ensure the fitness and readiness of the command. The weekly inspection includes the common areas, under sinks, the heads, under beds, etc., but does not extend to opening wall lockers, modules, etc. The commander further authorizes the inspector to be accompanied by a drug detection dog and

AD-A145 877 NOT IN MY NAVY A LEGAL GUIDE TO DRUG ABUSE(U) NAVAL JUSTICE SCHOOL NEWPORT R I JUN 84 3/4

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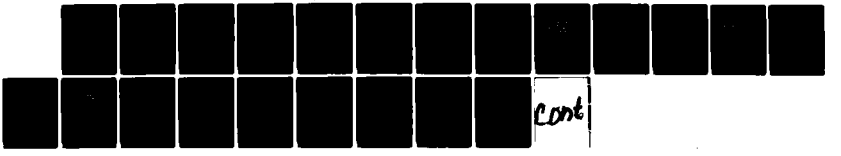

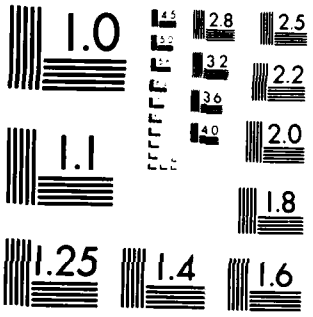

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handler. While the cleanliness and safety aspects of the room are being inspected, the dog is permitted to sniff around the room. In one room the inspector sees a clear bag of green, leafy vegetable matter under a bed; simultaneously, the dog becomes visibly excited and agitated while sniffing around a wall locker. If the inspector, based on his past education, training and experience, believes the bag under the bed contains marijuana, he may seize it as contraband. (As the inspector is lawfully in the room, contraband may be seized without prior authorization if observed "in plain view" during the inspection). If the dog handler tells the inspector that his dog has just "alerted" on the wall locker, the inspector may suspect that further contraband may be located inside the locker. However, to open the locker door to satisfy those suspicions is beyond the scope of the inspection (again assuming that this was not a wall locker inspection). For this inspector to take it on himself to cut the lock and open the locker door, "triggered" by the dog's alert would be to usurp the commanding officer's authority, for only the commanding officer has authority to order a search. For the inspector to lawfully enter the wall locker in this example, authorization must be obtained from the commanding officer. The commander, once advised that the dog had "alerted," and the significance of the alert, could authorize a search of that locker if he believed that more likely than not it contained contraband capable of being detected by the dog. The commander could reasonably arrive at this conclusion if he was aware of the capabilities of the dog, and believed that the dog's particular conduct reliably indicated the presence of detectable contraband. This conclusion would be based on the commander's knowledge of the training, experience and capabilities of the dog team (the "reliability" of the dog and handler) and on the conduct of the dog toward this particular locker (whether this "reliability" was manifested by the dog on this particular occasion). This information could be provided to the commander either orally (under oath), by the inspector and/or dog handler, or the commander could personally view the conduct of the dog by having him reintroduced to the room and locker in his presence. If the commander is satisfied, he would reach the conclusion that probable cause existed to believe contraband is in the locker, and he could authorize a search of that space. The alert by the dog would not preclude the continuing inspection of the rest of the BEQ.

5. Conclusion The enclosure has been prepared to assist you in the use of drug detection dogs to augment health and welfare inspections within your command. Should further information or assistance be required, please contact me or my deputy, Lieutenant Colonel Campbell, at extension 5943; the Military Justice Officer, Major Rachow, at 5125/5163; or the Chief Trial Counsel, Captain Newton, at 5755/56.

RUFUS C. YOUNG, JR.

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GUIDELINES FOR USE OF DRUG DETECTION DOGS

1. Prior to using drug detection dog teams in inspections, the commanding officer should visit the dog facilities aboard Marine Corps Base, Camp Pendleton (Call Lieutenant Colonel Palchak or Major Turner at extension 5001.). A visit should provide insight into the general role of dogs in law enforcement activities aboard the base. Specifically, the commanding officer should view the living and training facilities, observe demonstrations of dogs at work, and receive instruction on training programs and general systems of record-keeping. The commander should also be briefed on the capabilities of dogs in general, the criteria used for selection of dogs for detector training, and the various procedures and techniques available for use.

2. Whether or not dogs are involved in an inspection, the commanding officer should insure that inspecting officers understand the scope of their inspection. For example, if the commander intends for the inspection to extend to the entire BEQ area except for locked wall modules, this should be made clear to inspecting officers and dog handlers.

3. On the day of the inspection of, if it is one, the search, the commanding officer should be introduced to the dog team. It is suggested that the following factors be discussed and considered:

a. What is the history of this dog? What substances is he or she trained to detect?

b. What is the experience and training of this handler?

c. How long have they worked as a team? What training have they received?

d. Are there any recurring problems or eccentricities peculiar to this dog?

e. What is the "track record" of this dog in discovering contraband prior to the day of the search or inspection; specifically, what is his percentage of false alerts or mistakes? In this regard, the commander should inspect the records reflecting this dog's past performance.

f. What is the present health and condition of the dog? When did the dog last work?

g. Are there any circumstances of "distractors" which adversely affect this dog's abilities?

h. In what manner does this dog "alert" to contraband?

i. Is this trainer able to distinguish between a "live alert" (to the actual presence of contraband) and a "dead scent" (an area where the contraband has recently been located)?

j. What procedure will be employed in using this dog team?

It is recommended that the commander observe a demonstration of the dog "alerting" on known contraband prior to the dog's actual use.

3. During the course of the inspection, it is better practice for the commanding officer not to accompany the dog team. Should the dog "alert" to an object, the commander will be approached to authorize a search. When a commanding officer is asked for permission to search an area within his command, he may authorize the search only upon his independent determination that there is probable cause to believe that contraband is present in that specified area.

If the commanding officer is actively engaged in the "competitive enterprise of ferreting out crime," the law presumes him to be incapable of making that probable cause determination in a "neutral and detached" manner. This independent determination may be made by having the inspector and the handler relate to the commander all of the relevant facts which lead them to think a further search is necessary. This may be done telephonically and should be done under oath. The commander should elicit all the facts necessary for his decision whether or not to authorize a search. The commander may, upon learning of the "alert," go to the suspect area and personally observe the dog react. Whatever the method employed, the commander must arrive at his own determination of whether or not contraband is likely to be found in a specific place, and not rely exclusively on the conclusions of others. In this regard, the dog may be analogized to a "meter;" before a commander may rely on the reading registered on a "meter," he must be convinced that the device is in proper working order, that it can accurately detect that which it purportedly is detecting, and that nothing on this occasion is interfering with that capability. Hence, the importance of learning as much as possible about the dog team and the circumstances surrounding this particular "alert" cannot be overemphasized.

4. For additional information, call the Military Justice Officer or Chief Trial Counsel in the Office of the Assistant Chief of Staff, Staff Judge Advocate. For Marine Corps Base units, the numbers are: MJO: 5125/5163; Chief Trial Counsel: 5755/5756.

Navy Drug Detector Dogs

Purpose: To provide information on current procurement procedures and to outline the methods to use when employing Drug Detector Dog (DDD) Teams.

Procurement

All dogs for the Military Working Dog Program are screened and purchased for the Department of Defense by the DOD Dog Center located at Lackland AFB, San Antonio, Texas. The Navy requirements for military working dogs are determined from user requests and are submitted to the Air Force via the Commander, Naval Military Personnel Command (NMPC-84). Commands are given quotas for the Military Working Dog School at Lackland AFB by NMPC-84 from those allocated to the Navy. Funding for the purchase of dogs comes from the Commander, Naval Military Personnel Command (NMPC-84). Funding for travel and per diem is the responsibility of the handlers parent command. Under the new program where billets have been established for Drug Detector Dog handlers, the handlers will be trained enroute as part of their PCS move. All expenses for the maintenance of the Drug Detector Dog Team is the responsibility of the activity where the team is located. The prospective handler receives a dog at the start of training and he and the animal progress through the course of instruction together. Upon graduation from the school both the handler and dog return to the command. Under procedures recently implemented, a handler who has already been through the school can receive a pre-trained Drug Detector Dog necessitating only a few days of familiarization between the dog and handler. Previously, pre-trained handlers had to attend the full course of instruction in order to receive a replacement dog. The full course of instruction for the Drug Contraband Course is eleven weeks.

Employment of DDD Teams

The following methods and time frames for searches have proven most effective.

-- Approximately 30 minutes prior to the ships getting underway and with the crew at Sea and Anchor Detail the DDD Teams should come aboard. During this period all personnel must remain at their posts, out of the areas to be searched until after the DDD Teams have left the ship. The teams can be taken off by tug or helicopter.

-- Weekends are particularly good for conducting a search as security is generally lax and persons going to and from liberty break out their drugs for use from the various hiding places around the ship.

-- The period following a Pay Day is a good time for a search. Usually amounts of narcotics are fairly plentiful on board for a period of three to seven days following a pay period. During this period ship board dealers (who deal in very small amounts generally) are active and the average user has money to spend.

-- Barracks searches should be held during working hours, weekends and the period after Pay Day, generally the same time frames as ship searches.

Special Considerations

-- The period before Pay Day is a very poor time to conduct a search. It should be remembered that the dogs will alert on seeds and residue too small to see and generally there will be nothing of substance to be found.

-- Drug Dogs should not be transferred via ship-to-ship Hi-line or 'wired' from a helicopter.

-- The time frame for a search varies greatly. A destroyer-sized vessel can be searched by two dogs in approximately two and a half to three hours. One dog and handler can search a vehicle in one and a half minutes, screen 125 packages in seven minutes, and check fifty boxes and suitcases in three minutes. Four dogs and handlers working seven hours a day for a month probably cannot adequately search an aircraft carrier.

-- The number one problem facing DDD Teams in their searches is the reluctance of Commanding Officers to hold searches. Common problems are the restriction of the search to specific areas of the ship, restriction of the search to a particular time frame, and the 'leaking' of the knowledge of the impending search.

-- The only persons who should have knowledge of the impending search are the Commanding Officer and the Executive Officer. Other individuals may be informed the day of the search and no more than a few hours in advance of the search.

Summary: Regardless of how sophisticated Drug Detector Dogs become in their ability to detect concealed narcotics, they are not a panacea for drug enforcement. In considering the employment of Drug Detector Dogs, the obvious pitfalls of excessive optimism or extreme cynicism with respect to their capabilities should be avoided.

UNCLASSIFIED
R 150021Z DEC 82
FM: CNO WASHINGTON DC
TO: NAVOP
INFO RUEAHOF/EXEC DIR MIL POSTAL SVC AGCY ALEX VA//MPSA-OP//
RI
UNCLAS //N05112//
NAVOP 138/82
SUBJ: INSPECTION AND SEARCH OF MILITARY POST OFFICE MAIL OVERSEAS
A. CH-1 TO OPNAVINST 5112.4 NOTAL
1. SUMMARY. THIS NAVOP PROVIDES INFORMATION REGARDING NEW DOD REGULATIONS ON INSPECTION AND SEARCH OF MILITARY POSTAL SYSTEM (MPS) MAIL OVERSEAS.
2. AS A RESULT OF COMMANDERS'/COMMANDING OFFICERS' CONCERNS REGARDING USE OF THE MPS AS A CONDUIT FOR DRUG TRAFFICKING AND BLACK MARKETING, DOD AND THE U.S. POSTAL SERVICE (USPS) ENTERED INTO AN AGREEMENT WHEREBY RESPONSIBILITY FOR THE PRIVACY AND SECURITY OF MPS MAIL OVERSEAS HAS BEEN TRANSFERRED TO DOD. THE NEW REGULATIONS PROMULGATED BY DOD AND DISTRIBUTED BY REF A, WERE EFFECTIVE 20 NOV 1982. THEY APPLY ONLY TO MAIL IN THE MPS OVERSEAS. FOR PURPOSES OF THESE REGULATIONS, OVERSEAS MEANS ANY PLACE OUTSIDE THE UNITED STATES (THE 50 STATES AND THE DISTRICT OF COLUMBIA) IN WHICH THE USPS DOES NOT OPERATE A CIVILIAN POST OFFICE. THIS ALSO INCLUDES SHIPS OPERATING OFFSHORE BEYOND THE 3-MILE LIMIT OF THE UNITED STATES. THE REGULATIONS PROVIDE FOR:

A. RANDOM INSPECTION OF MAIL BAGS AND PARCELS IN AN OVERSEAS MILITARY POSTAL FACILITY.

B. THE SEARCH AND SEIZURE OF INDIVIDUAL ITEMS OF MPS MAIL, BASED ON PROBABLE CAUSE.

C. THE USE OF MAIL COVERS IN LIMITED CIRCUMSTANCES WHEN AUTHORIZED BY SPECIALLY DESIGNATED MILITARY OFFICIALS.

D. CUSTOMS INSPECTIONS OF MPS MAIL BY FOREIGN CUSTOMS OFFICIALS.

3. THE AUTHORITY TO CONDUCT RANDOM INSPECTIONS, PROBABLE CAUSE SEARCHES, MAIL COVERS, AND CUSTOMS INSPECTIONS HAS ALWAYS EXISTED. IN THE PAST, HOWEVER, THE AUTHORITY TO ORDER SUCH INSPECTIONS, SEARCHES, AND MAIL COVERS RESTED EITHER WITH USPS INSPECTORS OR WITH FEDERAL JUDGES AND MAGISTRATES. UNDER THE NEW REGULATIONS, MILITARY COMMANDERS/COMMANDING OFFICERS HAVE THE AUTHORITY TO AUTHORIZE THESE INSPECTIONS AND SEARCHES. IT IS EMPHASIZED THAT THE SERVICE MEMBER'S PRIVACY RIGHTS WILL CONTINUE TO BE PROTECTED TO THE MAXIMUM EXTENT POSSIBLE CONSISTENT WITH THE NEED OF THE MILITARY TO ENSURE THAT THE MPS IS NOT USED AS A CONDUIT FOR DRUG TRAFFICKING, BLACK MARKETING, AND OTHER ILLEGAL ACTIVITY.
4. THE NEW REGULATIONS AUTHORIZE FIRST CLASS MAIL TO BE OPENED ONLY IN FOUR SITUATIONS:

(1) WITH THE CONSENT OF THE SENDER OR ADDRESSEE,
(2) PURSUANT TO A SEARCH WARRANT OR AUTHORIZATION BASED ON PROBABLE CAUSE.
(3) PURSUANT TO A FOREIGN CUSTOMS INSPECTION AND
(4) WHEN MAIL IS SUSPECTED OF BEING DANGEROUS, SUCH AS A SUSPECTED MAIL BOMB.

5. UNDER THE PROVISIONS OF REFERENCE (A), COGNIZANT COMMANDING OFFICERS ARE AUTHORIZED:

A. TO CONDUCT RANDOM INSPECTION OF MAIL BAGS AND PARCELS IN AN OVERSEAS MILITARY POSTAL FACILITY, USING FLUOROSCOPES, METAL DETECTORS, DRUG DETECTION DOGS, OR SIMILAR MEANS, WHEN AUTHORIZED BY THE COGNIZANT COMMANDING OFFICER. FIRST CLASS MAIL WILL NOT BE OPENED AS PART OF A RANDOM INSPECTION PROGRAM UNLESS SUCH INSPECTION GIVES RISE TO PROBABLE CAUSE TO BELIEVE THAT THE MAIL ITEM CONTAINS DRUGS, OTHER CONTRABAND, OR OTHER EVIDENCE OF A CRIME.

B. TO EFFECT THE SEARCH AND SEIZURE OF INDIVIDUAL ITEMS OF MPS MAIL, BASED ON PROBABLE CAUSE, IN ACCORDANCE WITH THE MILITARY RULES OF EVIDENCE.

C. TO USE MAIL COVERS IN LIMITED CIRCUMSTANCES WHEN AUTHORIZED BY SPECIALLY DESIGNATED MILITARY OFFICIALS TO ASSIST IN CRIMINAL AND COUNTERINTELLIGENCE INVESTIGATIONS. A MAIL COVER CONSTITUTES THE RECORDING OF INFORMATION FROM THE OUTSIDE COVER OF MAIL RECEIVED OR SENT BY A NAMED INDIVIDUAL BY A MILITARY POST OFFICE (MPO) SUPERVISOR OR DESIGNATED MILITARY POSTAL CLERK.

D. TO PERMIT CUSTOMS INSPECTIONS OF MPS MAIL BY FOREIGN CUSTOMS OFFICIALS, UNLESS EXEMPT FROM INSPECTION BY INTERNATIONAL OR STATUS OF FORCES AGREEMENT. ALSO AUTHORIZED ARE CUSTOMS INSPECTIONS BY U.S. MILITARY CUSTOMS OFFICIALS WHERE INTERNATIONAL OR STATUS OF FORCES AGREEMENT EXEMPTS MPS MAIL FROM FOREIGN CUSTOMS INSPECTION ON THE CONDITION THAT THE UNITED STATES CONDUCT SUCH INSPECTION.

6. DUE TO THE EXTREMELY SENSITIVE NATURE OF THIS SUBJECT, IT IS IMPERATIVE THAT IMPLEMENTATION OF REF A BE CLOSELY COORDINATED WITH STAFF JUDGE ADVOCATES, LAW ENFORCEMENT OFFICIALS, PUBLIC AFFAIRS OFFICERS, AND MILITARY POSTAL AUTHORITIES.

BT

#9932

THE SELF-REFERRAL AND DRUG EXEMPTION PROGRAMS

SECTION XI

II. NAVY: SECNAVINST 5300.28 cancelled the Navy Drug Exemption Program and established a new program called "Voluntary Self-Referral for Rehabilitation." This program enables any member who seeks treatment or rehabilitation for drug abuse to initiate the evaluation and treatment process by voluntarily disclosing the nature and extent of his/her drug abuse to qualified drug screening personnel. This voluntary disclosure includes statements made at Alcoholics Anonymous and Narcotics Anonymous meetings and while attending NASAP/NDSAP classes. OPNAVINST 5350.4 defines qualified drug screening personnel as medical officers, qualified command Substance Abuse Coordinators, Counseling and Assistance Center (CAAC) counselors and properly trained and qualified Substance and Abuse Treatment Specialists. Immediately following the disclosure, the individual to whom the disclosure is made shall notify the member's commanding officer by letter and recommend a course of treatment.

Disclosures made to appropriate drug abuse screening, counseling, treatment or rehabilitation personnel relating to the member's past drug use or possession of drugs incident to such use are privileged provided that the disclosures are for the express purpose of seeking or obtaining treatment or rehabilitation. They may not be used against the member in any disciplinary action under the UCMJ or to characterize a discharge, This privilege does not preclude the introduction of evidence for impeachment or rebuttal purposes in any proceeding in which drug abuse (or lack thereof) has first been introduced by the member, nor does it preclude use of such disclosures as a basis for discharge.

The following disclosures are not privileged: information disclosed to persons other than drug screening, counseling, treatment, or rehabilitation personnel, or information disclosed after official questioning in connection with any investigation or any administrative or disciplinary proceeding. Notwithstanding a member's self-referral, appropriate disciplinary or administrative action including separation with an other than honorable discharge may be taken against the member for drug abuse occurring either before or after self-referral. Such actions can be taken only if they are based upon independent evidence (i.e., evidence which is not derived directly or indirectly from disclosures made by the member which are privileged).

III. MARINE CORPS: Although the provisions of SECNAVINST 5300.28 establishing the Voluntary Self-Referral for Rehabilitation Program also apply to the Marine Corps, the Marines have not yet cancelled the Marine Corps Drug Exemption Program established by MCO 5355.3. The Drug Exemption Program provides that the commander will, upon proper request of eligible personnel, grant a one-time exemption from punitive or adverse administrative action for prior in-service incidents of personal drug use or drug possession for the purpose of personal use. The Request For and Grant of Exemption Form to be used is provided in enclosure (1) to the order. Exemption also may be granted to Marines who voluntarily request exemption after having been mentioned as users or possessors of drugs for personal use in the exemption disclosure of another member. The grant of

exemption will be extended only to voluntary statements made prior to the Marine having been apprehended or officially warned that he or she is suspected of drug abuse or drug-related offenses. Exemption may not be granted to members who have been previously designated as drug abusers or granted recruitment waivers for pre-service drug use, nor for wrongful sale, transfer, distribution, or possession of drugs with the intent to sell, transfer, or distribute. Disclosures made to persons other than the designated unit exemption representative will not qualify for exemption.

NOTE: It now appears (November 1983) that the Marine Corps Exemption Program will be eliminated by a forthcoming MCO 5300 __, Subj: The Marine Corps Substance Abuse Program. The new Marine Corps "Voluntary Drug Disclosure Program" will apparently be very similar to the Navy's "Voluntary Self-Referral for Rehabilitation" program.

ADMINISTRATIVE SEPARATIONS

SECTION XII

ADMINISTRATIVE SEPARATIONS

I. INTRODUCTION

Administrative separation processing is a valuable tool for the commander contemplating an appropriate disposition of a drug abuse case. Current regulations evidence a "zero drug tolerance" approach for the Navy and Marine Corps with the exception of certain one or two-time enlisted drug abusers whom the commander considers to have potential for further productive service and who are not drug dependent.

The Navy's drug policy is set forth in OPNAVINST 5350.4 and the administrative separation procedures are contained in MILPERSMAN 3630500 and 3630620. MARCORSEPMAN 6208 and 6210.5 set forth the administrative discharge guidelines for the Marine Corps. Reference may also be made to the Naval Justice School Civil Law Study Guide, Chapters 6 and 7. Remember, too, that separation processing does not preclude appropriate disciplinary action.

II. NAVY AND MARINE CORPS SEPARATIONS

A. Drug Abuse Rehabilitation Failure (MILPERSMAN 3630500; MARCORSEPMAN 6208).

A servicemember may be separated from the naval service with a separation characterized as Honorable or General or with an uncharacterized Entry Level Separation (ELS) due to drug abuse rehabilitation failure. After a member has been formally referred to a program of rehabilitation in accordance with appropriate service regulations, the member may be separated for failure through inability or refusal to participate in, cooperate in, or successfully complete such a program in the following circumstances.

1. There is a lack of potential for continued military service;

or

2. Long-term rehabilitation is determined necessary and the member is transferred to a civilian (VA) medical facility for rehabilitation.

3. OPNAVINST 5350.4 seems to indicate that if a servicemember uses drugs any time within two (2) years of completion of a rehabilitation program, the servicemember has failed to successfully complete the program. (OPNAVINST 5350.4 , enclosure (7) at para. 6.) Accordingly, he/she could be processed for drug rehabilitation failure.

> NOTE: The Marine Corps maintains a different position. If an individual completes a drug rehabilitation program (including after care), subsequent use of drugs will not be the basis for processing under the category drug rehabilitation failure.

B. Misconduct-Drug Abuse (MILPERSMAN 3630620; OPNAVINST 5350.4; MARCORSEPMAN 6210).

1. Definitions.

a. Drug Abuse - The illegal or wrongful use or possession of a controlled substance.

b. Drug-related Incident - Any incident in which drugs are a factor, including voluntary self-referral, use and/or possession of drugs or paraphernalia, or trafficking. For the definition of paraphernalia see SECNAVINST 5300.28 at enclosure (1).

2. Administrative Processing.

a. Basis.

A servicemember may be processed for misconduct due to drug abuse. Any evidence of drug abuse may constitute a drug incident. On the basis of one drug incident involving simple use and/or possession a member may be processed for separation. When two drug incidents involving simple use and/or possession have been identified, the servicemember should be processed unless the commanding officer determines that the member exhibits exceptional potential for future service. (In the Navy if the abuser is retained, NMPC must be notified. Where three drug incidents involving simple use and/or possession have been identified, the member must be processed unless a waiver is obtained from NMPC/CMC. Processing is mandatory for any drug incidents involving sale, trafficking (distribution), or possession of illegal drugs with the intent to distribute.

b. Characterization.

Characterization of service for members processed due to misconduct - drug abuse will normally be under Other Than Honorable conditions, however, an Honorable, General, or ELS is possible. Drug incidents based upon evidence which is not usable for disciplinary purposes may not be used to characterize the separation. Therefore, if the only evidence of drug abuse is based upon command assistance urinalysis, fitness for duty exams, or self-referral disclosures (exemption), then the service member must receive either an Honorable, General, or ELS (as warranted by his/her service record.)

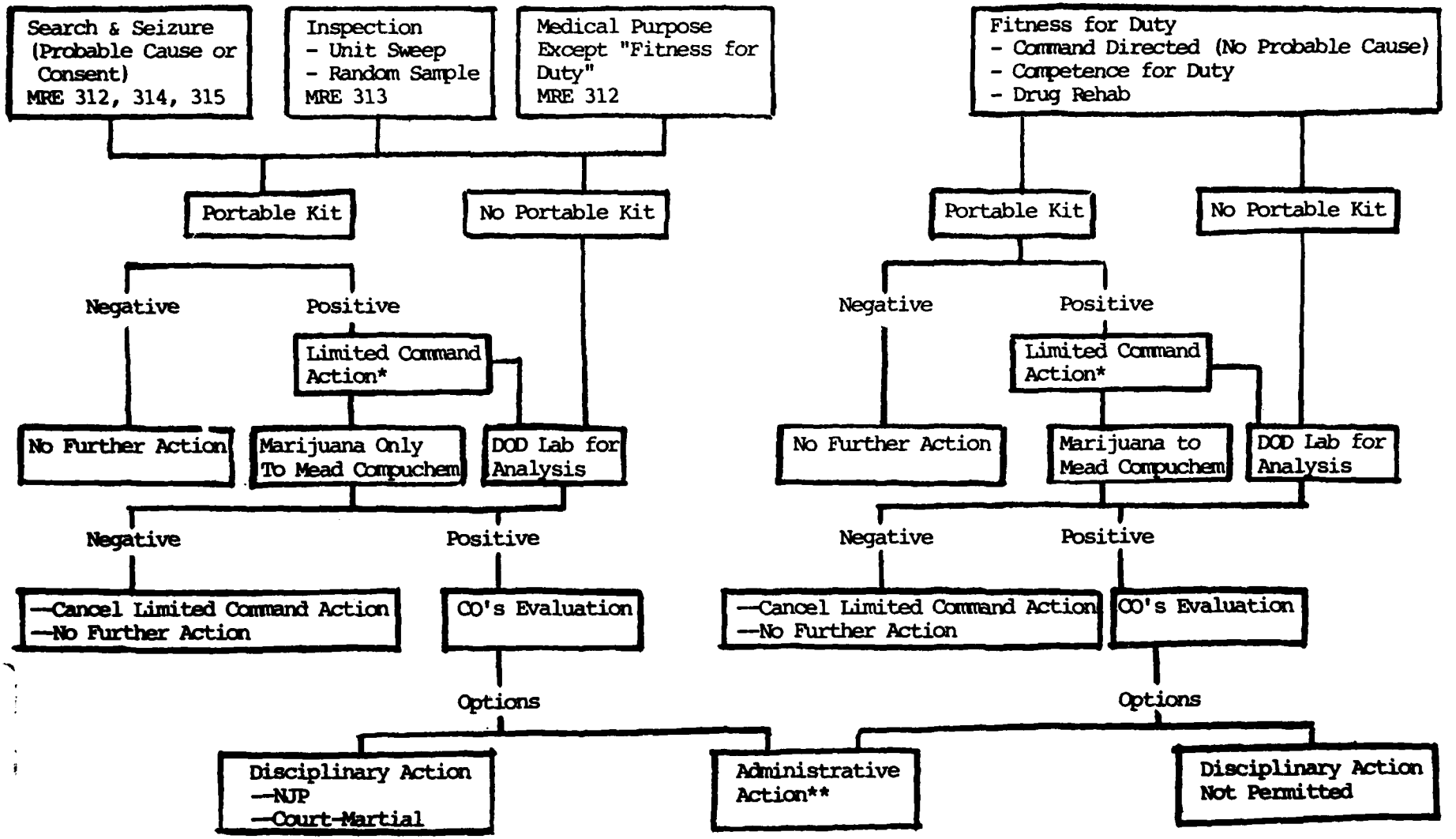
c. Processing.

Presently, a servicemember in the Marine Corps is entitled to an administrative board if he/she is processed for misconduct -- drug abuse. This is true even though the drug incident upon which the processing is based may be one which will not authorize separation under Other Than Honorable conditions. The Navy, on the other hand, provides for the use of notification procedures when processing is based solely on urinalysis evidence, the results of which cannot be used to characterize discharge (i.e., no OTH is authorized). A forthcoming change to the MARCORSEPMAN will permit Marines to use notification procedures in the same circumstances.

A DRUG ABUSER
" FLOW CHART "

SECTION XIII

RATIONALE FOR URINALYSIS TESTING



* Limited Command Action

** Administrative Action

See page XIII-2 for definitions.

LIMITED COMMAND ACTION INCLUDES:

1. Removal from leadership position.

2. Reassignment away from flight line, military vehicle operation, etc.

3. Counselling including CAAC referral.

ADMINISTRATIVE ACTION INCLUDES:

1. "Limited command action."

2. After hours education.

3. Withdrawal of:

   a. Driving privileges

   b. On station housing

   c. Flight status

   d. Off station living privilege

4. Urinalysis surveillance.

5. Professional competency board.

6. Disqualification from PRP, submarine, nuclear power, and other special programs.

7. Fitness report or evaluation comment.

8. Misconduct administrative discharge (no OTH if based only on "fitness for duty" testing).

APPENDIX A

Laboratory Drug Standards

The use of drug standards is an important and necessary aspect of the daily routine in the analysis of drug substances in a forensic laboratory. Actual standards are required for two main reasons. First, they are needed in performing comparative chemical examinations such as thin-layer chromatography, color tests, microcrystalline tests and in the preparation of standard solutions for quantitative analyses. Standards are also needed to generate known ultraviolet, infrared and mass spectra which will ultimately be compared to spectra received from submitted samples. These standards originate from only a few sources.

The major source for new laboratory drug standards at this time is the USP (United States Pharmacopoeia). While the use of prescription drugs on a regular basis is important to good health and even life to many people, very rarely is the doctor, the pharmacist, the nurse or the patient in any position to determine personally the quality and reliability of the drug being used. Instead, all of these people rely on an independent national standards-setting system, the United States Pharmacopoeial Convention, Inc. (USPC). The USP has been recognized in federal law - and in virtually every state law - as the national standard governing the strength, quality, purity, packaging, and labeling of drugs. The USPC is a non-profit organization which sustains itself wholly from the sale of its official compendia for standards for drugs and the USP Reference Standards. The USP Reference Standards are usually independently analyzed as to their suitability by three or more laboratories. The USP Drug Research and Testing Laboratory and the Food and Drug Administration Laboratories participate in testing almost all new standards and replacements for existing standards. In addition, laboratories throughout the nation, both academic and industrial, participate in the testing.

In recognition of the fact that a central source was needed to maintain authentic samples of narcotics and other drugs of abuse needed for legitimate use by analytical, clinical, research, toxicology, and police laboratories, the USP began their "Authentic Substances" program. This was done at the urging of the Drug Enforement Administration (DEA) and involves testing and distribution of samples of Schedule I and II substances. Each batch of these drugs is collaboratively tested and found to be suitable for qualitative and semi-quantitative purposes.

Other sources of drug standards which are not available from USP are:

(1) The National Institute of Drug Abuse which supplies only those substances which are not available from any other source.

(2) Commercial firms which are major suppliers of gas chromatography and other chromatographic supplies, but also supply drug, pesticide and hydrocarbon standards. Examples of these are Supelco, Inc. and the Applied Science Division of the Milton Roy Company.

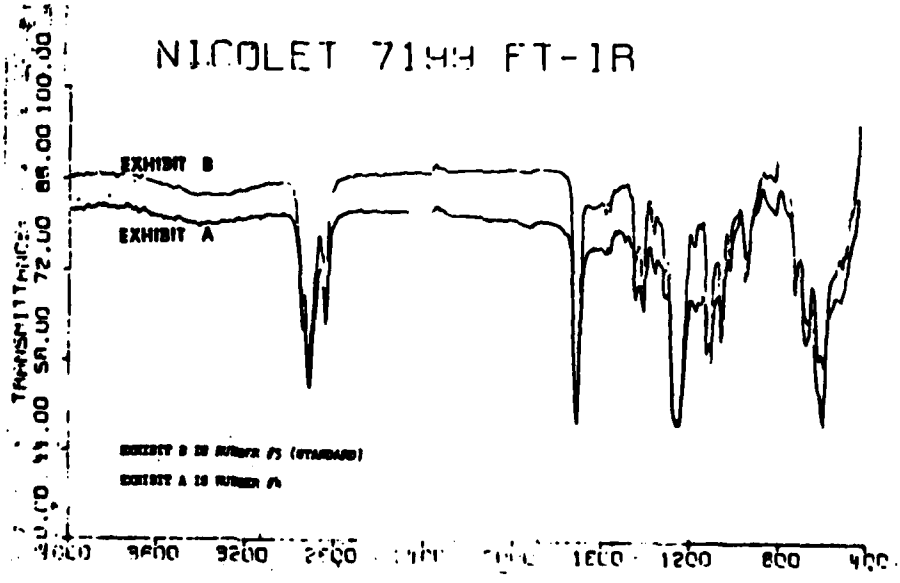
(3) The local military pharmacy which supplies prescription and over-the-counter drugs.

With the possible exception of some standards received from the local military pharmacy, all of the above standards are received in sealed containers. Once the standard arrives at the laboratory, it is the responsibility of the controlled substance custodian to receive the substance, maintain usage records, prepare standard solutions for thin-layer chromatogaphy examinations, prepare standard ultraviolet, infrared and mass spectra, and insure that adequate amounts of standards are available for use. The drug standards are stored in the laboratory based upon how they are controlled by Public Law 91-513. All Schedule I substances, as well as bulk quantities of Schedule II substances, are stored in a locked safe which conforms to the security requirements as outlined in section 1301.72 of Title 21 of the Code of Federal Regulations. Working quantities of Schedule II substances, as well as those substances listed or controlled by Schedules III through V are stored in one locked cabinet, while all prescription and over-the-counter drugs are secured in another locked cabinet.

The term "standard" is also applied to a referenced Infrared or Mass spectrum. The final step in the analysis of a drug substance is the comparison of the Infrared or Mass spectrum of a suspected drug while the Infrared or Mass spectrum of a known or standard drug substance. These standard spectra are obtained by either performing the Infrared or Mass spectrometry examination on an actual drug standard or from one of the many recognized books and journals in the scientific literature which publish these types of spectra.

Vernon P. Koziatek, Forensic Chemist
US Army Criminal Investigation
Laboratory CONUS, Fort Gordon, GA

[TCAP Note:] The following example of a spectra printout is provided for trial counsel who may not have seen one before.



EXPERT WITNESSES IN DRUG CASES

Robert Willette, Ph.D.
1 Action Place
Annapolis, MD 21401

Mahmoud Elsohley, Ph.D.
School of Pharmacy
University of Mississippi
University, MS 38677

Alan Q. Jones, Ph.D.
School of Pharmacy
University of Mississippi
University, MS 38677

Bryan S. Finkle, Ph.D.
Center for Human Toxicology
University of Utah
21 Skaggs Hall
Salt Lake City, UT 84112

Rodger Foltz, Ph.D.
Center for Human Toxicology
University of Utah
32 Skaggs Hall
Salt Lake City, UT 84112

Monroe Wall, Ph.D.
Research Triangle Institute
P.O. Box 12194
Research Triangle Park, NC 27709

Ed Cook, Ph.D.
Research Triangle Institute
P.O. Box 12194
Research Triangle Park, NC 27709

Charles Gorodetzky, Ph.D.
Additiction Research Center
P.O. Box 12390
Lexington, KY 40583

Arthur McBay, Ph.D.
Office of the Chief Medical Examiner
P.O. Box 2488
Chapel Hill, NC 27514

Hans Hager, Ph.D.
Roche Diagnostics
340 Kingland Street
Nutley, NJ 07110

Richarge Bastiani, Ph.D.
SYVA Company
3181 Porter Drive
Palo Alto, CA 94304

Carl Pederson, Ph.D.
Roche Diagnostics
340 Kingsland Street
Nutley, NJ 07110

Ted Schram, D.D.
Behavior Research Inc.
11524 Valle Vista Road
Lakeside, CA 92040

Robert Dupont, Ph.D.
6191 Executive Building
Rockville, MD 20852

Richard Hawks, Ph.D.
5600 Fishers Lane
NIDA, Room 9-42
Rockville, MD 20857

Carlton E. Turner, Ph.D.
Director, Drug Abuse Policy Office
Old Executive Office Building, Room 218
White House
Washington, D.C. 20500

Col. Manders
Toxicology Department
Armed Forces Institute of Pathology (AFIP)
Washington, D.C.
COM. (202) 576-2910; AV. 291-2910
Note: AFIP has many experts (both military and civilian)

Assoc. Professor Mario Perez-Reyes, M.D.
Division of Health Affairs
Dept. of Psychiatry
University of North Carolina School of Medicine
Chapel Hill, NC 27514
Phone: (919) 966-2544

Harold M. Ginzburg, M.D., M.P.H.
3562 Raymoor Road
Kensington, MD 20895
Phone: (301) 933-7502

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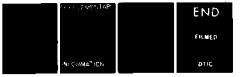

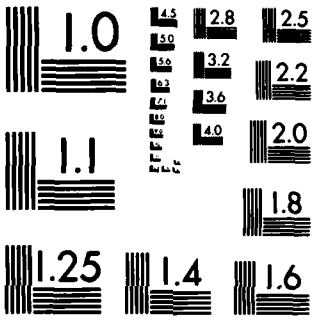

SUPPLEMENTARY

INFORMATION

AD-A145877

ERRATA

Subject: NOT IN MY NAVY - A LEGAL GUIDE TO DRUG ABUSE (6/84)

1. Please make the following changes to subject text:

a. Page I-20: Delete MCO 5355.1, MCO 5355.2, MCO 5355.3.

b. Page I-21: Delete MCO P 5300. - (Draft); add MCO P5300.12 of 25 Jun 84.

c. Page V-24: Add note: "The confirmation test currently being used in Navy DoD labs is GC/MS."

d. Page VI-12: Delete paragraph B.1; add the following:

"7. Distribution of a controlled substance and the attendant possession of the same substance are multiplicious for findings because possession is an LIO of distribution. United States v. Zubko, 18 M.J. 378 (C.M.A. 1984).

"8. Possession and use of the same drugs are multiplicious for findings because possession is an LIO of use. United States v. Bullington, 18 M.J. 164 (C.M.A. 1984).

"9. Introduction and possession with intent to distribute are not multiplicious for findings. United States v. Zupanic, 18 M.J. 387 (C.M.A. 1984)."

e. Page IX-3: Add note: "Mil.R.Evid. 313 was amended 1 August 1984 to delete the 'reasonable suspicion' basis for authorizing an inspection. Consequently, such contraband inspections must now be previously scheduled or the government will have the burden of demonstrating that the inspection was not a subterfuge search."

f. Page X-6: Delete paragraph 4.a.

g. Page X-7: Delete paragraphs 6.a., 6.b., and 6.b.(1)-(4).

h. Pages X-19 thru X-40: Delete all. (Part III, MCM, 1984, should be consulted for the correct Military Rules of Evidence.)

END

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