



**NONRESIDENT  
TRAINING  
COURSE**



January 1994

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# **Legalman 1 & C**

**NAVEDTRA 14135**

Although the words “he,” “him,” and “his” are used sparingly in this course to enhance communication, they are not intended to be gender driven or to affront or discriminate against anyone.

## PREFACE

By enrolling in this self-study course, you have demonstrated a desire to improve yourself and the Navy. Remember, however, this self-study course is only one part of the total Navy training program. Practical experience, schools, selected reading, and your desire to succeed are also necessary to successfully round out a fully meaningful training program.

**THE COURSE:** This self-study course is organized into subject matter areas, each containing learning objectives to help you determine what you should learn along with text and illustrations to help you understand the information. The subject matter reflects day-to-day requirements and experiences of personnel in the rating or skill area. It also reflects guidance provided by Enlisted Community Managers (ECMs) and other senior personnel, technical references, instructions, etc., and either the occupational or naval standards, which are listed in the *Manual of Navy Enlisted Manpower Personnel Classifications and Occupational Standards*, NAVPERS 18068.

**THE QUESTIONS:** The questions that appear in this course are designed to help you understand the material in the text.

**VALUE:** In completing this course, you will improve your military and professional knowledge. Importantly, it can also help you study for the Navy-wide advancement in rate examination. If you are studying and discover a reference in the text to another publication for further information, look it up.

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## **Sailor's Creed**

“I am a United States Sailor.

I will support and defend the Constitution of the United States of America and I will obey the orders of those appointed over me.

I represent the fighting spirit of the Navy and those who have gone before me to defend freedom and democracy around the world.

I proudly serve my country's Navy combat team with honor, courage and commitment.

I am committed to excellence and the fair treatment of all.”

# CONTENTS

## BASIC PART

CHAPTER	PAGE
1. General Administration and Security . . . . .	1 - 1
2. The Law Library and Legal Research . . . . .	2 - 1
3. Court Reporting . . . . .	3 - 1
4. Constitutional Considerations . . . . .	4 - 1
5. Nonjudicial punishment . . . . .	5 - 1
6. Pretrial Matters . . . . .	6 - 1
7. Court-Martial Trials . . . . .	7 - 1
8. Posttrial Duties and the Review Process . . . . .	8 - 1
9. Administrative Separations . . . . .	9 - 1
10. Delivery of Personnel . . . . .	10 - 1
11. Legal Assistance . . . . .	11 - 1

## ADVANCED PART

12. Claims . . . . .	12-1
13. Administrative Investigations . . . . .	13-1
14. Office Organization, Management, and Supervision	

## APPENDIX

I. References . . . . .	AI - 1
II. Glossary . . . . .	AII-1
INDEX . . . . .	INDEX-1

# INSTRUCTIONS FOR TAKING THE COURSE

## ASSIGNMENTS

The text pages that you are to study are listed at the beginning of each assignment. Study these pages carefully before attempting to answer the questions. Pay close attention to tables and illustrations and read the learning objectives. The learning objectives state what you should be able to do after studying the material. Answering the questions correctly helps you accomplish the objectives.

## SELECTING YOUR ANSWERS

Read each question carefully, then select the BEST answer. You may refer freely to the text. The answers must be the result of your own work and decisions. You are prohibited from referring to or copying the answers of others and from giving answers to anyone else taking the course.

## SUBMITTING YOUR ASSIGNMENTS

To have your assignments graded, you must be enrolled in the course with the Nonresident Training Course Administration Branch at the Naval Education and Training Professional Development and Technology Center (NETPDTC). Following enrollment, there are two ways of having your assignments graded: (1) use the Internet to submit your assignments as you complete them, or (2) send all the assignments at one time by mail to NETPDTC.

**Grading on the Internet:** Advantages to Internet grading are:

- you may submit your answers as soon as you complete an assignment, and
- you get your results faster; usually by the next working day (approximately 24 hours).

In addition to receiving grade results for each assignment, you will receive course completion confirmation once you have completed all the

assignments. To submit your assignment answers via the Internet, go to:

**<http://courses.cnet.navy.mil>**

**Grading by Mail:** When you submit answer sheets by mail, send all of your assignments at one time. Do NOT submit individual answer sheets for grading. Mail all of your assignments in an envelope, which you either provide yourself or obtain from your nearest Educational Services Officer (ESO). Submit answer sheets to:

COMMANDING OFFICER  
NETPDTC N331  
6490 SAUFLEY FIELD ROAD  
PENSACOLA FL 32559-5000

**Answer Sheets:** All courses include one “scannable” answer sheet for each assignment. These answer sheets are preprinted with your SSN, name, assignment number, and course number. Explanations for completing the answer sheets are on the answer sheet.

**Do not use answer sheet reproductions:** Use only the original answer sheets that we provide—reproductions will not work with our scanning equipment and cannot be processed.

Follow the instructions for marking your answers on the answer sheet. Be sure that blocks 1, 2, and 3 are filled in correctly. This information is necessary for your course to be properly processed and for you to receive credit for your work.

## COMPLETION TIME

Courses must be completed within 12 months from the date of enrollment. This includes time required to resubmit failed assignments.

## **PASS/FAIL ASSIGNMENT PROCEDURES**

If your overall course score is 3.2 or higher, you will pass the course and will not be required to resubmit assignments. Once your assignments have been graded you will receive course completion confirmation.

If you receive less than a 3.2 on any assignment and your overall course score is below 3.2, you will be given the opportunity to resubmit failed assignments. **You may resubmit failed assignments only once.** Internet students will receive notification when they have failed an assignment--they may then resubmit failed assignments on the web site. Internet students may view and print results for failed assignments from the web site. Students who submit by mail will receive a failing result letter and a new answer sheet for resubmission of each failed assignment.

## **COMPLETION CONFIRMATION**

After successfully completing this course, you will receive a letter of completion.

## **ERRATA**

Errata are used to correct minor errors or delete obsolete information in a course. Errata may also be used to provide instructions to the student. If a course has an errata, it will be included as the first page(s) after the front cover. Errata for all courses can be accessed and viewed/downloaded at:

<http://www.advancement.cnet.navy.mil>

## **STUDENT FEEDBACK QUESTIONS**

We value your suggestions, questions, and criticisms on our courses. If you would like to communicate with us regarding this course, we encourage you, if possible, to use e-mail. If you write or fax, please use a copy of the Student Comment form that follows this page.

## **For subject matter questions:**

E-mail: n313.products@cnet.navy.mil  
Phone: Comm: (850) 452-1001, Ext. 2167  
DSN: 922-1001, Ext. 2167  
FAX: (850) 452-1370  
(Do not fax answer sheets.)  
Address: COMMANDING OFFICER  
NETPDTC (CODE N313)  
6490 SAUFLEY FIELD ROAD  
PENSACOLA FL 32509-5237

## **For enrollment, shipping, grading, or completion letter questions**

E-mail: fleetservices@cnet.navy.mil  
Phone: Toll Free: 877-264-8583  
Comm: (850) 452-1511/1181/1859  
DSN: 922-1511/1181/1859  
FAX: (850) 452-1370  
(Do not fax answer sheets.)  
Address: COMMANDING OFFICER  
NETPDTC (CODE N331)  
6490 SAUFLEY FIELD ROAD  
PENSACOLA FL 32559-5000

## **NAVAL RESERVE RETIREMENT CREDIT**

If you are a member of the Naval Reserve, you will receive retirement points if you are authorized to receive them under current directives governing retirement of Naval Reserve personnel. For Naval Reserve retirement, this course is evaluated at 5 points. (Refer to *Administrative Procedures for Naval Reservists on Inactive Duty*, BUPERSINST 1001.39, for more information about retirement points.)

## **COURSE OBJECTIVES**

In completing this nonresident training course, you will demonstrate a knowledge of the subject matter by correctly answering questions on the following: drafting correspondence, instructions and notices; legal research; pertrial confinement procedures; chain of custody procedures; review of charge sheets; interviewing witnesses; administrative discharge warnings; service of process and subpoenas; claims; administrative investigations; office organization and

management; and letters of indebtedness. Note that some material has been embedded in the basic part because it fits smoothly with existing

topics found there. Only assignment one of the LN 1 & C addresses this embedded material specifically.



## Student Comments

**Course Title:** Legalman 1 & C

**NAVEDTRA:** 14135 **Date:** \_\_\_\_\_

**We need some information about you:**

Rate/Rank and Name: \_\_\_\_\_ SSN: \_\_\_\_\_ Command/Unit \_\_\_\_\_

Street Address: \_\_\_\_\_ City: \_\_\_\_\_ State/FPO: \_\_\_\_\_ Zip \_\_\_\_\_

**Your comments, suggestions, etc.:**

<p><b>Privacy Act Statement:</b> Under authority of Title 5, USC 301, information regarding your military status is requested in processing your comments and in preparing a reply. This information will not be divulged without written authorization to anyone other than those within DOD for official use in determining performance.</p>
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NETPDTC 1550/41 (Rev 4-00)



## CHAPTER 1

# GENERAL ADMINISTRATION AND SECURITY

If you are new to the Legalman (LN) rating, you will soon learn that the scope of the rating is as broad as the Navy's legal system. In addition to clerical duties, you will be required to perform many different and important duties under the guidance of a Navy lawyer or senior LN. These duties include matters pertaining to military justice, claims, investigations, administrative discharges, and legal assistance. As you advance in the rating, you will find that your duties and responsibilities will be expanded to include performing legal research, preparing and administering office and claims budgets, interviewing of witnesses and clients, and preparing to become an office manager.

In studying the material contained in this training manual, you will encounter several terms that are used when working with law and other related legal matters. You will run across these terms throughout this manual and in your daily duties as an LN. To help you become more familiar with these terms, a glossary is attached as appendix I to this manual.

When you begin work in a new billet, whether it be in a naval legal service office (NLSO) or in a small staff judge advocate (SJA) office, one of your first jobs is to learn as much as possible about the organization in which you work. You should learn the primary responsibilities of your office and those related functions it performs. You also need to learn your office's relationship to the overall command organization. You must be able to understand the organization of your office and learn what the chain of command is for your organization.

After you understand the functions of your office; for example, claims, military justice, or legal assistance, you will see how your own duties fit into these functions. This knowledge will make your various jobs and responsibilities more interesting to you.

You should know the name and the rank or rate of every person in your office and the manner in which signing officials sign their names. You also should learn what part of the office operations each person performs and how this work contributes to the overall office functions.

Thinking of your office in relation to your ship or station, you should study the ship or station

organization and the name, title, and rank of those above your office in the chain of command. You should know which other offices are closely related to yours in their duties. To understand the Navywide program that you are a part of, you need to study the publications related to your work. Learn which reports are due and the appropriate submission format.

In this chapter we discuss matters relating to correspondence, publications and directives, files, reports control system, records disposal, logs, the Judge Advocate General Management Information System (JAG-MIS), security, and the release of government information.

### CORRESPONDENCE

One of your most important tasks is the preparation of correspondence. You will be expected to produce properly formatted official correspondence with no uncorrected errors. Correspondence does not just include basic letters. The term *official correspondence* includes all written materials—standard, business, joint, and multiple-address letters; endorsements; memorandums; messages—that are sent to or from the command.

You should familiarize yourself with the information provided in the *Department of the Navy Correspondence Manual*, SECNAVINST 5216.5C, and the *Department of the Navy Directives Issuance System*, SECNAVINST 5215.1C. These two directives are the primary sources of information used throughout the Navy for the proper preparation of correspondence.

To handle naval correspondence properly there are four major areas that you should become familiar with. These areas are preparation, routing, filing, and subject classification.

### PREPARATION

As a Legalman 3 (LN3) or Legalman 2 (LN2), you must make sure any correspondence you are assigned to type is placed in the proper format and basic correspondence procedures are followed. In addition to following the procedures outlined in the *Correspondence Manual* and the *Directives Issuance System*, it is

very important that you remember to take care in the actual typing of correspondence. The quality of the correspondence sent out by your office not only reflects upon you as the typist, but also affects the impression others have of your office and command.

We will now look at the requirements for the preparation of the different types of official correspondence mentioned previously.

### **Standard Letter**

Use the standard letter to correspond officially with activities in the Department of Defense (DOD). You can also use the standard letter when corresponding with organizations outside the DOD if they have adopted the format. Outside users include the Coast Guard and some contractors who deal extensively with the Navy and Marine Corps. For instructions on how to prepare and examples of properly prepared standard letters, refer to the *Correspondence Manual*, chapter 2.

### **Multiple-Address Letter**

Use the multiple-address letter when you have more than one action addressee. Except for its handling of addressees, the multiple-address letter is the same as the standard letter. For instructions on the preparation of and samples of properly prepared multiple-address letters, refer to the *Correspondence Manual*, chapter 3.

### **Endorsement**

When a letter comes to your activity because you are a via addressee, prepare an endorsement rather than another letter. You can use either a same-page endorsement or a new-page endorsement as shown in the *Correspondence Manual*, chapter 4. Many endorsements simply forward letters without substantive comment to the next via addressee, if any, or to the action addressee; however, other possibilities exist. An endorsement may either comment on the basic letter or any earlier endorsement. An endorsement may alter the order of any remaining via addressees or add others. An endorsement may return the basic letter with a final reply or a request for more information.

### **Memorandum**

A memorandum provides an informal way to correspond within an activity or between several activities. Subordinates may use a memorandum to correspond directly with each other on routine business. You may not use a memorandum to issue directives. Examples of

memorandums are shown in the *Correspondence Manual*, chapter 6.

### **Business Letter**

Use the business letter to correspond with agencies or individuals outside the Department of the Navy (DON) who are unfamiliar with the standard letter. You may also use the business letter for official correspondence between individuals within the DON when the occasion calls for a personal approach. Instructions for the proper preparation and samples of business letters are shown in the *Correspondence Manual*, chapter 7.

### **Message**

Messages are the quickest form of written communication in the Navy. Our telecommunications system is designed to get time-sensitive or critical information to addressees rapidly for effective use of information.

There are four types of classified and unclassified narrative messages: single-address, multiple-address, book, and general messages.

A message that has only one addressee, either action (TO) or information (INFO), is a single-address message.

A message that has two or more addressees, whether action or information, and is of such a nature the drafter considers that each addressee should know the other recipients is a multiple-address message.

A message that is destined for two or more addressees, but is of such a nature the drafter considers that no addressee need or should be informed of the other addressee(s), is a book message.

General messages are designed to meet recurring requirements for the issuing of information to a wide, predetermined standard distribution. General messages are titled; for example, ALCOM, ALMILACT, or NAVOP. Because the title indicates the distribution, it serves as the address designator in the address line of the message heading.

General administrative (GENADMIN) is the format used for most narrative messages, with the only exception being those narrative messages that a publication, instruction, or directive requires a different format. Refer to the *Telecommunications Users Manual*, NTP 3(I), Annex C, regarding the rules and general regulations for the preparation of the GENADMIN message format.

You may not use a DD Form 173 for submission of messages anymore. Instead, you must use the message text format (MTF) program. This program allows for floppy diskette transmission and up to 50 messages may be included on one diskette.

## **ROUTING**

Knowing what to do with incoming correspondence is important to the efficient operation of your office and command. You must take care in the initial sorting and routing of incoming correspondence. You must make sure the proper individual receives the correspondence so he or she may take any action that is required with a particular piece of correspondence.

## **FILING**

Constant changes in naval office personnel due to transfers, leave, and discharges create a need for a single subject classification system. The present standard Navywide system fulfills that need because it makes sure any person who knows the subject filing system of one ship or station can operate that of another with little decrease in efficiency. This does not mean that each office has the same number or type of files. Instead, it signifies that a standard system is used to (1) assign subject codes (numbers), (2) guarantee that general files have the same basic arrangement, and (3) make sure certain sets of files are kept by all activities.

Details of file arrangement within any particular naval office depend upon the mission or function of the office and the volume of its official correspondence.

You will find that the general files in your office are similar to those found in any other office in the Navy. These general files contain such items as incoming letters, copies of outgoing letters, and memorandums that normally form the bulk of your office files. In addition to the general files, you may decide to set up separate files for such items as claims, court-martial records, investigations, and nonjudicial punishments.

In a small SJA office where the volume of claims business is not so heavy, you could probably file all your claims correspondence in the general file (5890). However, if your office processes many claims, you should file only general correspondence in the general files and set up a special file in alphabetical order (by last name of claimant) for claims processed.

In a decentralized filing system, files are normally kept by the section responsible for the function being performed; that is, the claims section would keep claims

files, the review section would keep review files, and the legal assistance section would keep legal assistance files. You may encounter the decentralized filing system in NLSOs where the volume of files warrants such a system. However, in a small SJA office where the volume of business (and hence, the volume of files) is not so heavy, such a system probably should not be instituted.

Court-martial records, while a part of your general files, are normally kept in a separate drawer of the filing cabinet. You should file summary court-martial (SCM), special court-martial (SPCM), and general court-martial (GCM) records separately. They may, of course, be filed in the same drawer of the filing cabinet, if necessary, but group them together by the type of court involved and file alphabetically according to the last name of the accused.

Whether your office uses a centralized or decentralized filing system is usually determined by the size of your organization and the volume of business handled. Whichever system you use, it is important that you thoroughly understand the system in use.

## **SUBJECT CLASSIFICATION**

Having the proper subject classification on a naval letter or a directive will help you and the individual that the correspondence is being sent to in filing and in proper identification of the subject material. To make sure a piece of correspondence has the proper subject identification code, you should refer to the *Department of the Navy Standard Subject Identification Codes*, SECAVINST 5210.11.

## **DRAFTING CORRESPONDENCE**

As a senior LN, you will compose letters from brief notes or even from oral instructions. In preparing long letters, you should be able to prepare a first draft that will need only minor changes before the draft is ready for smooth typing. You should master the preparation of short, routine letters to the point where they rarely need any change before signature. Refer to the *Correspondence Manual* for instructions regarding naval writing standards and sample letters.

## **PUBLICATIONS AND DIRECTIVES**

Handling, correcting, and using publications and directives are a big part of the daily routine of any Navy office. The efficiency of the office depends on how well this is done. This makes it important for you to

recognize various publications, to understand their contents, and to know how to store and retrieve them as they are needed. You cannot remember everything; however, the trick is to know where to find information.

## USING PUBLICATIONS

In any office you maybe assigned to work, you will be required to use Navy publications effectively. Each publication is unique and requirements for its use are as individual as the publication itself. You will have the need to be familiar with certain publications that you will find to be indispensable in your area of work. Some of the most common publications you will find in an office that is involved in legal matters include the following:

- *United States Navy Regulations, 1990*—This publication outlines the organizational structure of the DON and issues the principles and policies by which the Navy is governed. It is published in loose-leaf form and kept in an adjustable binder so changes may be inserted as necessary. The Chief of Naval Operations (CNO) is responsible for making changes as approved by the Secretary of the Navy (SECNAV) to *Navy Regulations*.

- *Manual for Courts-Martial, United States, 1984* (MCM)—This publication is considered the LN's bible. No law office should be without one. By enacting the *Uniform Code of Military Justice* (UCMJ), Congress established a single set of laws for administering justice to all the armed forces. The MCM consists of five parts that include Part I—the Preamble; Part II—the Rules for Courts-Martial (R.C.M.); Part III—the Military Rules of Evidence (Mil.R.Evid or M.R.E. ); Part IV—the punitive Articles; and Part V—Nonjudicial Punishment Procedures.

Part II, the R.C.M.S govern the procedures and punishments in all courts-martial and, whenever expressly provided, preliminary, supplementary, and appellate procedures and activities. Part III, the M.R.E.s, is construed to ( 1 ) secure fairness in administration, (2) eliminate unjustifiable expense and delay in court-martial proceedings, and (3) promote growth and development of the law of evidence to the end that the truth may be learned and proceedings justly determined. Part IV, the Punitive Articles, addresses all the punitive articles of the UCMJ. Each article includes the text of that particular article, an explanation of the article, the elements of the offense, any lesser included offenses,

the maximum punishment for the offense, and a sample specification for the article.

- *Manual of the Judge Advocate General* (JAGMAN), JAGINST 5800.7C—The JAGMAN contains regulations for the DON. It is prepared by the Judge Advocate General of the Navy and covers issues such as administrative investigations; Article 138 complaints; Article 139 investigations; release of government information; delivery of service members; service of process and subpoenas; authority of armed forces personnel to perform notarial acts; legal assistance; claims regulations; international law; customs requirements; admiralty claims; environmental protection; and payments due mentally incompetent members, physical examinations of such members, and trustee designations.

- *Naval Military Personnel Manual* (MILPERSMAN), NAVPERS 15560C—The MILPERSMAN is issued under *Navy Regulations, 1990*, Article 0105, for direction and guidance, and contains policy, rules, and practices for administration of military personnel within the Navy. Each article is identified by a seven-digit number. The first two digits identify the chapter; the second two identify a section within the chapter; and the last three identify an article within a section. Changes are made quarterly by the Deputy Chief of Naval Personnel with approval of the Chief of Naval Personnel.

- *The United States Navy Uniform Regulations*—This publication is prepared and distributed by the Chief of Naval Personnel. It describes and lists the various uniforms for personnel in all categories, lists the uniforms required, and contains lists of articles worn or used together. It also describes occasions when the various uniforms should be worn; methods of wearing medals, decorations, ribbons, rating badges, and special markings; and gives notes on the care of the uniform. Changes are issued by the Chief of Naval Personnel as changes in uniforms occur.

- *The Department of the Navy Correspondence Manual*, SECNAVINST 5216.5C—This manual is prepared and approved in the Office of the Secretary of the Navy. It contains instructions for preparing letters, endorsements, memorandums, and messages. Instructions cover all parts of correspondence such as address, subject, references, paragraphing, and signature together with directions for assembling correspondence for signature and mailing.

- *Department of the Navy Standard Subject Identification Codes* (SSIC), SECNAVINST 5210.11D—The

Naval Data Automation Command maintains the system and provides for changes and presents them to SECNAV for issuance. The SSIC outlines the process for segregating and filing Navy and Marine Corps records and the single standard system of numbers and/or letter symbols used throughout the DON for categorizing and subject classifying information. SSICs are required on all Navy letters, messages, directives, forms, and reports.

- *Standard Organization and Regulations of the U.S. Navy (SORM)*, OPNAVINST 3120.32B—This publication is issued by CNO. It issues regulations and guidance governing the conduct of all members of the U.S. Navy. These regulations use two types of print—the material printed in uppercase is regulatory, and the material printed in plain type is for the guidance of commanders, commanding officers (COs), and officers in charge (OICs). These regulations apply to each member of the Navy individually. Violation of any provision of these regulations is punishable under the UCMJ.

- *Department of the Navy Information Security Program Regulations*, OPNAVINST 5510.1H—This publication is issued by CNO and is commonly referred to as the *Security Manual*. Its provisions apply to DON military and civilian personnel and activities. The *Security Manual* provides personnel with regulations and guidance for classifying and safeguarding classified information and for personnel security.

- *Standard Navy Distribution List (SNDL)*—The SNDL is published by the CNO and provides for the proper addressing and distribution of mail to all activities of the DON and provides a central distribution system for directives and correspondence. The SNDL is published in two parts and each part is issued separately. Part 1 is often referred to as the yellow pages and is entitled *Standard Navy Distribution List, Operating Forces of the Navy, Unified and Specified Commands, U.S. Elements of International Command*, OPNAVINST P09B2-107. The SNDL listings are identified by a two-digit number for each major group followed by one or more letters for each subgroup. Part 2 of the SNDL, contained in the publication *Catalog of Naval Shore Activities*, OPNAVINST P09B2-105, provides distribution lists for the Navy Department and all shore activities of the Naval Establishment. Each symbol represents a type of naval activity.

Revisions and changes to the SNDL are issued periodically, normally on a quarterly basis, by CNO. When issued, changes are of two types—page changes in the form of a supplement and serial changes. The

supplements are sent to all commands, but serial changes are provided only to commands handling large volumes of mail that require up-to-date information.

- *Joint Federal Travel Regulations (JFTR)*—The JFTR is issued in three volumes, over the signatures of the Secretaries of the Army, Navy, Air Force, Transportation, Commerce, and Health and Human Services through the Per Diem, Travel, and Transportation Allowance Committee that operates under the cognizance of the DOD. Volume 1 deals with travel of members of the uniformed services; volume 2 deals with travel of DOD civilian personnel; and volume 3 deals with personnel in the foreign service. The JFTR interprets the laws and regulations concerning travel, the manner in which transportation is furnished to personnel, provisions for travel of dependents, transportation of household goods, reimbursements for travel expenses, and similar information.

- *Disbursing, Administrative and Personnel Manual (DAPMAN)*—Formerly the *Navy Pay and Personnel Procedures Manual (PAYPERSMAN)* this manual is issued jointly by the Office of the Comptroller of the Navy and the Chief of Naval Personnel. The DAPMAN contains detailed pay and personnel procedures for maintaining the Joint Uniform Military Pay System (JUMPS) for members of the Navy. You will use this manual to assist in the preparation of page 6s and 7s.

- Other manuals—Certain commands have manuals dealing with technical subjects involved in their respective functions. If you are assigned to a department where one of these manuals is used, you should become acquainted with the format and general content.

## **MAINTENANCE REQUIREMENTS AND UPDATING PROCEDURES**

No publication or directive can stay on the shelf for a long time without needing to be changed. Changes will come from the originator as reprinted pages that need to be inserted in place of the outdated pages or as pen-and-ink changes that require you to enter or delete information by hand. Most publications contain a list of effective pages. Part of your job is to make sure publications are complete by checking each page number against the list. When you receive new pages as part of a change, a new list of effective pages is included and must be verified after you enter the change(s).

Proper notations, such as CH-1, are entered in the upper right margin of the first page of each directive changed, or on the record-of-changes sheet for

publication-type instructions, to indicate changes received and incorporated.

## **ORDERING FORMS AND PUBLICATIONS**

To order new forms or publications (with the exception of those issued through the Directives Issuance System), or to replace those that have become damaged or mutilated, all you need do is notify your supply officer. The method of letting the supply officer know what you need varies with the activity or size of your ship. The supply officer will let you know how the information is to be given. The supply department prepares a DOD Single Line Item Requisition System Document, DD Form 1348, and sends it to the supply activity responsible for the supply support of your ship or station.

## **DIRECTIVES ISSUANCE SYSTEM**

The Department of the Navy Directives Issuance System provides a standard method of issuing directives by all activities in the Navy. As set forth in SECNAV-INST 5215.1C, the system contains the following two parts and two tables:

Part I—Definition, Criteria, and Responsibility

Part II—Preparation and Maintenance of Directives

Table I—Preparation of Letter-Type Directives

Table II—Preparation of Special-Type Directives

The Directives Issuance System contains the standard procedures and formats used to issue policy, procedural, and informational releases in the Department of the Navy.

In general, a document is issued in the Directives Issuance System when it does one or more of the following:

- Regulates or is essential to effective administration
- Establishes policy
- Delegates authority or assigns responsibility
- Assigns an organizational structure
- Assigns a mission, function, or task
- Initiates or governs a course of action or conduct

- Establishes a procedure, technique, standard, guide, or method of performing a duty, function, or an operation
- Establishes a reporting requirement
- Changes, supersedes, or cancels another directive

With certain exceptions, issuances not falling within the scope of the previous criteria nevertheless may be issued in the Directives Issuance System to obtain quick and controlled dissemination. Normally issued as notices, these may include the following:

- Requests for comments, approval, or information
- Directions for routinely carrying out established operations, such as matters about individual personnel actions or special shipments of material
- Informative announcements, such as education or promotion opportunities, recreational activities, work improvement plans, suggestions for morale building, or changes in office locations or telephone extensions

There are two types of exceptions—required and optional. Required exceptions are Navy regulations, Top Secret documents, and registered publications. Optional exceptions are operation plans and orders, technical and regulatory manuals and publications, and changes to them.

A directive prescribes or establishes policy, organization, conduct, methods, or procedures; requires action or states information essential to the effective administration or operation of activities concerned; or contains authority or information that must be issued formally.

The types of directives used in the Directives Issuance System include instructions, notices, and change transmittals.

### **Instructions**

An instruction is a directive that contains authority or information having continuing reference value, or requiring continuing action. It remains in effect for 7 years or until superseded or otherwise canceled, whichever occurs first, by the originator or higher authority.

### **Notices**

A notice is a directive of a one-time nature or one that contains information or action for a brief time only.



A notice usually remains in effect for less than 6 months, but is not permitted to remain in effect for longer than a year. A notice has a self-canceling provision. The cancellation date is always stated. When the exact length of time a notice is to remain in effect cannot be determined at the time of issuance, the specific date for record purposes is set far enough in the future to allow all necessary uses of the notice. Reports and procedures covered in a notice are considered canceled when the notice is canceled, unless requirements have been issued in another document. Cancellation determinations are shown at the top right corner and/or as a last paragraph titled Cancellation Contingency.

### **Change Transmittal**

A change transmittal is the medium used to transmit changes to an instruction, and under special circumstances, to a notice. Each transmittal describes the nature of the change it transmits and gives directions for making the change.

### **Drafting Instructions and Notices**

When drafting instructions and notices use the same rules and procedures that you would if you were drafting any type of correspondence. Instructions and notices must be clear, concise, and easily understood. Clarity of language as well as neatness in appearance of the instruction or notice will promote increased understanding by recipients and greater efficiency within your organization.

The elements of a directive, both as to content and format, generally in the order that they appear in a directive, are contained in table 1, Preparation of Letter-Type Directives, and table 2, Preparation of Special-Type Directives, of SECNAVINST 5215.1C. The Navy *Correspondence Manual*, SECNAVINST 5216.5C, provides additional guidance on the preparation of directives.

### **FILING DIRECTIVES**

Instructions normally should be filed according to (1) subject identification number, (2) consecutive number, and (3) issuing authority. Checklists of directives issued by Washington headquarters organizations should be organized in this manner. If local conditions require, however, directives may be filed primarily by issuing authority or by a combination of subject identification number and issuing authority. You should

disregard alphabetic prefixes (C and S showing security classification) to the subject designation in determining the numerical filing sequence.

Because of their brief duration, you need not file notices in the master file. If it is necessary to interfile them with instructions temporarily, the notices should be tabbed so each may be easily and promptly removed as soon as its cancellation date is reached. Copies may be filed in separate binders when necessary.

File cross-reference sheets for instructions permanently or temporarily removed from your office with these instructions. Insert locator sheets in normal sequence in place of the removed instructions they reference. You should place a subject cross-reference sheet in front of those instructions that carry the same subject identification number. A second copy of the cross-reference sheet should be placed in a suspense file for temporarily loaned instructions. An instruction should be returned within 5 days, unless the borrower is still using it.

When you need copies of directives to complete a record or to support or further document a specific action, you may file them on your office's general subject files, pertinent case files, or other appropriate correspondence files.

### **FILES**

As an LN, you must be able to file correspondence correctly and retrieve it quickly. The amount of time it takes you to locate a certain piece of correspondence depends on how well you know the Navy's filing system.

This section introduces you to the Navy way of filing. You are introduced to various procedures that will help you to perform your duties efficiently. You are also instructed in using the numerical subject identification coding system that was addressed previously and contained in the *Department of the Navy Standard Subject Identification Codes (SSIC)*, SECNAVINST 5210.11D.

The SSIC contains the numerical codes that provide the basic classification structure for identifying and filing records. These codes cover most subjects found in general correspondence and other files. Since these numbers are used for numbering other naval documents such as reports, forms, and directives by subject category, they also provide the basis for a single Navywide subject numbering system.

There are 14 major numerical subject groups, each having a thousand possible topics:

- 1000 series - Military Personnel
- 2000 series - Telecommunications
- 3000 series - Operations and Readiness
- 4000 series - Logistics
- 5000 series - General Administration and Management
- 6000 series - Medicine and Dentistry
- 7000 series - Financial Management
- 8000 series - Ordnance Material
- 9000 series - Ship's Design and Material
- 10000 series - General Material
- 11000 series - Facilities and Activities Ashore
- 12000 series - Civilian Personnel
- 13000 series - Aeronautical and Astronautical Material
- 14000 series - Coast Guard Mission

Within the major groups are subdivisions using the second, third, and, sometimes, fourth digit; for example:

- 5000 - General Administration and Management
- 5800 - Laws and Legal Matters
- 5810 - Military Justice
- 5812 - Commanding Officer's Nonjudicial Punishment.

## **MAINTENANCE**

File material loosely in folders unless you need fasteners to hold pages in a particular order. Use prong fasteners rather than staples, clips, or rubber bands to hold material.

## **DISPOSAL**

The *Navy and Marine Corps Records Disposition Manual*, SECNAVINST 5212.5C, prescribes policy and procedures for the Department of the Navy's Records Disposition Program relating to records creation, maintenance, and disposition. Files as well as records are disposed of according to the requirements of SECNAVINST 5212.5C. This issue will be further addressed later in this chapter under Records Disposal.

## **REPORTS CONTROL SYSTEM**

Whether you are assigned to an NLSO or a small SJA office, you will find that your office is responsible for preparing and submitting several different types of reports. Knowing what these reports are, how to prepare them, and when and to whom they are to be sent is important to the efficient operation of both your office and the offices that receive these reports. To help commands effectively control the preparation and submission of required reports, the Navy has designed a reports control management system. When working with the reports control system, you should become familiar with the tickler system, the preparation of the reports, and the procedures for filing these reports. The following hints are provided to help you establish and maintain the reports control system for your office.

### **ESTABLISHMENT OF A REPORTS CONTROL SYSTEM AND TICKLER FILE**

To determine which reports your activity submits and, therefore, needs to be included in your tickler file, it is necessary to check the current 5214 instructions issued by commands senior to yours in the chain of command as well as the *JAG Manual* which is the primary source of required reports within the JAG community. Once you know what reports are required, you must establish a system that gives you a master list of all reports and a means to make sure they are submitted in a timely manner. This is done by using a Recurring Reports Record Card, NAVSO 5213/7, for each report. All the completed cards together make up the tickler system.

### **MAINTENANCE OF A REPORTS CONTROL SYSTEM AND TICKLER FILE**

What reports have to be prepared and sent out by my office? When do they have to be sent out? Who are they sent to? These are questions that can be easily answered if you have an effective tickler system being used in your office. A tickler system consists of either a list of reports or a card file listing all the reports required for your office. It is suggested that you use either 5-inch by 8-inch cards or reports control record cards. On each card the following information should appear:

- The frequency of the report; for example, annual, semiannual, quarterly
- Title of the person/departn/cnt responsible for preparing the report

- Title of report and/or report symbol; for example, Legal Assistance Report, NAVJAG 5801.3
- Reference requiring the report; for example, JAGMAN, chapter 1, section 0102

File the tickler cards together in the tickler file by the frequency; for example, monthly or quarterly, of the report they reference and in chronological order by the date the report should be prepared. Another thing to remember when working with the tickler system is that you should continually check the references listed on each card to make sure the reporting requirements are current.

## **PREPARATION OF REPORTS**

When tasked with preparing a report, you should check the tickler card to determine when the report is due, who it goes to, and what format you should use in preparing the report. You also should check the reference that requires the report and follow the procedures outlined in that reference for the proper preparation of the report.

## **FILING REPORTS**

When you complete the preparation of a report, file a copy in your office's general files. The size of the office you are working in will determine whether you will file the copy of the report in a separate report file by its frequency of submission; for example, annual reports, semiannual reports, or in the general files by its subject classification code. When practical, a reports control case file should be maintained for each type of report and should contain the following information about the report:

- A copy of the directive authorizing the report
- Instructions for the preparation and submission of the report
- A sample copy of the report
- Any correspondence or other matter about the report

Whenever possible, file reports separate from the general files to provide for easier reference.

## **RECORDS DISPOSAL**

How important are records in your files? Important enough that Congress has passed laws governing their disposition and fixing penalties for their unauthorized

destruction. These laws apply to all official government records, not only to those that are classified.

Though sometimes monotonous, all tasks connected with files, including their disposition when no longer needed, must be taken seriously.

Decisions whether or not to save files cannot be avoided by simply saving everything. Sooner or later filing cases fill up and something has to be done. No matter how firmly you believe that if you get rid of it today, somebody will want it tomorrow, you cannot go on collecting forever. On the other hand, the "if in doubt, throw it out" school of thought, if allowed to operate unchecked, goes to the opposite extreme.

You may be called upon to help determine the proper disposition of files and records maintained in your office. In doing this, you will have to know what files and records are maintained in your office, how long they should be kept, and what should be done with these files and records after they have served their usefulness to your office. The specific procedures are outlined in the *Navy and Marine Corps Records Disposition Manual*, SECNAVINST 5212.5C. You should also become familiar with any additional procedures that may be required by other directives for the proper disposition of specific files and records that maybe maintained by your office; for example, court-martial records, legal assistance case files, and claims files.

## **JAGMIS**

JAGMIS provides the Commander, Naval Legal Service Command (NLSC) with monthly workload data summaries for purposes of current trend identification, resource allocation verification, long-range planning, and determination of responsiveness of the Navy's legal service requirements. JAGMIS was initially developed as a tool for tracking court-martial processing to ensure the speedy trial and review of cases. It has been expanded to assist management review and analyses of NLSC functions.

While case-by-case data entry in JAGMIS is not required, so long as monthly JAGMIS reports contain the data specified in the automated JAGMIS format, it is strongly encouraged as an informational tool for all levels of command and supervision, particularly in the military justice area.

All NLSC activities, except the Naval Justice School, must prepare and submit each month a productivity report in the format required by the *Naval Legal Service Command Productivity Report*,

NAVLEGSVCCOMINST 5800.3A. The report is sent to Code 63 to arrive not later than the 15th day of the following month.

## SECURITY

As an LN, you will be required to work with classified information; however, your involvement with it will be minimal. There may be court-martial trials and investigations in which classified information is involved and possibly admitted in evidence as exhibits. There will also be incoming and outgoing routine classified documents that are necessary to the conduct of official business. You should become familiar with the procedures that have been established by your office and command for the proper security of your office space. Even though most of the files, records, and documents you will be required to work with are not classified, many of them contain sensitive information and care should be taken to make sure these materials are properly safeguarded.

Remember, as an LN you are considered to be working in a position of high trust and confidence. The unauthorized disclosure of sensitive and/or confidential information about a legal assistance client, investigation, or court-martial can be detrimental to the client, the investigation or court-martial, and to the reliability of your office. Communications between an attorney and client are privileged to anyone unless the client consents to the disclosure. When you are working for an attorney, you are also bound by this privilege. Specific procedures for the safeguarding of such materials as evidence, records of trial and investigations, and legal assistance files are discussed in those chapters that pertain to these topics.

In addition to those procedures for properly maintaining the security of your office, you may occasionally have to handle classified material. These occasions will normally occur only when you are working with an investigation or a trial in which classified information may be involved, either in testimony or as documentary evidence. Familiarize yourself with the *Department of the Navy Information and Personnel Security Program Regulation*, SECNAVINST 5510.1H, if you are required to handle classified material.

## PURPOSE

Basic to a security education program is the appreciation that there is a need for protecting classified information from hostile threats. The purpose of the Information and Personnel Security Program is to

protect against the dissemination of information that is essential to national security. In an open society, such as that of the United States, disclosure outside authorized channels is tantamount to disclosure to a hostile intelligence service.

The purpose of the security education program is to make sure all personnel understand the need to protect classified information and know how to safeguard it. The goal is to develop fundamental habits of security to the point that proper discretion is automatically exercised in the discharge of duties and that the security of classified information becomes a natural element of every task.

## RESPONSIBILITY, MAINTENANCE, AND SAFEGUARDING

The Chief of Naval Operations (OP-09N) is responsible for policy guidance, education requirements, and source support for the security education program. Commanding officers, through their security managers, are responsible for security education in their command and for making sure it is afforded a significant share of the time dedicated to command security training.

Classified information or material will be used only when there are proper facilities or under conditions adequate to prevent unauthorized persons from gaining access to it. To the extent possible, classified holdings will be consolidated to limit the areas where it will be used. Anyone who has possession of classified material is responsible for safeguarding it at all times and particularly for locking classified material in appropriate security containers whenever it is not in use or under direct supervision of authorized persons. The custodian must follow procedures that will guarantee unauthorized persons do not gain access to classified information by sight or sound or other means. Classified information will not be discussed with or in the presence of unauthorized persons. During working hours, the following precautions will be taken to prevent access to classified information for unauthorized persons:

- When classified documents are removed from storage for working purposes, they will be kept under constant surveillance and facedown or covered when not in use. Cover sheets are Standard Forms 703, 704, and 705 for, respectively, Top Secret, Secret, and Confidential documents.

- Classified information will be discussed only when an unauthorized person cannot overhear the discussion. Particular care should be taken when there are

visitors or workmen present. Escorts should alert fellow workers when visitors or workmen are in the area.

Preliminary drafts, carbon sheets, plates, stencils, stenographic notes, work sheets, and all similar items containing classified information will be protected either by destroying them by a method approved for destroying classified material immediately after they have served their purposes or by giving them the same classification and safeguarding them in the same manner as the classified material they provided.

Typewriter ribbons used in typing classified material will be protected the same as the highest level of classification for which they have been used. They will be destroyed as classified waste.

## **DESTRUCTION OF CLASSIFIED MATERIAL**

Classified record material may be destroyed only when destruction is the disposition authorized by SECNAVINST 5212.5C. All other classified material will be destroyed as soon as it is no longer required and will not be retained for more than 5 years from the date of origin unless authorized by SECNAVINST 5212.5C.

Classified material will be destroyed only by authorized means by personnel cleared to the level of the material being destroyed. Classified material awaiting destruction will be afforded the protection of the information it contains. Burn bags will be safeguarded at the level of the highest classification they contain until they are completely destroyed.

The destruction of Top Secret and Secret material will be recorded. Destruction may be recorded on OP-NAV Form 5511/12, Classified Material Destruction, or on any other record that includes complete identification of the material, number of copies destroyed, and the date of destruction. Two officials are responsible for the destruction of Top Secret and Secret material and they are required to sign the record of destruction. Records of destruction are maintained for 2 years. The fact that an originator may state in a document that it may be destroyed without report does not change the requirement to record destruction. It only means that the originator does not have to be notified that the document was destroyed. Confidential material and classified waste are destroyed by authorized means by appropriately cleared personnel but do not require a record of destruction.

The methods used to destroy classified material must prevent later recognition or reconstruction.

Burning has been the traditional method for destroying classified material because destruction is complete and disposition of the remaining ash is relatively simple. The remaining ash needs only to be stirred to make sure destruction is complete and reconstruction is impossible.

Shredding machines are relatively quiet and require little skill to operate. Shredders vary in their degree of effectiveness, depending on the mechanical condition of the equipment. A strip shredding machine must cut the material to be destroyed into strips no greater than 1/32 inch in width. A crosscut shredding machine must reduce the material to shreds no greater than 3/64 inch wide by 1/2 inch long. Ordinarily, shredding suffices as complete destruction of classified material and the residue may be handled as unclassified waste.

## **REQUESTS FOR RELEASE OF GOVERNMENT INFORMATION**

This section addresses the three principal types of requests for information or records likely to be received by naval activities and the procedures to follow upon receipt of a request. It does not apply to routine naval correspondence or to congressional inquiries. Commands receiving a request for records or information from members of the public should examine the request and determine if it cites or implicates the Freedom of Information Act (FOIA), the Privacy Act, or related naval or DOD regulations. Records of information may also be requested for litigation purposes—often to bring suit against the Navy. We will now take a look at these different types of requests in greater detail.

## **FREEDOM OF INFORMATION ACT**

The Freedom of Information Act, 5 U.S.C. § 552, generally provides that all persons, including citizens and residents of other countries, have a right of access to federal agency records, unless such records are exempt from disclosure. The *Department of the Navy Freedom of Information Act (FOIA) Program*, SECNAVINST 5720.42E, addresses FOIA exemptions, time limits for responses, formal and informal extensions of time limits, appeal procedures, fee schedules, and includes sample format responses to respond to FOIA requests. SECNAVINST 5720.45, *Indexing, Public Inspection, and Federal Register Publication of Department of the Navy Directives and Other Documents Affecting the Public*, directs that the public be provided, to the maximum extent possible, information on the organization and functions of the Navy and the

policies and procedures by which those functions are performed in relation to the public.

The FOIA requires publication in the *Federal Register* of information that affects the public; for example, descriptions of agency organization, functions, procedures, substantive rules, and statements of general policy. Additionally, materials such as opinions rendered in the adjudication of cases, specific policy statements, and certain administrative staff manuals must be made available for public inspection. All other Navy records—those not required to be published in the *Federal Register* or made available for public opinion—are subject to disclosure upon receipt of a proper request for access, unless exempt.

An agency record includes all books, papers, maps, photographs, machine-readable materials, or other documentary materials, regardless of physical form or characteristic, made or received by an agency of the United States Government under federal law or in connection with the transaction of agency business and in the agency's control at the time the FOIA request is made. An agency record does not include the following items:

- Objects or articles such as structures, parts from wrecked aircraft and ships, furniture, paintings, sculpture, three-dimensional models, and vehicles and equipment.
- Anything that is not a tangible record such as an individual's memory or oral communications.
- Computer software, if not created or used as primary sources of information about organizations, policies, functions, decisions, or procedures of the agency.
- Personal records not subject to Navy creation or retention requirements, created or maintained primarily for a Navy employee's personal convenience, and not distributed to other agency employees for their official use. For example, a supervisor's personal notes on an employee's performance, not required to be maintained and used solely as a memory aid in preparing evaluations and then destroyed, are not an agency record.

### **Minimum Requirements**

The minimum requirements for an FOIA request are the request (1) cites or implicates the FOIA, (2) contains a reasonable description of the information or records requested, and (3) contains a clear statement of the requester's willingness to pay fees, a willingness to

pay fees up to a stated amount, or a request for a fee waiver. If the FOIA request does not meet these requirements, the naval activity should answer the inquiry, within 10 working days, to inform the requester of the contents of a proper request.

### **Identify the Records Requested**

Commands must search their filing systems and existing retrieval systems if the description provided by the requester enables naval personnel to locate the records with reasonable effort.

The FOIA does not authorize "fishing expeditions," nor are commands required to respond to blanket requests for all documents. The naval activity will notify the requester if the description does not reasonably describe the records sought and provide guidance on the specificity required to begin a search.

If the requested record was originated by another activity, the receiving activity will not release or deny such records without consulting the other naval activity. The receiving activity will coordinate with that activity before referring the FOIA request and copies of the requested documents for direct response.

A naval activity does not have to create or compile a record. A record may be compiled if it is either a more useful response to the requester or a lesser burden to the naval activity than providing existing records, and the requester does not object.

### **Requests Requiring Special Handling**

Detailed instructions for records requiring special handling are in paragraph 62(4) of SECNAVINST 5720.42E. The most common requests requiring special handling are briefly outlined as follows:

- **Classified records**—If the existence or nonexistence of the requested information is classified, the naval activity will refuse to confirm or deny its existence or nonexistence. If the documents requested are classified by another agency, or if the head of the agency is not the classifying authority, the agency will refer the request and copies of the requested documents to the originating agency or classification authority.

- **Naval Criminal Investigative Service Command reports**—Requests should be sent to the Naval Criminal Investigative Service Command, Washington, DC 20374-5000, and the requester so notified.

- **JAG Manual** investigative reports—Requests should be referred to the Office of the Judge Advocate

General, 200 Stovall Street, Alexandria, Virginia 22332-2400, and the requester so notified.

- Mishap investigation reports—Requests should be sent to Commander, Naval Safety Center, Naval Air Station, Norfolk, Virginia 23511-5796, and the requester so notified.

Misdirected/misaddressed requests will be promptly readdressed and sent to the cognizant or originating activity for action and the requester so notified.

### **Time Limits**

The responsible naval activity has 10 working days from receipt to respond to an FOIA request, excluding weekends and holidays. If the naval activity cannot respond within 10 days, it may inform the requester of the reasons for the delay, that the delay may be treated as an initial denial of the request, and the requester will be informed of the appeal rights. This is considered a formal extension of time. The activity also may negotiate an informal extension of time with the requester that is mutually agreeable.

### **Exemptions**

A naval record maybe withheld from disclosure if exempt. For additional guidance on exemptions, refer to SECNAVINST 5720.42E.

### **Public Interest**

The public interest to be considered under the FOIA is the public's interest in obtaining official information that sheds light on the agency's performance of its statutory duties. In the typical case in which one private citizen is seeking information about another, the requester does not intend to discover anything about the conduct of the agency that has possession of the records, and a response to the request would not shed any light on the conduct of the government agency or official. In such a case where no FOIA-type public interest exists, release of any private information about an individual would constitute a clearly unwarranted invasion of personal privacy. In evaluating the public interest apparent in release of the requested records, neither the identity of the requester nor the purpose for desiring the request is relevant.

### **Privacy Interest**

A privacy interest may exist in personal information even though the information has been made

available to the general public at some place and time. If personal information is not freely available from sources other than the federal government, the person to whom that information pertains has a privacy interest in its nondisclosure. Often, the very fact that the federal government expended funds to prepare, index, and maintain records containing personal information and the fact the requester invokes the FOIA to obtain the private information indicates that the information is not freely available.

### **Mailing Lists**

Most naval activities receive FOIA requests for mailing lists—names and home addresses or names and duty addresses. Requests for mailing lists of names and home addresses should be denied as a clearly unwarranted invasion of personal privacy. An FOIA request for a list of names and duty addresses of members attached to units that are stationed in foreign territories, routinely deployable, or sensitive must be denied as a clearly unwarranted invasion of personal privacy. Disclosure is a security threat to those members because it reveals information about their involvement in military actions, the type of naval unit, and their presence or absence from their households. Release aids the targeting of members and their families by terrorists and other persons opposed to the national policy. Lists of names and duty addresses, not covered by the previous policy, are not exempt.

### **Nonjudicial Punishment Results**

Information on nonjudicial punishment will not normally be released under the FOIA. The privacy interest of the member must be balanced against the public interest of the information. Disclosure should be made when the events leading to the nonjudicial punishment are particularly newsworthy or the case involves a senior official abusing the public trust through office-related misconduct such as embezzlement, fraud, or misuse of government property.

### **PRIVACY ACT**

The Privacy Act, 5 U.S.C. § 552a, applies to documents and records in a system of records maintained by an agency from which information is retrieved by the person's name or other personal identifier such as a social security number. The Privacy Act balances the government's need to maintain information about

individuals against the right of individuals to be protected from unwarranted invasions of their privacy by government collection, maintenance, use, and disclosure of personal information, SECNAVINST 5211.5C contains DON policy guidance on the Privacy Act and prescribes procedures for notifying individuals of a system of records pertaining to them, granting access to the subject of the records, reviewing request to amend records, disclosing personal information to third parties, and safeguarding personal information.

Naval activities may not maintain records retrievable by name or personal identifier unless a system notice has been published in the *Federal Register*. Maintaining an unpublished system of records is a criminal violation. Information in a Privacy Act system of records may not be disclosed to the public unless (1) the subject of the record consents, (2) the disclosure is pursuant to a routine use, released under an exemption for an official use, or (3) by order of a court of competent jurisdiction.

### **Responsibilities**

For request for access or amendment to records, the system manager must establish and make available upon request rules on requests for access or amendments that conform to paragraph 6 and enclosures (4) and (5) of SECNAVINST 5211.5C. The official with custody of the record may grant access to the requested record even if he or she is not the system manager. Only officials designated as denial authorities in paragraph 4c of SECNAVINST 5211.5C may deny a request for access. Blanket requests for notification and/or access to all systems of records within the Navy are not honored.

### **Procedures**

The requesting individual should request the records in writing, providing the name of the system of records, full name, social security number, and a signed release, if necessary. The system manager or other responsible official will verify the identity of the requesting individual, such as by employee or military identification card or driver's license, as a subject of the record. If a written request, identity may be verified by the requester providing minimum identifying data such as date of birth. If the information is sensitive, a signed and notarized statement of identity may be required. The system manager will grant access to the requested record unless exempt. If necessary, the system manager

or other custodial official will inform the requester of any additional information that is needed. The system manager may deny a request for notification, access, or amendment only if there is a significant and legitimate governmental interest.

A request for notification, access, or amendment will be acted on in 10 working days, or a response to the requester will indicate when the request will be acted upon. Action should be completed within 30 days of receipt by the cognizant office.

If access should be granted, the system manager or other custodial official will inform the requester in writing and (1) inform the requester where and when the records may be viewed, that a person may accompany the requester, and a copy of the record may be provided upon agreement to pay duplication fees or (2) furnish a copy of the record, if the requester asked for a copy of the record and agreed to pay duplication fees, unless fees were waived. If the system manager or other custodial official determines the request should be denied, in whole or in part, that officer will send the request to the cognizant denial authority with a copy of the requested record and recommendations as to the denial.

### **Disclosure to Others**

Generally, records in a system of records may not be disclosed except pursuant to a written request of the subject of the record or with the prior written consent of the subject of the record.

Disclosure may be made to other DON or DOD personnel who need the records in the performance of their duties, if compatible with the purpose for which the information is maintained.

Disclosure may be made upon written assurance that the record will be used solely as statistical research or a reporting record, and the record is not individually identifiable.

Disclosure may be made to another agency or instrumentality of any governmental jurisdiction, controlled by the United States, for a civil or criminal law enforcement activity if (1) the activity is authorized by law and (2) the head of the agency or instrumentality made a written request to the head of the agency maintaining the record, specifying the record desired and the law enforcement purpose.

Disclosure may be made to either House of Congress, or to any committee or subcommittee of Congress



to the extent the matter is within its jurisdiction. Disclosure is not authorized to an individual Member of Congress acting on his or her own behalf or on behalf of a constituent.

Disclosure may be made in response to an order of a court of competent jurisdiction signed by a judge.

### **Collection of Information**

Personal information is information private or intimate to the individual and not related solely to official functions. It ordinarily does not include information such as time, place, and manner of, or reasons and authority for, an individual's act or omission directly related to official duties. Personal information will be collected to the maximum extent possible from the individual, except when (1) there is a need to make sure of the accuracy of the information supplied by verifying the information through a third party, (2) information can only be obtained through a third party, and (3) obtaining information directly from the individual would involve exceptional difficulties or unreasonable costs.

A Privacy Act statement must be provided when individuals supply personal information about themselves. The individual need not sign the Privacy Act statement. The Privacy Act statement must include the following:

- Authority for the solicitation (statute or executive order)
- Brief summary of routine uses for the information, as published in the *Federal Register*
- Purpose for which the information is used
- Whether disclosure is mandatory or voluntary and effects of nondisclosure

A Privacy Act statement must be provided when requesting a social security number. A social security number may be requested even if not required by federal statute, if the individual is informed that disclosure is voluntary.

### **LITIGATION PURPOSES**

Official documents and information should be made reasonably available for use in federal courts, state courts, foreign courts, and other governmental proceedings unless the information is classified, privileged, or otherwise protected from public disclosure.

Requests for documents, testimony, depositions, or interviews of witnesses in connection with litigation will be processed under SECNAVINST 5820.8A.

### **Relationship With FOIA and Privacy Act**

If an FOIA or a Privacy Act request pertains to litigation to which the United States is a present or potential party, the release authority should notify the Judge Advocate General or the General Counsel, as appropriate. Requests for Privacy Act records must be accompanied by a written release from the subject of the record, a court order, or a subpoena signed by a judge of a court of competent jurisdiction.

### **Responsibilities**

Requests for official information and records will be processed according to SECNAVINST 5820.8A. Generally, the responsibility to act as the determining authority has been delegated to GCM convening authorities and those commands and activities with an SJA assigned. If compliance is inappropriate for any reason, such as the records contain classified or privileged information, send the court order or subpoena to the Judge Advocate General or Associate General Counsel (Litigation) and notify the parties of this action.

If the United States is not and is not reasonably anticipated to become a party to the proceedings, the production in federal or state courts of evidentiary material from *JAG Manual* investigations, and the service, employment, pay, or medical records of dependent or members of the naval service is authorized upon receipt of a request complying with SECNAVINST 5820.8A, accompanied by a subpoena, court order, or other request signed by the judge of a court of competent jurisdiction. The specific authority of the Judge Advocate General is not required.

### **Production of Official Records Without a Court Order**

Send any requests for release outside of the DON to JAG when the requests are for one of the following official records:

- *JAG Manual* investigations
- Court-martial records
- Article 69 and 73, UCMJ, petitions

- Article 138 and 1106 complaints of wrongs

Affirmative claims files, except for copies of reports or JAG *Manual* investigations containing classified or privileged information, may be released by local holders to insurance companies to support claims; to civilian attorneys representing the injured parties and the government's interests; and to other components of the DOD, without the prior approval of JAG, if the amount of the claim is within the settlement authority of the releaser.

## SUMMARY

This chapter has given you some insight into how to prepare the various forms of correspondence that you may be required to use. You will become better at drafting letters, messages, memorandums, endorsements, and so forth, as you gain experience. However, it is always wise to study and have readily available copies of the *Department of the Navy Correspondence Manual* and NTP-3. Remember, when in doubt, go to the manuals.

## CHAPTER 2

# THE LAW LIBRARY AND LEGAL RESEARCH

As part of your duties as an LN, you may be responsible for the proper maintenance and upkeep of the office law library. The importance of a properly maintained law library is sometimes overlooked. The law library should be setup and maintained to meet the needs of those who will be using it rather than for the convenience of the librarian. Attorneys, LNs, and others involved in legal research must be able to find the current status of the law. Accordingly, the ability to efficiently perform the task of researching reference material will depend to a large extent on how well the law library is maintained.

### THE LAW LIBRARY

A law library is a collection of legal reference materials of several different types, consisting of various formats, including hardbound volumes, paperback supplements, loose-leaf services, pamphlets, handbooks, manuals, periodicals, and advance opinions.

The type of materials contained in a library is governed by many considerations, such as the size and functions of the office it is designed to serve, and the preferences of the personnel assigned to that office. The library in a small staff judge advocate (SJA) office might consist of a few hundred volumes, whereas several thousand volumes might be needed in the library that serves a large naval legal service office (NLSO).

Regardless of the library's size, your first task as a librarian is to determine what legal reference materials are contained in the library and where they are located. Legal reference materials fall into three broad categories that include the following:

- Primary sources—These contain the law as stated in statutes, case decisions, and regulations.
- Finding tools—These are aids used to help locate the information contained in primary sources,
- Secondary sources—These contain discussions or explanations of the law that can be useful in examining the legal concepts and problems associated with a particular law from both a practical and theoretical point of view.

Further on in this chapter, we will examine the different types of legal reference material that are grouped in these three categories.

### SOURCES OF THE LAW

The primary sources of law in the United States are the *U.S. Constitution*, its amendments, and the *Bill of Rights*.

This type of law is called the supreme law of the land and is also commonly known as constitutional law. Constitutional law addresses such matters as your right to counsel, your right to a trial of the facts by your peers, your right against self-incrimination, and your right to be confronted by and to cross-examine any witnesses against you.

The second source of law includes those laws passed or enacted by the various legislative bodies such as Congress or state legislatures. These laws come from the federal and state statutes and are commonly called statutory law. These laws include such matters as federal and state income tax laws, controlled substance laws, drunk driving laws, and gun control laws, to name a few.

A third source of law comes from the judicial system itself. This type of law is based on the concept that our judges will apply either constitutional or statutory law, or will apply a previous court decision to the facts in a given case, thereby rendering a fair and proper decision in the case. This type of law is referred to as case law. Case law is very important because it is often used by attorneys in an effort to persuade a judge to decide a case favorably toward their side. Case law provides guidance and in many instances the requirements for the proper conduct of trials and for the administration of justice in cases. For example, the case of *U.S. v. Allen* makes it mandatory for courts to give every accused person credit against his or her sentence for any pretrial confinement adjudged at trial. There are thousands of cases that have previously been decided by courts and each decision may have an effect on all future cases with either the same or similar facts.

A fourth source of law is administrative law. Administrative law originates primarily with

governmental agencies such as the Department of Transportation, the Department of State, the Department of Agriculture, and the Department of Defense. For example, the Department of the Navy has issued the *U.S. Navy Regulations*, 1990. These regulations are not constitutional law because they are not founded in the *U.S. Constitution* nor any state constitution. They are not statutory law since neither Congress nor any state legislature enacted any law regarding Navy regulations. They are not case law since they did not come into effect as a result of a case decision. Navy regulations were written by the Navy to regulate behavior within the Department of the Navy and as such are administrative in nature. Although some of the regulations may be punitive, they are still administrative law.

A fifth source of law is really nothing more than a combination of any or all of the previous four sources. A good example of this type of law is the *Manual for Courts-Martial* (MCM). Congress enacted the *Uniform Code of Military Justice* (UCMJ) as law. The Congress also enacted a law giving the President of the United States, as the Commander in Chief, the power to enact rules that are necessary to regulate and govern the armed forces, including the enforcement of the UCMJ. The President did this by issuing what is called an Executive Order placing the MCM into effect.

The MCM contains the procedural rules for the proper conduct of trials, known as the Rules for Courts-Martial or R.C.M. The MCM also contains the rules governing what items may be admitted into evidence. These rules are known as the Military Rules of Evidence or Mil.R.Evid. Some of these rules are based on constitutional law such as the rule that gives all military accused the right to counsel. The MCM also contains statutory law such as the UCMJ. Moreover, the MCM refers to case law for some rules. The MCM also contains administrative law that provides the rules that must be followed to hold a court-martial. As you can see, the MCM contains many different types of law and is a good example of a combination of laws.

From all the previously mentioned sources, you should be able to see that a great deal of law is written on many topics virtually every day. For the attorneys to be effective at their jobs, it is critical that they have access to the most recent law in any given area. The lawyers must also be able to rely on the information that is available in the law library. Therefore, it is very important that you maintain the library and keep it as up to date as possible.

## Official v. Unofficial

Many field libraries contain both official and unofficial sets of books. There are some differences between them. A set of books is considered official when one of the two following tests is met:

- If the book is published pursuant to some sort of statutory direction or law, then it is considered to be the official set of books to report the laws or cases within the jurisdiction of the legislative body that enacted the statute. For example, there is a federal statute that states that the *United States Code* (U.S.C.) will be the official set of books to report all the statutes enacted by the U.S. Congress. Any other set of books that reports these same statutes would be considered unofficial.

- The other test is met when the author of the book allows a publisher to print the material. Since the author has given permission for the printing, it is considered official. If you authored a book and then authorized a certain publisher to print it, you then would consider that publisher's printing of your book to be the official version and any other printing by another publisher to be unauthorized and thus considered unofficial.

Most libraries contain official and unofficial sets of books that report the same cases. For example, the U.S.C. is the official set of books that reports the statutes enacted by Congress. Additionally, two unofficial sets of books that report the same law are the *United States Code Annotated* (U.S.C.A.) and the *United States Code Service* (U.S.C.S.).

You may ask yourself why there are three sets of books that report the same thing? There are several reasons a command might want to subscribe to the unofficial set of books as well as the official set of books. The unofficial sets often extend beyond a single jurisdictional boundary and will report the case for an entire geographical area rather than for a single state. For example, the *Atlantic Reporter*, part of the *National Reporter System*, covers the cases for the states of Maine, Vermont, New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Delaware, Pennsylvania, Maryland, and Washington, DC. When several states report cases in a single set of books, you can see why the set of books would be published sooner than publishing one set for each state.

The unofficial sets are usually uniform in how the material is indexed. West Publishing Company, for example, uses the system known as the key numbering system for all its books.

## List of Lawbooks in the Typical NLSO Law Library

The following list of lawbooks is usually included in all NLSO law libraries:

- *United States Reports*
- *Lawyer's Edition of the Supreme Court Report*
- *Supreme Court Reporter*
- *United States Law Week*
- *Federal Reporter*
- *Federal Reporter, 2d Series*
- *Federal Supplement*
- *Military Justice Reporter*
- *Court-Martial Reports*
- *United States Code Annotated*
- *Code of Federal Regulations*
- *Black's Law Dictionary*
- The local state statutes

## Sources of Authority

There are three types of books in the law library; those that contain the laws that are to be enforced by our government; those that explain or try to describe the law; and those that help us to find a particular law. These books fall into three basic categories called primary authority, secondary authority, and finding tools. Do not confuse this manner of description with official and unofficial.

Primary authority includes rules for human behavior that are enforced by the state or federal government. In other words, it is the law and it must be followed. Primary authority may be in the form of court decisions, statutes enacted by our Congress or other legislative bodies, or administrative law.

You will find that when Congress enacts a law, it is usually written in very broad and general terms so many people are affected by it. The courts then apply the laws to a specific set of facts. The courts also use prior decisions of courts to guide them in how to decide a case. A legal term known as *stare decisis* is followed in most cases by the court system. By definition it means to adhere to precedents and not unsettle those things that are already established. In simpler terms, this means

that when the facts of a current case are basically the same as the facts in a case previously decided by the courts, then the decision reached by the court in the current case should be the same as it was in the earlier case.

Secondary authority is not the law itself, but instead is an explanation or description of the law. Since it is not actually the law itself, it lacks legal authority in a formal sense, but it has some degree of persuasive value. This persuasive value exists because of the soundness of the reasoning of the explanation or description; or possibly because of the status of the court presenting it; or possibly because of the author's explanation or description. It, most often, is contained in unofficial sets of books, but not always.

Some types of books that might be secondary authorities are text books, treatises, commentaries, restatements, and periodicals.

Finding tools are those books that help the researcher to find a particular law contained in a primary or secondary source. It is estimated that some 30,000 new decisions are made each year in our court systems. In addition, there are already more than 18,000,000 published decisions. It would be physically impossible for any one person to read all of them, let alone try to remember them and then use them to prepare a case for trial. As the term *finding tools* indicates, these books are the tools of the researcher. Learning to use them makes conducting research much easier.

Some samples of finding tools are digests, citators, encyclopedias, phrase books, indexes, some loose-leaf services, annotated compilations, and dictionaries.

## MINIMUM REQUIREMENTS

Every law library should contain those legal reference materials that are required for the lawyers using that library to adequately perform the legal research necessary to provide effective service in their areas of responsibility. Even though you will not be primarily responsible for determining what material should be contained in the library, you should be familiar enough with the contents of the library and the demands placed on it for specific research materials to recommend or at least be able to provide a list of books that lawyers should have available for their use when requested. To accomplish this, it may be necessary to ask the lawyers in your office what materials they need. In addition to this, you also should check the standard minimum list of commercial lawbooks that is provided to all field libraries by the Judge Advocate General (JAG). This

list, as shown in figure 2-1, is a guide to what is available from JAG. An SJA located near another law library would not need a full collection, whereas an SJA in an isolated location may need a full collection and perhaps more.

This standard minimum list does not cover all the legal research materials that may be required by your office. The Head, Field Law Library Section is responsible for providing an initial supply of only those materials on the standard minimum list, but is also

<b>STANDARD MINIMUM LIST - COMMERCIAL LAWBOOKS</b> <b>NAVAL LEGAL SERVICE OFFICE LIBRARIES (All items listed)</b> <b>NAVAL LEGAL SERVICE DETACHMENTS (*)</b> <b>STAFF JUDGE ADVOCATE LIBRARIES (#)</b>	
<u>Federal Materials</u>	
*	ALR Federal Federal Digest (closed set for federal cases before 1940) Federal Jury Practices & Instructions Federal Reporter 1st (closed set in ultrafiche only) Federal Reporter 2d, with Advance Sheet subscription (vols 1-600 in hard copy or ultrafiche) Federal Supplement, with Advance Sheet subscription
*#	Military Justice Citations
*#	Military Justice Digest
*#	Military Justice Reporter
*	Military Law Reporter subscription (every 2 months)
	Modern Federal Practice Digest (closed set for federal cases 1940-1960)
	Shepard's Federal Citations
	Shepard's Military Justice Citations
*	Shepard's U.S. Citations (cases and statutes)
*#	U.S. Code Annotated <u>or</u> U.S. Code Service
*	U.S. Code Congressional and Administrative News
*#	U.S. Court of Military Appeals Slip Opinions
*#	U.S. Law Week subscription (weekly)
*	U.S. Supreme Court Digest (to match reporter held)
*	U.S. Supreme Court Reporter (West <u>or</u> Lawyers Ed.)
	West's Federal Practice Digest 2d (for federal cases 1960-1975)
	West's Federal Practice Digest 3d (for federal cases since 1975)
<u>Criminal Law Materials</u>	
*	ABA Standards for Criminal Justice
*	Crimes of Violence—Homicide and Assault
*	Crimes of Violence—Rape and Other Sex Crimes
*	Cross-Examination in Criminal Trials
*	Federal Rules of Evidence Manual

Figure 2-1.—Standard minimum list—commercial lawbooks.

- \* Goldstein Trial Technique
- \* Handling Narcotic and Drug Cases
- \* Investigation and Preparation of Criminal Cases
- \* Military Rules of Evidence Manual
- \* Shepard's Criminal Justice Citations (for ABA Standards for Criminal Justice)
- Standards for Criminal Justice (ABA)
- \* Successful Techniques from Criminal Trials
- \* Wharton's Criminal Evidence
- \* Wharton's Criminal Law
- \* Wharton's Criminal Procedure

#### Legal Assistance Materials

- \*# Family Law Reporter weekly (limited to 100 domestic law cases yearly)
- \*# Federal Tax Manual
- \*# Legal Formulary (AMJUR2d or West 2d or Jones)
- \*# Martindale-Hubbell Law Directory (every other year, Law Digest volume every year)
- \*# NADA Official Used Car Guide subscription
- \*# NADA Title and Registration Book or AAA Digest of Motor Laws
- \*# State statutes as needed

#### General Materials

ALR 2d (in hard copy or microfiche, closed set kept current with ALR 2d Later Case Service)

ALR 2d Digest

ALR 3d (closed set kept current with pocket supplements)

ALR 4th

ALR Digest (for ALR 3d, 4th, Federal)

AMJUR Pleading and Practice Forms Annotated

AMJUR Proof of Facts (30 vols closed set kept current w/pocket supplement)

AMJUR Proof of Facts 2d (continuation of AMJUR Proof of Facts)

AMJUR Trials

- \*# Effective Legal Research

Ethics Treaties

- \*# Law Dictionary

- \* Legal Encyclopedia (AMJUR2d, CJS)

- \*# Medical Legal Dictionary

- \*# Uniform System of Citation (Harvard "Blue Book")

- \* Weinstein's Evidence

Words and Phrases

#### Civil Practice (Federal and local) Materials (stateside NLSO only)

American Law of Medical Malpractice

Federal Practice and Procedure

Figure 2-1.—Standard minimum list—commercial lawbooks—Continued.

<p>Handling Federal Tort Claims, Personal Injury</p> <p>NADA Appraisal Guides Official Car, Older Car, etc.</p> <p>Regional or State Reporter, w/Advance Sheet subscription, as needed (Regional Reporters available also in ultrafiche)</p> <p>Regional or State Digest (to match reporter system)</p> <p>Shepard's Citations (to match reporter system)</p> <p>West Federal Forms</p>
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**Figure 2-1.—Standard minimum list—commercial lawbooks—Continued.**

responsible for providing automatic upkeep service on many other commercial lawbooks that are not listed. Commercial lawbook needs vary from office to office. Each year, each field library is informed by JAG Report 5070-2 (to be discussed later in this chapter) of the exact materials maintained for them by JAG.

Other reference materials (noncommercial) needed for your library may be handled by one of several other offices in OJAG. These include the following:

- The *JAG Journal* and the *Off the Record*—published and distributed by the Office of the Executive Assistant to JAG.
- The *Legal Newsletter*— materials about continuing legal education and legal assistance are published and/or distributed by the Continuing Legal Education/Legal Assistance Policy Division of JAG.
- The *Military Justice Reporter*— although published by West Publishing Company, it is considered noncommercial and is provided to all JAG field activities by the Publications section of OJAG. This office also provides for the distribution of *Shepard's Military Justice Citations*, military legal publications such as the *Military Law Review* published by the Department of the Army, and publications of the Government Printing Office (GPO) such as the MCM. In addition to the previous services, the Publications section is also responsible for distributing JAG instructions and notices, as well as the *JAG Manual*.

Of those offices briefly mentioned previously, you will probably have more direct contact with the Field Library section and the Publications section than any other. The following discussion is provided to help you better understand the functions and responsibilities of these offices and their relationship to the field law libraries.

## **FIELD LAW LIBRARY SECTION, OJAG**

The Field Law Library Program was established in 1974 to centralize purchasing of commercial lawbooks for Navy field law libraries. Centralized purchasing results in (1) reduced administrative costs by combining individual requisitions; (2) frequent publisher discounts for bulk purchases; and (3) standardized field law libraries for the Naval Establishment.

The Head, Field Law Library section acts as primary advisor to JAG on all matters related to the commercial lawbook needs of the field library activities as well as keeping track of the status of the commercial books and services contracted and paid for by JAG. Additionally, this office is responsible for keeping JAG informed on which contracted services are to be renewed or canceled, which materials provided to field libraries have been replaced due to loss or damage, and which new materials, if any, should be purchased for use by the field libraries.

As an aid in keeping track of the needs of the field libraries and the status of the contracted services, an annual report is sent to each individual field library. This report serves a dual purpose because it provides a list of the commercial lawbooks and services that are automatically provided for each field library by JAG and also provides the Field Library section with valuable information that can be used to determine which services need to be renewed, which can be canceled, and which materials, if any, need to be replaced. A sample of this report, JAG Report Symbol JAG 5070-2, is shown in figure 2-2. We will discuss your responsibilities concerning this report more fully later in this chapter.

The Field Library Program handles only commercial lawbooks. The *Code of Federal Regulations* and the *Federal Register* may be obtained from the OJAG Publications Section, Code 64; the *Naval Law Review*



JAG REPORT SYMBOL JAG 5070-2

SAMPLE

SAMPLE

SAMPLE

Staff Judge Advocate, Naval Station, Norfolk, Virginia 23462

LIST OF COMMERCIAL LAWBOOKS for which maintenance (pocket parts, new volumes, replacement sets, as published, and/or subscription renewals) will be provided automatically by the JAG centralized fund.

NATIONAL MATERIALS

AMERICAN JURISPRUDENCE LEGAL FORMS 2d - Lawyers Co-op

AMERICAN JURISPRUDENCE 2d with New Topic Service - Lawyers Co-op

MARTINDALE-HUBBELL LAW DIRECTORY with STATE LAW DIGEST

MILITARY LAW REPORTER - Public Law Education Institute

MOYER'S JUSTICE AND THE MILITARY - Public Law Education Institute

NADA OFFICIAL USED CAR GUIDE

NADA TITLE BOOK

U.S. CODE ANNOTATED - West

U.S. LAW WEEK - BNA

STATE MATERIALS

VIRGINIA STATUTES ANNOTATED - West

The foregoing list stands correct as of \_\_\_\_\_

\_\_\_\_\_  
Signature of OIC or SJA

Figure 2-2.—JAG Report Symbol JAG 5070-2.

(formerly the *JAG Journal*) is available from the Naval Justice School and *Off the Record* from the Executive Assistant to the Deputy Judge Advocate General, Code 001A. The *JAG Manual*, the MCM, and Navy directives may be ordered from the Naval Publication and Forms, Navy Aviation Supply Office, Philadelphia,

Pennsylvania 19120. Individual commands are responsible for ordering GPO publications and copies of *U.S. Treaties and Other International Agreements* from the GPO. Periodical subscriptions such as law journals must be ordered with the commanding officer's approval directly from the supplier. Care must be taken

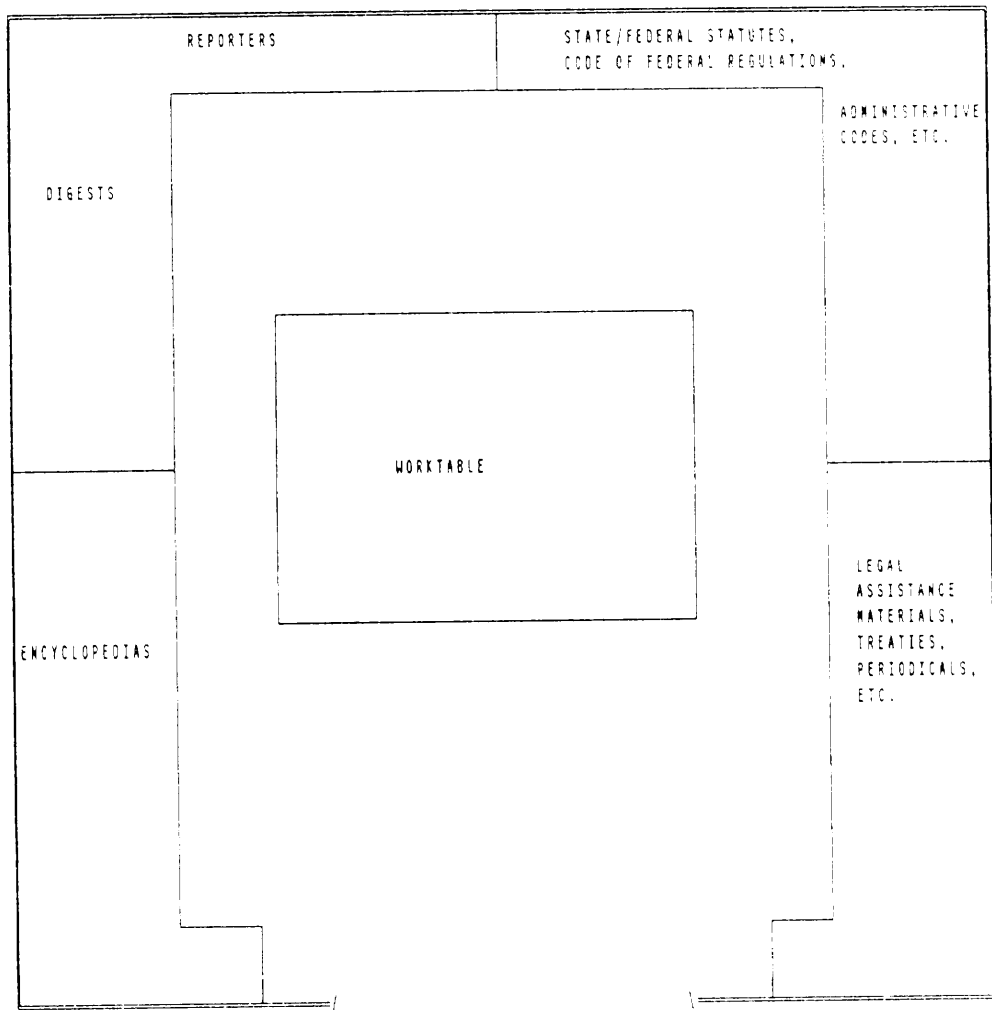


Figure 2-3.—Library layout for large library.

that these are mission essential and support the work of the ordering activity.

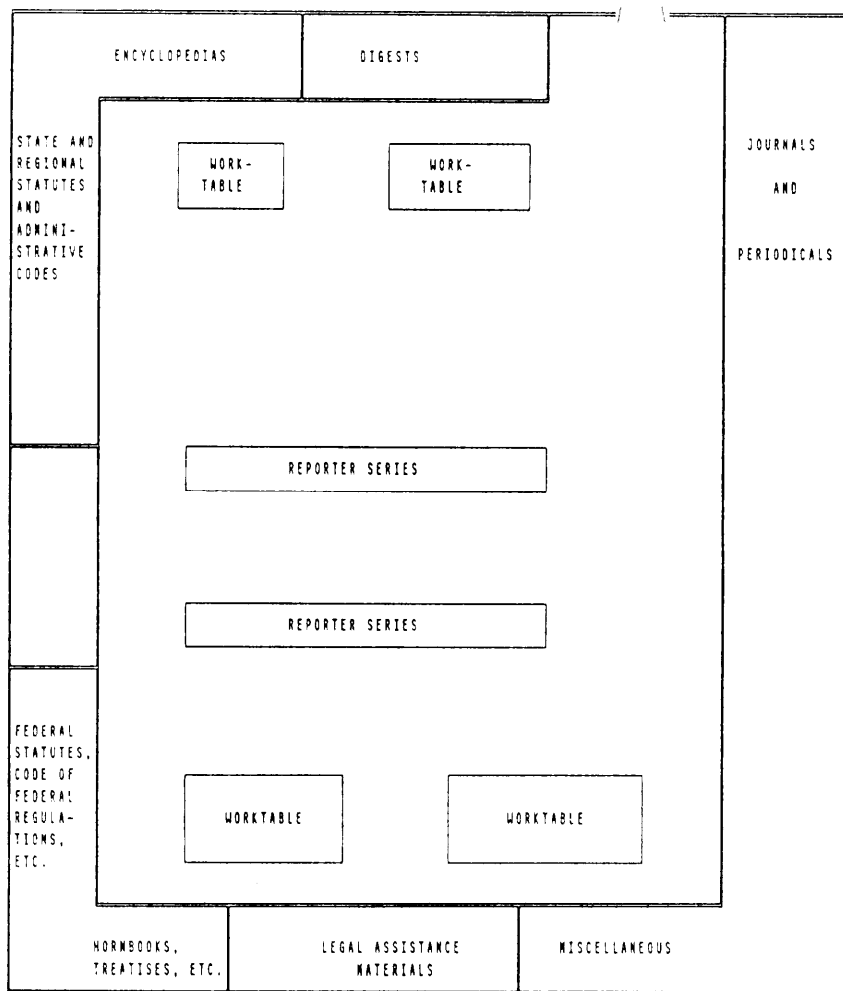
### LAW LIBRARY MAINTENANCE

One of the most important tools used by lawyers in performing their duties is legal research. The effectiveness of legal research depends on how well legal reference materials are maintained and kept up to date. As an LN, you play an important role in the upkeep of the library. At the same time, you will need to know how to arrange the materials in the library, how to file these materials, how to keep these materials up to date, and how to keep track of these materials. There are no standardized methods prescribed for maintaining a law library; however, the following discussion and

suggestions should help you in performing your duties as a law librarian.

### ARRANGEMENT

Having a definite arrangement of materials contained in the law library will help you keep track of these materials as well as making it easier for those using the library to locate specific reference materials. The first step you should take in arranging these materials is to determine where the various materials are located. Not all the materials contained in the library will be kept in a central location. You will probably find that some of the lawyers will want to keep specific materials in their offices for ready reference. You may also find, especially in large NLSOs, that the materials related to



**Figure 2-4.—Library layout for small- or medium-sized library.**

specific areas of law, such as military justice, legal assistance, and claims, should be kept in the spaces of the division primarily concerned with those specific areas. Even though some of the materials contained in the library are located in various offices, there are certain materials that should be kept in a central location. These include such materials as finding tools, reporters, and certain sets containing statutes. A definite arrangement is needed in the central library for these particular materials to help you and those individuals using the library to locate specific references quickly and easily. The arrangement of the materials kept in separate offices should be left up to the individuals controlling those offices. However, the accountability for these materials is still your responsibility since they are part of the law library.

Legal research frequently entails the use of several books simultaneously. Observe someone researching the law and you will see that person find a point of law

in one book, then obtain another book to help develop that point, then refer to another book to develop it further, and so on until that person has refined it to its most effective point. This process involves the examining of a law from many varied sources. The physical arrangement of the library should be established in a manner that will permit the researcher to reach each of these books with a minimum of wasted motion. Space and equipment limitations will dictate the most effective layout for your library. Figures 2-3 and 2-4 show two sample arrangements.

The following suggestions may be helpful to you in determining the arrangement of the materials in your library.

- Organization by major subject—In some libraries, the books are shelved in groups based on their major subject content (military justice, criminal law, or admiralty law).

- **Organization by type of publication**—This involves the arrangement of the materials by the type of publication, such as encyclopedias, journals, treatises, statutes, and reports.

Either of these methods is effective or as an alternative, a combination of these methods may be used in arranging the materials in the library. Whenever you use one of these suggested methods or some other method of your own design, you should first take a look at what types of materials are contained in the library and then make a determination as to which method or methods would work best.

## **MAINTENANCE PROCEDURES**

The importance of properly filing, updating, and accounting for the materials contained in the library cannot be overemphasized. This should be accomplished immediately upon receipt (or upon completion of office routing) of any new materials. There can be no excuse for an error caused by using an out-of-date lawbook when the update is sitting off in a corner. The following hints are given to help make your job easier in these areas.

### **Filing**

As you begin working with the various types of materials contained in the law library, you will discover that the publishers of these materials have designed the format of each publication to allow for frequent and continuous updating. This is necessary to keep up with the constant changes that occur in the laws that govern our states and country. The methods used to update these materials vary with each publisher, but the most common ones that you will work with are loose-leaf supplements, pocket parts, interim pamphlets, advance sheets, bound volume replacements, and bound volume supplements. Because of these variances, you should carefully read any instructions the publishers have prepared about the proper methods to make changes and updates to their published materials. Let's take a look at these seven methods and see how they are used to keep the materials in your library up to date.

- **Loose-leaf supplements**—As the name implies, these materials are loose-leaf and are usually kept in special binders provided by the publisher. *U.S. Law Week*, published by the Bureau of National Affairs (BNA), and the *Military Law Reporter*, published by Public Law Education Institute, are examples of loose-leaf services you may find in the library. *U.S. Law Week* is designed to keep lawyers current on selected new

laws, regulatory agency interpretations of new and existing laws, and recent opinions of the U.S. Supreme Court and lower federal courts. The *Military Law Reporter* is designed to keep military lawyers current on selected new laws, regulations, and directives of the armed forces, and recent opinions of the U.S. Court of Military Appeals and the published and unpublished opinions of the Army, Air Force, and Navy Courts of Military Review.

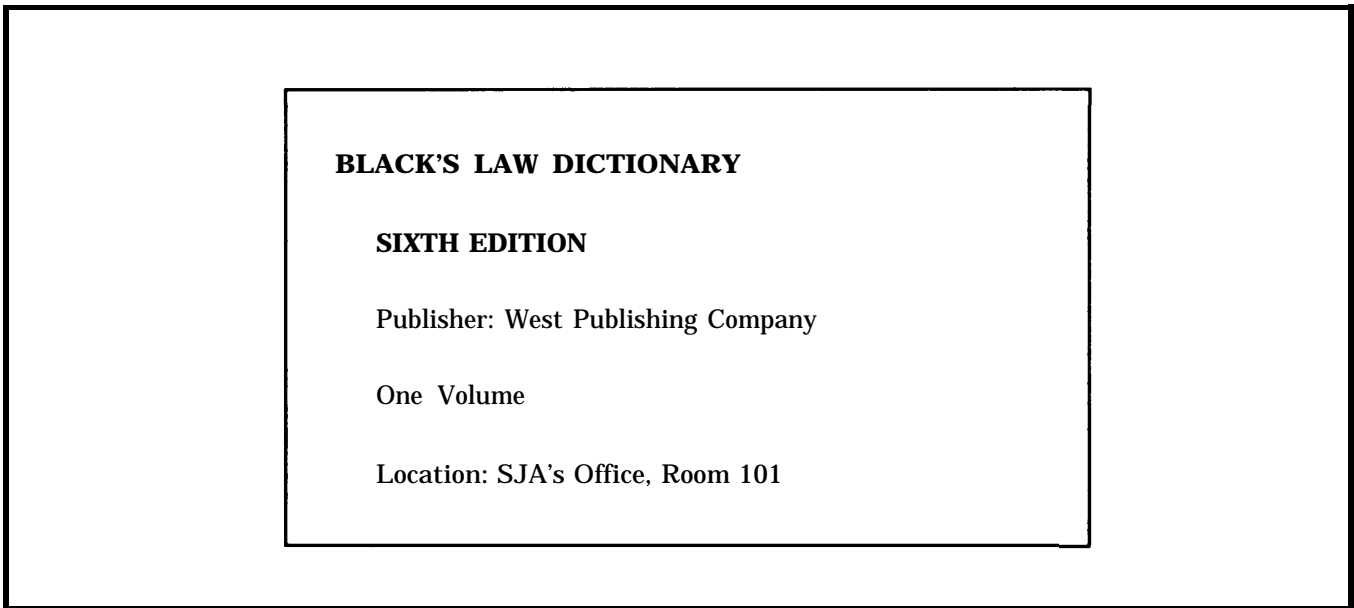
You should file these loose-leaf supplements as soon as possible after receipt. Special emphasis should be placed on following the filing instructions—this may appear time-consuming but is often the quickest method to make sure the loose-leaf service is properly maintained.

- **Pocket parts**—These supplements are published periodically (usually annually) and are designed to fit into a pocket provided by the publisher inside the book cover of the bound volume for which the pocket part has been printed. The *U.S. Code Annotated* (U. S.C.A.), published by West Publishing Company, uses the pocket part system. It is important, when filing pocket parts, to make sure each pocket part is placed in the proper volume and the outdated pocket part is discarded.

- **Supplementary pamphlets**—These are sometimes published as an alternative or an addition to a pocket part. They should normally be shelved beside the volume(s) they supplement. Instructions on the pamphlets will inform you of whether or not you should discard the pocket parts. The U.S.C.A. usually contains several supplementary pamphlets at any given time.

- **Interim pamphlets**—These are published at various times, usually to update a set between issuance of annual pocket parts or other periodic updates. For example, U.S.C.A. pocket parts are published around March and normally include all updates through the last calendar year adjournment (session) of Congress. Then, usually in June, September, and November—but these months can vary—the publisher will issue an interim pamphlet to incorporate laws passed since the last session. Not many sets contain interim pamphlets, but the instructions on those received should be followed closely.

- **Advance sheets**—These are paperbound volumes, usually prepared and sent out before the printing and publication of the hardbound volumes. The *Military Justice Reporter* is the most common set that uses these advance sheets. These advance sheets should be placed on the Shelves immediately following the latest



**Figure 2-5.—Catalog card.**

hardbound volume and should be discarded when they are replaced by the appropriate hardbound volume. Hardbound volumes may contain revisions of the advance sheets, a good reason for discarding the advance sheets when you receive the hardbound volumes.

- **Bound volumes replacements**—Bound volumes are often published to replace outdated volumes in a set, sometimes two or more new volumes will replace an old volume. In these cases, the old volume should be discarded. The U.S.C.A. normally receives 12 replacement volumes each fiscal year.

- **Bound volume supplements**—Occasionally a supplement is published in the form of a bound volume, in that case you do not discard the basic volume but merely shelve the bound volume supplement next to it. If a pocket part is later published, it will state whether it is to be placed in the rear of the basic volume or the supplementary volume. The U.S.C.A. frequently contains several bound volume supplements.

### **Accountability**

An important function of your duties in maintaining the library is keeping track of the materials contained in the library. To be able to quickly account for the whereabouts of all material belonging to the library will help you and the persons using the library. Furthermore, it will also save command funds because replacement items will not be required because of losses due to a poor accounting system. The size of your library and the

needs of the library users will generally dictate the type of accountability used. For most libraries, it is recommended that the books be cataloged using a simple card index system (see fig. 2-5) that lists the following minimum information for each item:

- Title of the reference material
- Edition (if applicable)
- Publisher
- Number of volumes
- Location of the reference material

In addition to setting up a card catalog system as suggested previously, you also should set up a checkout system to keep track of those materials that are borrowed from the library. Two different check-out systems are described in the following paragraphs.

- **Check-out card**—This is probably the most effective system that can be used. It consists of placing a check-out card in either the front or back of each volume of reference material. This card should contain enough information to identify the specific volume it came from and should provide sufficient space for the individual checking out the material to enter the date checked out, the individual's name, and the individual's office and/or command. When a book is checked out, the card may be placed on the shelf in place of the book, or all check-out cards may be kept in a central location for

Am Jur 2d		
Vol. 12		
PLEASE PRINT YOUR NAME		
DATE	NAME	OFFICE/CMD

Figure 2-6.—Check-out card.

easy reference. Figure 2-6 is a sample of a check-out card.

- Sign-out list—This system is effective for use in a small library and consists of a simple sign-out sheet with space provided for individuals to enter the date material is checked out, the title of the material, the individual’s name, and the individual’s office and/or command. The sign-out sheet should be kept in a highly visible location where it will remind people to sign for the books they are borrowing. Near the door of the library would probably be the best location. Figure 2-7 is a sample of a sign-out list.

Whether you use one of these suggested systems or some other system, the system that is used can only be effective if it is actively controlled by the person who is in charge of maintaining the library.

In addition, it is a good idea to have each volume identified in some way to show that it came from your

library. An easy way to do this would be to stamp each individual volume or item with the return mailing stamp used by your office or command. This maybe time-consuming initially, especially if none of the volumes have been previously identified. On the other hand, it is an easy task to stamp each new item on the three outside closed book edges and on the margins of pages 1 and 101—a common library practice—as soon as you receive them.

The need to maintain a reliable and effective means of accountability for the materials contained in the law library can be appreciated when you consider the high cost involved in replacing lost or damaged legal reference materials.

**Ordering Materials**

From time to time, you will probably discover that some of the books or materials contained in your library have been lost or damaged. When this occurs, you



annual report to each field library activity listing those commercial lawbooks and services that are maintained by JAG for the particular field library (see fig. 2-2). When this report is received by your office, you will probably be tasked with checking those items listed in the report against the contents of the library. This can be done quickly and easily if you have an effective system of accountability established. After you have completed this check of the library, you should send your findings through your immediate supervisor to the head of your office who will then complete the report and send it to JAG. Even though this may be the only report you will have to work with concerning the library, there may be occasions when the Head, Field Library section may desire a special report about specific books and materials contained in your library. If such a report is received, it should be handled according to the instructions that accompany it.

## LEGAL RESEARCH

Even though you may not be directly involved in the actual performance of legal research as an LN3 or LN2, you may be required to locate reference materials for the lawyers in your office. The following paragraphs should help you become more familiar with the types of materials normally contained in a law library and how these materials are related to the basic legal research categories mentioned earlier in this chapter. In addition to this, we will also discuss what is meant by citing a legal source and how to use these citations to locate specific references.

## REFERENCE MATERIALS

At the beginning of this chapter, we took a brief look at the three broad categories that legal reference materials fall into, these being primary sources, finding tools, and secondary sources. Let us look at these categories a little closer and see what types of materials are contained in each.

### Primary Sources

Primary sources have been defined as those recorded rules of human behavior that will be enforced by the state. These rules may be recorded in federal or state statutes, administrative and executive regulations, issued to comply with a legislative authorization, or as court decisions.

- Statutes—Statutes are published by jurisdiction and in chronological order of enactment. Chronological

publications of these laws are called session laws. One such publication of federal laws that will probably be part of your library is *Statutes at Large*. Because these laws are listed in chronological order and not by subject and date of passage, it is difficult for the researcher to locate a particular law. To help solve this problem, these laws are codified by subject matter and the laws that pertain to a particular subject, regardless of when they were passed, are found together under a specific subject codification. Normally, your library will have either the U.S.C. published by the GPO, which is the official codification of federal statutes or the U.S.C.A. or the U.S.C.S., which are unofficial versions published by West Publishing Company or Lawyers Cooperative Publishing Company, respectively. You may also find that you will have similar codification for state statutes contained in your library covering the laws for the state where your command is located.

- Regulations—Administrative and executive regulations provide the guidelines to be followed in carrying out certain statutes. For example, the MCM was published according to the directive issued as Executive Order 12473 of August 1, 1984, to comply with federal legislation enacted that affected the application of military justice in the Armed Forces of the United States. Another example is the regulations and instructions used by the Internal Revenue Service to provide the guidelines for implementing federal tax laws. Federal regulations are officially printed in the *Federal Register*. Because the *Federal Register* is published in chronological order, the same as *Statutes at Large*, the same problem exists for the researcher trying to find a specific regulation. To help solve this problem, the *Code of Federal Regulations* (C.F.R.) was developed and serves the same function for regulations that the U.S.C. serves for statutes.

- Court decisions—One of the bedrock principles of our judicial system is *stare decisis et non quieta movere*, which basically means to adhere to precedent and not to unsettle things that are settled. Questions arise daily that require interpretation of the law. These questions are resolved by the courts (usually appellate courts), and these decisions become law.

Case decisions are collected and published in chronologically arranged volumes that become a very important part of your library. As an LN, you will be concerned primarily with the reports of cases that have been decided by the U.S. Supreme Court, the U.S. Courts of Appeals for the federal circuits, federal district courts, the U.S. Court of Military Appeals (U.S.C.M.A.), and the Navy and Marine Corps Court of



Military Review (N.M.C.M.R.). The case decisions handed down by these courts can be found in official and unofficial publications called reporters. The reporters that you will most likely come in contact with are the *U.S. Supreme Court Reporter*, the *Military Justice Reporter*, the *Courts-Martial Reports*, the *Federal Reporter*, and the *Federal Supplement*. (NOTE: The last bound volume of *Courts-Martial Reports* (C.M.R.) was volume 50, published in 1975. The *Military Justice Reporter* (M.J.), which began publication in 1978, picks up where the C.M.R. leaves off. Those cases reported in advance sheets published between 50 C.M.R. and 1 M.J. are included in 1 M.J.) Additionally, you may have in your library a state and/or regional reporter (from West's National Reporter System) covering the decisions of state and local courts for your command's location. Not all states have individual reporters available. Many states use the National Reporter System developed by West Publishing Company. The size of your office, as well as the type of services provided by that office, will have a large bearing on determining what type of reporters will be maintained in the library.

### Finding Tools

As you can see from the previous discussions concerning primary sources, there are many different sources that cover a vast number of laws, regulations, and court decisions. To help the researcher, several different types of materials have been developed to aid in finding the information contained in the primary sources. The three basic types of finding tools are digests, legal encyclopedias, and citators.

- **Digests**—To impose some sort of order for the more than 3 million reported case decisions related to federal and state laws, digests were developed to classify these cases according to their legal topics and then arrange these topics in alphabetical order. These digests provide the researcher with citations to specific uses and a very brief, often one-sentence digest of each point of law addressed in each case. The digest (called a headnote when appearing at the head of the case in the reporter) is provided to help the researcher decide which of the cases cited might prove helpful to the researcher if the entire opinion of a particular case were to be examined.

Probably the most comprehensive of these digests is the *American Digest System* published by West Publishing Company. This digest system was developed for use in conjunction with West's *National Reporter System*. Three of the other digests published by West are the *Federal Digest*, the *Modern Federal Practice*

*Digest*, and the *Federal Practice Digest 2d*. The *Federal Digest* is used for finding federal case law from 1754 to 1939, the *Modern Federal Practice Digest* from 1940 to 1960, and the *Federal Practice Digest 2d* from 1961 to date. All three sets are needed to complete federal case law coverage although upkeep and accounting to JAG is required only to the latest. These three digests are common to all the NLSO law libraries you will encounter. They use a system where general topics are subdivided into smaller subtopics identified by key numbers that can be used for easy reference. The key numbering system was developed by West Publishing Company to help the researcher quickly find applicable laws. The topics and subtopics are set out alphabetically in these digests and identified with key numbers to give the researcher cross-reference to cases involving similar subject matter. Detailed instructions on how to use this key number system can be found in each of the digests and in Price and Bitner's *Effective Legal Research*, which is published by Little, Brown, and Company.

- **Encyclopedias**—A second source for finding cases is through the use of a legal encyclopedia. Even though these encyclopedias state the law, they are of dubious value in that they tend to overgeneralize. The researcher may, however, find in the footnote citations in encyclopedias a source of cases that can be used to branch out through the use of digests or a citator. The national legal encyclopedias are *American Jurisprudence 2d* and *Corpus Juris Secundum*, published by the Lawyers Cooperative Publishing Company and West Publishing Company, respectively.

- **Citators**—Still another type of finding tool that can be used, more for determining the history or status of a case than as an initial source for finding the case, is the citator. The most common of these is *Shepard's Citations*. This particular citator is the most comprehensive and widely used citator available in that it allows the researcher to accomplish the following actions:

- To trace the judicial history of each reported case, including proceedings following the cited decision

- To verify the current status of each reported case so as to determine whether it is still effective law, or has been modified or overruled

- To find later cases that have cited the main case

- To find citations in periodical articles and attorney general's opinions

Additionally, pamphlets are issued on a regular basis by Shepard's to reflect the most recent developments and then the information printed in these pamphlets is eventually printed in bound volumes. Specific instructions on how to use this citator can be found in each of the bound volumes and in *How to Use Shepard's Citations* printed by Shepard's Citation, Inc.

One final case finder you may encounter while working with the law library is *Words and Phrases* which is published by West Publishing Company and contains thousands of legally significant words and phrases arranged in alphabetical order. Each of these words or phrases is followed by a definition and a citation to the decision from which the definition was taken. Additionally, this particular case finder is kept up to date with pocket parts issued annually by the publisher.

### Secondary Sources

Secondary sources may be defined as those legal materials that are not in any way binding, although they may be persuasive, upon the courts. Included, among others, are treatises and periodicals.

• **Treatises**—Treatises run the gamut from the most scholarly treatment of a particular legal subject to practice guides that make no pretense to scholarly analysis. Depending upon where they fit into this spectrum, they may be divided into the following groups:

- Scholarly surveys of particular fields in depth
- Hornbooks, student tests, and treatise abridgements
- Practitioners' handbooks in particular fields
- Specialized monographs on more or less narrow topics
- Comprehensive commentaries, histories, and works of juris prudence

The greatest danger involved to the researcher in the use of treatises is sometimes one of currency. A survey that is one day definitive in a given subject area may become quickly obsolete unless revised to reflect changes in the area.

• **Periodicals**—Periodicals are issued by law schools, bar associations, private publishers, or just about anybody else who has something to say and the money to pay for their publication. As you might guess, the quality varies from the first-rate scholarship of the best law school reviews to the hackwork of some special

interest groups. In addition to the periodic indexes issued for the individual publication, there are a number of periodical indexes, most useful of which is the *Index to Legal Periodicals*. The *JAG Journal* and *Off the Record* are two periodicals of particular interest to Navy practitioners. Other publications that should prove useful are the *Military Law Review* (Army) and the *Air Force Law Review* (formerly the *United States Air Force JAG Law Review*).

### FINDING CITED SOURCES

The use of citations in law serves as a means to identify the reference materials used in the preparation of legal writings. To standardize the system of citing legal references, the Harvard Law Review Association developed and published a comprehensive and standard system of citations known as *A Uniform System of Citations* (U.S.O.C.). The U.S.O.C., even though it does not adequately provide citation procedures to be used with military law, has been officially adopted for use throughout the Navy. In an effort to supplement the U.S.O.C. in those areas that are not adequately covered, JAG has developed supplemental guidelines, which can be found in JAGINST 5850.2, to be used with citing military law.

Although the combined system may at times seem needlessly complicated and arbitrary, it has the virtue of identifying precisely to the reader the exact reference intended by the drafter of legal material,

As an LN3 or LN2, you will seldom be required to construct citations to be used in legal writings or to conduct legal research, but you should be familiar with the methods used in citing legal references so you will be able to locate specific cases when you are asked to do so and the only thing you have to work with is a citation. To do this, you will need to know how to translate a citation to locate the source wherein the reference is to be found and the exact page or pages where the reference is located in that source. The following discussion should be useful in helping you become more familiar with the methods that are ordinarily used in citing statutes, court decisions, and other references. In addition to these discussions, specific information and instructions concerning citations may be found in the U.S.O.C. and in supplementary material supplied by JAG.

### Statutes

Federal statutes are ordinarily cited to the U.S.C. by the title and section number, as well as the year the

statutes were published. For example, a citation referring to section 501 of Title 10 of the U.S.C. would read 10 U.S.C. §501501 (1970). When *Statutes at Large* are cited, the volume and page number and date published would be used in the citation; for example, 47 Stat. 1470 (1933). However, in practice, reference is almost always made to the U.S.C. You may have occasion to look up a statute that has not yet been incorporated into *Statutes at Large* or U.S.C. When this occurs, the statute is referred to by the public law number assigned to it. This number can be found in the slip law that is an advance publication of the statute printed as a means of disseminating this law before incorporating it into *Statutes at Large* and the U.S.C. A citation using a public law number will tell what session of Congress passed the law, the number assigned to it, the section being referred to, and the date the law was enacted. An example of a citation using a public law number would read, Pub.L.No. 89-320, § (Feb 11, 1965). This information can also help you find a public law in *Statutes at Large*. Citations of state statutes usually refer to the official code for that particular state. In cases where a state statute has not yet appeared in the official code for that state or if that state has no official code, then the citation usually refers to the preferred unofficial code. For example, a citation referring to a particular statute published in chapter 41 of the Massachusetts General Laws would read as Mass. Gen. Laws ch. 41, § 95 (1932), which also tells you what section is being referred to and when the statute was published. State statutes may also be cited referring to that particular state's published session laws, which are the state's equivalent to *Statutes at Large*.

### **Court Decisions**

Court cases are cited by names (plaintiff v. defendant) excerpted from what is called the style of the case. The citation of a court case refers to both the official (where there is one) and unofficial reporter, followed by both the title of the court that made the decision and the year in parentheses. The citation will show you the volume and page number where the cited case may be found. For example, a citation referring to a case decided by the Supreme Court of Virginia would be shown as *Henderson v. Commonwealth*, 215 Va 811, 213 S.E. 2d 782 (1975). The title of the court is not shown in *Henderson, supra*, because citations to state court decisions are presumed to be referring to the highest court of that particular state unless some other court is named in the citation. A citation to a case decided by the District Court of Appeals in Florida, which has no official reporter, would be shown as *Lopez v. State*, 372

So. 2d 1136 (FL Ct. App 1979). Where a court decision has not yet been published in an official or unofficial report, the citation will refer to the slip opinion (an opinion printed in advance of the publishing of the case decision in an official and unofficial reporter) and will cite the style of the case, docket number, the court of record, and the date the case was decided. Normally, citations of cases will provide you with the following information: the name (style) of the case, the name of the reporter and the volume the case can be found in, the page number where the opinion begins, the court that decided the case, and the year or date the decision was made. For example, *United States v. Mathew's*, 6 M.J. 357 (CMA 1979) refers to a case decided by the U.S.C.M.A. in 1979 and can be found in volume 6 of the *Military Justice Reporter* on page 357. Additional information concerning case citations and what they mean can be found in the U.S.O.C., JAG Instruction 5850.2, and Price and Bitner's *Effective Legal Research*.

### **Other Sources**

A citation for a treatise would refer to the volume number (if more than one), the author, title, page, section or paragraph number, edition (if more than one have appeared), and the date the treatise was published. For example, a treatise on the History of English Law would be shown as 1 F. Pollock & F. Maitland. *The History of English Law* 518 (2d ed. 1898). Citations of legal writings contained in journals and periodicals that are paginated consecutively throughout a volume refer to that volume number, abbreviated title of the periodical or journal, page number and year published, as well as the title of the article and name of the author. For example, a citation for an article appearing in the *Harvard Law Review* would be shown as Chafee, *Equitable Servitudes on Chattles*, 41 *Har. L. Rev.* 945 (1928).

Legal encyclopedias are referred to in citations by volume, abbreviated title of the encyclopedia, subject title, section number, and date printed. For example, a citation referring to contracts in *American Jurisprudence* 2d would appear as 12 *Am. Jur. 2d Contracts* § 15 (1965).

### **AUTOMATED RESEARCH SYSTEMS**

As you progress in your career as an LN, you will witness that even the legal field is going high tech, Computers are here and the effects of their existence are already being felt. Legal research is fast becoming part

of the technological age. Using a system of computerized research can be costly to the user if the right system is not chosen. Even though automated systems are time-savers, a user must be aware of alternatives. The following paragraphs provide you with a brief overview of automated systems. Whether or not your command uses an automated system depends on the attorneys and budget limitations.

### **Federal Legal Information Through Electronics**

Federal Legal Information Through Electronics (FLITE) is an automated legal research system established by the Department of Defense and operated by the Department of the Air Force for use by all federal agencies. FLITE is the best bargain of all the existing systems since its services are available at no cost to judge advocates. FLITE uses computer technology to help federal employees and military members obtain more accurate and comprehensive legal research, saving time and effort. FLITE performs the following services:

- Creates and maintains full-text data bases of legal information
- Provides computer-assisted research to all federal agencies
- Produces and distributes computer-generated research tools such as indexes, digests, and citations
- Provides advisory service to federal, state, and local governments relating to automated legal research systems

FLITE does not give legal opinions or supply legal memorandums. Its role is to provide cases, decisions,

statutes, regulations, and other legal references that are relevant to the user's problems.

### **Other Available Systems**

In addition to FLITE, several other automated research systems are available to the legal profession. However, unlike FLITE, they do not fit into the realm of a tight budget. Other available systems such as WESTLAW, LEXIS, and JURIS require a significant cash outlay for installation and continuing expenditures for usage and equipment rental. As a senior LN, you might be tasked with a budget input for your command regarding the use of automated research systems. If so, the cost factor may be the deterrent that prevents your command from using services other than FLITE. However, FLITE research attorneys have access to WESTLAW, LEXIS, and JURIS as well as other existing systems. Although automated research systems are the coming event in the legal profession, it may be a while before they are the primary research systems in the Navy.

### **SUMMARY**

As you can see, the maintenance of a law library is an important part of your duties as an LN. Your familiarity with the maintenance and upkeep procedures of the law library will help you as a future LN1 or LNC to become more involved in the actual performance of legal research and the preparation of legal writings. Although attorneys are better trained to conduct effective legal research, senior LNs are increasingly being tasked to aid those attorneys in this area. This chapter has described how to carry out legal research by using primary and secondary sources and by citing sources. With a working knowledge of how to use finding tools, you will become an effective paralegal conducting legal research.

## CHAPTER 3

# COURT REPORTING

Court reporting is an old and honored profession. It is an endeavor you may be proud of because it serves a definite need. Wherever prominent people speak, a reporter is close by recording their words for dissemination to the public and for posterity. Whenever a general court-martial (GCM) or a special court-martial (SPCM) is sitting, a court reporter is recording the proceedings of that court-martial. This is done to preserve an account of what occurred on that day. You paint a complete picture of the proceeding by your finished product, the record of trial. The reviewer, staff judge advocate (SJA), convening authority (CA), the Navy and Marine Corps Court of Military Review (NMCMR), and the Court of Military Appeals (COMA) rely solely upon your record of trial to arrive at their decisions. Our motto as reporters is The Record Never Forgets.

Probably the most important duty you perform as an LN is to serve as a court reporter. As a court reporter, you must record and transcribe various types of proceedings and then place the transcription of these proceedings into the proper format. The most common types of proceedings you will record and transcribe include courts-martial, Article 32 pretrial investigations, courts of inquiry, *Manual of the Judge Advocate General* (JAGMAN) investigations as directed, and depositions. In this chapter you will become familiar with the general qualifications, duties, and functions of the court reporter. You also will become familiar with the different methods used in court reporting, administrative requirements, and standardized transcribing techniques. In addition you will examine these basic functions and duties along with some helpful hints and suggestions that will assist you as you perform your duties as a court reporter.

### FUNCTIONS OF THE COURT REPORTER

The primary function of a court reporter is to record all proceedings verbatim (word for word) and then transcribe what has been recorded into the proper format for that particular proceeding. The court reporter is also responsible for performing several related administrative functions before, during, and

after each proceeding. Many times these additional functions will include such duties as scheduling and preparing the courtroom, preparing requests for witnesses, preparing and distributing posttrial documents, and preparing confinement orders. Some of these duties are addressed in this chapter and the remainder are addressed in chapter 6, Pretrial Matters.

Before looking at the general duties of the court reporter, let's take a brief look at the issue of appointment and detailing of court reporters.

### APPOINTMENT AND DETAILING OF REPORTERS

Article 28, *Uniform Code of Military Justice* (UCMJ), provides, in part, that "Under such regulations as the Secretary concerned may prescribe, the CA of a court-martial, military commission, or court of inquiry will detail or employ qualified reporters, who shall record the proceedings of and testimony taken before that court or commission."

The *Rules for Courts-Martial* (R.C.M.) 405(d)(3)(B), *Manual for Courts-Martial* (MCM), 1984, provides, in part, that "The commander who directed the pretrial investigation may also, as a matter of discretion, detail or request an appropriate authority to detail a reporter."

R.C.M. 501(c) provides, in part, that "Reporters may be detailed or employed as appropriate but need not be detailed by the CA personally." The CA may direct that a reporter not be used in an SPCM. Regulations of the Secretary concerned may also require or restrict the use of reporters in SPCMs.

A bad-conduct discharge (BCD) may not be adjudged by an SPCM unless a verbatim record of the proceedings and testimony was made.

Reporters are not detailed to an SPCM to take a verbatim record unless the SPCM is convened by (1) an officer exercising general court-martial jurisdiction (OEGCMJ) or (2) a GCM CA who is granted the authorization. Reporters are not detailed to summary courts-martial (SCM).

Normally the commanding officer (CO) of the naval legal service office (NLSO) directs the employment of reporters.

R.C.M. 502(e), MCM, 1984, refers to the qualifications of reporters and provides, in part, that “The qualifications of reporters may be prescribed by the Secretary concerned. No person shall act as reporter in any case in which that person is, or has been, in the same case (1) the accuser, (2) a witness, (3) an investigating officer, (4) counsel for any party, or (5) a member of the court-martial or of any earlier court-martial of which the trial is a rehearing, new, or other trial.”

## OATHS

R.C.M. 807(b) provides that “The reporters shall take an oath to perform their duties faithfully.” The JAGMAN lists the required verbiage of the oath:

Oath for reporters: The trial counsel (TC) will administer the following oath to every reporter of a court-martial who has not been previously sworn:

Do you (swear) (affirm) that you will faithfully perform the duties of reporter to this court-martial (so help you God)?”

The TC administers the oath to the reporter at the court-martial. At the discretion of the CO of the NLSO to which the reporter is assigned or employed, reporters may execute a written oath to perform their duties faithfully in all cases to which they are detailed or employed before an officer qualified to administer oaths.

When a reporter who has been sworn is used by, reassigned to, or employed by a different GCM CA, a copy of the oath is given to the CO of the NLSO of the new CA. The CO of the NLSO authorizing the administration of a written oath maintains a copy of the oath so it may readily be determined that the reporter has been previously sworn. When reporters are not sworn in court because they have previously been sworn, this fact is noted in the transcript or the record of trial.

When calling the court-martial to order for the first time in a case, the military judge makes sure the name and rank of the detailed court reporter are announced. After all personnel of the court have been accounted for, the TC announces whether the reporter, if one is present, has been previously sworn. If not sworn, the reporter is then sworn. If a reporter is ever

replaced during the trial, this fact must be noted in the record.

## VERBATIM REPORTING

You, as the court reporter, are responsible for recording all proceedings verbatim. Actually, the term *verbatim reporting* may be misleading. There will, of course, be instances where you will know beforehand that a verbatim transcript of the proceedings will not be required, as in an SPCM where a punitive discharge is not authorized. Good reporting techniques, however, dictate that you should record all proceedings verbatim. There is always the chance that the CA may desire a verbatim transcript even though such a transcript would not otherwise be required. Obviously, you cannot prepare a verbatim transcript unless you have previously recorded the proceedings word for word. Also, there are certain portions of a summarized record that must be transcribed verbatim.

## GENERAL DUTIES OF THE COURT REPORTER

The most important thing you should always keep in mind when you are detailed as a reporter for any military court or commission is that it is your job to get it all down.

If a question is raised whether any particular matter is included in the terms *proceedings of* and *testimony taken*, the military judge determines the question according to applicable law and regulations. It is the duty of the reporter to include in the record everything that is said or takes place in open sessions and in hearings out of the presence of the court members. The reporter does not omit any portion of these proceedings from the record.

### Before Trial

Before trial you may be directed to perform other administrative duties that could include typing and preparing the following documents:

- Article 32 investigations
- Oral depositions
- Investigating officer's report
- Advice of the SJA
- Pretrial agreements

- Stipulations
- Charges and specifications
- Fliers
- Findings and sentence work sheets
- Proposed instruction to the members

Make sure copies of the appropriate court-martial convening order and any amendments are before each member of the court, military judge, TC, defense counsel (DC), and the accused. In addition, if the case was originally referred to one convening order and then re-referred to another, you must furnish the original order to the military judge. You also will provide a copy of the charges and specifications, questions forms, and sufficient paper and pencils to all parties to the trial.

You must make sure your recording equipment is in proper working condition and the other tools of good reporting are available; for example, extra pencils, extra prenumbered tapes, chalk, blackboard, erasers, tags for real evidence, and a reporter's work sheet.

Some of these pretrial administrative duties are addressed in this chapter and some are addressed later in chapter 6.

### **During Trial**

There are many duties of the court reporter during the actual proceedings. Of course, the most important duty is the actual verbatim recording of all proceedings. This also includes all actions of the witnesses, accused, counsel, and any other parties to the trial.

You may be required to remain in the courtroom during short recesses when the TC is unable to be present. You also will be tasked with securing the courtroom during meal recesses, overnight recesses, and any other period that necessitates the absence of the TC or yourself for extended periods. Make sure any evidence admitted during the trial is secured during such recesses or adjournments.

You are authorized, through the military judge, to stop the proceedings for various reasons. Keep these interruptions to a minimum. Some of the allowable reasons for stopping proceedings include the following:

- You did not hear the testimony of the witness.
- You did not hear something said by any other party to the trial.

- Time is required to change tapes.
- Time is required to mark exhibits.
- Anything else that requires your attention to make an accurate verbatim transcript.

### **After Trial**

After the trial is complete, you are responsible for retrieving all exhibits that were admitted in evidence (and those offered but not admitted) from the TC and DC, and any extra copies of these exhibits that are available. If charts, blackboards, or real evidence were introduced, you need to make the necessary arrangements to have these photographed immediately after the trial or, if time permits, during recesses or adjournments, as directed by the TC.

While the military judge or members see the physical evidence, the NCMR, which has fact-finding power, must often rely on photographs or descriptions. The TC has the responsibility of making sure the substituted photographs or descriptions adequately depict the exhibit. While the use of a self-developing photograph is convenient, the resulting photograph is often virtually useless to the appellate courts. Do not overlook the use of local photographic offices to help in preparing adequate photographic representations of the trial exhibits.

After the proceedings you are responsible for cleaning up the courtroom for the next trial and preparing the report of result of trial and a confinement order, if necessary, for the TC.

Last but certainly not least, you may be responsible for the preparation of the record of trial in that court. Each NLSO conducts business differently. If you are assigned to the court reporting and transcription shop, you may be required, at times, to transcribe your own courts. However, cases may also be turned in to the supervisor who then assigns them to the next available transcriptionist for preparation. It is, therefore, very important to remember that you may not be the one assigned to transcribe the court you are recording, so do the best job possible.

### **Loss of Recordings**

The military judge may, before authentication of the record, hold a posttrial session to repeat proceedings in which a verbatim transcript cannot be prepared because of loss of recordings.

## **Retention of Trial Notes**

For cases in which a summarized record of trial is authorized, retain the notes or recordings of the original proceedings until the record is authenticated.

For cases in which a verbatim transcription is required, retain the verbatim notes or recordings of the original proceedings until completion of final action or appellate review, whichever is later.

The verbatim notes or recordings may be kept by the TC, an assistant, a court reporter, or the supervisor of the court reporting and transcription shop.

## **COURT REPORTING METHODS AND EQUIPMENT**

You may use various types of equipment and methods to record and transcribe proceedings. The type of equipment and method used will depend largely upon the availability of equipment and the method you have been trained to use. Proceedings may be recorded using longhand, shorthand, or by using either mechanical or electronic equipment. As a practical matter, however, recording proceedings using longhand would be unduly slow and cumbersome and should not be used except as a last resort when none of the other more effective methods and means of recording are available. To help you understand more fully these methods, a brief discussion of each is provided as follows.

### **SHORTHAND**

Shorthand is a more efficient method of recording than longhand because it uses abbreviations, symbols, and characters in the place of letters, words, and phrases in recording what is being dictated. The only equipment needed for this method is pencils and paper.

### **MULTICHANNEL TAPE RECORDER**

The use of a multichannel tape recorder can guarantee that everything said during a particular proceeding is recorded. The major drawback of this method is that the individuals speaking may not be readily identified when the recording is transcribed and gestures and other nonverbal actions are not recorded at all. The use of a multichannel tape recording system has been found to be useful as a primary system with the incorporation of the reporter

notes to add in the missing elements of speaker identification and nonverbal responses and gestures.

## **REPORTER'S LOG**

During the proceedings of an SPCM or a GCM, the reporter is responsible not only for recording verbatim the proceedings of the court but also for noting in the record such items as the stages of examination; time of opening, recessing, closing, and adjournment of the court; and the marking of exhibits.

The reporter's log, Figure 3-1, can be a great aid to you both during and after the court. Use this log in any court-martial you record. The log has a place to fill in all the pertinent data that you will need to help in the transcription of the record of trial.

## **GENERAL RECORDING INFORMATION AND REPORTING TIPS**

In the following paragraphs, you will find some tips to help you produce records of trial that will be consistent and uniform in format. General information on such items as margins, page numbering, abbreviations, grammar, and punctuation is included. Taking a few minutes now to familiarize yourself with these basic rules will save you much time in the future and also enable you to turn out a finished product ready for immediate review. The following information relates primarily to SPCMs and GCMs. We will discuss the preparation of SCM records later in this chapter.

### **MARGINS**

The left margin of the record of trial should be 1 inch (10 picas or 12 elite spaces). The right margin should be set 1/2 inch from the side of the page (5 picas or 6 elite spaces.) The top margin on all pages should be 2 1/2 inches (15 lines) to allow room for binding with ACCO fasteners. The bottom margin on all pages should end as close to 1 inch (but not more than 2 inches) from the bottom of the page as possible. If the typed text ends more than 2 inches from the bottom of the page, as when it has been necessary to insert an additional partial page of testimony, you must draw a diagonal line from the left margin, starting immediately under the last line of typing to the right margin 1/2 inch from the bottom of the page. The reason for this action is to make the reviewing authorities aware that nothing has been inadvertently omitted from the record.



REPORTER'S LOG

SPECIAL: \_\_\_\_\_ GENERAL: \_\_\_\_\_ ACCUSED: \_\_\_\_\_  
REPORTER: \_\_\_\_\_ MJ: \_\_\_\_\_  
TC: \_\_\_\_\_ DC: \_\_\_\_\_ IMC: \_\_\_\_\_  
CIV COUNSEL: \_\_\_\_\_ CONV ORD & MODS: \_\_\_\_\_  
CONVENING AUTHORITY: \_\_\_\_\_  
DATE(S) OF TRIAL: \_\_\_\_\_ PLACE OF TRIAL \_\_\_\_\_

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NOTE	TIME	NOTE	TIME	NOTE	TIME	NOTE	TIME
_____	_____	_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____	_____	_____

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PLEAS

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FINDINGS

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SENTENCE

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<u>PROSECUTION WITNESSES</u>	<u>DEFENSE WITNESSES</u>	<u>COURT WITNESSES</u>
1. _____	_____	_____
2. _____	_____	_____
3. _____	_____	_____
4. _____	_____	_____
5. _____	_____	_____

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<u>PROSECUTION EXHIBITS</u>	<u>DEFENSE EXHIBITS</u>	<u>APPELLATE EXHIBITS</u>
1. _____	A. _____	I. _____
2. _____	B. _____	II. _____
3. _____	C. _____	III. _____
4. _____	D. _____	IV. _____
5. _____	E. _____	V. _____

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Figure 3-1.—Reporter's log



Indent two spaces from the left margin for each prefix; for example, TC, DC, PRES, ACCUSED, WITNESS, Q, and A. The second and subsequent lines should be typed flush with the left margin. Examples are as follows:

TC: I object to the last question of the defense on the grounds that it calls for an opinion on the part of the witness.

Q. Could you please relate, to the members of the court, the circumstances surrounding the burglary on the evening in question?

## NUMBERING PAGES

Number pages in the center of the page 1/2 inch (three lines) from the bottom of the page. If, during the course of transcribing the record, you accidentally skip a page number or duplicate a page number, correct the error as follows:

SKIPPED PAGE NUMBER—for example, numbers jump from 18 to 20, but nothing has been omitted from the transcript.

18

There is no page 19

Next page 20

NUMBER DUPLICATED OR EXTRA PAGE TO BE INSERTED—use the preceding page number plus an “a” as in “19a.” At the bottom of the preceding page, type:

19

Next page is 19a

On the inserted page, type:

19a

Next page 20

## ABBREVIATIONS

Unless a word or acronym is actually spoken as an abbreviation; for example, BM1, USS, or U.S. Navy, only the following abbreviations are

authorized. Keep in mind that you use the first four of these abbreviations only as prefixes to statements and they are not authorized for use in the text or when transcribing gestures or motions. The last five may be used in the text of the record:

TC: Trial counsel

DC: Defense counsel

PRES: President

MJ: Military judge

Mr. Mister

Mrs. Mistress

U.S. United States

USS United States Ship

Dr. Doctor

## GRAMMAR AND PUNCTUATION IN TRANSCRIPTION

You have previously studied general punctuation in chapter 1. Certain rules are covered here because you have a greater need to be familiar with them in legal work than in typing correspondence.

Use the apostrophe (') to form contractions; to form possessives of nouns (but not of pronouns); as a single quotation mark; to express feet and minutes; and to form the exclamation mark (unless your typewriter or computer keyboard has an exclamation mark on its keyboard). You form the plurals of letters and of numbers by adding 's. Within a word the apostrophe is written without spaces. Examples: It's not true that a company reported its change of policy. Boys' and girls' camps are advertised in this month's issue. Appellate is spelled with two L's.

Two spaces must follow a question mark (?) that appears at the end of a sentence. However, in the rare instances that the question mark appears within a sentence, leave only one space after the question mark. Examples: Q. Can he do it? or anyone? Q. What was the percentage of interest you paid?

Do not leave spaces between brackets [ ] and the matter enclosed. In the event the matter appearing in

brackets appears in the middle of a sentence, leave one space before the opening bracket and one space after the closing bracket. Example: Q. What did you see? A. About this far [gesturing] from the hammer, on the upper side of. . .

Place the period and the comma inside the closing quotation marks (") except in congressional and certain other classes of work showing amendments, and in court work with quoted language. Punctuation marks are printed after the quotation marks when not a part of the quoted matter, Examples: Insert the words "growth", "production", and "manufacture". This court finds you Guilty, except the word "steal", substituting therefor . . .

Place the semicolon (;) and the colon (:) outside the closing quotation marks. The question mark and the exclamation mark must be placed outside the closing quotation marks if the marks punctuate the entire sentence. Place them inside the closing quotation marks if they punctuate the quoted material only. Examples: As I was saying, "Seeing is believing." Did you see the sign, "Off Limits"? He asked me, "What is the punishment for shooting a man with a pistol?" All he said was, "What an awful mess!"

Use the single quotation mark (') when a quotation is enclosed within a quotation. Example: He answered, "I am not willing positively to say, 'Seaman Jones is the guilty one.'"

The rules on end spacing are as follows: Two spaces must follow all end punctuation marks, and two spaces must follow the colon.

When writing whole numbers, the numbers one through nine must be spelled out except when used in conjunction with other numbers in a series (example, 1, 2, 12, 25, and 50); as a measurement (example, 1 inch); time (example, 3 p.m.); decimals (example, 1.25); age (example, 6 years old); or as a percentage (example, 2%).

At the beginning of a sentence, numbers must be spelled out (example, Five years ago), except in questions and answers (Q. and A.) when time, money, percentage, serial numbers, and so on, are

concerned. In such cases use the numerals. Show dates as they are spoken in court (example, 1 June 1993 or 1st of June 1993). Always use numerals where monetary values are concerned and the money is a specific amount. If the amount is referred to in a general way, use words instead of figures. Examples: Q. How much money was in the bag? A. About a million dollars. Q. Exactly how much? A. \$1,055,000.00.

When writing fractions and whole numbers, transcribe the fraction by separating the figures with a slant (/); examples: 1/4, 1/2, 1/3, 5/8, 7/8, and 3 3/4. Do not use the fractions that appear on the keyboard. The reason for this is your fractions will be typed consistently throughout the record, since most keyboards have only the 1/4 and 1/2 fractions. An exception to this rule would be when the military judge or president of the court gives instructions, closes to vote on the findings and sentence, and states "three-fourths (or two-thirds) of the members present at the time the vote was taken concurring . . ." Type these fractions using words.

## **IDENTIFICATION OF SPEAKERS**

Identify the side or person conducting an examination by using one of the following standard stock entries (SSEs):

Questions by the prosecution:

Questions by the defense:

Questions by the military judge:

Questions by the president:

Questions by a court member (LT DOE):

Identify individual questions posed by the questioner by a Q. Identify answers by the witness in response to questions posed by a questioner having control of the stage of examination by an A. Identify answers by the witness in response to questions asked by anyone else by WITNESS.

Use these prefixes to identify speakers:

<u>COURT-MARTIAL PARTICIPANT</u>	<u>ORAL (SPOKEN)</u>	<u>TYPED</u>
Military Judge	JUDGE	MJ:
President (speaking as presiding officer)	PREZ	PRES:
Court Member	MEMBER LT DOE	MBR (LT DOE):
Trial Counsel	PROS	TC:
Assistant Trial Counsel	ATC	ATC:
Defense Counsel	DEF	DC:
Assistant Defense Counsel	ADC	ADC:
Individual Military Counsel	MC	IMC:
Individual Civilian Counsel	ICC	ICC:
Witness (when speaking but not answering a question on examination)	WITNESS	WIT
Accused (when speaking but not answering a question on examination as a witness on his or her own behalf)	ACCUSED	ACC:

**SLIPS OF THE TONGUE, FALSE STARTS**

You must record the testimony of witnesses and the remarks of court personnel and transcribe verbatim all slips of the tongue, false starts, interruptions, and pauses. When the person speaking interrupts himself or herself or pauses, use two hyphens to show this interruption; example:

- Q. What did he tell you?
- A. Well, I-- -I'm not really certain.

When the person speaking is interrupted by another, use four hyphens to show this type of interruption; example:

- Q. What did the commander tell you?
- A. He told me that- - - -
- DC: I object. What the commander said is hearsay.

**REPORTER'S REMARKS**

Paragraph 49b of the MCM, in discussing the duties of the reporter, states in part, "It is the duty of the reporter to include in the record everything that is said or takes place in open sessions, hearings out of

the presence of the court members, and the reporter will omit no portion of these proceedings from the record." (Emphasis supplied.)

You must record such acts as a witness pointing to the accused when identifying the accused, or any other motion or movement of personnel in the courtroom (other than spectators). Reporting these reporter's remarks is called ad libbing. Enclose your remark in brackets, except SSEs, to show that it is a reporter's remark or an ad lib.

Report the swearing, opening, closing, recessing, adjourning of the court, or the calling and excusing of witnesses with SSEs. Notations by the reporter that are required to be enclosed in brackets should commence, if possible, on the same line or on the next immediate line; for example: A. [Pointing in the direction of the accused.] That's him over there.

Insert other reporter notations, where brackets are not required, two lines below the preceding line and indent them two spaces from the left margin; example:

Lieutenant (junior grade) Hatch, the challenged member, withdrew from the courtroom.

## STANDARD STOCK ENTRIES

We have mentioned earlier the SSEs and their use for routine required items of information. The types of information covered by such entries are discussed as follows with examples.

### Opening and Closing of the Court

The reporter is responsible for noting the time the court opens, recesses, closes, and adjourns. Note that the record must show the time (expressed in hours and minutes) and the date of each opening, closing, recess, and adjournment of the court. After the court closes, it thereafter opens. After the court recesses or adjourns, it thereafter is called to order. Use the following SSEs for these purposes:

The court closed at 0915 hours, 15 November 1994.

The court opened at 0930 hours, 15 November 1994.

The court recessed at 0915 hours, 15 November 1994.

The court was called to order at 0930 hours, 15 November 1994.

The court adjourned at 0915 hours, 15 November 1994.

The court was called to order at 0930 hours, 15 November 1994.

## Calling Witnesses

The record must show that a witness was called or recalled by the prosecution, the defense, or the court. You must record the witness' name and, if a military person, rank or grade and armed force; examples:

Aviation Storekeeper Third Class John A. Doe, U.S. Navy, was called as a witness for the prosecution, was sworn, and testified as follows:

Yeoman Second Class Mary N. Christmas, U.S. Navy, was called as a witness for the defense, was sworn, and testified as follows:

Airman John A. Doe, U.S. Navy, was recalled as a witness for the court, was reminded that he was still under oath, and testified as follows:

### Stages of Examination

The reporter records and transcribes the proper stage of examination during the proceedings. The stages of examination usually take place in the following order: direct examination, cross-examination, redirect examination, recross-examination, and examination by the court.

When transcribing the record, type the stage of examination in capital letters and centered on the page, two lines below the SSE calling the witness or after the previous stage of examination. The following example shows where and how the stage of examination and the identity of the examiner should appear in the record:

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## DIRECT EXAMINATION

Questions by the Prosecution:

Q. State your full name, last, first, and middle, for the record.

A. John Adam Doe.

A brief method for recording the stages of examination, the party conducting the examination, and the first question the party will ask is shown in figure 3-2. Note that a witness called for the defense is initially examined by the prosecution. This examination is normally limited to establishing the identity of the witness and whether the witness knows the accused in the case. The defense then conducts the actual direct examination of its witness. The prosecution would conduct a cross-examination of a defense witness. Use the brief method shown in figure 3-2 for recording the previous information.

<u>PROSECUTION WITNESS</u>	<u>DEFENSE WITNESS</u>	<u>COURT WITNESS</u>
DIRECT - PROS - Q	DIRECT - PROS - Q	DIRECT - PROS - Q
CROSS - DEF - Q	DEF - Q	(JUDGE)(PREZ) - Q
REDIRECT - PROS - Q	CROSS - PROS - Q	CROSS - PROS - Q
		or
RE CROSS - DEF - Q	REDIRECT - DEF - Q	CROSS - DEF - Q
COURT EXAM - (JUDGE) (PREZ) - Q	RE CROSS - PROS - Q	
	COURT EXAM - (JUDGE) (PREZ) - Q	

**Figure 3-2.-Abbreviations used in recording stages of examination.**

### **MARKING EXHIBITS**

Another one of your duties during the proceeding will be to mark the exhibits received in evidence. You must mark prosecution exhibits in the following manner:

Prosecution Exhibit 1 for identification (insert consecutive Arabic numerals for each succeeding exhibit admitted).

Mark exhibits for the defense as follows:

Defense Exhibit A for identification (insert consecutive capital letters; for example, A, B, and C for each succeeding exhibit admitted). Transcribe defense exhibits in the record in the same manner as prosecution exhibits, except letter them instead of numbering them.

Mark appellate exhibits with Roman numerals; for example Appellate Exhibit I, Appellate Exhibit II.

After an exhibit is admitted in evidence, it is your responsibility to delete the words *for identification*. You will do this when directed by the military judge or president during the proceedings. If copies or a true description is submitted for original evidence received during the trial, the authenticity of the copies or description must be attested to. This is usually done by the TC. Here are a few examples:

A true copy.

A true description.

A true photograph.

Attest:

Attest:

Attest:

J. A. DOE  
LT, JAGC, USNR  
Trial Counsel

J. A. DOE  
LT, JAGC, USNR  
Trial Counsel

J. A. DOE  
LT, JAGC, USNR  
Trial Counsel

You must identify real evidence in the same manner as documentary exhibits; however, you will place identifying markings on a tag and attach them to the exhibit.

### **SAMPLE PLEAS AND FINDINGS**

The manner in which you will transcribe the accused's pleas and the findings of the court in the record is shown as follows. Remember, these are only samples. You must record and transcribe the pleas and findings verbatim exactly as stated by the defense or accused or as announced by the presiding officer:

#### **Pleas**

##### Sample pleas of not guilty-one Charge, one Specification:

To the Specification and the Charge:	Not guilty.
	or
To the Specification of the Charge:	Not guilty.
To the Charge:	Not guilty.

##### Many Specifications and Charges; but plea to all consistent:

To all Specifications and Charges:	Not guilty.
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##### One Charge and two Specifications:

To Specification 1 of the Charge:	Guilty.
To Specification 2 of the Charge:	Not guilty.
To the Charge:	Guilty.

##### Two Charges—one with one Specification and one with two Specifications:

To the Specification of Charge I:	Not guilty.
To Charge I:	Not guilty.
To Specification 1 of Charge II:	Guilty.
To Specification 2 of Charge II:	Not guilty.
To Charge II:	Guilty.

##### Guilty with exceptions and substitutions-(Charged with larceny but pleading to the Lesser Included Offense (LIO) - wrongful appropriation):

To the Specification:	Guilty, except the word "steal", substituting therefor the words "wrongful appropriate"; to the excepted words, Not guilty, to the substituted words, Guilty.
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To the Charge: Guilty.

Sometimes the defense may plead:

To all Charges and Specifications: Not guilty (or guilty).

**Findings**

Sample finding of guilty—one Charge and one Specification

Of the Specification of the Charge: Guilty.

Of the Charge: Guilty.

or

Of the Specification and the Charge: Guilty.

Sample finding of guilty—one Charge and two Specifications:

Of Specification 1 of the Charge: Not guilty.

Of Specification 2 of the Charge: Guilty.

Of the Charge: Guilty.

Sample finding two Charges—one guilty and one not guilty, one Specification under each Charge:

Of the Specification of Charge I: Guilty.

Of Charge I: Guilty

Of the Specification of Charge II: Not guilty.

Of Charge II: Not guilty.

Sample finding in case of two Charges—two Specifications under each Charge, with the second Specification under each Charge found not guilty:

Of Specification 1 of Charge I: Guilty.

Of Specification 2 of Charge I: Not guilty.

Of Charge I: Guilty.

Of Specification 1 of Charge II: Guilty.

Of Specification 2 of Charge II: Not guilty.

Of Charge II: Guilty.

Sample finding in case of one Charge with one Specification thereunder, of which the court found the accused guilty with exceptions and substitutions:

Of the Specification of the Charge: Guilty, except the words “in the nighttime burglariously break and enter” and “with intent to commit larceny therein”, substituting therefor the words “unlawfully enter” and “with intent to commit a criminal offense, to wit: Willful damage military property therein”; of the excepted words, Not guilty, of the substituted words, Guilty.

Of the Charge: Not guilty, but guilty of a violation of Article 130.

Sample finding where there are several Charges and Specifications thereunder and the finding of the court is guilty to all the Charges and Specifications:

Of all Specifications and Charges: Guilty.

If three charges and specifications were deliberated upon by the court, and the finding of the court was guilty as to the first and third charges with their specifications, but not guilty to the second charge and its specification, the following is the manner in which the findings should be recorded:

Of Charges I and III and the Specifications thereunder: Guilty.

Of Charge II and the Specification thereunder: Not guilty.

If five charges were referred to trial and a motion for a finding of not guilty was sustained as to Charge II, the CA withdraws Charge IV after arraignment, the accused pleads guilty to Charge I and the court found the accused guilty of Charge III and its specification, but not guilty of Charge V and the specification thereunder, the findings would be set out as follows:

Of Charges I and III and the Specifications thereunder: Guilty.

Of Charge V and the Specifications thereunder: Not guilty.

No mention should be made in the findings as to withdrawn charges or charges upon which a determination of not guilty has previously been made by the court.

In an appropriate case, where the accused is found not guilty of all charges and specifications, or of the charge and specification, amounting to an acquittal, the findings need not be indented or blocked, but should instead appear as one continuous statement by the president as shown in the following example:

PRES: Doe, it is my duty as president of this court to advise you that the court in closed session and upon secret written ballot has found you not guilty of (the) (all) Specification and Charge(s).

## **RECORDS OF TRIAL AND CONTENTS GENERAL AND SPECIAL COURTS-MARTIAL**

The final format of the record of trial is dictated by the MCM and supplemental regulation issued by the SECNAV(JAG). Making sure the record is correct and complete is one of your greatest responsibilities as a court reporter.

### **TYPES**

There are two types of trial records. These are verbatim and summarized records. Verbatim records are required in all GCM cases when any part of the sentence adjudged exceeds 6 months of confinement or other punishments that may be adjudged by an SPCM, or a BCD has been adjudged. A verbatim record is also required in SPCMs where a BCD has been adjudged. Summarized records may be used only in an SPCM that does not adjudge a BCD.

### **COPIES AND DISTRIBUTION**

In GCMs and SPCMs that require a verbatim transcript, prepare an original and four copies of the record of trial and send them to the CA. In all other GCMs and SPCMs, prepare an original and one copy of the record of trial and send them to the CA. In a joint or common trial you will need to prepare an additional copy of the record for each accused. The convening or higher authority may direct that additional copies of the record of trial of any GCM or SPCM be prepared. You should check the policy before sending the record of trial to make sure the correct number of copies is provided. You also must prepare a copy of the record for delivery to each accused after it is authenticated.

### **SECURITY CLASSIFICATION**

If the record of trial contains matter that is classified according to *Department of the Navy Information and Personnel Security Program Regulation*, OPNAVINST 5510.1H, the TC must make sure a proper security classification is assigned to the record of trial and on each page that classified material appears. Do not include classified matter in a record of trial whenever it can be avoided.

Before delivery of a copy of a classified record to the accused, send it to the CA who will remove all classified matter from it. The CA prepares a certificate showing the page(s) removed or partially

deleted and the exhibits removed. The cleansed copy of the record with the original certificate is then delivered to the accused. Attach a copy of the certificate and a statement signed by the accused acknowledging receipt of the cleansed copy of the record to the original record of trial.

### **GENERAL CONTENT AND ARRANGEMENT**

When you send a record of trial to the Judge Advocate General (JAG) or send it out for a judge advocate's review under Article 64(a), UCMJ, arrange the record and bind all the allied papers in the following order:

1. Front cover and inside front cover (chronology sheet) of DD Form 490.
2. Posttrial checklists 1, 2, or 3 and 4, 5, and 6.
3. Judge advocate's review pursuant to Article 64(a) if any.
4. Request of the accused for appellate defense counsel, or waiver or withdrawal of appellate rights, if applicable.
5. Briefs of counsel submitted after trial, if any.
6. Court-Martial Data Sheet, DD Form 494.
7. Court-martial orders promulgating the result of trial as to each accused (ten copies verbatim and four copies summarized).
8. When required, signed recommendation of the SJA or the legal officer, in duplicate, together with all clemency papers, including clemency recommendations by the court members.
9. Matters submitted by the accused pursuant to R.C.M. 1105.
10. Charge Sheet, DD Form 458 (unless included at the point of arraignment in the record).
11. Congressional inquiries and replies, if any.
12. Investigating Officer's Report, DD Form 457, pursuant to Article 32, UCMJ, if such investigation was conducted, followed by any other papers that accompanied the charges when referred for trial, unless included in the record of trial proper.
13. Advice of the SJA or the legal officer, when prepared pursuant to Article 34, UCMJ.

14. Requests by counsel and action taken by the CA; for example, requests about delay, witnesses, and depositions.

15. Records of former trials.

16. Record of trial proper in the following order:

a. Errata sheet, if any.

b. Index sheet with the reverse side showing receipt by the accused or the DC for a copy of the record or a certificate in lieu of receipt.

c. Record of proceedings in court, including Article 39(a) sessions, if any.

d. Authentication sheet, followed by certificate of correction, if any.

e. Action of the CA and, if appropriate, action of the OEGCMJ.

f. Exhibits admitted in evidence. Order is prosecution and defense.

g. Exhibits not received in evidence. You must note the page of the record of trial where each exhibit was offered and rejected on the front bottom of each exhibit as shown:

Offered Page \_\_\_\_\_ /Not Admitted Page \_\_\_\_\_

h. Appellate exhibits. These can include proposed instructions, written offers of proof or preliminary evidence (real or documentary), and briefs of counsel submitted at trial.

i. Back cover sheet.

The TC is ultimately responsible for arranging the record as indicated, except that items 7, 8, and 16e are inserted by the convening or reviewing authority, as appropriate, and items 11 and 15 are inserted by either the TC or the convening or reviewing authority, whichever has custody of them.

## **AUTHENTICATION OF THE RECORD**

A record is authenticated by the signature of a person specified who declares that the record accurately reports the proceedings. No person may be required to authenticate a record of trial if he or she is not satisfied that it accurately reports the proceedings.

In SPCMs where a BCD has been adjudged and in all GCMs the military judge present at the end of the proceedings authenticates the record of trial, or that portion over which the military judge presided. If

more than one military judge presided over the proceedings, each military judge authenticates the record of proceedings over which that military judge presided.

If the military judge cannot authenticate the record of trial because of his or her death, disability, or absence, the TC present at the end of the proceedings authenticates the record of trial. If the TC cannot authenticate the record of trial because of his or her death, disability, or absence, a member authenticates the record of trial. In a court-martial composed of a military judge alone, or as to sessions without members, the court reporter authenticates the record of trial when this duty would fall upon a member. A person authorized to authenticate a record may authenticate the record only as to those proceedings at which that person was present. In an SCM the SCM officer authenticates the record of trial.

## **CORRECTION OF THE RECORD**

In GCMs and SPCMs the TC examines the record of trial before authentication and causes those changes to be made that are necessary to report the proceedings accurately. The TC cannot change the record after authentication.

The TC may personally correct and initial the necessary changes. If major changes are necessary, the TC will direct the reporter to rewrite the entire record of trial or the portion of the record that is defective.

The TC must make sure the reporter makes a true, complete, and accurate record of the proceedings so the record will meet the applicable requirements.

After you send the record to the CA, the record may be corrected only by a certificate of correction or proceedings in revision. These two procedures are discussed later in this chapter.

## **SERVICE OF THE RECORD OF TRIAL**

In each GCM and SPCM you must serve a copy of the record of trial on the accused as soon as the record of trial is authenticated.

Attach the accused's receipt for the copy of the record of trial to the original record of trial. If it is impractical to secure a receipt from the accused before you send the original record of trial to the CA, prepare a certificate indicating that a copy of the record of trial has been transmitted to the accused. Include on this certificate the means of transmission and the address. This certificate must be attached to the original record of trial. Once the accused's receipt is received at the NLSO, send it to the CA as soon as possible.

If it is impractical to serve the record of trial on the accused because of (1) the transfer of the accused to a distant place, (2) the unauthorized absence of the accused, (3) military exigency, or (4) if the accused so requests on the record at the court-martial or in writing, send the accused's copy of the record to the accused's DC, if any. The TC will attach a statement to the record explaining why the accused was not served personally. If the accused has no counsel and if the accused is absent without authority, the TC prepares an explanation for the failure to serve the record. Send the explanation and the accused's copy of the record along with the original record to the CA. The accused is provided with a copy of the record as soon as possible after its return.

### **DISTRIBUTION OF RECORDS OF TRIAL**

Send the original and all copies of the record of trial, except for the accused's copy to the CA. Retain one copy in the court reporting shop.

### **SUMMARIZED RECORDS OF TRIAL**

In those cases not requiring a verbatim record, prepare a summarized record of trial using the DD Form 490 kit.

The fact that a summarized record of trial is to be prepared does not affect any of the procedures of the trial itself. As mentioned before, you should record everything verbatim because events could occur that require a verbatim record even though it might appear before trial that a summarized record would be sufficient.

### **Pleas**

Set forth the pleas verbatim as stated in court. If the accused pleads guilty, the ruling officer will

explain to the accused the meaning and effect of the guilty plea. This explanation includes (1) the elements of the offense, (2) that the plea admits every element charges and every act or omission alleged, and (3) that the plea authorizes conviction without further proof. The ruling officer also advises the accused of the maximum authorized punishment that may be adjudged for the offense upon conviction. The record of trial must show that this was done. Therefore, it is recommended that this be set forth verbatim.

### **Prosecution Case**

Set forth the testimony of witnesses in summarized form in first person, present tense. If no witnesses are called by the TC, the word *None* must be typed in the record at this point.

At the conclusion of the TV's case, insert the words *The prosecution rested*.

### **Defense Case**

Again, set forth the testimony of witnesses in summarized form in first person, present tense. If no witnesses are called by the defense, insert the word *None* in the record at this point.

If no evidence or testimony is presented by the accused, the record must so reflect. The words *The defense rested* should appear at the conclusion of the DC's case.

### **Findings**

Set forth the findings verbatim as announced in court. Before announcing the findings, the ruling officer may state that all manuals and legal references or authorities were removed from the closed session of the court. If such a statement is made, the record should so indicate by the addition of an entry reflecting this statement.

### **Personal Data on the Accused**

If any data on the accused is incorrect, such data must be noted and copied into the record with the substance of the corrective action taken noted.

## **Previous Convictions**

The TC presents evidence of admissible previous convictions, if any, and this information is included in the record of trial.

## **Matters in Extenuation and Mitigation**

The ruling officer advises the accused that he or she may present any matters he or she desires in mitigation or extenuation, including unsworn statements. If any matters are presented, transcribe them into the record in chronological order in which presented. If testimony is presented, the same procedures are used as when testimony is taken from other witnesses.

## **Sentence**

Before closing the court, the ruling officer instructs the court on the maximum sentence that may be adjudged. The record must reflect that this was done. The ruling officer also instructs the court on any matters presented in extenuation and mitigation. It is recommended that these instructions be set forth verbatim.

You must set forth the sentence verbatim as announced in court. Again, before announcing the sentence, as before announcing findings, the ruling officer may state that all manuals and legal authorities were removed from the closed session of the court. The addition of an entry to this effect should be made if such a statement is made by the ruling officer.

## **Recess or Adjournment**

Use standard stock entries (SSEs) in the record for recording recesses or adjournment, or for accounting for parties to the trial. The entry you should use for this latter purpose is as follows:

All parties to the trial who were present when the court recessed are again present in court.

If a member fails to return from a recess of the court, the reason must be shown. After arraignment, a member may be excused by the CA only for good cause.

Use an SSE for recording closings and openings of the court. No entry to show an accounting of parties to the trial need be made on opening the court except when necessary to show the absence of a party after the court was in closed session. Again, the reason must be shown for a member's absence.

## **Authentication**

A summarized record is authenticated in the same manner as a verbatim record. Appendix 13 of the MCM contains further information on the preparation of summarized records of trial and you should refer to it when preparing a summarized record of trial.

## **RECORDING CONTEMPT PROCEEDINGS**

What is contempt of court? It is defined as any willful disregard of the authority of a court or disobedience of its order. Article 48, UCMJ, gives courts-martial the power to punish for the following contemptuous acts: menacing words, signs, or gestures, and any disturbance of the court's proceedings by riot or disorder. These acts must occur in the presence of the court to be punished under Article 48, UCMJ. Any person, whether subject to the UCMJ or not (with the exception of the ruling officer or members of the court), including the accused, TC, DC, reporter, witnesses, spectators, and even the CA may be punished for contempt.

There is no separate record of contempt proceedings. Normally, a contempt proceedings is a part of the record of trial. If the court desires, however, the record of contempt proceedings may be transcribed separately so that it may be sent to the CA immediately for his or her action. Whether this is done or whether it is transcribed in the record of trial is a matter within the discretion of the ruling officer. See figure 3-3 for the recommended format to use in recording contempt proceedings.

There is no appeal or review of contempt action other than an automatic review by the CA. If, on review, the CA is satisfied that a contempt occurred and that the punishment adjudged is appropriate, the CA may order the punishment executed. The CA may (1) require the offender to serve any confinement adjudged pending formal review of the proceedings,

(2) reduce the punishment, and (3) designate an appropriate place of confinement, if necessary.

The offender must be notified, in writing, of the holding and the punishment and of the CA's action. To be effective, the punishment adjudged for contempt must be approved by the CA.

### **CERTIFICATE OF CORRECTION**

A certificate of correction is a document that corrects an error or omission so the record of trial will reflect what actually occurred at the trial. Keep in mind if the error or omission actually occurred at the trial, the record is correct as it stands and a certificate of correction must not be used.

The following is the normal course of action taken when a certificate of correction is necessary:

1. The CA returns the record to the military judge, president, or SCM, as appropriate, with a memorandum indicating the defects to be corrected and directing that a certificate be prepared.

2. The TC prepares the certificate. No erasures, additions, deletions, or other physical corrections are made in the record. The certificate is authenticated in the same manner as the record of trial. A copy must be served on the accused who must receipt for it. The receipt is attached to the original record. The certificate of correction is included in the original record immediately following the authentication

CONTEMPT PROCEEDINGS

Against

Lieutenant John A. Doe, U.S. Navy

in the trial of the United States v. Very C. Pistol, Fireman, U.S. Navy, tried by Special Court-Martial convened by the Commanding Officer, USS DWIGHT D. EISENHOWER (CVN 69) on board USS DWIGHT D. EISENHOWER at sea, on 7 June 19CY.

The contempt proceedings commenced at 1920 hours, 7 June 19CY.

(Here follows a verbatim transcript of the contempt proceedings.)

The contempt proceeding ended at 1941 hours, 7 June 19CY, and the court then proceeded with the trial of Fireman Very C. Pistol, U.S. Navy.

AUTHENTICATION OF CONTEMPT PROCEEDINGS

\_\_\_\_\_  
(Military Judge or President)

**Figure 3-3. Sample format for contempt proceedings.**

page. See figure 3-4 for a sample format to be used for certificates of correction.

## **PROCEEDINGS IN REVISION**

Proceedings in revision may be directed to correct an apparent error, omission, or improper or inconsistent action by the court-martial that can be rectified by reopening the proceedings without material prejudice to the accused.

Because the action at proceedings in revision is corrective, proceedings in revision may not be conducted for the purpose of presenting additional evidence.

Examples of when proceedings in revision are appropriate include (1) correction of an ambiguous or apparently illegal action by the court-martial, (2) inquiry into the terms of a pretrial agreement, and (3) inquiry to establish the accused's awareness of certain rights.

The normal steps to be followed in proceedings in revision are as follows:

1. The CA returns the record to the TC with a letter pointing out the defects and directing proceedings in revision.

2. The court convenes. Only members who participated in the original findings and sentence may sit in the proceedings in revision. Some members may be absent so long as a quorum is present. However, if the court that heard the case has already been dissolved by an order, there can be no proceedings in revision. If necessary, the CA may detail a new military judge, TC, and DC who must be sworn during the proceedings in revision (unless previously sworn). If, however, a military judge alone adjudged the original findings and sentence, a new military judge may not be detailed to proceedings in revision.

3. The TC reads the CA's letter in open court and announces that it will be inserted in the record. The ruling officer then instructs the court, as necessary.

4. The court closes to reconsider the findings or sentence and cure the defect.

5. The court opens and announces its action. The court may revoke its former findings or sentence and announce a new finding or sentence; or it may adhere to its former findings and sentence.

6. The court then adjourns.

You will prepare the record of proceedings in revision and have it authenticated in the same manner as the original record of trial. Use SSEs in recording opening, closing, calling the court to order, adjournments, and so on.

Insert the original of the proceedings in revision in the original record of trial immediately following the authentication page, or certificate of correction, if used. Copies are placed in all copies of the record. Serve a copy on the accused and attach his or her receipt to the original record of trial. Then return the record to the CA for action.

## **SUMMARY COURT-MARTIAL RECORDS**

The record of trial by SCM consists of the original and at least two copies that include the following:

- The pleas, findings, and sentence and, if the accused was represented by counsel at the SCM, a notation to that effect
- A statement that the accused was advised of the matters set forth in R.C.M. 130-1(b)(1)
- If the SCM is the CA, a notation to that effect

Appendix 15, MCM, is a sample Record of Trial by Summary Court-Martial, DD Form 2329. This form is filled out by the SCM and becomes a part of the record of trial. In addition, if the accused is found not guilty of any charge that the accused entered a plea of not guilty, the charge sheet and a summary of any evidence presented during trial is included.

The summary of evidence considered by the SCM must be attached to the record only when the accused has entered a plea of not guilty to any charge and was then found guilty by the SCM.

Matters considered by an SCM in extenuation and mitigation must, in all cases, be summarized and attached to the record.

Although no reporter is required for an SCM, if it appears that the case will be rather lengthy or that several witnesses will be called to testify, it is probable that a reporter, if one is available, will be detailed to record the case. However, in the vast majority of cases, no reporter is detailed because the necessary clerical functions can normally be performed by any clerical assistant. In those cases, the SCM officer summarizes the testimony himself or



CERTIFICATE OF CORRECTION

\_\_\_\_\_, 19 \_\_\_\_

United States

v.

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

The record of trial in the above case, which was tried by the \_\_\_\_\_ court-martial convened by \_\_\_\_\_, dated \_\_\_\_\_ 19 \_\_\_\_, (at) (on board) \_\_\_\_\_, on \_\_\_\_\_ 19 \_\_\_\_, is corrected by the insertion on page \_\_\_\_\_, immediately following line \_\_\_\_\_, of the following:

“The detailed reported, \_\_\_\_\_, was sworn.”

This correction is made because the reporter was sworn at the time of trial but a statement of that effect was omitted, by error, from the record.

R.C.M. 1104(d) has been complied with.

**(NOTE:** The certificate of correction is authenticated in the same manner as for the record of trial.)

Copy of the certificate received by me this \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_.

\_\_\_\_\_  
(Signature of accused)

(Name of accused)

**(NOTE:** The certificate of correction is bound at the end of the original record immediately before the action of the convening authority.)

Figure 3-4.—Format for certificate of correction.

herself. The SCM authenticates each copy of the record by signing them.

If the sentence ordered executed includes confinement on bread and water or diminished rations, the medical certificate is attached to the original copy of the record of trial.

## **DISTRIBUTION**

The SCM will cause a copy of the record of trial to be served on the accused as soon as it is authenticated. The SCM also causes the accused's receipt for the copy of the record of trial to be obtained and attaches to the original record of trial or attaches to the original record of trial a certificate that the accused was served with a copy of the record. If the record of trial was not served on the accused personally, the SCM attaches a statement explaining how and when such service was accomplished. If the accused was represented by counsel, that counsel may be served with the record of trial.

## **FORWARDING**

The original and one copy of the record of trial are sent to the CA for action.

## **DEPOSITIONS**

A deposition may be ordered whenever, after preferral of charges, due to exceptional circumstances of the case, it is in the interest of justice that the testimony of a prospective witness be taken and preserved for use at an Article 32 investigation or a court-martial. A CA who has the charges for disposition or, after referral, the CA or the military judge may order that a deposition be taken on request of a party.

A deposition is the out-of-court testimony of a witness under oath in response to questions by the parties that is reduced to writing or recorded on videotape or audiotape or similar material. A deposition taken on oral examination is an oral deposition, and a deposition taken on written interrogatories is a written deposition. Written interrogatories are questions, prepared by the prosecution, defense, or both, that are reduced to writing before submission to a witness whose testimony is to be taken by deposition. The answers, reduced to writing and properly sworn to, constitute the deposition testimony of the witness. A deposition

may be taken by agreement of the parties without necessity of an order.

A deposition may be taken to preserve the testimony of a witness who is likely to be unavailable at the investigation or at the time of trial. Part or all of a deposition may be used on the merits or on an interlocutory question as substantive evidence if the witness is unavailable. A deposition may be admitted in a capital case only upon offer by the defense. In any case, a deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a deposition is offered in evidence by a party, an adverse party may require the proponent to offer all that is relevant to the part offered, and any party may offer other parts.

A deposition that is transcribed is ordinarily read to the court-martial by the party offering it. The transcript of a deposition may not be inspected by the members. Objections may be made to testimony in a written deposition in the same way that they would be if the testimony were offered through the personal appearance of a witness.

## **TYPES OF DEPOSITIONS**

There are two types of depositions—written and oral. A written deposition consists of a document that sets forth a series of written questions prepared by counsel. These are called interrogatories and cross-interrogatories. The other part of the document consists of the answers of the deponent (the person who testifies) that were given orally in the presence of the deposition officer and sworn to.

A written deposition may be used against an accused only when the accused is present at the taking of the deposition or when the accused expressly waives his or her right to be present. The Interrogatories and Deposition, DD Form 456 (fig. 3-5), illustrates a completed written deposition.

An oral deposition consists of a document that sets forth questions asked personally of the deponent by counsel and the deponent's answers. This questions and answers session is accomplished in the presence of the deposition officer, counsel for the accused and the government, the accused, and a reporter.

INTERROGATORIES AND DEPOSITION <sup>1</sup>																						
<p><sup>1</sup> This form to be used when a deposition is taken on written interrogatories. It may be appropriately modified when used for an oral deposition. (See generally, RCM 702, MCM, 1984.)</p> <p><sup>2</sup> Strike out words not applicable.</p> <p><sup>3</sup> General, special, or summary court-martial, military commission, court of inquiry, or military board.</p> <p><sup>4</sup> Insert name or title of person who is requested to authorize the taking of the deposition. A separate letter complying with RCM 702(c)(2) should be enclosed.</p> <p><sup>5</sup> To be subscribed by the trial counsel or other person requesting the deposition with name, rank, unit/command name, and official title, as "trial counsel," "defense counsel," "summary court," "recorder," etc. Describe legal qualifications, as "certified in accordance with Article 27(b)," "member of the bar of the Supreme Court of _____" etc.; if none, so state.</p> <p><sup>6</sup> If it is desired to give special instructions, there should be added "special instructions attached."</p>	<div style="text-align: center;">           UNITED STATES )            v. )            )            In the Matter of <sup>2</sup> )  <u>U.S. v. Fireman Phineus R. Quirk</u> )         </div> <p>Deposition of <u>Seaman Richard C. Jones</u> (stationed) (residing) <sup>2</sup>          at <u>Naval Base, Norfolk, Virginia</u> to be read in evidence before a <sup>3</sup>  <u>special court-martial</u> of the United States,          convened to meet at <u>Naval Base, Norfolk</u> by <u>Court-Martial</u>          Convening Order <u>2-94</u> dated <u>2 February</u>, 19 <u>94</u></p> <p>TO: <sup>4</sup> <u>Rear Admiral Eye M. Mean, Naval Base, Norfolk, Virginia</u></p> <p>It is requested that you authorize the deposition of the above-named witness to be taken on the following interrogatories.</p> <table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th colspan="3" style="text-align: left;">TRIAL COUNSEL OR OTHER PERSON REQUESTING DEPOSITION <sup>5</sup></th> </tr> </thead> <tbody> <tr> <td style="width: 50%; padding: 2px;">a. TYPED NAME (Last, First, Middle Initial) <u>RYAN, Peter R.</u></td> <td colspan="2" style="padding: 2px;">b. OFFICIAL TITLE <u>Trial Counsel</u></td> </tr> <tr> <td style="padding: 2px;">c. UNIT/COMMAND NAME <u>Naval Base, Norfolk, VA</u></td> <td colspan="2" style="padding: 2px;">d. LEGAL QUALIFICATIONS <u>certified in accordance with Article 27(b)</u></td> </tr> <tr> <td style="padding: 2px;">e. SIGNATURE </td> <td style="padding: 2px;">f. RANK <u>LT, JAGC, USN</u></td> <td style="padding: 2px;">g. DATE SIGNED <u>1 March 1994</u></td> </tr> </tbody> </table> <p>_____, 1 March, 19 94</p> <p>TO: <u>LT Peter R. Ryan, JAGC, Trial Counsel</u></p> <p>You will take or cause to be taken the deposition of the above-named witness on the following interrogatories, cross-interrogatories, and additional interrogatories, if any. <sup>6</sup></p> <p>By _____ Command of <u>Rear Admiral Mean</u></p> <table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th colspan="3" style="text-align: left;">PERSON ORDERING DEPOSITION OR PERSON SIGNING THEREFOR</th> </tr> </thead> <tbody> <tr> <td style="width: 33%; padding: 2px;">a. TYPED NAME (Last, First, Middle Initial) <u>MEAN, Eye M.</u></td> <td style="width: 15%; padding: 2px;">b. RANK <u>ADM USN</u></td> <td style="padding: 2px;">c. SIGNATURE </td> </tr> <tr> <td style="padding: 2px;">d. UNIT/COMMAND NAME <u>Naval Base Norfolk, Virginia</u></td> <td colspan="2" style="padding: 2px;">e. OFFICIAL TITLE <u>Commander</u></td> </tr> </tbody> </table>	TRIAL COUNSEL OR OTHER PERSON REQUESTING DEPOSITION <sup>5</sup>			a. TYPED NAME (Last, First, Middle Initial) <u>RYAN, Peter R.</u>	b. OFFICIAL TITLE <u>Trial Counsel</u>		c. UNIT/COMMAND NAME <u>Naval Base, Norfolk, VA</u>	d. LEGAL QUALIFICATIONS <u>certified in accordance with Article 27(b)</u>		e. SIGNATURE 	f. RANK <u>LT, JAGC, USN</u>	g. DATE SIGNED <u>1 March 1994</u>	PERSON ORDERING DEPOSITION OR PERSON SIGNING THEREFOR			a. TYPED NAME (Last, First, Middle Initial) <u>MEAN, Eye M.</u>	b. RANK <u>ADM USN</u>	c. SIGNATURE 	d. UNIT/COMMAND NAME <u>Naval Base Norfolk, Virginia</u>	e. OFFICIAL TITLE <u>Commander</u>	
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DD Form 456, OCT 84, Page 1

Previous editions are obsolete.

Figure 3-5. Interrogatories and Deposition, DD Form 456 (page 1 of 6).

<p><i><sup>1</sup> The officer taking the deposition shall administer the following oath to the deponent prior to deposing: "You (swear) (affirm) that the evidence you give shall be the truth, the whole truth, and nothing but the truth, so help you God?"</i></p> <p><i><sup>2</sup> If the spaces for answers are not sufficient, extra sheets may be inserted by the officer taking the deposition. In such case he/she will rewrite the interrogatories, writing the answers immediately below the respective interrogatories.</i></p>	<p>Interrogatories propounded by the above-named person requesting the deposition are as follows: <sup>1</sup></p> <p>First Interrogatory: Are you in the military service of the United States? If so, what is your full name, rank, unit/command name, and station? If not, what is your full name, occupation, and residence?</p> <p>Answer: <sup>2</sup></p>
	<p>Second interrogatory: Do you know the accused? If so, how long have you known him/her?</p> <p>Answer:</p>
	<p>Third interrogatory:</p> <p>Answer:</p>

DD Form 456, OCT 84, Page 2

**Figure 3-5.-Interrogatories and Deposition, DD Form 456 (page 2 of 6).**

<p><sup>1</sup> To be subscribed by the defense counsel or other person with name, pay grade, unit/command name, and official title. Describe legal qualifications, as "certified in accordance with Article 27(b)," "member of the bar of the Supreme Court of _____" etc.; if none, so state. When deposition is requested by the defense, the trial counsel propounds the cross interrogatories.</p> <p><sup>2</sup> If none, so state.</p> <p><sup>3</sup> insert "court," "commission," "board," if appropriate. If not applicable, or if no interrogatories are propounded, so state.</p>	The following cross-interrogatories are propounded by:		
	PERSON PROPOUNDING CROSS-INTERROGATORIES <sup>1</sup>		
	a TYPED NAME (Last, First, Middle Initial)	b OFFICIAL TITLE	
	c UNIT/COMMAND NAME	d LEGAL QUALIFICATIONS	
	e SIGNATURE	f. RANK	g DATE SIGNED
	First cross-interrogatory: <sup>2</sup>		
	Answer:		
	Additional interrogatories by the _____ are as follows: <sup>3</sup>		
	Answer:		

DD Form 456, OCT 84, Page 3

Figure 3-5.-Interrogatories and Deposition, DD Form 456 (page 3 of 6).

My answers to the foregoing interrogatories, cross-interrogatories, if any, are indicated above.			
<b>WITNESS</b>			
a. TYPED NAME (Last, First, Middle Initial)	b. SIGNATURE	c. DATE SIGNED	
JONES, Richard C.	<i>Richard C. Jones</i>	6 Mar 94	
<u>CERTIFICATE OF PERSON TAKING DEPOSITION</u>			
I certify that the above deposition was duly taken by me on the <u>6th</u> day of <u>March</u> , 19 <u>94</u> ; the above-named witness, having been first sworn by me, gave the foregoing answers to the several interrogatories; that the above-named witness was given an opportunity to read his/her testimony after it was reduced to writing, and all corrections desired by the above-named witness were made; and the above-named witness subscribed the foregoing deposition in my presence at <u>NAVLEGSVCOFF, NAVBAS, Norfolk</u> , this <u>7th</u> day of <u>March</u> , 19 <u>94</u> . I further certify that the detailed reporter was duly sworn by me and that said reporter signed in my presence the reporter's certificate appearing below.			
<b>OFFICER TAKING DEPOSITION</b>			
a. TYPED NAME (Last, First, Middle Initial)	b. RANK	c. SIGNATURE	d. DATE SIGNED
RYAN, Peter R.	LT, JAGC USN	<i>Peter R. Ryan</i>	7 Mar 94
e. UNIT/COMMAND NAME	f. OFFICIAL TITLE		
Naval Base Norfolk, Virginia	Trial Counsel		
<u>REPORTER'S CERTIFICATION</u>			
I certify that the foregoing interrogatories and answers thereto are a true, complete and accurate transcription of the interrogatories propounded to and the answers by the above-named witness.			
<b>REPORTER</b>			
a. TYPED NAME (Last, First, Middle Initial)	b. SIGNATURE	c. DATE SIGNED	
DOELITTLE, John Q.	<i>John C Doelittle</i>	7 Mar 94	
d. UNIT/COMMAND NAME			
Naval Base, Norfolk, Virginia			

Figure 3-5. Interrogatories and Deposition, DD Form 456 (page 4 of 6).

## DIRECT EXAMINATION

Questions by the prosecution:

Q. State your full name, grade, organization, and armed force.

A. Water T. Door, Aviation Boatswain's Mate Second Class, Naval Air Station, Pensacola, Florida.

Q. And your armed force, please?

A. United States Navy, sir.

Q. What is your social security number, Petty Officer Door?

A. 666-66-6666, sir.

Q. Petty Officer Door, do you know Airman Boat?

A. Yes, sir, I do.

Q. If he is present, would you please point to him and call him by name?

A. Airman Boat, sitting over there [pointing in the direction of Airman Boat].

Q. Door, what are your duties?

A. I am acting right now as a plane captain.

Q. I see. In that capacity, did you have direct control over Airman Boat?

A. Yes, sir, I did.

Q. Did you give him any specific instructions on 31 December 19CY which might be relevant to this case?

A. Yes, sir, I did. During this period of time we had been on a half-day schedule because of the Christmas holiday period and, seeing as this schedule ended on the 31st. I told Boat that he was to be at work at 0700 hours on 2 January. On the 2nd, he was not at work at 0700, and I reported it to the Master Chief.

TC: No further questions.

## CROSS-EXAMINATION

Questions by the defense:

Q. When did you last see Airman Boat?

A. I last saw him on 31 December, sir.

Figure 3-5.-Interrogatories and Deposition, DD Form 456 (page 5 of 6).

Q. You didn't go with him then?

A. No, sir. I believe he left with Airman Frost who also works for me.

Q. Did you say anything else to Boat, other than what you have testified to on direct examination?

A. No, sir, I did not.

Q. And that was the last time you saw him?

A. Yes, sir, the last time until the Shore Patrol brought him back.

#### REDIRECT EXAMINATION

Questions by the prosecution:

Q. When you last saw Airman Boat, where was he at that time?

A. Leaving the hangar, sir.

Q. And he was with Airman Frost, is that right?

A. Yes, sir.

#### RECROSS-EXAMINATION

Questions by the defense:

Q. Was Airman Boat in uniform or civilian clothes when you last saw him?

A. He was in uniform.

Q. Was he carrying anything-like a suitcase or package of any type?

A. Not that I can recall, sir.

Q. Did you personally inform someone that Boat was UA?

A. Yes, sir. I notified the Command Master Chief.

DC: I have no further questions.

TC: I have nothing further.

TC: That concludes the deposition.

Figure 3-5.-Interrogatories and Deposition, DD Form 456 (page 6 of 6).



## **PROCEDURES FOR TAKING DEPOSITIONS**

For oral depositions the accused has the right to do the following:

- Be present except when (1) the accused, absent for good cause, fails to appear after notice of time and place of the deposition, (2) the accused is disruptive, or (3) the deposition is ordered instead of producing a witness on sentencing and the authority ordering the deposition determines that the interests of the parties and the court-martial can be served adequately by an oral deposition without the presence of the accused

- Be represented by counsel

Each witness giving an oral deposition is examined under oath. The scope and manner of examination and cross-examination are such as would be allowed in the trial itself. The government makes available to each accused, for examination and use at the taking of the deposition, any statement of the witness that is in the possession of the government and that the accused would be entitled at trial.

For written depositions, the accused has the right to be represented by counsel for the purpose of taking a written deposition, except when the deposition is taken for use at an SCM. No party has a right to be present at a written deposition. The party requesting a written deposition submits to the opposing counsel a list of written questions to be asked of the witness. Opposing counsel examines the questions and is allowed a reasonable time to prepare cross-interrogatories and objections, if any.

The normal steps to be followed in the taking of a written deposition are as follows:

1. The side desiring the deposition gives the other side written notice that the deposition has been authorized by the CA, advises of the time and place it will be taken and the name and address of each person to be examined, and furnishes a list of written interrogatories to be asked the deponent.

2. The opposing counsel prepares cross-interrogatories and objections.

3. The interrogatories, objections, and cross-interrogatories are submitted to the CA, or to the court if it is in session.

4. The TC prepares the Interrogatories and Deposition, DD Form 456, including therein the interrogatories, cross-interrogatories, and objections.

5. The TC sends the deposition form to the command nearest the deponent with a cover letter, addressed return envelope, and a subpoena for a civilian witness, if necessary.

6. The command receiving the deposition form appoints a deposition officer and a reporter, if necessary.

7. Oral answers are recorded on the deposition form, even if an objection is set forth to the questions. The court will rule on the objections at the trial. The deposition officer must not make any rulings on the objections.

8. The deponent examines the deposition and signs it.

9. The deposition officer authenticates the deposition and returns it to the TC.

The normal steps to be followed in the taking of an oral deposition are as follows:

1. The side desiring the deposition gives the other side written notice that the deposition has been authorized by the CA, advises of the time and place it will be taken, and provides a memorandum stating the reasons for the deposition and the points desired to be covered in an oral examination of the deponent.

2. The opposing counsel then submits a similar memorandum.

3. The memorandums are submitted to the CA (or the court, if in session) who may prepare additional memorandums covering other points to be covered.

4. The TC then prepares the form for the deposition and it, along with the memorandums, is mailed to the command nearest the deponent under a cover letter with an addressed return envelope and subpoena for a civilian witness, if necessary. If the deposition is to be taken locally, the CA appoints a

deposition officer who, together with counsel, takes the deposition.

5. The command receiving the deposition form appoints a deposition officer, counsel for the government and accused, and a reporter. However, if charges have been referred to trial, the accused must consent to the appointment of a second counsel (other than counsel who will represent the accused before the court) to represent him or her.

6. The deposition is then taken.

7. Oral questions and the answers are transcribed verbatim, signed by the deponent, authenticated by the deposition officer, and returned to the TC.

The Interrogatories and Deposition, DD Form 456 (fig. 3-5), illustrates a completed written deposition. Figure 3-6 shows the format to be used in oral depositions.

SUGGESTED FORMAT FOR DEPOSITION ON ORAL DEPOSITION

UNITED STATES	)	
	)	Naples, Italy
v.	)	
	)	
VERY C. PISTOL	)	DEPOSITION
Electrician's Mate Third Class	)	
123-45-6789	)	
U.S. Naval Support Activity, Naples	)	

TC: Let the record reflect that this deposition proceeding commenced at 0915 hours, on 12 September 19CY, at the courtroom at Naval Legal Service Office, Naples, Italy, pursuant to the authority attached hereto as enclosure (1). Present at the taking of the deposition are:

Lieutenant Mary N. Christmas, Trial Counsel, certified in accordance with Article 27(b), UCMJ, and previously sworn.

Lieutenant John A. Dot, Defense Counsel, certified in accordance with Article 27(b), UCMJ, and previously sworn.

Figure 3-6. Sample format for oral deposition.

TC: Let the record further reflect that Mr. Hatch is present to testify as a witness for the prosecution in the forthcoming Article 32 investigation and possible court-martial in the case of United States versus Electrician's Mate Third Class Very C. Pistol.

TC: Counsel representing the accused is requested to state any objection he has pertaining to the taking of this deposition including the notice of the taking, time to prepare, or formal defect in the proceedings. Are there any objections?

DC: There are such objections We would object to the time given to prepare and that I was notified of this deposition at approximately 1530 hours, on 11 September 19CY. While I have had an opportunity to question Mr. Hatch, I have not had an opportunity to question any of the other individuals about whom--from whom statements have been taken and involving Mr. Hatch. And I received this packet last night at approximately 1800 hours; once again on 11 September 19CY. I would also object on the form of the proceedings. And would also object to this proceeding being implemented since other means are available of making Mr. Hatch available at the Article 32 investigation and this is not being done for any practical matter or any practical reason.

TC: Can you be more specific in the other means that you believe are available to assure his presence?

DC: Yes, he could be detained here in country until the Article 32 investigation.

TC: Are you familiar with what authority the US has to do that?

DC: I am aware of no authority under which he's--I've been given no indication that he is going to be deported by anyone in the form of any type of deportation letter or intent from the Italians. He is presently in country under what auspices and what authority I know not. But the government could also obtain the consent of the witness to come back for the Article 32 investigation should that prove necessary and should one be convened at any time. He has not indicated an aversion to coming back for an Article 32 investigation in that it does not properly state out--or set out the points to be covered as required under paragraph 117(b), and we would also object to the person who has been designated to take the deposition as being an involved party in the deposition-- an adversary party, and a person who's not neutral and detached who should act as a person who has been designated to take the deposition.

TC: Do you have authority for that final one?

DC: Just paragraph 117.

TC: Okay, anything-- is that in paragraph 117, or is it only in the DA Pam?

DC: [No response.]

**Figure 3-6-Sample format for oral deposition--Continued.**

TC: Those objections will be noted and included in the record.

TC: The recorder, Legalman Second Class Door, has been previously sworn.

TC: I will now swear the deponent, Mr. Hatch.

Close D. Hatch, civilian, was called as a witness for the prosecution, was sworn and testified as follows:

DIRECT EXAMINATION

Questions by the prosecution:

Q. Will you state your full name, please?

A. My full name is Close Hatch, ma'am.

Q. Do you have a middle name?

A. My middle name is Dee, ma'am.

Q. Do you have a social security number?

A. Yes, I do, ma'am, 333-33-3333.

Q. Are you currently in the armed forces?

A. Yes, ma'am.

Q. When do you intend to depart?

A. In the morning.

-----  
The deposition continues  
-----

TC: Let the record reflect that these proceedings terminated at 1408 hours,  
12 September 19CY.

Figure 3-6.-Sample format for oral deposition—Continued.

AUTHENTICATING CERTIFICATE

(Certificate of person taking deposition)

I certify that the above deposition was duly taken by me on the 12th day of September 19CY, the above-named witness, having been first sworn by me, gave the foregoing answers to the questions presented to him, that the above-named witness was given an opportunity to read his testimony after it was reduced to writing, and all corrections desired by the above-named witness were made; and the above-named witness subscribed the foregoing deposition in my presence at 0915 hours, this 12th day of September 19CY. I further certify that the detailed reporter, LNC Water T. Door, was duly sworn by me and that said reporter signed in my presence the reporter's certificate appearing below.

I. M. LAWYER  
LT, JAGC, USNR  
NAVLEGSVCOFF  
Naples, Italy

REPORTER'S CERTIFICATE

I certify that the foregoing interrogatories and answers thereto are true, complete and accurate transcription of the interrogatories propounded to and the answers by the witness above-named.

WATER T. DOOR  
LNC, USN  
NAVLEGSVCOFF  
Naples, Italy

(NOTE: The taking of the deposition will follow the same basic format as a record of trial.)

**Figure 3-6. Sample format for oral deposition—Continued.**

## **OTHER REPORTING AND TRANSCRIPTION DUTIES**

On occasion you may be called on to record proceedings other than military courts or investigations. You could be called on to record meetings or conferences, administrative discharge boards, Article 39(a) sessions, Article 32 investigations, or courts of inquiry or other fact-finding bodies required to conduct a hearing for which a substantially accurate record of what transpired at the meeting or conference is needed or required.

There is no prescribed or standard format for such proceedings, with the exception of an Article 39(a) session and an Article 32 investigation. You should seek guidance on the format of the record from some responsible person concerned with the meeting or conference.

By using basically the same method that you use in court reporting, you should be able to produce an accurate record of the proceedings in the format desired or directed by appropriate authorities.

### **SUMMARY**

In summation, legal reporting is one of the most important and challenging duties of your rating as an LN. You will often find yourself right in the middle of important investigations, inquiries, or judicial proceedings for which an accurate record is important. Legal reporting is both a challenging and rewarding duty that must be done accurately and efficiently if it is to be of benefit to officials who are charged with the proper administration of the Navy. Your job, as a reporter, is to provide this accurate and efficient clerical support.

## CHAPTER 4

# CONSTITUTIONAL CONSIDERATIONS

The time has now come for a more searching examination of the *Uniform Code of Military Justice* (UCMJ) and of your duties as an LN in the area of military justice. Future lessons will be devoted to nonjudicial punishment (NJP), to courts-martial, and to the pretrial and posttrial activity associated with courts-martial. Before we address these subjects, however, you must develop an understanding of several important constitutional principles—principles that, if not exactly followed, may invalidate the results of disciplinary proceedings.

The first of these constitutional principles that we will look at concerns the accused's rights under the Fifth Amendment and how Article 31 of the UCMJ is used to interpret these rights as well as the procedures used to inform the accused of these rights.

### ARTICLE 31, UCMJ, AND THE FIFTH AMENDMENT

Article 31 of the UCMJ is a statutory enactment of judicial interpretations of the Fifth Amendment protection against compulsory self-incrimination. Like all statutes, Article 31 is of a lesser importance than the constitutional provision. It is, however, broader than the constitutional guarantee and will, therefore, be used as a basis of discussing the rights of persons subjected to interrogation.

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

### PREINTERROGATION WARNINGS

Before an individual can be questioned on an alleged crime that the individual is suspected of committing, that person's rights as afforded by the *U.S. Constitution* must be explained. This explanation of the individual's rights is called a preinterrogation warning.

To help you understand this warning, you will examine what is required by the Fifth Amendment, how Article 31 of the UCMJ incorporates the Fifth Amendment, and what procedures must be followed to properly administer a warning under Article 31, UCMJ.

### Fifth Amendment Rights

The Fifth Amendment to the *U.S. Constitution* provides, among other things, that no person "shall be compelled in any criminal case to be a witness against himself." The Sixth Amendment requires that the accused in a criminal case "be informed of the nature . . . of the accusation" and that he or she have the "assistance of counsel for his defense." In passing the UCMJ, Congress enacted the spirit of the Fifth Amendment in Article 31. Much later, the Court of Military Appeals made applicable to the military a decision of the Supreme Court of the United States. That decision declared if an accused person is interrogated with a view toward using his or her statement in evidence against him or her, the accused has not only the right to have the assistance of counsel, but must be advised of this right before any interrogation.

Since you will be dealing with persons suspected of offenses, you will be primarily interested with real world ramifications of these rights. When and by whom must a suspect be warned? What is a valid warning? What are the consequences of a failure to warn?

### Article 31, UCMJ

Article 31 is divided into four subsections. The first three regulate the activities of persons subject to the Code when they are questioning or interrogating persons. The fourth subsection prohibits the receipt into evidence of any statement taken from an accused in violation of the first three subsections.

Article 31 (a)—"No person subject to this chapter may compel any person to incriminate himself or to answer any question, the answer to which may tend to incriminate him." Compulsion and self-incrimination are the keys to understanding this subsection. Evidence is incriminating if it tends to establish guilt. Interrogation is improper under Article 31(a) if it

compels the person being questioned to give responses that tend to establish his or her guilt of a crime. Notice that the article deals with persons, not just suspects. The privilege against self-incrimination applies to both accused persons and to witnesses. The type of compulsion contemplated could involve an in-court situation where either a witness or the accused is required to answer questions.

In court, the accused has an absolute right not to take the stand and testify. If the accused chooses to take the stand to testify on any or all of the charges against him or her, the accused may be compelled to answer any questions on the charge or charges about which the accused did testify, even though the answer would incriminate him or her.

The accused may, however, take the stand and limit his or her testimony to a collateral issue. He or she would then retain his or her privilege against self-incrimination as to all other issues.

Example: Prosecution offers a statement of the accused into evidence. The accused takes the stand to testify about the voluntariness of the statement. Trial counsel, on cross-examination, asks the accused “But isn’t your statement true?”

This question is improper, not only because the truth of the offered statement is immaterial to its voluntariness, but also because the accused may not be compelled to answer the question. The accused may assert his or her right against self-incrimination. Similarly, the accused who is defending against more than one specification may elect to take the stand and limit his or her testimony to less than all the offenses charged. If he or she does this, the accused retains his or her privilege against self-incrimination as to the offenses about which he or she does not testify.

On the other hand, a witness may be compelled to come to court, to take the stand, and to testify. However, the witness may not be compelled to incriminate himself or herself.

The witness’ privilege against self-incrimination is personal. He or she must assert it personally. When he or she does, the ruling officer, usually the military judge, will decide if the answer will in fact incriminate the witness. If the ruling officer decides that it will not incriminate the witness, the ruling officer will direct the witness to answer. If the ruling officer is incorrect in his or her determination, the answer cannot later be used in a trial against the witness. This is because the answer will have been compelled in violation of Article 31(a).

Article 31(b)—“No person subject to this chapter may interrogate or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used against him in a trial by court-martial.”

This is the subsection of Article 31 that will be most significant to you. The previous examples indicate that it is the person conducting the hearings who must concern himself or herself with Articles 31(a) and 31(c). On the other hand, as an LN, you will be intimately involved in pretrial and investigative interviews with suspects, and you must understand and comply with Article 31(b) to guarantee the admissibility of any statement elicited.

Article 31(c)—“No person subject to this chapter may compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him.”

This subsection is an enactment of a rule of evidence that prevents the admission of immaterial or irrelevant evidence. It is important to notice that the witness may be compelled to answer, no matter how degrading the answer may be, if the court determines the evidence to be relevant.

Article 31(d)—“No statement obtained from any person in violation of this article or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.”

This subsection is the teeth of Article 31. In general terms, it provides that evidence or statements obtained without affirmative compliance with Article 31 by the interrogator are inadmissible in a court-martial. A few examples are necessary to define the scope of unlawful influence and inducement.

- Interrogator tells the accused that if he or she does not make a statement the interrogator will see that the accused’s wife is arrested. This is a violation of Article 31.

- Interrogator tells the accused that if he or she makes a statement the interrogator will see to it that the case will be handled in juvenile court and will not affect the accused’s service. This is a violation of Article 31.



- Interrogator questions the accused for 12 hours. He or she does not allow the accused to eat or smoke, makes him or her sit at attention, and does not allow head calls. This is a violation of Article 31.

A failure to comply with Article 31 does not mean that a guilty person goes free. There may be independent evidence sufficient to convict. At the very least, however, it does mean that the business of prosecuting charges will be needlessly complicated. A little experience will convince you that it is much easier to give the required warnings—even at the possible expense of making the interrogation more difficult than it is to attempt to develop independent evidence sufficient to convict several years after the fact when the military conviction has been set aside on appeal. If in doubt, warn!

### **Procedures for Administering a Warning Under Article 31, UCMJ**

As an LN, you may be required to administer Article 31, UCMJ warnings to individuals who are either suspected of or accused of committing an offense under the UCMJ. The following discussions should help you become familiar with who can give the warning, when to give the warning, and how the warning should be given. Additionally, you should become familiar with the accused's right to counsel in connection with this warning.

### **Who Must Be Warned?**

Article 31(b) requires that an accused or suspect be advised of his or her rights before questioning or interrogation. A person is an accused if charges have been preferred against him or her. On the other hand, to determine when a service member is a suspect is more difficult. The test applied in this situation is whether suspicion has crystallized to such an extent that a general accusation of some recognizable crime can be made against this individual. This test is objective. Courts will review the facts available to the interrogator to determine whether the interrogator should have suspected the service member, not whether he or she in fact did. Rather than speculate in a given situation, it is preferable to warn all potential suspects before attempting any questioning.

If an individual is to be questioned merely as a witness, the individual need not be warned. If, however, during the interview of a witness it becomes apparent that he or she may have committed a crime, the

individual must be warned before continued interrogation.

### **Who Must Give the Warning?**

The plain language indicates that only the persons subject to the UCMJ are required to give the warning. Beware, however, of too literal a reading. Persons not subject to the Code but employed by the armed forces for law enforcement or investigative purposes must give the warning. This includes Naval Criminal Investigative Service (NCIS) agents, security personnel agents, and their counterparts in other services. Persons acting on the request of the military in furtherance of a military investigation also must warn.

### **When Are Warnings Required?**

As soon as an interrogator seeks to question or interrogate a service member suspected of an offense, the member must be warned according to Article 31(b).

### **Fair Notice as to the Nature of the Offense**

The question frequently arises, "Must I warn the suspect of the specific article(s) of the UCMJ allegedly violated?" There is no need to advise a suspect of the particular article(s) violated. The warning must, however, give fair notice to the suspect of the offense(s) or area of inquiry so he or she can intelligently choose whether to discuss this matter.

For example, Special Agent Igotcha is not sure of exactly what offense Seaman Killer has committed, but he knows that Seaman Killer shot and killed Seaman Victim. In this situation, rather than advise Seaman Killer of a specific article of the UCMJ, it would be appropriate to advise Seaman Killer that he is suspected of shooting and killing Seaman Victim.

### **Cleansing Warnings**

When an interrogator obtains a confession or admission without proper warnings, subsequent compliance with Article 31 will not automatically make later statements admissible. This is best illustrated with the following example.

Assume the accused or suspect initially makes a confession or admission without proper warnings. This is called an involuntary statement and, due to the deficient warning, the statement is inadmissible at a court-martial. Next, assume the accused or suspect is later properly advised and then makes a second

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

The Court of Military Appeals has sanctioned a procedure to be followed when a statement has been improperly obtained from an accused or suspect. In this situation, re-warn the accused giving all the warnings mandated. In addition, include a cleansing warning to this effect:

“You are advised that the statement you made on \_\_\_\_\_ cannot and will not be used against you in a subsequent trial by court-martial.”

Although not a per se requirement for admission, this cleansing warning will help the TC in meeting his or her burden of a clear showing that the second statement was not tainted by the first. Therefore, it is recommended that cleansing warnings be given when necessary.

Another problem in this area concerns the suspect who has committed several crimes. The interrogator may know of only one of these crimes and properly advises the suspect about the known offense. During the interrogation, the suspect relates the circumstances surrounding desertion, the offense about which the interrogator has warned the accused. During questioning, however, the suspect tells the interrogator that while in a desertion status he or she stole a military vehicle. As soon as the interrogator becomes aware of the additional offense, the interrogator must advise the suspect of his or her rights about the theft of the military vehicle before interrogating the suspect on this additional crime.

If the interrogator does not follow this procedure, statements about the desertion may be admissible, but statements on the theft of the military vehicle that are given in response to interrogation about the theft probably will be excluded.

### **Acts as Statements**

Up to this point, you may have assumed that Article 31 concerns only statements of a suspect or an accused.

This is correct, but the term *statement* means more than just the written or spoken word.

First, a statement can be oral or written. In court, if the statement was oral, the interrogator can relate the substance of the statement from recollection or notes. If written, the statement of the accused or suspect may be introduced in evidence by the prosecution. Many individuals, after being taken to an NCIS office and after waiving their right to remain silent and their right to counsel, have given a full confession. When asked if they made a statement to the NCIS, they will often respond, “No, I did not make a statement. I told the agent what I did, but I refused to sign anything.” Provided the accused was fully advised of his or her rights, understood and voluntarily waived those rights, an oral confession or admission is as valid for a court’s consideration as a writing. Naturally, where the confession or admission is in writing and signed by the accused, the accused will have difficulty denying the statement or attributing it as a lie by the interrogator. Thus, where possible, pretrial statements from an accused or suspect should be reduced to writing, whether or not the accused or suspect agrees to sign it.

In addition to oral statements, some actions of an accused or suspect may be considered the equivalent of a statement and are thus protected by Article 31. During a search, for example, a suspect may be asked identify an item of clothing in which contraband has been located. If, as indicated, the service member is a suspect, these acts on his or her part may amount to admissions. Therefore, care must be taken to see that the suspect is warned of his or her Article 31 (b) rights or the identification of the clothing is obtained from some other source.

In most cases, however, a request for the identification of an individual is not an interrogation; production of the identification is not a statement within the meaning of Article 31 (b) and, therefore, no warnings are required. Superiors and those in positions of authority may lawfully demand a service member to produce identification at any time without first warning the service member under Article 31(b). Merely identifying one’s self upon request is considered a neutral act. An exception to this general rule arises when the service member is suspected of carrying false identification. In such cases, the act of producing identification is an act that directly relates to the offense of which the service member is suspected. The act, therefore, is testimonial and not neutral in nature.

## Body Fluids

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

## Other Nontestimonial Acts

To compel a suspect to display scars or injuries, try on clothing or shoes, place feet in footprints, or submit to fingerprinting does not require an Article 31(b) warning. A suspect does not have the option of refusing to perform these acts. The reason for this rests on the fact that these acts do not, in or of themselves, constitute an admission, even though they may be used to link a suspect with a crime. The same rule applies to voice and handwriting exemplars and participation in lineups.

## Applicability to NJP Hearings

The *Manual for Courts-Martial* (MCM) provides that the mast hearing includes an explanation to the accused of his or her rights under Article 31(b). Thus, an Article 31(b) warning is required, and these rights may be exercised. That is, the accused is permitted to remain silent at the hearing.

While no statement need be given by the accused, Article 15 presupposes that the officer imposing NJP will afford the service member an opportunity to present matters in his or her own behalf. It is recommended that compliance with Article 31(b) rights at NJP be documented on forms such as those set forth in the *Manual of the Judge Advocate General* (JAGMAN), appendix A-1-b, A-1-c, or A-1-d.

Article 15 hearings are usually custodial situations. As discussed later, when a suspect is in custody, the law requires that certain counsel warnings be given to make sure of the admissibility of statements at a later

court-martial. Therefore, since counsel rights will not usually be given at an NJP hearing, statements made by the accused during NJP might not be admissible against him or her at a later court-martial.

For example, if, during his NJP hearing for wrongful possession of marijuana, Seaman Stoned confesses to selling drugs, the confession might not be admissible against him at his subsequent court-martial for wrongful sale of drugs. Statements given at NJP by the accused, however, are admissible against the accused at the NJP itself, regardless of whether the accused was given counsel warnings.

## THE RIGHT TO COUNSEL

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

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

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

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

## Custodial Interrogations

While custody might imply the jailhouse or brig, the courts have interpreted this term in a far broader sense. Any deprivation of one's freedom of action in any significant way is custody for the purpose of the counsel requirement. Two examples will highlight the broad definition of this concept:

- Suppose Seaman Arm is taken before his CO, Captain Mad, for questioning. Seaman Arm is not under apprehension or arrest; furthermore, no charges have been preferred against him. Captain Mad proceeds to question Seaman Arm about a broken window in the former's office. Captain Mad has been informed by Petty Officer Isawit that he saw Seaman Arm toss a rock through the window. Here, Seaman Arm is suspected of damaging military property of the United States. In this situation, with Seaman Arm standing before his commanding officer (CO), it should be obvious that Seaman Arm has been denied his freedom of action to a significant degree. Seaman Arm is not free simply to leave his CO's office or to refuse to appear for questioning. Thus, Captain Mad would be required to advise Seaman Arm of his counsel rights as well as his Article 31(b) rights. If Captain Mad does not, Seaman Arm's admission that he broke the window would be inadmissible in any forthcoming court-martial.

- Seaman Dopper is suspected by the CO of having marijuana in his possession. The CO directs him to report to the NCIS for questioning. Upon arrival at NCIS, Seaman Dopper is in custody for the purpose of counsel and Article 31 warnings.

As a general rule, advice to the accused of his or her right to counsel is required whenever an Article 31 warning is required. The major exception to this rule is that the accused has no right to counsel at an Article 15 hearing (as opposed to a prehearing interrogation), but is to be advised of the right to consult with independent counsel before making a decision on acceptance/rejection of NJP. Observe, however, that no statement made at NJP without warnings about the right to counsel can be used in a later court-martial proceeding.

### **Scope of the Right to Counsel**

What are the rights to counsel of which the accused must be informed? In the first place, counsel means a lawyer within the meaning of Article 27, UCMJ. The lawyer must be a judge advocate of one of the armed services, a graduate of an accredited law school, or a member of the bar of a federal court or of the highest court of a state. Unless the accused waives his or her right to counsel, a military lawyer will be appointed by military authority without cost to the accused. Alternatively, the accused has the right to retain a counsel of his or her own choice at his or her own expense. The accused has the absolute right to consult with counsel before the interrogation and is entitled to have counsel present during the interrogation.

### **Spontaneous Confessions**

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

### **RIGHT TO TERMINATE THE INTERROGATION**

An associated right, itself not technically a part of the Sixth Amendment right to counsel, is that the accused has the power to terminate the interrogation at any time for any reason (or for no reason at all). If the accused indicates in any manner a desire to terminate the interview, it must be terminated. Failure to do so makes inadmissible any statement made after the request to terminate.

### **FACTORS AFFECTING VOLUNTARINESS**

The following factors may affect the admissibility of a confession or admission. For instance, it is possible to completely advise a person of his or her rights, yet secure a confession or admission that is completely involuntary because of something that was said or done.

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

- Physical force—Obviously, physical force will invalidate a confession or admission. Consider this situation. SN Thief steals SN Victim's radio. SN Pal, a friend of SN Victim's, learns of SN Victim's missing radio and suspects SN Thief. SN Pal beats and kicks SN Thief until SN Thief admits the theft and the location of the radio. SN Pal then notifies the investigator, Petty

Officer Cop, of the threat. Petty Officer Cop has no knowledge of SN Thief having been beaten by SN Pal. Petty Officer Cop proceeds to advise SN Thief of his rights and obtains a confession from SN Thief. Is the confession made by SN Thief to Petty Officer Cop voluntary? This situation raises a serious possibility that the confession is not voluntary if SN Thief were in fact influenced by the previous beating received at the hands of SN Pal, even though Petty Officer Cop knew nothing about this. Therefore, cleansing warnings to remove this actual taint would be required.

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

### **CONSEQUENCES OF VIOLATING THE RIGHTS AGAINST SELF-INCRIMINATION**

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

The primary taint is the initial violation of the accused's right. The evidence that is the product of the exploitation of this taint is labeled fruit of the poisonous tree. The question to be determined is whether the evidence has been obtained by the exploitation of a violation of the accused's rights or has been obtained by means adequately distinguishable to be purged of the primary taint.

Thus, if Seaman Pot is found with marijuana in her pocket, is interrogated without being advised of her Article 31(b) rights, and confesses to the possession of 100 pounds of marijuana in her parked vehicle located on base, the 100 pounds of marijuana as well as Seaman Pot's confession will be excluded from evidence. The reason—the 100 pounds of marijuana was discovered by exploiting the unlawfully obtained evidence.

The opposite of this situation also represents the same principle. As the result of an illegal search, marijuana is found in Seaman Stupid's locker. Seaman

Stupid confesses because he was told that they had the goods on him and was confronted with the marijuana that was found in his locker. This confession is not admissible because it was obtained by exploiting the unlawfully obtained evidence.

When a command is concerned about what procedures to follow, or whether or not a confession or admission can be allowed into evidence, a lawyer should be consulted. Unlike practical engineering, basic electronics, or elementary mathematics, many legal questions do not have definite answers. On the basis of his or her training, however, a lawyer's professional opinion should provide the best available answers to difficult questions that arise daily.

### **HOW TO GIVE THE WARNINGS**

The foregoing discussions of Fifth and Sixth Amendment rights have indicated that suspects have rights that do not run to mere witnesses. Guidelines have been given for helping you determine when a witness shifts to the suspect category. The concept of in custody has been explained. Now that you know how to fit the person who is being interrogated into the various categories, you are probably interested in a formula that assures the admission of any evidence produced by an interrogation.

#### **Warning the Witness**

Under Article 31, a witness enjoys two significant rights. He or she may not be compelled to incriminate himself or herself. Neither may the witness be compelled to make a statement nor produce evidence before a military tribunal if the evidence is not material to the issue and tends to degrade him or her. Even though each witness should be advised of these rights, they are likely to become significant to you, the LN, when the witness shifts to the suspect category.

#### **Warning the Suspect**

All suspects and accused persons are entitled to warnings flowing from rights guaranteed by both the Fifth and Sixth Amendments. A proper warning to one accused or suspected of an offense is as follows:

1. You are suspected of committing the following offenses(s): (Here describe the offense[s])
2. You have the right to remain silent.
3. Any statement you do make may be used as evidence against you in trial by court-martial.

4. You have the right to obtain and consult with a lawyer, either a civilian lawyer retained by you at your own expense, or, if you wish, a military lawyer who will be appointed to act as your counsel without cost.

5. You have the right to have a retained civilian lawyer or an appointed military lawyer present with you during this interview.

6. You have the right to terminate this interview at any time and for any reason.

7. Do you understand?

8. Do you waive your right to counsel? (If the accused has such a right.)

9. Do you consent to make a statement?

Ascertaining that the accused or suspect fully understands his or her rights is particularly important, for in the absence of understanding there can be no intelligent choice to exercise or waive the rights. A court may later look not only to the words used in giving the warning, but also to the suspect's age, intelligence, and experience in this regard.

### **Documenting the Warning**

Your command will likely have preprinted local forms that detail these rights. Typically the accused will be advised according to the form and will sign on the form to indicate that he or she has been advised of his or her rights. The form is then retained in case it becomes necessary to prove in court that the warnings were properly given. If your command does not have a preprinted form, a sample appears in appendix A-1-m of the *JAG Manual*.

When only the Article 31 warning is required (that is, when the accused is going to NJP and has no right to counsel), the warning will eliminate references to the right to counsel and is given in the manner prescribed by the article itself. Article 31(b) imposes the three following requirements:

1. That the accused or suspect be informed of the nature of the accusations against him or her

2. That the accused be told that he or she has the right to remain silent

3. That the accused be advised that any statement made by him or her maybe used as evidence against him or her at a trial by court-martial

It is essential not only that the accused understands the advice given, but also that the person giving the advice makes certain (1) the accused understands this

advice and (2) the accused affirmatively waives his or her rights before any statement is obtained. Accordingly, a proper Article 31 warning could be phrased as follows:

Example: (The accused is suspected of stealing two wallets that contained a total of \$30.)  
"Seaman Thief, I advise you that I suspect you of stealing two wallets from the lockers of Seaman One and Seaman Two last night. I advise you that you have the right to remain silent and if you do say anything, what you say may be used against you as evidence in a trial by court-martial. Do you understand? Do you waive your rights and desire to make a statement?"

It is not sufficient merely to read Article 31 to the suspect or the accused. Neither is it in compliance with Article 31 to tell the suspect or accused that he or she need not incriminate himself or herself.

## **SEARCH AND SEIZURE**

What is a search? What are the rights of an individual being searched? What procedures must be followed in requesting and conducting a search? What are the different types of searches? You may not be involved in conducting a search, but you should be familiar with the procedures for preparing the paper work associated with searches and the rights of individuals being searched. The following discussions are intended to help you answer the previous questions and become familiar with the standards that must be followed to make sure a search has been conducted properly. In addition to these discussions, you should familiarize yourself with the applicable command instructions and JAG directives on search and seizure procedures.

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

Searches and seizures conducted according to the requirements of the *United States Constitution* will generally yield admissible evidence. On the other hand, evidence obtained in violation of constitutional mandates will not be admissible in any later criminal

prosecution. With this in mind, the most productive approach for you is to develop a thorough knowledge of what actions are legally permissible (producing admissible evidence for trial by court-martial) and what actions are not. This understanding will enable the command to determine, before acting in a situation, whether prosecution will be possible. The legality of the search or seizure depends on what was done by the command at the time of the search or seizure. No amount of legal brilliance by a TC at trial can undo an unlawful search and seizure.

## **SOURCES OF THE LAW OF SEARCH AND SEIZURE**

*United States Constitution*— Although enacted in the 18th century, the language of the Fourth Amendment has never changed. The Fourth Amendment was not an important part of American jurisprudence until this century when courts created an exclusionary rule based on its language:

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

An important concept contained in the Fourth Amendment is that of probable cause. This concept is not particularly complicated, nor is it as confusing as often assumed.

In deciding whether probable cause exists, you must first remember that conclusions of others do not comprise an acceptable basis for probable cause. The person who is called upon to determine probable cause must, in all cases, make an independent assessment of facts presented before a constitutionally valid finding of probable cause can be made. The concept of probable cause arises in many different factual situations. Numerous individuals in a command may be called upon to establish its presence during an investigation. Although the reading of the *U.S. Constitution* would indicate that only searches performed pursuant to a warrant are permissible, there have been certain exceptions carved out of that requirement, and these exceptions have been classified as searches otherwise reasonable. Probable cause plays an important role in

some of these searches that will be dealt with individually in this chapter.

Although the Fourth Amendment mandates that only information obtained under oath may be used as a basis for probable cause, military courts traditionally ignored this requirement. Still, it is strongly recommended that the information be given under oath. The oath is one factor that can add to the believability of the person given the oath, the importance of which will be discussed as follows.

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

The exclusionary rule of the Fourth Amendment is a judicially created rule based upon the language of the Fourth Amendment. The United States Supreme Court considered this rule necessary to prevent unreasonable searches and seizures by government officials. In more recent decisions, the Supreme Court has reexamined the scope of this suppression remedy and concluded that the rule should only be applied where the Fourth Amendment violation is substantial and deliberate. So, where government agents are acting in an objectively reasonable manner (in good faith), the evidence seized should be admitted despite technical violations of the Fourth Amendment.

*Manual for Courts-Martial*— Unlike the area of confessions and admissions covered in Article 31, UCMJ, there is no basis in the UCMJ for the military law of search and seizure. By a 1980 amendment to the MCM, the Military Rules of Evidence were enacted. The Military Rules of Evidence provide extensive guidance in the area of search and seizure in rules 300-317. Anyone charged with the responsibility for authorizing and conducting lawful searches should be familiar with those rules.

## **THE LANGUAGE OF THE LAW OF SEARCH AND SEIZURE**

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

**Search**—A search is a quest for incriminating evidence. It is an examination of a person or an area

with a view to the discovery of contraband or other evidence to be used in a criminal prosecution. Three factors must exist before the law of search and seizure will apply. Does the command activity constitute:

- a quest for evidence;
- a search conducted by a government agent; or
- a search conducted in an area where a reasonable expectation of privacy exists.

If, for example, it were shown that the evidence in question has been abandoned by its owner, the quest for such evidence by a government agent that led to the seizure of the evidence would present no problem, since there was no reasonable expectation of privacy of such property.

**Seizure**—A seizure is taking possession of a person or some item of evidence in conjunction with the investigation of criminal activity. The act of seizure is separate and distinct from the search; the two terms varying significantly in legal effect. On some occasions a search of an area may be lawful, but not a seizure of certain items thought to be evidence. Examples of this distinction will be seen later in this chapter, Mil.R.Evid. 316 deals specifically with seizures and creates some basic rules for application of the concept. Additionally, a proper person, such as anyone with the rank of E-4 or above, or any criminal investigator, such as an NCIS special agent, generally must be used to make the seizure, except in cases of abandoned property.

**Probable cause to search**—Probable cause to search is a reasonable belief, based upon believable information having a factual basis, that a crime has been committed and the person, property, or evidence sought is located in the place or on the person to be searched.

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

- Written statements
- Oral statements communicated in person, via telephone, or by other appropriate means of communication
- Information known by the authorizing officer (the CO)

**Probable cause to apprehend**—Probable cause to apprehend an individual is similar in that a person must conclude, based upon facts, that a crime was committed and the person to be apprehended is the person who committed the crime.

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

## **OBJECTS OF A SEARCH OR SEIZURE**

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

- Unlawful weapons made unlawful by some law or regulation
- Contraband or items that may not legally be possessed
- Evidence of a crime that may include such things as instrumentalities of crime, items used to commit crimes, fruits of crime, such as stolen property, and other items that aid in the successful prosecution of a crime
- Persons, when probable cause exists for apprehension
- Abandoned property that may be seized or searched for any or no reason, by any person

- Government property

With regard to government property, the following rules apply:

- Generally, government agents may search for and seize such property for any or no reason, and there is a presumption that no privacy expectation attaches.
- Footlockers or wall lockers are presumed to carry with them an expectation of privacy; thus they can be searched only when the Military Rules of Evidence permit.

## **CATEGORIZATION OF SEARCHES**

In discussing the law of search and seizure, we can divide all search and seizure activity into two broad areas—those that require prior authorization and those that do not. Within the latter category of searches, there are two types—searches requiring probable cause and searches not requiring probable cause. The constitutional mandate of reasonableness is most easily met by those searches predicated on prior authorization, and thus authorized searches are preferred. The courts have recognized, however, that some situations require



immediate action, and here the reasonable alternative is a search without prior authorization. Although this second category is more closely scrutinized by the courts, several valid approaches can produce admissible evidence.

### **Probable Cause Searches Based Upon Prior Authorization**

**Military search authorization**—This type of prior authorization search is akin to that described in the text of the Fourth Amendment, but is the express product of Mil.R.Evid. 315. Although the prior military law contemplated that only officers in command could authorize a search, Mil.R.Evid. 315 clearly intends that the power to authorize a search follows the billet occupied by the person involved rather than being founded in rank or officer status. Thus, in those situations where senior noncommissioned or petty officers occupy positions as officers in charge (OICs) or positions similar to command, they are generally competent to authorize searches absent contrary direction from the Secretary of the Navy.

In the typical case, the commander or other competent military authority, such as an OIC, decides whether probable cause exists when issuing a search authorization. Although there is no per se exclusion of COs, courts will decide, on a case-by-case basis, whether a particular commander was in fact neutral and detached. Mil.R.Evid. 315(d) provides that:

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.

**JURISDICTION TO AUTHORIZE SEARCHES.**— Before any competent military authority can lawfully order a search and seizure, he or she must have the authority necessary over both the person and/or place to be searched, and the persons or property to be seized. This authority, or jurisdiction, is most often a dual concept—jurisdiction over the place and over the person. Any search or seizure authorized by one not having jurisdiction is a nullity, and even

though otherwise valid, the fruits of any seizure would not be admissible in a trial by court-martial if objected to by the defense.

**Jurisdiction Over the Person.**— It is critical to any analysis of the authority of the CO over persons to determine whether the person is a civilian or military witness.

**Civilians**— The search of civilians is now permitted under Mil.R.Evid. 315(c) when they are present aboard military installations. This gives the military commander an additional alternative in such situations where the only possibility before the Mil.R.Evid. was to detain that person for a reasonable time while a warrant was sought from the appropriate federal or state magistrate. Furthermore, a civilian desiring to enter or exit a military installation maybe subject to a reasonable inspection as a condition precedent to entry or exit. Such inspections have recently been upheld as a valid exercise by the commander of the administrative need for security of military bases. Inspections will be discussed later in this chapter.

**Military**— Mil.R.Evid. 315 indicates two categories of military persons who are subject to search by the authorization of competent military authority— members of that CO's unit and others who are subject to military law when in places under that CO's jurisdiction; for example, aboard a ship or in a command area. There is military case authority for the proposition that the commander's power to authorize searches of members of his or her command goes beyond the requirement of presence within the area of the command. In one case, the court held that a search authorized by the accused's CO, although actually conducted outside the squadron area, was nevertheless lawful. Although this search occurred within the confines of the Air Force base, a careful consideration of the language of Mil.R.Evid. 315(d)(1) indicates that a person subject to military law could be searched even while outside the military installation. This would hold true only for the search of the person, since personal property, located off base is not under the jurisdiction of the CO if situated in the United States, its territories, or possessions.

**Jurisdiction Over the Property.**— Several topics must be considered when determining whether a CO can authorize the search of property. It is necessary to decide first if the property is government-owned and, if so, whether it is intended for governmental or private use. If the property is owned, operated, or subject to the control of a military person, its location determines whether a commander may authorize a search or seizure.

If the private property is owned or controlled by a civilian, the commander's authority does not extend beyond the limits of the pertinent command area.

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

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

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

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

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

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

considered extensions of the sovereignty of the United States.

#### **DELEGATION OF THE POWER TO AUTHORIZE SEARCHES.—**

Traditionally, commanders have delegated their power to authorize searches to their chief of staff, command duty officer (CDO), or even the officer of the day (OOD). This practice was held to be illegal, as the Court of Military Appeals has held that a CO may not delegate the power to authorize searches and seizures to anyone except a military judge or military magistrate. The court decided that most searches authorized by delegees such as CDOs would result in unreasonable searches or seizures in violation of the Fourth Amendment. If full command responsibility devolves upon a subordinate, that person may authorize searches and seizures since the subordinate in such cases is acting as the CO. General command responsibility does not automatically devolve to the CDO, OOD, or even the executive officer (XO) simply because the CO is absent. Only if full command responsibilities devolve to a subordinate member of the command may that person lawfully authorize a search. If, for example, the CDO or OOD must contact a superior officer or the CO before acting on any matter affecting the command, full command responsibilities will not have devolved to that person and, therefore, he or she could not lawfully authority a search or seizure. Guidance on this matter has been issued by the Commander in Chief Atlantic Fleet (CINCLANTFLT), Commander in Chief Pacific Fleet (CINCPACFLT), and Commander in Chief U.S. Naval Forces, Europe (CINCUSNAVEUR). Until the courts provide further guidance on this issue, you should follow the guidance set forth by your respective CINCs.

#### **THE REQUIREMENT OF NEUTRALITY AND DETACHMENT.—**

A commander must be neutral and detached when acting on a request for search authorization. The courts have issued certain rules that, if violated, will void any search authorized by a CO on the basis of lack of neutrality and detachment. These rules are designed to prevent an individual who has entered the evidence gathering process from thereafter acting to authorize a search. The intent of both the courts' decisions and the rules of evidence is to maintain impartiality in each case. When a commander has become involved in any capacity concerning an individual case, the commander should carefully consider whether his or her perspective can truly be objective when reviewing later requests for search authorization.

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

**THE REQUIREMENT OF PROBABLE CAUSE.**— As discussed earlier, the probable cause determination is based upon a reasonable belief that a crime was committed and certain persons, property, or evidence related to that crime will be found in the place or on the persons to be searched.

Before a person may conclude that probable cause to search exists, he or she should have a reasonable belief that the information giving rise to the intent to search is believable and has a factual basis.

The portion of Mil.R.Evid. 315 dealing with probable cause recognizes the proper use of hearsay information in the determination of probable cause and allows such determinations to be based either wholly or in part on such information.

Probable cause must be based on information provided to or already known by the authorizing official. Such information can come to the commander through written documents, oral statements, messages relayed through normal communications procedures such as the telephone or by radio, or may be based on information already known by the authorizing official.

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

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

- An individual making a probable cause determination who observes an incident firsthand must determine only that the observation is reliable and that the property is likely to be what it appears to be. For example, an officer who believes that he or she sees an individual in possession of heroin must first conclude that the observation was reliable; for example, whether his or her eyesight was adequate and the observation was long enough, and that he or she has sufficient knowledge

and experience to be able reasonably to believe that the substance in question is in fact heroin.

- 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 consider the demeanor of the informant to help determine whether the informant is believable. An individual known to have a clean record and no bias against the suspect is likely to be credible.

- An individual making a probable cause determination who relies upon the report of an informant not present before the authorizing official must determine both that the informant is believable and that the information supplied has a factual basis. The individual making the determination may use one or more of the following factors to decide whether the informant is believable.

Prior record as a reliable informant—Has the informant given information in the past that proved to be accurate?

Corroborating detail—Has enough detail of the informant's information been verified to imply that the remainder can reasonably be presumed to be accurate?

Statement against interest—Is the information given by the informant sufficiently adverse to the pecuniary or penal interest of the informant to imply that the information may reasonably be presumed to be accurate?

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

The factors listed previously are not the only ways to determine an informant's believability. The commander may consider any factor tending to show believability, such as the informant's military record, his or her duty assignments, and whether the informant has given the information under oath.

Mere allegations, however, may not be relied upon. Thus, an individual may not reasonably conclude that an informant is reliable simply because the informant is described as such by a law enforcement agent. The individual making the probable cause determination should 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. The informant's identity need not be disclosed to the authorizing officer, but it is often a good practice to do so.

**FORMS.**— Although written forms to record the terms of the authorization or to set forth the underlying information relied upon in granting the request are not mandatory, the use of such memorandums is highly recommended for several reasons. Many cases may

take some time to get to trial. It is helpful to the person who must testify about actions taken in authorizing a search to review such documents before testifying. Further, these records may be introduced to prove that the search was lawful.

The Judge Advocate General of the Navy has recommended the use of the standard record of search authorization form set forth in appendix A-1-n to the *JAG Manual* and as shown in figure 4-1. Should the

**RECORD OF AUTHORIZATION TO SEARCH**  
(SEE JAGMAN 0170)

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

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

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

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

\_\_\_\_\_  
Grade Signature Title  
\_\_\_\_\_  
Date and Time

Figure 4-1.—Record of authorization to search.

## INSTRUCTIONS

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

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

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

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

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

- a. an offense probably is about to be, or has been committed;
- b. specific fruits or instrumentalities of the crime, contraband, or evidence of the crime exist; and
- c. such fruits, instrumentalities, contraband, or evidence are probably in a certain place.

In arriving at the above determination it is generally permissible to rely on hearsay information, particularly if it is reasonably corroborated or has been verified in some substantial part by other facts or circumstances. However, unreliable hearsay cannot alone constitute probable cause, such as where the hearsay is several times removed from its source or the information is received from an anonymous telephone call. Hearsay information from an informant maybe considered if the information is reasonably corroborated or has been verified in some substantial part by other facts, circumstances, or events. The mere opinion of another that probable cause exists is not sufficient; however, along with the pertinent facts, it may be considered in reaching the conclusion as to whether or not probable cause exists. If the information available does not satisfy the foregoing, an additional investigation to produce the necessary information may be ordered.

Figure 4-1.—Record of authorization to search—Continued.

exigencies of the situation require an immediate determination of probable cause, with no time to use the form, make a record of all facts used and actions taken as soon as possible after the events have occurred.

Finally, probable cause must be determined by the person who is asked to authorize the search without regard to the prior conclusions of others on the question to be answered. No conclusion of the authorizing official should ever be based on a conclusion of some other person or persons. The determination that probable cause exists can be arrived at only by the officer charged with that responsibility,

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

#### **Probable Cause Searches Without Prior Authorization**

As discussed earlier, there are two basic categories of searches that can be lawful if properly executed. Our discussion to this point has centered on those types of searches that require prior authorization. We will now discuss those categories of searches that have been recognized as exceptions to the general rule requiring authorization before the search. Recall that within this category of searches there are searches requiring probable cause and searches not requiring probable cause.

#### **Exigency Searches**

This type of search is permitted by Mil.R.Evid. 315(g) under circumstances demanding some immediate action to prevent removal or disposal of property believed, on reasonable grounds, to be evidence of a crime. Although the exigencies may permit a search to be made without the requirement of a search authorization, the same amount of probable cause required for search authorizations must be found to justify an intrusion based on exigency. Prior authorization is not required under Mil.R.Evid. 315(g)

for a search based upon probable cause under the following circumstances:

**Insufficient time**—No authorization need be obtained where there is probable cause to search and there is a reasonable belief that the time required to obtain an authorization would result in the removal, destruction, or concealment of the property or evidence sought. Although both military and civilian case law, in the past, have applied this doctrine almost exclusively to automobiles, it now seems possible that this exception may be a basis for entry into barracks and apartments in situations where drugs are being used. The Court of Military Appeals found that an OOD, when confronted with the unmistakable odor of burning marijuana outside the accused's barracks room, acted correctly when he demanded entry to the room and placed all occupants under apprehension without first obtaining the CO's authorization for his entry. The fact that he heard shuffling inside the room, and was on an authorized tour of living spaces, was considered crucial, as well as the fact that the unit was overseas. The court felt that this was a present danger to the military mission, and thus military necessity warranted immediate action.

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

**Search of operable vehicles**—This type of search is based upon the United States Supreme Court's creation of an exception to the general warrant requirement where a vehicle is involved. Two factors are controlling. First, a vehicle may easily be removed from the jurisdiction if a warrant or authorization were necessary; and second, the court recognizes a lesser expectation of privacy in automobiles. In the military, the term *vehicle* includes vessels, aircraft, and tanks, as well as automobiles, trucks, and so on. If probable cause exists to stop and search a vehicle, then authorities may search the entire vehicle and any containers found therein in which the suspected item might reasonably be found. All this can be done without an authorization. It is not

necessary to apply this exception to government vehicles, as they may be searched any time and any place under the provisions of Mil.R.Evid. 314(d).

### Searches Not Requiring Probable Cause

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

**SEARCHES UPON ENTRY TO OR EXIT FROM U.S. INSTALLATIONS, AIRCRAFT, AND VESSELS ABROAD.**— Commanders of military installations, aircraft, or vessels located abroad may authorize personnel to conduct searches of persons or property upon entry to or exit from the installation, aircraft, or vessel. The justification for the search is the need to make sure the security, military fitness, or good order and discipline of the command is maintained.

**CONSENT SEARCHES.**— If the owner, or other person in a position to do so, consents to a search of his or her person or property over which he or she has control, a search may be conducted by anyone for any reason (or for no reason) pursuant to Mil.R.Evid. 314(e). If a free and voluntary consent is obtained, no probable cause is required. For example, where an investigator asks the accused if he or she “might check his or her personal belongings” and the accused answers, “Yes . . . it’s all right with me,” the Court of Military Appeals has found that there was consent. The court has also said, however, that mere agreement in the face of authority is not consent. Thus, where the CO and the chief master-at-arms appeared at the accused’s locker with a pair of bolt cutters and asked if they could search, the accused’s affirmative answer was not consent. The question in each case will be whether consent was freely and voluntarily given. Voluntary consent can be obtained from a suspect who is under apprehension if all other facts indicate it is not mere acquiescence.

Except under the Navy’s urinalysis program, there is no absolute requirement that an individual who is asked for consent to search be told of the right to refuse such consent, nor is there any requirement to warn under Article 31(b), even when the individual is a suspect before requesting consent. (OPNAVINST 5350.4B currently requires the Navy to inform a member of his or her right to refuse a consent urinalysis.) Both warnings can help show that consent was voluntarily given. The courts have been unanimous in finding such warnings to be strong

indicia that any waiver of the right to privacy thereafter given was free and voluntary.

Additionally, use of a written consent to search form is a sound practice. JAGMAN, appendix A-1-o, and figure 4-2 illustrate the consent to search form that should be used. Remember that since the consent itself is a waiver of a constitutional right by the person involved, it may be limited in any manner, or revoked at anytime. The fact that you have the consent in writing does not make it binding on a person if a withdrawal or limitation is communicated. Refusing to give consent or revoking it does not then give probable cause where none existed before. You cannot use the legitimate claim of a constitutional right to infer guilt or that the person must be hiding something.

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

As previously noted, we use the term *control* over property rather than ownership. For instance, if Seaman Frost occupies a residence with her male companion, John Doe, John can consent to a search of the residence. Suppose, however, that Seaman Frost keeps a large tin box at the residence to which John is not allowed access. The box would not be subject to a search based upon John’s consent. He could only consent to a search of those places or areas where Seaman Frost has given him control. Likewise, if Seaman Frost maintained her own private room within the residence, and John was not permitted access to the room by her, John could not give consent for a search of that room.

**STOP AND FRISK.**— Although most often associated with civilian police officers, this type of limited seizure of the person is specifically included in Mil.R.Evid. 314(f). It does not require probable cause to be lawful and is most often used in situations where an experienced officer, chief petty officer, or petty officer is confronted with circumstances that just do not seem right. This articulable suspicion allows the law enforcement officer to detain an individual to ask for identification and an explanation of the observed circumstances. This is the stop portion of the intrusion. Should the person who makes the stop have reasonable grounds to fear for his or her safety, a limited frisk or pat down of the outer garments of the person stopped is permitted to find out whether a weapon is present. If any weapon is discovered in this pat down, its seizure can provide probable cause for apprehension and a later search incident thereto. There is, however, no right to frisk or pat down a suspect in situations where no

CONSENT TO SEARCH  
(SEE JAGMAN 0170)

I, \_\_\_\_\_, have been advised that inquiry is being made in connection with \_\_\_\_\_. I have been advised of my right not to consent to a search of [my person] [the premises mentioned below]. I hereby authorize \_\_\_\_\_ and \_\_\_\_\_ who [has] [have been] identified to me as \_\_\_\_\_ to' conduct a  
Position(s)

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

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

Figure 4-2.-Consent to search.

apprehension of personal danger is involved, nor can the frisk be conducted in a more than cursory manner to ensure safety. Further, any detention must be brief and related to the original suspicion that underlies the stop.

**SEARCHES INCIDENT TO LAWFUL APPREHENSION.**— A search of an individual's person, of the clothing he or she is wearing, and of the places into which he or she could reach to obtain a weapon or destroy evidence is a lawful search if conducted incident to a lawful apprehension of that individual and pursuant to Mil.R.Evid. 314(g).

Apprehension is the taking into custody of a person. This means the imposition of physical restraint and is substantially the same as civilian arrest. It differs from military arrest which is merely the imposition of moral restraint.

A search incident to a lawful apprehension will be lawful if the apprehension is based upon probable cause. This means that the apprehending official is aware of facts and circumstances that would justify a reasonable person to conclude that an offense has been or is being committed and the person to be apprehended committed or is committing the offense.

The concept of probable cause as it relates to apprehension differs somewhat from that associated with probable cause to search. Instead of concerning oneself with the location of evidence, the second inquiry concerns the actual perpetrator of the offense.

An apprehension may not be used as a subterfuge to conduct an otherwise unlawful search. Furthermore, only the person apprehended and the immediate area where that person could easily obtain a weapon or



destroy evidence may be searched. For example, a locked suitcase next to the person apprehended may not be searched incident to the apprehension, but it may be seized and held pending authorization for a search based on probable cause.

Until recently, the extent to which an automobile might be searched incident to the apprehension of the driver or passengers therein was unsettled. In 1981, however, the United States Supreme Court firmly established the lawful scope of such apprehension searches. The court held that when a law enforcement officer lawfully apprehends the occupants of an automobile, the officer may conduct a search of the entire passenger compartment, including a locked glove compartment, and any containers found therein, whether opened or closed.

Decisions of the United States Supreme Court have further limited the scope of a search incident to apprehension where the suspect possesses a briefcase, duffel bag, footlocker, suitcase, and soon. If it is shown that the object carried or possessed by a suspect was searched incident to the apprehension; that is, at the same time as the apprehension, then the search of that item is likely to be upheld. If, however, the suspect is taken away to be interrogated in room 1 and the suitcase is taken to room 2, a search of the item would not be incident to the apprehension since it is outside the reach of the suspect. Here, search authorization would be required.

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

### **Plain View Searches**

When a government official is in a place where he or she has a lawful right to be, whether by invitation or official duty, evidence of a crime observed in plain view may be seized according to Mil.R.Evid. 316. An often repeated example of this type of lawful seizure arises during a wall locker inspection. While looking at the uniforms of a certain service member, a baggie of marijuana falls to the deck. Its seizure as contraband is

justifiable under these circumstances as having been observed in plain view. Another situation could arise while a searcher is carrying out a duly authorized search for stolen property and comes upon a gun in the search area. Since it is contraband, it is both seizable and admissible in court-martial proceedings.

### **Body Views and Intrusions**

Under certain circumstances defined in Mil.R.Evid. 312, evidence that is the result of a body view or intrusion will be admissible at court-martial. There are also situations where such body views and intrusions may be performed in a nonconsensual manner and still be admissible.

Visual examination of the unclothed body may be made with the consent of the individual subject to the inspection. 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 the Military Rules of Evidence:

- Inspections and inventories under Mil.R.Evid. 313
- Searched under Mil.R.Evid. 314(b) and 314(c) if there is a reasonable suspicion that weapons, contraband, or evidence of a crime is concealed on the body of the person to be searched
- Searched within jails and similar facilities under Mil.R.Evid. 314(h) if reasonably necessary to maintain the security of the institution or its personnel
- Searched incident to lawful apprehension under Mil.R.Evid. 315

An examination of the unclothed body under this rule should be conducted whenever practical 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 Mil.R.Evid. 311.

A reasonable nonconsensual physical intrusion into the mouth, nose, and ears may be made when a visual examination of the body is permissible. Nonconsensual intrusions into other body cavities may be made under the following categories.

For purposes of seizure—When there is a clear indication that weapons, contraband, or other evidence of a crime is present, to remove weapons, contraband, or evidence of a crime discovered if such intrusion is

made in a reasonable fashion by a person with appropriate medical qualifications.

For purposes of search—To search for weapons, contraband, or evidence of a crime if authorized by a search warrant or search authorization and conducted by a person with appropriate medical qualifications.

Notwithstanding this rule, a search under Mil.R.Evid. 314(h) may be made without a search warrant or authorization if such search is based on a reasonable suspicion that the individual is concealing weapons, contraband, or evidence of a crime.

Extraction of bodily fluids—The nonconsensual extraction of body fluids; for example, blood, is permissible under the two following circumstances:

- Pursuant to a lawful search authorization
- Where the circumstances show a clear indication that evidence of a crime will be found, and that there is reason to believe that the delay required to seek a search authorization could result in the destruction of the evidence

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

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

## **THE USE OF DRUG-DETECTOR DOGS**

Military working dogs can be used as drug-detector dogs. As such, they can be used to assist in the obtaining of evidence for use in courts-martial. Some of the ways they can be used include their use in gate searches or other inspections under Mil.R.Evid. 313 and to establish the probable cause necessary for a later search.

One situation where the use of the dog was considered permissible was during a gate search conducted on an overseas installation. The dog's alert

could be used to establish probable cause to apprehend the accused. All evidence obtained was held to be admissible. Recently, the Court of Military Appeals held that the use of detector dogs at gate searches in the United States was also reasonable.

In another case, the Court of Military Appeals permitted a detector dog to be brought to an automobile believed to contain marijuana. The dog alerted on the car's rear wheels and exterior and that prompted the police to detain the accused. The proper commander was then notified of this alert and the other circumstances surrounding the case. The search of the vehicle was then conducted pursuant to the authorization of the commander.

The court held that the use of the marijuana dog in an area surrounding the car was lawful. The mere act of monitoring airspace surrounding the vehicle did not involve an intrusion into an area of privacy. Thus, the dog's alert was not a search, but a fact that could be relayed to the proper commander for a determination of probable cause. The Supreme Court has also held that using a dog in a common area to sniff a closed suitcase is not a search at all.

Close attention must be given to establishing the reliability of the informers in this situation; for example, the dog and doghandler. The drug-detector dog is simply an informant, albeit with a longer nose and a somewhat more scruffy appearance. As in the usual informant situation, there must be a showing of both factual basis; for example, the dog's alert and surrounding circumstances and the dog's reliability. This reliability may be determined by the CO through either of two commonly used methods. The first method is for the CO to observe the accuracy of a particular dog's alert in a controlled situation. The second method is for the CO to review the record of the particular dog's previous performance in actual cases. Although either of these methods may be sufficient by itself for a determination that a dog is reliable, both should be used whenever practical. For more information on the use of military working dogs as drug detectors and establishing their reliability as such, see *Military Working Dog Manual*, OPNAVINST 5585.2A.

A few words of caution about the use of drug dogs. One court has stated that a military commander who participates in an inspection involving the use of detector dogs in the command area cannot later authorize a search based upon later alerts by the same dogs during that use. This illustrates the point that any person swept into the evidence-gathering process may find it impossible later to be considered an impartial

official. The provisions of the Military Rules of Evidence are geared to lessen the effect in this type of case, in that mere presence at the scene is not per se disqualifying; but again, the line is difficult to draw.

In summary, the use of dogs for the purpose of ferreting out drugs or contraband that threaten military security and performance is reasonable means to provide probable cause when:

- the dog alerts in a common area, such as a barracks passageway, or
- the dog alerts on the airspace extending from an area where there is an expectation of privacy.

## **INSPECTIONS AND INVENTORIES**

Although not within either category of searches (prior authorization/without prior authorization), administrative inspections and inventories conducted by government agents may yield evidence admissible in trials by court-martial. Mil.R.Evid. 313 codifies the law of military inspections and inventories. Traditional terms that were formerly used to describe various inspections; for example, shakedown search or gate search, have been abandoned as being confusing. If carried out lawfully, inspections and inventories are not designed to be quests for evidence and are thus not searches in the strictest sense. It follows that items of evidence found during these inspections are admissible in court-martial proceedings. If either of these administrative activities is primarily a quest for evidence directed at certain individuals or groups, the inspection is actually a search and evidence seized will not be admissible.

### **Inspections**

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

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

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

Suppose, however, that Captain Deck, having no information concerning Seaman Doe, is seeking to remove contraband from his command, prevent removal of government property, and reduce drug trafficking. He establishes inspections at the gate. Those entering and leaving through the gate have their persons and vehicles inspected on a random basis. Captain Deck is not trying to get goods on Seaman Doe or any other particular individual. Seaman Doe carries marijuana through the gate and is inspected. The inspection is a reasonable one; the trunk of the vehicle, under its seats, and Seaman Doe’s pockets are checked. Marijuana is discovered in Seaman Doe’s trunk. The marijuana was discovered incident to the inspection. Seaman Doe was not singled out and inspected as a suspect. Here, the purpose was not to get Seaman Doe, but merely to deter the flow of drugs or the contraband. The evidence would be admissible.

An inspection may be made of the whole or any part of a unit, organization, installation, vessel, aircraft, or vehicle. Inspections are quantitative examinations because they do not single out specific individuals or very small groups of individuals. There is, however, no legal requirement that the entirety of a unit or organization be inspected. An inspection should be totally exhaustive (for example, every individual of the chosen component is inspected) or it should be done on a random basis, by inspecting individuals according to

some rule of chance. Such procedures will be an effective means to avoid challenges based on grounds that the inspection was a subterfuge for a search. Unless authority to so do 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.

An inspection also includes an examination to locate and confiscate unlawful weapons and other contraband. 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, liquor is prohibited aboard ship and would be contraband if found in Seaman Doe's seabag aboard ship, although it might not be contraband if found in Seaman Jones' BEQ room.

Mil.R.Evid. 313(b) indicates that certain classes of contraband inspections are especially likely to be subterfuge searches and thus not inspections at all. If the contraband inspection (1) occurs immediately after a report of some specific offense in the unit and was not previously scheduled; (2) singles out specific individuals for inspection; or (3) inspects some people substantially more thoroughly than others, then the government must prove that the inspection was not actually a subterfuge search.

As a practical matter, the rule expresses a clear preference for previously scheduled contraband inspections. Such scheduling helps make sure the inspection is a routine command function and not an excuse to search specific persons or places for evidence of a crime. The inspection should be scheduled sufficiently far enough in advance to eliminate any reasonable chance that the inspection is being used as a subterfuge. 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, or on the occurrence of a specific event beyond the usual control of the commander. The previously scheduled inspection, however, need not be preannounced.

Mil.R.Evid. 313(b) permits a person acting as an inspector to use any reasonable natural or technological aid in conducting an inspection. The marijuana detection dog, for instance, is a natural aid that may be used to assist an inspector in more accurately discovering marijuana during an inspection of a unit for marijuana. If the dog should alert on an area that is not within the scope of the inspection, however, that area may not be searched without a prior authorization. Also, where the CO is conducting the inspection when the dog alerts, he or she should not authorize the search himself

or herself, but should seek authorization from some other competent authority. This is because the commander's participation in the inspection may render him or her disqualified to authorized searches.

## **Inventories**

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

## **DRUG ABUSE DETECTION**

Not in My Navy and Zero Tolerance are the Navy's call to arms in the war on drugs. These statements reflect our commitment to the elimination of illicit drugs and drug abusers from the Naval Establishment and the continued emphasis placed on deterrence, leadership, and expeditious action. While the options available to commanders in combating drug abuse are many and varied, this section deals only with the urinalysis program and its limitations.

## **GENERAL GUIDANCE**

The urinalysis program of the Navy was established to provide a means for the detection of drug abuse and to serve as a deterrent against drug abuse. OPNAVINST 5350.4B contains guidelines on alcohol and drug abuse prevention and control. Additional guidance is found in the Military Rules of Evidence. These rules and directives contain detailed guidelines for the collection, analysis, and use of urine samples.

The positive results of a urinalysis test may be used for a number of distinct purposes, depending on how the original sample was obtained. Therefore, it is important to be able to recognize when, and under what circumstances, a command may conduct a proper urinalysis.

## **TYPES OF TESTS**

OPNAVINST 5350.4B directs that commanders, COs, and OICs should conduct an aggressive urinalysis

testing program, adapted as necessary to meet unique unit and local situations. The specific types of urinalysis testing and authority to conduct them are outlined as follows.

### Search and Seizure

Tests conducted with member's consent. Members suspected of having unlawfully used drugs may be requested to consent to urinalysis testing. For consent to be valid, it must be freely and voluntarily given. In this regard, OPNAVINST 5350.4B provides that, before requesting consent, commands should advise the member that he or she is suspected of drug use and may decline to provide a sample. A recommended urinalysis consent form is shown in figure 4-3.

Probable cause and authorization. Urinalysis testing may be ordered, according to Mil.R.Evid 312(d) and 315, whenever there is probable cause to believe that a member has wrongfully used drugs and that a test

will produce evidence of such use. For example, during a routine locker inspection in the enlisted barracks, you find an open baggie of what appears to be marijuana under some clothes in Petty Officer Doe's wall locker. Along with the marijuana you find a roach clip and some rolling papers. You notify the CO of your find and he sends for Doe. A few minutes later, Petty Officer Doe staggers into the CO's office-eyes red and speech slurred. He is immediately apprehended and searched. A marijuana cigarette is found in his shirt pocket. Under these facts, a commander would have little trouble finding probable cause to order that a urine sample be given.

Probable cause and exigency. Mil.R.Evid 315 recognizes that there may not always be sufficient time or means available to communicate with a person empowered to authorize a search before the evidence is lost or destroyed. While more commonly seen in the operable vehicle setting, facts could give rise to support an exigency search of a member's body fluids.

<b>URINALYSIS CONSENT FORM</b>	
<p>I, _____ having been requested to provide a urine sample have been advised that:</p>	
<p>(1) I am suspected of having unlawfully used drugs;</p>	
<p>(2) I may decline to consent to provide a sample of my urine for testing;</p>	
<p>(3) If a sample is provided, any evidence of drug use resulting from urinalysis testing may be used against me in a court-martial.</p>	
<p>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.</p>	
	<p>_____</p> <p>Signature</p>
	<p>_____</p> <p>Date</p>
<p>_____</p> <p>Witness' signature</p>	
<p>_____</p> <p>Date</p>	

Figure 4-3.—Urinalysis consent form.

Remember, to be lawful, an exigency search must still be based upon a finding of probable cause. Because drugs tend to remain in the system in measurable quantities for some time, it is unlikely that this theory will be the basis of many urinalysis tests.

### **Inspections Under Mil.R.Evid. 313**

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

- Random selection of individual service members from the entire unit or from an identifiable segment or class of that unit. Random selection is achieved by making sure each service member has an equal chance of being selected each time personnel are chosen.

- Selection, random or otherwise, of an entire subunit or identifiable segment of a command. Examples of such groups include an entire department, division, or watch section; all personnel within specific paygrades; all newly reporting personnel; or all personnel returning from leave, liberty, or unauthorized absence (UA).

- Urinalysis testing of an entire unit. As a means of quota control, Navy commands are required to obtain second-echelon approval before conducting all unit sweeps and random inspections involving more than 20 percent of a unit, or 200 members. Failure to obtain such approval, however, will not invalidate the results of the testing.

### **Service-Directed Testing**

Service-directed testing is actually nothing more than inspections of units expressly designated by the Chief of Naval Operations (CNO). These include rehabilitation facility staff; security personnel; A school candidates; officers and enlisted in the accession pipeline; and those executing permanent change of station (PCS) orders to an overseas duty station.

### **Valid Medical Purposes**

Blood tests or urinalyses also may be performed to assist in the rendering of medical treatment (for example, emergency care, periodic physical examinations, and such other medical examinations as are necessary for diagnostic or treatment purposes). Do not confuse this with a fitness-for-duty examination ordered by a service member's command.

### **Fitness-for-Duty Testing**

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

**Command-directed testing.** A command-directed test will be ordered by a member's CO or OIC, or other authorized individual whenever a member's behavior, conduct, or involvement in an accident or other incident gives rise to a reasonable suspicion drug abuse and a urinalysis has not been conducted on a probable cause or consensual basis. Command-directed tests are often ordered when suspicious or bizarre behavior does not amount to probable cause.

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

**Evaluation testing.** This refers to command-directed testing when a commander has doubt as to the member's wrongful use of drugs following a laboratory-confirmed urinalysis result. Evaluation testing should be conducted twice a week for a maximum of 8 weeks and is often referred to as a two-by-eight evaluation.

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

### **USES OF URINALYSIS RESULTS**

Of particular importance to the command is what use may be made of a positive urinalysis. The results of a lawful search and seizure, inspection, or a valid

medical purpose may be used to refer a member to a Department of Defense (DOD) treatment and rehabilitation program, to take appropriate disciplinary action, and to establish the basis for a separation and characterization in a separation proceeding.

The results of a command-directed/fitness-for-duty urinalysis may **not** be used against the member for any disciplinary purposes, not on the issue of characterization of service in separation proceedings, **except** when used for impeachment or rebuttal in any proceeding that evidence of drug abuse has been first introduced by the member. In addition, positive results obtained from a command-directed fitness-for-duty urinalysis may not be used as a basis for vacation of the suspension of execution of punishment imposed under Article 15, UCMJ, or a result of court-martial. Such result may, however, serve as the basis for referral of a member to a DOD treatment and rehabilitation program and as a basis for administrative separation.

What administrative or disciplinary action can be taken against service members identified as drug abusers through service-directed urinalysis testing varies, depending upon which CNO-designated unit was tested. The only constant is that all service-directed testing may be considered as the basis for administrative separation.

## **THE COLLECTION PROCESS**

The weakest link in the urinalysis program chain is in the area of collection and custody procedures. Commands should conduct every urinalysis with the full expectation that administrative or disciplinary action might result. The use of chiefs and officers as observers and unit coordinators is strongly encouraged. Strict adherence to direct observation policy during urine collection to prevent substitution, dilution, or adulteration is an absolute necessity. Mail samples immediately after collection to reduce the possibility of tampering. Make sure all documentation and labels are legible and complete. Special attention should be given to the ledger and chain of custody to make sure they are all accurate, complete, and legible. Additional guidance is provided in OPNAVINST 53530.4B.

## **SUMMARY**

The information that has been presented to you in this chapter is complex and difficult. You must be knowledgeable, however, of the importance of properly advising accused's of their rights, the types of and the requirements for conducting a lawful search and seizure, and drug abuse detection. This chapter has given you a basic understanding of these issues.





## CHAPTER 5

# NONJUDICIAL PUNISHMENT

As an LN you will become extensively involved with all aspects of nonjudicial punishment, commonly called either NJP or mast. In this chapter we discuss duties and procedures required before, during, and after NJP proceedings.

Although both commanding officers (COs) and officers in charge (OICs) can conduct mast, we will use only the abbreviation CO in this chapter. For a discussion on the differences between masts held by COs and OICs, see Article 15, *Uniform Code of Military Justice* (UCMJ), and part V of the *Manual for Courts-Martial* (MCM).

The term *nonjudicial punishment* and the abbreviation NJP are used interchangeably. They refer to certain limited punishments that can be awarded for minor disciplinary offenses by a CO to members of his or her command. Nonjudicial punishment proceedings are called captain's mast or simply mast.

Article 15 of the UCMJ, part V of the MCM, 1984, and part B of chapter 1 of the *Manual of the Judge Advocate General* (JAGMAN) are the basic laws about nonjudicial punishment procedures. The legal protection afforded an individual subject to NJP proceedings is more complete than is the case for nonpunitive measures, but, by design, is less extensive than for courts-martial. NJP is not administrative and is nonadversarial in nature. When punishment is imposed it is not considered a conviction, and when a case is dismissed it is not considered an acquittal.

The word *mast* also is used to describe three different types of proceedings: request mast, meritorious mast, and disciplinary mast. Request mast is a hearing before the CO, at the request of service personnel, for making requests, reports, statements, and for airing grievances. Meritorious mast is for the purpose of publicly and officially commending a member of the command for noteworthy performance of duty. This chapter discusses disciplinary mast. When we use the term *mast*, that is what is meant.

Mast is a procedure where the CO may (1) inquire into the facts surrounding minor offenses allegedly committed by a member of his or her command, (2) afford the accused a hearing as to the offense(s), and (3) dispose of such charges by dismissing the charges,

imposing punishment, or referring the case to a court-martial.

### NATURE AND REQUISITE OF NONJUDICIAL PUNISHMENT

Nonjudicial punishment is a disciplinary measure more serious than administrative corrective measures, but less serious than trial by court-martial. Nonjudicial punishment provides commanders with an essential and prompt means of maintaining good order and discipline and also promotes positive behavior changes in service members without the stigma of a court-martial conviction.

### WHO MAY IMPOSE NJP

Authority to impose nonjudicial punishment under Article 15, UCMJ, maybe exercised by a CO, an OIC, or by certain officers to whom the power has been delegated by the Secretary of the Navy (SECNAV).

In the Navy and Marine Corps, billet designations by the Chief of Naval Personnel and Headquarters Marine Corps identify those persons who are commanding officers. So the term *commanding officer* has a precise meaning and is not used arbitrarily.

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

OICs exist in the naval service. An OIC is a commissioned officer appointed as an OIC of a unit by departmental orders, tables of organization, manpower authorizations, orders of a flag or general officer in command, or orders of the senior officer present.

Ordinarily, the power to impose NJP cannot be delegated. One exception is that a flag or general officer in command may delegate all or a portion of his or her Article 15 powers to a principal assistant. A principal assistant is a senior officer on a flag or general officer's staff who is eligible to succeed to command. This delegation must be made with the express approval of the Chief of Naval Personnel or the Commandant of the Marine Corps.

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

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

If a CO determines that his or her authority under Article 15 is not enough to make a proper disposition of the case, he or she may refer the case to a superior commander for appropriate disposition.

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

#### **PERSONS ON WHOM NJP MAY BE IMPOSED**

A CO may impose NJP on all military personnel of his or her command. An OIC may impose NJP only on enlisted members assigned to the unit that he or she is in charge of.

At the time punishment is imposed, the accused must be a member of the command of the CO (or of the unit of the OIC) who imposes the NJP. A person is of the command or unit if he or she is assigned or attached to it. This includes temporary additional duty (TEMADD) personnel. TEMADD personnel may be punished either by the CO of the unit that they are TEMADD to or by the CO of the duty station that they are permanently attached to. Note, however, that both COs cannot punish an individual under Article 15 for the same offense. In addition, a party to a *JAG Manual* investigation remains of the command or unit that he or she was attached to at the time of his or her designation as a party for the sole purpose of imposing a letter of admonition or reprimand as NJP.

#### **Personnel of Another Armed Force**

Under present agreements between the armed forces, a Navy CO should not exercise NJP jurisdiction on Army or Air Force personnel assigned or attached to

a naval command. As a matter of policy, return these personnel to their parent-service unit for discipline. If this is impractical and the need to discipline is urgent, NJP maybe imposed, but a report to the Department of the Army or Department of the Air Force is required. See the *Naval Military Personnel Manual* (MILPERSMAN), Article 1860320.5a and 5b, for the procedures to follow.

Express agreements do not extend to Coast Guard personnel serving with a naval command, but other policy statements say that the naval command should not try to exercise NJP over such personnel assigned to its unit. Refer to section 1-3(c), *Coast Guard Military Justice Manual*, COMDTINST M5801.1.

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

#### **Imposition of NJP on Embarked Personnel**

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

#### **Imposition of NJP on Reservists**

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

The offense(s) that the CO or OIC seeks to punish at NJP must have occurred while the member was on active duty or inactive duty training. However, it is not necessary that NJP occurs (or the offense even be discovered) before the end of the active duty or inactive duty training period during which the alleged misconduct occurred. In that regard, the officer seeking to impose NJP has the following options:

- He or she may impose NJP during the active duty or inactive duty training when the misconduct occurred.

- He or she may impose NJP at a later period of active duty or inactive duty training (so long as this is within 2 years of the date of the offense).

- He or she may request from the regular component officer exercising general court-martial jurisdiction (OEGCMJ) over the accused an involuntary recall of the accused to active duty or inactive duty training to impose NJP.

- If the accused waives his or her right to be present at the NJP hearing, the CO or OIC may impose NJP after the period of active duty or inactive duty training of the accused has ended.

Punishment imposed upon persons who were involuntarily recalled for imposition of NJP may not include restraint unless SECNAV approves the recall.

### **Right of an Accused to Demand Trial by Court-Martial**

Article 15a, UCMJ, and part V, par. 3, MCM, 1984, provide another limitation on the exercise of NJP. Except for a person attached to or embarked in a vessel, an accused may demand trial by court-martial in lieu of NJP.

This right to refuse NJP exists up until the time of imposition of NJP (that is, up until the CO announces the punishment). This right is not waived by the accused having previously signed a report chit showing that he or she would accept NJP.

The category of persons who may not refuse NJP includes those persons assigned or attached to a vessel who are on board for passage or assigned or attached to an embarked staff, unit, detachment, squadron, team, air group, or other regularly organized body.

The key time factor in determining whether or not a person has the right to demand trial by court-martial is the time of the imposition of the NJP and not the time of the commission of the offense. There is no power for a CO or an OIC to impose NJP on a civilian.

### **OFFENSES PUNISHABLE UNDER ARTICLE 15, UCMJ**

Article 15 gives a CO power to punish individuals for minor offenses. The term *minor offense* has been the cause of some concern in the administration of nonjudicial punishment.

Article 15, UCMJ, and part V, par. 1e, MCM, say that the term *minor offense* means misconduct normally

not more serious than that usually handled at an summary court-martial (SCM) (where the maximum punishment is 30 days' confinement). These sources also say that the nature of the offense and the circumstances surrounding its commission are also factors that should be considered in determining whether an offense is minor in nature.

The term *minor offense* ordinarily does not include misconduct that, if tried by a general court-martial (GCM), could be punished by a dishonorable discharge (DD) or confinement for more than 1 year. The Navy and Marine Corps, however, have taken the position that the final determination of whether an offense is minor is within the sound discretion of the CO.

### **Maximum Penalty**

To determine if the offense is minor, begin the analysis with a consultation of the punitive articles (part IV, MCM, 1984) and determine the maximum punishment for the offense. Although the MCM does not so state, if the authorized confinement is 30 days to 3 months, the offense is most likely a minor offense. If the authorized confinement is 6 months to 1 year, the offense may be minor. However, if authorized confinement is 1 year or more, the offense is usually not minor.

### **Nature of the Offense and Circumstances Surrounding Its Commission**

The MCM, 1984, also states that, in determining whether an offense is minor, the nature of the offense and the circumstances surrounding its commission should be considered. This is a significant statement and often is misunderstood as referring to the seriousness or gravity of the offense. Gravity refers to the maximum punishment. In contrast, the nature of the offense refers to its character, not its gravity.

In military criminal law, there are two basic types of misconduct—disciplinary infractions and crimes. Disciplinary infractions are breaches of standards governing the routine functioning of society. Thus, traffic laws, license requirements, disobedience of military orders, and disrespect to military superiors are disciplinary infractions. Crimes, on the other hand, involve offenses recognized as particularly evil. Crimes are acts of robbery, rape, murder, aggravated assault, and larceny. Both types of offenses involve a lack of self-discipline, but crimes involve a particular gross absence of self-discipline amounting to a moral deficiency. Crimes are the product of a mind particularly disrespectful of good moral standards.

In most cases, criminal acts are not minor offenses. However, they are serious or minor depending upon circumstances and, thus, while some disciplinary offenses carry severe maximum penalties, the law recognizes that the impact of some of these offenses on discipline will be slight.

The circumstances surrounding the commission of a disciplinary infraction are important to the determination of whether such an infraction is minor. For example, willful disobedience of an order to take ammunition to a unit engaged in combat can have fatal results for those engaged in the fight and is a serious matter. Willful disobedience of an order to report to the barber-shop may have much less impact on discipline. The offense must provide both extremes, and it does because of a high maximum punishment limit.

When dealing with disciplinary infractions, the commander must be free to consider the impact of the circumstance since he or she is considered the best judge of it. However, in disposing of crimes, society at large has an interest coexistent with that of the command, and criminal defendants are given more safeguards. The commander's discretion in disposing of disciplinary infractions is much greater than his or her latitude in dealing with crimes.

The Navy has taken the position that the final determination of what is a minor offense is within the sound discretion of the CO. Imposition of NJP does not, in all cases, prevent a later court-martial for the same offense. See part V, par. 1e, MCM, 1984.

### **Cases Previously Tried in Civil Court**

Sections 0108b and 0124c(2) of the JAGMAN permit the use of NJP to punish an accused for an offense that he or she has been (1) tried (whether acquitted or convicted) by a domestic or foreign civilian court, (2) diverted out of the regular criminal process for a probationary period, or (3) adjudicated by juvenile court authorities. This is true only if authority is obtained from the OEGCMJ (usually the general or flag officer in command over the command desiring to impose nonjudicial punishment).

NJP may not be imposed for an act tried by a court that derives its authority from the United States, such as a federal district court.

Cases in which a finding of guilt or innocence has been reached in a trial by court-martial cannot be taken to NJP.

### **Off-Base Offenses**

COs and OICs may dispose of minor disciplinary infractions that occur on base or off base at NJP. Unless the off-base offense is a traffic offense or one previously adjudicated by civilian authorities, there is no limit on the authority of military commanders to resolve such offenses at NJP.

In areas not under military control, the responsibility for maintaining law and order rests with civil authority. The enforcement of traffic laws falls within the purview of this principle. Off-duty, off-installation driving offenses, however, show inability and lack of safety consciousness. Such driving performance does not prevent the use of nonpunitive measures that could include denial of on-installation driving privileges.

### **THE NJP PACKAGE**

The NJP package, as we will refer to it, includes numerous documents and forms along with any evidence on the case. As we will discuss, strict compliance with filling out the forms is essential to a proper NJP proceeding.

### **REPORT AND DISPOSITION OF OFFENSE(S)**

Your office may receive notification that an offense has been committed in a variety of ways. These ways can include a shore patrol report, a verbal complaint by a victim, or a local report chit. Except when serious crimes are involved, charges are reduced to writing on the Report and Disposition of Offense(s), NAVPERS 1626/7, and processed in the manner prescribed by the form itself.

The NAVPERS 1626/7 is a one-sheet (back and front) form. It is not a substitute for a charge sheet and it is not a substitute for the pretrial investigation required by Article 32, UCMJ. However, so long as the offense(s) remains in the group of cases to be handled by the CO at mast, this one form satisfies most paper work requirements of a mast proceeding. Among the functions the NAVPERS 1626/7 serves are the following:

- It reports the offense(s).
- It records that the accused has been advised of his or her rights under Article 31, UCMJ.
- It records any premast restraint.
- It serves as a preliminary inquiry report.

- It records the action of the XO at screening mast.
- It records that the accused has been advised of the right to refuse NJP (if that right exists under the circumstances of the case).
- It shows the action of the CO at mast.
- It records that appeal rights have been explained to the accused.
- It becomes a permanent record of the case in the Unit Punishment Book (UPB). No additional record is needed such as 3 x 5 cards or a mast logbook.

Remember, however, that the NAVPERS 1626/7 does not include all the required premast advice that must be given to the accused according to the JAG-MAN, section 0109.

## **PREPARATION INSTRUCTIONS**

Regardless of how the commission of a minor offense is brought to your attention, you will probably need to prepare the smooth NAVPERS 1626/7. Figure 5-1 illustrates a completed NAVPERS 1626/7. Let's look at the information that you will place on this form.

Referring to figure 5-1, section A, start with addressing the report to the OIC or CO of the accused. Fill in the date of the report. Type the name of the accused in last name, first name, middle initial order. Verify the social security number from the accused's service record and type it in. Type in the present rate of the accused and the branch and class of service. Designate the department or division that the accused is attached to. Fill in the place of the offense. If there is more than one place, list all applicable places of the offense(s). Show the date of the commission of the offense. If there is more than one date, show all dates.

In the section entitled Details of the Offense, it is not mandatory that you type the offenses in the manner that you would on a charge sheet. However, this is good practice. If you always prepare a specification in full detail, you will not have to change it in the event the charges are referred to a court-martial.

List military witnesses to the offense in order of seniority, followed by civilian witnesses, if any. If the witnesses are attached to the same command as the offender, it is only necessary to give the witness' division or department. If the witness is attached to another command, identify that command completely. If a witness is a civilian, give the complete address, business

and home, if available. Finally, be sure to get the signature of the person placing the accused on report.

Section B of figure 5-1 shows the acknowledgement of the accused having been informed of the nature of the accusation(s) against him or her and his or her right not to answer any questions relating to the offense. After the accused is formally informed of the accusations against him or her, this section should be signed by the accused and the person informing the accused of his or her rights. If the accused refuses to sign this section, that fact must be witnessed by the person informing the accused of the accusations who will sign attesting to that fact.

Section C of figure 5-1 shows any premast restraint of the accused. If the accused is not being restricted, put the entry in the No Restrictions block. On the other hand, if the accused is placed on restriction or placed in confinement pending investigation of the charges, you will either mark the Pretrial Confinement block or the Restricted block. If the Restricted block is used, fill in the restricted to the limits of portion. Be sure to get the signature and title of the person who is imposing the restraint.

Section D of figure 5-1 shows information about the accused. Get the accused's service record before filling out this section to verify all the information. In the section Record of Previous Offense(s), list all NJPs and courts-martial during the accused's current enlistment.

## **PREMAST SCREENING**

After you complete the front of the NAVPERS 1626/7, the case must touch two more bases before it is ready for hearing by the CO. The first step is to refer the report chit to an officer or a senior enlisted person for a preliminary inquiry that will later be screened by the XO.

## **PRELIMINARY INQUIRY**

At small commands, refer the cases to division officers for the preliminary inquiry. At large commands, the discipline officer or the legal officer is delegated the authority to appoint the preliminary inquiry officer (PIO). You need to fill in the name of the PIO at the top of section E on figure 5-1 before referring it to the PIO for action.

It is not the job of the PIO to develop a case against the accused. Rather, the PIO is to collect all available

REPORT AND DISPOSITION OF OFFENSE(S)  
 NAVPERS 1626/7 (REV. 8-81) B/N 0106-LF-016-2838

To: Commanding Officer, Naval Base, Norfolk, Virginia Date of Report: 14 April 1993

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

NAME OF ACCUSED	SERIAL NO	SOCIAL SECURITY NO	RATE/GRADE	RP & CLAS	DIV/DEPT
Door, Water T.		222-22-2222	BM3	USN	Base Ops

PLACE OF OFFENSE(S): Naval Base, Norfolk, Virginia DATE OF OFFENSE(S): 7 and 8 April 1993

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

Charge: Violation of the Uniform Code of Military Justice, Article 121

A Specification 1: In that Boatswain's Mate Third Class Water T. Door, U.S. Navy, Naval Base, Norfolk, Virginia, on active duty, did, on board Naval Base, Norfolk, Virginia, on or about 7 April 1993, steal two \$50 bills, of a value of about \$100.00, the property of BM3 Able B. Seaman, U.S. Navy.

Specification 2: In that Boatswain's Mate Third Class Water T. Door, U.S. Navy, Naval Base, Norfolk, Virginia, on active duty, did, on board Naval Base, Norfolk, Virginia, on or about 8 April 1993, steal one \$20 bill, of a value of about \$20.00, the property of BM1 Igot Robbed, U.S. Navy.

NAME OF WITNESS	RATE/GRADE	DIV/DEPT	NAME OF WITNESS	RATE/GRADE	DIV/DEPT
Doe, John A.	LT	OPS	Pistol, Very C.	MA1	Security
Boat, Jon T.	BMC	OPS	Seaman, Able B.	BM3	OPS
Robbed, Igot	BM1	OPS	Frost, Jack R.	BMSN	OPS

MAC, USN, Base Security Chief

*Christopher COP*  
 CHRISTOPHER COP

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

Witness: *Christopher COP* Acknowledged: Water T. Door

C PRE-ARREST RESTRAINT  PRE TRIAL CONFINEMENT  RESTRICTED: You are restricted to the limits of \_\_\_\_\_ in lieu of arrest by order of the CO. Until your status as a restricted person is terminated by the CO, you may not leave the restricted limits except with the express permission of the CO or XO. You have been informed of the times and places which you are required to muster.  NO RESTRICTIONS

D INFORMATION CONCERNING ACCUSED

CURRENT ENL. DATE	EXPIRATION DATE	TOTAL ACTIVE NAVAL SERVICE	TOTAL SERVICE ON BOARD	EDUCATION	DOY	AGE
02 Jan 1990	01 Jan 1994	3 year 3 months	18 months	12	21	22

MARITAL STATUS: Married NO. DEPENDENTS: 5 CONTRIBUTION TO FAMILY OR OTHER ALLOWANCE (Amount required by law): N/A PAY PER MONTH (including inc. or foreign duty pay, if any): \$1,250.20

D RECORD OF PREVIOUS OFFENSE(S) (Date, type, action taken, etc. Nonjudicial punishment incidents are to be included.)  
 19 June 1991: CO's NJP  
 OFFENSE: Viol UCMJ Art. 92 - Failure to obey a lawful order on 16 June 1991.  
 NJP AWARDED: Restriction to the limits for a period of 14 days and extra duty for a period of 14 days.

Figure 5-1A.—Report and Disposition of Offense(s), NAVPERS 1626/7 (front).

**PRELIMINARY INQUIRY REPORT**

From: Commanding Officer  
 To: **ENS Floss A. Brush, USN, Supply Department** Date: **15 April 1993**

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

REMARKS OF DIVISION OFFICER (Performance of duty, etc.)  
 BM3 Door is a capable and conscientious worker. He has been experiencing financial difficulties that appear to have been the basis of this misconduct.

NAME OF WITNESS	RATE/GRADE	DIV/DEPT	NAME OF WITNESS	RATE/GRADE	DIV/DEPT
SEE FRONT OF REPORT CHIT					

RECOMMENDATION AS TO DISPOSITION:  REFER TO COURT MARTIAL FOR TRIAL OF ATTACHED CHARGES (Complete Charge Sheet (DD Form 458) through Page 2)  
 DISPOSE OF CASE AT MAST  NO PUNITIVE ACTION NECESSARY OR DESIRABLE  OTHER

Comment (Include data regarding availability of witnesses, quantity of expected evidence, conflicts in evidence, if expected. Attach statements of witnesses, documentary evidence such as service record entries in UA cases, items of real evidence, etc.)  
 Summary of Evidence: Statements of LT Doe, BMC Boat, and BMSN Frost (enclosures (1), (2), and (3)) state that they saw BM3 Door remove the money from the personal desks of BM1 Robbed and BM3 Seaman. BMC Boat also states in his statement that he has personally counselled BM3 Door on numerous occasions concerning indebtedness and was aware that BM3 Door was experiencing money problems. In view of the seriousness of the offense, NJP is recommended.

ACTION OF EXECUTIVE OFFICER  
 DISMISSED  REFERRED TO CAPTAIN'S MAST  
 SIGNATURE OF EXECUTIVE OFFICER: *Mary N. Christmas*  
 MARY N. CHRISTMAS, CDR, USN

RIGHT TO DEMAND TRIAL BY COURT-MARTIAL  
 (Not applicable to persons attached to or embarked in a vessel)  
 I understand that nonjudicial punishment may not be imposed on me if, before the imposition of such punishment, I demand in lieu thereof trial by court-martial. I therefore (do) (do not) demand trial by court-martial.  
 SIGNATURE OF ACCUSED: *Water T. Door*  
 WATER T. DOOR

ACTION OF COMMANDING OFFICER

<input type="checkbox"/> DISMISSED <input type="checkbox"/> DISMISSED WITH WARNING (Not considered NJP) <input type="checkbox"/> ADMONITION: ORAL/IN WRITING <input type="checkbox"/> REPRIMAND: ORAL/IN WRITING <input type="checkbox"/> REST. TO _____ FOR _____ DAYS <input type="checkbox"/> REST. TO _____ FOR _____ DAYS WITH SUSP. FROM DUTY <input type="checkbox"/> FORFEITURE: TO FORFEIT \$ _____ PAY PER MO. FOR _____ MO(S) <input type="checkbox"/> DETENTION: TO HAVE \$ _____ PAY PER MO. FOR (1, 2, 3) MO(S) DETAINED FOR _____ MO(S)	<input type="checkbox"/> CONF. ON _____, 1, 2, OR 3 DAYS <input type="checkbox"/> CORRECTIONAL CUSTODY FOR _____ DAYS <input type="checkbox"/> REDUCTION TO NEXT INFERIOR PAY GRADE <input checked="" type="checkbox"/> REDUCTION TO PAY GRADE OF <b>E-3</b> <input checked="" type="checkbox"/> EXTRA DUTIES FOR <b>45</b> DAYS <input type="checkbox"/> PUNISHMENT SUSPENDED FOR _____ <input type="checkbox"/> ART. 32 INVESTIGATION <input type="checkbox"/> RECOMMENDED FOR TRIAL BY COM <input type="checkbox"/> AWARDED BCM <input type="checkbox"/> AWARDED SCM
---	--

DATE OF MAST: **18 April 1993** DATE ACCUSED INFORMED OF ABOVE ACTION: **18 April 1993** SIGNATURE OF COMMANDING OFFICER: *Imma Boss*  
 IMMA BOSS, CAPT, USN

It has been explained to me and I understand that if I feel this imposition of nonjudicial punishment to be unjust or disproportionate to the offenses charged against me, I have the right to immediately appeal my conviction to the next higher authority within \_\_\_\_\_ days.  
 SIGNATURE OF ACCUSED: *Water T. Door* DATE: **18 April 1993** I have explained the above rights of appeal to the accused.  
 SIGNATURE OF WITNESS: *J. Doe, LNC, USN* DATE: **18 Apr 93**

FINAL ADMINISTRATIVE ACTION  
 APPEAL SUBMITTED BY ACCUSED: **None** DATED: \_\_\_\_\_ FINAL RESULT OF APPEAL: \_\_\_\_\_  
 FORWARDED FOR DECISION ON: \_\_\_\_\_  
 APPROPRIATE ENTRIES MADE IN SERVICE RECORD AND PAY ACCOUNT, WHERE REQUIRED: *[Signature]* FILED IN UNIT PUNISHMENT BOOK: *[Signature]*  
 DATE: **19 Apr 93** DATE: **19 Apr 93**

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

Figure 5-1B.—Report and Disposition of Offense(s), NAVPERS 1626/7 (back).

PRELIMINARY INQUIRY OFFICER'S REPORT IN THE CASE OF \_\_\_\_\_

1. Read paragraph in MCM concerning offenses/charges: Yes

2. Witnesses interviewed (not the accused):

(NAME)	(PHONE)	SIGNED STATEMENT ATTACHED	SUMMARY OF INTERVIEW ATTACHED
a. _____	_____	<input type="checkbox"/>	or <input type="checkbox"/>
b. _____	_____	<input type="checkbox"/>	or <input type="checkbox"/>
c. _____	_____	<input type="checkbox"/>	or <input type="checkbox"/>
d. _____	_____	<input type="checkbox"/>	or <input type="checkbox"/>
e. _____	_____	<input type="checkbox"/>	or <input type="checkbox"/>
f. _____	_____	<input type="checkbox"/>	or <input type="checkbox"/>

3. Accused's supervisor(s) interviewed:

a. _____	_____	<input type="checkbox"/>	or <input type="checkbox"/>
b. _____	_____	<input type="checkbox"/>	or <input type="checkbox"/>

4. Documentary evidence:

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

5. Real evidence:

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

- 6. Permit the accused to inspect report chit: Yes \_\_\_ No \_\_\_
- 7. Accused initialed second page of charges (if any):N/A \_\_\_ Yes \_\_\_ No \_\_\_
- 8. Accused signed acknowledgement line of NAVPERS 1626/7: Yes \_\_\_ No \_\_\_
- 9. Investigator signed witness line on NAVPERS 1626/7: Yes \_\_\_ No \_\_\_
- 10. Accused waived his or her rights: Yes \_\_\_ No \_\_\_
- 11. Accused made statement (only when #10 is Yes), and

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

Figure 5-2.—Sample preliminary inquiry officer's report.

facts about the offense itself and about the background the accused. You should have a standard form that the PIO prepares for submission to the CO. Figure 5-2 is a good example of what should be included in a PIO's report.

The suspect's rights acknowledgement/statement (fig. 5-3) contains a suggested format that may be used by investigative personnel in cases in which criminal suspects desire to waive their rights on self-incrimination and to make statements. This format is designed as



**SUSPECT'S RIGHTS ACKNOWLEDGEMENT/STATEMENT**

(See JAGMAN 0170)

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

**RIGHTS**

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

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

\_\_\_\_\_

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

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

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

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

**WAIVER OF RIGHTS**

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

**Figure 5-3.-Suspect's rights acknowledgement/statement.**



a guide and its use is not mandatory. However, you should provide the PIO with this form in case the accused desires to make a statement.

In addition to filling out a PIO's report, the PIO completes section E of figure 5-1 by doing the following:

- Inserting a short resume of the division officer's opinion of the accused
- Listing the names of the witnesses whose presence at mast is necessary to dispose of the case
- Recommending disposition of the case
- Summarizing the evidence that supports the recommendation

The recommendation of the PIO is not binding on the CO.

After the PIO has completed his or her inquiry, the report, chit, preliminary inquiry report, and all statements are sent to the CO for a determination of whether disposition by NJP is appropriate.

## **PREHEARING ADVICE**

If, after the preliminary inquiry, the CO determines that disposition by NJP is appropriate, the CO must make sure the accused is given the advice outlined in part V, par. 4, MCM, 1984. The CO need not give the advice personally but may assign this responsibility to the legal officer, discipline officer, or another appropriate person. The advice that must be given includes the following:

- Contemplated action—this informs the accused that the CO is considering the imposition of NJP for the offense(s).
- Suspected offense(s)—this describes the suspected offense(s) to the accused. The description should include the specific article(s) of the UCMJ that the accused is alleged to have violated.
- Government evidence—this advises the accused of the information that the allegations are based on. It also informs the accused that, upon request, he or she is allowed to examine all available statements and evidence.
- Right to refuse NJP—unless the accused is attached to or embarked in a vessel (in which case he or she has no right to refuse NJP), this informs the accused of his or her right to demand trial by court-martial in lieu of NJP. The accused must also be informed (1) of

the maximum punishment imposable at NJP, (2) that if he or she demands trial by court-martial, referral of the charges to trial by an SCM, an SPCM, or a GCM is possible, (3) that he or she cannot be tried by a special court-martial (SPCM) over his or her objection, and (4) that at an SPCM or a GCM he or she has the right to representation by counsel.

- Right to confer with independent counsel—because an accused who is not attached to or embarked in a vessel has the right to refuse NJP, this informs the accused of his or her right to confer with independent counsel about his or her decision to accept or refuse the NJP. This advice must be given to make sure the record of that NJP is admissible in evidence against the accused should he or she ever be tried by court-martial. A failure to advise an accused properly of his or her right to confer with counsel, or a failure to provide counsel, will not, however, render the imposition of NJP invalid or make a ground for appeal. Therefore, if the command imposing the NJP desires that the record of the NJP be admissible for court-martial purposes, you must prepare the record of the NJP according to applicable service regulations and show that:

1. the accused was advised of his or her right to confer with counsel;
2. the accused either exercised his or her right to confer with counsel or made a knowing, intelligent, and voluntary waiver of this right; and
3. the accused knowingly, intelligently, and voluntarily waived his or her right to refuse NJP. All such waivers must be in writing.

- Hearing rights—the accused is entitled to appear personally before the CO for the NJP hearing if he or she did not demand trial by court-martial or if the right to demand trial by court-martial is not applicable. At such a hearing the accused is entitled to:

1. be informed of his or her rights under Article 31, UCMJ;
2. be accompanied by a spokesperson provided by, or arranged for, the member (the proceedings should not be unduly delayed to permit the presence of the spokesperson, nor is the spokesperson entitled to travel or similar expenses);
3. be informed of the evidence against him or her relating to the offense;

4. be allowed to examine all evidence that the CO will rely on in deciding whether and how much NJP to impose;

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

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

7. have the proceedings open to the public unless the CO determines that the proceedings should be closed.

## FORMS

The form that you must use to record that the accused was informed of his or her prehearing rights will depend upon the status of the accused.

The accused's notification and election of rights (figs. 5-4, 5-5, and 5-6), also illustrated in appendixes A-1-b, A-1-c, and A-1-d of the JAGMAN, comply with the previous requirements of prehearing advice to the accused.

Use appendix A-1-b, figure 5-4, when the accused is attached to or embarked in a vessel.

Use appendix A-1-c, Figure 5-5, when an accused is not attached to or embarked in a vessel, and the command does not afford the accused the right to consult with a lawyer to assist the accused in deciding whether to accept or reject NJP. In this case the record of NJP will not be admissible for any purpose at any later court-martial.

Use appendix A-1-d, figure 5-6, when an accused is not attached to or embarked in a vessel, and the command affords the accused the right to consult with a lawyer before deciding whether to accept or reject NJP.

The use and retention of the proper form are essential. Whatever form you use, attach it to the NAVPERS 1626/7 and retain it in the command's unit punishment book (UPB).

In the event punishment is imposed at captain's mast, and appendix A-1-d, figure 5-6, is used, or the accused is represented by a lawyer at the hearing, you will need to document the Booker rights advice on a

page 13 of the member's service record book. This is necessary because appendix a-1-d, figure 5-6, stays in the command's UPB. If the member transfers out of the area and is later charged with offenses that are referred to a court-martial, the trial counsel (TC) can prove Booker rights advice was given with the page 13. As an example, the page 13 should state the following:

(Grade and name of accused) signed JAG Manual, appendix A-1-d, before his or her captain's mast which was held on (date of captain's mast). The accused [talked to a lawyer before deciding whether to demand trial by court-martial in lieu of captain's mast] [gave up his or her right to talk to a lawyer before deciding whether to demand trial by court-martial in lieu of captain's mast]. The accused was advised that acceptance of nonjudicial punishment does not preclude further administrative action. In completing the remainder of the form, the accused did not demand trial by court-martial in lieu of captain's mast.

If the accused is represented by a military or civilian lawyer as a personal representative at his or her captain's mast, the following example should be made on a page 13:

(Grade and name of accused) received punishment at captain's mast on (date). The accused was represented by a lawyer.

If the member refuses to sign the forms, simply record that you advised the member of his or her rights but he or she declined to sign the forms. Note that the member must demand trial by court-martial and if he or she fails to make such to demand, the command may proceed with NJP. Once all prehearing advice is given, the accused is ready for the XO's screening.

## EXECUTIVE OFFICER'S SCREENING

The XO may screen a case by holding an informal hearing or may merely review the record of the accused and the report chit. If the XO has been given the power by the CO, he or she may dismiss the case, but may never impose punishment.

At the XO's screening mast the accused is advised again of the right to refuse NJP and demand a trial by court-martial. At this point section G of figure 5-1 can be signed by the accused if it was not signed before. Be sure to get the witness' signature in this section also.

Remember Article 15, UCMJ, does not give the right to refuse NJP to persons attached to vessels. Also

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

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

NOTIFICATION

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

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

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

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

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

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

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

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

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

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

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

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

Figure 5-4.—Accused's notification and election of rights. Accused attached to or embarked in a vessel.

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

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

ELECTION OF RIGHTS

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

a. Personal appearance. (Check one)

\_\_\_\_\_ I request a personal appearance before the commanding officer.

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

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

\_\_\_\_\_ Written matters are attached.

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

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

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

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

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

\_\_\_\_\_  
(Signature of witness)

\_\_\_\_\_  
(Signature of accused)

\_\_\_\_\_  
(Name of witness)

\_\_\_\_\_  
(Name of accused)

Figure 5-4.—Accused's notification and election of rights. Accused attached to or embarked in a vessel—Continued.

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

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

NOTIFICATION

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

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

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

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

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

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

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

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

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

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

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

Figure 5-5.—Accused's notification and election of rights. Accused not attached to or embarked in a vessel. Record cannot be used in aggravation in event of later court-martial unless lawyer serves as personal representative.

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

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

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

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

ELECTION OF RIGHTS

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

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

\_\_\_\_\_ I refuse nonjudicial punishment.

\_\_\_\_\_ I accept nonjudicial punishment.

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

b. Personal appearance. (Check one)

\_\_\_\_\_ I request a personal appearance before the commanding officer.

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

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

\_\_\_\_\_ Written matters are attached.

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

c. Election at personal appearance. (Check one or more)

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

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

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

\_\_\_\_\_  
(Signature of witness)

\_\_\_\_\_  
(Signature of accused)

\_\_\_\_\_  
(Name of accused)

\_\_\_\_\_  
(Name of witness)

Figure 5-5.—Accused's notification and election of rights. Accused not attached to or embarked in a vessel. Record cannot be used in aggravation in event of later court-martial unless lawyer serves as personal representative—Continued.



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

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

NOTIFICATION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Figure 5-6.—Accused's notification and election of rights. Accused not attached to or embarked in a vessel. Record may be used in aggravation in event of later court-martial.

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

ELECTION OF RIGHTS

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

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

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

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

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

\_\_\_\_\_  
(Signature of witness)

\_\_\_\_\_  
(Signature of accused/date)

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

I talked to \_\_\_\_\_, a lawyer, on \_\_\_\_\_.

\_\_\_\_\_  
(Signature of witness)

\_\_\_\_\_  
(Signature of accused/date)

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

I refuse nonjudicial punishment.

I accept nonjudicial punishment.

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

c. Personal appearance. (Check one)

I request a personal appearance before the commanding officer.

I waive a personal appearance. (Check one)

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

Written matters are attached.

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

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

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

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

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

\_\_\_\_\_  
(Signature of witness)

\_\_\_\_\_  
(Signature of accused)

\_\_\_\_\_  
(Name of witness)

\_\_\_\_\_  
(Name of accused)

Figure 5-6.—Accused's notification and election of rights. Accused not attached to or embarked in a vessel. Record may be used in aggravation in event of later court-martial—Continued.

remember that an accused not attached to or embarked in a vessel may elect at any time before imposition of NJP to refuse it and demand a court-martial. It is, then, possible for an accused to elect not to demand trial by court-martial at the XO's screening but later at captain's mast demand it provided it is before any punishment is imposed.

Once the XO has conducted an inquiry, he or she has the option of referring the case to mast or dismissing it. The XO fills in section F of figure 5-1 noting the action he or she has taken. If the case is referred to the CO for mast, a formal hearing is set up.

### THE HEARING PROCEDURE

Captain's mast is held at the time and place decided on by the CO. The XO, legal officer, or discipline officer

normally assists the CO. Additionally, a master-at-arms will be present to keep order and call the accused to mast. Your function will be to have the service record of the accused and other associated documents available for the CO.

While local practices will come into play as far as setting up the mast and the formalities required, appendix A-1-e of the JAGMAN, figure 5-7, is the official guide for the NJP proceedings.

### HEARING REQUIREMENTS

Except as noted in the following paragraph, NJP cases must be handled at a hearing whereby the accused is allowed to exercise the foregoing rights. In addition, there are other technical requirements about the hearing and the exercise of the accused's rights.

CAPTAIN'S MAST GUIDE	
	(NOTE: The formalities before and after captain's mast normally are determined by customs and tradition of the Navy.)
CO:	You are suspected of committing the following violation(s) of the Uniform Code of Military Justice: _____ _____ _____
	You do not have to make any statement regarding the offense(s) of which you are accused or suspected and any statement made by you may be used as evidence against you.
	(NOTE: If it is reasonably foreseeable that the accused's statements during the captain's mast proceedings may be considered for introduction in evidence at a later court-martial, an explanation of rights and a waiver, in the format of appendix A-1-m of the JAG Manual, will have to be obtained from the accused, during the hearing, before proceeding further.)
CO:	You are advised that a captain's mast is not a trial and that a determination of misconduct on your part is not a conviction by a court. Further, you are advised that the formal rules of evidence used in trials by court-martial do not apply at captain's mast.
CO:	I have a statement signed by you acknowledging that you were fully advised of your legal rights pertaining to this hearing. (NOTE: This statement will be JAGMAN, appendix A-1-b, A-1-c, or A-1-d.)
CO:	Do you understand this statement and do you understand the rights explained therein?
ACC:	_____.
CO:	Do you have any questions about them or do you wish to make any requests?
ACC:	_____.

Figure 5-7.-Captain's mast guide.

CO: [To witness (if any are present)] What can you tell me about the accused's involvement in (these) (this) offense(s)?

WIT: \_\_\_\_\_.

CO: [To witness(es) who has/have previously provided written statement(s) when accused and CO both have copies of the statement(s).] Do you adopt your statement(s) as your testimony here today?

ACC: \_\_\_\_\_.

CO: Do you have anything to add to or change in your statement?

ACC: \_\_\_\_\_.

CO: (To accused) Would you like me to ask any further questions of this witness?

ACC: \_\_\_\_\_.

CO: (After all witnesses are questioned) I have before me the following (documents) (statements) (other physical evidence) that will be considered by me. Have you been given the opportunity to examine them?

ACC: \_\_\_\_\_.

CO: (If there is a "no," offer the accused the opportunity to examine the evidence.)

CO: Is there anything that you wish to offer? (If the answer is "yes," permit the accused the opportunity to call his or her witnesses, make a personal statement in defense, and present other evidence.)

ACC: \_\_\_\_\_.

CO: Are there any other witnesses you would like to call or any other evidence you would like to present?

ACC: \_\_\_\_\_.

CO: (To witness) What can you tell me about (accused's name) performance of duty?

WIT: \_\_\_\_\_.

CO: (To accused) Is there anything else you would like to present?

ACC: \_\_\_\_\_.

CO: I impose the following punishment:

\_\_\_\_\_.

My decision to impose this punishment was based on my determination that you committed the minor offenses of:

\_\_\_\_\_.

You are advised that you have the right to appeal this punishment to (identify the superior authority by name and organizational title). Your appeal must be made within a reasonable time—which is normally 5 days. Following this hearing \_\_\_\_\_ will advise you more fully of this right to appeal. Do you understand?

ACC: \_\_\_\_\_.

CO: You are dismissed.

Figure 5-7.—Captain's mast guide-Continued.

## **Personal Appearance Waived**

Part V, par. 4c(2), MCM, 1984, provides that if the accused waives his or her right to appear personally before the CO, he or she may submit written matters for consideration by the CO before the imposition of NJP. If the accused makes this election, inform the accused of his or her right to remain silent and that any matters submitted may be used against him or her at a trial by court-martial.

Notwithstanding the accused's expressed desire to waive his or her right to appear personally at the NJP hearing, he or she maybe ordered to attend the hearing if the officer imposing NJP desires his or her presence. If the accused waives his or her personal appearance and NJP is imposed, the CO must make sure the accused is informed of the punishment as soon as possible.

## **Hearing Officer**

Normally, the officer who actually holds the NJP hearing is the CO of the accused. COs or OICs are allowed to delegate their authority to hold the hearing to another officer under extraordinary circumstances. These circumstances must be unusual and significant rather than matters of convenience to the commander. This delegation of authority should be in writing and the reasons for it detailed. This delegation, however, does not include the authority to impose punishment. At such a hearing, the officer delegated to hold the hearing will receive all evidence, prepare a summarized record of matters considered, and send the record to the officer having NJP authority.

## **Burden of Proof**

The CO must decide that the accused is guilty by a preponderance of the evidence. *Black's Law Dictionary* defines preponderance of evidence as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it . . . ."

## **Personal Representative**

The burden of getting a representative is on the accused. As a practical matter, the accused is free to choose anyone he or she wants—a lawyer or a nonlawyer, an officer or an enlisted person. This freedom of the accused to choose a representative does not compel the command to provide lawyer counsel, and current regulations do not create a right to lawyer counsel at NJP where such a right exists at court-martial.

Representation by any lawyer who is willing and able to appear at the hearing is available to the accused. While a lawyer's workload may prevent the lawyer from appearing, a blanket rule that no lawyers will be available to appear at Article 15 hearings would appear to contravene the spirit if not the letter of the law. It is likewise doubtful that a lawyer can lawfully be ordered to represent the accused. It is fair to say that the accused can have anyone who is able and willing to appear on his or her behalf without cost to the government. While a command does not have to provide a personal representative, it should help the accused get the representative he or she wants. In this connection, if the accused desires a personal representative, allow him or her a reasonable time to get someone. Use good judgment here, for such a period should be neither too short nor too long.

## **Witnesses**

When the hearing involves controverted questions of fact about the alleged offenses, witnesses should be available to testify if they are present on the same ship or base or are otherwise available at no expense to the government. Thus, in a larceny case, if the accused denies that he or she took the money, the witnesses who can testify that the accused did take the money should be called to testify in person if they are available at no cost to the government. It should be noted, however, that no authority exists to subpoena civilian witnesses for an NJP proceeding.

## **Public Hearing**

The accused is entitled to have the hearing open to the public unless the CO determines that the proceeding should be closed for good cause. The CO is not required to make any special arrangements to facilitate public access to the proceedings.

## **Publication of NJP Results**

Authority to publish the results of NJP is granted by the JAGMAN, section 0115. You may publish the name, rate, offense(s), and disposition of the offender in the plan of the day (POD). Publish the results not later than 1 month after the imposition of NJP. If the NJP is appealed, publish the results not later than 1 month after the date the appeal is denied. If the POD is distributed to military personnel only, you may include all the details stated previously. If the POD is distributed to other than military personnel, NJP results maybe published without the name of the accused.

IMPOSED BY	IMPOSED ON	CONFINEMENT ON B&W OR DIM RATS (2)	CORRECTIONAL CUSTODY (3)	ARREST IN QUARTERS (1)	FORFEITURE (6) (5)	REDUCTION (6) (8)	EXTRA DUTIES (4)	RESTRICTION TO LIMITS (4)	ADMONITION (6)	REPRIMAND (6)
GENERAL OFFICERS	OFFICERS	NO	NO	30 days	1/2 one mo. for 2 mos.	NO	NO	60 days	YES	YES
EN	E-4 to E-9	NO	NO	NO	1/2 one mo. for 2 mos.	1 grade	45 days	60 days	YES	YES
COMMAND	E-1 to E-3	3 days	30 days	NO	1/2 one mo. for 2 mos.	1 grade	45 days	60 days	YES	YES
O-4	OFFICERS	NO	NO	NO	NO	NO	NO	30 days	YES	YES
to	E-4 to E-9	NO	NO	NO	1/2 one mo. for 2 mos.	1 grade	45 days	60 days	YES	YES
O-6	E-1 to E-3	3 days	30 days	NO	1/2 one mo.	1 grade	45 days	60 days	YES	YES
O-3	OFFICERS	NO	NO	NO	NO	NO	NO	15 days	YES	YES
Below and OIC's (7)	E-4 to E-9	NO	NO	NO	7 days	1 grade	14 days	14 days	YES	YES
	E-1 to E-3	3 days	7 days	NO	7 days	1 grade	14 days	14 days	YES	YES

(1) May not be combined with restriction

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

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

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

(5) Shall be expressed in whole dollar amounts only

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

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

(8) Chief petty officers, paygrades E-7 thru E-9, may not be reduced at NJP in the Navy; while Marine Corps NCOs, paygrades E-6 thru E-9, may not be reduced at NJP-

**Figure 5-8.—Limits of punishments under UCMJ, Article 15.**

### **POSSIBLE ACTIONS BY THE CO AT MAST**

Dismissal with or without warning —this action is taken if the CO is not convinced by the evidence that the accused is guilty of an offense or decides that no punishment is appropriate in light of the accused's record and other circumstances. Dismissal, whether with or without a warning, is not considered NJP, nor is it considered an acquittal.

Referral to an SCM, SPCM, or a pretrial investigation under Article 32, UCMJ —the CO may in his or her

sole discretion, refer the charge(s) to an SCM, an SPCM or an Article 32 investigation. This will, of course, depend upon the severity of the charges.

Postponement of action —the CO can postpone any action on the NJP pending further investigation or for other good cause, such as a pending trial by civil authorities for the same offense.

Imposition of NJP —the CO may impose NJP and award any of the authorized punishments outlined in part V, par. 5, MCM.

## AUTHORIZED PUNISHMENTS

If the CO is convinced by the evidence that the accused is guilty of the offense(s) and he or she deems punishment is proper, the CO has wide latitude to impose punishment. There are, however, limitations that are placed on the CO based upon his or her rank and the status of the accused.

### LIMITATIONS

The maximum imposable punishment in any Article 15, UCMJ, case is limited by several factors that include the following:

- The grade of the imposing officer—COs in grades O-4 to O-6 have greater punishment powers than officers in grades O-1 to O-3. Flag officers, general officers, and OEGCMJs have greater punishment authority than COs in grades O-4 to O-6.

- The status of the imposing officer—regardless of the rank of an OIC, his or her punishment power is limited to that of a CO in grades O-1 to O-3. The punishment powers of a CO are commensurate with his or her permanent grade.

- The status of the accused—punishment authority is also limited by the status of the accused. Is the accused an officer or an enlisted person attached to or embarked in a vessel?

Maximum punishment limitations apply to each NJP action and not to each offense. Note that there is a policy that all known offenses that the accused is suspected of should ordinarily be considered at a single Article 15 hearing. Figure 5-8 summarizes the maximum punishment limitations for NJP.

### MAXIMUM LIMITS—SPECIFIC

There are specific maximum limits on punishment that may be imposed on an individual. Depending upon whether the accused is an officer, a warrant officer, or an enlisted person will depend on the type of punishment that may be imposed. Also the rank of the official imposing the punishment is a limiting factor on the amount and type of punishment that may be awarded. A flow chart demonstrating this follows:

1. Upon commissioned officers and warrant officers

- a. Imposed by an OEGCMJ, an officer of general or flag rank in command, or designated principal assistant:

- (1) Punitive admonition or reprimand.
- (2) Arrest in quarters for not more than 30 consecutive days.
- (3) Restriction to specified limits, with or without suspension from duty, for not more than 60 consecutive days.

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

- b. Imposed by any CO:

- (1) Admonition or reprimand.
    - (2) Restriction to specified limits, with or without suspension from duty for more than 30 consecutive days.

- c. Imposed by an OIC: OICs do not have the authority to impose NJP upon officers.

2. Upon enlisted accused

- a. If imposed by COs of the grade of lieutenant commander or above or a principal assistant:

- (1) Admonition or reprimand.
    - (2) If imposed upon a person attached to or embarked in a vessel, confinement on bread and water or diminished rations for not more than 3 consecutive days. Accused must be in the paygrade of E-3 or below.

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

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

- (5) Reduction of one paygrade for members in paygrades E-6 and below. Reduction is not imposable on E-7 and above (Navy) or on E-6 and above (Marine corps).

- (6) Extra duties for not more than 45 consecutive days.

- (7) Restriction to specified limits for not more than 60 consecutive days.

- b. Imposed by COs in grades O-3 and below, or any commissioned OIC:

- (1) Admonition or reprimand.
    - (2) Confinement on bread and water or diminished rations for not more than 3 consecutive days and only on grade E-3 and below attached to or embarked in a vessel.

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

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

(5) Reduction to the next inferior paygrade, if the grade from which demoted is within the promotion authority of the officer imposing the reduction. Reduction is not imposable on E-7 and above (Navy) and E-6 and above (Marine Corps).

(6) Extra duties for not more than 14 consecutive days.

(7) Restriction for not more than 14 consecutive days.

## **NATURE OF THE PUNISHNIENT**

There are eight specific types of punishment that may, under proper circumstances, be imposed as NJP. Remember that there are limitations that are based upon the CO's rank and the status of the offender. Refer to figure 5-8 as you read the discussion of individual punishments that follows.

### **Admonition and Reprimand**

Admonition and reprimand are two forms of censure intended to express adverse reflection upon or criticism of a person's conduct. A reprimand is a more severe form of censure than an admonition. When imposed as NJP, the admonition or reprimand is considered to be punitive, unlike the nonpunitive admonition and reprimand. Punitive censure for officers must be in writing, although it may be either oral or written for enlisted personnel. Procedures for issuing punitive letters are detailed in the JAGMAN, section 0114. A sample punitive letter of reprimand is shown in the JAGMAN, appendix A-1-g.

### **Arrest in Quarters**

This punishment is imposable only on officers. It is a moral restraint, as opposed to a physical restraint. It is similar to restriction, but has much narrower limits. The limits of arrest are set by the officer imposing the punishment and may extend beyond quarters. The term quarters includes military and private residences. The officer may be required to perform his or her regular duties as long as they do not involve the exercise of authority over subordinates.

### **Restriction**

Restriction is the least severe form of deprivation of liberty. Restriction involves moral rather than physical restraint. The severity of this type of restraint depends on its duration and the geographical limits specified when the punishment is imposed. A person undergoing restriction may be required to report to a designated place at specified times if reasonably necessary to make sure the punishment is being properly executed.

Restriction ashore means that an accused will be restricted to the limits of the command except, of course, at larger shore stations where the use of recreational facilities might be further restricted. Restriction and arrest in quarters are normally imposed by a written order detailing the limits thereof and usually requires the accused to log in at certain specified times during the restraint. Article 1103 of *U.S. Navy Regulations, 1990*, provides that an officer placed in the status of arrest or restriction will not be confined to his or her room unless the safety or the discipline of the ship requires such action.

### **Forfeiture**

Forfeiture means a permanent loss of entitlement to the pay forfeited. A forfeiture applies to basic pay and to sea or foreign duty pay, but not to incentive pay or allowances for subsistence or quarters. The amount of forfeiture of pay is expressed in whole dollar amounts, not in fractions, and shows the number of months affected. An example of a properly stated forfeiture is to forfeit \$50 pay per month for 2 months.

If the punishment includes both reduction, whether or not suspended, and forfeiture of pay, the forfeiture must be based on the grade the accused is reduced to. Forfeitures are effective on the date imposed unless suspended or deferred. Where a previous forfeiture is being executed, that forfeiture will be completed before any newly imposed forfeiture will be executed.

### **Extra Duty**

Extra duties involve the performance of duties in addition to those normally assigned to the person undergoing the punishment. Various types of duties may be assigned, including fatigue duties. The MCM prohibits extra duties that are a known safety or health hazard, those that are cruel and unusual, or those that are not sanctioned by the customs of the service involved.



When extra duties are imposed upon a petty or noncommissioned officer, the duties cannot be demeaning to his or her rank or position. The immediate CO of the accused normally designates the amount and character of extra duty. Such duties normally should not extend beyond 2 hours per day. Guard duty may not be assigned as extra duty. Extra duty is not performed on Sunday although Sundays count as if such duty was performed.

### **Reduction in Grade**

Reduction in paygrade is limited to one grade only for members in paygrades E-1 through E-6. E-7 through E-9 personnel cannot be reduced in grade at NJP. The grade from which reduced must be within the promotional authority of the CO imposing the reduction. See also the NAVMILPERSMAN, Article 3420140.2, for additional information on reduction.

### **Correctional Custody**

Correctional custody is a form of physical restraint of a person during either duty or nonduty hours, or both, and may include hard labor, extra duties, or fatigue duties. Awardees may perform military duty but not watches and cannot bear arms or exercise authority over subordinates. Specific regulations for administering correctional custody can be found in *Instructions for Administering Correctional Custody*, OPNAVINST 1640.7C.

Time spent in correctional custody is not lost time. Correctional custody cannot be imposed on paygrades E-4 and above. To assist commanders in imposing correctional custody, correctional custody units (CCUs) have been established at major shore installations. Check the local operating procedures for the nearest CCU before correctional custody is imposed.

### **Confinement on Bread and Water or Diminished Rations**

These punishments can only be awarded to E-3s and below if they are attached to or embarked in a vessel. These punishments involve physical confinement and are equivalent to solitary confinement because contact is allowed only with authorized personnel.

A medical officer must first certify in writing that the accused will suffer no serious injury and that the place of confinement will not harm the accused. Diminished rations is a restricted diet of 2,100 calories per day,

and instructions for its use are detailed in SECNAV-INST 1640.9.

## **EXECUTION OF PUNISHMENTS**

All punishments, if not suspended, take effect when imposed. This means that the punishment in most cases will take effect when the CO informs the accused of his or her punishment decision. Thus, if the CO wishes to impose a prospective punishment, one to take effect at a future time, he or she should simply delay the impositions of NJP altogether. There are, however, several specific rules that authorize the deferral or stay of a punishment already imposed.

### **Deferral of Correctional Custody or Confinement on Bread and Water or Diminished Rations**

The JAGMAN, section 0113b(3), permits a CO or an OIC to defer correctional custody, confinement on bread and water, or confinement on diminished rations for up to 15 days when adequate facilities are not available, the exigencies of the service so require, or the accused is not physically fit for the service of the punishments.

### **Deferral of Restraint Punishments Pending Appeal From NJP**

A service member who has appealed NJP may be required to undergo any punishment imposed while the appeal is pending. However, if action is not taken on the appeal within 5 days after the appeal was submitted, and if the service member so requests, any unexecuted punishment involving restraint or extra duties is stayed until action on the appeal is taken.

### **Interruptions of Restraint Punishment by Subsequent NJP**

The execution of any NJP involving restraint will normally be interrupted by a later NJP where restraint is awarded. Thereafter, the unexecuted portion of the prior restraint punishment will be executed. The officer imposing the later punishment, however, may order that the prior punishment be completed before the service of the later punishment.

## **Interruption of Punishment by Unauthorized Absence**

Service of all NJP is interrupted during any period that the service member is unauthorized absence (UA). A punishment of reduction maybe executed even when the accused is UA.

## **COMBINATION OF PUNISHMENTS**

Part V, par. 5d, MCM, 1984, provides that all authorized NJPs maybe imposed in a single case subject to the following limitations:

- Arrest in quarters may not be imposed in combination with restriction.
- Confinement on bread and water or diminished rations may not be imposed in combination with correctional custody, extra duties, or restriction.
- Correctional custody may not be imposed in combination with restriction or extra duties.
- Restriction and extra duties may be combined to run concurrently, but the combination may not exceed the maximum imposable for extra duties.

Here are a few examples of acceptable combinations of punishments:

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

- a. punitive letter of reprimand or admonition (or an oral reprimand or admonition);
- b. reduction to E-2;
- c. forfeiture of one-half pay per month for 2 months (based upon the reduced rate); and
- d. 45 days' restriction and extra duties to be served concurrently.

2. If an O-3 CO (or any OIC, regardless of grade) wishes to impose the maximum amount of all permissible NJP upon an E-3, the maximum that could be imposed would be a:

- a. punitive letter of reprimand or admonition (or an oral reprimand or admonition);
- b. reduction to E-2;
- c. forfeiture of 7 days' pay (based upon the reduced rate); and
- d. 14 days' restriction and extra duties to be served concurrently.

## **CLEMENCY AND CORRECTIVE ACTION ON REVIEW**

Clemency action is a reduction in the severity of punishment that is done at the discretion of the officer authorized to take such action for reasons thought sufficient to him or her. Remedial corrective action is a reduction in the severity of punishment or other action taken by proper authority to correct some defect in the NJP proceeding and to offset the adverse impact of the error on the accused's right.

## **AUTHORITY TO ACT**

Part V, par. 6a, MCM, 1984, and the JAGMAN, section 0118, state that after the imposition of NJP the following officials have authority to take clemency action or remedial corrective action:

- The officer who initially imposed the NJP (this authority is inherent in the office, not the person holding the office)
- The successor in command to the officer who imposed the punishment
- The superior authority to whom an appeal from the punishment would be sent, whether or not such an appeal has been made
- The CO or OIC of a unit, activity, or command that the accused is properly transferred to after the imposition of punishment by the first commander
- The successor in command of the latter

## **FORMS OF ACTION**

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

### **Setting Aside**

This power has the effect of voiding the punishment and restoring the rights, privileges, and property lost to the accused by virtue of the punishment imposed. This action should be reserved for compelling circumstances where the commander feels a clear injustice has occurred. This normally means that the commander believes the punishment of the accused was clearly a mistake.

If the punishment has been executed, executive action to set it aside should be taken within a reasonable time—normally within 4 months of its execution. The CO who wishes to reinstate an individual reduced in rate at NJP is not bound by the provisions of the

### SAMPLE LETTER OF NOTIFICATION

From: (command setting aside punishment)  
To: Chief of Naval Personnel (PERS-82 or 83, as appropriate)  
Subj: SET ASIDE OF NJP ICO (GRADE, RATE, NAME, AND SSN)  
Ref: (a) UCMJ

1. I hereby set aside the nonjudicial punishment (NJP) in the case of (grade, rate, and name). All rights, privileges, and property affected by virtue of the execution of this punishment will be restored. Per authority of Article 15(d) of reference (a), request that you remove all reference to the NJP contained in (grade, rate, and names) official record. Request that copy-to addressees take appropriate restorative action in the case of (grade, rate, and name) and notify me and the member concerned when completed.

2. The following identifying information is provided:

- a. Name: (grade, rate, name, and SSN)
- b. Date of NJP: (date)
- c. Imposing Command: (indicate using guideline below)

(If different from the command setting aside, indicate by Standard Navy Distribution List (SNDL) long title and send a copy of the letter of notification to that command.)

(If imposing command is also the command that is setting aside the NJP, indicate by stating "This Command.")

- d. Reason: (indicate)

3. This letter will not be filed in (grade, rate, and name) official record, but will be destroyed after your action is completed.

Signature of Commanding Officer  
(No "By direction")

Copy to:  
(command that imposed punishment)  
(cognizant personnel office)  
(cognizant disbursing office if pay affected)  
(member concerned)

**Figure 5-9.-Sample letter of notification.**

MILPERSMAN, Article 2230200, limiting advancement to a rate formerly held only after a minimum of 12 months' observation of performance. Such action can be taken with respect to the whole or a part of the punishment imposed. All entries on the punishment set aside are removed from the service record of the accused. Refer to the MILPERSMAN, Article 5030500.

According to the MILPERSMAN, Article 5040110, once a punishment is set aside, the CO prepares and personally signs (no By direction signature is allowed) a letter of notification as shown in figure 5-9. This letter is sent to the Chief of Naval Personnel (PERS-82 for officers and PERS-83 for enlisted) to

make sure all local records are purged of any notation of the NJP and its residual effects. PERS-82 or 83, as appropriate, identifies the documents to carry out the actions authorized by the CO and directs PERS-313D to remove all references to the matter from the microfiche record. PERS-82 or 83 will notify the CO and the member when the action has been completed.

#### **Remission**

This action also relates to the unexecuted portions of the punishment; that is, those parts that have not been completed. This action relieves the accused from having to complete his or her punishment, even though he or she has partially completed it. Rights, privileges, and

property lost by virtue of executed portions of punishment are not restored, nor is the punishment voided as in the case when it is set aside. The expiration of the current enlistment or term of service of the service member automatically remits any unexecuted punishment imposed under Article 15.

### **Mitigation**

This action also relates to the unexecuted portions of the punishment. Mitigation of punishment is a reduction in the quantity or quality of the punishment imposed. In no event may the punishment imposed be increased to be more severe.

**QUALITY.**— Without increasing quantity, the following reductions by mitigation may be taken:

- Arrest in quarters to restriction
- Confinement on bread and water or diminished rations to correctional custody
- Correctional custody or confinement on bread and water or diminished rations to extra duties or restriction or both (to run concurrently)
- Extra duties to restriction

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

**REDUCTION IN GRADE.**— Reduction in grade, though executed, may be mitigated to forfeiture of pay. The amount of forfeiture can be no greater than that which could have been imposed by the mitigating commander had he or she initially imposed punishment. This type of mitigation may be done only within 4 months after the date of execution.

As an example, in mitigating NJP, neither the quantity nor the quality of the punishment may be increased. Therefore, it would be impermissible to mitigate 3 days' confinement on bread and water to 4 days' restriction because this would increase the quantity of the punishment. It would also be impermissible to mitigate 60 days' restriction to 1 day of confinement on bread and water because this would increase the quality of the punishment.

### **Suspension**

This is an action to withhold the execution of the imposed punishment for a stated period pending good behavior on the part of the accused. Only later misconduct during the probationary period will cause the sus-

pension to be vacated (revoked) and this misconduct must be an offense under the UCMJ. This action may be taken with respect to unexecuted portions of the punishment or, in the case of a reduction in rank or a forfeiture, such action may be taken even though the punishment has been executed, subject to the following rules:

- An executed punishment of reduction or forfeiture may be suspended only within 4 months after the date of its execution.

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

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

- Vacation of the suspended punishment may be effected by any CO or OIC over the person punished who has the authority to impose the kind and amount of punishment to be vacated.

- a. Vacation of the suspended punishment may only be based upon an offense under the UCMJ committed during the probationary period.

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

- c. Vacation of a suspension is not punishment for the misconduct that triggers the vacation. Accordingly, misconduct may be punished and also serve as the reason for vacating a previously suspended punishment imposed at mast. Vacation proceedings are often handled at NJP. First, the suspended punishment is vacated; then the CO can impose NJP for the new offense. If NJP is imposed for the new offense, the accused must be afforded all of his or her hearing rights.

- d. The order vacating a suspension must be issued within 10 working days of the start of the vacation proceedings and the decision to vacate the suspended punishment is not appealable as an NJP appeal.

ACCUSED'S ACKNOWLEDGEMENT OF APPEAL RIGHTS

I, \_\_\_\_\_, SSN \_\_\_\_\_.  
(Name and grade of accused)

assigned or attached to \_\_\_\_\_,  
have been informed of the following facts concerning my rights of appeal as a result of captain's mast held on \_\_\_\_\_.

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

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

c. The appeal must be in writing.

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

(1) The punishment was unjust, or

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

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

\_\_\_\_\_  
(Signature of Accused/Date)

\_\_\_\_\_  
(Signature of Witness/Date)

Figure 5-10.—Accused's acknowledgment of appeal rights.

e. The probationary period cannot exceed 6 months from the date of suspension and ends automatically upon expiration of the current enlistment. The running of the period of suspension is interrupted, however, by the unauthorized absence of the accused or the beginning of any proceeding to vacate the suspended punishment. The running of the period of probation resumes when the unauthorized absence ends or when the suspension proceedings are terminated without vacation of the suspended punishment.

**APPEAL FROM NJP**

A member who is awarded NJP and who believes the punishment unjust or disproportionate to the offense has the right to appeal the award to higher authority.

**PROCEDURE**

If punishment is imposed at NJP, the CO is required to make sure the accused is fully advised of his or her

right to appeal. Refer to part V, par. 4c(4)(B)(iii), MCM, 1984, and the JAGMAN, section 0110c. Figure 5-10 is an accused's acknowledgment of appeal rights that should be signed by the accused and witnessed to prove that the accused was informed of his or her appeal rights. File this form along with all the other papers in the accused's case file in the UPB.

A person punished under Article 15 may appeal the imposition of such punishment through proper channels to the appropriate appeal authority. If, however, the offender is transferred to a new command before filing his or her appeal, the immediate CO of the offender at the time the appeal is filed should send the appeal directly to the officer who imposed the punishment.

When the officer who imposed the punishment is in the Navy chain of command, the appeal will normally be sent to the area coordinator authorized to convene general courts-martial. A GCM authority superior to the officer imposing punishment may, however, set up an alternate route for appeals.

When the area coordinator is not superior in rank or command to the officer imposing punishment, or when the area coordinator is the officer imposing punishment, the appeal will be sent to the GCM authority next superior in the chain of command to the officer who imposed the punishment. An immediate or delegated area coordinator who has authority to convene GCMs may take action instead of an area coordinator if he or she is superior in rank or command to the officer who imposed the punishment.

For mobile units, the area coordinator for the previous purposes is the area coordinator most accessible to the unit at the time of sending the appeal.

When the officer who imposed the punishment is in the chain of command of the Commandant of the Marine Corps, the appeal will be made to the officer next superior in the chain of command to the officer who imposed the punishment.

When the officer who imposed the punishment has been designated a CO for naval personnel of a multi-service command, the appeal will be made according to the JAGMAN.

A flag or general officer in command may, with the express prior approval of the Chief of Naval Personnel or the Commandant of the Marine Corps, delegate authority to act on appeals to a principal assistant. An officer who has delegated his or her NJP power to a principal assistant may not act on an appeal from punishment imposed by that assistant.

## **TIME**

Appeals must be submitted in writing within 5 days of the imposition of NJP or the right to appeal is waived in the absence of good cause shown. The appeal period runs from the date the accused is informed of his or her appeal rights. Normally, this is the day NJP is imposed. With an appeal submitted more than 5 days after the imposition of NJP (less any mailing delays), the officer acting on the appeal determines whether good cause was shown for the delay in the appeal.

### **Extension of Time**

If it appears to the accused that good cause may exist that would make it impossible or extremely difficult to prepare and submit the appeal within the 5-day period, the accused should immediately advise the officer who imposed the punishment of the problems and request an extension of time. The officer imposing NJP determines whether good cause was shown and advises the accused whether an extension of time is permitted.

## **Request for Stay of Restraint Punishments or Extra Duty**

A service member who has appealed may be required to undergo any restraint punishment or extra duties imposed while the appeal is pending. If action is not taken on the appeal by the appeal authority within 5 days after the written appeal has been submitted and if the accused has so requested, any unexecuted punishment involving restraint or extra duties will be stayed until action on the appeal is taken. The accused should include in his or her written appeal a request for stay of restraint punishment or extra duties; however, a written request for a stay is not specifically required.

## **CONTENTS OF APPEAL PACKAGE**

The appeal package will consist of the appellant's basic letter of appeal, the endorsement by the CO who imposed the NJP, and the supervisory authority's response to the appeal.

### **Appellant's Letter (Grounds for Appeal)**

The letter of appeal from the accused should be addressed to the appropriate appeal authority via the commander who imposed the punishment and other appropriate COs in the chain of command. The letter should set forth the obvious features of the NJP (date, offense, who imposed it, and punishment imposed) and detail the specific grounds for relief.

There are only two grounds for appeal—the punishment was unjust or the punishment was disproportionate to the offense committed. The grounds for appeal are broad enough to cover all reasons for appeal.

Unjust punishment exists when the evidence is not enough to prove the accused committed the offense; when the statute of limitations prohibits lawful punishment; or when any other fact, including a denial of substantial rights, calls in question the validity of the punishment.

Punishment is disproportionate if it is, in the judgment of the reviewer, too severe for the offense committed. An offender who believes that his or her punishment is too severe, appeals on the ground of disproportionate punishment, whether or not his or her letter artfully states the ground in precise terminology. A punishment may be legal but excessive or unfair considering circumstances such as (1) the nature of the offense, (2) the absence of aggravating circumstances, (3) the prior record of the offender, and (4) any other circumstances in extenuation and mitigation.

The grounds for appeal need not be stated artfully in the accused's appeal letter, and the reviewer may have

SAMPLE NJP APPEAL

5800  
11 Feb CY

From: DPSA Jane A. Doe, USN, 333-33-3333  
To: Commander Fleet Air Mediterranean  
Via: Commanding Officer, U.S. Naval Support Activity, Naples, Italy

Subj: APPEAL FROM NONJUDICIAL PUNISHMENT

Ref: (a) Art. 15(c), UCMJ  
(b) Part V, par. 7, MCM, 1984  
(c) JAGMAN 0116

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

1. As provided by references (a) through (c), appeal is herewith submitted from nonjudicial punishment imposed upon me on 10 February 19CY by Captain Jon T. Boate, Commanding Officer, U.S. Naval Support Activity, Naples, Italy, as follows:

a. Offense(s)

Charge: Violation of Article 134, UCMJ

Specification: In that DPSA Jane A. Doe, USN, was, on board U.S. Naval Support Activity, Naples, Italy, on or about 29 January 19CY, drunk and disorderly.

b. Punishment: Forfeiture of \$250.00 pay per month for 2 months

c. Grounds of Appeal

Punishment for the Charge is unjust because I was not really that drunk and unfortunately just lost my balance dancing and fell into the plate glass window.

JANE A. DOE

Figure 5-11.-Sample NJP appeal.

to deduce the appropriate ground implied in the letter. Unartful craftsmanship or draftsmanship or improper addressees or other administrative irregularities are not grounds for refusing to send the appeal to the reviewing authority. If you note any administrative mistakes, if material, correct them in the endorsement that sends the appeal. Thus, if an accused does not address his or her letter to all appropriate commanders in the chain of command, just readdress and send the appeal to the proper authority. Do not send the appeal back to the accused for redrafting since the appeal should be sent promptly to the reviewing authority.

The appellant's letter begins the review process and is a quasi-legal document. It should be temperate and state the facts and opinions the accused believes entitles

him or her to relief. The offender should avoid unfounded allegations on the character or personality of the officer imposing punishment. See Article 1108, *U.S. Navy Regulations, 1990*. The accused, however, should state the reasons for his or her appeal as clearly as possible. Supporting documentation in the form of statements of other persons or personnel records may be submitted if the accused desires. In no case is the failure of the accused to do these things a lawful reason for refusing to process the appeal. Finally, should the accused desire that his or her restraint punishment or extra duties be stayed pending the appeal, he or she should specifically request this in the letter. Refer to figure 5-11 for a sample of an accused's letter of appeal.

SAMPLE FIRST ENDORSEMENT TO NJP APPEAL

5800  
Ser  
13 Feb CY

FIRST ENDORSEMENT on DPSA Jane A. Doe's ltr of 11 Feb CY

From: Commanding Officer, U.S. Naval Support Activity, Naples, Italy  
To: Commander Fleet Air Mediterranean

Subj: APPEAL FROM PUNISHMENT ICO DPSA JANE A. DOE, USN, 333-33-3333

Encl: (4) NAVPERS 1626/7 with attachments thereto  
(5) DPSA Doe's record of performance (page 9)

1. Forwarded for action. Enclosures (4) and (5) are attached in amplification of the appeal.
2. (Statement of facts or circumstances or other matter that is not contained in appellant's letter of appeal and that would aid the command acting on appeal in arriving at a proper determination. This should not be argumentative nor in the form of a "defense" to the matters stated in appellant's letter of appeal.)

JON T. BOATE

**Figure 5-12.-Sample first endorsement to NJP appeal.**

**Contents of the Forwarding Endorsements**

All via addressees should use a simple forwarding endorsement and should not comment on the validity of the appeal. The exception to this rule is the endorsement of the officer who imposed the punishment. The JAG-MAN requires that this endorsement, shown in figure 5-12, include the following information:

- A comment on any assertions of fact contained in the letter of appeal that the officer who imposed the punishment considers inaccurate or erroneous.

Recitation of any facts on the offenses that are not otherwise included in the appeal papers. If such factual information was brought out at the mast, the endorsement should so state and include any comment made by the appellant at the mast. Any other adverse factual information stated in the endorsement, unless it recites matters already stated in official service record entries, should be referred to the appellant for comment, if possible, and the appellant should be given an opportunity to submit a statement about it or state that he or she does not wish to make any statement.

- As an enclosure, a copy of the completed mast report form (NAVPERS 1626/7).

- As enclosures, copies of all documents and signed statements that were considered as evidence at

the mast or, if the NJP was imposed on the basis of the record of a court of inquiry or other fact-finding body, a copy of that record, including the findings of fact, opinions, and recommendations, together with copies of any endorsements thereon.

- As enclosures, copies of the appellant's record of performance as set forth on service record page 9, administrative remarks set forth on page 13, and disciplinary records set forth on page 7.

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



**SAMPLE ACTION BY SUPERVISORY AUTHORITY ON NJP APPEAL**

5800  
Ser  
14 Feb CY

**From:** Commander Fleet Air Mediterranean  
**To:** DPSA Jane A. Doe, USN, 333-33-3333  
**Via:** Commanding Officer, U.S. Naval Support Activity, Naples, Italy  
**Subj:** APPEAL FROM NONJUDICIAL PUNISHMENT ICO DPSA JANE A. DOE

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

**HEADY HONCHO**

**FIRST ENDORSEMENT** on Commander Fleet Air Mediterranean ltr 5800  
Ser of 14 Feb CY

**From:** Commanding Officer, U.S. Naval Support Activity, Naples, Italy  
**To:** DPSA Jane A. Doe, USN, 333-33-3333  
**Subj:** APPEAL FROM PUNISHMENT ICO DPSA JANE A. DOE

- SECTION B**
1. Returned for delivery.
  2. You are directed to return this appeal and accompanying papers to the legal officer for filing with the record in your case.

**JON T. BOATE**

**SECOND ENDORSEMENT** on Commander Fleet Air Mediterranean ltr 5800  
Ser of 14 Feb CY

**From:** DPSA Jane A. Doe, USN, 333-33-3333  
**To:** Commanding Officer, U.S. Naval Support Activity, Naples, Italy  
**Subj:** APPEAL FROM NONJUDICIAL PUNISHMENT

- SECTION C**
1. I acknowledge receipt and have noted the contents of the letter on my appeal from nonjudicial punishment.
  2. The appeal and all attached papers are returned for filing with the record of my case.

**JANE A. DOE**

**Figure 5-13.-Sample action by supervisory authority on NJP appeal.**

**Endorsement of the Reviewing Authority**

There are no particular legal requirements on the content of the reviewer's endorsement except to inform the offender of his or her decision. Figure 5-13, section

A, shows a sample response by a supervisory authority on an NJP appeal. A legally sound endorsement will include the reviewer's specific decision on each ground of appeal, the basic reasons for the decision, a statement that a lawyer has reviewed the appeal, if such review is

required, and instructions for the disposition of the appeal package after the offender receives it. The endorsement should be addressed to the accused via the appropriate chain of command. Where persons not in the direct chain of command (such as finance officers) are directed to take some corrective action, copies of the reviewer's endorsement should be sent to them. Words of exhortation or admonition, if temperate in tone, are suitable for inclusion in the return endorsement of the reviewer.

### **Via Addressee's Return Endorsement**

If any via addressee has been directed by the reviewer to take corrective action, the accomplishment of that action should be noted in that commander's endorsement. This endorsement should reiterate the steps the reviewer directed the accused to follow in disposing of the appeal package. These instructions should always be to return the appeal to the appropriate commander for filing with the record of his or her case. See figure 5-13, section B, for an example of this endorsement.

### **Accused's Endorsement**

The last endorsement should be from the accused to the CO holding the records of the NJP. See figure 5-13, section C. The endorsement will acknowledge receipt of the appeal decision and send the package back for filing.

## **POSTMAST ACTIVITY**

The LN may have duties in several distinct areas at the completion of NJP. The LN must make sure all necessary entries are made in the service record of the member being punished and must provide reports for entries in the POD and the ship or station logbook. Finally, the LN maintains the UPB.

### **EXECUTION OF NJP**

When punishment is imposed as a result of CO's mast, that punishment must be recorded in the accused's service record. Additionally, depending on the type of punishment imposed, certain forms and/or letters must be prepared in conjunction with standard service record entries. The following discussion is provided to help you better understand the procedures for preparing these forms and letters used in conjunction with enlisted service record entries.

### **Confinement Order**

When a member is awarded punishment that includes confinement on bread and water or confinement on diminished rations, a Confinement Order, NAVPERS 1640/4, must be prepared indicating the offense(s) committed, the time and date the confinement was directed, by whom and when the accused was given a medical examination, and who authorized the confinement. A sample of a completed confinement order is shown in figure 5-14.

### **TEMADD Orders for Correctional Custody**

TEMADD orders must be prepared transferring the accused to the correctional custody facility under the provisions of the *Manual for the Administration of Correctional Custody*, OPNAVINST 1640.7C. There are other administrative matters that must be completed when transferring an accused to a correctional custody Facility and the specific requirements can be found in OPNAVINST 1640.7C and in SECNAVINST 1640.7. Both instructions outline the requirements for placing a person into correctional custody and procedures for administering the same.

### **Letter of Censure**

As previously discussed in this lesson, a CO may award as punishment an admonition or a reprimand to the accused. These can be either oral or written in the case of enlisted personnel, and in writing only in cases of commissioned and warrant officers. If the admonition or reprimand is to be written, the format shown in the JAGMAN should be used. When either of these types of letter of censure is prepared, careful attention to the requirements outlined in the JAGMAN should be followed. When the admonition or reprimand is given orally, as in the case of enlisted personnel, the proper notation must be made on the NAVPERS 1626/7 and recorded in the Punishment Awarded section of the service record page being used to record the results of CO's mast.

### **NJP of Officers**

Before we look at the procedures for making service record entries for enlisted personnel, a brief discussion of the procedures involved when an officer receives NJP as a result of CO's mast is needed.

Whenever NJP is imposed upon an officer, the authority imposing the punishment immediately notifies PERS-82 by letter as soon as the results are final;

**CONFINEMENT ORDER**  
 NAVPERS 1640/4 (REV. 2-78) S/N 0106-LF-016-4021

NAME (Last, first, middle) Seaman, Able B.		SSN 555-55-5555	RATE/GRADE PCSA	BRANCH SER USN
SHIP OR ORGANIZATION USS John F. Kennedy			DATE 01 August 19CY	

**STATUS**

RETAINED (Alleged violation of UCMJ Articles)

CONFINED AS RESULT OF  VACATED SUSPENSION

NJP  SCM  SPCM  GCM

CHARGES AND SPECIFICATION CONVICTED OF  
 Art. 86 - UA from 0800, 29 Jun CY until 1530, 30 Jul CY

SENTENCE ADJUDGED  
 3 days bread & water  
 FFP - \$350 x 2 mos  
 DATE 01 Aug 19CY

IF SENTENCE DEFERRED, DATE DEFERMENT TERMINATED:

SENTENCE APPROVED	APPROVED BY	DATE
	CA	
	SA	
	NCMR	
	USCMA	
	OTHER	

"I have been informed that I am being confined for the above alleged offense(s)"

Date \_\_\_\_\_ Signature of accused \_\_\_\_\_

Date \_\_\_\_\_ Signature of witness \_\_\_\_\_

PRE TRIAL CONFINEMENT NECESSARY--

BECAUSE OF THE SERIOUSNESS OF THE OFFENSE CHARGED

TO ENSURE THE PRESENCE OF THE ACCUSED AT THE TRIAL

REMARKS SECTION  
 FOR ARTICLE 86 OFFENSES ONLY:

SURRENDERED (VOLUNTARY RETURN)

APPREHENDED BY CIVIL/MILITARY AUTHORITIES

CONFINEMENT DIRECTED AT

HOUR	DATE
1320	01 Aug CY

TYPED NAME/RANK/TITLE  
 J. A. Doe, CAPT, USN, CO

SIGNATURE \_\_\_\_\_

MEDICAL CERTIFICATE

The above named individual was examined by me at 1345 (HOUR) on 01 Aug CY (DATE) and found to be

fit  unfit for confinement. The following irregularities were noted during the examination: (if none, so state)

TYPED NAME/RANK/TITLE  
 Jon T. Boate, LT, MC, USN

SIGNATURE \_\_\_\_\_

RECEIPT FOR PRISONER

The above named individual was received at Ship's Brig, USS John F. Kennedy (NAME OF CORRECTIONAL CENTER)

at 1408 (HOUR) on 01 Aug CY (DATE)

TYPED NAME/RANK/TITLE  
 H. H. Hull, MACM, USN, Brig Officer

SIGNATURE \_\_\_\_\_

U.S. GOVERNMENT PRINTING OFFICE: 1981-703-100/7595 2-1

Figure 5-14. Confinement Order, NAVPERS 1640/4.

for example, when the officer declines to appeal, does not appeal within the required time, or after the appeal has been decided. If the officer imposing NJP is not a flag officer, the letter report must be submitted via the first flag officer in the administrative chain of command. These required reports are separate and distinct from any reported NJP that maybe contained in inves-

tigations or other correspondence. Refer to the MILPERSMAN for the format of the report.

**ENLISTED SERVICE RECORD ENTRIES**

Upon completion of NJP you will, in all probability, be responsible for making (or causing to be made) a

number of record entries to record the action taken at mast.

The manner in which service record entries must be made depends upon the nature of the offense and of the action taken by the CO. Since most service record entries must be prepared using optical character recognition (OCR) forms for inclusion into the Joint Uniform Military Pay System (JUMPS), you should become familiar with the use of OCR typewriters and procedures for preparing the OCR document. The OCR documents must follow exactly the procedures outlined in the *Disbursing, Administrative, and Personnel Manual* (DAPMAN), NAVSO P-3680.

Let us now look at the procedures for recording the actions of a CO taken as a result of CO's mast, including the procedures for preparing OCR documents.

### **No Punishment**

If the CO decides that the alleged offender has not committed the offense and dismisses the charge(s) or if it is found that the alleged offender is guilty but a decision is made that punishment is inappropriate and the offense is excused, you will make no entry in the member's service record. There is one exception to this general rule.

Whenever the service record contains a UA entry, the MILPERSMAN requires you to make an entry on the service member's page 13 showing the period of UA and the final action taken by the CO. Additionally, the MILPERSMAN also requires that you prepare a page 13 entry when there is a UA of less than 24 hours, and the DAPMAN requires that a NAVPERS 1070/606 be prepared when there is a UA of more than 24 hours. If no punishment is awarded at CO's mast for the UA, you must prepare an explanatory entry on a page 13 for UA periods of less than 24 hours, and on a NAVPERS 1070/606 when the UA period is for more than 24 hours. If there is no UA involved, and no punishment is awarded as a result of CO's mast, then you will make no service record entries.

### **Reference to Court-Martial**

When a CO refers a case to a court-martial from CO's mast, do not make any service record entry unless the case involves a UA of the service member. When a UA case is referred to a court-martial, the DAPMAN requires you to make entries on a NAVPERS 1070/606 showing the UA.

### **Punishment Imposed**

Whenever NJP is imposed on enlisted members, a memorandum entry on page 9 is required by the MILPERSMAN. If the case is dismissed or excused, no service record entry on a page 9 is needed. An example of a page 9 entry is shown in figure 5-15.

**PUNISHMENT AFFECTING PAY.**— The cardinal principle here is that for every punishment that affects the member's pay, you must prepare a NAVPERS 1070/607. Punishments that affect pay are a reduction in rate and forfeiture of pay. An example of how to use the NAVPERS 1070/607 is shown in figure 5-16. See the DAPMAN for detailed instruction on its use along with numerous explanatory examples.

Before turning to specific UA examples, there is one general requirement—wherever the mast results in a reduction in rate, the MILPERSMAN requires a page 4 entry in addition to all other required entries.

**UA, Less Than 24 Hours.**— Because there is no lost time when a UA period is less than 24 hours, it is not necessary to prepare a NAVPERS 1070/606. You need only prepare a NAVPERS 1070/607 substantially as shown in figure 5-17. Because you will have a page 13 entry, it will, of course, be necessary to make another page 13 entry showing the end of UA. Do not put the NJP entry on a page 13 as it has been made on a NAVPERS 1070/607.

**UA, More Than 24 Hours.**— In this case, you will have prepared a NAVPERS 1070/606 on the second day of UA. After the CO decides that the absence was both (1) unauthorized absence and (2) not excused (both of which the CO must do before imposing any punishment that affects pay), you must complete blocks 38 through 42 of the NAVPERS 1070/606 as shown in figure 5-18. Do not record the punishment awarded in section 1. Instead, you will show the punishment awarded on a NAVPERS 1070/607 as shown in figure 5-19.

**PUNISHMENT NOT AFFECTING PAY.**— Again we must distinguish between offenses that involve lost time and those that do not. If the punishment does not affect the member's pay (a punishment other than reduction or forfeiture) and does not involve lost time, you need only make a page 13 entry as shown in figure 5-20. Other sample page 13 entries are given in the MILPERSMAN.

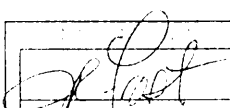
If lost time is involved, you will need to complete the NAVPERS 1070/606 that initially recorded the UA. Because the punishment does not affect pay, it is not necessary to prepare a NAVPERS 1070/607.



BUPERS USE ONLY		P601-7R				BUPERS USE ONLY		
<b>COURT MEMORANDUM</b>								38
1. DATE SUBMITTED CYAPR17		2. SHIP OR STATION AND LOCATION NAVAL BASE, NORFOLK, VA						
3. DATE OF REFERRAL		4. TYPE OF COURT NJP		5. DATE OF COURT/ MAY CYAPR17		6. UCMJ ARTICLE(S) 12B		
7. DATE OF ACTION		8. TYPE OF ACTION <input checked="" type="checkbox"/> REPORT OF ACTION		9. MODIFICATION OF ACTION <input type="checkbox"/>		10. CORRECTION TO PREVIOUS 1070/607 <input type="checkbox"/>		
<input checked="" type="checkbox"/> 12. RATE ADJUSTMENT		13. FROM SK3		14. TO SKSN		15. TIR CYAPR17		
<input checked="" type="checkbox"/> 16. FORFEITURE		17. MONTHLY AMT. \$100.00		18. NO. MONTHS 2				
<input type="checkbox"/> 19. FINE		20. AMOUNT \$		21. CONSENT TO CHECKAGE <input type="checkbox"/>		22. DOES NOT CONSENT TO CHECKAGE <input type="checkbox"/>		
<input type="checkbox"/> 25. DETENTION		26. MONTHLY AMT. \$		27. NO. MONTHS		28. DETENTION RE-FUND DATE		
29. DESERTION MARK REMOVED <input type="checkbox"/>		30. ADJUDGED <input type="checkbox"/>		31. ADJUDGED AND DIS-APPROVED <input type="checkbox"/>				
PRE TRIAL CONFINEMENT 37 FROM		33 TO		34. DAYS LOST TIME (30 DAY BASIS)		35. DAYS LOST TIME (DAY FOR DAY)		
CONFINEMENT ORDERED AND COMPLETED 36 FROM		37 TO		38. DAYS LOST TIME (30 DAY BASIS)		39. DAYS LOST TIME (DAY FOR DAY)		
40 CHANGE EAOS TO		41. CHANGE EXP. ENL TO						
42. SYNOPSIS OF OFFENSE(S), DATE(S), AND SENTENCE ADJUDGED (ALSO AMPLIFYING REMARKS MAY BE CONTINUED ON REVERSE)								
CYAPR17: CO'S NJP HELD THIS DATE VIOLATION UCMJ ART 12B, ASSAULT ON SKSN JONES, USN, ON CYAPR08 PUNISHMENT AWARDED: RIR TO SKSN, FOR OF \$100.00 PPM X 2, AND 10 DAYS' RESTRICTION TO THE LIMITS OF NAVAL BASE, NORFOLK, VA.								
DATE IDENTIFICATION AND RESUME OF CONVENING, SUPERVISORY, OR OTHER AUTHORITY INCLUDING ACTION UNDER ARTICLES 65, 66, 67, 69, 72, 73, 74, OR 15 (D) OR (E) UCMJ (ALSO ANY APPEAL)								
43. 1070 607DTD				44. AUTHORITY TYPE				
(MAY BE CONTINUED ON REVERSE)								
46. (SIGNATURE) BY DIRECTION				GRADE				
MARY N. CHRISTMAS, PNC, USN, BY DIR OF THE OIC								
47. UNIT I.D. CODE 12345				48. RATE SKSN				
49. NAME (LAST, FIRST, MIDDLE) HATCH, JOHN ADAM				50. SSN 233-33-3333		51. BRANCH CLASS USN		
COURT MEMORANDUM NAVPERS 1070/607 (REV. 12-75) S/N 0106-LF-010-6460								
W. U.S. GOVERNMENT PRINTING OFFICE: 1986-1491-5481-40037				FORWARD TO LOCAL DISBURSING OFFICE				

32154

Figure 5-16.—Preparation of Court Memorandum, NAVPERS 1070/607.

BUPERS USE ONLY		P601-7R				BUPERS USE ONLY		
<b>COURT MEMORANDUM</b>								38
1. DATE SUBMITTED CYJUN08		2. SHIP OR STATION AND LOCATION USS DAHLGREN (DDG 43)						
3. DATE OF REFERRAL		4. TYPE OF COURT NJP		5. DATE OF COURT/MAST CYJUN08		6. UCMJ ARTICLE(S) 86		
7. DATE OF ACTION CYJUN08		8. REPORT OF ACTION <input checked="" type="checkbox"/>		9. MODIFICATION OF ACTION <input type="checkbox"/>		10. CORRECTION TO PREVIOUS 1070/607 <input type="checkbox"/>		
11. DATE OF SUBMISSION ON 1070/607 MOD OR CORRECTED		13. FROM		14. TO		15. TIR		
12. RATE ADJUSTMENT <input type="checkbox"/>		17. MONTHLY AMT. \$ 50.00		18. NO. MONTHS 2				
16. FORFEITURE <input checked="" type="checkbox"/>		20. AMOUNT \$		21. CONSENT TO CHECKAGE <input type="checkbox"/>		22. DOES NOT CONSENT TO CHECKAGE <input type="checkbox"/>		
19. FINE <input type="checkbox"/>		26. MONTHLY AMT. \$		27. NO. MONTHS		23. MO. AMT. OF CHECKAGE \$		
25. DETENTION <input type="checkbox"/>		30. ADJUDGED <input type="checkbox"/>		31. ADJUDGED AND DIS-APPROVED <input type="checkbox"/>		24. NO. MOS.		
29. DESERTION MARK REMOVED <input type="checkbox"/>		33. TO		34. DAYS LOST TIME (30 DAY BASIS)		35. DAYS LOST TIME (DAY FOR DAY)		
PRE-TRIAL CONFINEMENT 32 FROM		36. FROM		38. DAYS LOST TIME (30 DAY BASIS)		39. DAYS LOST TIME (DAY FOR DAY)		
CONFINEMENT ORDERED AND COMPLETED		41. CHANGE EXP. ENL. TO						
42. SYNOPSIS OF OFFENSE(S), DATE(S), AND SENTENCE ADJUDGED (ALSO AMPLIFYING REMARKS, MAY BE CONTINUED ON REVERSE)								
<p>CYJUN08: COMMANDING OFFICER'S NONJUDICIAL PUNISHMENT  OFFENSE: VIOL UCMJ ART. 86. UA FROM 0730, CYJUN02 TO 0600, CYJUN03.  NONJUDICIAL PUNISHMENT AWARDED: FORFEITURE OF \$50.00 PAY PER MONTH FOR TWO (2) MONTHS AND 15 DAYS' EXTRA DUTY.</p>								
DATE IDENTIFICATION AND RESUME OF CONVENING, SUPERVISORY, OR OTHER AUTHORITY INCLUDING ACTION UNDER ARTICLES 65, 66, 67, 69, 72, 73, 74, OR 15 (D) OR (E), UCMJ, (ALSO ANY APPEAL)								
43. 1070/607DTD				44. AUTHORITY TYPE				
45.								
(MAY BE CONTINUED ON REVERSE)								
		 46. (SIGNATURE) BY DIRECTION GRADE						
		J. R. FROST, LNC, USN, BY DIR OF THE CO						
		47. UNIT I.D. CODE 12345		48. RATE BTFA				
49. NAME (LAST, FIRST, MIDDLE) DOE, JOHN ADAM		50. SSN 123-45-6789		51. BRANCH/CLASS USN				
COURT MEMORANDUM NAVPERS 1070/607 (REV 12-75) S-N 0106-LF-010-6960								
☆ U.S. GOVERNMENT PRINTING OFFICE: 1986-491-648-T 40037				FORWARD TO LOCAL DISBURSING OFFICE				

32152

Figure 5-17.—Preparation of Court Memorandum, NAVPERS 1070/607, reflecting NJP punishment for a UA period of less than 24 hours.

BUPERS USE ONLY	P601-6R	BUPERS USE ONLY	38	
<b>RECORD OF UNAUTHORIZED ABSENCE</b>				
<b>A</b>	1. DATE OF SUBMISSION CYJUN08	2. SHIP OR STATION AND LOCATION USS DAHLGREN (DDG 43)		
<b>B</b>	UNAUTHORIZED ABSENCE FROM: 3. HOUR: 0730 4. DATE: CYMAY11		LIBERTY BEGAN 6. HOUR: 1700 7. DATE: CYMAY10	
		<input checked="" type="checkbox"/> 5. OVER LIBERTY	<input type="checkbox"/> 8. OVER LEAVE	<input type="checkbox"/> 9. AWOL
<b>C</b>	HELD AND CHARGED BY CIVIL AUTH. 10. HOUR: 11. DATE:		<input type="checkbox"/> 12. DELIVERED TO CIVIL AUTH	<input type="checkbox"/> 13. APPREHENDED BY CIVIL AUTHORITIES
14. DD 616 ISSUED				
15. AT (ORGANIZATION AND LOCATION)				
<b>D</b>	<input checked="" type="checkbox"/> 16. DD 553 ISSUED		<input checked="" type="checkbox"/> 17. PERSONAL EFFECTS COLLECTED, INVENTORIED, AND IN SAFEKEEPING	
<b>E</b>	18. UIC MEMBER UA FROM: 12345		19. ACTIVITY MEMBER UA FROM: USS DAHLGREN (DDG 43)	
RETURNED TO MILITARY JURISDICTION 20. HOUR: 1910 21. DATE: CYJUN07		<input type="checkbox"/> 22. APPREHENDED	<input checked="" type="checkbox"/> 23. SURRENDERED	<input type="checkbox"/> 24. DD 616 ISSUED
<b>F</b>	25. RETURNED TO MILITARY JURISDICTION AT: (ACTIVITY) USS DAHLGREN (DDG 43)		26. UIC 12345	<input checked="" type="checkbox"/> 27. RET. ON BOARD
28. TRANSFERRED TO: (ACTIVITY)		29. UIC		
<input type="checkbox"/> 30. DETERMINATION NOT UNAUTHORIZED ABSENCE		31. NAVPERS 1070/606 WHICH REPORTED ABSENCE IN ERROR		
<input type="checkbox"/> 32. ABSENCE EXCUSED UNAVOIDABLE		33. CHARGED NO. DAYS LEAVE (DAY FOR DAY)		
<b>G</b>	SKMC 34. FROM:		35. TO:	
		<input checked="" type="checkbox"/> 38. ABSENCE NOT EXCUSED	39. CHARGE NO. DAYS LOST TIME (30 DAY MO)	40. CHARGE NO. DAYS LOST TIME (DAY FOR DAY)
		36. DISEASE DUE TO USE OF ALCOHOL/DRUGS		<input type="checkbox"/> 37. OTHER
		41. CHANGE EAOS TO: CY+1NOV16		42. CHANGE EXPR ENL TO: CY+1NOV16
<input type="checkbox"/> 43. ADJUST PREVIOUSLY SUBMITTED 1070/606		44. DATED		<input type="checkbox"/> 45. CORRECTED INFO ENTERED ABOVE
<b>H</b>	46. ERRONEOUSLY REPORTED LEAVE		47. ERRONEOUSLY REPORTED LOST TIME (30 DAY MONTH)	
48. ERRONEOUSLY REPORTED LOST TIME (DAY FOR DAY)				
49. AMPLIFYING REMARKS (MAY BE CONTINUED ON REVERSE) CYMAY11: UA OVER REGULAR LIBERTY FM USS DAHLGREN (DDG 43) FM 0730, CYMAY11. INTENTIONS UNKNOWN. <i>J.R. Doe</i> J.R. DOE, LNC, USN, BY DIR OF THE CO CYMAY20: DD 553 ISSUED. MBR'S PERSONAL EFFECTS COLLECTED. <i>J.R. Doe</i> J.R. DOE, LNC, USN, BY DIR OF THE CO CYJUN07: SURRENDERED ON BOARD 1910 HOURS THIS DATE. <i>J.R. Doe</i> J.R. DOE, LNC, USN, BY DIR OF THE CO				
<b>J</b>	50. (SIGNATURE) BY DIRECTION <i>J.R. Doe</i>		RANK/GRADE J.R. DOE, LNC, USN, BY DIR OF THE CO	
53. NAME (LAST, FIRST, MIDDLE) PISTOL, VERY C.		51. UNIT I.D. CODE 12345	52. RATE QMSN	54. SSN 999-99-9999
		55. BRANCH/CLASS USN		
RECORD OF UNAUTHORIZED ABSENCE NAVPERS 1070/606 (REV. 1-77) S/N 0106-LF-010-6957 ★ U.S. GOVERNMENT PRINTING OFFICE: 1990-282-225/20024				
THIRD COPY				

45805

Figure 5-18.—Preparation of Record of Unauthorized Absence, NAVPERS 1070/606.




BUPERS USE ONLY	P601-7R	BUPERS USE ONLY	
<b>COURT MEMORANDUM</b>			38
1. DATE SUBMITTED CYFEB15	2. SHIP OR STATION AND LOCATION USS CARR (FFG 52)		
3. DATE OF REFERRAL	4. TYPE OF COURT NJP	5. DATE OF COURT/ MARK CYFEB15	6. UCMJ ARTICLE(S) 86
7. DATE OF ACTION CYFEB15	8. REPORT OF ACTION <input checked="" type="checkbox"/>	9. MODIFI- CATION OF ACTION <input type="checkbox"/>	10. CORRECTION TO PREVIOUS 1070/607 <input type="checkbox"/>
11. DATE OF SUBMISSION ON 1070/ 607 MOD OR CORRECTED	12. RATE ADJUSTMENT <input type="checkbox"/>	13. FROM	14. TO
15. TIR	16. FORFEITURE <input checked="" type="checkbox"/>	17. MONTHLY AMT. \$ 100.00	18. NO. MONTHS 2
19. FINE <input type="checkbox"/>	20. AMOUNT \$	21. CONSENT TO CHECKAGE <input type="checkbox"/>	22. DOES NOT CONSENT TO CHECKAGE <input type="checkbox"/>
23. MO. AMT. OF CHECKAGE \$	24. NO. MOS.	25. DETENTION <input type="checkbox"/>	26. MONTHLY AMT. \$
27. NO. MONTHS	28. DETENTION RE- FUND DATE	29. DESERTION MARK REMOVED <input type="checkbox"/>	30. ADJUDGED <input type="checkbox"/>
31. ADJUDGED AND DIS- APPROVED <input type="checkbox"/>	32. PRE TRIAL CONFINEMENT FROM	33. TO	34. DAYS LOST TIME (30 DAY BASIS)
35. DAYS LOST TIME (DAY FOR DAY)	36. CONFINEMENT ORDERED AND COMPLETED FROM	37. TO	38. DAYS LOST TIME (30 DAY BASIS)
39. DAYS LOST TIME (DAY FOR DAY)	40. CHANGE EAOS TO	41. CHANGE EXP. ENL TO	
42. SYNOPSIS OF OFFENSE(S), DATE(S), AND SENTENCE ADJUDGED (ALSO AMPLIFYING REMARKS, MAY BE CONTINUED ON REVERSE) CYFEB15: COMMANDING OFFICER'S NONJUDICIAL PUNISHMENT OFFENSE: VIOL UCMJ ART. 86. UA FM 0600, CYJAND1 TO 1000, CYFEB14. NONJUDICIAL PUNISHMENT AWARDED: FORFEITURE OF \$100.00 PAY PER MONTH FOR TWO (2) MONTHS, 30 DAYS' RESTRICTION AND 30 DAYS' EXTRA DUTY.			
DATE IDENTIFICATION AND RESUME OF CONVENING, SUPERVISORY, OR OTHER AUTHORITY INCLUDING ACTION UNDER ARTICLES 65, 66, 67, 69, 72, 73, 74, OR 15 (D) OR (E), UCMJ, (ALSO ANY APPEAL)			
43. 1070/607 DTD		44. AUTHORITY TYPE	
(MAY BE CONTINUED ON REVERSE)			
45		46. SIGNATURE BY DIRECTION  GRADE	
J.R. DOE, LNC, USN, BY DIR OF THE CO			
47. UNIT I.D. CODE 44444		48. RATE SA	
49. NAME (LAST, FIRST, MIDDLE) LINE, PULL A.		50. SSN 666-66-6666	51. BRANCH, CLASS USN
COURT MEMORANDUM NAVPERS 1070/607 (REV. 12-75) S-N 0106-LF-010 6960			
U.S. GOVERNMENT PRINTING OFFICE 1986 491 648 T 40037			ACTIVITY FILE

Figure 5-19.—Preparation of Court Memorandum, NAVPERS 1070/607, reflecting NJP punishment for UA over 24 hours.

SHIP OR STATION  
NAVAL STATION, CHARLESTON, SOUTH CAROLINA

1 Jul CY: COMMANDING OFFICER'S NONJUDICIAL PUNISHMENT  
DATE OF OFFENSE: 30 June 19CY  
NATURE OF OFFENSE: Viol of Station Order 1-91. Driving a motor vehicle in excess of posted speed limits.  
DATE OF CAPTAIN'S MAST: 1 July 19CY  
NONJUDICIAL PUNISHMENT AWARDED: Two weeks' restriction to the limits of the station.

Seaman Smith signed JAG Manual, appendix A-1-d, prior to his captain's mast which was held on 1 July 19CY.

The accused talked to a lawyer prior to deciding to demand trial by court-martial in lieu of captain's mast. The accused was advised that acceptance of nonjudicial punishment does not preclude further administrative action. In completing the remainder of the form, the accused did not demand trial by court-martial in lieu of nonjudicial punishment.

NOTE: If the accused was represented by a military or civilian lawyer as a personal representative at mast, the following example would be used in place of the one appearing above:

Seaman Smith received punishment at captain's mast on 1 July 19CY. The accused was represented by a lawyer.

JACK N. JILL, LNC, USN  
By direction of the Commanding Officer

<u>NAME (Last, First, Middle)</u> Smith, John A.	<u>SSN</u> 333-33-3333	<u>BRANCH AND CLASS</u> USN
---	---------------------------	--------------------------------

13

Figure 5-20. Preparation of Page 13, NAVPERS 1070/613, reflecting NJP results.

For other punishments that do not affect the pay of an individual (extra duty, restriction, or arrest in quarters), it is good administrative practice to spell out in writing the specific orders on these types of punishment even though there are no specific regulations requiring anything more than a notation in the proper block on the

NAVPERS 1626/7. Figures 5-21 and 5-22 show samples of orders to carry out when extra duty and restriction have been awarded as a result of CO's mast.

In some cases involving restriction, your command may not have the facilities to properly administer restriction. In such cases, you should make arrangements

DEPARTMENT OF THE NAVY  
NAVAL BASE  
NORFOLK, VIRGINIA 23511

\_\_\_\_\_  
Date

From: Commanding Officer, Naval Base, Norfolk, Virginia  
To:

Subj: ORDERS TO CARRY OUT NONJUDICIAL PUNISHMENT

Ref: (a) Manual for Courts-Martial, 1984  
(b) U.S. Navy Regulations, 1990

1. You appeared at commanding officer's nonjudicial punishment this date and have been awarded \_\_\_\_\_ days' extra duty.
2. Immediately upon receipt of these orders, you will report to the Chief Master-at-Arms (CMAA), Building 27, Naval Base, Norfolk, Virginia, and under his supervision perform the above extra duty. In the event you are not able to perform extra duty because of a watch, being in sick bay, et cetera, at the time specified by the CMAA, you will have your leading petty officer notify him in person or by calling extension 1111 during regular working hours and extension 1000 after normal working hours, Saturdays, or on holidays.
3. The CMAA will supervise the extra duty to be performed according to references (a) and (b).
4. The hours of extra duty will be reasonable, not less than 2 hours per day, and will be performed outside of normal duties and working hours. Extra duty will not be performed on Sunday although Sunday counts in the computation of the period for which such punishment is imposed.
5. Any failure to carry out these orders will result in further disciplinary action.
6. Upon completion of this punishment, the CMAA will notify the commanding officer, via the discipline officer, that such punishment has been completed.

Discipline officer  
By direction

-----  
I have read the above orders to the individual named and have delivered to him one copy.

\_\_\_\_\_  
Discipline officer/Master-at-Arms

Copy to:  
CMAA  
Accused's LPO

**Figure 5-21.-Sample letter of orders to carry out NJP punishment of extra duty.**

DEPARTMENT OF THE NAVY  
NAVAL BASE  
NORFOLK, VIRGINIA 23511

\_\_\_\_\_  
Date

From: Commanding Officer, Naval Base, Norfolk, Virginia

To:

Subj: INSTRUCTIONS FOR CARRYING OUT PUNITIVE RESTRICTION

1. You appeared at commanding officer's nonjudicial punishment this date and have been awarded \_\_\_\_\_ days' restriction without suspension from duty.
2. The limits of your restriction are the confines of the Naval Base, Norfolk, Virginia proper. This excludes any recreational facilities on board the base.
3. You will report and muster at the following times:  
With the Master-at-Arms, Building 27  
Weekdays: 0745, 1230, and 1600  
With the OOD, Quarterdeck, Building 27  
Weekdays: 2000 and 2200  
Saturdays, Sundays and Holidays: 0745, 1000, 1230, 1400, 1600, 2000, and 2200  
The above musters will be in the uniform of the day.
4. Additional rules on your restriction will be found on the reverse side of this form. You will read these additional instructions and sign the acknowledgement below.

Discipline office

By direction

-----  
I have read and fully understand the instructions on my restriction and I hereby acknowledge receipt of one (01) signed original of these orders.

\_\_\_\_\_  
Witness

\_\_\_\_\_  
Signature of person being restricted

DISTRIBUTION:

Original to person being restricted

CMAA

OOD

Discipline officer

Figure 5-22.—Sample letter of instruction for carrying out punitive restriction.

with the nearest command that does have the facilities to properly administer restriction, and in these cases you may be required to prepare TEMADD orders for the period of punishment.

## **UNIT PUNISHMENT BOOK**

The UPB contains a record of all NJP hearings conducted by a command, not just those in which punishment was awarded, and is required by the MILPERSMAN. The form that is used to record NJP hearings is the NAVPERS 1626/7. When all actions have been completed on a particular NJP hearing, the space provided in the final administrative action portion of the NAVPERS 1626/7 (see section J of fig. 5-1) that indicates when the case record is filed in the UPB should be filled out. Though there is no requirement to do so, it is good administrative practice to attach all relevant documents on that particular case to the NAVPERS 1626/7.

There are no specific instructions as to what manner these cases should be filed in the UPB; however, the suggested procedure is to file cases in alphabetical order, chronological order by date, or a combination of both.

## **LOG ENTRIES**

*The Standard Organization and Regulations of the U.S. Navy*, (SORM), OPNAVINST 3120.32B,

prescribes the log entry for mast results afloat. Such an entry should be substantially in the format for the POD entry, and you should provide this information to the officer of the deck (OOD) for inclusion in the deck log. Although there is no Navywide requirement for log-books ashore, you will find that logs are kept ashore pursuant to local instructions. Unless these local instructions require a different format, you should provide information about the mast results to the OOD in the same format that is used afloat.

## **SUMMARY**

NJP is the lowest form of discipline available to COs to aid them in maintaining good order and discipline within the Navy. As you can see from the preceding discussions, there are many considerations when the various aspects of NJP are carried out. It is important for you, as an LN, to keep abreast of all the requirements and procedures associated with the proper administration of NJP because of its effect upon individuals as well as its effect upon the Navy.

A checklist for report chit/NJP processing, figure 5-23, is provided for you as a guide in helping you to carry out all the responsibilities inherent in NJP proceedings.

## CHECKLIST FOR REPORT CHIT/NJP PROCESSING

The following process assumes that the command has a local report chit or system for reporting offenses and conducting the preliminary inquiry before the preparation of a NAVPERS 1626/7 for use at XOI or CO's mast.

### A. BEFORE CO's MAST

1. Log local report into the logbook. (A log should be used for tracking the report through your command.)
2. Send local report and request for preliminary inquiry and recommendation as to disposition to SNM's department head.
3. If returned recommending XOI or mast, check service record out from personnel or PSD.
4. Review service record to make sure all pages are there and to determine if SNM is on any suspended sentence, is in a frocked paygrade, or has been given an administrative separation warning.
5. Prepare NAVPERS 1626/7 and appropriate acknowledgement of rights from JAG Manual. If a UA case, make sure you have a page 601/6R or page 13.
6. Attach preliminary inquiry report, including statements and other evidence, to report chit.
7. Contact and inform the accused of all rights and let him or her inspect the evidence. (If shore-based, set up appointment with defense counsel if accused wants to consult with counsel.)
8. Inform accused, his or her supervisors, and witnesses of time and place of XO's/CO's mast.

### B. AFTER CO's MAST

1. Make sure CO has completed section of NAVPERS 1626/7 entitled Action of the Commanding Officer.
2. Inform accused of right to appeal NJP. Make sure accused signs the appropriate forms. Make sure NAVPERS 1626/7 is modified to reflect the 5-day time limit vice 15 days that is preprinted on NAVPERS 1626/7.
3. Prepare necessary service record entries.
  - a. Service record entries required when the commanding officer EXCUSES or DISMISSES the offense(s):
    - (1) When the service record contains an entry regarding UA, an entry must be made to show what action was taken. If the UA is less than 24 hours, a page 13 entry is required.
    - (2) If UA is more than 24 hours, completion of a page 601-6R is required.
    - (3) For all other offenses EXCUSED or DISMISSED, no service record entry is required. If UA offense excused or dismissed, page 13 is required to reflect the disposition.
  - b. When mast results in a decision to refer charges to trial by summary or special court-martial, prepare a charge sheet (DD 458). No service record entry is required.
  - c. When mast results in a decision to refer charges to a pretrial investigation under Article 32, no service record entry is required.
  - d. Required service record entries if punishment imposed:
    - (1) Punishments NOT including reduction or forfeiture of pay:
      - (a) NAVPERS 1070/613 (page 13)
      - (b) NAVPERS 1070/609 (page 9)

Figure 5-23.—Checklist for report chit/NJP processing.

(c) NAVPERS 1070/606 (page 6) - Must be completed in UA cases in excess of 24 hours. Since UA of 24 hours or more is lost time, completion of the page 6 (blocks 1 and 2, 38 through 42, and block 50) must be timely and accurate. Strict adherence to the DAPMAN, section 90435, is mandatory.

(2) Punishment including reduction or forfeiture of pay:

(a) NAVPERS 1070/607 (page 7)

(b) NAVPERS 1070/609 (page 9)

(c) NAVPERS 1070/604 (page 4) if reduction awarded.

(d) NAVPERS 1070/606 (page 6) to be completed in UA cases in excess of 24 hours as outlined above.

(e) If reduction and forfeitures, make sure forfeitures are based on reduced paygrade (even if reduction suspended). NOTE: *Manual of Advancement*, BUPERSINST 1430.16D, section 301.12.17 states that all lost time in excess of 15 days as a result of UA, sick, misconduct, confinement, or so on, is not creditable in computing service in paygrade. When cumulative lost time is in excess of 15 days in the same paygrade, adjust TIR date by adding the number of lost days, ONLY if there has been NO REDUCTION IN RATE.

(3) Punishments involving reduction or forfeiture of pay that are suspended:

(a) NAVPERS 1070/613 (page 13) if punishment awarded pertains to RIR or FF and was suspended.

(b) NAVPERS 1070/607 (page 7) if one or more types of punishment awarded are suspended, but still included at least one punishment not suspended that pertains to pay.

(c) NAVPERS 1070/609 (page 9) if reduction is awarded.

(d) NAVPERS 1070/604 (page 4) if reduction is awarded.

(4) Punishments involving restraint:

(a) Correctional custody. If CC is awarded at mast, prepare TEMADD orders. NOTE: The accused will be escorted to the local medical facility for a preconfinement physical. This is a function of the master-at-arms.

(b) Restriction to limits. If restriction is imposed, restriction papers need to be typed. Usually this is on a local preprinted form, necessitating only the completion of the accused's name, rate, and social security number. It will show the boundaries of restriction, times, dates and places for muster, and is signed by someone authorized to do so.

(c) Extra duty. If extra duty is imposed, virtually the same procedure as in (b) above will be used. Again, notification is by preprinted locally prepared form that defines the extra duty, the time it will be accomplished, to whom the accused reports, and any extra instructions necessary.

(d) Confinement on bread and water. Prepare confinement orders for bread and water. The accused must be given a confinement physical and found to be fit for confinement on bread and water.

(e) File documents in UPB and, after all action (including any appeal), make sure it is complete.

(5) Remission, mitigation, or setting aside of NJP:

(a) The DAPMAN contains block-by-block instructions for preparation of NAVPERS 1070/607 for these actions.

(b) Refer to the DAPMAN for instructions to mitigate, reinstate, or set aside the punishment for members who have previously been reduced in rate.

Figure 5-23.-Checklist for report chit/NJP processing—Continued.

### C. MISCELLANEOUS MATTERS

1. If the CO's NJP results in a restraint-type punishment, the details must be furnished to the OOD for inclusion in the deck log.
2. Prepare notice for POD. If it is the policy of commands to publish the results of CO's NJP in the command POD, strict compliance with the JAGMAN is mandatory. (It is suggested that names of the offenders be omitted if the information may be disseminated to civilians.) In no instance will the social security number of an individual be used in the publication of NJP results. (See SECNAVINST 5211.5.)
3. If appropriate, prepare page 13—warning member of consequences of future misconduct.
4. If a basis for administrative discharge applies, determine if command wants to process member for discharge.

### D. NJP APPEALS

1. After receipt of accused's appeal, prepare written endorsement for the CO's signature. Include a copy of NAVPERS 1626/7, copies of all statements or evidence used at mast, and copy of page 9 from accused's service record (with all endorsements).
2. Indicate appeal on NAVPERS 1626/7.
3. If no response to appeal is received from appeal authority within 5 days to accused's appeal, then restraint punishments must be stayed if accused has requested this.

### E. OFFICER'S NJP

1. Before taking an officer to NJP, check with regulations promulgated by the type commander regarding any additional requirements or procedures required by him or her. (Many want notification before the NJP hearing. CINCPACFLT commands must have a prompt verbal report of all incidents of officer misconduct to CINCPACFLT.)
2. If an officer is awarded NJP, then a disciplinary report must be sent to NMPC 82. (The MILPERSMAN contains the applicable provisions.)
3. If the officer is also being detached for cause, consult the MILPERSMAN for the provisions for this procedure.

**Figure 5-23.-Checklist for report chit/NJP processing—Continued.**



## CHAPTER 6

# PRETRIAL MATTERS

Pretrial matters take on a significant importance to the successful completion of any trial by court-martial. For a case to go before a court-martial, certain pretrial matters must be accomplished. These pretrial matters extend not only to paper work but also to acts that must be taken care of before the trial. In this chapter we discuss the different types of pretrial matters.

### PRETRIAL PAPER WORK

There are numerous situations in which you will play an important role such as the preparation of charge sheets, pretrial agreements, grants of immunity, individual military counsel requests, witness requests, flyers, findings and sentence worksheets, and seating charts for members. The office you are assigned to depends on what pretrial items you will prepare. However, there is no doubt that you will be involved in some aspect of pretrial paper work.

### CHARGE SHEET

One of your most important pretrial duties is the preparation of the Charge Sheet, DD Form 458, which is shown in figure 6-1. You will most likely draft the charge(s) and specification(s), particularly if there is no judge advocate available.

### Charges and Specifications

The officer conducting a preliminary inquiry on a serious offense usually completes the charge sheet and delivers it with the preliminary inquiry report. Then, if the commanding officer (CO) orders a pretrial investigation, the charge sheet is available for the investigating officer's use. You must prepare this formal written accusation, known as the charges and specifications, before any accused is tried.

The charge lists, by number, the article of the *Uniform Code of Military Justice* (UCMJ) that the accused has allegedly violated. The specification states specifically what the accused did or caused to violate the Code. The specification must allege all the elements of the offense. The specification also contains jurisdictional allegations. Jurisdictional allegations are the facts that show the court has jurisdiction over the

accused and the offense. The specification further identifies the accused and gives the details that form the violation. These details include the where, when, and how of the offense.

Courts-martial have been disapproved on review by higher authority because of faulty or "fatally defective" specifications, even though the accused has been convicted. The *Manual for Courts-Martial* (MCM) contains forms for drafting charges and specifications for most offenses. Do not alter these forms.

**NUMBERING OF CHARGES AND SPECIFICATIONS.—** If there is only one charge, do not number it. If more than one charge exists, number each charge in order using Roman numerals I, II, and so on. Charges that are preferred after other charges have been preferred are called additional charges and are also numbered using Roman numerals. However, the word *Additional* must appear in front of the word *Charge*; for example, Charge I: Violation of the Uniform Code of Military Justice, Article 86; Additional Charge I: Violation of the Uniform Code of Military Justice, Article 86.

In numbering specifications, use Arabic numerals 1, 2, 3, and so on. If there is only one specification under the charge, do not number it. Designate the specifications under additional charges in the same manner as for regular specifications. Do not use the word *Additional with* the specifications.

**DRAFTING OF CHARGES.—** The charge should be appropriate to all specifications under it, and is written: "Violation of the Uniform Code of Military Justice, Article\_\_\_\_," giving the number of the article.

**DRAFTING OF SPECIFICATIONS.—** A specification should be brief but complete and must contain the following essential elements:

- Rate of accused
- Name of accused
- Branch of service of accused
- Unit of accused
- Time of alleged offense based on a 24-hour clock



12. On 2 August, 19 94, the accused was informed of the charges against him/her and of the name(s) of the accuser(s) known to me (See R.C.M. 308 (a)). (See R.C.M. 308 if notification cannot be made.)

Mary Christmas Discipline Naval Air Station, Oceana  
*Typed Name* ~~XXXXXXXXXXXX~~ *Organization of Immediate Commander*

Chief Legalman, U.S. Navy Officer  
*Grade*

\_\_\_\_\_  
*Signature*

---

**IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY**

13. The sworn charges were received at 1100 hours, 2 August 19 94 at Naval Air Station, Oceana,  
*Designation of Command or*  
Virginia Beach, Virginia  
*Officer Exercising Summary Court-Martial Jurisdiction (Sec R.C.M. 403)*

FOR THE <sup>1</sup> Commanding Officer  
Executive Officer  
*Official Capacity of Officer Signing*

Very C. Pistol  
*Typed Name of Officer*

Commander, U.S. Navy  
*Grade*

\_\_\_\_\_  
*Signature*

---

**V. REFERRAL; SERVICE OF CHARGES**

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY <u>Naval Air Station, Oceana</u>	b. PLACE <u>Virginia Beach, Virginia</u>	c. DATE <u>7 August 1994</u>
--	---	---------------------------------

Referred for trial to the Special court-martial convened by my Special Court-Martial Convening Order  
1-94 of \_\_\_\_\_

\_\_\_\_\_, 1 August 19 94, subject to the following instructions: <sup>2</sup> None.

\_\_\_\_\_  
~~BY~~ *Command or Order* ~~&&~~

Jack N. Jill Commanding Officer  
*Typed Name of Officer* *Official Capacity of Officer Signing*

Captain, U.S. Navy  
*Grade*

\_\_\_\_\_  
*Signature*

---

15. On 8 August, 19 94, I ~~(XXXXXXXXXX)~~ served a copy hereof on (each of) the above named accused.

Jane A. Doe Lieutenant, JAGC, U.S. Naval Reserve  
*Typed Name of Trial Counsel* *Grade or Rank of Trial Counsel*

\_\_\_\_\_  
*Signature*

---

FOOTNOTES: 1 - When an appropriate commander signs personally, inapplicable words are stricken  
2 - See R.C.M. 601(e) concerning instructions. If none, so state.

DD Form 458 Reverse, 84 AUG

Figure 6-1B.-Charge Sheet, DD Form 458 (back).

- Place of alleged offense
- Statement of facts that allege the offense

In pleading these elements on the charge sheet, you should stick to certain rules such as the following:

- In pleading rate, spell out the words instead of using the abbreviation for the rating; for example, Storekeeper Third Class, Seaman, and Hospitalman Third Class. If the rank or grade of the accused has changed since the date of the alleged offense(s), identify the accused by his or her present rank or grade followed by his or her former rank or grade; for example. In that Seaman John A. Doe, U.S. Navy, then Seaman Apprentice John A. Doe, U.S. Navy . . . .

- Set forth the accused's first name, middle initial or name, and last name in that order. Capitalize the first letters in each name only; for example, Seaman John Adam Doe or Seaman John A. Doe. Charge the accused under the name he or she admits to be his or her true name. If the accused is known by more than one name, use the acknowledged name of the accused. List the true name of the accused first, followed by any known aliases; for example, In that Seaman John A. Doe, alias Seaman John A. Doezyneckski . . . .

- Never allege the social security number (SSN) of the accused.

- Show the branch of service as U.S. Navy, U.S. Naval Reserve, or U.S. Marine Corps.

- In the unit or organization portion, show only the name of a ship. Do not allege the hull number. Capitalize only the first letter of the ship's name; for example, USS Independence. In alleging shore or overseas activities, give the name and the location of the activity. For overseas activities, you may use FPO or APO numbers instead of the physical location. You can use Roman or Arabic numerals if they are a part of the title of the unit.

- In alleging personal jurisdiction for military members on active duty, the phrase *on active duty* must be added immediately after the description of the accused. Also, for members of Reserve components on active duty, the specification must contain the phrase *on active duty*. Since reservists not on active duty are not subject to the UCMJ, failure to show that the member is on active duty is sufficient cause to raise the question of jurisdiction.

- In alleging times and dates, use a 24-hour clock; that is, time runs 0100, 0200, 0300, up to 2400. Where

the date or exact time is uncertain, use the phrase *at or about* or *on or about*; for example, In that \*\*\*\*\* did, at or about 1223 hours, on or about 17 July 19CY . . . . The exact hour of an offense is not normally alleged in a specification except in certain absence offenses.

- In alleging the place of the offense, if the offense occurred at the accused's unit, allege as "on board said ship" or "at said base." When the offense occurs at a place other than the accused's unit, describe the location of that place in enough detail so no question arises as to its location; for example, at or near the intersection of Third and Garden Streets in the town of Pensacola, Florida.

- Before drafting the specification, you should analyze the facts and refer to the pertinent paragraphs of the MCM. This is where the elements of proof of various offenses appear and examples of the forms of specifications are shown. Include all elements of an offense. Allege any intent or state of mind that is expressly made an essential element of an offense. Thus, where appropriate, allege the offense as having been committed knowingly, willfully, wrongfully, unlawfully, without authority, or dishonorably. One specification should not allege more than one offense. However, if two acts or a series of acts constitute one offense, you may allege them together. For the vast majority of cases, you can use the suggested forms and wording contained in part IV of the MCM. For those few cases where no form is shown, you must make sure you cover all the elements of the offense in the specification,

- U.S. and USS are permissible abbreviations. Do not use any other abbreviations in specifications.

- The specification is typed using the block form in what is called margin-to-margin fashion. After typing your charge line, drop down two lines and begin typing directly under the word *Charge*.

EXAMPLE: Charge: Violation of the UCMJ, Article  
86

Specification: In that . . . . .

**SUFFICIENCY OF SPECIFICATIONS.**— If a specification that the accused has been found guilty fails to allege any offense under the Code, the proceedings as to that specification are a nullity and must be declared invalid. If a specification alleges an offense under the Code, the proceedings as to that specification should not be held invalid solely because the specification is defective. However, if it appears from the record that the accused was misled by the defect or that his or her

substantial rights were otherwise materially prejudiced, appropriate corrective action must be taken. The test of the sufficiency of a specification is not whether it could have been made more definite and certain, but whether the facts alleged and reasonably implied set forth the offense sought to be charged with sufficient clarity to apprise the accused of what he or she must defend himself or herself against. Whether the record is sufficient to enable the accused to avoid a second prosecution for the same offense must also be considered in applying this test.

## Preparation Instructions

The preparation of the charge sheet is a matter for the regulations of the secretary of a department; however, certain rules and considerations have been adopted to make sure there is consistency in the preparation of the charge sheet. In typing the charge sheet use initial caps. Let us take a look at the block-by-block preparation instructions:

**Block 1: Name of Accused**—Type the accused's last name, first name, and middle initial.

**Block 2: SSN**—Verify the accused's SSN from his or her enlistment contract and type in as verified.

**Block 3: Grade or Rank**—Abbreviate the grade or rank of the accused; for example, SN, YN3, BM2, PFC, ENS, or LT.

**Block 4: Paygrade**—Indicate the accused's paygrade by either an O or E level; for example, E-3, E-4, E-7, O-2, or O-4.

**Block 5: Unit or Organization**—Type the organization to which the accused is assigned for strength accountability. For example, for ships use the name of ship and hull number, USS Midway (CV 41); for shore activities use the name of activity and geographical location, U.S. Naval Support Activity, Naples, Italy; or Fighter Squadron One Zero One, Naval Air Station, Oceana, Virginia Beach, Virginia.

**Block 6: Current Service**—Verify these entries from the accused's enlistment contract(s).

a. Initial Date—Example: 1 April 19CY.

b. Term—Example: 3 years, 4 years, or Indefinite.

**Block 7: Pay Per Month**—Verify this amount with the disbursing or finance office.

a. Basic—Dollar amount. Example: \$1,297.00.

b. Sea/Foreign Duty—Dollar amount. Example: \$100.00. (If there is no sea or foreign duty pay, then type in the word None.)

c. Total—Add up the pay per month and the sea/foreign duty pay and enter the dollar amount. Example: \$1,397.00.

**Block 8: Nature of Restraint of Accused**—Use one of the following terms: *Restriction, Confinement, or None*, whichever is applicable.

**Block 9: Date(s) Imposed**—Show the inclusive dates of any restraint, including the beginning and ending dates. Example: 1-2 August 19CY or 1 May -7 June 19CY.

If the accused is still in restraint on the date you are preparing the charge sheet, show only the date that the restraint began. If the accused is released from restraint status after the charge sheet is typed and before the date of trial, the trial counsel (TC) will amend the entry as appropriate and initial it.

According to the decision rendered in *United States v. Allen*, 17 M.J. 126 (1984), periods of legal pretrial confinement are given a day-for-day credit against any confinement awarded at trial. Additionally, periods of illegal pretrial confinement or restriction that is considered by the military judge to be equal to confinement will be given an additional day-for-day credit. You may also list confinement by civilian authorities. However, it must be related to, or as a result of, the current charges listed on the charge sheet.

**Block 10: Charges and Specifications**—Use block 10 for stating the charges and specifications alleged against the accused. Prepare the charges and specifications according to part IV, MCM.

**Block 11a: Name of Accuser**—Type in the accuser's last name, first name, and middle initial.

**Block 11b: Grade**—List the grade or rate of the accuser. Example: CAPT, ENS, LTJG, LNC, or YN1. You may spell out the grade if room allows.

**Block 11c: Organization of Accuser**—Type in the activity of the accuser. Example: U.S. Naval Support Activity, Naples, Italy.

**Block 11d and e: Signature of Accuser/Date**—The accuser will sign and date this entry after swearing to the charges and specifications. The accuser must sign all copies of the charge sheet in the presence of the officer who administers the oath. The accuser, by signing the charge sheet, "prefers" the charges. Any person subject to the Code may prefer charges.

Block 11: Affidavit—Line out information where appropriate.

a. Day, Month, and Year—You may type this entry or leave it blank until the affidavit is signed. Then the officer who signs the affidavit can pen in the information.

b. Typed Name of Officer—Type in this information as the person will sign.

c. Grade—Include armed force and Staff Corps designation (if applicable). Example: LCDR, JAGC, USN, or MAJ, JAGC, USA.

d. Organization of Officer—Refer to the typing instructions given for the accuser in block 11c.

e. Official Capacity to Administer Oath—Only certain officers are authorized to administer oaths. These officers are set forth in (1) Article 136(a), UCMJ, that extends this authorization to all judge advocates; all summary courts-martial; all adjutants; assistant adjutants; acting and personal adjutants; all COs of the Navy, Marine Corps, and Coast Guard; all staff judge advocates (SJAs) and legal officers and acting or assistant SJAs and legal officers; and all other persons designated by regulations of the armed forces or by statute; (2) Section (b) of Article 136, MCM, lists other persons who may administer oaths in the performance of their duties; and (3) *Manual of the Judge Advocate General* (JAGMAN).

This officer must not only witness the accuser's signature on the charge sheet, but must actually administer to the accuser the oath to charges that is set forth in *Rules for Courts-Martial* (R. C. M.) 307, MCM, 1984.

Block 12: Informing Accused of Charges-Line out information where appropriate.

a. Date—This entry will be the date that the accused is formally informed of the charges.

b. Typed Name of Immediate Commander—Type the name of the person who actually informs the accused of the charges. Often, this person is the discipline officer and the block will be marked accordingly.

c. Grade-Refer to the example in the affidavit sections for typing grade.

d. Organization of Immediate Commander—Type in the name of the unit or organization that the person informing the accused belongs to. Example: USS Midway (CV 47) or U.S. Naval Support Activity, Naples, Italy.

e. Signature—This entry will bear the signature of the person who actually informs the accused of the charges. This person personally signs the original charge sheet and all copies. R.C.M. 308, MCM, 1984, states that the accused's immediate commander will cause the accused to be informed of the charges against him or her and the name of the accuser. This is done by the immediate commander personally informing the accused and signing or certifying with his or her signature that he or she has caused this to be done.

Block 13: Receipt for Sworn Charges.

a. Designation of Command or Officer Exercising Summary Court-Martial Jurisdiction-Type in the name of the activity or the name of the officer holding that designation.

b. Typed Name of Officer—Type in the name of the individual who will sign.

c. Grade—Refer to the example for affidavit.

d. Official Capacity of Officer Signing—What position does the individual who is signing hold within the command? Is it adjutant, judge advocate, or personnel officer? The position may be the commander or a subordinate authorized to sign for him or her. When the commander signs personally, strike out the inapplicable words FOR THE appearing above the signature line; for example, ~~FOR THE~~ COMMANDER

e. Date/Hour—The date of receipt of the charges is extremely important. If this date occurs during the running of the statute of limitations, the accused can be tried by court-martial. If this date occurs after the running of the statute of limitations, the accused is not liable to be tried by court-martial. Leave the hours section blank until receipt of the sworn charges has been signed, then the officer signing will pen in the hours entry.

Block 14: Referral of Charges.

a. Designation of Command of Convening Authority—Type in the name of the activity. For ships, type in uppercase and include the hull number.

b. Place—Give the geographical location of all activities other than ships. For ships, leave blank.

c. Date—This entry will be the date that the convening authority (CA) refers the charges for court-martial.

d. Convened by—Type in the convening order number and its date; for example, my Special

Court-Martial Convening Order 1-CY of 1 January 19CY.

e. Subject to the Following Instructions—The CA may have any number of instructions about a case being referred to court-martial. In this event, the CA would state in this section what instructions or conditions are applicable. These instructions could include (1) that the charges against the accused be tried with certain other charges; (2) that the CA is referring a capital offense as noncapital if the death penalty is not mandatory (when a CA has this discretion to refer a capital case as noncapital, he or she should refer to the criteria found in R.C.M. 1004); (3) that no bad-conduct discharge (BCD) be adjudged; and (4) instructions on amending orders to the court-martial. **NOTE:** You must state all special instructions in the referral.

f. By Command or Order of—Referral will be by the personal order of the CA. In some instances, the CA may not be signing the charge sheet. If this should occur, reflect it by showing the signer's authority.

If the CA is signing (which is usually the case), then this section would be lined out by using slashes. **SPECIAL NOTE:** If the only officer present in the command refers the charges to an summary court-martial (SCM) and serves as SCM officer, complete the referral with this additional comment: Only Officer Present in the Command.

#### Block 15: Service of Charges.

a. Date—Type or handwrite in the date that service upon the accused is made.

b. Typed Name of Trial Counsel—Type in the full name of the TC.

c. Grade or Rank of Trial Counsel—Example: LT, JAGC, USNR (spell out if room allows).

d. Signature—The TC signs his or her name as typed in this block.

If charges are for trial by SCM, this section would reflect that the summary court served the accused. This process would be done by typing slashes through the words *Trial Counsel* and replacing them with the words *Summary Court*.

The TC is responsible for serving the accused. Some items to keep in mind at this point are that you or the TC must actually give a copy of the charges to the accused. Substitute service upon the defense counsel (DC) is not enough. Service should be made immediately after receipt of the charges by the TC. The TC promptly informs the DC that service was made.

Any questions by the accused when served should be referred to the respective DC. Changes or amendments to the charge sheet need to be brought to the attention of the DC. Any charge sheet that is amended or substantially changed must be additionally served upon the accused.

e. Service on Accused "By Direction" of the Trial Counsel—Although the TC is tasked with service of charges upon the accused, the TC may not be able to accomplish this on all occasions. If this situation should occur, follow the steps set forth below:

(1) Service section will reflect all personal information of the TC.

(2) Service "By direction of the Trial Counsel" is shown by leaving the section (caused to be) unmarked.

In time of peace, no person may, over objection, be brought to trial, including an Article 39(a) session, before a general court-martial (GCM) within the period of 5 days after service of charges, or before a special court-martial (SPCM) within a period of 3 days after service of charges.

In computing these dates, exclude the date of service. You will also exclude the date of trial. However, you will include holidays and Sundays. The accused has the right, however, to waive the mandatory waiting period and proceed to trial before the 3- or 5-day period has elapsed.

#### **Distribution Requirements**

With one accused prepare at least an original and six copies of the charge sheet. You will distribute them as follows:

1. Original—For insertion in the original record of trial
2. Copies to—TC, DC, military judge, accused, court reporter, and the file

This is a recommended distribution. Numbers may vary depending upon local practices.

#### **CONVENING AND AMENDING ORDERS**

Courts-martial are convened by means of a convening order issued by the CA. The convening order must be personally signed by the CA. Without a convening order, no court-martial can be held, with one exception; the exception is when only one officer is attached to a command. In this case, he or she is the

SCM of the command and no order detailing him or her is needed.

A court is usually created to hear several cases, but may in fact hear only one. In detailing a new court, the old court should not be dissolved nor should the old convening order be rescinded or revoked. One good reason for this is if the court that heard a case that was returned for proceedings in revision has been dissolved there can be no proceedings in revision.

Circumstances will determine whether a new court will be convened to hear the case or whether the case will be referred to an existing court. In the first instance, there will be a new convening order prepared. In the latter, a current convening order may be used, or it may be amended as necessary. Amendments may become necessary when there is an insufficient number of officer members available or when the court may be reduced below a quorum, or when the assignment of enlisted members is required according to the request of an enlisted accused.

### Preparation

A convening order for a GCM or an SPCM will designate the type of court-martial and detail the members and may also designate where the

court-martial will meet. If the CA has been designated by the secretary concerned, the convening order will state this. Refer to appendix 6 of the MCM for forms for orders convening courts-martial. Figure 6-2 illustrates a convening order for an SCM. Figure 6-3 shows a convening order for an SPCM. Figure 6-4 shows a convening order for a GCM.

The members, military judge, and counsel may be changed by an authority competent to detail such persons. Changes of the members of the court-martial should be kept to a minimum. If extensive changes are necessary and no session of the court-martial has begun, it may be appropriate to withdraw the charges from one court-martial and refer them to another.

When new persons are added as members or counsel or when substitutions are made as to any members or counsel or the military judge, such persons are detailed in the same manner as original members. An order changing the members of the court-martial, except one that excuses members without replacements, is reduced to writing and is called an amending order. Figure 6-5 shows an SPCM amending order permanently adding officer members to a previously established court. Figure 6-6 shows an SPCM amending order temporarily adding officer members to a previously established court for a

<p>DEPARTMENT OF THE NAVY Naval Air Station Norfolk Norfolk, Virginia 23511</p>	<p>17 July 19CY</p>
<p><u>SUMMARY COURT-MARTIAL CONVENING ORDER 1-CY</u></p>	
<p>Pursuant to authority contained in paragraph 0120c, Judge Advocate General of the Navy Instruction 5800.7C, of 3 October 1990, Lieutenant Water T. Door, U.S. Navy, is detailed a summary court-martial.</p>	
<p>PAUL T. BOAT Commanding Officer Naval Air Station Norfolk Norfolk, Virginia</p>	

Figure 6-2.-Summary court-martial convening order.



DEPARTMENT OF THE NAVY  
Naval Air Station Norfolk  
Norfolk, Virginia 23511

17 July 19CY

SPECIAL COURT-MARTIAL CONVENING ORDER 1-CY

Pursuant to authority contained in paragraph 0120b, Judge Advocate General of the Navy Instruction 5800.7C, of 3 October 1990, a special court-martial is convened with the following members:

Lieutenant Commander John A. Doe, U.S. Navy;  
Lieutenant Jack R. Frost, U.S. Navy;  
Lieutenant Mary N. Christmas, U.S. Navy;  
Lieutenant Junior Grade Floss A. Brush, U.S. Navy; and  
Chief Warrant Officer Very C. Pistol, U.S. Navy.

PAUL T. BOAT  
Commanding Officer  
Naval Air Station Norfolk  
Norfolk, Virginia

**Figure 6-3. Special court-martial convening order.**

DEPARTMENT OF THE NAVY  
Naval Air Station Norfolk  
Norfolk, Virginia 23511

17 July 19CY

GENERAL COURT-MARTIAL CONVENING ORDER 1-CY

Pursuant to authority contained in paragraph 0120a, Judge Advocate General of the Navy Instruction 5800.7C, of 3 October 1990, a general court-martial is convened with the following members:

Commander John A. Hull, SC, U.S. Navy;  
Lieutenant Commander Open A. Hatch, U.S. Navy;  
Lieutenant Drag A. Line, U.S. Navy;  
Lieutenant Able B. Seaman, U.S. Navy;  
Lieutenant Junior Grade Jane B. Doe, U.S. Navy;  
Ensign Water T. Door, U.S. Naval Reserve; and  
Chief Warrant Officer Paul A. Craft, U.S. Navy.

PAUL T. BOAT  
Commanding Officer  
Naval Air Station Norfolk  
Norfolk, Virginia

**Figure 6-4. General court-martial convening order.**

DEPARTMENT OF THE NAVY  
Naval Air Station Norfolk  
Norfolk, Virginia 23511

26 July 19CY

SPECIAL COURT-MARTIAL AMENDING ORDER 1A-CY

The following members are detailed to the special court-martial convened by order 1-CY, this command, dated 17 July 19CY:

Lieutenant Junior Grade Jane B. Doe, U.S. Navy; and  
Lieutenant Junior Grade John A. Doe, U.S. Navy.

PAUL T. BOAT  
Commanding Officer  
Naval Air Station Norfolk  
Norfolk, Virginia

Figure 6-5. Special court-martial amending order permanently adding officer members to a previously established court.

DEPARTMENT OF THE NAVY  
Naval Air Station Norfolk  
Norfolk, Virginia 23511

26 July 19CY

SPECIAL COURT-MARTIAL AMENDING ORDER 1A-CY

The following members are detailed to the special court-martial convened by order 1-CY, this command, dated 17 July 19CY, for the trial of Aviation Storekeeper Third Class Very C. Pistol, U.S. Navy, only:

Lieutenant Junior Grade Jane B. Doe, U.S. Navy; and  
Lieutenant Junior Grade John A. Doe, U.S. Navy.

PAUL T. BOAT  
Commanding Officer  
Naval Air Station Norfolk  
Norfolk, Virginia

Figure 6-6. Special court-martial amending order temporarily adding officer members to a previously established court for a specific case only.

specific case only. Figure 6-7 shows an SPCM amending order used to permanently remove officer

members from a previously established court without replacement members. Figure 6-8 shows an SPCM

DEPARTMENT OF THE NAVY  
Naval Air Station Norfolk  
Norfolk, Virginia 23511

26 July 19CY

SPECIAL COURT-MARTIAL AMENDING ORDER 1A-CY

The following members, detailed to the special court-martial convened by order 1-CY, this command, dated 17 July 19CY, are hereby relieved:

Lieutenant Mary N. Christmas, U.S. Navy; and  
Lieutenant Junior Grade Floss A. Brush, U.S. Navy.

PAUL T. BOAT  
Commanding Officer  
Naval Air Station Norfolk  
Norfolk, Virginia

**Figure 6-7.-Special court-martial amending order permanently removing officer members from a previously established court without replacement members.**

DEPARTMENT OF THE NAVY  
Naval Air Station Norfolk  
Norfolk, Virginia 23511

26 July 19CY

SPECIAL COURT-MARTIAL AMENDING ORDER 1A-CY

The following members, detailed to the special court-martial convened by order 1-CY, this command, dated 17 July 19CY, are hereby relieved for the trial of Yeoman Third Class Pull A. Line, U.S. Navy, only:

Lieutenant Mary N. Christmas, U.S. Navy; and  
Lieutenant Junior Grade Floss A. Brush, U.S. Navy.

PAUL T. BOAT  
Commanding Officer  
Naval Air Station Norfolk  
Norfolk, Virginia

**Figure 6-8.-Special court-martial amending order temporarily removing officer members from a previously established court without replacements for a specific case only.**

amending order used to temporarily remove officer members from a previously established court without replacements for a specific case only. Figure 6-9 shows a GCM amending order used to permanently remove an officer member from a previously established court and replace that member with a new officer member.

The previous samples show some of the various types of amending orders and the intended purposes of each different type. These samples can be modified for use in amending either an SPCM or a GCM convening order simply by changing the heading and the body to read the appropriate type of order. Keep in mind, however, that the basic format of these samples will not change regardless of the type of order you are amending.

### **Distribution**

The original convening order and any amendments are inserted in the original record of trial. Provide copies of the convening order and any amending orders to the TC, DC, military judge, court reporter, and the file.

### **PRETRIAL AGREEMENTS**

What is a pretrial agreement? As the name itself indicates, a pretrial agreement is an agreement made

before the trial between the accused and the CA. The agreement stipulates the maximum sentence that the CA will approve in return for a guilty plea of the accused. Actually, it is not quite that simple, as the following discussion will bear out.

### **Purpose**

Pretrial agreements are advantageous to both the government and the accused. By entering into an agreement with the CA, the accused knows in advance the maximum sentence that the CA will approve. On the other hand, through advanced planning, the government can effect savings in money and manpower while also effecting the expeditious administration of justice. Therefore, from the government's viewpoint, savings is the primary purpose of entering into pretrial agreements with accused persons. From the accused person's point of view, he or she has the advantage of knowing beforehand what his or her maximum sentence will be.

This is true provided the accused is in fact guilty and desires to plead guilty.

A pretrial agreement may include (1) a promise by the accused to plead guilty to or to enter a confessional

<p>DEPARTMENT OF THE NAVY Naval Air Station Norfolk Norfolk, Virginia 23511</p> <p style="text-align: right;">26 July 19CY</p> <p><u>GENERAL COURT-MARTIAL AMENDING ORDER 1A-CY</u></p> <p>Chief Warrant Officer CWO2 Peter Cottontail, U.S. Navy, is detailed as a member of the general court-martial convened by order number 1-CY, this command, dated 17 July 19CY, vice Lieutenant Jack A. Lantern, U.S. Navy, relieved.</p> <p style="text-align: right;">PAUL T. BOAT Commanding Officer Naval Air Station Norfolk Norfolk, Virginia</p>
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**Figure 6-9.** General court-martial amending order permanently removing an officer member from a previously established court and replacing that member with a new officer member.

stipulation as to one or more charges and specifications and to fulfill such additional terms or conditions that may be included in the agreement and that are not prohibited and (2) a promise by the CA to do one or more of the following: (a) refer the charges to a certain type of court-martial; (b) refer a capital offense as noncapital; (c) withdraw one or more charges and specifications from the court-martial; (d) have the TC present no evidence as to one or more specifications or portions thereof; and (e) take specified action on the sentence adjudged by the court-martial.

### **Execution of Agreements**

Pretrial agreements may be entered into in both GCMs and SPCMs. No provision exists for entering into a pretrial agreement in SCMs. Pretrial agreement negotiations may be initiated by the accused, DC, TC, SJA, and CA, or their duly authorized representatives. Either the defense or the government may propose any term or condition not prohibited by law or public policy. Government representatives negotiate with the DC unless the accused has waived the right to counsel. In GCMs, the TV works through the CA's SJA in making his or her recommendations about the offer to the CA. However, in SPCMs, this procedure is not required if the CA has no SJA.

After negotiations, if the accused elects to propose a pretrial agreement, the defense submits a written offer. All terms, conditions, and promises between the parties are contained in this offer. The proposed agreement is personally signed by the accused and DC, if any. If the agreement contains any specified action on the adjudged sentence, that action will be set forth on a page separate from the other portions of the agreement.

The CA may either accept or reject an offer of the accused to enter into a pretrial agreement, or may propose by a counteroffer any terms or conditions not prohibited by law or public policy. The decision whether to accept or reject an offer is within the sole discretion of the CA. When the CA has accepted a pretrial agreement, the CA, or an authorized representative such as the SJA or the TC, signs the agreement.

The accused may withdraw from a pretrial agreement at any time. The CA may withdraw from a pretrial agreement under the following circumstances: (1) any time before the accused begins performance of promises contained in the agreement, (2) upon the failure by the accused to fulfill any material promise or condition in the agreement, (3) when inquiry by the

military judge discloses a disagreement as to a material term in the agreement, or (4) if findings are set aside because a pica of guilty is held improvident on appellate review.

A suggested form for such an agreement for GCMs and SPCMs is shown in figure 6-10. See also appendix A-1-h of the *JAG Manual* for an example of a pretrial agreement. You must modify the format of the agreement as necessary to include all the terms of the agreement made between the accused and the CA. No matters that are "understood" between the accused and the CA should be omitted from the written agreement.

Except in an SPCM without a military judge, no member of a court-martial may be informed of the existence of a pretrial agreement. In addition, the fact that an accused offered to enter into a pretrial agreement and any statements made by an accused in connection with that offer, whether during negotiations or during the providence inquiry, may not be disclosed to the members. Also, the court may not be informed of any such agreement made and later rejected by the accused who has decided to plead not guilty at trial. You should use caution to prevent the court from obtaining any unofficial knowledge of the negotiation for, or existence of, a pretrial agreement. However, the military judge is authorized to examine the pretrial agreement in those cases that he or she sits with members. The military judge is not authorized to examine or inquire into that part of the agreement that states the specific sentence agreed upon by the accused and CA in those cases that the military judge hears alone (without members). The existence of a pretrial agreement does not prevent the accused from presenting matter in mitigation and extenuation. Counsel for the accused also has a continuing duty, in spite of a pretrial agreement, to vigorously represent the accused before the court with respect to the sentence to be adjudged.

Actually, the accused benefits in two ways by entering into a pretrial agreement. First, if the court adjudges a greater sentence than provided for in the pretrial agreement, the CA must reduce the sentence according to the terms of the agreement. However, if the court adjudges a lesser sentence than provided for in the pretrial agreement, the CA may not increase the sentence as provided for in the agreement and the accused must only serve the lesser sentence as adjudged by the court. Further information on pretrial agreements is contained in the *JAG Manual*.

MEMORANDUM OF PRETRIAL AGREEMENT  
GENERAL AND SPECIAL COURTS-MARTIAL  
(See JAGMAN 0137)

MEMORANDUM OF PRETRIAL AGREEMENT

UNITED STATES

Place \_\_\_\_\_

v.

Date \_\_\_\_\_

\_\_\_\_\_  
(Name)

\_\_\_\_\_  
(Rate/Grade)

\_\_\_\_\_  
(SSN)

I, \_\_\_\_\_, the accused in a \_\_\_\_\_ court-martial, do hereby certify:

That, for good consideration and after consultation with my counsel, I do agree to enter a voluntary plea of GUILTY to the charges and specifications listed below, provided the sentence as approved by the convening authority will not exceed the sentence hereinafter indicated by me:

That it is expressly understood that, for the purpose of this agreement, the sentence is considered to be in these parts, namely: the punitive discharge, period of confinement or restraint, amount of forfeiture or fine, and reduction in rate or grade;

That should the court award a sentence which is less, or a part thereof is less, than that set forth and approved in the agreement, then the convening authority, according to law, will only approve the lesser sentence;

That I am satisfied with my defense counsel in all respects and consider him or her qualified to represent me in this court-martial;

That this offer to plead guilty originated with me and my counsel that no person or persons whomsoever have made any attempt to force or coerce me into making this offer or pleading guilty;

That my counsel has fully advised me of the meaning and effect of my guilty pleas and that I fully understand and comprehend the meaning thereof and all of its attendant effects and consequences, including the possibility that I may be processed for an administrative discharge, even if part of or all of the sentence, including a punitive discharge, is suspended or disapproved pursuant to this agreement;

That I understand that I may ask permission to withdraw my plea of guilty at any time before sentence is announced, and that the military judge may, at his discretion, permit me to do so; and

That I understand this offer and agreement and have been advised that it cannot be used against me in the determination of my guilt on any matters arising from the charges and specifications made against me in this court-martial.

That it is expressly understood that the pretrial agreement will become null and void in the event (1) I fail to plead guilty to each of the charges and specifications set forth below, (2) the court refuses to accept my plea of guilty to any of the charges and specifications set forth below, (3) the court accepts each of my pleas but, before the time sentence is announced, I ask permission to withdraw any of my pleas, and the court permits me to do so, and (4) the court initially accepts my plea of guilty to each of the charges and specifications set forth below but, before the time the sentence is adjudged, the court sets aside any of my guilty pleas and enters a plea of not guilty on my behalf.

Figure 6-10.-Memorandum of pretrial agreement for general and special courts-martial.

CHARGES PREFERRED:

GUILTY PLEA BY ACCUSED TO:

<u>Article #</u>	<u>Description</u>	<u>Article #</u>	<u>Description</u>
1.			
2.			
3.			

MAXIMUM SENTENCE TO BE APPROVED BY CONVENING AUTHORITY

See maximum sentence appendix to memorandum of pretrial agreement.

Signed: \_\_\_\_\_  
Name of accused/date and place

Witness: \_\_\_\_\_ (Defense counsel/date/place)  
\_\_\_\_\_ Statement of qualification where appropriate

Witness: \_\_\_\_\_ (Name/date/place; statement of qualification of additional defense counsel, when used)

The foregoing agreement is [approved] [disapproved].

\_\_\_\_\_  
Signature, grade, and title of convening authority

MAXIMUM SENTENCE APPENDIX TO  
MEMORANDUM OF PRETRIAL AGREEMENT

UNITED STATES

Place \_\_\_\_\_

v.

Date \_\_\_\_\_

\_\_\_\_\_  
Name

\_\_\_\_\_  
Rate/Grade

\_\_\_\_\_  
SSN

Maximum Sentence to be Approved by Convening Authority

1. Punitive Discharge: [character of and, if on probation, term thereof]
2. Confinement or Restraint: [amount and kind]
3. Forfeiture or Fine: [amount and duration]
4. Reduction to: [rate or grade]

Signed: \_\_\_\_\_  
Name of accused/date/place

Witness: \_\_\_\_\_ [Defense counsel/date/place]

Witness: \_\_\_\_\_ [Name, date and place]

Figure 6-10.—Memorandum of pretrial agreement for general and special courts-martial—Continued.

## GRANTS OF IMMUNITY

In certain cases involving more than one participant, the interests of justice may make it advisable to grant immunity, either transactional or testimonial, to one or more of the participants in the offense. Issuance of a grant of immunity is in consideration for an individual testifying for the government or the defense in the investigation and/or the trial of the principal offender. Transactional immunity means immunity from prosecution for any offense or offenses that the compelled testimony relates. Testimonial immunity means immunity from the use of testimony or other information compelled under an order to testify (or any information directly or indirectly derived from such testimony or other information).

The authority to grant either transactional or testimonial immunity to a witness is reserved to officers exercising general court-martial jurisdiction (OEGCMJs). This authority may be exercised in any case, whether or not formal charges have been preferred, and whether or not the matter has been referred for trial. The approval of the Attorney General of the United States on certain orders to testify may be required, as outlined in the following paragraph.

### Procedure

A written recommendation that a certain witness be granted either transactional or testimonial immunity in consideration for testimony essential to the government or to the defense must be sent to the OEGCMJ. A sample proposed grant of immunity request from a TC is shown in figure 6-11. If the case has been referred for trial, the TC sends the recommendation. If the case has not been referred for trial, then the pretrial investigating officer, the counsel or recorder of any other fact-finding body, or the investigator when no charges have been preferred sends the recommendation. The recommendation must state in detail why the testimony of the witness is so essential or material that the interests of justice cannot be served without the grant of immunity. Before acting on the recommendation, the OEGCMJ refers it to his or her SJA for consideration and advice. If approved, a copy of the written grant of immunity must be served upon the accused or his or her DC within a reasonable time before the witness testifies. Additionally, if any witness is expected to testify in response to a promise of leniency, the terms of the promise of leniency must be reduced to writing and served upon the accused or his or her DC in the same manner as a grant of immunity. Figure 6-12 illustrates a sample transactional grant of

immunity. Figure 6-13 shows a sample of a testimonial grant of immunity.

### Civilian Witnesses

When the testimony of a civilian witness is considered necessary at a court-martial, and the civilian witness has refused or is likely to refuse to testify or provide other information on the basis of his or her privilege against self-incrimination, the approval of the Attorney General of the United States, or his or her designee, must be obtained before the OEGCMJ may issue an order to the civilian witness to testify.

In all cases that approval of the Attorney General of the United States is required before issuance of a grant of immunity, the cognizant OEGCMJ sends by message or letter the proposed order to testify and grant of immunity to the Judge Advocate General (JAG).

The order to testify should be in the form set forth in appendix A-1-i(3) of the *JAG Manual* and as shown in figure 6-14. Requests for assistance will be in writing, and you should allow at least 3 weeks for consideration. The request must contain the following:

- Name, citation, or other identifying information of the proceeding in which the order is to be used
- Name of the individual for whom the immunity is requested
- Name of the employer or company that the witness is associated with
- Date and place of birth, if known, of the witness
- FBI number or local police number, if any, and if known
- Whether any state or federal charges are pending against the prospective witness and the nature of the charges
- Whether the witness is currently incarcerated, under what conditions, and for what length of time
- A brief resume of the background of the investigation or proceeding
- A concise statement of the reasons for the request, including the following information:

What testimony the prospective witness is expected to give



17 Apr CY

From: LCDR Jack R. Frost, JAGC, USN, Trial Counsel, Naval Legal Service Office, Norfolk

To: Commander Naval Base, Norfolk

Subj: PROPOSED GRANT OF IMMUNITY ICO UNITED STATES V. SN JOHN A.DOE, U.S. NAVY, 111-11-1111

Ref: (a) JAGMAN, Section 0138

(b) R.C.M. 704, MCM, 1984

1. In accordance with the authority and procedures contained in references (a) and (b), it is recommended that a grant of immunity be extended to SA Jon T. Boate, U.S. Navy, 123-45-6789, in consideration for his testimony at an Article 32 investigation convened by Commanding Officer, Naval Station, Norfolk, Virginia.

2. SA Boate has been tried for his involvement in a larceny of private property and housebreaking. Upon completion of final review, SA Boate could be forced to testify without this grant of immunity. To increase the chances of success in presenting evidence before the Article 32 investigating officer and to strengthen the circumstantial evidence case against SN Doe about the damaging personal property charge, however, it is recommended that SA Boate be granted immunity for his testimony. Removal of the threat of further prosecution for offenses other than those for which he was already tried is also an important factor in this recommendation.

3. It is anticipated that SA Boate will provide key testimony in the case of SN Doe. The larceny and housebreaking charges, of which Boate was a co-conspirator, amount to almost \$5,000.00. Boate will further provide testimony on the damaging of the personal property, as Doe told Boate shortly after the incident what he had done. Additionally, this grant of immunity costs the government nothing in terms of legal advantage or expense.

4. Your signature above your typed name at the base of subject grant will bring it into effect. The proposed grant is attached for your consideration.

JACK R. FROST

Figure 6-11.-Sample request for a proposed grant of immunity.

GRANT OF IMMUNITY

IN THE MATTER OF

\_\_\_\_\_ )

\_\_\_\_\_ )

\_\_\_\_\_ )

GRANT OF IMMUNITY

To: (Witness to whom immunity is to be granted)

1. It appears that you are a material witness for the government in the matter of [if charges have been preferred, set forth a full identification of the accused and the substance of all specifications preferred].

2. In consideration of your testimony as a witness for the government in the foregoing matter, you are hereby granted immunity from prosecution for any offense arising out of the matters therein involved concerning which you may be required to testify under oath.

3. It is understood that this grant of immunity from prosecution is effective only upon the condition that you actually testify as a witness for the government. It is further understood that this grant of immunity from prosecution extends only to the offense or offenses that you were implicated in the matter herein set forth and concerning which you testify under oath.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Grade, title

Figure 6-12. Sample transactional grant of immunity.

GRANT OF IMMUNITY

IN THE MATTER OF

\_\_\_\_\_ )

\_\_\_\_\_ )

\_\_\_\_\_ )

GRANT OF IMMUNITY

To: (Witness to whom immunity is to be granted)

1. It appears that you are a material witness for the government in the matter of [if charges have been preferred, set forth a full identification of the accused and the substance of all specifications preferred].

2. In consideration of your testimony as a witness for the government in the foregoing matter, you are hereby granted immunity from the use of your testimony or other information given by you (or any other information directly or indirectly derived from such testimony or other information) against you in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with an order to testify in this matter.

3. It is understood that this grant of immunity from the use of your testimony or other information given by you (or other information directly or indirectly derived from such testimony or other information) against you in any criminal case is effective only upon the condition that you testify under oath as a witness for the government.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Grade, title

Figure 6-13. Sample testimonial grant of immunity.

How this testimony will serve the public interest

Whether the witness has invoked the privilege against self-incrimination, or is likely to invoke the privilege

If the witness is likely to invoke the privilege against self-incrimination, why is it anticipated that he or she will do so

- An estimate as to whether the witness is likely to testify in the event immunity is granted

ORDER TO TESTIFY  
IN THE MATTER OF

\_\_\_\_\_ )

\_\_\_\_\_ )

\_\_\_\_\_ )

ORDER TO TESTIFY

To: (Witness to whom immunity is to be granted)

1. As an officer empowered to convene general courts-martial and pursuant to the provisions of sections 6002 and 6004, Title 18, United States Code, I hereby make the following findings:

a. That (name of witness) possesses information relevant to the pending trial by general court-martial of \_\_\_\_\_, and that the presentation of his or her testimony at this trial is necessary to the public interest; and

b. That it is likely that (name of witness) would refuse to testify on the basis of his privilege against self-incrimination if subpoenaed to appear as a witness.

2. On the basis of these facts, and pursuant to section 6004, Title 18, United States Code, I hereby order (name of witness) to appear and testify before the general court-martial convened for the trial of \_\_\_\_\_. In accordance with section 6002, Title 18, United States Code, no testimony or other information given by (name of witness) (or any information directly or indirectly derived from such testimony or other information) can be used against him or her in any criminal case, except a prosecution for perjury, giving false statement, or otherwise failing to comply with this order.

3. This order is issued with the approval of the Attorney General of the United States set forth in enclosure (1) annexed hereto.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Grade, title

Figure 6-14. Sample order to testify.

After a civilian witness immunized has testified, provide the following information to the United States Department of Justice, Criminal Division, Immunity Unit, Washington, DC 20530, via JAG:

- Name, citation, or other identifying information of the proceeding in which the order was requested
- Date of the examination of the witness
- Name and residence address of the witness
- Whether the witness invoked the privilege against self-incrimination
- Whether the immunity order was used
- Whether the witness testified pursuant to the order
- If the witness refused to comply with the order, whether contempt proceedings were instituted, or are contemplated, and the result of the contempt proceeding, if concluded

Provide a copy of this correspondence with a verbatim transcript of the witness' testimony, properly authenticated by the military judge, to JAG at the conclusion of the trial. No testimony given by a civilian witness following an order to testify can be used against him or her in any criminal case, except a prosecution for perjury, giving a false statement, or failing to comply with the order in some other manner.

In all cases involving national security or foreign relations of the United States, the cognizant OEGCMJ sends in the form prescribed in the *JAG Manual*, section 0139, any proposed grant of immunity to JAG for consultation with the Department of Justice.

### **Forms of Grants of Immunity**

In any case that a military witness is granted transactional immunity, the GCM CA executes a written grant in the form set forth in the *JAG Manual*, appendix A-1-i(1). In any case that a witness is granted testimonial immunity, the GCM CA executes a written grant in the form set forth in the *JAG Manual*, appendix A-1-i(2).

### **REQUEST FOR INDIVIDUAL MILITARY COUNSEL AND WITNESSES**

An accused has the right to request representation by a military counsel of his or her own choosing at an

SPCM or a GCM. The accused also has the right to request any witnesses desired for his or her defense to be made available for the court-martial.

### **Individual Military Counsel**

An accused has the right to be represented before a GCM or an SPCM by civilian counsel and either by the military counsel detailed to him or her or by military counsel of the accused's own selection, if reasonably available. An accused may request a determination of the availability of only one individual military counsel at a time.

A request for a specific individual military counsel should be in writing, showing the duties and location of the requested counsel, if known. The request must clearly state whether there is an existing attorney-client relationship between the accused and the requested military counsel regarding the charge(s) in question. The request also must indicate whether the requested military counsel has any unique or special qualifications pertinent to the case and specify those qualifications in the request. The accused or the detailed DC makes the request and submits it through the TC, if any, to the CA.

If the requested military counsel is a member of the Army, Air Force, Coast Guard, or Navy and there is no claim of an existing authorized attorney-client relationship regarding the charge(s) in question, the CA will promptly deny the request and inform the accused in writing. In all other cases, the CA sends the request to the commander of the requested counsel. For counsel assigned to a naval legal service office (NLSO) detachment, the commander of such counsel is the CO of the cognizant NLSO.

The CA provides that authority with the following information: (1) the nature and complexity of the charges and legal issues involved in the case; (2) the estimated duration of the necessary absence (travel, preparation, and participation in the proceeding); (3) the experience level and any special or unique qualifications of the detailed DC; and (4) other information or comments that are appropriate.

The commander of the requested military counsel determines whether such counsel will be reasonably available. In making that determination, the commander assesses the impact upon the command should the requested counsel be made available. The commander may consider, among others, the following factors: (1) the anticipated duties and workload of the requested military counsel including authorized leave; (2) the estimated duration of the necessary absences; (3)

any unique or special qualifications relevant to the proceedings possessed by the requested counsel; (4) the ability of other counsel to assume the duties of the requested counsel; (5) the nature and complexity of the charges or legal issues involved in the proceedings; (6) the experience level; and (7) any information or comments of the CA. If a determination of unavailability is made, the reasons are set forth in writing and provided to the CA and the accused. The decision whether a requested military counsel will be available to act as an individual military counsel is an administrative determination within the sole discretion of the commander of the requested counsel.

If a determination of unavailability is made regarding a requested individual military counsel, the accused may appeal that decision to the immediate superior in command of the authority who made the determination, via that authority. The basis for such appeal will normally be an abuse of discretion. If, however, the accused claims that the person who made that determination did not have the authority to do so, or did so on the basis of inaccurate or incomplete information, the reviewing authority considers those allegations and, if warranted, directs corrective action. Prompt review of the appeal is required and, after a decision is made, the commander of the requested military counsel, the CA, and the accused are promptly informed of the decision.

## **Witnesses**

The Sixth Amendment to the United States *Constitution* provides “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor. . . .” The TC and the DC have equal opportunity to obtain witnesses and other evidence.

The TC must take timely and appropriate action to provide for the attendance of the witnesses who have personal knowledge of the fact at issue in the case for both the prosecution and defense.

If the TC is satisfied that a prosecution witness on the merits is both relevant and necessary, then the CA should produce the witness for trial. Although the decision belongs to the CA, failure to produce these witnesses may have a harmful impact on the outcome of the case.

The TC arranges for the presence of any witness listed by the defense unless the TC contends that the witness’ production is not required under the rules for

courts-martial. If the TC contends production is not required, the defense can renew the matter at trial before the military judge.

The defense request for the personal appearance of a witness on the merits must be submitted in writing together with a statement signed by counsel requesting the witness. The request must contain (1) the telephone number, if known, as well as the location or address of the witness and (2) a synopsis of the expected testimony of the witness that is enough to show its relevance and necessity.

In determining whether the personal appearance of a defense witness requested on the merits is necessary, the CA and/or the military judge refers to the following factors:

- The issues involved in the case
- The importance of the requested witness to these issues (Does the testimony of the witness tend to prove or disprove a fact in issue in the case?)
- The total impact of the witness’ testimony in light of other witnesses
- The availability of any acceptable evidentiary substitutes for the production of the witness

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

**MILITARY WITNESSES.**— Military witnesses in the same location as the trial or other proceedings may be informally requested to attend through their respective COs. If a formal written request is required, it should be sent through the regular channels.

In the event that a military witness is located at a place other than the location of the trial, and travel at government expense is required, the appropriate superior will be requested to issue the necessary orders. Normally, the CA will contact the command that the witness is attached to and will furnish the accounting data for the witness. The cost of travel and per diem of military personnel and civilian employees of the Department of the Navy is charged to the operation and maintenance allotment that supports temporary additional duty (TAD) travel for the CA of the court-martial.

It is a violation of Article 92, UCMJ, for a military witness to refuse to appear at trial after having received a lawful order to do so.

**CIVILIAN WITNESSES.**— Like a military witness, a civilian witness can be given an order to attend a court-martial. This order is called a subpoena. Technically, this subpoena is from the President of the United States to the witness. The TC of a court-martial is authorized to issue a subpoena, in the President's name, to any civilian who is a material witness and is within any part of the United States, its territories, or its possessions. The subpoena is prepared in duplicate on DD Form 453. Figure 6-15 is an example of a properly prepared subpoena. Instructions for completion of the form are contained on the form itself.

The subpoena is not necessary if the witness appears voluntarily at no expense to the United States. Civilian employees of the Department of Defense may be directed by appropriate authorities to appear as witnesses in courts-martial as an incident of their employment. Appropriate travel orders may be issued for this purpose. A subpoena may not be used to compel a civilian to travel outside the United States and its territories. A witness must be subject to United States jurisdiction to be subject to a subpoena. Foreign nationals in a foreign country are not subject to a subpoena. Their presence may be obtained through cooperation of the host nation.

**Warrant of Attachment.**— A warrant of attachment may be necessary to compel a witness to appear. It may, however, be issued only upon probable cause to believe that the witness was duly served with a properly issued subpoena, that appropriate fees and mileage were tendered to the witness, that the witness is material, that the witness refused or willingly neglected to appear at the time and place specified on the subpoena, and that no valid excuse reasonably appears for the witness' failure to appear. All documents in support of the warrant are attached, together with the charge sheet and convening order.

**Travel Order.**— Civilian witnesses who are employees of the Department of Defense may be directed to appear as a witness in a court-martial as an incident of their employment. If so, appropriate orders may be issued for that purpose. See figure 6-16. The travel order must accompany the service of the subpoena in one original and two copies.

**Payments.**— In processing a payment to a civilian witness, you will have to maintain close coordination with the disbursing office. While disbursing personnel

are responsible for computing and paying travel money to witnesses, the witness may look to you, as an LN, to make sure he or she is properly paid. You may have to assist the witness in filling out his or her claim for travel pay and fees and assemble all the necessary paper work before sending the witness to disbursing for payment. Therefore, if it becomes apparent that you will have a witness to be paid, you should make sure you have had advance contact with disbursing and administrative personnel to know what paper work they require to be sure smooth payments are made when a witness presents his or her claim.

**Messing and Berthing.**— You should make advance arrangements for a witness needing messing and berthing. A military witness is normally berthed in the bachelor enlisted quarters (BEQ) or bachelor officer quarters (BOQ), as appropriate. A civilian witness may be berthed in the BOQ or in civilian facilities at his or her own expense, if available. If possible, you should contact a civilian witness in advance to determine his or her desire concerning messing and berthing.

### **Subpoenas**

A subpoena is a court order requiring a person to testify in either a civil or criminal case as a witness. As an LN, you may be required to be sure military personnel are served properly with subpoenas and they understand when and if they are entitled to reimbursement.

**ON BEHALF OF THE FEDERAL GOVERNMENT.**— Where Department of the Navy interests are involved and departmental personnel are required to testify for the Navy, the Bureau of Naval Personnel (BUPERS) or Commandant of the Marine Corps (CMC) will direct the command to which the witness is attached to issue TAD orders. Costs of such orders are borne by the command. In the event Department of the Navy interests are not involved, the Navy will be reimbursed by the concerned federal agency.

**ON BEHALF OF THE ACCUSED IN FEDERAL COURT.**— When naval personnel are served with a subpoena and appropriate fees and mileage are tendered, COs should issue no-cost permissive orders unless the public interest would be seriously prejudiced by the member's absence from the command. In those cases where fees and mileage are not tendered as required by the Federal Rules of Criminal Procedure, but the person subpoenaed still desires to attend, the CO is authorized to issue permissive orders at no cost to the government. The individual should be advised that an agreement to





TRAVEL ORDER

Payment of travel allowances is authorized pursuant to 10 U.S.C. § 847 and 28 U.S.C. § 1821. You should travel from Anywhere, OH in sufficient time to arrive at NAS Pensacola, FL on the date and at the time specified. You will be paid fees and expenses for attendance at the specified hearing and travel directly to and from that place. You may travel by  rail,  commercial or military aircraft,  bus, or  privately owned automobile.

You  have  have not been given a "Government Transportation Request" to exchange for commercial tickets. No mileage will be paid for any transportation provided by the Government in kind or by Government Transportation Request. If a Government Transportation Request is not given to you and you travel by commercial carrier at personal expense, reimbursement for your cost of transportation will be limited to:

- a. The least costly regularly scheduled air service between the points involved; or
- b. The cost of the rail fare and a lower berth, or the lowest first-class rail accommodation available at the time reservations were made; or
- c. Actual cost of commercial bus fare.

If you travel by private automobile, you will be reimbursed at the rate of (twenty cents \$ .20) \_\_\_\_\_ a mile, plus the cost of necessary parking fees, bridge, ferry, and other highway tolls incurred while traveling under this travel order. The total reimbursement will be limited to the cost of travel by the usual mode of common carrier, including per diem. Receipts and ticket stubs will be required to support your claim for cost of transportation and subsistence for each item in excess of (\$15.00) \_\_\_\_\_.

You will be traveling to a high-cost area.

The travel regulations designate certain cities as high cost areas. Because your attendance requires travel to one of these cities, you will be authorized an actual expense allowance instead of a per diem allowance. You will be reimbursed for the actual expenses incurred, not to exceed the maximum amount prescribed for the city involved. The expenses may include lodgings, meals, tips to waiters, bellboys, maids, porters, personal laundry, pressing and dry-cleaning, local transportation (including usual tips) between places of lodging and duty; and other necessary expenses. You must itemize your daily actual expenses on your claim and receipts for lodging and any items over (\$15.00) \_\_\_\_\_ are required.

You will not be traveling to a high-cost area.

Because you are not traveling to a high-cost area, you will be entitled to a per diem allowance to cover your expenses for lodging, meals, and incidentals. While traveling and attending the specified hearing within the continental United States, you will be authorized a per diem equal to the daily average you pay for lodging, plus (\$23.00) \_\_\_\_\_ per day for meals and incidentals, rounded off to the next dollar. If the resulting amount is more than the maximum per diem allowable, which is (\$50.00) \_\_\_\_\_, then you will be reimbursed only the maximum per diem authorized. You are required to state on your reimbursement claim that the per diem claimed is based on the average cost to you for lodging while on required travel within the continental United States during the period covered by the claim. Receipts are required for lodging. The per diem allowance for travel overseas is based on rates set by the Department of State or by the Department of Defense, and you will be reimbursed the amount specified for the particular overseas area involved.

You are entitled to an attendance fee of (\$30.00) \_\_\_\_\_ per day under 28 U.S.C. § 1821.

Address any inquiries regarding the matter to: LT I. M. BAD, JAGC, USNR, NLSO, Bldg 45, Naval Air Station, Pensacola, FL 32501

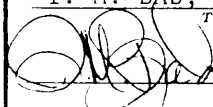
This is travel order number 94-3, dated 6 July 1994, issued by (headquarters) NAS Pensacol, FL  
TDN Accounting Citation XX111112211-XX-0

FOR THE COMMANDER

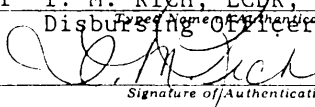
I. M. BAD, LT, JAGC, USNR, Trial Counsel I. M. RICH, LCDR, SC, USN,

*Typed Name of Approving Official*

*Typed Name of Authenticating Official*



*Signature of Approving Official*



*Signature of Authenticating Official*

Figure 6-16.-Sample DD Form 453-1, Travel Order.

will grant leave or liberty to the person provided such absence will not prejudice the best interests of the naval service. If the member is being called as a witness for a nongovernmental party only because of performance of official duties, the CO is authorized to issue the member permissive orders at no expense to the government.

### **FLYERS, WORKSHEETS, SEATING CHARTS, FORM FOR QUESTIONS BY COURT MEMBERS**

Depending upon your job assignment, you may be required to prepare some or all of these additional pretrial paper work matters. Some are prepared by the court reporter and some by defense or trial paralegals. However, it is essential that you have an understanding of these important pretrial matters.

#### **Flyers**

When you type a flyer, list only those charges and specifications that will be before the members. Check with the TC before typing because there might be changes to the charges and specification that you are not aware of.

The flyer is prepared from the charge sheet before the initial Article 39(a) session and contains all pending charges and specifications.

The renumbering of specifications that you provide to the members during preliminary instructions or *voir dire* in partial or mixed plea cases is not required because of the administrative problems and needless confusion that would be created. Instruct the members that they are not to speculate as to why the charges and specifications are numbered as they are. Use two separate flyers-one listing only charges and specifications to be litigated on findings and the other reflecting all the charges and specifications to be presented to the members for sentencing. If, in such circumstance, the DC desires to inform the members of guilty plea specifications, the record will show that the military judge asked for the views of both counsel and that the DC chose to do so for tactical considerations.

If a motion to dismiss or motion for appropriate relief is granted and the charges are amended before the seating of the panel, prepare a new flyer to reflect the amended charges. The panel members will receive only those specifications and charges that the accused is to be tried on. Figure 6-17 shows a sample flyer.

#### **Findings Worksheet**

The MCM discusses the findings worksheet in R.C.M. 921, "Discussion." Ordinarily, a findings worksheet is provided to the members as an aid to putting the findings in proper form. If the military judge examines any writing by the members, or otherwise helps them to put findings in proper form, this is done in open session and counsel is given an opportunity to examine such a writing and to be heard on any instructions the military judge may give.

The findings worksheet is designed to assist the president of a court-martial to properly announce the findings of the court-martial in open session. During an Article 39(a) session, before instructions and argument on findings, counsel for both sides and the military judge decide whether or not they feel that a lesser included offense contained within the charged offenses has been raised during the trial. After this Article 39(a) session, if required, a modified findings worksheet is prepared to reflect the decision of the court as to possible exceptions and substitutions or violations of offenses other than those charged.

The findings worksheet is generally prepared by the TC who should take care that it is tailored to the individual case. (Format for findings is shown in appendix 10 of the MCM.) A sample findings worksheet is shown in figure 6-18. The worksheet is marked as in appellate exhibit and attached to the record of trial.

In preparing the worksheet, each specification is addressed individually, as well as the charge. It is proper to allow for acquittal of all charges and specifications before allowing for conviction of all charges and specifications. This is also true for allowing the members to select Not Guilty before Guilty so as not to show prejudice toward the guilt of the accused.

If the accused pled to a lesser included offense, the members must be informed of that plea since it admits some essential elements that the government would otherwise have to prove. Do not enter findings in a member's trial on a lesser included offense plea unless the prosecution does not intend to prove the greater offense. If members will decide between the greater and lesser offense, then tailor the worksheet to limit their findings to those choices.

**SAMPLE FLYER**

Charge: Violation of the Uniform Code of Military Justice, Article 86

Specification 1: In that Seaman Drag A. Line, U.S. Navy, Naval Base, Norfolk, Virginia, on active duty, did, on or about 01 January 19CY, without authority, absent himself from his organization, to wit: Naval Base, located at Norfolk, Virginia, and did remain so absent until on or about 14 February 19CY.

Specification 2: In that Seaman Drag A. Line, U.S. Navy, Naval Base, Norfolk, Virginia, on active duty, did, on or about 17 February 19CY, without authority, absent himself from his organization, to wit: Naval Base, located at Norfolk, Virginia, and did remain so absent until on or about 04 November 19CY.

Additional Charge I: Violation of the Uniform Code of Military Justice, Article 90

Specification: In that Seaman Drag A. Line, U.S. Navy, Naval Base, Norfolk, Virginia, on active duty, having received a lawful command from Lieutenant Mary N. Christmas, U.S. Navy, his superior commissioned officer, then known by the said Seaman Drag A. Line, U.S. Navy, to be his superior commissioned officer, to "settle down and be quiet," or words to that effect, did, at Naval Base, Norfolk, Virginia, on or about 26 November 19CY, willfully disobey the same.

Additional Charge II: Violation of the Uniform Code of Military Justice, Article 121

Specification: In that Seaman Drag A. Line, U.S. Navy, Naval Base, Norfolk, Virginia, on active duty, did, at Naval Base, Norfolk, Virginia, on or about 26 November 19CY, steal a purse of a value of about \$120.00, the personal property of Yeoman First Class Jane A. Doe, U.S. Navy.

**APPELLATE EXHIBIT \_\_\_\_\_**

**Figure 6-17. Sample flyer.**

**Sentence Worksheet**

The sentence worksheet is designed to help the president of a court-martial to properly announce the

sentence of the court-martial in open court. Normally, the military judge and counsel for the prosecution and defense discuss the maximum permissible punishment for the offenses that the accused has been convicted and

UNITED STATES )

)

v. )

(Name of Accused) )

(Rank and SSN) )

(Unit) )

**FINDINGS WORKSHEET**

Note: After the members have reached their findings, the president shall strike all inapplicable language and announce:

(State name and rank of accused) this court-martial finds you:

**I. ACQUITTAL**

Of all Specifications and Charges: Not Guilty.

**II. FINDING OF NOT GUILTY ONLY BY REASON OF LACK OF MENTAL RESPONSIBILITY**

Of (the) Specification (\_\_\_\_) of (the) Charge (\_\_\_\_) and of (the) Charge (\_\_\_\_): Not Guilty only by Reason of Lack of Mental Responsibility

**III. CONVICTION OF ALL CHARGES**

Of all Specifications and Charges: Guilty

**IV. CONVICTION OF ALL SPECIFICATIONS AND SOME CHARGES**

Of all Specification(s) of Charge I: (Not Guilty) (Guilty).

Of Charge I: (Not Guilty) (Guilty)

Of all Specification(s) of Charge II: (Not Guilty) (Guilty)

Of Charge II: (Not Guilty) (Guilty)

**VI. CONVICTION BY EXCEPTIONS**

Of (the) Specification (\_\_\_\_) of Charge I: Guilty, except the words "\_\_\_\_\_" Of the excepted words: Not Guilty

Of Charge I: (Guilty) (Not Guilty, but Guilty of a violation of Article \_\_\_\_\_)

**VII. CONVICTION BY EXCEPTIONS AND SUBSTITUTIONS**

Of (the) Specification (\_\_\_\_) of Charge I: Guilty, except the words "\_\_\_\_\_" substituting therefor the words "\_\_\_\_\_" Of the excepted words: Not Guilty. Of the substituted words: Guilty

Of Charge I: (Guilty) (Not Guilty, but Guilty of a violation of Article \_\_\_\_\_)

**Figure 6-18.-Findings worksheet.**

## VIII. CONVICTION UNDER ONE CHARGE OF OFFENSES UNDER DIFFERENT ARTICLES

Of Specification 1 of (the) Charge (\_\_\_\_): Guilty. Of Specification 2 of (the) Charge (\_\_\_\_): Guilty, except the words “\_\_\_\_\_.”

Of (the) Charge (\_\_\_\_), as to Specification 1: Guilty. As to Specification 2: Not Guilty, but Guilty of a violation of Article \_\_\_\_\_.

Figure 6-18.—Findings worksheet—Continued.

any requests for instructions at an Article 39(a) session before instructions and argument on sentencing. After this Article 39(a) session, the sentence worksheet is prepared reflecting the announcement of two-thirds of the members agreeing if the sentence is to confinement for more than 10 years. In the case of a guilty plea by the accused to all charges and specifications, with a panel of members for sentencing, the sentence worksheet can be prepared before the court-martial.

A format for a sentence worksheet is shown in appendix 11 of the MCM and figure 6-19. In a special BCD court-martial, allow for discharge with a BCD. In a GCM, the worksheet also could include confinement for a period of years, forfeiture of all pay and allowances, dishonorable discharge, and dismissal from the service, depending upon the charges and specifications that the accused was convicted of, and the rank of the accused. If you have an accused who is an E-1, do not allow for his or her reduction. The sentence worksheet is labeled as an appellate exhibit and attached to the record of trial.

### Seating Chart

The members are seated with the president who is the senior member in the center and the other members alternately to the president's right and left, according to rank.

To prevent confusion for the members upon entering the courtroom, take the time to prepare a seating chart for them and show them the order that they should enter the courtroom for ease in finding their respective seats. Give a copy of the seating chart to the military judge, counsel, and yourself for identification of members during the proceedings.

A sample seating chart is shown in figure 6-20. However, remember that depending upon the configuration of your courtroom this may or may not apply. It is a suggested sample that may need to be tailored.

### Court-Martial Member's Question Form

During a member's trial, there maybe times when the member needs to ask questions of a witness or the accused. If this procedure happens, the member must reduce his or her questions to writing and the writing is then inserted into the record of trial as an appellate exhibit. To make this procedure easier for the member and more uniform for the record of trial, a sample member question form is shown in figure 6-21. Prepare enough of these forms in advance and place them on the member's table for easy retrieval.

## PRETRIAL PROCEDURES

Other than paper work, there are other pretrial procedures that must be dealt with before the trial of an accused. One situation is the pretrial restraint of the accused and another is evidence.

### PRETRIAL RESTRAINT

Immediately upon receipt of the charges or information about a suspected offense, the proper authority must determine the type of restraint, or if restraint is considered necessary. Pretrial restraint usually consists of either restriction to certain specified limits or confinement. Counsel is provided, if requested, to an accused in pretrial confinement before the initial review of the confinement; however, the accused has no right to an individual military counsel.

UNITED STATES )  
 )  
 v. )  
(Name of Accused) )  
(Rank and SSN) )  
(Unit) )

### SENTENCE WORKSHEET

Note: After the members or the military judge reaches his or her sentence, the president or the military judge shall strike all inapplicable language and announce:

(State name and rank of accused) this court-martial sentences you:

#### NO PUNISHMENT

1. To no punishment.

#### REPRIMAND

2. To be reprimanded.

#### FORFEITURES, ETC.

3. To forfeit \$\_\_\_\_\_ pay per month for \_\_\_\_ (months) (years).
4. To forfeit all pay and allowances.
5. To pay the United States a fine of \$\_\_\_\_\_ (and to serve [additional] confinement of \_\_\_\_ [days] [months] [years] if the fine is not paid).

#### LOSS OF NUMBERS, ETC.

6. To (lose \_\_\_\_\_ unrestricted numbers) (be placed at the foot of the \_\_\_\_\_'s list of present date and to remain there until you shall have lost unrestricted numbers) (lose \_\_\_\_\_ unrestricted line officer running mate numbers).
7. To lose \_\_\_\_\_ month's seniority in the date of his warrant (as machinist) (\_\_\_\_\_), and to lose corresponding rank in the list of (machinists) (\_\_\_\_\_) of the (Navy) (\_\_\_\_\_).

#### REDUCTION OF ENLISTED PERSONNEL

8. To be reduced to \_\_\_\_\_.

Figure 6-19.—Sentence worksheet.

## RESTRAINT AND HARD LABOR

9. To be restricted to the limits of \_\_\_\_\_ for \_\_\_\_\_ (days) (months).
10. To perform hard labor without confinement for \_\_\_\_\_ (days) (months).
11. To be confined for \_\_\_\_\_ (days) (months) (years) (the length of your natural life).
12. To be confined on (bread and water) (diminished rations) for \_\_\_\_\_ days.

## PUNITIVE DISCHARGE

13. To be discharged from the service with a bad-conduct discharge (enlisted personnel only).
14. To be dishonorably discharged from the service (enlisted personnel and noncommissioned warrant officers only).
15. To be dismissed from the service (commissioned officers, commissioned warrant officers, cadets and midshipmen only).

## DEATH

16. To be put to death.

APPELLATE EXHIBIT \_\_\_\_\_

Figure 6-19.—Sentence worksheet—Continued.

### Conditions on Liberty

Conditions on liberty are imposed by orders directing a person to do or refrain from doing specified acts. Conditions may be imposed in conjunction with other forms of restraint or separately.

### Arrest

Arrest is the restraint of a person by oral or written order, not imposed as punishment, directing the person to remain within specified limits. A person in the status of arrest may not be required to perform full military duties such as commanding or supervising personnel, serving as guard, or bearing arms. The status of arrest automatically ends when the person is placed, by the authority who ordered the arrest or a superior authority,

on duty inconsistent with the status of arrest, but this does not prevent the person arrested from doing ordinary cleaning or policing, or taking part in routine training and duties.

The two most common types of pretrial restraint used in the naval service are restriction in lieu of arrest and confinement (pretrial restriction and pretrial confinement). We will now discuss these and what rights are given to an accused placed under either of these types of restraint.

### Pretrial Restriction (Restriction in Lieu of Arrest)

Pretrial restriction or restriction is the restraint of a person by oral or written orders directing the person to

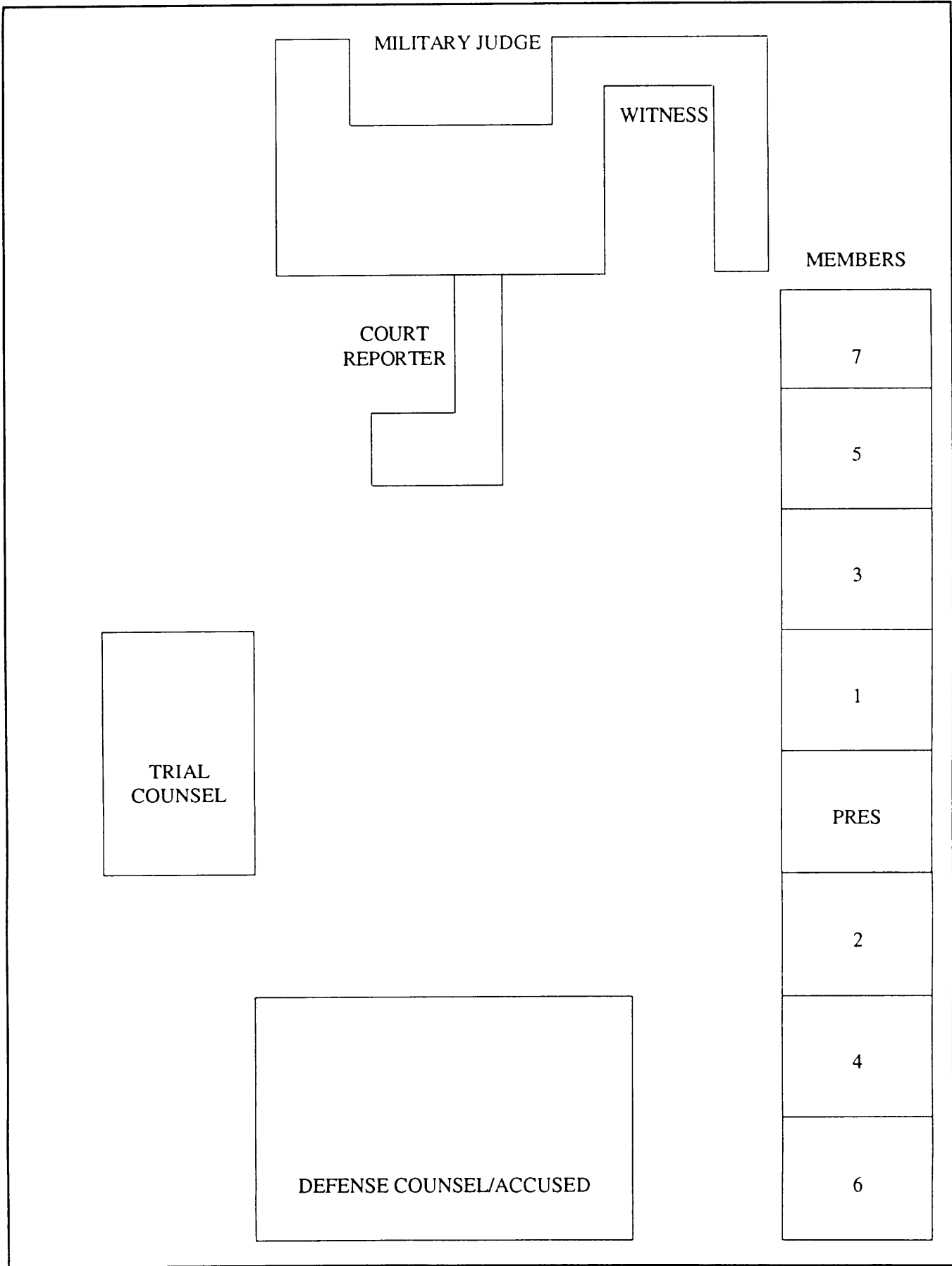


Figure 6-20.-Seating chart.



## QUESTIONS BY COURT MEMBER

For: Witness' Name: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

	NO OBJECTION	OBJECTION
TC		
DC		

\_\_\_\_\_  
COURT MEMBER'S SIGNATURE

**Figure 6-21.-Form for member's questions.**

remain within specified limits. A restricted person must, unless otherwise directed, perform full military duties. Restriction is a less severe restraint on liberty than arrest. Arrest includes a suspension from performing full military duties and the limits of arrest are normally narrower than those of restriction. The actual nature of the restraint imposed, and not the characterization of it by the officer imposing it, determines whether it is technically an arrest or restriction. Restriction is the most commonly used type of pretrial restraint when confinement is deemed necessary and is usually issued by written order.

Rule 304 of the MCM, 1984, requires that when a person is placed under restraint, he or she must be informed of the nature of the offense that is the basis for such restraint. The MCM further states that pretrial restraint is not punishment and must not be used as such. A person restrained pending trial may not be punished for the offense that is the basis for the restraint.

Pretrial restriction ends when the CO deems it appropriate to terminate the restriction, upon direct

orders to do so by higher authority or when a sentence is adjudged, the accused is acquitted, or all charges are dismissed.

### **Pretrial Confinement**

Pretrial confinement is physical restraint, imposed by order of competent authority, depriving a person of freedom pending disposition of charges.

The MCM requires that each person confined be promptly informed of the following:

- The nature of the offense for which he or she is held
- The right to remain silent and that any statement made by the person may be used against him or her
- The right to retain civilian counsel at no expense to the government, and the right to request assignment of military counsel free of charge

- The procedures used to review pretrial confinement

Not later than 72 hours after ordering an accused into pretrial confinement, or after receipt of a report that a member of a commander's unit or organization was confined, the commander is to decide whether pretrial confinement will continue. The command is to direct the accused's release unless it believes upon probable cause; that is, upon reasonable grounds, that:

- an offense triable by court-martial was committed,
- the accused committed the offense, and
- confinement is necessary because it is foreseeable that the accused will not appear at trial, pretrial hearing, or investigation, or the accused will engage in serious criminal misconduct, and less severe forms of restraint are inadequate.

A person should not be confined as a mere matter of convenience or expedience. Some factors that should be considered are as follows:

- The nature and circumstances of the offenses charged or suspected, including extenuating circumstances
- The weight of the evidence against the accused
- The accused's ties to the locale, including family, off-duty employment, financial resources, and length of residence
- The accused's character and mental condition
- The accused's service record, including any record of previous misconduct
- The accused's record of appearance at or flight from other pretrial investigations, trials, and similar proceedings
- The likelihood that the accused can and will commit further serious criminal misconduct if allowed to remain at liberty

In determining if pretrial confinement is the proper form of restraint, the command should judge the reliability of the information available. Before relying on the reports of others, the commander must have a reasonable belief that the information is believable and has a factual basis. The command can base a decision on oral or written information. This information need not be under oath, but an oath may add to its reliability. The command may examine the accused's personnel

records, police records, and may consider the recommendation of others. Less serious forms of restraint must always be considered before pretrial confinement may be approved. Therefore, the commander should consider whether the accused could be safely returned to his or her unit, at liberty or under restriction, arrest, or conditions on liberty.

If the commander approves continued pretrial confinement, he or she is to prepare a written memorandum justifying continued confinement. The memorandum may include hearsay and may incorporate by reference other documents, such as witnesses' statements, investigative reports, or official records. The commander forwards this memorandum to the reviewing officer. If the commander had prepared a memorandum before ordering confinement, a second memorandum need not be prepared. However, information may be added to the memorandum at any time.

**CONFINEMENT ORDER AND PRETRIAL CONFINEEES.**— Most brig have their own instructions on local requirements such as minimum seabag needs, visiting hours, and release times. Obtain a copy of the local instruction for further guidance. See also the *Navy Corrections Manual*, SECNAVINST 1640.9, and OPNAVINST 1640.6 for all brig procedures.

For pretrial confinees, prepare a Confinement Order, NAVPERS 1640/4. The procedures for the preparation of confinement orders are contained in chapter 8. The only difference in a pretrial confinement order and a posttrial confinement order is that you will fill out the section titled Detained and not the section titled Confined as a Result Of. You also need to fill in the section Pretrial Confinement Necessary. You will normally need an original and three copies. Check the local requirements to determine whether to send dental, medical, and pay records to the brig. Have the accused's division officer or the chief master-at-arms assist the accused in obtaining the seabag requirements for the brig. Check local requirements to determine whether the brig requires TEMADD orders. Do not use temporary duty (TEM DU) orders for pretrial confinement. Have the member escorted to the medical department for the confinement physical. **NOTE:** The doctor must sign the confinement order.

**REVIEW OF PRETRIAL CONFINEMENT.**— As mentioned previously, after the member is confined, the CO must determine, within 72 hours, that continued confinement is warranted. The command should be

prepared to send a knowledgeable representative to the hearing held by the initial review officer (IRO). This representative should be cognizant of (1) the circumstances regarding the charges; (2) the accused's past history for reliability; and (3) unauthorized absences. After the hearing by the IRO, the command will receive a memo either allowing the confinement to continue or ordering the accused's release. If the member is ordered released, the command must comply. A lesser form of restraint may be imposed, but reconfinement may not occur without further misconduct or new evidence that would impact on the accused's reliability. If pretrial confinement is to extend to 30 days, permission for continued confinement must be obtained from the cognizant GCM authority. Make sure permission is received before the expiration of the 30th day, and the request must be reviewed every 30 days after that.

**LETTER TO INITIAL REVIEW OFFICER.—**

The OEGCMJ at the location of the confinement facility designates one or more officers of the grade of O-4 or higher to act as the IRO for purposes of pretrial confinement. The IRO maintains a copy of the documents considered and the memorandum prepared under R.C.M. 305(i)(6) in each case until completion of appellate review. The IRO then sends a copy of the documents considered and the memorandum prepared to the OEGCMJ from whom he or she derived the authority as IRO. The officers designated as IROs should be neutral and detached, should be selected for their maturity and experience, and, if practical, should have had command experience. A sample letter from a CO to an initial pretrial review officer is shown in figure 6-22.

**MATTERS CONSIDERED.—** The review by the IRO is a review of the memorandum submitted by the accused's commander. Additional written matters may be considered, included any submitted by the accused, The accused and his or her counsel, if any, can appear before the IRO and make a statement, if possible. A representative of the command may appear before the IRO to make a statement. In most cases, this representative will be you or one of your subordinates.

The IRO may, for good cause, extend the time limit for completion of the initial review to 10 days after pretrial confinement is imposed.

The requirements for confinement discussed previously need not be proven beyond a reasonable doubt, but by a preponderance of the evidence.

**ACTION OF THE IRO.—** When the IRO completes the review, he or she approves continued confinement or orders immediate release. The IRO writes a memorandum that contains conclusions and supporting factual findings. A copy of the memorandum and all documents considered in each case are kept until completion of appellate review. Copies are given to the accused or the government on request. Your office must receive and keep copies for future reference and as part of the accused's court-martial file.

The IRO will, after notice to the parties, reconsider the decision to confine the accused upon a request based upon significant information not previously considered.

If the decision of the IRO is for immediate release, he or she will so notify the accused's CO. The CO then directs the appropriate corrections officer to release the accused immediately, with a copy of the release order forwarded to the OEGCMJ.

The decision of the IRO to release the accused is final and binding upon the CO, corrections officer, and OEGCMJ. No administrative appeal of the IRO's decision is authorized or permissible.

The command may not re-confine unless:

- discovery of a new offense that may authorize pretrial confinement; or
- discovery of any other evidence establishing that the accused will flee to avoid trial; or
- discovery of any other evidence establishing both a lawful basis and a need for pretrial confinement.

Once charges for which the accused has been confined are referred to trial, the military judge reviews the propriety of pretrial confinement. The IRO is divested of authority to order the accused's release or continued pretrial confinement when the charges are referred to a court-martial.

**EVIDENCE**

Another very important duty before the trial is the preservation of evidence. Evidence must be maintained until retrieved for trial. Every NLSO has to deal with evidence used in cases tried by court-martial. The proper identifying, safeguarding, and maintaining of this evidence is a critical task that must be performed efficiently and accurately. Sometime in your LN career, you will hear of tales of evidence that were inappropriately safeguarded. To avoid this, you will learn in this section the importance of proper procedures

DEPARTMENT OF THE NAVY  
USS PUGET SOUND (AD 38)  
FPO AE 09544-2520

1640  
Ser 00/  
17 Jul CY

From: Commanding Officer, USS PUGET SOUND (AD 38)

To: Initial Review Officer, Naval Base, Norfolk, Virginia

Subj: PRETRIAL CONFINEMENT ICO YN3 JOHN A. DOE, USN, 123-45-6789

Ref: (a) R.C.M. 305, MCM, 1984

(b) SECNAVINST 1640.10

1. In accordance with references (a) and (b), the following information is provided for the purpose of conducting a hearing into the pretrial confinement of YN3 John A. Doe, USN, 123-45-6789.

a. Hour, date, and place of confinement:

1400, 16 July 19CY, Navy Brig, Naval Base, Norfolk, Virginia

b. Offenses charged:

Violation of UCMJ, Article 86 - Unauthorized absence from USS Puget Sound (AD 38) from 1 September 19CY(-1) until apprehended on 16 July 19CY.

Violation of UCMJ, Article 87 - Missing movement of USS Puget Sound (AD 38) on or about 1 September 19CY(-1).

c. General circumstances:

(1) Petty Officer Doe's absence commenced over liberty that expired on board at 0500, 1 September 19CY(-1). The circumstances, as related by Petty Officer Doe to his division officer, are that YN3 Doe was not going to get underway for a Mediterranean cruise that was to begin on 01 September 19CY(-1). Petty Officer Doe had a pregnant wife at the time of the scheduled departure and his wife did not want to be left alone in the Norfolk area.

(2) Petty Officer Doe was apprehended by Norfolk City Police at 1121, 16 July 19CY, when he was stopped for a speeding violation. He was subsequently turned over to the shore patrol. I found it appropriate to place YN3 Doe in confinement due to the duration of the absence and that the absence was terminated by apprehension. YN3 Doe had every opportunity to turn himself in as he never left the immediate Norfolk area.

d. Previous disciplinary action:

a. CO's NJP, USS Puget Sound (AD 38) on 6 June 19CY(-1). Violation of UCMJ, Article 86 - Leaving appointed place of duty. Awarded 30 days' extra duties.

b. CO's NJP, USS Puget Sound (AD 38) on 11 February 19CY(-1). Violation of UCMJ, Article 86 - Unauthorized absence from unit (approximately 2 days). Awarded 45 days' restriction and 45 days' extra duties.

2. Extenuating or Mitigating circumstances: Wife was pregnant with her first child and did not want to be left alone in a strange city during this period.

3. Due to the aforementioned information, continued pretrial confinement is deemed appropriate in this case. Petty Officer Doe has a history of unauthorized absences that indicates to me the solution to any of his problems is to absent himself without authority. Petty Officer Doe has shown that a lesser form of restraint is inadequate as evidenced by paragraph 2.b. above. Charges have been preferred to trial by special court-martial, and no unusual delay is expected in this case. Given the nature of the offenses charged and the sentence that could be imposed by court-martial for this offense, it is felt YN3 Doe would again flee to avoid prosecution.

PAUL T. BOAT

Figure 6-22.-Sample letter to initial review officer.

for handling evidence from initial receipt to final disposition.

*Black's Law Dictionary* defines evidence as "Any species of proof, or probative matter, legally presented at the trial of an issue, by the act of the parties and through the medium of witnesses, records, documents, exhibits, concrete objects, and so on, for the purpose of inducing belief in the minds of the court or jury as to their contention." Said another way, evidence is anything that tends to prove or disprove any matter in question, or to influence the belief regarding it.

The MCM, 1984, sets forth the rules of evidence to be used before courts-martial. As an LN, you will not be particularly concerned with the rules of evidence. Such matters are best left to the lawyers. However, you will be concerned with preserving evidence for use at trial.

### **Constitutional Requirements**

You have already covered the requirements for taking statements and conducting searches and seizures in chapter 5. Perhaps a review of chapter 5 would be helpful at this point.

Unless the suspect or accused is afforded all the rights that he or she is legally entitled to, any evidence obtained from him or her, whether it be a statement or seized articles, may be contested in court and found inadmissible as evidence. Thus, it is very important that all legal rights be afforded the suspect or accused.

### **Physical Handling of Evidence**

To admit lawfully seized items in evidence at trial they must be authenticated. That is, it must be shown that they are what they purport to be. Sheer administrative convenience dictates that all evidence seized be tagged to indicate the following:

- Date and time of seizure
- Location of article when discovered
- Identification of person, if any, from whom the property was taken
- Name of person seizing evidence
- Name of suspect(s) against whom the evidence may be used

The problem in getting evidence admitted, then, is one of proving to the court that the evidence offered is precisely the same evidence as was seized. Dependent

upon the characteristics of the evidence, in-court identification may be made by either of two means, and how you handle the evidence will depend on what method of in-court identification is contemplated.

If the evidence has a peculiar identifying feature, one familiar with that feature may identify the evidence by that feature in court. The use of a serial number to identify a typewriter is an example of this method of identification. Your sole concern with such evidence is to guarantee its presence in court, and this is done by providing physical security until the trial.

Evidence that does not have such an identifying feature must be treated with greater care. Suspected marijuana cigarettes are an example of this kind of evidence. To demonstrate that the proffered evidence is the same as that seized, the TC will have to show a chain of custody from the time of seizure until the time of trial. The TC will prove his or her evidence by calling a succession of witnesses beginning with the person who made the seizure and ending with the person who delivers the evidence to the court. Each witness will testify how he or she got the evidence; what, if anything, he or she did with it; and to whom he or she delivered it. The necessity of limiting access to the evidence and of keeping a record of those who have had control over the evidence is obvious.

**RECEIPT.**— The Evidence/Property Custody Document, OPNAV 5527/22, is used as the official record of receipt, chain of custody, and final disposition of items of physical evidence. The form normally is prepared with an original and three copies. Entries should be typed or printed in ink. The last or third copy is used as a receipt when evidence is received from an individual. The original and other two copies are presented to the evidence custodian who maintains the original and first copy. The second copy is returned to the investigator (master-at-arms [MAA] or Naval Criminal Investigative Service [NCIS]) for submission of the evidence for inclusion in the case file. An example of a completed evidence custody document is shown in figures 6-23A and 6-23B.

**SAFEGUARDING.**— Each individual in the chain of custody is responsible for the care, safekeeping, and preservation of items of evidence. Because of the sensitive nature of evidence, an evidence custodian assumes responsibility for the evidence when not in use by you or other competent authority involved in the investigation, such as the TC.

The evidence custodian must be a commissioned officer, warrant officer, or an enlisted person E-6 or



NOTE: REMOVE AND REVERSE CARBONS BEFORE COMPLETING THIS SIDE

17. CHAIN OF CUSTODY (CONTINUED)				
ITEM	DATE & TIME	RELEASED BY	RECEIVED BY	PURPOSE
1	1320 07	NAME John A. Doe, LT	NAME Dep E. Dog, MAC	Returned to evidence custodian
2	July CY	ORGANIZATION NLSO Pensacola, FL	ORGANIZATION NASP Investigations	
		SIGNATURE /s/ John A. Doe	SIGNATURE /s/ Dep E. Dog	
1	0940 08	NAME Dep E. Dog, MAC	NAME Rich L. Guy, SK2	Final disposition
2	July CY	ORGANIZATION NASP Investigations	ORGANIZATION NAS Pensacola, FL	
		SIGNATURE /s/ Dep E. Dog	SIGNATURE /s/ Rich L. Guy	
		NAME	NAME	
		ORGANIZATION	ORGANIZATION	
		SIGNATURE	SIGNATURE	
		NAME	NAME	
		ORGANIZATION	ORGANIZATION	
		SIGNATURE	SIGNATURE	
18. REMARKS				
19. FINAL DISPOSAL ACTION				
FINAL DISPOSAL AUTHORITY				
Able B. Seaman		CDR, JAGC	Naval Legal Service Office, Pensacola	
NAME (Typed or Printed)		GRADE/RANK	ORGANIZATION	
20. PERSON(S) RECEIVING ITEMS/WITNESSING DESTRUCTION				
	NAME	ORGANIZATION	SIGNATURE/DATE	
1.	Rich L. Guy	NAS Pensacola, FL	/S/ Rich L. Guy, 08 Jul CY	
2.	_____	_____	_____	
3.	_____	_____	_____	
4.	_____	_____	_____	
CONTINUE 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.)				

OPNAV 5527/22 (12 82) BACK

Figure 6-23B.—Evidence/Property Custody Receipt, OPNAV Form 5527/22 (back).

above who is appointed in writing by the CO. The person appointed as evidence custodian should be available to receive and release evidence and attend to other administrative matters as required.

The criteria for appointment and duties of the alternate custodian are the same as those for the custodian. The alternate custodian should assist the custodian and be available when the custodian is not. The custodian and alternate should not be sent TEMADD at the same time or otherwise be absent from the job.

### **Chain of Custody**

The chain of custody begins when an item of evidence is collected, and the chain is maintained until the evidence is disposed of. The chain of custody assures continuous accountability. This accountability is important because, if not properly maintained, an item may be inadmissible in court.

The chain of custody is a chronological written record of those individuals who have had custody of the evidence from its initial acquisition until its final disposition. These persons in the chain of custody must be identified on the OPNAV 5527/22, Evidence/Property Custody Document, which is initiated when the evidence is acquired.

Each individual in the chain of custody is responsible for an item of evidence to include its care, safekeeping, and preservation while it is under his or her control. Because of the sensitive nature of evidence, an evidence custodian is provided to assume responsibility for the evidence when not in use by the investigating officer of other competent authority involved in the investigation; for example, a TC.

### **Evidence Custodian**

The evidence custodian must be a commissioned officer, warrant officer, or an enlisted person appointed on competent orders. The person appointed as the custodian should be available to receive and release evidence and attend to other matters as required.

The criteria for appointment and duties of the alternate custodian are the same as those for the custodian. The alternate is to assist the custodian and is available when the custodian is not. The custodian and alternate should not be absent at the same time. The alternate does not make final disposition on any item of evidence.

## **Records**

The Evidence/Property Custody Receipt, OPNAV Form 5527/22 (fig. 6-23), is issued as the official record of receipt, chain of custody, and final disposition of items of physical evidence.

**EVIDENCE RECEIPT.**— When using this form as an evidence receipt, prepare an original and three copies. Present the original and first copy to the evidence custodian, give the second to the person from whom the evidence was received, and place the third in the report file. When items of evidence gained during one transaction exceed the space allotted on a single form, continue the list on additional forms.

**EVIDENCE VOUCHER.**— The original chain of custody form becomes a voucher and is given a voucher number when it is presented to the evidence custodian. Number evidence vouchers consecutively for each calendar year. Write these numbers in the margin at the bottom right corner of the form. Pencil in the location of the evidence accounted for with the voucher on the bottom left margin of the form and erase and change it whenever the location of the evidence changes; for example, located in evidence room safe, items 1 and 2 in safe, items 3 and 4 in evidence bin No. 6.

Complete the chain of custody section on the evidence voucher whenever any part of the evidence leaves the office, is returned, or a new evidence custodian assumes control. The original evidence voucher should not leave the office except for submission in court. Maintain a duplicate copy in the voucher file to show the disposition of the original.

**EVIDENCE SUBVOUCHER.**— A chain of custody form used as a subvoucher accompanies evidence to record any changes of custody that may occur while the evidence leaves the evidence room. Use a copy of the original evidence voucher or make an extract of the original. Always prepare subvouchers in duplicate with the original accompanying the evidence. Number subvouchers consecutively; for example, SV-1 and SV-2. Add this number to the number of the original voucher. When only part of the items listed on a voucher is to be removed from the evidence room, prepare an evidence subvoucher. Prepare it exactly as the original voucher but include only those items being released in the description of evidence.

**ORIGINATION.**— Rarely if ever will you have to start the original chain of custody receipt. Normally, this is begun at base security or NCIS. Understanding the need for maintaining the chain of custody to properly



safeguard evidence is important for all involved, from the security investigator to the TC. As an LN working in the trial division, you could possibly be responsible for keeping and maintaining evidence. Observing the proper procedures will save a lot of embarrassment for you and the command.

### **Disposition of Evidence**

When no longer needed for a court-martial or other purposes, property of evidentiary value should be disposed of as follows: if the owner of the property is known, and it is legal for him or her to have it, return it; if it is legal to own the property in question, but the owner is unknown, turn the property over to the property disposal officer, unless the property is money, in which case it is turned over to the disbursing officer; and if the property is illegal to have, then destroy it and keep a record of its destruction.

### **PRETRIAL REVIEW OF CHARGE SHEET**

What do you look for when reviewing charge sheets and allied papers before trial? Well, the answer is not standard because every SJA and NLSO operation throughout the world has its uniqueness because of geographical responsibilities. As a senior LN, it will be your responsibility to be able to adapt to these local requirements. The following are the basic procedures that are common to all pretrial reviews.

### **Purpose of Review**

Aside from the routine review of a charge sheet, the critical area is whether or not the specification(s) is/are sufficient. In other words, if a specification of which an accused has been found guilty fails to allege an offense under the UCMJ or shows lack of jurisdiction, the proceedings as to that specification will not be legally valid and have no legal effect. If a specification alleges an offense under the UCMJ, proceedings as to that specification should not be held invalid solely because the specification is defective; however, if it appears from the record that the accused was, in fact, misled by the defect or that his or her substantial rights were otherwise materially prejudiced, appropriate corrective action must be taken.

The test of sufficiency of a specification is not whether it could have been made more definite or certain, but whether the facts alleged and reasonably implied set forth the offense sought to be charged with sufficient clarity to inform the accused of what he or she must defend against. Whether the record is sufficient to

enable him or her to avoid a second prosecution for the same offense must also be considered in applying the test.

### **Sworn Charges**

Once the charges and specifications have been prepared, they are signed and sworn to by the accuser before an officer authorized to administer oaths and must state both that the signer has personal knowledge of, or has investigated, the charges set forth, and that they are true to the best of his or her knowledge and belief. The accuser must be a person subject to the UCMJ. Usually, the CO has the officer who conducted the preliminary investigation sign the charges.

### **Statute of Limitations**

Except for certain offenses, there is a time limit specified in Article 43, UCMJ, within which a person may be charged with an offense. Unless the statute of limitations has been tolled, extended, or suspended, or unless the offense is one for which there is no limitation, sworn charges must be received by the officer exercising SCM jurisdiction over the command within the specified time. See Article 43 for the statute of limitations on all offenses under the UCMJ.

### **Jurisdiction**

An important area of review is jurisdiction. Let's examine jurisdiction and see why it is critical when an offense has been alleged. After all, if the government does not have the jurisdiction over the accused, it cannot try the case.

#### **JURISDICTION OVER THE ACCUSED.—**

Generally speaking, a court-martial has jurisdiction to try only military members on active duty. Therefore, each specification must clearly indicate that the accused is on active duty. Jurisdiction over the accused normally begins with a valid enlistment and ends with delivery of valid discharge papers.

In most cases, there is little doubt that the accused is on active duty; that is, he or she has validly enlisted. However, even when there is no valid enlistment, the accused may still be subject to court-martial jurisdiction. If an enlistment ceremony has occurred, but is for some reason invalid, the doctrine of constructive enlistment may apply; one who acts as if he or she is in the military, accepts the pay and benefits, and wears the uniform, is deemed to be in the military even though his or her original enlistment is invalid for

some reason. Article 2 of the UCMJ now provides a statutory constructive enlistment with four basic requirements as follows:

- Voluntary submission to military authority
- Minimum age and mental competency standards (no one under age 17 may be subject to military jurisdiction by force of law)
- Receipt of military pay or allowances
- Performance of military duties

If these requirements are met, a person is subject to the UCMJ until properly discharged, despite any recruiting defect.

The possibility of the exercise of military jurisdiction ends with the delivery of a discharge certificate with the intent to effect separation. This is true even though the offense was committed while on active duty.

Three potential exceptions exist to the general rule concerning discharge as follows:

- In the very unusual case contemplated by Article 3(a), UCMJ, (serious offenses committed off base overseas), jurisdiction will continue into a subsequent enlistment.
- When a person is discharged before the expiration of his or her term of enlistment for the purpose of reenlistment and, thus, there has been no interruption of his or her active service, court-martial jurisdiction exists to try the member for offenses committed during the prior enlistment. Note, however, that jurisdiction is ended by a discharge at the end of an enlistment even though the service member immediately reenters the service.
- If a person fraudulently obtains the delivery of the discharge papers, jurisdiction is not lost.

#### **JURISDICTION OVER THE OFFENSE.—**

Before the Supreme Court's decision in U.S. v. Soloria it was necessary to show that an offense committed off base had a service connection in order for a court-martial to have jurisdiction. The *Soloria* decision held that the accused's status as a person subject to the UCMJ, and not the subject matter of the offense, was the test for court-martial jurisdiction. Accordingly, it is no longer necessary to plead subject matter jurisdiction in a specification.

## **Review of Supporting Documents**

When reviewing specifications, you should use all the tools at your disposal. Reviewing supporting documents that accompany a charge sheet will ensure the accuracy of your effort. The accused's service record will aid you in determining whether or not there is jurisdiction over the accused. Also, this helps to verify the personal information on page 1 of the charge sheet. Other documents that will help you are shore patrol reports, incident complaint reports, NCIS reports, records of unauthorized absences (NAVPERS 601-6Rs, page 6s), and administrative remarks (NAVPERS 601-13s, page 13s). These documents will help you in determining the correctness of the drafted charge(s) and specification(s).

## **WITNESS INTERVIEWS**

Some aspects of LN duty assignments require you to interview witnesses with the purpose of gathering information much the same as an investigator. In most cases, witnesses have been interviewed by trained investigators before you undertake the task. In any event, the techniques used by you to gather information are universal and effective if applied properly.

### **Interviews**

During the process of gathering information for an investigation, you almost invariably make use of one of the most valuable sources, people; you do so by interviewing them. An interview is the questioning of a person believed to possess knowledge of official interest to the command and the interviewer. In an interview, the interviewer encourages the person questioned to give an account of an incident under investigation in his or her own words and in his or her own way. Interviews are used for the following purposes:

- To establish the facts of a crime that may provide the investigator with leads that will disclose the perpetrator of the crime or offense under investigation or of other crimes committed or both
- To corroborate or disprove statements
- To verify inferences derived from physical evidence
- To link physical evidence of a suspect with a case
- To clear a suspect (develop evidence that eliminates an individual as suspect of committing an offense)

- To secure evidence that may establish the guilt or complicity of a suspect, to help in the recovery of fruits of the crime, or identify accomplices

You must become thoroughly familiar with the military and civilian laws that apply to the specific offense under investigation before conducting an interview. A knowledge of these laws assists you in evaluating the relevancy of information you receive. You must avoid any oversight or mistake that would impair the value of the results of your investigation to the person or agency using the results in a legal action. Often, through questioning a witness about one offense, you may develop investigative leads related to other offenses. This additional information may be of value to other investigative agencies.

Human factors affect success in stimulating the subject to talk and influence the accuracy or truthfulness of the information that you secure from him or her. Evaluate each subject and the evidence he or she furnished; attempt to understand the subject's motivations, fears, and mental makeup; and use your understanding of the subject to gain useful information. In selecting a technique of interview, consider the following factors.

**PERCEPTION AND MEMORY.**— The validity of the information divulged during an interview is influenced by the subject's ability to perceive correctly what happened in his or her presence, to recollect that information, and to transmit it correctly. A mistake made in recalling a particular incident is often caused by the following:

- A weakness in the subject's ability to see, hear, smell, taste, or touch.
- The location of the subject in relation to the incident at the time it occurred. Rarely do two people give the same account of an incident witnessed by them.
- A lapse of time since the occurrence of the incident or the subject having had no reason for attaching much importance to it when it occurred. The account given an incident at a later time is often colored, consciously or unconsciously, by what the subject has heard or seen regarding the incident since it occurred. Furthermore, a subject may fill in the gaps in his or her knowledge of a particular incident by rationalizing what he or she actually did see or hear and may repeat the entire mixture of fabrication and fact to you as the truth. Therefore, a subject should be interviewed as soon as possible after the occurrence of an incident. Even then

all your skill is required to discover what the subject actually observed.

**PREJUDICE.**— When making a statement, the subject may be influenced by prejudice. You should be alert to this possibility and attempt to discover the motivation behind such prejudice. A statement influenced by prejudice should be carefully evaluated and closely examined for reliable information that may be helpful in the investigation.

**RELUCTANCE TO TALK.**— You may meet a person who is reluctant to divulge information. You must legally overcome this reluctance to secure the information you need. The most common reasons for reluctance to talk are as follows:

- Fear of self-involvement. Many persons are unfamiliar with investigative methods to the extent that they are afraid to give the investigator their aid. They may have committed a minor offense that they believe will be brought to light upon the least involvement with authorities. They may have the opinion that the incident that occurred is not their business or that guilt lies jointly on the victim and the accused. They may fear the publicity that may be given to persons involved in any way with criminal cases.

- Inconvenience. Many persons disclaim knowledge of incidents because they do not wish to be inconvenienced by being subjected to questioning or by being required to appear in court.

- Resentment toward authority. This resentment may be present particularly among persons who do not have a positive loyalty to the organized community. Sometimes the resentment manifests itself as sympathy for an accused who is regarded as an underdog pitted against the impersonal, organized forces of society represented by the authorities.

**PERSONALITY CONFLICT.**— The lack of success in an interview may be caused by a personality conflict between the interviewer and the subject. When that is the case, you should voluntarily recognize this fact and, before all chances of success are lost, withdraw in favor of another interviewer. The subject may feel a willingness to talk to the new interviewer after his or her experience with an objectable one.

**REFUSAL TO TALK.**— A recognized weakness of the interview technique is that no person can legally be made to talk if he or she is not willing to do so. No person capable of committing a crime should be expected to confess his or her guilt.

When too many persons are present, the individual being interviewed may be reluctant to divulge all that he or she knows about an incident. Interviewing an individual in the presence of many persons has been held by the courts to constitute duress. On the other hand, someone should be present to witness the questioning, to witness any statement made, and to protect the interviewer against a possible charge of coercion or duress. Normally, not more than two interviewers should be present.

### **Preparing for the Interview**

Prepare yourself adequately to conduct an interview. This preparation is sometimes hasty, consisting of no more than a mental review of your knowledge of the case or of a quick briefing by the investigator who arrived first at the crime scene. When time permits, a more formal preparation is made. Preparation includes the following three elements.

**FAMILIARITY WITH THE CASE.**— You should fix in your mind all that is known of the who, what, when, where, and how of the crime. Pay particular attention to the specific details, especially those that have not become public knowledge.

**FAMILIARITY WITH THE SUBJECT'S BACKGROUND.**— Acquire some background knowledge of the subject before attempting to interview him or her. In the event this is impossible, attempt to obtain the background information during the initial portion of the interview. This knowledge will enable you to adopt a correct approach to the subject and to extract a maximum amount of valuable information from him or her. The actual knowledge will also enable you to test the subject's truthfulness and to impress him or her with the thoroughness of the investigation. Background facts of particular value include the following:

- Age, place of birth, nationality, and race
- Present or former rank (with civilians, status in business or the community)
- Educational level, present duty, and former occupation
- Habits and associates; how and where leisure time is spent
- Information concerning any prior courts-martial or civilian court convictions

### **ESTIMATE OF INFORMATION SOUGHT.**—

Determine in advance, where possible, the information to be sought in the interview. Prepare a set of questions that you can consult unobtrusively during the interview. Design questions to induce the subject to tell his or her story rather than to elicit yes or no answers. Take care neither to overestimate nor underestimate the subject as a source of information.

### **Planning the Interview**

A person is formally interviewed as soon as possible after the incident to obtain information still fresh in his or her mind, to prevent him or her from being threatened or coerced, or to prevent collaboration of testimony between him or her and others.

**TIME OF INTERVIEW.**— The time that is chosen must be convenient to both you and the subject and must allow adequate opportunity for a thorough interview. Improper scheduling will result in a rushed interview in which important details can be overlooked. If an interview is to take place in the home or place of business of the subject, give consideration to the time of day; generally, a time should be selected that will interfere least with the normal activities of the subject and will permit the completion of the interview.

Sometimes, to throw the subject off balance and thereby achieve an important psychological advantage, it is advisable to select a time that will completely disrupt the subject's normal activities. However, take great care to be sure such action does not result in either legal liability on the part of the military or unfavorable comment in the civilian community.

**PLACE OF INTERVIEW.**— You should make every effort to conduct the interview in a place where you have the psychological advantage. Decide on the basis of the facts in each case where you think your chances are best for encouraging the subject to talk. At times it is best to interview a subject among familiar surroundings, such as in his or her home or office, especially if visiting the investigator's office would impose an undue hardship on the subject or tend to disturb him or her unduly.

At other times it is best to hold an interview in your office or in some other place where the subject is deprived of the comfort or ease of familiar environment. At a regular place of interview, you can control the lighting and the physical features of the room and also be able to prevent destructing influences that may affect the subject's ability to conceal wanted information. For an interview with an informer witness whose identity

has not been publicized, it is best to pick a place that will not attract attention to the subject.

### **Introduction and Identification**

Introduce yourself courteously and make certain the subject is aware of your correct identity. Also make certain of the identity of the person before you.

A hasty introduction or an appearance of one at the beginning of the interview may cause an embarrassing situation or may make the subject think that his or her presence is of little importance and that the information he or her is able to give is of little value. A few minutes spent in a proper introduction gives you time in which to evaluate the subject and the approach you have selected; and the subject is given an opportunity to overcome any nervousness and get in a better frame of mind to answer questions.

When the introduction is completed, make a general statement about the case without disclosing any of the specific facts that have been developed.

If appropriate, warn the interviewee of his or her rights. The warning is required only where there is reason to believe that the interviewee is involved in the offense in question or that he or she may be involved in another offense, the investigation or prosecution of which may be jeopardized if the warning is not given.

### **Conducting the Interview**

Interviews are classified as either formal or informal. The informal interview is used primarily at the scene of the crime to screen those persons who have pertinent information about an offense. After establishing that a person does have information regarding the offense or incident, immediately segregate him or her from the others and interview him or her formally as soon as practical. Also, take the names and addresses of all persons in the vicinity for future reference.

The formal interview is conducted to obtain specific information concerning an offense or incident from a person believed to be aware of such information. The formal interview may be conducted at the scene, at a place convenient to the subject, or at your office.

Attitude and actions usually determine the success or failure of the interview. Be friendly and businesslike; try to get the subject into a talkative mood and to guide the conversation toward the subject's knowledge of the case. Permit the subject to tell his or her complete story without unnecessary interruptions. Phrase the questions

to maintain a free flow of talk from the subject. Take care not to coach or lead the subject into merely telling you what you want to hear. Mentally note any inconsistencies and obtain clarification after the subject has completed his or her story. Specific types of approaches are as follows:

- The indirect approach is generally used in the interview. The subject is aware of the reason for the interview and is permitted to discuss the facts with you rather than answer probing questions. He or she is encouraged to talk about the incident and to give a true and complete account of his or her knowledge of it.

- The more direct type of questioning, usually reserved for the interrogation of a suspect, maybe used when the subject shows fear, dislike, or distrust of interviewers; dreads retaliation by criminals; desires to protect friends or relatives; or displays a general unwillingness to talk for reasons best known to himself or herself.

**COMPLAINANTS.**— The complainant is interviewed first, if possible, to find out whether the crime did occur as alleged when interviewing a complainant, be receptive and sympathetic; let the subject know that you recognize the importance of the complaint and intend to take proper action. Be tactful and open-minded toward the subject and his or her complaint, but equally realistic and careful in developing complete information. Attempt to establish the motive for the complaint and determine the subject's relationship to the accused. Be alert to detect any grudge or jealousy. Always assure the complainant that appropriate action will be started promptly and that a complete and thorough investigation will be conducted.

**VICTIMS.**— When interviewing the victim of a crime, particularly a crime of violence, consider the victim's emotional and physical state. A state of shock or hysteria may cause the victim to give a hazy, erroneous, or garbled account of the crime. Wild and unsupported opinions or conclusions regarding the circumstances of persons connected with the crime are often included in the victim's account. Retain an open mind and evaluate each element of the victim's story in relation to the testimony of witnesses and the physical evidence.

**WITNESSES.**— Frequently guide the witness to help him or her to recall and to relate the facts of an incident as they were observed. Try to make him or her realize that he or she has important and necessary information. Design your questioning to develop a detailed account of the witness' knowledge.

Be constantly aware of the human factors that affect a witness' ability to observe and describe actions, articles, or circumstances related to the commission of a crime. The age, emotional stability, prejudices, and general reputation of a witness are important factors. The relation of the witness to the person connected with the crime is extremely important, both from the legal viewpoint and with regard to the reliability of information furnished by the witness.

Avoid questions of a leading nature. Direct yes or no answers to leading question are not valid information on which to base an investigation. An unstable person, a highly suggestible person, or a person whose memory of events is hazy will often give answers that were suggested to him or her by leading questions.

### **Recording the Interview**

Attempt to record the interview for future reference. Interviews can be recorded as a statement initiated by the interviewee, recorded on an electronic recording device, or merely recorded in the form of notes taken by the investigator.

Statements are elicited from persons with pertinent knowledge regarding the offense or incident under investigation. Written statements serve as permanent records of the pretrial testimony of complainants, victims, and witnesses. The written statement may be used in court as evidence to attest to what was told the investigator and to refresh the memory of the maker of the statement or the memory of the investigator.

An electronic recording device provides a convenient means of preserving the content of an interview. The recordings should be carefully kept in their entirety, together with stenographic transcripts made from them. A complete chain of custody should be maintained for all such items as they may later prove valuable in legal proceedings, provided they can be identified and authenticated.

Take notes of the interview. Most persons interviewed have no objection to discreet note-taking. Notes, however, should not be taken until the subject has had the opportunity to tell his or her story completely and to correct any honest mistakes that he or she made in the first telling. Some subjects display annoyance when you divert your attention from them to take notes. Other subjects are reluctant to talk when they know what they say is being recorded. When either of these situations is apparent, the best time to write down the details of an interview is immediately after it is completed.

### **SUMMARY**

By now you should be aware of the various and important tasks involved with pretrial administrative procedures and how they affect the military justice system. Your role as an LN is important to this system, and the invaluable service you provide to your attorneys enhances the morale and efficiency of served commands. Also, keep in mind that the tasks noted throughout this chapter require that you keep current of requirements levied as a result of appellate decisions and congressional actions.

## CHAPTER 7

# COURT-MARTIAL TRIALS

Trial procedures differ according to the type of court convened to hear the case. Summary courts-martial (SCM) are convened to try relatively minor offenses and they use a simple form of procedure. Special courts-martial (SPCM) try serious offenses that are deemed to be beyond the scope of an SCM but not serious enough to warrant trial by general courts-martial (GCM). The major differences in these types of courts-martial are the maximum punishments that each may adjudge and the manner in which you prepare the records of proceedings.

This chapter examines the types of courts-martial, the procedures each uses, and other procedural matters that occur before and during trial. In our discussion of trial procedures, it is necessary to treat the SCM separately because its procedures are much different from those of the SPCM and GCM.

### THE SUMMARY COURT-MARTIAL

An SCM is the least formal of the three types of courts-martial and the least protective of individual rights. The SCM is a streamlined trial process involving only one officer who performs the duties of prosecutor, defense counsel, judge, and members. The purpose of this type of court-martial is to dispose of relatively minor offenses. The one officer assigned to perform the various roles must inquire thoroughly and impartially into the matter concerned to make sure both the United States and the accused receive a fair hearing. The SCM is a streamlined procedure that provides less protection of the rights of the accused than other forms of court-martial. The maximum imposable punishment that an SCM can award is very limited. Furthermore, it may try only enlisted personnel who consent to be tried by SCM.

As the SCM has no civilian equivalent, it is strictly a creature of statute within the military system. While it is a criminal proceeding at which the technical rules of evidence apply and at which a finding of guilty can result in loss of liberty and property, there is no constitutional right to representation by counsel. Therefore, it is not a truly adversarial proceeding.

### CREATION OF THE SUMMARY COURT-MARTIAL

An SCM is convened (created) by an individual authorized by law to convene an SCM. Article 24, *Uniform Code of Military Justice (UCMJ)*; *Rules for Courts-Martial (R.C.M.) 1302a*, *Manual for Courts-Martial (MCM)*, 1984; and *Manual of the Judge Advocate General (JAGMAN) 0120c* identify those persons who have the power to convene an SCM. These individuals include any person who may convene a GCM or an SPCM; or the commanding officer (CO) or officer in charge (OIC) of any other command when empowered by the Secretary of the Navy (SECNAV).

The authority to convene an SCM rests in the office of the authorized command vice in the person of its commander. For example, Captain Doe, U.S. Navy, has SCM convening authority while performing his or her duties as Commanding Officer, USS *Mississippi*. When Captain Doe goes on leave or is absent from his or her command for other reasons, he or she loses his or her authority. The power to convene an SCM is nondelegable and in no event can a subordinate exercise such authority "by direction." When Captain Doe is on leave from his or her ship, his or her authority to convene an SCM passes to his or her temporary successor in command (usually the executive officer) who, in the eyes of the law, becomes the acting CO.

COs or OICs not empowered to convene an SCM may request such authority by following the procedures contained in the JAGMAN.

### Restrictions on Authority to Convene

Unlike the authority to impose nonjudicial punishment (NJP), a competent superior commander may restrict the power to convene SCMs. Furthermore, the commander of a unit attached to a ship should, as a matter of policy, refrain from exercising his or her SCM convening powers. He or she should refer such cases to the CO of the ship for disposition while the unit is embarked. This policy does not apply to commanders of units that are embarked for transportation

only. When an individual has already been tried by a state or foreign court, you must obtain permission from the officer exercising general court-martial jurisdiction (OEGCMJ) before imposition of NJP or referral to an SCM. Offenses that have already been tried in a court deriving its authority from the United States (such as U.S. District Courts) may not be tried by court-martial.

If the convening authority (CA) or SCM officer is the accuser, it is discretionary with the CA as to whether to forward the charges to a superior with a recommendation to convene the SCM or convene the court himself or herself. If the SCM officer is the accuser, the jurisdiction of the SCM is not affected.

### **Mechanics of Convening**

Before bringing any case before an SCM, you must properly convene the court. You create an SCM by the order of the CA detailing the SCM officer to the court. The convening order will specify that it is an SCM and appoint the SCM officer. Additionally, the convening order may designate where the court-martial will meet. If the CA derives his or her power from designation by SECNAV, include this information in the order. Each convening order is assigned a court-martial convening order number. The CA personally signs the convening order showing his or her name, grade, and title, including organization and unit.

The MCM, 1984, authorizes the CA to convene an SCM by notation on the charge sheet signed by the CA. However, the better practice is to use a separate convening order for this purpose. Appendix 6b of the MCM, 1984, contains a suggested format for the SCM convening order. Also discussed in chapter 6 is the proper preparation of a convening order.

### **Summary Court-Martial Officer**

An SCM is a one-officer court-martial. As a jurisdictional prerequisite, this officer must be a commissioned officer on active duty and of the same armed force as the accused. (The Navy and Marine Corps are part of the same armed forces—the naval service.) Where possible, the officer's grade should not be below O-3. The SCM officer should be qualified because of age, education, experience, and judicial temperament as his or her performance will have a direct impact upon the morale and discipline of the command. Where more than one commissioned officer is

present within the command or unit, the CA may not serve as SCM officer. When the CA is the only commissioned officer in the unit, however, he or she may serve as SCM officer. Note this fact in the convening order and attach it to the record of trial. If such a situation exists, the better practice is to appoint an SCM officer from outside the command. The SCM officer does not have to be from the same command as the accused.

The SCM officer assumes the burden of prosecution, defense, judge, and jury. He or she must thoroughly and impartially inquire into both sides of the matter making sure the interests of both the government and the accused are safeguarded and justice is done. While the SCM officer may seek advice from a judge advocate or legal officer on questions of law, he or she may not seek advice from anyone on questions of fact, since he or she has an independent duty to make these determinations.

### **Jurisdictional Limitations-Persons**

Article 20, UCMJ, and R.C.M. 1301(c) provide that an SCM has the power (jurisdiction) to try only (how enlisted person who consent to trial by SCM. The right of an enlisted accused to refuse trial by SCM is absolute. Commissioned officers, warrant officers, cadets, aviation cadets, and midshipmen, or persons who are not subject to the UCMJ, may not be tried by SCM.

### **Jurisdictional Limitations-Offense**

An SCM has the power to try all offenses described in the UCMJ except those for which a mandatory punishment beyond the maximum imposable at an SCM is prescribed by the UCMJ. An SCM cannot try capital offenses that involve the death penalty. Refer to R.C.M. 1004 for a discussion of capital offenses. You may dispose of any minor offense by an SCM.

### **PREFERRAL AND REFERRAL OF CHARGES**

In this section, we will focus on the mechanism for properly preparing a particular case for trial before an SCM. Referral is the basic process by which you send a case to a particular type of court-martial.



## **Preliminary Inquiry**

Every court-martial case begins with a complaint by someone that a person subject to the UCMJ has committed an offense that results in the discovery of misconduct. The officer exercising immediate NJP authority over the accused has the duty to make, or cause to be made, an inquiry into the truth of the complaint or apparent wrongdoing.

## **Preferral of Charges**

Charges are formally made against an accused when signed and sworn to by a person subject to the UCMJ. This procedure is known as referral of charges. You refer charges by executing the appropriate portions of the charge sheet. There are several steps involved in this referral process. These steps include the following:

1. Personal data—Complete part I of page 1 of the charge sheet first. You can find the information relating to personal data in the pertinent portions of the accused's service record.

2. The charges—Next, you complete part II of page 1 of the charge sheet indicating the precise misconduct involved in the case. Each punitive article found in part IV, MCM, 1984, contains sample specifications. If the charges are so numerous that they will not all fit in part II, place them on a separate piece of paper and refer to it as attachment A. The preparation of charges and specifications were dealt with in detail in chapter 6.

3. Accuser—The accuser is a person subject to the UCMJ who signs item 11 in part III at the bottom of page 1 of the charge sheet. The accuser swears to the truth of the charges and has the affidavit executed before an officer authorized to administer oaths. This step is important, as an accused has a right to refuse trial on unsworn charges.

4. Oath—The oath must be administered to the accuser and the affidavit shows that it was executed by a person with proper authority. Article 136, UCMJ, authorizes commissioned officers who are judge advocates, staff judge advocates (SJAs), legal officers, law specialists, SCM officers, adjutants, and Marine Corps and Navy commanding officers, among others, to administer oaths for this purpose. Also authorized to administer oaths are officers certified by the Judge Advocate General of the Navy as counsel under Article 27, UCMJ, all officers in paygrade O-4 and above, executive officers, and administrative officers of Ma-

rine Corps aircraft squadrons. Often the legal officer will administer the oath regardless of who conducted the preliminary inquiry. When the charges are signed and sworn to, they are preferred against the accused.

## **Informing the Accused**

The next step that you take is to inform the accused of the charges against him or her. The purpose of this step is to provide an accused with reasonable notice of impending criminal prosecution. This action is in compliance with the criminal due process of law standards. The immediate commander of the accused is required to have the accused informed as soon as possible of the following elements: (1) the charges preferred against him or her; (2) the name of the person who preferred the charges; and (3) the name of the person who ordered the charges to be preferred.

The person who gives notice to the accused executes block 12 at the top of page 2 of the charge sheet. If not the immediate commander of the accused, the person signing on the signature line should state his or her rank, component, and authority. The law does not require a formal hearing to provide notice to the accused, but the charge sheet must show that notice was given.

When the accused is absent without leave at the time charges are sworn, it is permissible and proper to execute the receipt certification even though the accused cannot be advised of the existence of the charges. In such cases, attach a statement indicating the reason for the lack of notice to the case file. When the accused returns to military control, the notice should then be given.

Once formal charges have been signed and sworn to, the referral process is complete. The preferred charges are then receipted for by the officer exercising SCM jurisdiction over the accused. This officer or his or her designee may formally receipt for the preferred charges. The purpose of this receipt certification is to stop the running of the statute of limitations for the offense charged. The receipt section, part IV of the charge sheet, is filled in now.

## **The Act of Referral**

Once the charge sheet and the supporting materials are presented to the SCM CA and he or she decides to refer the case to an SCM, he or she must send the case to one of the SCMs previously convened. You complete this procedure by means of completing

block 14 in part V on page 2 of the charge sheet. The referral is executed personally by the CA. It explicitly details the type of court to which the case is being referred (SCM, SPCM, GCM) and the specific court to which the case is being referred.

A court-martial can only hear a case properly referred to it. The simplest and most accurate way to describe the correct court is to use the serial number and date of the order creating that court. Thus, the referral might read "referred for trial to the summary court-martial appointed by my summary court-martial convening order 1-CY dated 17 July 19CY." This language precisely identifies a particular kind of court-martial and the particular SCM to try the case.

In addition, the referral on page 2 of the charge sheet should show any particular instructions applicable to the case. These instructions could include statements such as confinement is not an authorized punishment in this case or any other instructions desired by the CA. If no instructions apply to the particular case, the referral should so indicate by use of the word *None* in the appropriate blank. Once the referral is properly executed, the case is referred to trial. Send the case file to the proper SCM officer for further action.

## **PRETRIAL PREPARATION**

After charges are referred to trial by SCM, and all case materials are sent to the proper SCM officer, he or she is responsible for preparing the case for trial.

### **Preliminary Preparation**

Upon receipt of the charges and accompanying papers, the SCM officer begins preparation for trial. The charge sheet is carefully examined, and all obvious administrative, clerical, and typographical errors are corrected. The SCM officer initials each correction he or she makes on the charge sheet. If there are so many errors as to require preparation of a new charge sheet, reswearing of the charges and re-referral are required. If the SCM officer changes an existing specification to include any new person, offense, or matter not fairly included in the original specification, the new specification must be resworn and re-referred. The SCM officer continues with his or her examination of the charge sheet to determine the correctness and completeness of the information on pages 1 and 2.

## **Pretrial Conference With the Accused**

After initial review of the court-martial file, the SCM officer meets with the accused in a pretrial conference. This section discusses the accused's right to counsel later in this chapter. If the accused elects representation by counsel, all dealings with the accused are through his or her counsel. Thus, the accused's counsel, if any, should be invited to attend the pretrial conference. At the pretrial conference, the SCM officer follows the suggested guide found in appendix 9, MCM, 1984, and documents the fact that all applicable rights were explained to the accused. This is done by completing blocks 4 and 5 on the Record of Trial by Summary Court-Martial, DD Form 2329.

### **Purpose**

The purpose of the pretrial conference is to provide the accused with information on the nature of the court-martial, the procedure to be used, and his or her rights with respect to that procedure. No attempt should be made by the SCM officer to interrogate the accused or otherwise discuss the merits of the charges. The proper time to deal with the merits of the accusations against the accused is at trial. The SCM officer provides the accused with a meaningful and thorough briefing so the accused fully understands the court-martial process and his or her rights pertaining to that process.

### **Advice to Accused—Rights**

The SCM officer advises the accused of the following matters:

- The general nature of the charges
- The fact that the charges have been referred to an SCM for trial and the date of referral
- The identity of the CA
- The name of the accuser
- The name of the witnesses who could be called to testify and any documents or physical evidence that the SCM officer expects to introduce into evidence
- The accused's right to inspect the allied papers and immediately available personnel records
- That during the trial the SCM officer will not consider any matters including statements previously made by the accused to the officer detailed as SCM

unless they are admitted according to the Military Rules of Evidence

- The right to plead not guilty or guilty
- The right to cross-examine witnesses and have the SCM officer cross-examine witnesses on behalf of the accused
- The right to call witnesses and produce evidence with the assistance of the SCM officer, if necessary
- The right to testify on the merits or to remain silent with the assurance that no adverse inference will be drawn by the SCM officer for such silence
- If any findings of guilty are announced, the right to remain silent, to make an unsworn statement, oral or written or both, to testify, and to introduce evidence in extenuation and mitigation
- The right to object to trial by SCM
- The maximum sentence that the SCM officer may adjudge if found guilty of the offense(s) alleged

The maximum punishment at a SCM includes the following:

E-4 and below—The jurisdictional maximum sentence that an SCM may adjudge in the case of an accused who, at the time of trial is in paygrade E-4 or below, extends to (1) reduction to the lowest paygrade (E-1); (2) forfeiture of two-thirds of 1 month's pay (CA may apportion collection over no more than 3 months); (3) a fine not to exceed two-thirds of 1 month's pay; (4) confinement not to exceed 1 month; (5) hard labor without confinement not to exceed 45 days (instead of confinement); and (6) restriction to specified limits for 2 months. If the accused is attached to or embarked in a vessel and is in paygrade E-3 or below, he or she may be sentenced to serve 3 days' confinement on bread and water/diminished rations and 24 days' confinement instead of 30 days' confinement.

E-5 and above—The jurisdictional maximum that an SCM could impose in the case of an accused who, at the time of trial is in paygrade E-5 or above, extends to (1) reduction, but only to the next inferior paygrade; (2) restriction to specified limits for 2 months; and (3) forfeiture of two-thirds of 1 month's pay. Unlike NJP, where an E-4 may be reduced to E-3 and then awarded restraint punishments imposable only upon an E-3 or below, at SCM, an E-5 cannot be sentenced to confinement or hard labor without

confinement even if a reduction to E-4 has also been adjudged.

### **Advice to Accused Regarding Counsel**

While the MCM, 1984, created no statutory right to detailed military defense counsel at an SCM, the CA may still permit the presence of such counsel if the accused can obtain such counsel. However, the MCM, 1984, has created a limited right to civilian defense counsel at SCMs. The accused has a right to hire a civilian lawyer and have that lawyer appear at trial, if such appearance will not necessarily delay the proceedings and if military exigencies do not prevent it. The accused must, however, bear the expense involved. If the accused wishes to retain civilian counsel, the SCM officer should allow him or her a reasonable time to do so.

An accused has no right to military counsel at an SCM. However, if an accused was not given an opportunity to consult with counsel before accepting an SCM, the SCM will be inadmissible at a later trial by court-martial. The term *independent counsel* means a lawyer qualified within the meaning of Article 27(b), UCMJ, who, in the course of regular duties, does not act as the principal legal advisor to the CA.

To be admissible at a later trial by court-martial, evidence of an SCM at which an accused was not actually represented by counsel must affirmatively demonstrate that:

- the accused was advised of his or her right to confer with counsel before deciding to accept trial by SCM;
- the accused either exercised his or her right to confer with counsel or made a voluntary, knowing, and intelligent waiver; and
- the accused voluntarily, knowingly, and intelligently waived his or her right to refuse an SCM.

If an accused has been properly advised of his or her right to consult with counsel and to refuse an SCM, his or her elections and/or waiver in this regard are made in writing and are signed by the accused. Use a form similar to that shown in figure 7-1 to record the advice/waiver. It should be made on a page 13 of the accused's service record with a copy attached to the record of trial. The Acknowledgement of Rights and Waiver, properly completed, contains all the necessary advice to an accused. When it is properly executed, it will establish a voluntary, knowing,

SUMMARY COURT-MARTIAL  
ACKNOWLEDGEMENT OF RIGHTS AND WAIVER

I, \_\_\_\_\_,  
assigned to \_\_\_\_\_,  
acknowledge the following facts and rights regarding summary courts-martial:

1. I have the right to consult with a lawyer prior to deciding whether to accept or refuse trial by summary court-martial. Should I desire to consult with counsel, I understand that a military lawyer may be made available to advise me, free of charge, or, in the alternative, I may consult with a civilian lawyer at my own expense.

2. I realize that I may refuse trial by summary court-martial, in which event the commanding officer may refer the charge(s) to a special court-martial. My rights at a summary court-martial would include:

- a. the right to confront and cross-examine all witnesses against me;
- b. the right to plead not guilty and the right to remain silent, thus placing upon the government the burden of proving my guilt beyond a reasonable doubt;
- c. the right to have the summary court-martial call, or subpoena, witnesses to testify in my behalf;
- d. the right, if found guilty, to present matters which may mitigate the offense or demonstrate extenuating circumstances as to why I committed the offense(s); and
- e. the right to be represented at trial by a civilian lawyer provided by me at my own expense, if such appearance will not unreasonably delay the proceedings and if military exigencies do not preclude it.

3. I understand that the maximum punishment which may be imposed at a summary court-martial is:

On E-4 and below

Confinement for 1 month

45 days' hard labor without confinement

60 days' restriction

Forfeiture of two-thirds pay for 1 month

Reduction to the lowest paygrade

On E-5 and above

60 days' restriction

Forfeiture of two-thirds pay for 1 month

Reduction to next inferior paygrade

Figure 7-1.—Summary court-martial acknowledgement of rights and waiver.

4. Should I refuse trial by summary court-martial, the commanding officer may refer the charge(s) to trial by special court-martial. At a special court-martial, in addition to those rights set forth above with respect to a summary court-martial, I would also have the following rights:

a. The right to be represented at trial by a military lawyer, free of charge, including a military lawyer of my own selection if he or she is reasonably available. I would also have the right to be represented by a civilian lawyer at my own expense.

b. The right to be tried by a special court-martial composed of at least three officers as members or, at my request, at least one-third of the court members would be enlisted personnel. If tried by a court-martial with members, two-thirds of the members, voting by secret written ballot, would have to agree in any finding of guilty, and two-thirds of the members would also have to agree on any sentence to be imposed should I be found guilty.

c. The right to request trial by military judge alone. If tried by a military judge alone, the military judge alone would determine my guilt or innocence and, if found guilty, he or she alone would determine the sentence.

5. I understand that the maximum punishment which can be imposed at a special court-martial for the offense(s) presently charged against me is:

discharge from the naval service with a bad-conduct discharge (delete if inappropriate);

confinement for \_\_\_\_\_ months;

forfeiture of two-thirds pay per month for \_\_\_\_\_ months;

reduction to the lowest enlisted paygrade (E-1).

Knowing and understanding my rights as set forth above, I (do) (do not) desire to consult with counsel before deciding whether to accept trial by summary court-martial.

Knowing and understanding my rights as set forth above (and having first consulted with counsel), I hereby (consent) (object) to trial by summary court-martial.

\_\_\_\_\_  
Signature of accused and date

\_\_\_\_\_  
Signature of witness and date

**Figure 7-1.-Summary court-martial acknowledgement of rights and waiver—Continued.**

and intelligent waiver of the accused's right to consult with counsel and/or his or her right to refuse trial by an SCM. Assuming Booker warnings have been given (proper advice and recordation of election/waivers), evidence of the SCM will be admissible at a later trial by court-martial as evidence of the character of the accused's prior service.

### **Final Pretrial Preparation**

After the pretrial interview, the SCM officer determines whether the accused has decided to accept or refuse trial by SCM. If the accused needs more time to decide, it should be provided. If the case is to proceed, the witnesses or the description of other evidence that the accused wishes presented at trial should be identified. The SCM officer arranges for a time and place to hold the open session of the trial. These arrangements are made through the legal officer, and the SCM officer notifies all personnel involved of the time and place of the first meeting.

The SCM officer plans an orderly trial procedure to include a chronological presentation of the facts. Appendix 9, MCM, is an SCM trial guide. The SCM officer should follow it closely and precisely during the hearing. The admissibility and authenticity of all known evidentiary matters are determined and numbers are assigned to all exhibits to be offered at trial. The evidence reviewed by the SCM officer includes not only that contained in the original file, but also any other relevant evidence discovered by other means. The SCM officer has the duty of making sure all relevant and competent evidence in the case, both for and against the accused, is presented. It is the responsibility of the SCM officer to make sure only legal and competent evidence is received and considered at the trial. Only legal and competent evidence received in the presence of the accused at trial can be considered in determining the guilt or innocence of the accused. The Military Rules of Evidence apply to an SCM and must be followed. If a question regarding admissibility of evidence arises, the SCM officer may seek assistance from the local naval legal service office (NLSO) in resolving the issue.

The SCM is authorized to issue subpoenas to compel the appearance at trial of civilian witnesses. In such a case, the SCM officer follows the same procedure detailed for an SPCM or a GCM trial counsel (TC).

## **TRIAL PROCEEDINGS**

The actual trial procedure, while somewhat different from that of the GCM or the SPCM, is governed by the same general principles and has the same basic procedures as those for courts-martial. The major steps of the SCM include the arraignment, motions, pleas, presentation of the evidence, and findings and sentence. Each of these steps will be reviewed individually.

### **Arraignment**

The SCM reads and shows the charges and specifications to the accused and, if necessary, explains them to him or her. The accused may waive the reading of the charges. The SCM officer then asks the accused to plead to each charge and specification.

### **Motions**

Before receiving pleas, the SCM officer allows the accused to make motions to dismiss or for any other relief. The SCM officer takes action on behalf of the accused, if requested by the accused, or if it appears necessary in the interest of justice.

### **Pleas**

When a not guilty plea is entered, the SCM officer proceeds to trial. If the accused pleads guilty to any offense, the SCM officer determines the providence of the plea(s). If the SCM officer is in doubt that the accused's plea(s) of guilty are voluntarily and understandingly made, or if at any time during the trial any matter inconsistent with the plea(s) of guilty arises, the SCM officer enters not guilty plea(s) on behalf of the accused. If the accused refuses to plead, the SCM officer enters not guilty plea(s). The accused may change any plea at any time before findings are announced.

### **Presentation of Evidence**

Witnesses for the prosecution are called first and examined under oath. The accused is permitted to cross-examine these witnesses. The SCM officer can aid the accused in the cross-examination process. The witnesses for the accused are then called and examined under oath.

The SCM officer obtains evidence that tends to disprove the accused's guilt or establishes extenuating circumstances.

### **Findings and Sentence**

The SCM officer announces the findings and sentence to the accused in open session. If the sentence includes confinement, the SCM officer advises the accused of the right to apply to the CA for deferment of the service to confinement. If the accused is found guilty, he or she is informed of the right to submit matters to the CA within 7 days.

### **POSTTRIAL RESPONSIBILITIES OF THE SUMMARY COURT-MARTIAL OFFICER**

After the SCM officer deliberates and announces findings and, where appropriate, the sentence, he or she then must fulfill certain posttrial duties. The nature and extent of these posttrial responsibilities depend upon whether the accused was found guilty or innocent of the offenses charged.

Accused acquitted on all charges—In cases in which the accused has been found not guilty as to all charges and specifications, the SCM officer must do the following:

- Announce the findings to the accused in open session.
- Inform the CA as soon as possible of the findings.
- Prepare the original and at least two copies of the record of trial. A completed SCM record of trial is shown in figure 7-2.
- Serve one copy of the record of trial upon the accused and secure the accused's receipt for it.
- Send the original and one copy of the record of trial to the CA for action.

Accused convicted on some or all of the charges—In cases in which the accused has been found guilty of one or more of the charges and specifications, the SCM officer must do the following:

- Announce the findings and sentence to the accused in open session.
- Advise the accused of the appellate rights under R.C.M. 1306.

- If the sentence includes confinement, inform the accused of his or her right to apply to the CA for deferment of confinement.

- Inform the CA of the results of trial as soon as possible. This includes the findings, sentence, and recommendations for suspension of the sentence and any deferment request.

- Prepare the record of trial.

- Cause one copy of the record of trial to be served upon the accused and secure the accused's receipt.

- Send the original and one copy of the record of trial to the CA for action.

The SCM officer authenticates the record of trial by signing each copy. The CA's action and the review procedures for SCM are discussed in the next chapter.

### **THE SPECIAL COURTS-MARTIAL**

The SPCM is the intermediate level court-martial created by the UCMJ. The maximum penalties that an accused may receive at an SPCM are generally greater than those of an SCM, but less than those of a GCM. The rights of an accused at an SPCM are also generally greater than the rights at an SCM but less than the rights at a GCM. The SPCM is a court consisting of at least three members, trial and defense counsels, and a military judge. The maximum imposable punishment at an SPCM extends to a bad-conduct discharge (BCD), 6 months' confinement, forfeiture of two-thirds pay per month for 6 months, and reduction to paygrade E-1. This chapter will discuss in detail the SPCM and the mechanics of its operation.

### **CREATION OF THE SPECIAL COURT-MARTIAL**

Article 23, UCMJ, and the JAGMAN prescribe who has the power to convene (create) an SPCM. The power to convene an SPCM is nondelegable and, in no event, can a subordinate exercise such authority. Avoid signature titles such as Acting Commanding Officer and Executive Officer on legal documents regardless of the validity of such titles on other administrative correspondence.

The commander of a unit embarked on a naval vessel who is authorized to convene an SPCM should refrain from exercising such authority and defer instead to the desires of the ship's commander.

RECORD OF TRIAL BY SUMMARY COURT—MARTIAL			
1a. NAME OF ACCUSED ( <i>Last, First, MI</i> ) DOE, John A.	b. GRADE OR RANK SN, USN	c. UNIT OR ORGANIZATION OF ACCUSED USS HERMITAGE (LSD 34)	d. SSN 444-44-4444
2a. NAME OF CONVENING AUTHORITY ( <i>Last, First, MI</i> ) DOOR, Walter T.	b. RANK CDR, USN	c. POSITION COMMANDING OFFICER	d. ORGANIZATION OF CONVENING AUTHORITY USS HERMITAGE (LSD 34)
3a. NAME OF SUMMARY COURT-MARTIAL ( <i>If SCM was accuser, so state.</i> ) FROST, Jack R.	b. RANK LT, USNR	c. UNIT OR ORGANIZATION OF SUMMARY COURT-MARTIAL NAVAL LEGAL SERVICE OFFICE, NORFOLK, VA	
<i>(Check appropriate answer)</i>			
			YES NO
4. At a preliminary proceeding held on <u>1 January</u> 19 <u>CY</u> , the summary court-martial gave the accused a copy of the charge sheet.			X
5. At that preliminary proceeding the summary court-martial informed the accused of the following:			
a. The fact that the charge(s) had been referred to a summary court-martial for trial and the date of referral.			X
b. The identity of the convening authority.			X
c. The name(s) of the accuser(s).			X
d. The general nature of the charge(s).			X
e. The accused's right to object to trial by summary court-martial.			X
f. The accused's right to inspect the allied papers and immediately available personnel records.			X
g. The names of the witnesses who could be called to testify and any documents or physical evidence which the summary court-martial expected to introduce into evidence.			X
h. The accused's right to cross-examine witnesses and have the summary court-martial cross-examine on behalf of the accused.			X
i. The accused's right to call witnesses and produce evidence with the assistance of the summary court-martial if necessary.			X
j. That during the trial the summary court-martial would not consider any matters, including statements previously made by the accused to the summary court-martial, unless admitted in accordance with the Military Rules of Evidence.			X
k. The accused's right to testify on the merits or to remain silent, with the assurance that no adverse inference would be drawn by the summary court-martial from such silence.			X
l. If any findings of guilty were announced, the accused's right to remain silent, to make an unsworn statement, oral or written or both, and to testify and to introduce evidence in extenuation or mitigation.			X
m. The maximum sentence which could be adjudged if the accused was found guilty of the offense(s) alleged.			X
n. The accused's right to plead guilty or not guilty.			X
6. At the trial proceeding held on <u>14 January</u> 19, <u>CY</u> , the accused, after being given a reasonable time to decide, <input type="checkbox"/> did <input checked="" type="checkbox"/> did not object to trial by summary court-martial. <i>(Note: The SCM may ask the accused to initial this entry at the time the election is made.)</i>			JAD <i>(Initial)</i>
7a. The accused <input type="checkbox"/> was <input checked="" type="checkbox"/> was not represented by counsel. <i>(If the accused was represented by counsel, complete b, c, and d below.)</i>			
b. NAME OF COUNSEL ( <i>Last, First, MI</i> ) N/A			c. RANK ( <i>If any</i> ) N/A
d. COUNSEL QUALIFICATIONS N/A			

DD FORM 2329  
84 AUG

S/N 0102-LF-002-3290

Figure 7-2A.—Record of Trial by Summary Court-Martial, DD Form 2329 (front).





Before any case can be brought before an SPCM, such a court-martial must be convened. The creation of an SPCM is accomplished by the written orders of the CA in which the members are also detailed.

In chapter 6, you learned the procedures for the preparation of the convening order. The order is typed on command letterhead, is dated and serialized, and is signed personally by the CA. The order specifies the names and ranks of all members detailed to serve on the court. When a proper convening order is executed, an SPCM is created and remains in existence until dissolved. A sample convening order can be found in chapter 6.

### **COMPOSITION OF SPECIAL COURTS-MARTIAL**

There are several configurations of an SPCM depending upon either the desires of the CA or the desires of the accused. The constitution of the court refers to the court's composition; that is, the personnel involved. The different types of SPCM compositions are as follows:

**Three members**—One type of SPCM consists of a minimum of three members and counsel, but no military judge. Such an SPCM can try any case referred to it but cannot adjudge a sentence (in enlisted cases) of more than 6 months' confinement, forfeiture of two-thirds pay per month for 6 months, and reduction to paygrade E-1. So, in ordinary circumstances, a punitive discharge may not be adjudged. Where a three-member type of court-martial is used, the CA must include in the Referral block on the charge sheet instruction that a BCD is not an authorized punishment.

**Military judge and members**—This type of SPCM involves counsel, at least three members, and a military judge. The members' role is similar to that of a civilian jury. They determine guilt or innocence and impose sentence. The senior member is, in effect, the jury foreman who presides during deliberations. The military judge functions as does a civilian criminal court judge. He or she resolves all legal questions that arise and otherwise directs the trial proceedings. This form of SPCM is authorized to adjudge a punitive discharge and has become fairly standard in the naval service.

**Military judge alone**—This form of SPCM is not created by a convening order, but by the accused's exercise of a statutory right. The accused has the right to request orally on the record or in writing a trial by

military judge alone—without members. Before choosing to be tried by a military judge alone, an accused is entitled to know the identity of the judge who will sit on his or her case. The TC may argue against the request when it is presented to the military judge. The judge rules on the request and, if the request is granted, he or she discharges the court members for the duration of that case only. A court-martial so configured is authorized to impose a sentence extending to a punitive discharge.

### **IMPROPER CONSTITUTION OF THE COURT**

Requisites to the power of a court-martial to try a case are jurisdiction over the offense, jurisdiction over the defendant, proper convening, and proper constitution. A deficiency in any of these requisites makes the court powerless to adjudicate a case lawfully. The rules relating to constitution of the court must, therefore, be carefully observed.

### **QUALIFICATIONS OF MEMBERS**

**Selection of members**—The CA has the ultimate legal responsibility to select the court members. This responsibility cannot be delegated. The CA may choose from lists of members suggested by subordinates, but the final decision is his or hers. A CA appoints, as members, those personnel who, in his or her judgment, are best qualified by reason of age, education, training, experience, length of service, and judicial temperament. These factors, of course, vary with individuals and do not necessarily depend on the grade of the particular person. No person in arrest or confinement is eligible to be a court member. Similarly, no person who is an accuser, witness for the prosecution, or has acted as investigative officer or counsel in a given case is eligible to serve as a member for that case.

**Commissioned officers**—The members of an SPCM must, as a general rule, be commissioned officers. When the accused is an enlisted service member, noncommissioned warrant officers are eligible to be court members. No member of the court should be junior in grade to the accused if it can be avoided. Members of an armed force other than that of the accused may be used, but at least a majority of the members should be of the same armed force as the accused.

Enlisted members—An enlisted accused has a right to be tried by a court consisting of at least one-third enlisted members. The accused desiring enlisted membership submits a personally signed request before the conclusion of any Article 39(a), UCMJ, session (pretrial hearing), or before the assembly of the court at trial, or makes the request orally on the record. Only enlisted persons who are not of the same unit as the accused can lawfully be assigned to the court. Unit means company, squadron, battery, ship, or similar sized element,

If, when requested, enlisted members cannot be detailed to the court, the CA may direct the original court to proceed with the trial. Such actions should only be taken when enlisted service members cannot be assigned because of extraordinary circumstances. In such a case, the CA sends to the TC for attachment to the record of trial, a detailed explanation of the extraordinary circumstances and why the trial must proceed without enlisted members.

### **QUALIFICATIONS OF THE MILITARY JUDGE**

The military judge of an SPCM must be a commissioned officer, a member of the bar of the highest court of any state or the bar of a federal court, and certified by the Judge Advocate General as qualified to be a military judge. A military judge qualified to act on GCM cases can also act on SPCM cases.

### **QUALIFICATIONS OF COUNSEL**

Articles 19 and 38, UCMJ, describe the accused's right to counsel at SPCMs. Article 27, UCMJ, sets forth the qualifications for counsel.

#### **Trial Counsel**

The TC in military criminal law serves as the prosecutor. For an SPCM, the TC need only be a commissioned officer.

#### **Defense Counsel**

There are various types of defense counsel (DC) in military practice. The detailed DC is the DC initially assigned to the case. Individual counsel is a counsel requested by the accused and can be a civilian or military lawyer.

**DETAILED DEFENSE COUNSEL.**— Article 27(c), UCMJ, describes the qualifications for detailed

DCs at SPCMs. An Article 27(b) DC is detailed at no cost to the accused unless, due to military exigencies or physical conditions, one cannot be obtained.

The protection given to an accused by Article 27(c) is expanded in that it requires Article 27(b) counsel to be detailed as detailed DCs in SPCMs.

**INDIVIDUAL COUNSEL.**— The term *individual counsel* is used to refer to a counsel specifically requested by an accused. Such counsel may be military or civilian.

**CIVILIAN COUNSEL.**— At any SPCM, the accused has the right to be represented by civilian counsel provided by him or her at his or her own expense. When the accused retains such counsel, the detailed DC remains to assist the individual counsel unless expressly excused by the accused. The accused is entitled to a reasonable delay before trial for the purpose of obtaining and consulting with civilian individual counsel.

**INDIVIDUAL MILITARY COUNSEL.**— At an SPCM, the accused has the right to be represented by a military counsel of his or her own choice at no cost to the accused if such counsel is reasonably available.

#### **No Defense Counsel**

An accused has the right to represent himself or herself at an SPCM without assistance of counsel.

### **REFERRAL OF CHARGES**

The process of referring a given case to trial by SPCM is essentially the same as that for referral to an SCM. Thus, the principles that apply to the preliminary inquiry, preferral of charges, informing the accused, and receipt of sworn charges also apply to the SPCM. As far as the referral process is concerned, the only essential difference between the referral of an SCM and an SPCM is the information contained in block 14 on page 2 of the charge sheet.

#### **Referral to Trial**

If, after reviewing the applicable evidence, the CA determines that trial by SPCM is warranted, he or she executes Part V of the charge sheet in the proper manner. In addition to the command data entered on the appropriate lines of block 14, the CA indicates the type of court-martial to which the case is being referred, the particular SPCM to which the case is

assigned, and any special instructions. Block 14 is then personally signed by the CA or by his or her personal order reflecting the signer's authority. It might serve well to recall that a clear and concise serial system is essential to proper referral. The referral should identify a particular court to hear the case; that is, it should relate to a specific convening order. Take care in preparing convening orders and referral blocks to avoid confusion and legal complications at the trial.

### **Withdrawal of Charges**

Withdrawal of charges is a process by which the CA takes from a court-martial a case previously referred to it for trial. The CA cannot withdraw charges from one court and re-refer them to another without proper reasons. These reasons are articulated in writing by the CA and included in the record of trial when the case is tried by the second court. The CA may withdraw charges for the purpose of dismissing them for any reason deemed sufficient to him or her. Mechanically, accomplish the withdrawal by drawing a diagonal line across the referral block on page 2 of the charge sheet and have the CA initial the line-out. It is also advisable to write withdrawn across the endorsement and date the action.

### **DISESTABLISHMENT OF THE COURT.—**

Perhaps the most frequently occurring withdrawal problem is presented when the CA wants to disestablish the court and create another to take its place. This usually happens when several members have been transferred, or the particular court has been in existence for a long time, and the CA wants to relieve the court. Such grounds are valid and constitute a proper reason. If evidence shows that a change was made because the CA was displeased with the leniency of a sentence or the number of acquittals, then the withdrawal would not be lawful. Whenever a new court relieves an old one, it creates a problem with respect to the cases previously referred to the old court (which was, disestablished and are now being referred to the new court. Remember, only the court to which a case is specifically referred can try it. The CA can withdraw each case from the old court (by lining out the referral block) and then re-refer the case to the new court. This action is accomplished by executing a new block 14 referral on the charge sheet, indicating the serial number and date of the convening order that appoints the new court. The new referral is taped along the top edge over the old lined-out referral to allow inspection of both referrals.

**CHANGE IN COURT—NO DISESTABLISHMENT.—** Sometimes a CA may have good cause for withdrawing a case from a court that he or she does not intend to disestablish. For instance, one of several court panels may be backlogged and the CA may wish to redistribute the pending cases. This action is accomplished by lining out and initialing the old referral block on the charge sheet and executing a new block 14 re-referring the case to a new court. The new block 14 is taped over the old one to allow inspection of both referrals.

### **Amendment of Charges**

In some instances, an amendment to a specification will necessitate further administrative action with respect to the charge sheet. Minor changes in the form of correction of typographical errors normally will require no more administrative action than lining out and initialing the erroneous data and substituting the correct data. If, on the other hand, the contemplated change involves any new person, offense, or matter not fairly included in the charges as originally preferred, the amended specification must go through the preferral-referral process or the accused can exercise his or her right to object to trial on the unsworn charges.

### **Additional Charges**

If an accused awaiting trial on certain charges commits new offenses, or other previously unknown offenses are discovered, an entirely new charge sheet is prepared. The CA states, in the special instructions section of the referral block, that the additional charges are to be tried together with the charges originally referred to the court-martial.

### **TRIAL PROCEDURE**

It is not necessary that you have a complete understanding of all the complex rules and procedures applicable to the SPCM. However, it is essential that you have a general knowledge of the mechanics of the trial process. Though an infinite number of variations exist in any particular case, the following procedure is generally followed in most SPCMs.

### **Service of Charges**

In time of peace no person can be brought to trial in any SPCM until 3 days have elapsed since the formal service of charges upon that person. In computing

the 3-day period, neither the date of service nor the date of trial count. Sundays and holidays do count, however, in computing the statutory period. If the accused is served on Wednesday, one must wait Thursday, Friday, and Saturday before compelling trial. Trial in this example could not be compelled before Sunday, and, as a practical matter, not before Monday. You will find that at U.S. shore establishments, trials normally do not occur on the weekends. However, when ships are at sea or in overseas ports, a trial is possible at any time and any day of the week.

The date of service of charges upon the accused is reflected by the certificate in block 15 at the bottom of page 2 of the charge sheet. The TC normally executes this certificate when he or she presents a copy of the charge sheet to the accused personally. He or she must do this even though the accused has previously been informed of the charges against him or her. This service of a copy of the charge sheet may also be done by the command at any time after referral as long as the service is to the accused personally. Any accused can lawfully object to participating in trial proceedings before the 3-day waiting period has expired. The accused may, however, waive the 3-day period, so long as he or she understands the right and voluntarily agrees to go to trial earlier.

### **Pretrial Hearings**

After the 3-day period has elapsed, the military judge may hold sessions of court without members for the purpose of litigating motions, objections, and other matters not amounting to a trial of the accused's guilt or innocence. The accused may be arraigned and his or her pleas taken and determined at such a hearing. At such hearings, the judge, TC, DC, accused, and reporter will be present. Several such hearings may be held if desired. These hearings are commonly referred to as Article 39(a) sessions.

### **Preliminary Matters**

At the initial pretrial hearing (Article 39(a) session), the first order of business is to incorporate into the record those documents relating to the convening of the court and referral of the case for trial. Also all oaths are administered. The convening order and the charge sheet and any amendments to either document become matters of record at this point in the proceedings.

In addition, an accounting of the presence or absence of those personnel required to be present is made. This accounting includes all persons named in the convening order, the counsel, the reporter, and the military judge. Qualifications of all personnel are checked for the record.

### **The Arraignment**

The arraignment is the procedure involving the reading of the charges to the accused and asking for the accused's pleas. The actual pleading is not part of the arraignment. The arraignment is complete when the accused is asked to enter his or her pleas. This stage is an important one in the trial because if the accused voluntarily absents himself or herself without authority and does not thereafter appear during court sessions, he or she may nevertheless be tried and, if the evidence warrants, convicted. The arraignment is also the cutoff point for the adding of additional charges to the trial. After arraignment, no new charges can be added without the consent of the accused.

### **Motions**

At arraignment, the military judge advises the accused that his or her pleas are about to be requested and that if he or she desires to make any motions he or she should now do so. Many times all such motions (attacking jurisdiction, sufficiency of charges, illegal pretrial confinement, and speedy trial) will have already been litigated at a previous pretrial hearing. Nevertheless, the accused may decide to make additional motions and is allowed to do so. If there are motions, they are litigated at this time. If there are no motions, the trial proceeds to the arraignment.

### **Pleas**

The arraignment is the process of asking the accused to plead to charges and specifications. The responses of the accused to each specification and charge are known as the pleas. The recognized pleas in military practice are guilty, not guilty, guilty to a lesser included offense, and, under some circumstances, a conditional plea of guilty. Any other pleas (such as *nolo contendere*) are improper, and the military judge enters a plea of not guilty for the accused.

**NOT GUILTY PLEAS.**— When not guilty pleas are entered by the court or accused, the trial proceeds to the presentation of evidence—first by the prosecutor and then by the defense.

**GUILTY PLEAS.**— Where guilty pleas are entered or the accused pleads guilty to a lesser included offense, the judge determines that such pleas are made knowingly and voluntarily and that the accused understands the meaning and effect of such pleas. This process is known as providency. The military judge advises the accused (1) of the maximum sentence that can be imposed in his or her case; (2) that a plea of guilty is the strongest form of proof known to the law; and (3) that by pleading guilty the accused is giving up the right to a trial of the facts, the right against self-incrimination, and the right to confront and to cross-examine the witness against him or her. In addition, the judge explores the facts thoroughly with the accused to obtain from the accused an admission of guilt-in-fact to each element of the offense(s) to which the pleas relate.

**CONDITIONAL PLEAS.**— With the approval of the military judge and the consent of the TC, an accused may enter a conditional plea of guilty. The main purpose of such a conditional plea is to preserve for appellate review certain adverse determinations that the military judge may make against the accused regarding pretrial motions. If the accused prevails on appeal, his or her conditional plea of guilty may then be withdrawn.

### **Assembly of the Court**

After the accused enters pleas, the military judge assembles the court. This is done by bringing the members into the courtroom if it is a member's trial. The military judge announces that all parties are present and the members are sworn. The court is then assembled. After assembly the military judge may give preliminary instructions to the members. Any witnesses that are expected to be called to testify are asked to withdraw from the courtroom. The TC restates the general nature of the charges in the case for the benefit of the members.

### **Challenge Procedure**

Where the court is composed of members, the next stage will involve a determination of the eligibility of court members to participate in the trial. Members may be asked questions individually or collectively. This procedure is called *voir dire*. This procedure determines whether or not a member is suitable to sit as a member of the court-martial.

Mechanically, both the TC and DC are given an opportunity to question each member to see if a

ground for challenge exists. In this connection, there are two types of challenges—challenges for cause and peremptory challenges. A challenge, if sustained by the judge who rules upon it, excuses the challenged member from further participation in the trial. The law places no limit on the number of challenges for cause that can be made at a trial. A peremptory challenge is a challenge that can be made for any reason. The TC and accused are entitled to one peremptory challenge.

### **Case on the Merits**

At this point the military judge announces to the members the plea(s) of the accused. The TC and DC may make one opening statement to the court before the presentation of evidence begins. The defense may elect to make its opening statement after the prosecution has rested and before the presentation of evidence for the defense. After opening statements are made, the prosecution commences presenting his or her case-in-chief. Each party has full opportunity to present evidence. Ordinarily the following sequence is used:

- Presentation of evidence for the prosecution
- Presentation of evidence for the defense
- Presentation of prosecution evidence in rebuttal
- Presentation of defense evidence in surrebuttal
- Additional rebuttal evidence in the discretion of the military judge
- Presentation of evidence requested by the military judge or members

The testimony of witnesses is taken orally in open session. Each witness must testify under oath. After the witness is sworn he or she is identified for the record. The party calling the witness conducts direct examination of the witness, followed by cross-examination of the witness by the opposing party. Redirect and recross-examinations are conducted as necessary followed by any questions by the military judge or members. All documentary and real evidence is marked and introduced into evidence.

### **Argument on Findings and Findings**

After all evidence has been presented, the TC makes argument on findings. Following the TC's argument, the DC presents argument. In this stage the

TC is allowed to make another argument, rebutting anything that was brought up by the DC. After all arguments are complete and if the trial is composed of members, the military judge instructs the members on findings. The members withdraw from the courtroom for deliberation on findings.

If the court is composed of members, the president of the court will announce the findings. If no members, the judge announces findings. At an SPCM, two-thirds of the members present at trial must agree on each finding of guilty. In computing the necessary number of votes to convict, a resulting fraction is counted as one. Thus, on a court of five members, the number of voters required to convict is three and one-third or, applying the rule, four votes. In a trial by military judge alone, the required number of votes is one—the judge's.

### **Presentencing Procedure**

After findings of guilty have been announced, the prosecution and defense may present matters to aid the court-martial in determining an appropriate sentence. Such matters are ordinarily presented by the TC in the following sequence:

- Service record data relating to the accused taken from the charge sheet
- Personal data relating to the accused and of the character of the accused's prior service as taken from the service record
- Evidence of prior convictions, military or civilian
- Evidence of rehabilitative potential

### **Extenuation and Mitigation**

The defense may present matters in rebuttal of any material presented by the prosecution and may present matters in extenuation and mitigation. Matter in extenuation of an offense serves to explain the circumstances surrounding the commission of an offense, including those reasons for committing the offense that do not constitute a legal justification or excuse. Matter in mitigation of an offense is introduced to lessen the punishment to be adjudged by the court-martial, or to furnish grounds for a recommendation of clemency.

The accused may testify, make an unsworn statement, or both in extenuation, in mitigation or to rebut matters presented by the prosecution, or for all three

purposes. The accused may limit such testimony or statement to any one or more of the specifications of which the accused has been found guilty.

### **Argument on Sentence and Sentence**

After introduction of matters relating to sentencing, counsel for the prosecution and defense may argue for an appropriate sentence. Again, if it is a members' trial, the military judge will instruct the members on sentencing. As with findings, two-thirds of the members must be in concurrence for a particular sentence. In a members' trial, the president of the court will announce sentence, otherwise the military judge announces it. Immediately after sentencing the military judge informs the accused of posttrial and appellate rights.

### **Adjournment**

The military judge adjourns the court-martial at the end of the trial of an accused or proceeds to trial of other cases referred to that court-martial.

### **Clemency**

After trial, any or all court members and/or the military judge may recommend that the CA exercise clemency to reduce the sentence, notwithstanding their vote on the sentence at trial.

### **SPECIAL COURT-MARTIAL PUNISHMENTS**

Articles 19, 55, and 56, UCMJ, and R.C.M. 1003 are the primary references concerning the punishment authority of the SPCM. Appendix 12 and part IV, MCM, 1984, also address punishment power. Part IV of the MCM contains the maximum permissible punishment for a particular offense. The other references further limit punitive authority, depending on the level of court-martial and type of punishment being considered.

### **Prohibited Punishments**

Article 55, UCMJ, flatly prohibits flogging, branding, marking, tattooing, the use of irons (except for safekeeping of prisoners), and any other cruel and unusual punishment. Other punishments not recognized by service customs include shaving the head, tying up by hands, carrying a loaded knapsack, placing in stocks, loss of good conduct time (a strictly

administrative measure), and administrative discharge.

### **Jurisdictional Maximum Punishments**

In no case can an SPCM lawfully adjudge a sentence in excess of a BCD, confinement for 6 months, forfeiture of two-thirds pay per month for 6 months, and reduction to paygrade E-1. Within those outer limits are a number of variations of lesser forms of punishment that may be adjudged.

### **Authorized Punishments**

Appendix 12 and part IV, MCM, 1984, list the specific maximum punishments for each offense as determined by statutory provisions or by the President of the United States pursuant to authority delegated by Article 56, UCMJ. An accused, as a general rule, may be separately punished for each offense of which he or she is convicted, unlike NJP where only one punishment is imposed for all offenses. Thus, an accused convicted of unauthorized absence (Article 86), assault (Article 128), and larceny (Article 121) is subject to a maximum sentence determined by totaling the maximum punishment for each offense. A chart that lists punishments authorized at each type of court-martial is illustrated in figure 7-3. We will address each individual type of punishment.

**PUNITIVE SEPARATION FROM THE SERVICE.**— An SPCM is empowered to sentence an enlisted accused to separation from the service with a BCD. This is true provided the discharge is authorized for one or more of the offenses for which the accused stands convicted or by virtue of an escalator clause (discussed later). An SPCM is not authorized to sentence any officer or warrant officer to separation from the service. A BCD is a separation from the service under conditions not honorable and is designed as a punishment for bad conduct rather than as a punishment for serious military or civilian offenses. It is also appropriate for an accused who has been convicted repeatedly of minor offenses and whose punitive separation appears necessary.

The practical effect of this type of separation is less severe than a dishonorable discharge (DD), where the accused automatically becomes ineligible for almost all veterans' benefits. The effect of a BCD on veterans' benefits depends upon whether it was adjudged by a GCM or an SPCM, whether the benefits are administered by the service concerned or by the

Department of Veterans Affairs, and upon the particular facts of a given case.

**CONFINEMENT.**— Confinement involves the physical restraint of an adjudged service member in a brig or prison. Under military law, confinement automatically includes hard labor, but the law prefers that the sentence be stated as confinement—omitting the words *at hard labor*. Omission of the words *hard labor* does not relieve the accused of the burden of performing hard labor. An SPCM can adjudge 6 months' confinement upon an enlisted service member, but may not impose any confinement upon an officer or warrant officer. Part IV, MCM, limits this punishment to an even lesser period for certain offenses. As an example, failure to go to appointed place of duty (Article 86) has a maximum confinement punishment of only 1 month.

**HARD LABOR WITHOUT CONFINEMENT.**— This form of punishment is performed in addition to routine duties and may not lawfully be used instead of regular duties. The number of hours per day and the character of the hard labor will be designated by the immediate CO of the accused. The maximum amount of hard labor that can be adjudged at an SPCM is 3 months. This punishment is impossible only on enlisted persons and not upon officers or warrant officers. After each day's hard labor assignment has been performed, the accused should then be permitted normal liberty or leave. Hard labor means rigorous work but not so rigorous as to be injurious to the health of the accused. Hard labor cannot be required to be performed on Sundays, but may be performed on holidays. Hard labor can be combined with any other punishment.

**RESTRICTION.**— Restriction is a moral restraint upon the accused to remain within certain specified limits for a specified time. Restriction may be imposed on all persons subject to the UCMJ, but not in excess of 2 months. Restriction is a less severe form of deprivation of liberty than confinement or hard labor without confinement and may be combined with any other punishment. The performance of military duties can be required while an accused is on restriction.

**CONFINEMENT ON BREAD AND WATER/DIMINISHED RATIONS.**— As its name suggests, this punishment involves confinement coupled with a diet of bread and water or diminished rations. A diet of bread and water allows the accused as much bread and water as he or she can eat or drink. Diminished rations is food from the regular daily



PUNISHMENT	SCM		SPCM		GCM		
	E-4 & BELOW	E-5 & ABOVE	EMs	Os & WOs	EMs	WOs	Os
1. Death	NO	NO	NO	NO	YES (*1)	YES (*1)	YES (*1)
2. Dismissal	NO	NO	NO	NO	NO	NO	YES
3. Dishonorable Discharge	NO	NO	NO	NO	YES	YES	NO
4. Bad-conduct discharge	NO	NO	YES	NO	YES	NO	NO
5. Confinement	30 days	NO	6 mo	NO	YES (*5)	YES (*5)	YES (*5)
6. Solitary Confinement	NO	NO	NO	NO	NO	NO	NO
7. Confinement on bread and water or diminished rations	3 days (*2)	NO	3 days (*2)	NO	3 days (*2)	NO	NO
8. Restriction	2 mo	2 mo	2 mo	2 mo	2 mo	2 mo	2 mo
9. Hard labor w/o confinement	45 days	NO	3 mo	NO	3 mo	NO	NO
10. Forfeiture of all pay and allowances	NO	NO	NO	NO	YES	YES	YES
11. Forfeiture of 2/3 pay per month	1 mo (*3)	1 mo. (*3)	6 mo	6 mo	YES (*5)	YES	YES
12. Fine	YES (*4)	YES (*4)	YES (*4)	YES (*4)	YES	YES	YES
13. Reduction to next inferior paygrade	YES	YES	YES	NO	YES	NO	NO
14. Reduction to lowest paygrade	YES	NO	YES	NO	YES	NO	NO
15. Loss of numbers	NO	NO	NO	YES	NO	YES	YES
16. Reprimand	YES	YES	YES	YES	YES	YES	YES

(\*1) Where authorized or mandatory

(\*2) If attached to or embarked in a naval vessel

(\*3) May extend payment up to 3 months (JAGMAN 0019b)

(\*4) If given, a fine or a fine and forfeiture combination may not exceed the maximum amount of forfeitures which may be adjudged in a case

(\*5) Maximum punishment listed for each offense in part IV, MCM

**Figure 7-3.—Punishment chart.**

rations constituting a nutritionally balanced diet, but limited to 2,100 calories per day. No hard labor may be required to be performed by an accused undergoing this type of punishment. Confinement on bread and water/diminished rations may be imposed only upon

enlisted persons in paygrades E-1 to E-3 who are attached to or embarked in a vessel and then only for a maximum of 3 days. Further, both the prisoner and the confinement facility must be inspected by a medical officer who must certify in writing that the

punishment will not be injurious to the accused's health and that the facility is medically adequate for human habitation.

**FORFEITURE OF PAY.**— This kind of punishment involves the deprivation of a specified amount of the accused's pay for a specific number of months. The maximum amount that is subject to forfeiture at an SPCM is two-thirds of 1 month's pay per month for 6 months. The forfeiture must be stated in terms of pay per month for a certain number of months. The basis for computing the forfeiture is the base pay of the accused plus any sea and foreign duty pay. Other pay and allowances are not used as part of the basis. If the sentence is to include reduction in grade, the forfeiture must be based upon the grade to which the accused is to be reduced. A forfeiture may be imposed by an SPCM upon all military personnel. The forfeiture applies to pay becoming due after the forfeitures have been imposed and not to monies already paid to the accused. Unless suspended, forfeitures take effect on the date ordered executed by the CA when initial action is taken.

**FINE.**— A fine is a lump-sum judgment against the accused requiring him or her to pay specified money to the United States. A fine is not taken from the accused's accruing pay, as with forfeitures, but rather becomes due in one payment when the sentence is ordered executed. To enforce collection, a fine may also include a provision that, in the event the fine is not paid, the accused will, in addition to the confinement adjudged, be confined for a specified time. The total period of confinement so adjudged may not exceed the jurisdictional limit of the specified court-martial should the accused fail to pay the fine. While an SPCM can impose a fine upon all personnel, the punishment should not be adjudged unless the accused has been unjustly enriched by his or her crimes. A fine cannot exceed the total amount of money that the court could have required to be forfeited. The court may, however, award both a fine and forfeitures, so long as the total monetary punishment does not exceed the amount that could have been required to be forfeited.

**REDUCTION IN GRADE.**— This form of punishment has the effect of taking away the paygrade of an accused and placing him or her in a lower paygrade. Accordingly, this punishment can only be used against enlisted persons in other than the lowest paygrade. Officers may not be reduced in grade. An SPCM may reduce an enlisted service member to the lowest paygrade regardless of grade before

sentencing. A reduction can be combined with all other forms of punishment.

According to the power granted in Article 58(a), UCMJ, SECNAV has determined that automatic reduction will be effected according to the JAGMAN. Under the provisions of this section, a court-martial sentence of an enlisted member in a paygrade above E-1, as approved by the CA, that includes a punitive discharge or confinement in excess of 90 days (if the sentence is awarded in days) or 3 months (if awarded in months) automatically reduces the member to the paygrade of E-1 as of the date the sentence is approved. As a matter within his or her sole discretion, the CA or the supervisory authority may retain the accused in the paygrade held at the time of sentence or at an intermediate paygrade and suspend the automatic reduction to paygrade E-1 that would otherwise be in effect. Additionally, the CA may direct that the accused serve in paygrade E-1 while in confinement, but be returned to the paygrade held at the time of sentencing or an intermediate paygrade upon release from confinement. Failure of the CA to address automatic reduction will result in the automatic reduction to paygrade E-1 taking effect on the date of the CA's action.

**LOSS OF NUMBERS.**— Loss of numbers is the dropping of an officer a stated number of places on the lineal precedence list. Lineal precedence is lost for all purposes except consideration for promotion. This exception prevents the accused from avoiding or delaying being passed over. Loss of numbers does not reduce an officer in grade nor does it affect pay or allowances. Loss of numbers may be adjudged in the case of commissioned officers, warrant officers, and commissioned warrant officers. This punishment may be combined with all other punishments.

**PUNITIVE REPRIMAND.**— An SPCM may also adjudge a punitive reprimand against anyone subject to the UCMJ. A reprimand is nothing more than a written statement criticizing the conduct of the accused. In adjudging a reprimand, the court does not specify the wording of the statement but only its nature. The JAGMAN contains guidance for drafting the reprimand.

#### **Circumstances Permitting Increased Punishments**

There are three situations in which the maximum limits of part IV, MCM, may be exceeded. These are known as the escalator clauses and are designed to

permit a punitive discharge in cases involving chronic offenders. In no event, however, may the so-called escalator clauses operate to exceed the jurisdictional limits of a particular type of court-martial. With respect to an SPCM, these three clauses have the following impact.

**Three or more convictions**—If an accused is convicted of an offense for which part IV, MCM, does not authorize a DD, proof of three or more previous convictions by court-martial during the year preceding the commission of any offense of which the accused is convicted will allow an SPCM to adjudge a BCD, forfeiture of two-thirds pay per month for 6 months, and confinement for 6 months, even though that much punishment is not otherwise authorized. In computing the 1-year period, any unauthorized absence time is excluded.

**Two or more convictions**—If an accused is convicted of an offense for which part IV, MCM, does not authorize a punitive discharge, proof of two or more convictions within 3 years preceding the commission of any of the current offenses will authorize an SPCM to adjudge a BCD, forfeiture of two-thirds pay per month for 6 months, and, if the confinement authorized by the offense is less than 3 months, confinement for 3 months. For purposes of the second escalator clause, periods of unauthorized absence are excluded in computing the 3-year period.

**Two or more offenses**—If an accused is convicted of two or more separate offenses, none of which authorize a punitive discharge, and if the authorized confinement for these offenses totals 6 months or more, an SPCM may adjudge a BCD and forfeiture of two-thirds pay per month for 6 months.

## **PRETRIAL ASPECTS OF GENERAL COURTS-MARTIAL**

The GCM is the highest level of court-martial in the military justice system. Such a court-martial may impose the greatest penalties provided by military law for any offense. The GCM is composed of a minimum of five members, a military judge, and lawyer counsel for the government and the accused. In some cases, the court is composed of a military judge and counsel. The GCM is created by the order of a flag or general officer in command in much the same manner as the SPCM is created by subordinate commanders. Before a trial by GCM may lawfully occur, a formal investigation of the alleged offenses must be conducted and

a report forwarded to the OEGCMJ. This pretrial investigation (often referred to as an Article 32 investigation) is normally convened by an SCM CA. This section will discuss the legal requisites of the pretrial investigation.

## **NATURE OF THE PRETRIAL INVESTIGATION**

The formal pretrial investigation (Article 32, UCMJ) is the military equivalent of the grand jury proceeding in the civilian criminal procedure. The purpose of this investigation is to inquire formally into the truth of allegations contained in a charge sheet, to secure information pertinent to the decision on how to dispose of the case, and to aid the accused in discovering the evidence against which he or she must defend himself or herself. Basically, this investigation is protection for the accused; but it is also a sword for the prosecutor who may test his or her case for its strength in such a proceeding and seeks its dismissal if too frail or if groundless.

### **Authority to Direct**

An Article 32, UCMJ, investigation may be directed by one authorized by law to convene an SCM or some higher level of court-martial. As is true of all other forms of convening authority, the power to order the Article 32, UCMJ, investigation vests in the office of the commander.

### **Mechanics of Convening**

When the SCM or higher CA receives charges against an accused that are serious enough to warrant trial by a GCM, the CA directs a pretrial investigation. This is done by written orders of the CA, which assign personnel to participate in the proceedings. At the time the investigation is ordered, the charge sheet will have been completed up to, but not including, the referral block on page 2. Unlike courts-martial, pretrial investigations are directed as required, and standing orders for such proceedings are inappropriate. Also unlike courts-martial, there is no separate referral of a case to a pretrial investigation since the order creating the investigation also amounts to a referral of the case to the pretrial investigation. The original appointing order is sent to the assigned investigating officer along with the charge sheet, allied papers, and blank Investigating Officer's Report, DD Form 457.

## **Investigating Officer**

The pretrial investigation is a formal one-officer investigation into alleged criminal misconduct. The investigating officer must be a commissioned officer who should be a major/lieutenant commander or above, or an officer with legal training. The advantages of appointing a judge advocate (when available) to act as the investigating officer are substantial, especially in view of the increasingly complex nature of the military judicial process. Neither an accuser, prospective military judge, nor prospective TC or DC for the same case may act as the investigating officer. Further, the investigating officer must be impartial and cannot previously have had a role in inquiring into the offenses involved; for example, the provost marshal or public affairs officer. Mere prior knowledge of the facts of the case will not, alone, disqualify a prospective investigating officer. If such knowledge imparts a bias to the investigating officer, then he or she obviously is not the impartial investigator required by law. The law contemplates an investigating officer who is fair, impartial, mature, and with a judicial temperament. It is the responsibility of the CA to see that such an officer is appointed to pretrial investigations. If it is necessary for a nonlawyer investigating officer to obtain advice regarding the investigation, that advice should not be sought from one who is likely to prosecute the case.

## **Counsel for the Government**

While the pretrial investigation need not be an adversarial proceeding, current practice favors having the CA detail a lawyer to represent the interests of the government, especially when the investigating officer is not a lawyer. The assignment of a counsel for the government does not lessen the obligation of the investigating officer to investigate the alleged offenses thoroughly and impartially. As a practical matter, however, the presence of lawyers representing the government and the accused make the pretrial investigation an adversarial proceeding. Counsel for the government functions much as a prosecutor does at trial and presents evidence supporting the allegations contained on the charge sheet.

## **Defense Counsel**

The accused's rights to counsel are as extensive at the pretrial investigation as at the GCM. More specifically, an accused is entitled to be represented by civilian counsel, if provided by the accused at no expense

to the government, and by a detailed military lawyer, certified according to Article 27(b), UCMJ, or by a military lawyer of his or her own choice at no cost to the accused if such counsel is reasonably available. The detailed DC at a pretrial investigation must be a certified lawyer and be designated by the appointing order. Individual counsel, military or civilian, is normally not detailed on the appointing order. An accused is not entitled to more than one military counsel in the same case.

## **Reporter**

There is no requirement that a record of the pretrial investigation proceedings be made, other than the completion of the investigation officer's report. Accordingly, a reporter need not be detailed. It is a common practice, however, to assign a reporter to prepare a verbatim record—particularly in complex cases. When such a record is desired, the CA may detail a reporter but such assignment is usually made orally and is not part of the appointing order.

## **APPOINTING ORDER**

The order directing a pretrial investigation may be drafted in any acceptable form so long as an investigation is ordered and an investigating officer and counsel are detailed. A suggested format is shown in figure 7-4.

## **PREHEARING PREPARATION**

When the pretrial investigation officer receives his or her order of appointment, he or she should first study the charge sheet and allied papers to become thoroughly familiar with the case. The charge sheet should be reviewed for errors and any needed corrections should be noted. The pretrial investigation officer should consult the accused, counsel, and the legal officer of the CA to set up a specific hearing date.

## **WITNESSES**

All reasonably available witnesses who appear necessary for a thorough and impartial investigation are required to be called before the Article 32 investigation. Transportation and per diem expenses are provided for both military and civilian witnesses. Witnesses are reasonably available and, therefore, subject to production, when the significance of the testimony and personal appearance of the witness outweighs the difficulty, expense, delay, and effect on

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FPO AE 09619-1000

17 Jul 19CY

In accordance with R.C.M. 405, MCM, 1984, Commander Jon T. Boate, JAGC, U.S. Navy, is hereby appointed to investigate the attached charges preferred against Seaman Very C. Pistol, U.S. Navy. The charge sheet and allied papers are appended hereto. The investigating officer will be guided by the provisions of R.C.M. 405, MCM, 1984, and current case law relating to the conduct of pretrial investigations. In addition to the investigating officer hereby appointed, the following personnel are detailed to the investigation for the purposes indicated:

COUNSEL FOR THE GOVERNMENT

Lieutenant Jane B. Doe, JAGC, U.S. Naval Reserve, certified in accordance with Article 27(b), Uniform Code of Military Justice.

DEFENSE COUNSEL

Lieutenant Mary N. Christmas, JAGC, U.S. Naval Reserve, certified in accordance with Article 27(b), Uniform Code of Military Justice.

WATER T. DOOR  
Captain, U.S. Navy  
Commanding Officer  
U.S. Naval Support Activity  
Naples, Italy

Figure 7-4. Sample appointing order for an Article 32 pretrial investigation.

military operations of obtaining the witness' appearance. This balancing test means that the more important the expected testimony of the witness, the greater the difficulty, expense, delay, or effect on military operations must be to permit nonproduction. Similar considerations apply to the production of documentary and real evidence.

For both military and civilian witnesses, the pretrial investigation officer makes the initial determination on availability. For military witnesses, the immediate CO of the witness may overrule the pretrial investigation officer's determination. The decision not to make a witness available is subject to review by the military judge at trial.

A civilian witness whose testimony is material must be invited to testify, although he or she cannot be subpoenaed or otherwise compelled to appear at the investigation. Thus, the pretrial investigation officer should make a bona fide effort to have such civilian witnesses appear voluntarily, offering transportation expenses and a per diem allowance if necessary.

## **STATEMENTS**

The pretrial investigation officer has a number of alternatives to live testimony. When a witness is not reasonably available, even if the defense objects, the pretrial investigation officer may consider that witness' sworn statement. Unless the defense objects, a pretrial investigation officer may also consider, regardless of the availability of the witness, sworn and unsworn statements, prior testimony, and offers of proof of expected testimony of that witness.

Upon objection, only sworn statements may be considered. Since objections to unsworn statements are generally made, every effort should be made to get sworn statements. All statements considered by the pretrial investigation officer should be shown to the accused and the counsel. The same procedure should be followed with respect to documentary and real evidence.

## **TESTIMONY**

All testimony given at the pretrial investigation must be given under oath and is subject to cross-examination by the accused and the counsel for the government. The accused has the right to offer either

sworn or unsworn testimony. If undue delay will not result, the statements of the witnesses who testified at the hearing should be obtained under oath. In this connection, the pretrial investigation officer is authorized to administer oaths in connection with the performance of his or her duties.

## **RULES OF EVIDENCE**

The rules of evidence applicable to trial by court-martial do not strictly apply at the pretrial investigation, and the pretrial investigation officer need not rule on objections raised by counsel except where the procedural requisites of the investigation itself are concerned. This normally means that counsel's objections are merely noted on the record. Since the rules of evidence do not strictly apply, cross-examination of witnesses may be very broad and searching and should not be unduly restricted.

## **HEARING DATE**

Once the prehearing preparation has been completed, the pretrial investigation officer should convene the hearing. The pretrial investigation is a public hearing and should be held in a place suitable for a quasi-judicial proceeding. Accused, counsel, reporter (if one is used), and witnesses should be present. Witnesses must be examined one by one, and no witness should be permitted to hear another testify.

## **POSTHEARING PROCEDURES**

After the hearing is completed, the investigating officer prepares his or her report and submits it to the CO who directed the investigation. Figure 7-5 illustrates a completed investigating officer's report. The CO considers the investigating officer's recommendation as to disposition, but he or she need not follow it. The CO may dispose of the charges as he or she sees fit. If the CO deems a GCM is appropriate, but lacks the authority to convene such a court-martial, then he or she must send the report to the area coordinator, absent direction to the contrary from the OEGCMJ in his or her chain of command.

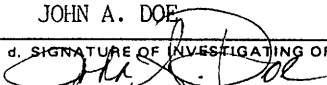
The report is sent with an endorsement that includes the recommendation of the officer directing the pretrial investigation, the recommendations of the

INVESTIGATING OFFICER'S REPORT (Of Charges Under Article 32, UCMJ and R.C.M. 405, Manual for Courts-Martial)					
1a. FROM: (Name of Investigating Officer - Last, First, MI) DOE, John A.	b. GRADE LCDR/ JAGC, USN	c. ORGANIZATION Naval Legal Service Office, Norfolk, VA	d. DATE OF REPORT 30 Aug CY		
2a. TO: (Name of Officer who directed the Investigation - Last, First, MI) DOOR, Walter T.	b. TITLE Commanding Officer	c. ORGANIZATION USS HERMITAGE (LSD 34)			
3a. NAME OF ACCUSED (Last, First, MI) PISTOL, Very C.	b. GRADE SN/USN	c. SSN 123-45-6789	d. ORGANIZATION USS HERMITAGE (LSD 34)	e. DATE OF CHARGES 20 Aug CY	
(Check appropriate answer)				YES	NO
4. IN ACCORDANCE WITH ARTICLE 32, UCMJ, AND R.C.M. 405, MANUAL FOR COURTS-MARTIAL, I HAVE INVESTIGATED THE CHARGES APPENDED HERETO (Exhibit 1)				X	
5. THE ACCUSED WAS REPRESENTED BY COUNSEL (If not, see 9 below)				X	
6. COUNSEL WHO REPRESENTED THE ACCUSED WAS QUALIFIED UNDER R.C.M. 405(d)(2), 502(d)				X	
7a. NAME OF DEFENSE COUNSEL (Last, First, MI) CRAFT, Hull	b. GRADE LT/JAGC/USNR	8a. NAME OF ASSISTANT DEFENSE COUNSEL (If any) N/A		b. GRADE N/A	
c. ORGANIZATION (If appropriate) Naval Legal Service Office Norfolk, VA		c. ORGANIZATION (If appropriate) N/A			
d. ADDRESS (If appropriate) N/A		d. ADDRESS (If appropriate) N/A			
9. (To be signed by accused if accused waives counsel. If accused does not sign, Investigating officer will explain in detail in Item 21.)					
a. PLACE N/A		b. DATE N/A			
I HAVE BEEN INFORMED OF MY RIGHT TO BE REPRESENTED IN THIS INVESTIGATION BY COUNSEL, INCLUDING MY RIGHT TO CIVILIAN OR MILITARY COUNSEL OF MY CHOICE IF REASONABLY AVAILABLE. I WAIVE MY RIGHT TO COUNSEL IN THIS INVESTIGATION.					
c. SIGNATURE OF ACCUSED N/A					
10. AT THE BEGINNING OF THE INVESTIGATION I INFORMED THE ACCUSED OF: (Check appropriate answer)				YES	NO
a. THE CHARGE(S) UNDER INVESTIGATION				X	
b. THE IDENTITY OF THE ACCUSER				X	
c. THE RIGHT AGAINST SELF-INCRIMINATION UNDER ARTICLE 31				X	
d. THE PURPOSE OF THE INVESTIGATION				X	
e. THE RIGHT TO BE PRESENT THROUGHOUT THE TAKING OF EVIDENCE				X	
f. THE WITNESSES AND OTHER EVIDENCE KNOWN TO ME WHICH I EXPECTED TO PRESENT				X	
g. THE RIGHT TO CROSS-EXAMINE WITNESSES				X	
h. THE RIGHT TO HAVE AVAILABLE WITNESSES AND EVIDENCE PRESENTED				X	
i. THE RIGHT TO PRESENT ANYTHING IN DEFENSE, EXTENUATION, OR MITIGATION				X	
j. THE RIGHT TO MAKE A SWORN OR UNSWORN STATEMENT, ORALLY OR IN WRITING				X	
11a. THE ACCUSED AND ACCUSED'S COUNSEL WERE PRESENT THROUGHOUT THE PRESENTATION OF EVIDENCE (If the accused or counsel were absent during any part of the presentation of evidence, complete b below.)				X	
b. STATE THE CIRCUMSTANCES AND DESCRIBE THE PROCEEDINGS CONDUCTED IN THE ABSENCE OF ACCUSED OR COUNSEL None.  (INCLUDE IN STATEMENT REASON(S) FOR ABSENCE OF ACCUSED OR HIS OR HER COUNSEL)					
NOTE: If additional space is required for any item, enter the additional material in Item 21 or on a separate sheet. Identify such material with the proper numerical and, if appropriate, lettered heading (Example: "7c"). Securely attach any additional sheets to the form and add a note in the appropriate item of the form: "See additional: # set."					

DD FORM 457  
84 AUG

EDITION OF OCT 69 IS OBSOLETE.

Figure 7-5A.—Investigating Officer's Report, DD Form 457 (front).

12a. THE FOLLOWING WITNESSES TESTIFIED UNDER OATH: (Check appropriate answer)				
NAME (Last, First, MI)	GRADE (if any)	ORGANIZATION/ADDRESS (Whichever is appropriate)	YES	NO
Boate, Paul T.	BM2, USN	USS HERMITAGE (LSD 34)	X	
Brush, Floss A.	BM1, USN	USS HERMITAGE (LSD 34)	X	
b. THE SUBSTANCE OF THE TESTIMONY OF THESE WITNESSES HAS BEEN REDUCED TO WRITING AND IS ATTACHED.			X	
13a. THE FOLLOWING STATEMENTS, DOCUMENTS, OR MATTERS WERE CONSIDERED; THE ACCUSED WAS PERMITTED TO EXAMINE EACH.				
DESCRIPTION OF ITEM	LOCATION OF ORIGINAL (If not attached)		YES	NO
NAVPERS 1070/606 (Page 6)/IO(2) Record of Unauthorized Absence	Accused's Service Record PERSUPPET, Naval Station, Norfolk, VA		X	
b. EACH ITEM CONSIDERED, OR A COPY OR RECITAL OF THE SUBSTANCE OR NATURE THEREOF, IS ATTACHED			X	
14. THERE ARE GROUNDS TO BELIEVE THAT THE ACCUSED WAS NOT MENTALLY RESPONSIBLE FOR THE OFFENSE(S) OR NOT COMPETENT TO PARTICIPATE IN THE DEFENSE. (See R.C.M. 909, 916(h).)				X
15. THE DEFENSE DID REQUEST OBJECTIONS TO BE NOTED IN THIS REPORT (If Yes, specify in Item 21 below.)				X
16. ALL ESSENTIAL WITNESSES WILL BE AVAILABLE IN THE EVENT OF TRIAL			X	
17. THE CHARGES AND SPECIFICATIONS ARE IN PROPER FORM			X	
18. REASONABLE GROUNDS EXIST TO BELIEVE THAT THE ACCUSED COMMITTED THE OFFENSE(S) ALLEGED			X	
19. I AM NOT AWARE OF ANY GROUNDS WHICH WOULD DISQUALIFY ME FROM ACTING AS INVESTIGATING OFFICER. (See R.C.M. 405(d)(1).)			X	
20. I RECOMMEND:				
a. TRIAL BY <input type="checkbox"/> SUMMARY <input type="checkbox"/> SPECIAL <input checked="" type="checkbox"/> GENERAL COURT-MARTIAL				
b. <input type="checkbox"/> OTHER (Specify in Item 21 below)				
21. REMARKS (Include, as necessary, explanation for any delays in the investigation, and explanation for any "no" answers above.) (EXAMPLE OF MATTERS TO BE COVERED HERE.)				
1. Discussion of evidence, credibility of witnesses, and sufficiency of proof.				
2. Explanation of delays in completing investigation.				
3. Recommendations to dismiss, reduce, or otherwise change any specification/charge.				
4. Statement of any anticipated defense and any expected difficulties in proving any specification/charge on which trial is recommended.				
5. Any other recommendations.				
6. Any other matters which should be known to the convening authority and subsequent reviewing authorities.				
22a. TYPED NAME OF INVESTIGATING OFFICER		b. GRADE	c. ORGANIZATION	
JOHN A. DOE		LCDR	NAVAL LEGAL SERVICE OFFICE, NORFOLK, VA	
		JAGC, USN		
d. SIGNATURE OF INVESTIGATING OFFICER			e. DATE	
			80 Aug 04	

DD Form 457 Reverse, 84 AUG

Figure 7-5B.—Investigating Officer's Report, DD Form 457 (back).



investigating officer, a detailed and explanatory chronology of events in the case, and any comments deemed appropriate. A sample endorsement is shown in figure 7-6.

If the CO who ordered the investigation is also an OEGCMJ, he or she may refer the case to trial by GCM if he or she believes the charges are

warranted by the evidence and such disposition is appropriate.

Before a case is referred to a GCM, the CA's SJA must review the case and prepare a written legal opinion on the sufficiency of the evidence and advisability of trial. This written legal opinion is referred to as the pretrial advice and is shown in figure 7-7.

DEPARTMENT OF THE NAVY  
Naval Education and Training  
Program Management Support Activity  
Pensacola, Florida 32509

17 April 19CY

FIRST ENDORSEMENT on LCDR Jack R. Frost, JAGC, USN Investigating Officer's  
Report of 13 April CY

From: Commanding Officer, Naval Education and Training Program Management  
Support Activity

To: Chief of Naval Education and Training

Subj: ARTICLE 32 INVESTIGATION ICO SEAMAN ABLE B. SEAMAN, USN,  
111-11-1111

1. Forwarded.
2. Recommend trial by general court-martial.

PAUL T. BOATE

Figure 7-6.-Sample endorsement on an Article 32 investigating officer's report.

COMMAND LETTERHEAD

From: Staff Judge Advocate  
To: (GCM Convening Authority)

Subj: UNITED STATES	}	
	}	ADVICE OF STAFF JUDGE
	}	ADVOCATE PURSUANT TO
V.	}	ARTICLE 34, UCMJ, AND
	}	R.C.M. 406, MCM
(RATE, NAME OF ACCUSED)	}	

Encl: (1) Charge sheet  
(2) Art. 32 Investigation with forwarding letter

1. Purpose. The charge(s) in the above cited case have been received in this office for consideration and advice in accordance with the provisions of Article 34, Uniform Code of Military Justice, and R.C.M, 406, Manual for Courts-Martial, 1984.

2. Charges and specifications: See enclosure (1).

3. Prior Action.

a. On \*, the Article 32 investigating officer submitted his report to Commanding Officer, \* recommending trial by \* court-martial on all offenses.

b. On \*, Commanding Officer, \*, concurred with the recommendations made by the investigating officer in the Article 32 investigation, recommending trial by \* court-martial.

c. The Article 32 investigation and commanding officer's endorsement are attached as enclosure (2).

4. Discussion of Charge(s)

a. Elements: \*

b. Discussion of proof: \*

c. Maximum authorized punishment: \*

d. Evidence presented at the Article 32 hearing established probable cause that the accused committed the offense(s) brought in Charge \* and its/the specification, and as to each element of that/the charge.

5. Additional information

a. Service record information: \*

b. Extenuating or mitigating circumstances: \*

6. Conclusion.

a. The Article 32 investigation complies with Article 32 of the Code and R.C.M. 405 of the Manual for Courts-Martial.

Figure 7-7.—Article 34 advice of the staff judge advocate.

- b. All specifications are in proper form and allege offenses under the Code.

The allegations of all offenses are warranted by evidence adduced at the investigation. {An allegation of offense is warranted if the evidence indicated in the report shows that there is probable cause to believe that the offense was committed, and that the accused is the person who committed it.}

- d. A court-martial will have jurisdiction over the accused and the offenses charged.

7. Recommendation. I recommend trial by \* court-martial on all charges and specifications,

8. Action by Officer Exercising General Court-Martial Jurisdiction

a. You are empowered to refer the subject charges to any type of trial by court-martial, provided that you find:

(1) that the court-martial has jurisdiction over the accused and the offenses, and

(2) that each charge so referred alleges an offense under the Code and is warranted by evidence indicated in the report of investigation.

- b. You may dispose of the case under Article 15, UCMJ.

- c. You may dismiss the charge(s) and specification(s) entirely.

d. As a general rule, a charge should not be referred for trial unless such disposition is considered clearly necessary and, if tried at all, should be tried by the lowest court with power to adjudge an appropriate and adequate punishment.

e. An endorsement on the charge sheet implementing the recommendation made above is attached for signature if you desire to effect such disposition. Otherwise, appropriate action will be prepared to effect any other disposition that you may desire.

Very respectfully,

SJA's NAME, RANK

-----  
DIRECTION OF THE CONVENING AUTHORITY

- 1. All opinions and recommendations of the staff judge advocate are approved.
- 2. Trial by general court-martial is directed.

GCM CA NAME  
RANK, ORGANIZATION  
TITLE

Figure 7-7.—Article 34 advice of the staff judge advocate-Continued.

The advice of the SJA includes a written and signed statement that sets forth that person's opinions regarding the following:

- Whether each specification on the charge sheet alleges an offense under the UCMJ
- Whether each allegation is substantiated by the evidence indicated in the Article 32 report of investigation
- Whether a court-martial would have jurisdiction over the accused and the offense(s)
- The action to be taken by the CA

The SJA is personally responsible for the pretrial advice and must make an independent and informed appraisal of the charges and evidence to render the advice. Another person may prepare the advice, but the SJA is responsible for it and must sign it personally.

The advice need not set forth the underlying analysis or rationale for its conclusions. Ordinarily, the charge sheet, forwarding letter and endorsements, and report of investigation are sent along with the pretrial advice. In addition, the pretrial advice should include, when appropriate, a brief summary of the evidence; discussion of significant aggravating, extenuating, or mitigating factors; and any previous recommendations, by commanders or others who have forwarded the charges, for disposition of the case. There is no legal requirement to include such information and failure to do so is not an error. Lastly, it should be noted that the legal conclusions reached by the SJA are binding on the CA whereas the recommendation is not.

### **THE GENERAL COURT-MARTIAL TRIAL**

A GCM may try any person subject to the Code for any offense made punishable under the Code. GCMs also may try any person for a violation of Articles 83, 104, and 106. Upon a finding of guilty of an offense made punishable by the Code, GCMs may, within limits prescribed in the MCM, adjudge any punishment authorized under R.C.M. 1003. The death penalty may not be adjudged if not specifically authorized for the offense by the Code or the case has been referred as noncapital. The GCM composed only of a military Judge does not have jurisdiction to try any person for any offense for which the death penalty

may be adjudged unless the case has been referred as noncapital. In essence, this means the death penalty may not be imposed by a military judge, it must be imposed by a court composed of members.

### **TRIAL PROCEDURES**

As you have just learned, there are prerequisites to convening a GCM. Once an Article 32 investigation has been conducted and a case is referred to a GCM, the actual procedure of the trial is the same as that of an SPCM. However, there are some differences between a GCM and an SPCM in composition and qualification of parties.

A GCM is composed of a military judge and not less than five members or except for in capital cases a military judge alone, if requested and approved.

The military judge of a GCM is designated for such duties by the Judge Advocate General, certified to be qualified for duty as a military judge of a GCM and is assigned and directly responsible to the Judge Advocate General.

There is no difference in the qualifications of any person who may be assigned to act as a member in a GCM. The only difference is that there must be a minimum of five members appointed. If the accused elects to be tried by a court composed of enlisted members, then the GCM must consist of at least two enlisted members.

As in an SPCM, a DC or associate DC must be certified under Article 27(b), UCMJ, to perform the duties of DC at a GCM. However, unlike the SPCM the TC only need be a commissioned officer, in a GCM the TC must be a person certified by the Judge Advocate General under Article 27(b) to perform such duties.

### **SUMMARY**

This chapter has given you the insight needed to understand how summary, special, and general court-martials work. As a Legal man you will be involved in court-martial proceedings whether it is from the convening authority level or at a NLSO where you will be involved in some aspect of the trial proceedings itself. The information found in this chapter should become second nature to you as you gain experience in the Legalman rating and process cases for court-martial.

## CHAPTER 8

# POSTTRIAL DUTIES AND THE REVIEW PROCESS

As an LN, it is important that you know something about the mechanics of court-martial reviews. This chapter prepares you for your court-martial posttrial duties, with the exception of transcription of the record of trial, from the time the trial adjourns until final disposition of the case.

Topics covered in this chapter are the preparation of the results of trial, confinement orders, the review process including the preparation of the staff judge advocate's (SJA's) recommendation, the convening authority's (CA's) action, promulgating orders, and required service record entries.

### POSTTRIAL ADMINISTRATIVE DUTIES

There are numerous duties that must be completed at the conclusion of any trial by court-martial. In this section we will discuss the preparation of results of trial, confinement orders, restriction, and extra duty orders. We will also discuss the deferment process of a sentence to confinement and what your role will be in this process.

Other posttrial duties include the preparation of the SJA's recommendation, sending the SJA's recommendation to the accused and the detailed defense counsel (DC), preparation of the CA's action, and preparation of the promulgating order and required service record entries. These issues will be addressed in the order in which they occur in the court-martial process.

### REPORT OF RESULTS OF TRIAL

Immediately following final adjournment of a court-martial, the trial counsel (TC) has a duty to notify the accused's immediate commander, the CA, or the CA's designee of the results of trial. Additionally, if the sentence includes confinement, the notification must be in writing with a copy sent to the commanding officer (CO) or the officer in charge (OIC) of the brig or confinement facility concerned.

A locally prepared form similar to that illustrated in figure 8-1 may be used for this purpose. The form should contain sufficient information to identify the

accused, show the findings and sentence, and the disposition of the accused after trial.

Distribution requirements for the report of results of trial include original to the CA; one copy to the CO of the accused (if different); one copy to the CO or OIC of the brig (if confinement is adjudged); one copy for the record of trial; and one copy for the officer exercising general court-martial jurisdiction (OEGCMJ).

### POSTTRIAL CONFINEMENT

An accused maybe placed in posttrial confinement if the sentence adjudged includes death or confinement. The confinement portion of a sentence runs from the date the sentence is adjudged.

#### Who May Order Confinement

Unless limited by a superior commander, a commander of the accused may order the accused into posttrial confinement when it is adjudged. A commander authorized to order posttrial confinement may delegate this authority to the TC. Normally the TC will prepare and sign the confinement order by the direction of the accused's CO.

#### Confinement Order

As a matter of policy, no member of the Navy may be confined without a written confinement order. The Confinement Order, NAVPERS 1640/4, is the document used to satisfy this requirement.

Upon notification from the TC of the results of trial, the accused's CO must take prompt and appropriate action with respect to the restraint of the person tried. If the accused has requested deferment of service to confinement and the request is approved by the CA, no confinement order is prepared at this time. However, if there is no deferment request by the accused, the TC will prepare a confinement order signing it by direction of the CA.

Distribution requirements for the confinement order include sending at least three copies with the package to the brig or confinement facility. You should inquire into the actual number of copies required by the brig your

REPORT OF RESULTS OF TRIAL

DATE

From:

Subj: REPORT OF RESULTS OF TRIAL

1. Pursuant to R.C.M. 1101(a) and 1304(b)(2)(f)(v), MCM, 1984, notification is hereby given in the case of United States v. \_\_\_\_\_.

2. Trial by \_\_\_\_\_ court-martial at \_\_\_\_\_, convened by \_\_\_\_\_

3. Offenses, pleas, and findings:

Charges & Specifications (with description of offense(s))	Pleas	Findings
--	-------	----------

4. Sentence adjudged:

5. Date sentence adjudged:

6. Forum: \_\_\_\_\_ Judge Alone  
          \_\_\_\_\_ Members  
          \_\_\_\_\_ Enlisted Members

7. Credits to be applied to confinement, if any:

a. Pretrial confinement: \_\_\_\_\_ days

b. Judicially ordered credits: \_\_\_\_\_ days

Total credits: \_\_\_\_\_ days

8. Terms of pretrial agreement concerning sentence, if any:

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

\_\_\_\_\_  
Trial Counsel/Summary Court-Martial

**Figure 8-1—Report of results of trial.**

command uses. Figure 8-2 illustrates a completed confinement order.

**Deferment of Confinement**

Deferment of a sentence to confinement is a postponement of the service and of the running of confinement. The deferment is not a form of clemency and is considered only upon written application by the

accused. If the accused requests deferment, the deferment may be granted any time after the adjournment of the court-martial, as long as the sentence has not been executed. If the deferment request is used to carry out the intent of a pretrial agreement (PTA) term suspending all confinement, the accused may submit the request along with the PTA. The CA may sign both documents at the same time and this maybe done before the trial.



show that both the interests of the accused and the community in release outweigh the community's interest in confinement. Factors that the authority acting on a deferment request may consider in determining whether to grant the deferment request include the following:

- The chance of the accused's flight
- The chance that the accused may commit other offenses, intimidate witnesses, or interfere with the administration of justice
- The nature of the offenses (including the effect on the victim) of which the accused was convicted
- The sentence adjudged
- The command's immediate need for the accused
- The effect of deferment on good order and discipline in the command
- The accused's character, mental condition, family situation, and service record

Although the decision to grant or deny the deferment request falls within the CA's sole discretion, that decision is subject to judicial review only for abuse of discretion. The action of the CA in granting or denying the accused's application for deferment is a written document of which a copy is provided to the accused.

**RESTRAINT WHEN DEFERMENT IS GRANTED.**— No form of restraint or other limitation on the accused's liberty is authorized as a substitute for the deferred confinement. The accused may, however, be restrained for an independent reason; for example, pretrial restraint resulting from a different set of facts in which disciplinary action is anticipated.

**TERMINATION OF DEFERMENT.**— Deferment to a sentence of confinement ends when:

- the CA acts on the sentence, unless the CA specifies in the action that service of the confinement after the action is deferred. In this case, deferment terminates when the conviction is final.
- the sentence to confinement is suspended.
- the deferment expires by its own terms.
- the deferment is rescinded by the officer who granted it or, if the accused is no longer under his or her jurisdiction, by the OEGCMJ over the accused's command.

**RESCISSION OF DEFERMENT.**— Deferment may be rescinded when additional information comes to the authority's attention that, in his or her discretion, presents grounds for denial of continued deferment. The accused must be given notice of the intended rescission and of the right to submit written matters. The accused, however, may be required to serve the sentence to confinement pending this action.

**RECORD OF PROCEEDINGS.**— Any document relating to deferment or rescission of deferment is made a part of the record of trial. The dates of any periods of deferment and the date of any rescission must appear in the CA's actions or supplementary actions.

## **RESTRICTION AND EXTRA DUTY ORDERS**

An accused may be awarded restriction and/or extra duty as a sentence at a court-martial. Chapter 6 covers the preparation of restriction and extra duty orders. No difference exists in the preparation of these orders to affect a sentence from a court-martial with the exception of stating in the text that the restriction and/or extra duty is the result of a court-martial.

### **Restriction**

Restriction is the least severe form of deprivation of liberty and it involves moral rather than physical restraint. Generally, the restricted member continues to perform military duties, but is required to report to a specified place at specific periods of time. Both officer and enlisted members may be restricted. The restriction order should be prepared by you and then you should turn it over to the chief master-at-arms (CMAA) for execution of the sentence.

### **Extra Duty**

Extra duty is the performance by enlisted members of duties in addition to those normally assigned. Extra duties normally should not exceed 2 hours per day, after which the accused is granted liberty—unless, of course, the member's liberty has been otherwise curtailed. Extra duty is not performed on Sundays but Sunday is counted as a day of performing extra duty. You should meet with your CMAA to determine who prepares the extra duty letter and log. Normally, the CMAA performs this function.



## REVIEW OF COURTS-MARTIAL

When proceedings at the trial court level have been completed, a record of trial must be prepared. Chapter 4 covers the preparation of the record of trial. Once prepared, the record of trial will be authenticated by the signature of a person who declares that the record accurately reports the proceedings. Except in unusual circumstances this person will be the military judge or summary court-martial officer. According to JAG/COMNAVLEGSVCCOMINST 5814.1, the NLSO or NLSO detachment responsible for the preparation of the record of trial will attach an appropriate posttrial checklist (GCM, SPCM [BCD], or SPCM [non-BCD]) to the original record of trial before sending the record to the CA for further review. The record of trial will then be sent to the CA and the review process begins. No part of the sentence, with the exception of confinement, can be executed against the accused until the CA has acted on the record.

Within certain time constraints, depending upon the type of court-martial and sentence adjudged, the accused may submit written "matters" to the CA. These matters can affect the CA's decision whether to approve or disapprove the trial results. In a general court-martial (GCM) or a special court-martial (SPCM) case involving a bad-conduct discharge (BCD), the CA's decision must await the written recommendation of the SJA or the legal officer (LO). With the benefit of these inputs, the CA determines, within his or her sole discretion, whether to approve or disapprove the sentence adjudged. This determination is in the form of a written legal document called the CA's action.

After the CA takes his or her action, the record of trial is sent for further review. The summary court-martial (SCM), the SPCM not involving a BCD, and all other noncapital courts-martial in which the accused waived appellate review are reviewed by a judge advocate assigned, in most cases, to the staff of an OEGCMJ. This written review will normally end the mandatory review process. However, in certain cases the OEGCMJ will have to take final action.

After initial review by the CA, the GCM and those SPCMs that include a BCD will normally be reviewed further by the Navy-Marine Corps Court of Military Review (NMCMR). Under certain circumstances, the case can also be considered by the Court of Military Appeals (COMA) and, possibly, the United States Supreme Court.

## THE CONVENING AUTHORITY'S REVIEW

The CA is the CO of the unit or, for the purpose of review, may be a successor in command or the OEGCMJ. The person who convenes the court-martial in a particular case normally is the CA who takes initial action on the record of trial. The power of the CA to take action rests in the office, not in the person.

When an assigned commander is not present for duty with his or her command because of incapacitation, leave, or for any other cause, the commissioned officer temporarily succeeding to command during that absence is the officer commanding for the time being and, as such, is authorized to take initial action on the record of trial. When it is impractical for the person who convened the court or the officer commanding for the time being or a successor in command to take initial action on the record of trial, this review may be taken by any OEGCMJ.

### Matters Submitted By the Accused

A copy of the record of trial must be served on the accused as soon as the record has been authenticated. This provides the accused with the opportunity to submit any written matters that may affect CA's decision whether or not to approve the trial results. The content of such matters is not subject to the Military Rules of Evidence and could include the following:

- Allegations of error affecting the legality of the findings and/or sentence
- Portions or summaries of the record and copies of documentary evidence offered or introduced at the trial
- Matters in mitigation that were not available for consideration at the trial
- Clemency recommendations (the defense may ask any person for such a recommendation, including the members, military judge, or TC)

The option of the accused to submit matters to the CA must be exercised within specifically defined time periods. Except in an SCM case, submission of matters by the accused must be made within 10 days after the accused is served with an authenticated record of trial and, if applicable, the service on the accused of the recommendation of the SJA or the LO. In an SCM case, submission must be made within 7 days after the sentence is announced. If the accused shows that additional time is required to submit matters, the CA may, for good cause shown, extend the applicable period

stated previously for not more than an additional 20 days.

### **Recommendation of the Staff Judge Advocate or Legal Officer**

In addition to the input from the accused, the CA must receive a written recommendation from his or her SJA or LO before taking action on a GCM or an SPCM involving a BCD. As required by JAG/COMNAV-LEGSVCCOMINST 5814.1 an SJA/legal officer recommendation checklist must be attached to the original record of trial at this point. The SJA/legal officer is responsible for using this form to assist in the preparation of the recommendation.

Care must be taken to make sure the SJA or the LO is not disqualified from submitting this recommendation. Disqualification will result when the SJA or the LO acted as a member, military judge, TC, assistant TC, or, more commonly, the investigating officer in the case. If the SJA or the LO is disqualified, the CA may request that another SJA be designated to prepare the recommendation.

The purpose of this recommendation is to assist the CA in deciding what action to take on the case. The recommendation must be a concise written communication summarizing the following:

- The findings and sentence adjudged
- A summary of the accused's service record, to include length and character of service, awards and decorations received, and any records of nonjudicial punishment (NJP) and/or previous convictions
- A statement of the nature and duration of any pretrial restraint
- A statement of any action the CA is obligated to take under a PTA or a statement on why the CA is not obligated to take specific action under the agreement
- A specific recommendation as to the action to be taken by the CA on the sentence

Identifying legal errors is not one of the required goals of this recommendation. In cases of acquittal of all charges and specifications, and cases where the proceedings were terminated before findings with no further action contemplated, the SJA's or the LO's recommendation is not required.

A sample letter addressing the SJA's recommendations is illustrated in figure 8-3.

Before you send the record of trial and the recommendation of the SJA to the CA for action, the SJA or the LO will cause a copy of the recommendation to be served on the counsel for the accused. A separate copy will be served on the accused. If it is impractical to serve the recommendation on the accused, the accused's copy will be sent to the accused's DC. A statement will be attached to the record explaining why the accused was not personally served. Figure 8-4 shows you an example of a memorandum forwarding the SJA's recommendations to the DC. The DC must acknowledge receipt of the SJA's recommendations. Figure 8-4, enclosure (2), is an acknowledgement receipt that the DC must fill out and return to the SJA. This is for the purpose of determining the date the DC received the recommendations of the SJA. Figure 8-5 illustrates the type of letter to use for receipt of the SJA's recommendations by the DC.

The accused's counsel has 10 days from the service of the record of trial or receipt of the recommendations, whichever is later, to submit written comments on the recommendation for consideration by the CA. These comments may include corrections or rebuttals to any matter in the recommendation believed to be erroneous, inadequate, or misleading, and may comment on any other matters desired. The SJA or the LO may supplement his or her recommendation based upon the DC's response. Figure 8-6 is an example of a response from a DC to an SJA's recommendation.

### **Action By the Convening Authority**

The first official action to be taken with respect to the results of trial is the CA's action. All materials submitted by the accused, the SJA and/or the LO, and the DC are preparatory to this official review. The CA may take action only after the applicable time periods have expired or the accused has waived the right to present matters, whichever is earlier. As required by JAG/COMNAVLEGSVCCOMINST 5814.1, use the CA's action checklist to assist in the preparation of the CA's action and attach this checklist to the original record of trial.

The CA's action is a legal document attached to the record of trial setting forth, in prescribed language, the CA's decisions and orders with respect to the sentence, the confinement of the accused, and further disposition of the case. The action will be signed personally by the CA, and the CA's authority to sign will appear below his or her signature. The action taken with respect to the sentence is a matter falling within the CA's sole discretion. The CA may for any reason or no reason

STAFF JUDGE ADVOCATE'S RECOMMENDATION

9 July 19CY

From: Staff Judge Advocate, U.S. Naval Support Activity, Naples, Italy

To: Commanding officer, U.S. Naval Support Activity, Naples, Italy

Subj: RECOMMENDATION IN THE SPECIAL COURT-MARTIAL CASE OF STOREKEEPER  
SECOND CLASS VERY C. PISTOL, USN, 222-22-2222

Ref: (a) R.C.M. 1106, MCM, 1984

(b) JAGMAN 0151c

Encl: (1) Record of trial in the case of SK2 Very C. Pistol, USN

1. Pursuant to references (a) and (b), the following information is provided:

a. Offenses, pleas, and findings:

Charges and specifications	Pleas	Findings
Charge I: Violation of Article 115, UCMJ	Guilty	Guilty
Specification: On or about 2 Dec 19CY during a time of war, feign a mental derangement.	Guilty	Guilty
Charge II: Violation of Article 134, UCMJ	Guilty	Guilty
Specification: On or about 2 Dec 19CY wrongfully communicate a threat.	Guilty	Guilty

b. Sentence adjudged: On 18 June 19CY, the accused was sentenced to reduction to grade of E-2, confinement for a period of 120 days, forfeiture of \$300.00 pay per month for 5 months, and to be discharged from the naval service with a bad-conduct discharge.

c. Clemency recommendation by court or military judge: None

d. Summary of accused's service record:

(1) Length of service: 15 years, 7 months.

(2) Character of service: 3.7 average of evaluation traits.

(3) Awards and decorations: The accused is entitled to an Overseas Service Ribbon.

(4) Records of prior nonjudicial punishment: CO's NJP on 2 January 19CY(-1) for a violation of Article 108, UCMJ, for destruction of military property and violation of Article 111, UCMJ, for driving while under the influence of alcohol, Awarded 30 days' restriction, 30 days' extra duty, and forfeiture of \$100.00 pay per month for 2 months.

**Figure 8-3.-Staff Judge advocate's recommendation.**

(5) Record of previous convictions: Conviction by special court-martial on 11 February 19CY(- 1) for a violation of Article 121, UCMJ, larceny of a private vehicle, for which a sentence of reduction from paygrade E-7 to E-5 and confinement for 3 months was finally approved.

(6) Other matters of significance: SK2 Pistol is 35 years old, married, and has four dependents. The accused has been in the Navy for over 15 years, having enlisted in the Navy on 28 December 19CY(-15) for a period of 4 years. SK2 Pistol's GCT is 47 and his ARI is 20. SK2 Pistol's educational background indicates that he completed the 10th grade and later obtained his GED.

e. Nature and duration of pretrial restraint: The accused was in pretrial confinement from 23 May to 18 June 19CY, a period of 25 days. In accordance with the decision rendered in United States v. Allen, 17 M.J. 126, the accused will be credited with 25 days of confinement against the sentence to confinement adjudged.

f. Judicially ordered credit to be applied to confinement, if any: None.

g. Terms and conditions of pretrial agreement, if any, that the convening authority is obligated to honor or reasons why the convening authority is not obligated to take specific action under the agreement: A pretrial agreement was submitted in this case and approved on 16 June 19CY. In return for the accused's provident guilty plea to all charges and specifications, the terms of this agreement called for a limitation on punishment as follows:

Confinement:	If adjudged, confinement in excess of 90 days will be disapproved.
Forfeitures:	If adjudged, forfeitures in excess of \$200.00 pay per month for a period of 4 months will be disapproved.
Fine:	As adjudged.
Reduction:	As adjudged.
Punitive discharge:	As adjudged.

Your obligation concerning the terms of the pretrial agreement in this case are as follows: Since the confinement awarded exceeds that provided for in the pretrial agreement, you are obligated to disapprove that portion that exceeds 90 days. The forfeiture awarded also exceeds the provisions of the pretrial agreement. In accordance with that agreement you may only approve forfeitures of \$200.00 pay per month for 3 months. The reduction to the grade of E-2 and the bad-conduct discharge may be approved as adjudged.

The 25 days of administrative credit to be awarded in accordance with United States v. Allen, will be administered by the confinement facility and should not be addressed in your convening authority's action.

h. The record of trial was served on the accused on 28 Jun CY. On behalf of the accused, the detailed defense counsel, LT Floss A. Brush, JAGC, USNR, has submitted a request for clemency in the form of reduction in the forfeitures to be approved.

2. In my opinion, the court was properly constituted and had jurisdiction over the accused and the offense. The accused was found guilty in accordance with his pleas. The proceedings were conducted in substantial compliance with current regulation and policy. The offenses of which the accused was found guilty are described as offenses under the UCMJ. There is no error noted nor any issues of error raised by the accused or his counsel. The sentence as adjudged is legal and appropriate.

3. I recommend that the sentence as adjudged be approved in accordance with the terms of the pretrial agreement. I further recommend that SK2 Pistol be reduced to the grade of paygrade E-1 as authorized by Article 58a(a) of the Uniform Code of Military Justice.

ABLE B. SEAMAN

Figure 8-3.-Staff judge advocate's recommendation—Continued.

disapprove a legal sentence in whole or in part. He or she can also mitigate it, suspend it, or change a punishment to one of a different nature as long as the severity of the sentence is not increased. His or her decision is a matter of command prerogative and is made in the interests of justice, discipline, mission requirements, clemency, and other appropriate reasons.

In taking his or her action, the CA is required to consider the results of trial, the SJA's and/or the LO's recommendation when required, and any matters submitted by the accused. Additionally, the CA may consider the record of trial, personnel records of the accused, and such other matters deemed appropriate by

the CA. In matters considered outside of the record, of which the accused is not reasonably aware, the matters should be disclosed to the accused to provide an opportunity for his or her rebuttal.

The CA will not take action approving or disapproving a finding of not guilty, a finding of not guilty only by reason of lack of mental responsibility, or a ruling amounting to a finding of not guilty.

Appendix 16, *Manual for Courts-Martial* (MCM), 1984, contains sample forms of action for an SCM, an SPCM, and a GCM. One or more of these forms are appropriate to implement the decisions of the CA in virtually every case. Deviation from these forms is risky

9 July 19CY

From: Staff Judge Advocate, U.S. Naval Support Activity, Naples, Italy  
To: LT Floss A. Brush, JAGC, USNR, Naval Legal Service Office, Naples, Italy  
Subj: RECOMMENDATION IN THE SPECIAL COURT-MARTIAL CASE OF STOREKEEPER SECOND CLASS VERY C. PISTOL, USN, 222-22-2222  
Ref: (a) Article 64, UCMJ  
(b) R.C.M. 1106(f)(1)  
Encl: (1) Copy of staff judge advocate's recommendation in the case of SK2 Very C. Pistol, USN  
(2) Acknowledgement receipt

1. Pursuant to reference (a), a review of the court-martial of SK2 Pistol has been conducted. Enclosure (1) is a copy of this review.
2. Pursuant to rules established by reference (b), you are hereby served with a copy of this review to afford you an opportunity to correct or challenge any matter therein that you may deem erroneous, inadequate, or misleading, or upon which you may otherwise wish to comment. Proof of service of this review upon you, together with any such correction, challenge, or comment you may make, shall be made a part of the record of proceedings.
3. You are advised that your failure to take advantage of the aforementioned opportunity within 10 calendar days from the date of this service will normally be deemed a waiver of any error in the review.
4. You are requested to acknowledge receipt of this letter, with attached copy of review, by immediately completing enclosure (2).

ABLE B. SEAMAN

Figure 8-4.-Memorandum forwarding staff judge advocate's recommendation to detailed defense counsel.

10 July 19CY

From: LT Floss A. Brush, JAGC, USNR, Naval Legal Service Office, Naples, Italy

To: Staff Judge Advocate, U.S. Naval Support Activity, Naples, Italy

Subj: RECOMMENDATION IN THE SPECIAL COURT-MARTIAL CASE OF STOREKEEPER  
SECOND CLASS VERY C. PISTOL, USN, 222-22-2222

1. I, the undersigned, counsel for the accused in the above-captioned proceedings, hereby acknowledge receipt of the aforementioned staff judge advocate's review required by Article 64, UCMJ, for the subject case on this 10th day of July 19CY.

FLOSS A. BRUSH

Figure 8-5. Defense counsel's acknowledgement of receipt of staff judge advocate's recommendation.

DEPARTMENT OF THE NAVY  
Naval Legal Service Office  
Naples, Italy  
FPO AE 09619-1000

17 July 19CY

From: LT Floss A. Brush, JAGC, USNR, Naval Legal Service Office, Naples, Italy

To: Staff Judge Advocate, U.S. Naval Support Activity, Naples, Italy

Subj: RECOMMENDATION IN THE SPECIAL COURT-MARTIAL CASE OF STOREKEEPER  
SECOND CLASS VERY C. PISTOL, USN, 222-22-2222

Ref: (a) Staff judge advocate's recommendation in the case of SK2 Pistol, USN

(b) R.C.M. 1106(f)(4)

Encl: (1) Mrs. Jane A. Pistol's ltr of 30 Jun CY

1. Reference (a) was received by me on 3 July 19CY and has been reviewed pursuant to reference (b).
2. I do not desire to submit a correction, challenge, or comment to the attached review,
3. I have attached a letter from the accused's wife for the convening authority's consideration,

FLOSS A. BRUSH

Figure 8-6. Detailed defense counsel's response to staff judge advocate's recommendation.

and usually leads to trouble unless the drafter is experienced.

The CA may recall and modify any action taken by him or her at any time before it has been published or before the accused has been officially notified. In addition, in any SPCM not involving a BCD or an SCM, the CA may recall and correct an illegal, erroneous, incomplete, or ambiguous action at any time before completion of review by a judge advocate, as long as the correction does not result in action less favorable to the accused than the earlier action. The CA must personally sign any supplementary or corrective action.

If any findings of guilty are disapproved, the action must state that. If a rehearing is not ordered, the affected charges and specifications will be dismissed by the CA in the action. If a rehearing or other trial is directed, the reasons for the disapproval of the findings will be set forth in the action.

The action will state whether the sentence adjudged by the court-martial is approved. If only part of the sentence is approved, the action will state which parts are approved. A rehearing may not be directed if any portion of the sentence is approved. The action will indicate, when appropriate, whether an approved sentence is to be executed or whether the execution of all or any part of the sentence is to be suspended. No reasons need to be stated. If the CA orders a sentence of confinement into execution, the CA will designate the place of confinement in the action. If a sentence of confinement is ordered into execution after the initial action of the CA, the authority ordering the execution will designate the place of confinement.

When a record of trial involves an approved sentence to death, the CA will, unless any approved sentence of confinement has been ordered into execution and a place of confinement designated, provide in the action for the temporary custody of the accused pending final disposition of the case on appellate review.

Whenever the service of the sentence to confinement is deferred by the CA before or concurrently with the initial action in the case, the action will include the date on which the deferment became effective. The reason for the deferment does not have to be stated in the action.

When the military judge directs that the accused receive credit for illegal pretrial confinement, the CA will so direct the credit in his or her action.

The CA will include in the action any reprimand that the CA has ordered executed.

If the accused was awarded a punitive discharge or confinement in excess of 90 days (awarded in days) or 3 months (awarded in months), the CA's action must address the issue of automatic administrative reduction. In his or her sole discretion, the CA may remit the automatic reduction, or he or she may retain the accused in the paygrade held at the time of sentence or in an intermediate paygrade and suspend the automatic reduction to paygrade E-1 that would otherwise be effected under Article 58a(a), *Uniform Code of Military Justice* (UCMJ). Additionally, the CA may direct that the accused serve in paygrade E-1 while in confinement but be returned to the paygrade held at the time of sentence or an intermediate paygrade upon release from confinement. Failure of the CA to address automatic reduction will result in the automatic reduction to paygrade E-1 on the date of the CA's action.

Figures 8-7, 8-8, 8-9, and 8-10 show examples of the CA's action. Figure 8-7 illustrates approval of part of the sentence and partial order of execution of the sentence awarded at trial. Figure 8-8 illustrates a CA's action on an acquittal. Figure 8-9 shows an example of a CA's action when the sentence adjudged by the court is approved by the CA and all but the BCD is ordered executed. Figure 8-10 illustrates a CA's action wherein the sentence awarded at trial is approved and ordered executed. These are the most common forms of the CA's action. However, as stated earlier, appendix 16, MCM, contains sample forms for action and should be referred to when drafting the action of the CA.

After taking action, the CA will publish the results of the trial and the CA's action in a legal document called a promulgating order.

### **Promulgating Orders**

Orders that promulgate the result of trial and the actions of the CA or higher authorities on the record are called promulgating orders. Promulgating orders are used as a method of recordkeeping and informing all those officials interested in the progress of the case. They are prepared, issued, and distributed in all GCM and SPCM cases regardless of action by the CA or higher authorities. Promulgating orders are not required for SCMs. The order is issued by the CA. As required by JAG/COMNAVLEGSVCCOMINST 5814.1, use the promulgating order checklist to assist in the preparation of the promulgating order and attach this checklist to the original record of trial. The form of the

DEPARTMENT OF THE NAVY  
U.S. NAVAL SUPPORT ACTIVITY, NAPLES, ITALY  
FPO AE 09619-1000

18 July 19CY

In that case of Storekeeper Second Class Very C. Pistol, 222-22-2222, U.S. Navy, only so much of the sentence as provides for forfeiture of \$200.00 pay per month for 4 months, confinement for a period of 90 days, and discharge from the naval service with a bad-conduct discharge is approved and, except for the part of the sentence extending to a bad-conduct discharge, will be executed. The Navy Brig, Naval Station, Rota, Spain, is designated as the place of confinement.

In accordance with Article 58a(a), UCMJ, and JAGMAN, Section 0152d, automatic reduction in rate to paygrade E-1 is effected as of the date of this action.

The accused is entitled to wear the Overseas Service Ribbon.

The record of trial is forwarded to the Navy-Marine Corps Court of Military Review, for review under Article 66, UCMJ.

PAUL T. BOAT  
Captain, U.S. Navy  
Commanding Officer  
U.S. Naval Support Activity  
Naples, Italy

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CONVENING AUTHORITY' S ACTION - THIS EXAMPLE SHOWS APPROVAL OF PART OF THE SENTENCE AND PARTIAL ORDER OF EXECUTION OF THE SENTENCE AWARDED AT TRIAL. THE CA ONLY APPROVED PART OF THE SENTENCE ADJUDGED BY THE COURT. THE COURT SENTENCED THE ACCUSED TO REDUCTION TO E-2, CONFINEMENT FOR A PERIOD OF 120 DAYS, FORFEITURE OF \$300.00 PAY PER MONTH FOR 5 MONTHS, AND A BAD-CONDUCT DISCHARGE. THE CA APPROVED THE REDUCTION TO E-2 AND THE BAD-CONDUCT DISCHARGE, BUT APPROVED ONLY 90 DAYS OF CONFINEMENT AND FORFEITURES OF ONLY \$200.00 PAY PER MONTH FOR 3 MONTHS.

THE PROVISION OF ARTICLE 58a(a), AUTOMATIC REDUCTION, IS INCLUDED IN THIS CASE ONLY BECAUSE THE REDUCTION AWARDED BY THE COURT WAS FROM E-5 TO E-2. HAD THE COURT REDUCED THE ACCUSED TO E-1, AND THAT PORTION OF THE SENTENCE BEEN APPROVED AND ORDERED EXECUTED, ARTICLE 58a(a) WOULD NO LONGER HAVE BEEN APPLICABLE.

Figure 8-7.-CA's action. Approval of part of the sentence and partial order of execution of the sentence awarded at trial.



DEPARTMENT OF THE NAVY  
U.S. NAVAL SUPPORT ACTIVITY, NAPLES, ITALY  
FPO AE 09619-1000

17 July 19CY

In that case of Electrician's Mate Fireman John A. Doe, 123-45-6789, U.S. Navy, tried by special court-martial on 1 July 19CY, the court had jurisdiction over the accused and the offense(s) for which he was tried and the court was properly convened and constituted.

PAUL T. BOAT  
Captain, U.S. Navy  
Commanding Officer  
U.S. Naval Support Activity  
Naples, Italy

**Figure 8-8.-CA's action. Acquittal record of trial.**

DEPARTMENT OF THE NAVY  
U.S. NAVAL SUPPORT ACTIVITY, NAPLES, ITALY  
FPO AE 09619-1000

14 April 19CY

In that case of Seaman Mary Christmas, 333-33-3333, U.S. Navy, the sentence is approved and, except for the part of the sentence extending to a bad-conduct discharge, will be executed. The Navy Brig, Naval Station, Rota, Spain, is designated as the place of confinement.

In accordance with Article 58a(a), UCMJ, and JAG MAN, Section 0152d, automatic reduction in rate to paygrade E-1 is effected as of the date of this action.

The accused is entitled to wear the Overseas Service Ribbon.

The record of trial is forwarded to the Navy-Marine Corps Court of Military Review, for review under Article 66, UCMJ.

PAUL T. BOAT  
Captain, U.S. Navy  
Commanding Officer  
U.S. Naval Support Activity  
Naples, Italy

**Figure 8-9.-CA's action. Sentence adjudged by court approved by the CA and all but the BCD ordered executed.**

DEPARTMENT OF THE NAVY  
U.S. NAVAL SUPPORT ACTIVITY, NAPLES, ITALY  
FPO AE 09619-1000

17 July 19CY

In that case of Personnelman Third Class Jack R. Frost, 111-11-1111, U.S. Navy, the sentence is approved and will be executed. The Navy Brig, Naval Station, Rota, Spain, is designated as the place of confinement.

In accordance with Article 58a(a), UCMJ, and JAGMAN, Section 0152d, automatic reduction in rate to paygrade E-1 is effected as of the date of this action.

The record of trial is forwarded to Commander, Fleet Air Mediterranean, for review under Article 64(a), UCMJ.

PAUL T. BOAT  
Captain, U.S. Navy  
Commanding Officer  
U.S. Naval Support Activity  
Naples, Italy

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In this sample the sentence does not include a punitive discharge, death, or dismissal, and the paragraph pertaining to automatic reduction should be included only if the sentence awarded and approved contained confinement in excess of 90 days/3 months.

**Figure 8-10.-CA's action. Sentence awarded at trial approved and ordered executed.**

initial promulgating order is set forth in appendix 17, MCM, and illustrated in figure 8-11.

The order will set forth the following:

- The type of court-martial and the command by which it was convened
- The charges and specifications, or a summary thereof, on which the accused was arraigned
- The accused's pleas
- The findings or other disposition of each charge and specification
- The sentence, if any
- The action of the CA or a summary thereof

A promulgating order will bear the date of the initial action, if any, of the CA. An order promulgating an acquittal, a court-martial terminated before findings, a court-martial resulting in a finding of not guilty only by reason of lack of mental responsibility of all charges and specifications, or action on the findings or sentence

taken after the initial action of the CA will bear the date of its publication.

The promulgating order will state the date the sentence was adjudged, the date the acquittal was adjudged, or the date the proceedings were otherwise terminated.

All initial and supplemental promulgating orders will be distributed as follows:

- Original to be attached to the original record of trial.
- Duplicate original to be placed in the service record of the accused, unless the court-martial proceedings resulted in acquittal of all charges, disapproval of all findings of guilty, or disapproval of the sentence by the CA when no findings have been expressly approved. Send this copy to the personnel support activity detachment maintaining the accused's service record.
- Duplicate originals or certified copies:

DEPARTMENT OF THE NAVY  
U.S. Naval Support Activity  
Naples, Italy  
FPO AE 09619-1000

17 July 19CY

Special Court-Martial Order No. 7-CY

Storekeeper Second Class Very C. Pistol, U.S. Navy, U.S. Naval Support Activity, Naples, Italy, was arraigned at Naval Legal Service Office, Naples, Italy, on the following offenses at a court-martial convened by this command.

CHARGE I: ARTICLE 115. Plea: G. Finding: G.

Specification: On or about 2 December 19CY during a time of war, feign a mental derangement. Plea: G. Finding: G.

CHARGE II: ARTICLE 134. Plea: G. Finding: G.

Specification: On or about 2 December 19CY wrongfully communicate a threat. Plea: G. Finding: G.

SENTENCE

Sentence adjudged on 18 June 19CY: To be reduced to the paygrade of E-2, to be confined for a period of 120 days, to forfeit \$300.00 pay per month for 5 months, and to be discharged from the naval service with a bad-conduct discharge.

ACTION

DEPARTMENT OF THE NAVY  
U.S. NAVAL SUPPORT ACTIVITY, NAPLES, ITALY  
FPO AE 09619-1000

17 July 19CY

In that case of Storekeeper Second Class Very C. Pistol, 222-22-2222, U.S. Navy, only so much of the sentence as provides for forfeiture of \$200.00 pay per month for 4 months, confinement for a period of 90 days, and discharge from the naval service with a bad-conduct discharge is approved and, except for the part of the sentence extending to a bad-conduct discharge, will be executed. The Navy Brig, Naval Station, Rota, Spain, is designated as the place of confinement.

In accordance with Article 58a(a), UCMJ and JAGMAN, Section 0152d, automatic reduction in rate to paygrade E-1 is effected as of the date of this action.

The accused is entitled to wear the Overseas Service Ribbon.

The record of trial is forwarded to the Navy-Marine Corps Court of Military Review for review under Article 66, UCMJ.

/s/ PAUL T. BOAT  
PAUL T. BOAT  
Captain, U.S. Navy  
Commanding Officer  
U.S. Naval Support Activity  
Naples, Italy

ABLE B. SEAMAN  
Lieutenant, JAGC, USNR  
Staff Judge Advocate  
U.S. Naval Support Activity  
Naples, Italy

Figure 8-11.—Promulgating order.

**Distribution:**

Original - Original ROT

Duplicate Original - Accused's SRB

Certified Copies - 3 to original ROT

1 to each copy of ROT

1 to CO, NAVSUPPACT NAPLES

1 to COMFAIRMED

1 to BUPERS (PERS-83)

2 to NAVBRIG, Rota, Spain

Plain Copies -1 to accused

1 to NAVLEGSVCOFF Naples, Italy

1 to MJ

1 to TC

1 to DC

1 to CO, NAVSUPPACT, Naples, Italy

1 to OIC, PERSUPPDET, Rota, Spain

**Figure 8-11.—Promulgating order—Continued.**

a. Three copies to be attached to the original record of trial. (Only one need be attached in those SPCMs in which the approved sentence does not include an unsuspended or suspended BCD.)

b. One copy to be attached to each copy of the record of trial.

c. Two copies to the CO of the accused if a brig or confinement facility is designated as the place of confinement; three copies if a disciplinary command is designated as the place of confinement. These copies should accompany the records of the accused to the place of confinement.

d. One copy to Commander, Bureau of Naval Personnel (PERS-06 in the case of officers, PERS-83 in the case of enlisted).

e. One copy to the OEGCMJ over the accused at the time of trial, and one to the current OEGCMJ over the accused (if different). The OEGCMJ will be identified by the command name.

f. One copy to the type commander of the accused at the time of trial. The type commander will be identified by the command name.

• Duplicate originals, certified copies, or plain copies:

a. One copy to the accused.

b. One copy to the CO of the naval legal service office (NLSO) where the accused was tried.

c. One copy each to the military judge, the TC, and the DC of the court-martial.

d. One copy to the CA and, if the accused was serving in a command other than that of the CA at the time of the alleged offense, one to the command in which he or she was then serving.

c. One copy to each appropriate subordinate unit and any other local distribution desired.

f. In addition to the distribution requirements stated previously, make sure the following distribution is made when the accused is a Navy officer:

(1) Copy to Officer in Charge, Personnel Support Activity Detachment, Building 29, Offutt AFB, Omaha, Nebraska 68113, if the U.S. Disciplinary Barracks, Fort Leavenworth, Kansas, is designated as the place of confinement.

(2) Copy to the Defense Finance Accounting Service (DFAS), Special Claims Department (Code 4311), Cleveland Center, Cleveland, Ohio 44199-2058, if the sentence includes forfeiture of pay that has been approved by the CA.

### **Supplemental Actions and Supplemental Promulgating Orders**

Action on the case occurring after the initial promulgating order has been published will be taken by issuing a supplemental action and a supplemental promulgating order. Appendix 17, MCM, 1984, provides the necessary forms.

### **Posttrial Service Record Entries**

When an enlisted member is tried and convicted by court-martial, and a guilty finding is approved by the CA, entries in the member's service record must be made setting forth the details of the trial.

When you are trying to determine which service record entries are required to properly document the results of trial, there are several things to consider.

There are several types of punishment that the court could adjudge. Some of these punishments will affect the accused's pay and some will not.

The types of punishment that affect an accused's pay are (1) reduction in rate; (2) forfeiture of pay; and (3) fine.

The types of punishment that do not affect the accused's pay are (1) confinement; (2) hard labor without confinement; (3) restriction; (4) admonition or reprimand; and (5) punitive discharge (DD or BCD).

You must also realize that even though the CA has approved a sentence, or any part of a sentence, he or she may still desire to suspend that sentence or any portion of that sentence. If the CA does suspend a sentence, or any portion thereof, it may have a bearing on the type of service record entries you will be required to make.

Notice that the service record pages that are required are pages 4, 7, 9, and 13. However, not all these pages will be used in every case. You will have to determine when any particular entry is required based upon the facts of the case.

You have already learned the basic preparation requirements for these service record pages in chapter 6. The only difference now is you will prepare them for approved court-martial sentences vice NJP results. A

few general rules apply for the preparation of these documents.

### Page 4 entries

1. If the sentence, as approved and ordered executed by the CA, includes a reduction in rate, you will prepare a page 4 entry.

2. If the sentence includes a reduction in rate that has been approved, but, instead of being ordered executed, has been suspended for a specified period of time by the CA, then you will not prepare a page 4 entry at this time.

3. If the reduction in rate has been suspended by the CA for a specified period of time, and during that period of time the accused violates the terms of the suspension, the CA will most likely order the suspended reduction in rate be executed. This is known as vacating a suspended sentence. When this happens, you will prepare a page 4 entry. The effective date and the time in rate date would be the date that the CA ordered the suspended reduction in rate vacated. A sample of a completed page 4 is shown in figure 8-12.

### Page 9 entries

You will always be required to make a page 9 entry to document that an accused has been to a court-martial if that court-martial resulted in a conviction. General rules for entries on page 9 include the following:

1. Block 2—Reason: If the accused was reduced in rate, you will type the letter abbreviation of the type of court-martial followed by a slash and then type RR.

2. Block 4—Traits: Always refer to all service record pages where an entry was made to reflect an approved sentence.

Figure 8-13 illustrates three examples of how to annotate a page 9. You would use the first sample if the sentence, as approved by the CA, did not include confinement and did not affect the accused's pay—in other words, there was no reduction in rate, no forfeiture of pay, no fine, and no confinement. You will use the second sample if the sentence, as approved by the CA, did include confinement and/or did affect the accused's pay, but did not include a reduction in rate. Use the third type of sample when the sentence as approved by the CA includes a reduction in rate. As the samples show, the choices of possible page 9 entries would be the same for an SCM or a GCM.

6. PERSONNEL ADVANCEMENT REQUIREMENT			7. PERFORMANCE TESTS			8. ADVANCEMENT, REDUCTION OR CHANGE IN RATING				
DESCRIPTION	DATE COMPLETED	*OFF. INIT.	DESCRIPTION	DATE COMPLETED	*OFF. INIT.	RATE ADVANCED, REDUCED OR CHANGED	EFFECTIVE	TIME IN RATE COMPUTED FROM	*OFF. INIT.	
						SK1	SKC	16AUGCY-2	16AUGCY-2	<i>[Handwritten initials]</i>
						SKC	SK2	11FEBCY-1	11FEBCY-1	
						SK2	SKSR	16JULCY	16JULCY	

9. RECORD OF OFF-DUTY EDUCATION AND VOC/TECH TRAINING									
DATE COMPLETED	NUMBER AND TITLE OF COURSE OR TEST	SCHOOL	GRADE	*OFF. INIT.	DATE COMPLETED	NUMBER AND TITLE OF COURSE OR TEST	SCHOOL	GRADE	*OFF. INIT.

10. GOOD CONDUCT AWARDS			11. DECORATIONS, UNIT, AND MARKSMANSHIP AWARDS			
AWARD NUMBER	DATE EARNED	*OFF. INIT.	AWARD	ACTIVITY	DATE OF AWARD	*OFF. INIT.

12. CAMPAIGN/SERVICE AND OTHER AWARDS					
AWARD	ENGAGEMENT(S)	*OFF. INIT.	AWARD	ENGAGEMENT(S)	*OFF. INIT.

13. OTHER TRAINING COURSES/INSTRUCTIONS COMPLETED				
DATE COMPLETED	TYPE OF COURSE AND/OR INSTRUCTION	DURATION	LOCATION	*OFF. INIT.

PISTOL, VERY C.

Figure 8-12.-Navy Occupational/Training and Awards History, NAVPERS 1070/604.

ENLISTED PERFORMANCE RECORD										
1. PERIOD OF REPORT	2. REASON	3. RATE	4. TRAITS						5. SHIP OR STATION	6. INITIALS
			Rate Knowledge	Reliability	Military Bearing	Personal Behavior	Directing	Overall Evaluation		
CY-2OCT14		SR	DATE OF ENLISTMENT						NAVCROIDIST CLEVELAND, OH	JER
CY-1FEB16	AR	SA	ADVANCED TO SA						SSC, NTC GREAT LAKES, IL	DSC
CY-1APR30	CR	BTFA	CHANGED RATE TO BTFA						SSC, NTC GREAT LAKES, IL	DSC
CY-1APR30	T	BTFA	3.6	3.6	3.6	3.6	3.6	3.6	SSC, NTC GREAT LAKES, IL	DSC
CY-1AUG16	AR	BTFN	ADVANCED TO BTFN						USS HERMITAGE (LSD 34)	CES
CYJAN21	SCM	BTFN	SUMMARY COURT-MARTIAL (NAVPERS 1070/613)						USS HERMITAGE (LSD 34)	CES
CYJAN12	SCM	BTFN	SUMMARY COURT-MARTIAL (NAVPERS 1070/607)						USS HERMITAGE (LSD 34)	CES
CYJAN10	SCM/RR	BTFR	SUMMARY COURT-MARTIAL (NAVPERS 1070/604/607)						USS HERMITAGE (LSD 34)	CES
EX 1 CYJAN30	SPQM	BTFN	SPECIAL COURT-MARTIAL (NAVPERS 1070/613)						USS HERMITAGE (LSD 34)	CES
EX 2 CYJAN15	SPQM	BTFN	SPECIAL COURT-MARTIAL (NAVPERS 1070/607)						USS HERMITAGE (LSD 34)	CES
EX 3 CYJAN22	SPQM/RR	BTFR	SPECIAL COURT-MARTIAL (NAVPERS 1070/604/607)						USS HERMITAGE (LSD 34)	CES
CYJAN05	GCM	BTFN	GENERAL COURT-MARTIAL (NAVPERS 1070/613)						USS HERMITAGE (LSD 34)	CES
CYFEB14	GCM	BTFN	GENERAL COURT-MARTIAL (NAVPERS 1070/607)						USS HERMITAGE (LSD 34)	CES
CYFEB10	GCM/RR	BTFR	GENERAL COURT-MARTIAL (NAVPERS 1070/604/607)						USS HERMITAGE (LSD 34)	CES
NAME (Last)			(First)			(Middle)			SSN	BRANCH/CLASS
DOE			JOHN			A .			123-45-6789	USN

Figure 8-13.—Enlisted Performance Record, NAVPERS 1070/609.

## Page 13 entries

You will be required to make a page 13 entry, similar to that shown in figure 8-14, in all cases resulting in a conviction where the sentence fits into one of the following categories:

- The sentence, as approved by the CA, was no punishment.
- The sentence, as approved and ordered executed by the CA, did not include confinement and did not affect the accused's pay (no reduction in rate, no forfeiture of pay, no fine).
- The sentence was such that it would normally require a page 7 entry (confinement, reduction in rate, forfeiture of pay, or fine), but the CA has suspended all portions of the sentence that would normally require you to prepare a page 7 entry. As long as no part of the sentence "ordered executed" includes confinement, reduction in rate, forfeiture of pay, or fine, then you would prepare a page 13 entry.

## Page 7 entries

You will be required to prepare a page 7 entry in all cases where the sentence, as approved and ordered executed by the CA, includes confinement, reduction in rule, forfeiture of pay, or fine.

Remember, if all the previous types of punishment have been suspended by the CA, then you will not prepare a page 7 entry, but instead you will prepare a page 13 entry. However, if any one portion of the previously mentioned types of punishment has been approved and not suspended then you must prepare a page 7 entry. The key to remember is that you will be required to prepare either a page 7 entry or a page 13 entry to reflect the result of trial, but not both.

Figure 8-15 shows an example of a completed page 7 reflecting the CA's action that approved and ordered executed the sentence awarded at trial. Figure 8-16 is a sample page 7 reflecting the CA's action that approves and orders executed the sentence awarded at trial with the exception of the BCD. Figure 8-17 illustrates a page 7 reflecting the CA's action in which the CA only partially approved the sentence and ordered it executed.

## **WAIVER OR WITHDRAWAL OF APPELLATE REVIEW**

After any GCM, except one in which the approved sentence includes death, and after any SPCM in which

the approved sentence includes a BCD, the accused may waive or withdraw appellate review. Appellate review is not available for SPCMs in which a BCD was not adjudged or approved and for SCMs. Cases not subject to appellate review, or in which appellate review is waived, are reviewed by a judge advocate only. Such cases may also be submitted to the Judge Advocate General (JAG) for review.

The accused has the right to consult with counsel before submitting a waiver or withdrawal of appellate review. The waiver or withdrawal must be a written document. The waiver must establish that the accused and the DC have discussed (1) the accused's right to appellate review; (2) the effect that the waiver or withdrawal will have on the review; (3) that the accused understands these matters; and (4) that the waiver or withdrawal is submitted voluntarily. A waiver or withdrawal must be signed by the accused and the DC.

A waiver of appellate review is filed with the CA and is attached to the record of trial. A withdrawal of appellate review is filed with the OEGCMJ over the accused who sends it to JAG.

The accused may file a waiver of appellate review within 10 days after the accused or DC is served with a copy of the CA's action. Upon written application of the accused, the CA may extend this period for good cause for not more than 30 days. A withdrawal may be submitted any time before appellate review is completed. In either case, however, once appellate review is waived or withdrawn, it is irrevocable and the case will thereafter be reviewed locally in the same manner as an SCM or an SPCM not involving a BCD.

Figure 8-18 is the form to be used when an accused wishes to waive or withdraw his or her right to appellate review in a GCM or an SPCM subject to review by a Court of Military Review. Figure 8-19 should be used for those members who desire to waive their rights to appellate review in GCM cases subject to examination in the Office of the Judge Advocate General.

## **APPELLATE LEAVE**

Under the provisions of Article 76(a), UCMJ, the Secretary of the Navy (SECNAV) may prescribe regulations that require officers and enlisted members to take leave pending completion of the appellate review process if the sentence, as approved by the CA, includes an unsuspended dismissal or an unsuspended dishonorable discharge (DD) or BCD. The regulations on appellate leave are contained in the *Naval Military Personnel Manual* (MILPERSMAN). Stated very



ADMINISTRATIVE REMARKS

NAVPERS 1070/613 (REV. 10-81)

S/N 0106-LF-010-8981

E-32

SHIP OR STATION

USS HERMITAGE (LSD 34)

03 Feb CY: SPECIAL COURT-MARTIAL

DATE OF OFFENSE: 23 September 19CY-1

NATURE OF OFFENSE: Violation of UCMJ, Article 86 - Unauthorized Absence from 23 September 19CY-1 to 7 January 19CY.

DATE OF TRIAL: 10 January 19CY

FINDINGS: Of the Charge and Specification thereunder: Guilty.

SENTENCE ADJUDGED: To be restricted to the limits of USS HERMITAGE (LSD 34) for a period of 45 days.

CA'S ACTION ON SENTENCE: Approved and ordered executed. The record of trial is forwarded to Commander, Amphibious Group TWO, Norfolk, VA, for review in accordance with Article 64(b), UCMJ.

PAUL T. BOAT, LNC, USN  
By direction of the Commanding Officer

Note: This is a sample page 13 entry that would be used when the sentence, as approved and ordered executed by the CA, does not include confinement and/or any type of punishment that affects the accused's pay.

The sample type of entry would also be used when an accused is tried and convicted at a court-martial (SCM, SPCM, or GCM) and receives a sentence of no punishment. The only difference would be the sentence adjudged entry would read "No punishment."

This is also the type of entry you would make when the sentence as approved and ordered executed by the CA includes punishment that normally requires a page 7 entry but the CA ordered that portion suspended.

When a person is acquitted at a court-martial there are no service record entries made at all to reflect the results of trial.

NAME (Last, First, Middle)  
DOE, JOHN A.

SSN  
111-11-1111

BRANCH AND CLASS  
USN

13

Figure 8-14.—Administrative Remarks, NAVPERS 1070/613.

BUPERS USE ONLY		P601-7R		BUPERS USE ONLY	
<b>COURT MEMORANDUM</b>					
38					
1. DATE SUBMITTED CYMAR22		2. SHIP OR STATION AND LOCATION USS HERMITAGE (LSD 34)			
3. DATE OF REFERRAL CYFEB16		4. TYPE OF COURT SPECIAL	5. DATE OF COURT/ MAY CYFEB28	6. UCMJ ARTICLE(S) 128, 134	
7. DATE OF ACTION CYMAR20		8. REPORT OF ACTION <input checked="" type="checkbox"/>	9. MODIFICATION OF ACTION <input type="checkbox"/>	10. CORRECTION TO PREVIOUS 1070/607 <input type="checkbox"/>	11. DATE OF SUBMISSION ON 1070/607 MOD OR CORRECTED <input type="checkbox"/>
<input checked="" type="checkbox"/> 12. RATE ADJUSTMENT	13. FROM YN2	14. TO YNSN	15. TIR CYMAR20		
<input checked="" type="checkbox"/> 16. FORFEITURE	17. MONTHLY AMT. \$ 250.00	18. NO. MONTHS 4			
<input type="checkbox"/> 19. FINE	20. AMOUNT \$	<input type="checkbox"/> 21. CONSENT TO CHECKAGE	<input type="checkbox"/> 22. DOES NOT CONSENT TO CHECKAGE	23. MO. AMT. OF CHECKAGE \$	24. NO. MOS.
<input type="checkbox"/> 25. DETENTION	26. MONTHLY AMT. \$	27. NO. MONTHS	28. DETENTION RE-FUND DATE		
29. DESERTION MARK REMOVED <input type="checkbox"/>	<input type="checkbox"/> 30. ADJUDGED	<input type="checkbox"/> 31. ADJUDGED AND DIS-APPROVED			
PRE TRIAL CONFINEMENT 32. FROM		33. TO	34. DAYS LOST TIME (30 DAY BASIS)	35. DAYS LOST TIME (DAY FOR DAY)	
CONFINEMENT ORDERED AND COMPLETED 36. FROM		37. TO	38. DAYS LOST TIME (30 DAY BASIS)	39. DAYS LOST TIME (DAY FOR DAY)	
40. CHANGE EAOS TO		41. CHANGE EXP. ENL. TO			
42. SYNOPSIS OF OFFENSE(S), DATE(S), AND SENTENCE ADJUDGED (ALSO AMPLIFYING REMARKS, MAY BE CONTINUED ON REVERSE)					
CYMAR22: SPECIAL COURT-MARTIAL DATE OF TRIAL: CYFEB28 VIOL UCMJ, ART. 128 - ASSAULT ON A PETTY OFFICER BY STRIKING HIM IN THE FACE WITH HIS FIST ON CYFEB10; VIO UCMJ, ART. 134 - DRUNK AND DISORDERLY CONDUCT ON STATION ON CYFEB10. SENTENCE ADJUDGED: REDUCTION TO THE GRADE OF PAYGRADE E-3, FORF OF \$250.00 PAY PER MONTH FOR 4 MONTHS DATE SENTENCE ADJUDGED: CYFEB28					
DATE IDENTIFICATION AND RESUME OF CONVENING, SUPERVISORY, OR OTHER AUTHORITY INCLUDING ACTION UNDER ARTICLES 65, 66, 67, 69, 72, 73, 74, OR 15 (D) OR (E), UCMJ, (ALSO ANY APPEAL)					
43. 1070, 607 DTD CYMAR20		44. AUTHORITY TYPE CONVENING		CO, USS HERMITAGE	
45. (LSD 34) LTR SER 377 DTD CYMAR20 FWD ROT TO COMPHIBGRU TWO					
CA'S ACTION: APPROVED AND ORDERED EXECUTED. THE FORF SHALL APPLY TO PAY BECOMING DUE ON OR AFTER THE DATE OF THIS ACTION. ROT FWD TO COMPHIBGRU TWO, NORFOLK, VA FOR REVIEW IAW ART. 64(C), UCMJ.					
(MAY BE CONTINUED ON REVERSE)					
		46. (SIGNATURE) BY DIRECTION PAUL T. BOAT, LNC, USN, BY DIR CO USS HERMITAGE (LSD 34)			
		GRADE			
		47. UNIT I.D. CODE 12345	48. RATE YNSN		
49. NAME (LAST, FIRST, MIDDLE) DOE, JOHN NMN		50. SSN 555-55-5555	51. BRANCH CLASS USN		
COURT MEMORANDUM NAVPERS 1070/607 (REV. 12-75) S-N 0106-LF-010-6960					
U.S. GOVERNMENT PRINTING OFFICE: 1986-491-648 T-40037					

Figure 8-15.-Court Memorandum, NAVPERS 1070/607—CA's action that approved and ordered executed the sentence awarded at trial.

BUPERS USE ONLY	P601-7R	BUPERS USE ONLY
<b>COURT MEMORANDUM</b>		
38		
1. DATE SUBMITTED CYMAR22	2. SHIP OR STATION AND LOCATION USS HERMITAGE (LSD 34)	
3. DATE OF REFERRAL CYFEB16	4. TYPE OF COURT SPECIAL	5. DATE OF COURT/ MAST CYFEB28
6. UCMJ ARTICLE(S) 128, 134		
7. DATE OF ACTION CYMAR20	8. REPORT OF ACTION <input checked="" type="checkbox"/> TYPE OF ACTION	9. MODIFICATION OF ACTION <input type="checkbox"/>
10. CORRECTION TO PREVIOUS 1070/607	11. DATE OF SUBMISSION ON 1070/607 MOD OR CORRECTED	
<input checked="" type="checkbox"/> 12. RATE ADJUSTMENT	13. FROM BT3	14. TO BTFR
15. TIR CYMAR20		
<input checked="" type="checkbox"/> 16. FORFEITURE	17. MONTHLY AMT. \$ 300.00	18. NO. MONTHS 3
19. FINE	20. AMOUNT \$	21. CONSENT TO CHECKAGE <input type="checkbox"/>
22. DOES NOT CONSENT TO CHECKAGE <input type="checkbox"/>	23. MO. AMT. OF CHECKAGE \$	24. NO. MOS.
<input type="checkbox"/> 25. DETENTION	26. MONTHLY AMT. \$	27. NO. MONTHS
28. DETENTION RE-FUND DATE		
29. DESERTION MARK REMOVED <input type="checkbox"/>	30. ADJUDGED <input type="checkbox"/>	31. ADJUDGED AND DIS-APPROVED <input type="checkbox"/>
PRE-TRIAL CONFINEMENT 32. FROM	33. TO:	34. DAYS LOST TIME (30 DAY BASIS)
35. DAYS LOST TIME (DAY FOR DAY)		
CONFINEMENT ORDERED AND COMPLETED 36. FROM CYFEB28	37. TO:	38. DAYS LOST TIME (30 DAY BASIS)
39. DAYS LOST TIME (DAY FOR DAY)		
40. CHANGE EAOS TO:	41. CHANGE EXP. ENL. TO:	
42. SYNOPSIS OF OFFENSE(S), DATE(S), AND SENTENCE ADJUDGED (ALSO AMPLIFYING REMARKS, MAY BE CONTINUED ON REVERSE)		
<p>CYMAR22: SPECIAL COURT-MARTIAL  DATE OF TRIAL: CYFEB28  VIOL UCMJ, ART. 128 - ASSAULT ON A PETTY OFFICER BY STRIKING HIM IN THE FACE WITH THIS FIST ON CYFEB10; VIOL UCMJ, ART. 134 - DRUNK AND DISORDERLY CONDUCT ON STATION ON CYFEB10.  SENTENCE ADJUDGED: REDUCTION IN GRADE TO PAYGRADE E-3, FORF OF \$300.00 PAY PER MONTH FOR 3 MONTHS; CONF FOR 6 MONTHS, AND DISCHARGE FROM THE NAVAL SERVICE WITH A BCD.  DATE SENTENCE ADJUDGED: CYFEB28  DATE IDENTIFICATION AND RESUME OF CONVENING, SUPERVISORY, OR OTHER AUTHORITY INCLUDING ACTION UNDER ARTICLES 65, 66, 67, 69, 72, 73, 74, OR 15 (D) OR (E), UCMJ, (ALSO ANY APPEAL)</p>		
43. 1070/607 DTD CYMAR20	44. AUTHORITY TYPE CONVENING	CO, USS HERMITAGE
45. (LSD 34) LTR SER 111 DTD CYMAR20 FWD ROT TO NMCMR		
<p>CA'S ACTION: APPROVED AND, EXCEPT FOR THAT PORTION OF THE SENTENCE EXTENDING TO A BCD, ORDERED EXECUTED. THE FORF SHALL APPLY TO PAY BECOMING DUE ON OR AFTER THE DATE OF THIS ACTION. THE NAVAL BRIG, NORFOLK, VA IS DESIGNATED THE PLACE OF CONF. IAW ART. 58A(A), UCMJ, AND DISC JAGMAN, RIR TO E-3 EFFECTIVE AS OF THE DATE OF THIS ACTION. ROT FWD TO NMCMR FOR REVIEW IAW ART. 66, UCMJ.</p>		
(MAY BE CONTINUED ON REVERSE)		
<div style="border: 1px solid black; padding: 5px; width: fit-content; margin: 0 auto;"> 46. (SIGNATURE) BY DIRECTION  PAUL T. BOAT, LNC, USN, BY DIR CO USS HERMITAGE </div>		
<div style="border: 1px solid black; padding: 5px; width: fit-content; margin: 0 auto;"> 47. UNIT I.D. CODE 12345 </div>		
<div style="border: 1px solid black; padding: 5px; width: fit-content; margin: 0 auto;"> 48. RATE BTFR </div>		
49. NAME (LAST, FIRST, MIDDLE) DOE, JOHN NMN		50. SSN 123-45-6789
		51. BRANCH/CLASS USN
<small>COURT MEMORANDUM NAVPERS 1070/607 (REV. 12-75) S/N 0106-LF-010-6960</small> <small>* US GOVERNMENT PRINTING OFFICE 1986-491-6481-40037</small>		
RETAIN IN SERVICE RECORD		

Figure 8-16.-Court Memorandum, NAVPERS 1070/607—CA's action that approved and ordered executed the sentence awarded with the exception of the BCD.

BUPERS USE ONLY

P601-7R

BUPERS USE ONLY

COURT MEMORANDUM

38

1. DATE SUBMITTED CYMAR22		2. SHIP OR STATION AND LOCATION USS HERMITAGE (LSD 34)			
3. DATE OF REFERRAL CYFEB16		4. TYPE OF COURT SPECIAL	5. DATE OF COURT, MAYE CYFEB28	6. UCMJ ARTICLE(S) 128, 134	
7. DATE OF ACTION CYMAR20		8. REPORT OF ACTION <input checked="" type="checkbox"/>	9. MODIFICATION OF ACTION <input type="checkbox"/>	10. CORRECTION TO PREVIOUS 1070/607 <input type="checkbox"/>	11. DATE OF SUBMISSION ON 1070/607 MOD OR CORRECTED
<input checked="" type="checkbox"/> 12. RATE ADJUSTMENT	13. FROM BT3	14. TO BTFN	15. TIR CYMAR20		
<input checked="" type="checkbox"/> 16. FORFEITURE	17. MONTHLY AMT. \$ 150.00	18. NO. MONTHS 3			
<input type="checkbox"/> 19. FINE	20. AMOUNT \$	<input type="checkbox"/> 21. CONSENT TO CHECKAGE	<input type="checkbox"/> 22. DOES NOT CONSENT TO CHECKAGE	23. MO. AMT. OF CHECKAGE \$	24. NO. MOS.
<input type="checkbox"/> 25. DETENTION	26. MONTHLY AMT. \$	27. NO. MONTHS	28. DETENTION RE-FUND DATE		
<input type="checkbox"/> 29. DESERTION MARK REMOVED	<input type="checkbox"/> 30. ADJUDGED	<input type="checkbox"/> 31. ADJUDGED AND DIS-APPROVED			
32. FROM		33. TO	34. DAYS LOST TIME (30 DAY BASIS)	35. DAYS LOST TIME (DAY FOR DAY)	
36. FROM		37. TO	38. DAYS LOST TIME (30 DAY BASIS)	39. DAYS LOST TIME (DAY FOR DAY)	
40. CHANGE EAOS TO:		41. CHANGE EXP ENL TO:			

42. SYNOPSIS OF OFFENSE(S), DATE(S), AND SENTENCE ADJUDGED (ALSO AMPLIFYING REMARKS, MAY BE CONTINUED ON REVERSE)  
 CYMAR22: SPECIAL COURT-MARTIAL  
 DATE OF TRIAL: CYFEB28  
 VIOL UCMJ, ART. 128 - ASSAULT ON A PETTY OFFICER BY STRIKING HIM IN THE FACE WITH HIS FIST ON CYFEB10; VIOL UCMJ, ART. 134 - DRUNK AND DISORDERLY CONDUCT ON STATION ON CYFEB10.  
 SENTENCE ADJUDGED: REDUCTION IN GRADE TO PAYGRADE E-3, FORFEITURE OF \$300.00 PAY PER MONTH FOR 3 MOS; AND CONF FOR 2 MOS.  
 DATE SENTENCE ADJUDGED: CYFEB28

DATE IDENTIFICATION AND RESUME OF CONVENING, SUPERVISORY, OR OTHER AUTHORITY INCLUDING ACTION UNDER ARTICLES 65, 66, 67, 69, 72, 73, 74, OR 15 (D) OR (E), UCMJ, (ALSO ANY APPEAL)

43. 1070/607 DTD CYMAR20		44. AUTHORITY TYPE CONVENING		CO, USS HERMITAGE	
-----------------------------	--	---------------------------------	--	-------------------	--

45. (LSD 34) LTR SER 146 DTD CYMAR20 FWD ROT TO COMPHIBGRU TWO

CA'S ACTION: ONLY SO MUCH OF THE SENTENCE AS PROVIDES FOR REDUCTION IN GRADE TO PAYGRADE E-3, FORF OF \$150.00 PAY PER MONTH FOR 3 MOS AND CONF FOR 2 MOS IS APPROVED AND ORDERED EXECUTED. THE FORF SHALL APPLY TO PAY BECOMING DUE ON AND AFTER THE DATE OF THIS ACTION. THE NAVAL BRIG, NAVSTA, NORFOLK, VA, IS DESIGNATED AS THE PLACE OF CONFINEMENT. ROT FWD TO COMPHIBGRU TWO, NORFOLK, VA FOR REVIEW IAW ART. 64(C), UCMJ.

MAY BE CONTINUED ON REVERSE

46. (SIGNATURE) BY DIRECTION <i>Paul T. Boat</i>		GRADE CNR	
PAUL T. BOAT, LNC, USN, BY DIR CO USS HERMITAGE (LSD 34)			
47. UNIT I.D. CODE 12345		48. RATE BTFN	
49. NAME (LAST, FIRST, MIDDLE) DOE, JOHN NMN		50. SSN 222-22-2222	51. BRANCH CLASS USN

COURT MEMORANDUM NAVPERS 1070, 607 (REV 12-75) S N 0106 LF 010 6960

U.S. GOVERNMENT PRINTING OFFICE: 1985-461-657 S-20015

RETAIN IN SERVICE RECORD

Figure 8-17.-Court Memorandum, NAVPERS 1070/607—CA's action in which the CA only partially approved the sentence and ordered it executed.

**WAIVER/WITHDRAWAL OF APPELLATE RIGHTS IN GENERAL AND SPECIAL  
COURTS—MARTIAL SUBJECT TO REVIEW BY A COURT OF MILITARY REVIEW**

*NOTE: See R.C.M. 1203(b) concerning which cases are subject to review by a Court of Military Review. See R.C.M. 1110 concerning waiver or withdrawal of appellate review.*

I have read the attached action dated \_\_\_\_\_.

I have consulted with \_\_\_\_\_, my (associate) defense counsel concerning my appellate rights and I am satisfied with his/her advice.

I understand that:

1. If I do not waive or withdraw appellate review —
  - a. My court-martial will be reviewed by the \_\_\_\_\_ Court of Military Review.
  - b. The Court of Military Review will review my case to determine whether the findings and sentence are correct in law and fact and whether the sentence is appropriate.
  - c. After review by the Court of Military Review, my case could be reviewed for legal error by the United States Court of Military Appeals, on petition by me or on request of the Judge Advocate General.
  - d. If the Court of Military Appeals reviews my case, my case could be reviewed for legal error by the United States Supreme Court on petition by me or the Government.
  - e. I have the right to be represented by military counsel, at no cost to me, or by civilian counsel, at no expense to the United States, or both, before the Court of Military Review, the Court of Military Appeals, and the Supreme Court.
2. If I waive or withdraw appellate review —
  - a. My case will not be reviewed by the Court of Military Review, or be subject to further review by the Court of Military Appeals, or by the Supreme Court under 28 U.S.C. 1259.
  - b. My case will be reviewed by a judge advocate for legal error, and I may submit in writing allegations of legal error for consideration by the judge advocate.
  - c. After review by the judge advocate and final action in my case, I may petition the Judge Advocate General for correction of legal errors under Article 69(b). Such a petition must be filed within 2 years of the convening authority's action, unless I can show good cause for filing later.
  - d. A waiver or withdrawal, once filed, cannot be revoked, and bars further appellate review.

Understanding the foregoing, I (waive my rights to appellate review) (withdraw my case from appellate review). I make this decision freely and voluntarily. No one has made any promises that I would receive any benefits from this waiver/withdrawal, and no one has forced me to make it.

\_\_\_\_\_  
TYPED NAME OF ACCUSED

\_\_\_\_\_  
RANK OF ACCUSED

\_\_\_\_\_  
SIGNATURE OF ACCUSED

\_\_\_\_\_  
DATE

DD FORM 2330  
84 AUG

**Figure 8-18.—Waiver/Withdrawal of Appellate Rights in GCM and SPCM Subject to Review by a Court of Military Review, DD Form 2330.**

STATEMENT OF COUNSEL

(Check appropriate block)

- 1. I represented the accused at his/her court-martial.
- 2. I am associate counsel detailed under R.C.M. 1110(b). I have communicated with the accused's (detailed) (individual military) (civilian) (appellate) defense counsel concerning the accused's waiver/withdrawal and discussed this communication with the accused.
- 3. I am substitute counsel detailed under R.C.M. 1110(b).
- 4. I am a civilian counsel whom the accused consulted concerning this matter. I am a member in good standing of the bar of \_\_\_\_\_.
- 5. I am appellate defense counsel for the accused.

I have advised the accused of his/her appellate rights and of the consequences of waiving or withdrawing appellate review. The accused has elected to (waive) (withdraw) appellate review.

_____	_____
TYPED NAME OF COUNSEL	UNIT OF COUNSEL
_____	_____
RANK OF COUNSEL	BUSINESS ADDRESS (If Civilian Counsel)
_____	_____
SIGNATURE OF COUNSEL	DATE

DD Form 2330 Reverse, 84 AUG

Figure 8-18.—Waiver/Withdrawal of Appellate Rights in GCM and SPCM Subject to Review by a Court of Military Review, DD Form 2330—Continued.

**WAIVER/WITHDRAWAL OF APPELLATE RIGHTS IN GENERAL COURTS—MARTIAL  
SUBJECT TO EXAMINATION IN THE OFFICE OF THE JUDGE ADVOCATE GENERAL**

*NOTE: See R.C.M. 1201(b)(1) concerning which cases are subject to examination in the Office of the Judge Advocate General. See R.C.M. 1110 concerning waiver or withdrawal of appellate review.*

I have read the attached action, dated \_\_\_\_\_.

I have consulted with \_\_\_\_\_, my (associate) defense counsel concerning my appellate rights and I am satisfied with his/her advice.

I understand that:

1. If I do not waive or withdraw appellate review —
  - a. My case will be examined in the Office of the Judge Advocate General to determine whether the findings and sentence are legally correct and whether the sentence is appropriate.
  - b. After examination in the Office of the Judge Advocate General and final action in my case, I may petition the Judge Advocate General for review under Article 69(b). Such a petition must be filed within 2 years after the convening authority took action in my case, unless I can show good cause for filing later.
2. If I waive or withdraw appellate review —
  - a. My case will not be examined in the Office of the Judge Advocate General under Article 69(a), UCMJ.
  - b. My case will be reviewed by a judge advocate for legal error, and I may submit in writing allegations of legal error for consideration by the judge advocate.
  - c. After review by the judge advocate and final action in my case, I may petition the Judge Advocate General for review under Article 69(b). Such a petition must be filed within 2 years after the convening authority took action in my case, unless I can show good cause for filing later.
  - d. A waiver or withdrawal, once filed, may not be revoked.
3. Understanding the above, I hereby (waive my rights to appellate review) (withdraw my case from appellate review). I make this decision freely and voluntarily. No one has made any promises that I would receive any benefits from this waiver/withdrawal, and no one has forced me to make it.

\_\_\_\_\_  
TYPED NAME OF ACCUSED

\_\_\_\_\_  
RANK OF ACCUSED

\_\_\_\_\_  
SIGNATURE OF ACCUSED

\_\_\_\_\_  
DATE

DD FORM 2331  
84 AUG

S/N 0102-LF-002-3310

**Figure 8-19.—Waiver/Withdrawal of Appellate Rights in GCM Subject to Examination in the Office of the Judge Advocate General, DD Form 2331.**

STATEMENT OF COUNSEL

*(Check appropriate block)*

- 1. I represented the accused at his/her court-martial.
- 2. I am associate counsel detailed under R.C.M. 1110(b). I have communicated with the accused's (detailed) (individual military) (civilian) (appellate) defense counsel concerning the accused's waiver/withdrawal and discussed this communication with the accused.
- 3. I am substitute counsel detailed under R.C.M. 1110(b).
- 4. I am a civilian counsel whom the accused consulted concerning this matter. I am a member in good standing of the bar of \_\_\_\_\_.
- 5. I am appellate defense counsel for the accused.

I have advised the accused of his/her appellate rights and of the consequences of waiving or withdrawing appellate review. The accused has elected to (waive) (withdraw) appellate review.

\_\_\_\_\_  
TYPED NAME OF COUNSEL

\_\_\_\_\_  
UNIT OF COUNSEL

\_\_\_\_\_  
RANK OF COUNSEL

\_\_\_\_\_  
BUSINESS ADDRESS *(If Civilian Counsel)*

\_\_\_\_\_  
SIGNATURE OF COUNSEL

\_\_\_\_\_  
DATE

**Figure 8-19.-Waiver/Withdrawal of Appellate Rights in GCM Subject to Examination in the Office of the Judge Advocate General, DD Form 2331—Continued.**



simply, procedures applicable to Navy personnel provide authority to place a member on mandatory appellate leave; the member can also request voluntary appellate leave. Members placed on mandatory appellate leave will be provided transportation to their home of record or place from which called to active duty. An entry will be made on a NAVPERS 1070/613, page 13, of the service record that will include a Privacy Act statement. The entry must be signed by the member and approved by the officer authorized to sign such entries.

Members may be granted voluntary appellate leave upon written request. The request must be approved by the OEGCMJ over the member and be in the best interest of the service. In the case of an SPCM, an officer then exercising SPCM jurisdiction may authorize appellate leave. Differing from mandatory appellate leave, personnel requesting appellate leave will not be provided transportation to their home of record.

Members not electing the leave option will be retained on temporary duty in a disciplinary status at the transient personnel unit collocated with the confinement site. Upon approval of the sentence by the CA, the member's leave status changes from voluntary to involuntary.

The following applies to all members placed on appellate leave:

- For members stationed outside the continental United States (CONUS), family member travel and household goods (HHG) shipment will be authorized or approved to home of record when the GCM authority or SPCM authority over the member determines such to be in the best interest of the government. See *Joint Federal Travel Regulations* (JFTR), U5370-D8 and U5240-2. For members stationed in CONUS, with family members, travel and HHG shipment may be authorized at the discretion of the CA. For members stationed in CONUS, without family members, HHG shipment is not authorized.

- Members will return all uniforms or civilian clothing issued by the government and will return all other property owned by the government.

- Pay and allowances will terminate as of the date of departure or date of expiration of accrued leave.

- Before departure the member must have a thorough physical examination.

- The member's private automobile decal will be removed.

- Both member and dependent's ID cards are turned in. New ID cards are then issued for a period of 3 months with appellate leave status stamped across the ID card.

- Members are not eligible for space-available travel. Refer to OPNAVINST 4630.25 and NAVMIL-PERSCOMINST 4650.2

## **DISPOSITION OF RECORDS OF TRIAL AFTER ACTION BY THE CA**

The CA's action for every trial by court-martial is reviewed by higher authority. Certain reviews are mandatory. Once these mandatory reviews are completed the case is final. Other reviews are discretionary. For example, the accused and his or her counsel must decide whether to petition the COMA for review of the case, whether to petition for review by JAG, or whether to petition for a new trial. The terms *mandatory* and *discretionary* reviews imply opposite concepts. In the former case, further review will happen regardless of the accused's wishes. In the latter case, further review will happen only if the accused or some other person takes some positive action. The concept of waiver and withdrawal gives an accused the option, except in a case involving death, to avoid appellate review.

### **Forwarding a GCM to the Judge Advocate General**

A record of trial by a GCM and the CA's action will be sent directly to JAG if the approved sentence includes death or if the accused has not waived appellate review. The original and three copies of the order promulgating the results of trial will be sent with the original record of trial.

### **Forwarding a GCM to a Judge Advocate**

You will send a record of trial by GCM and the CA's action directly to a judge advocate for review if the sentence does not include death and if the accused has waived appellate review. You must also include the original and three copies of the order promulgating the results of trial with the original record of trial.

## **SPCM With an Approved BCD**

If the approved sentence of an SPCM includes a BCD, you will dispose of the record in the same manner as provided for in a record of trial by a GCM.

## **Other SPCMs**

With a record of trial by an SPCM in which the approved sentence does not include a BCD you will send it directly to a judge advocate for review. Include four copies of the promulgating order with the record of trial.

## **SCM**

Send a record of trial by SCM to a judge advocate for review.

## **REVIEW BY A JUDGE ADVOCATE GENERAL**

Article 64, UCMJ, and Rules for Courts-Martial (R.C.M.) 1112 require that all SCMs, non-BCD SPCMs, and all other noncapital courts-martial where appellate review has been waived or withdrawn by the accused be reviewed by a judge advocate. The JAGMAN requires this officer to be the SJA of an OEGCMJ who, at the time of trial, could have exercised such jurisdiction over the accused. In all cases, the action of the CA will identify the officer to whom the record is sent by stating his or her official title.

## **Form and Content of a Judge Advocate's Review**

The judge advocate's review is a written document containing the following:

- A conclusion as to whether the court-martial had jurisdiction over the accused and over each offense for which there is a finding of guilty that has not been disapproved by the CA
- A conclusion as to whether each specification for which there is a finding of guilty that has not been disapproved by the CA stated an offense
- A conclusion as to whether the sentence was legal
- A response to each allegation of error made in writing by the accused
- In cases requiring action by the OEGCMJ, as noted in the following paragraph, a recommendation as

to appropriate action and an opinion as to whether corrective action is required as a matter of law

After the judge advocate has completed his or her review, most cases reach the end of mandatory review and will be considered final within the meaning of Article 76, UCMJ. If this is the case, the judge advocate's review will be attached to the original record of trial and a copy sent to the accused.

For SCM and SPCM cases not involving a BCD or where a shore activity judge advocate's review is the final action, the judge advocate's office will retain the original record of proceedings for a period of 2 years after final action. At the termination of such retention period, the original record of proceedings is transferred to the National Personnel Records Center, 9700 Page Boulevard, St. Louis, Missouri 63132. For fleet activities where the record of proceedings has been reviewed under Article 64, MCM, the original record of proceedings is retained for a period of 3 months after final action. At the expiration of the retention period, send the record to the National Personnel Records Center.

## **Forwarding of Record of Trial to Officer Exercising General Court-Martial Jurisdiction**

The review is not final, and a further step is required, however, in the following two situations:

1. The judge advocate recommends corrective action.
2. The sentence as approved by the CA includes a dismissal, a DD or BCD, or confinement for more than 6 months.

The existence of either of these two situations will require the SJA to send the record of trial to the OEGCMJ for further action.

## **Action by Officer Exercising General Court-Martial Jurisdiction**

The OEGCMJ who receives a record of trial may:

- disapprove or approve the findings or sentence in whole or in part;
- remit, commute, or suspend the sentence in whole or in part;
- order a rehearing on the findings, on the sentence, or on both except where the evidence was insufficient at the trial to support the findings; or

- dismiss the charges.

If the OEGCMJ orders a rehearing, but the CA finds a rehearing impractical, the CA will dismiss the charges. After the OEGCMJ has taken action, the accused will be notified of that action and the accused will be provided with a copy of the judge advocate's review.

### **Forwarding a Record of Trial to the Judge Advocate General**

Assuming that appellate review has not been waived or withdrawn by the accused, an SPCM involving a BCD, whether or not suspended, will be sent directly to the Office of the Judge Advocate General of the Navy. After detailing appellate defense and government counsel, the case will then be sent to the NMCMR.

### **REVIEW IN THE OFFICE OF THE JUDGE ADVOCATE GENERAL**

Article 69(b), UCMJ, provides that certain cases may be reviewed in the Office of the Judge Advocate General and that the findings or sentence, or both, may be vacated or modified by JAG on the grounds of newly discovered evidence, fraud on the court, lack of jurisdiction, or error prejudicial to the substantial rights of the accused. Review under this article may only be granted in a case that has been "finally" reviewed, but has not been reviewed by the NMCMR. Even then, such review by JAG is not automatic. The accused must petition JAG to review the case and JAG may or may not agree to do so. If the case is reviewed, JAG may or may not grant relief.

Article 73, UCMJ, provides that, under certain limited conditions, an accused can petition JAG to have his or her case tried again even after the conviction has become final by completion of appellate review. This is not another trial such as that ordered to cure jurisdictional defects. This is a *trial de novo*— a brand new trial—as if the accused had never been tried at all.

There are only two grounds for petition: (1) newly discovered evidence and (2) fraud on the court.

Sufficient grounds will be found to exist only if it is established that an injustice has resulted from the findings or sentence and that a new trial would probably produce a substantially more favorable result.

### **REVIEW BY A NAVY-MARINE CORPS COURT OF MILITARY REVIEW**

An NMCMR reviews cases referred to it by JAG. The NMCMR has review authority similar to that of the CA, except that it may not suspend any part of the sentence. The NMCMR is also limited to reviewing only those findings and sentences that have been approved by the CA. In other words, it may not increase the sentence approved by the CA, nor may it approve findings of guilty already disapproved by the CA.

### **Action on Review and Forwarding of Cases**

JAG may send the decision of the NMCMR to the COMA for review with respect to any matter of law. In such a case, JAG will cause a copy of the decision of the NMCMR and the order forwarding the case to be served on the accused and on the appellate DC.

In a case reviewed by the NMCMR in which the court sets aside the sentence and JAG does not send the case to the COMA, JAG will instruct an appropriate CA to take action according to the decision of the NMCMR. If the NMCMR orders a rehearing, the record will be sent to an appropriate CA. If the CA finds a rehearing impractical the CA may dismiss the charges.

If the NMCMR affirms any sentence that includes death, JAG transmits the record of trial and the decision of the NMCMR directly to the COMA when any period for reconsideration has expired.

If the NMCMR affirms any sentence other than one that includes death, JAG causes a copy of the decision of the NMCMR to be served on the accused.

If JAG believes that a sentence affirmed by the NMCMR, other than one that includes death, should be remitted or suspended in whole or in part, JAG may, before taking action, send the record of trial and the decision of the NMCMR to SECNAV with a recommendation for action under Article 74, UCMJ, or may take such action as he or she is authorized under Article 73(a), UCMJ.

If the decision of the NMCMR is not subject to review by the COMA or, if JAG has not sent the case to the COMA and the accused has not filed a petition to the COMA, JAG will do the following:

- If the sentence affirmed by the NMCMR includes a dismissal, send the record, the decision of the NMCMR, and JAG's recommendation to SECNAV for action.

- If the sentence affirmed by the NMCMR does not include a dismissal, notify the CA, the OEGCMJ over the accused, or SECNAV who may order into execution any unexecuted sentence affirmed by the NMCMR.

### **Notification to Accused**

The accused is notified of the decision of the NMCMR. If the accused has the right to petition the COMA for review, the accused is provided with a copy of the decision of the NMCMR bearing an endorsement notifying the accused of this right. The endorsement informs the accused that such a petition:

- may be filed only within 60 days from the time the accused was notified of the decision of the NMCMR or the mailed copy of the decision was postmarked, whichever is earlier; or
- may be sent through the officer immediately exercising general court-martial jurisdiction over the accused and through JAG or filed directly with the COMA.

The accused may be notified personally or a copy of the decision may be sent, after service on appellate counsel, by certified First-Class Mail to the accused. If JAG sends the case to the COMA, the accused should be so notified.

### **REVIEW BY A COURT OF MILITARY APPEALS**

The COMA reviews the record in all cases:

- in which the sentence, as affirmed by an NMCMR, extends to death;
- reviewed by an NMCMR that JAG orders sent to a COMA for review; and
- reviewed by an NMCMR, except those referred to it by JAG, in which, upon petition by the accused and on good case shown, the COMA grants a review.

In cases reviewed, a COMA has authority to act only on matters of law. A COMA does not have the authority to (1) weigh the evidence; (2) judge the credibility of witnesses; or (3) make new findings of fact.

Whether there is sufficient evidence to sustain a finding of guilty, however, is a matter of law.

In a case certified by JAG to a COMA, action by the COMA is not restricted to the issues certified by JAG. In a case reviewed upon petition of an accused, the court

is required to take action only with regard to the issues specified in the grant of review.

### **ACTION ON DECISION BY A COURT OF MILITARY APPEALS**

After it acts on a case, the COMA may direct JAG to return the record to the NMCMR for further proceedings according to the decision of the court. Otherwise, unless the decision is subject to review by the Supreme Court, or there is to be further action by the President of the United States or SECNAV, JAG will instruct the CA to take action according to the decision of the COMA.

If the COMA affirms a sentence that must be approved by the President before it can be executed, JAG sends the record of trial, the decision of the NMCMR, the decision of the COMA, and the recommendation of JAG to SECNAV for the action of the President.

### **REVIEW BY THE UNITED STATES SUPREME COURT**

Finally, review by the United States Supreme Court is possible under 28 U.S.C. § 1259 and Article 67(h), UCMJ. Decisions of the COMA may be reviewed by the Supreme Court by a *writ of certiorari* in the following cases:

- Cases reviewed by the COMA under Article 67(b)(1)
- Cases certified to the COMA by JAG under Article 67(b)(2)
- Cases in which the COMA granted a petition for review under Article 67(b)(3)
- Cases other than those described previously that the COMA has granted relief

A *writ of certiorari* is an order by the appellate court that is used by that court when it has discretion on whether or not to hear an appeal from a lower court. If the writ is denied, the court refuses to hear the appeal and, in effect, the previous judgement stands unchanged. If the writ is granted, then it has the effect of ordering the lower court to certify the record and send it to the higher court that has used its discretion to hear the appeal.

The Supreme Court may not review by a *writ of certiorari* any action of a COMA in refusing to grant a petition for review.

After the Supreme Court has taken action, other than denial of a petition for a *writ of certiorari*, in any case, JAG will, unless the case is returned to the COMA for further processing, send the case to the President or SECNAV, or instruct the CA to take action according to the decision.

#### **VACATION OF SUSPENDED SENTENCE**

An act of misconduct, to serve as the basis for vacation of the suspension of a sentence, must occur within the period of suspension. The order vacating the suspension is issued before the expiration of the period of suspension. The running of the period of suspension is interrupted by the unauthorized absence of the probationer or by commencement of proceedings to vacate the suspension. R.C.M. 1109 indicates that vacation of a suspended sentence may be based on a violation of the UCMJ. Furthermore, when all or part of the sentence has been suspended as a result of a pretrial agreement, the suspension may be vacated for violation of any of the lawful requirements of the probation, including the duty to obey the local civilian law (as well as military law), to refrain from associating with known drug users or dealers, and to consent to searches of his or her person, quarters, and vehicle at any time.

#### **AUTHORITY, PROCEDURE, AND ACTION BY THE OFFICER HAVING SPCM JURISDICTION**

Procedural rules for hearing requirements depend on the type of suspended sentence being vacated.

- Sentence of any GCM or an SPCM including an approved BCD. If the suspended sentence was adjudged by a GCM, or by an SPCM that included an approved BCD, the following rules apply. After giving notice to the accused, the officer having SPCM jurisdiction over the probationer personally holds a hearing to inquire into the alleged violation of probation. The procedure for the hearing is similar to that prescribed for a formal pretrial investigation (Article 32, UCMJ), and the accused has the right to detailed and/or civilian counsel at the hearing. The record of the hearing and the recommendations of the SPCM authority are sent to the OEGCMJ who may vacate the suspension.

- Sentence of an SPCM not including a BCD or sentence of an SCM. If the suspended sentence was adjudged by an SPCM and does not include a BCD, or if the sentence was adjudged by an SCM, the following rules apply. The officer having SPCM jurisdiction over the probationer personally holds a hearing to inquire into

the alleged violation of probation. The procedure for the hearing is similar to that prescribed for a formal pretrial investigation. The probationer must be accorded the same right to counsel at the hearing that he or she was entitled to at the court-martial that imposed the sentence, except there is no right to request individual military counsel. Counsel does not need to be the same counsel who originally represented the probationer. If the officer having SPCM jurisdiction over the probationer decides to vacate all or a portion of the suspended sentence, he or she records the evidence that he or she relied on and the reasons for vacating the suspension in his or her action.

The officer who actually vacates the suspension executes a written statement including a summary of the evidence he or she is relying on and his or her reasons for vacating the suspension.

If, based on an act of misconduct in violation of the terms of suspension, the accused is confined before the actual vacation of the suspended sentence, a preliminary hearing must be held before a neutral and detached officer to determine whether there is probable cause to believe the accused has violated the terms of his or her suspension. JAGMAN 0150 indicates that this officer should be one who is appointed to review pretrial confinement under R.C.M. 305.

#### **RECORD OF PROCEEDINGS TO VACATE SUSPENDED SENTENCE**

The officer who conducts the vacation proceeding makes a summarized record of the proceeding, using DD Form 455, Report of Proceedings to Vacate Suspension of General Court-Martial Sentence or of a Special Court-Martial Sentence Including a Bad-Conduct Discharge, and sends the record and his or her written recommendation about vacation to the OEGCMJ over the probationer.

#### **ACTION BY THE OFFICER EXERCISING GCM JURISDICTION**

Based on the record produced by and the recommendation of the officer exercising special court-martial jurisdiction over the probationer, the OEGCMJ over the probationer decides whether the probationer violated a condition of suspension and, if so, whether to vacate the suspended sentence. If the OEGCMJ decides to vacate, he or she prepares a written statement of evidence relied on and the reasons for vacating.

Any unexecuted part of a suspended sentence ordered vacated is vacated at this point.

## **CLEMENCY**

What is clemency? Clemency is defined as that action, other than the correction of a legal error, that results in mitigation, remission, or suspension of the whole or any part of the unexecuted portion of a court-martial sentence, restoration to duty, or full or partial restoration of paygrade.

## **RECOMMENDATION FOR CLEMENCY**

When an accused is convicted, an important posttrial duty of the DC is to prepare, in a proper case, a recommendation for clemency. The recommendation is made to the CA. However, since the recommendation is attached to the record of trial, it can be considered by any reviewing authority who has the power to act upon the recommendations; for example, JAG or the NCMR. The DC usually initiates the recommendation for clemency. However, it may also be initiated by a court member.

Mitigating circumstances that could not be taken into consideration in determining the sentence may be a basis for a recommendation for clemency; either the court members or the military judge may wish to recommend that the CA suspend the sentence since the court has no power to award a suspended sentence. The recommendation should be specific as to the reasons for the recommendation. A recommendation for clemency should never be based upon a doubt as to the accused's guilt.

When considered appropriate, disposition boards, commanding officers, or BUPERS may, with respect to the unexecuted parts of a sentence, recommend one or more of the following:

- Restoration to duty on probation
- Remission of the punitive discharge or dismissal
- Reduction in confinement, forfeitures, or fines
- Mitigation of the discharge to one less severe
- Full or partial restoration to paygrade or precedence
- No clemency

## **NAVAL CLEMENCY AND PAROLE BOARD**

The Naval Clemency and Parole Board was established by SECNAV to make appropriate recommendations in the cases of Navy and Marine Corps personnel eligible for clemency consideration. The board is composed of representatives of the Commandant of the Marine Corps, the Chief of Naval Personnel, the Judge Advocate General, the Chief, Bureau of Medicine and Surgery, and the Navy Council of Personnel Boards. The board bases its recommendations on the background of the individual concerned—his or her civil and military history, adjustment in confinement or while awaiting completion of appellate review if not confined, motivation for future service, the nature and circumstances of the offense(s), the recommendation of the commanding officer, and the recommendation of the Chief of Naval Personnel.

Recommendations to the Naval Clemency and Parole Board must comply with the provisions of SECNAVINST 5815.3. This instruction sets forth explicit directions and procedures for the submission of requests for clemency. At a minimum, the following documents must be submitted with a request for clemency:

- Petitioner's request
- Court-martial progress report
- Court-martial order and any supplementary court-martial orders
- Judge advocate's review
- The record of trial

## **SUMMARY**

The material covered in this chapter is an important aspect of the total court-martial procedure. The posttrial actions required after a court-martial has adjourned is just another aspect of the Legalman rating. Normally those LNs assigned to duty with a CA/SJA will handle the larger part of posttrial administrative work. These procedures are very important and the regulations governing them must be strictly followed in order to guarantee cases will not be overturned on appeal.

## CHAPTER 9

# ADMINISTRATIVE SEPARATIONS

As an LN you will work with administrative separations at some point in your career. Generally the nuts and bolts of administrative separations are done at commands other than naval legal service offices (NLSOs). However, even the NLSOs are involved during certain aspects of the processing procedure. As a senior LN resigned to an independent duty billet, you may not only be required to take care of all the paper work required for administrative discharge processing, you may also be assigned to act as the recorder. So, no matter where you may be assigned as an LN, administrative separations are just another dimension to your rating. Therefore, it is to your advantage to be very familiar with the regulations and procedures of administrative separation processing. In this chapter you will be given a general working knowledge of the regulations and procedures of administrative separations. However, it is advised that whenever you are involved in administrative separations, review all reference material as two cases are never the same.

The policy of the Navy is to promote readiness by maintaining high standards of conduct and performance. To maintain these standards, it is necessary to provide a variety of means for the orderly and timely administrative separation of naval personnel to:

- make sure the Navy is served by individuals capable of meeting required standards of duty, performance, and discipline;
- maintain standards of performance and conduct through appropriate separation and characterization of service that stress the traditional concept of honorable military service; and
- achieve authorized force levels and grade distribution.

The Navy separation policy strengthens the concept that military service is a calling different from any civilian occupation.

When persons enter the naval service, the Navy invests substantial resources in their training, equipment, and related expenses. Separation before completion of a period of obligated service represents a loss of that investment while requiring increased

accessions. Conversely, retaining individuals in the naval service who will not or cannot conform to naval standards of conduct, discipline, and performance creates a high cost in terms of pay, administrative efforts, degradation of morale, and substandard mission performance. Both situations represent an inefficient use of limited defense resources.

We will use the terms *discharge* and *separation* in discussing the termination of a service obligation. SECNAVINST 1910.4A defines these terms as follows:

- **Discharge**—complete severance from all naval status gained by the enlistment or induction concerned.
- **Separation**—a general term that includes discharge, release from active duty, transfer to the Fleet Reserve or Retired List, release from custody and control of the military services, transfer to the Individual Ready Reserve (IRR), and similar changes in active or reserve status.

### TYPES OF ENLISTED ADMINISTRATIVE SEPARATIONS

There are two types of separations given by the Armed Forces of the United States to enlisted service members: (1) punitive discharges and (2) administrative separations.

#### PUNITIVE DISCHARGES

Punitive discharges are authorized punishments of courts-martial. They can only be awarded as an approved sentence of a court-martial following a conviction for a violation of the *Uniform Code of Military Justice* (UCMJ).

There are two types of punitive discharges. The first type is a dishonorable discharge (DD). A DD can only be adjudged by a general court-martial (GCM) and is a separation under dishonorable conditions. The second type of punitive discharge is a bad-conduct discharge (BCD). A BCD can be adjudged by either a GCM or a special court-martial (SPCM) and is a separation under conditions other than honorable.

## ADMINISTRATIVE SEPARATIONS

Members of the naval service may be separated administratively for many reasons. Some separations are characterized and some are not. We will discuss the different types of characterized and uncharacterized separations.

Any member being separated, except those separated for immediate reenlistment, must be advised of the purpose and authority of the Naval Discharge Review Board (NDRB) and the Board for Correction of Naval Records (BCNR) at the time of processing for such a separation.

### Characterized Separations

Separations are characterized as honorable, general (under honorable conditions), or under other than honorable (OTH) conditions.

**HONORABLE.**— An honorable separation is with honor. The quality of the member's service has met the standards of acceptable conduct and performance of duty or is otherwise so meritorious that any other characterization would be clearly inappropriate.

An honorable separation requires a minimum final average for the current enlistment in performance and conduct marks of 2.8 and a minimum average in personal behavior of 3.0.

A member who would be eligible for a characterization of service as general may receive an honorable discharge if he or she was awarded certain personal decorations. These personal decorations could be, for example, the Medal of Honor, Navy Commendation, or Navy Achievement Medal.

**GENERAL (UNDER HONORABLE CONDITIONS).**— The general characterization is proper when service has been honest and faithful. However, significant negative aspects of the member's conduct or performance of duty outweigh the positive aspects. A characterization of separation as general is under honorable conditions and entitles the member to all veterans' benefits. A member would be eligible for a characterization of separation as general if the member's final average for performance and conduct marks fall below 2.8 and below 3.0 in personal behavior.

**UNDER OTHER THAN HONORABLE CONDITIONS.**— A characterization of OTH is appropriate when the reason for separation is based upon a pattern of adverse behavior or one or more acts that are a significant departure from the conduct expected from members of the naval service.

Persons who receive an OTH discharge are not entitled to retain their uniforms or wear them home. However, they may be furnished civilian clothing at a cost of not more than \$50. They must accept transportation in kind to their home of record. They are not eligible for notice of discharge to employers.

The Department of Veterans Affairs makes its own determination with respect to the benefits as to whether the discharge was under conditions other than honorable.

### Uncharacterized Separations

These types of separations are separations that, due to the short duration of service, are uncharacterized.

**ENTRY LEVEL SEPARATION.**— A member in an entry level status (first 180 days of a period of continuous active military service) will ordinarily be separated with an entry level separation (ELS). The exceptions to this are (1) when characterization under OTH conditions is authorized under the reason for separation and is warranted by the circumstances of the case and (2) when characterization as honorable is clearly warranted by the presence of unusual circumstances involving personal conduct and performance of duty. These types of cases must be approved by the Secretary of the Navy (SECNAV).

**VOID ENLISTMENT OR INDUCTION.**— A member whose enlistment or induction is void will not receive a discharge certificate, characterization of service, or an ELS. The separation will be an order of release from custody and control of the Navy. Reasons supporting a void enlistment include the following:

- Enlistment without the voluntary consent of a person who has the capacity to understand the significance of enlisting. This may include enlistment of a person who was intoxicated or insane at the time of enlistment. It may also include a person who was coerced into enlisting by being presented with the option of enlisting or going to jail.

- Person under the age of 17.
- Deserter from another service.

### BASES FOR SEPARATING ENLISTED PERSONNEL

This section lists the types of separations available for the particular bases of separation, the applicable procedures, including counseling where required, and defines these bases in general terms. Figure 9-1 shows



you an overview of all the possible types of administrative separations, the characterization of service that can be awarded for each type separation, the applicable *Naval Military Personnel Manual* (MILPERSMAN) articles and what type of procedure you use to effect the separation.

**SELECTED CHANGES IN SERVICE OBLIGATION**

Separation under this article is appropriate for general demobilization, reduction in authorized strengths, immediate enlistment or reenlistment, and

NAVY ENLISTED ADMINISTRATIVE SEPARATIONS				
<u>REASON FOR SEPARATION</u>	<u>CHARACTERIZATION OF SEPARATION</u>	<u>MILPERSMAN ARTICLE</u>	<u>ADMIN BOARD (A)/ NOTIFICATION (N)</u>	
1. EXPIRATION OF SERVICE OBLIGATION	HON/GEN	3620100		
	ELS	3620150		
2. CONVENIENCE OF GOVERNMENT Dependency or Hardship Pregnancy or Childbirth Physical Condition Not Disability Personality Disorder Surviving Family Member Other Designated Physical or Mental Condition Parenthood Aliens Conscientious Objector Further Education	HON/GEN		(N); (A)	
	ELS		if 6 yr	
			3620210	
			3620220	
			3620200	
			3620225	
			3620240	
			3620200	
			3620215	
			3620250	
			1860120	
			3620235	
	3. DEFECTIVE ENLISTMENT Minority Under 17 Age 17 Defective Enlistment Erroneous Enlistment Fraudulent Enlistment*			
				3620285
OOR			(N)	
ELS			(N)	
HON/ELS			(N)	
OOR				
HON/ELS			3620283	
OOR		3620280	(N); (A) if 6 yr	
HON/GEN		3630100	(N); (A) if 6 yr or OTH	
ELS/OTH				
OOR				

Figure 9-1.—Navy enlisted administrative separations.

NAVY ENLISTED  
ADMINISTRATIVE SEPARATIONS

<u>REASON FOR SEPARATION</u>	<u>CHARACTERIZATION OF SEPARATION</u>	<u>MILPERSMAN ARTICLE</u>	<u>ADMIN BOARD (A)/ NOTIFICATION (N)</u>
4. ENTRY LEVEL PERFORMANCE AND CONDUCT	ELS	3630200	(N); (A) if 6 yr
5. UNSATISFACTORY PERFORMANCE	HON/GEN	3630300	(N); (A) if 6 yr
6. HOMOSEXUALITY (As regulations are presently changing in July 1993, refer to the current instructions regarding this category)			
7. SECURITY	HON/GEN OTH/ELS	3630700	(N); (A) if 6 yr or OTH
8. DRUG/ALCOHOL ABUSE REHAB FAILURE	HON/GEN	3630500 3630550	(N); (A) if 6 yr
9. MISCONDUCT	HON/GEN ELS/OTH		
Minor Disciplinary Infractions		3630600	(N); (A) if 6 yr or OTH
Pattern of Misconduct		3630600	(N); (A) if 6 yr or
Misconduct due to Drug Abuse*		3630620	(N); (A) if 6 yr or OTH
Commission of Serious Offense*		3630600	(A)
Civilian Conviction*		3630600	(A)
10. SEPARATION IN LIEU OF COURT-MARTIAL	HON/GEN ELS/OTH	3630650	(N); (A) if 6 yr or OTH
11. SEPARATION IN BEST INTEREST OF SERVICE	HON/GEN ELS	3630900	(N)
12. UNSATISFACTORY PERFORMANCE IN READY RESERVE	HON/GEN ELS/OTH	3630800	(N); (A) if 6 yr or OTH
13. DISABILITY	HON/GEN ELS	3620270 SECNAVINST 1850.48	(N)
14. WEIGHT CONTROL FAILURE	HON/GEN	3620260	(N); (A) if 6 yr or

\*MANDATORY PROCESSING IN CERTAIN CASES

Figure 9-1.—Navy enlisted administrative separation—Continued.

other early-out programs. Also, acceptance of an active duty commission or permanent appointment, or acceptance into a program; for example, officer candidate school (OCS), leading to an active duty commissioner appointment will result in a separation under this article.

The member must submit an official letter of request for separation via his or her commanding officer (CO) to the Chief of Naval Personnel (PERS-28). The request must include a copy of the acceptance or appointment letter from the officer program and a copy of the reporting requirement for the officer program. The Chief of Naval Personnel makes final determination on the member's request.

The member will receive an honorable, general, or ELS characterization of service.

For additional guidance on separation processing by reason of selected changes in service obligation, refer to the MILPERSMAN.

#### **EXPIRATION OF ENLISTMENT OR FULFILLMENT OF SERVICE OBLIGATION OR EXPIRATION OF TOUR OF ACTIVE SERVICE**

Unless voluntarily or involuntarily retained beyond normal expiration of term of service, enlisted members will be discharged upon normal date of expiration of enlistment, extension of enlistment, or period of induction, provided the member does not have additional service obligations. The member will receive an honorable, general, or ELS characterization of service.

For additional guidance on separation processing by reasons of expiration of enlistment, fulfillment of service obligation, or expiration of tour of active service, refer to the MILPERSMAN.

#### **CONVENIENCE OF THE GOVERNMENT**

The Chief of Naval Personnel may authorize or direct the separation of enlisted or inducted members before their expiration of enlistment. A member cannot request separation for reasons pertaining to involuntary discharge or separation. You may not effect a separation of a member for convenience of the government until all outstanding disciplinary actions involving the member are resolved. Characterization of service will be honorable, general, or ELS.

COs with special court-martial convening authority (SPCM CA) have the authority to effect the separation

of members provided the member has received counseling (when required), all disciplinary action has been completed (if applicable), and the member does not object to the separation. If the member objects, send the case to the Chief of Naval Personnel (PERS-281) for final determination.

There are several subcategories of the convenience of the government basis for discharge. We will discuss each one individually.

#### **Dependency or Hardship**

Upon request of a member separation may be directed when genuine undue hardship exists. Since some Navy personnel and their families encounter hardships while serving on active duty, they may request separation from the naval service from the SPCM CA. The member's request must show that:

- a severe hardship exists, not normally encountered and resolved by other members of the naval service.
- the hardship affects the member's immediate family.
- the hardship is not of a temporary nature and cannot be resolved within the near future.
- the member and his or her family have made every reasonable effort to alleviate the hardship.
- the hardship has occurred or has been severely aggravated since entry into the service.
- there are no other family members or relatives nearby who are capable of providing the necessary assistance.

Except under extraordinary circumstances separation for hardship will not be authorized solely for financial or business problems, indebtedness, personal convenience, member's physical or mental health, moral support to a family member whose life expectancy is estimated at less than 6 months, custody battles, or divorce proceedings.

You must inform enlisted personnel who desire to request separation for hardship reasons of the proper procedures to follow. You should clearly explain to each applicant that his or her request will be submitted via official channels, that submission is no assurance that the discharge will be authorized, and that the decision is within the sole discretion of the SPCM CA. You should also explain to the member that once a request is

approved by the SPCM CA it is irrevocable except in the most unusual circumstances.

The request for hardship discharge format and a list of required enclosures can be found in the MILPERSMAN.

The SPCM CA sends all approved or disapproved hardship requests to the Chief of Naval Personnel (PERS-40HH) for review and record purposes.

The characterization of service will be honorable, general, or ELS.

For additional guidance on separation processing by reason of convenience of the government due to hardship, refer to the MILPERSMAN.

### **Pregnancy or Childbirth**

This type of separation is voluntary. A written request by the female service member initiates the process. The request may be denied if the member is serving in a critical rate, has received special compensation during the current enlistment, has not completed obligated service incurred, or has executed orders in a known pregnancy status.

Officers exercising SPCM CA are authorized to separate members requesting separation under this article. COs or officers in charge (OICs) with SPCM CA send the request to the Chief of Naval Personnel (PERS-282) for final action when the member has not completed obligated service incurred for fully or partially funded education or has not completed obligated service incurred for enlisted education and training. Characterization of service will be honorable, general, or ELS.

For additional guidance on separation processing by reason of convenience of the government due to pregnancy or childbirth, refer to the MILPERSMAN.

### **Parenthood**

This category is for separation of a member who is unable to perform duties assigned, is repetitively absent, or is unavailable for worldwide assignment or deployment due to parenthood.

The Chief of Naval Personnel or officer exercising SPCM CA may direct separation. The Chief of Naval Personnel (PERS-282) may direct separation when the member objects to the discharge and final resolution rests with him or her. Commands may not initiate separation processing until the member has been counseled formally about his or her deficiencies and has

been afforded an opportunity to overcome the deficiencies. Use the notification procedure for processing. The characterization of service will be honorable, general, or ELS.

For additional guidance on separation processing by reason of convenience of the government due to parenthood, refer to the MILPERSMAN.

### **Further Education**

This category allows for separation of a member to attend college, vocational school, or technical school. The requested separation must be within 3 months of the member's expiration of active obligated service (EAOS). The Deputy Chief of Naval Personnel is the approving authority for this early release program. COs are not delegated authority to separate members under this program.

All personnel desiring early release under this program should send their requests to the Deputy Chief of Naval Personnel via the Chief of Naval Personnel (PERS-282), their CO, and the area type commander.

For additional guidance on separation processing by reason of convenience of the government due to furthering of education, refer to the MILPERSMAN.

### **Conscientious Objectors**

Conscientious objectors are persons who, by reason of religious training and belief, have a firm, fixed, and sincere objection against participating in war in any form or the bearing of arms.

No vested right exists for any member to be discharged from the Regular Navy at his or her own request before his or her EAOS even for conscientious objection. The Chief of Naval Personnel must approve a member's administrative discharge before completion of his or her service obligation. If separation is deemed warranted, the type of discharge is determined by the member's service record and the provisions of DOD Directive 1332.14.

When processing a member's application for separation by reasons of conscientious objection, refer to the MILPERSMAN for procedures and guidelines.

### **Designation as a Surviving Son and/or Daughter**

Enlisted members who become surviving sons or daughters as defined in the MILPERSMAN may apply and promptly be discharged.

Any request for discharge under this article will be submitted in writing only by the member and may be approved by the Chief of Naval Personnel (PERS-282) or by the CO or OIC having SPCM CA. Characterization of service will be honorable, general, or ELS.

For additional guidance on separation processing by reason of convenience of the government due to surviving son or daughter status, refer to the MILPERSMAN.

### **Other Designated Physical or Mental Conditions**

This category provides for the separation of members on the basis of designated physical or mental conditions considered inherent or developmental defects that do not constitute a physical disability. Such conditions are those considered to interfere with a member's performance of duty or pose a threat to his or her safety or well-being.

These conditions include but are not limited to the following:

- Motion/air sickness—must be verified by an otolaryngologist (ENT) doctor. No counseling is required before initiation of separation processing.

- Enuresis (bed-wetting)—must be medically confirmed by a urologist. No counseling is required before initiation of separation processing.

- Somnambulism (sleepwalking)—must be medically confirmed. A sworn statement from the military member must be included documenting at least one sleepwalking episode. The episode must be witnessed by at least two military members. No counseling is required before initiation of separation processing.

- Allergies—must be medically confirmed by an allergy or internal medicine evaluation. No counseling is required before initiation of separation processing.

- Excessive height—must be medically confirmed by an orthopedic consultation. No counseling is required before initiation of separation processing.

### **Personality Disorders**

Separation may be directed by the Chief of Naval Personnel (PERS-282) or an officer with SPCM CA when a member has been diagnosed with a personality disorder and that such condition will interfere with the

member's performance of duty or pose a threat to his or her safety or well-being.

The member's CO is the initial authority responsible for determining if and when a member will be processed. Members may be separated under this article provided that:

- medical diagnosis is made by a competent military medical authority that concludes that the disorder is of such severity that it renders the member incapable of serving adequately.

- there is documented evidence that the diagnosis of personality disorder interferes with the member's performance of duty.

- documented interference must be a part of the CO's endorsement, as mere presence of a personality disorder is not a bar to naval service.

- counseling has been initiated whereby the member has been advised of his or her deficiencies and has been afforded the opportunity to overcome those deficiencies (page 13 entry required except in those instances where it has been determined by medical authority that the member is self-destructive or a continuing danger to themselves or others).

Start processing by use of the notification procedure. You will send any discharge requests that require approval from the Chief of Naval Personnel (PERS-282) to him or her for final determination. Make sure cases approved by an SPCM CA are sent to PERS-282 with the required documentation.

Message requests for a personality disorder separation should be reserved for unusual circumstances. If the necessity arises to submit a message, the complete psychiatric evaluation must be quoted verbatim.

For additional guidance on separation processing by reason of convenience of the government due to personality disorder, refer to the MILPERSMAN.

### **Aliens**

A member who is neither a natural born nor a naturalized citizen of the United States is an alien. A member may be separated upon his or her request with the approval of the Chief of Naval Personnel (PERS-282) on the basis of being an alien who no longer wishes to serve. You need to inform an alien seeking this type of discharge that discharge from the service under this article will be a permanent bar to becoming a

U.S. citizen. Characterization of service will be honorable, general, or ELS.

For additional guidance on separation processing by reason of convenience of the government due to status as an alien, refer to the MILPERSMAN.

### **WEIGHT CONTROL FAILURE**

This category allows separation of a member, on active duty, by reason of weight control when a member fails to achieve prescribed physical readiness standards as outlined in OPNAVINST 6110. 1.

COs with SPCM CA have the authority to effect the separation provided the member has been counseled, all disciplinary action is complete, and the member does not object to the separation. If the member objects, send the case to the Chief of Naval Personnel (PERS-282) for final determination.

Use the notification procedure for processing. The characterization of service will be honorable, general, or ELS.

For additional guidance on separation processing by reason of weight control failure, refer to the MILPERSMAN.

### **PHYSICAL DISABILITY**

This category provides for separation of a member on active duty, or active duty for training in excess of 30 days, by reason of physical disability upon determination that he or she is physically unfit to perform the duties of his or her rate.

A medical board must determine that a member is unable to perform the duties of his or her rate in such a manner as to reasonably fulfill the purpose of his or her employment on active duty.

The Chief of Naval Personnel (PERS-913) authorizes the separations for inactive duty members and members on active duty who are separated locally by their COs.

Characterization of service will be honorable, general, or ELS. A member may be separated for disability according to the *Disability Evaluation Manual*, SECNAVINST 1850.4C.

For additional guidance on separation processing by reason of physical disability for active and inactive duty members, refer to the MILPERSMAN.

### **DEFECTIVE ENLISTMENTS AND INDUCTIONS - ERRONEOUS ENLISTMENT**

This category allows separation of a member on the basis of erroneous enlistment, reenlistment, induction, or extension of enlistment when:

- the enlistment would not have occurred if the relevant facts had been known by the Navy or had appropriate directives been followed;
- the enlistment was not the result of fraudulent conduct on the part of the member; and
- the defect is unchanged in any material respect.

A member may also be separated under this category on the basis of not meeting physical standards for enlistment.

If after discovering that a member's enlistment may be erroneous, and the CO with SPCM CA recommends that the member be retained, initiation of separation processing is not required when the defect is no longer present or the defect, other than a medical condition, may be waived, and a waiver is obtained from the Chief of Naval Personnel.

Characterization of service will be honorable unless ELS is appropriate. Use the notification procedure. SPCM CAs have the authority to effect the separation if the member does not object to the separation. If the member objects, send the entire case to the Chief of Naval Personnel (PERS-281/282) for final determination. Send all completed cases by letter of transmittal to the Chief of Naval Personnel (PERS-282/283) for review and final determination.

For additional guidance on separation processing by reason of defective enlistments and inductions due to erroneous enlistment, refer to the MILPERSMAN.

### **DEFECTIVE ENLISTMENT AND INDUCTIONS - DEFECTIVE ENLISTMENT**

This category permits separation of a member by reason of defective enlistment and induction on the basis of defective enlistment. A defective enlistment exists when:

- the member reasonably relied upon a material misrepresentation by recruiting personnel and was induced to enlist by a commitment for which the member was not qualified;

- the member received a written enlistment commitment from recruiting personnel for which the member was qualified that cannot be fulfilled by the naval service; or

- the enlistment was involuntary; for example, one that is induced by fraud or duress or undue influence and not the product of a free and unconstrained choice.

Characterization of service will be honorable unless ELS is appropriate. COs of recruit training commands are authorized to discharge members under their command under this article. For members not assigned to recruit training commands, the Chief of Naval Personnel is the separation authority.

For additional guidance on separation processing by reason of defective enlistment, refer to the MILPERSMAN.

### **DEFECTIVE ENLISTMENT AND INDUCTION - MINORITY**

This category is for discharge of a member for a defective enlistment and induction on the basis of minority.

A member under age 18 is a minor. The minimum age for enlistment is 17. Written consent of a custodial parent or legal guardian must be obtained before enlistment of a minor.

The type of uncharacterized separation given is governed by the member's age when separation processing is commenced or completed. A member who is a minor under the age of 17 is discharged with an order of release from the custody and control of the Navy. If the minor who enlisted without proper consent has attained his or her 17th birthday, discharge is authorized or directed upon satisfactory evidence of true age. An application for discharge must have been submitted by a custodial parent or legal guardian and received by the Navy within 90 days of enlistment to effect the discharge of a member 17 years old.

If the member has attained the age of 18, separation is not warranted under this category. The member has effected a constructive enlistment.

Characterization of service will be (1) under age 17, order of release or (2) over age 17, ELS. Use the notification procedure. A commander of a naval training center, authorized to convene SPCMs, is authorized to act as a separation authority for those members under his or her command. For those members not assigned to a naval training center, the

Chief of Naval Personnel (PERS-282) is the separation authority. Send completed cases to the Chief of Naval Personnel.

For additional guidance on separation processing by reason of defective enlistment due to minority, refer to the MILPERSMAN.

### **DEFECTIVE ENLISTMENTS AND INDUCTIONS - FRAUDULENT ENTRY INTO NAVAL SERVICE**

This category provides for separation of members on the basis of procurement of a fraudulent enlistment, induction, or period of service through any knowingly false representation or deliberate concealment about any of the qualifications or disqualifications of military service.

Characterization of service will be honorable, general or ELS. If the fraud involves concealment of a prior separation for any characterization other than honorable, or the concealed offense would warrant consideration for a discharge under OTH conditions, process the member for a discharge under OTH conditions.

Use either the notification or administrative board procedure depending on the type of discharge sought. COs with SPCM CA are delegated to separate members with honorable, general, or ELS provided the member does not object. In cases where the member objects the Chief of Naval Personnel (PERS-83) is the separation authority. Send the processed case to the Chief of Naval Personnel (PERS-83). Message submission is authorized.

For additional guidance on separation processing by reason of fraudulent enlistment, refer to the MILPERSMAN.

### **ENTRY LEVEL PERFORMANCE AND CONDUCT**

Separate a member for entry level performance or conduct for the following reasons:

- It is determined that the member is unqualified for further military service by reason of unsatisfactory performance or conduct, as evidenced by incapability, lack of reasonable effort, failure to adapt to the naval environment, or minor disciplinary infractions.

- A member with broken service fails to satisfactorily complete indoctrination training.

Nothing in this article prevents separation of a member in an entry level status under another basis for separation. Do not initiate separation processing until the member has been counseled about the deficiencies and has been afforded an opportunity to overcome those deficiencies. Use the notification procedure with the following modification in the member's statement of awareness. "I understand that I am being considered for an administrative discharge by reason of entry level performance and conduct. I have been advised that if the proposed separation is approved it will result in my separation with an uncharacterized discharge identified as entry level separation. "

COs with SPCM CA have the authority to effect the separation provided the member has received counseling, all disciplinary action is complete, and the member does not object. Use the notification procedure. Send the processed case by letter of transmittal to the Chief of Naval Personnel (PERS-83). In those cases where the member objects or the CO does not have the authority to process, send the case to the Chief of Naval Personnel by either letter of transmittal or message. Characterization of service will be ELS.

For additional guidance on separation processing by reason of entry level performance and conduct, refer to MILPERSMAN.

### **UNSATISFACTORY PERFORMANCE**

Separation of a member under this category is authorized when it is determined that the member is unqualified for further naval service by reason of unsatisfactory performance. Unsatisfactory performance is demonstrated by one or more performance evaluations, either regular or special, with unsatisfactory marks for professional factors of 2.6 or below in either military or rating knowledge and performance, or with overall evaluation of 2.6 or below.

You may not use this basis for separation for a member in an entry level status or when processing for misconduct is appropriate.

Do not initiate separation processing until the member has been counseled and has had the opportunity to overcome his or her deficiencies. A page 13 must be issued by the parent command before the latest qualifying evaluation, and it must address the specific unsatisfactory performance.

Characterization of service will be type warranted by service record (TWSR), which is either honorable or general.

COs with SPCM CA may effect the separation provided the member does not object to the separation. If the member objects to separation, the Chief of Naval Personnel (PERS-83) is the separation authority.

Use the notification procedure. Send the processed case by letter of transmittal or message to the Chief of Naval Personnel (PERS-83).

For additional guidance on separation processing by reason of unsatisfactory performance and conduct, refer to the MILPERSMAN.

### **HOMOSEXUALITY**

Due to present (July 1993) changes occurring in policies regarding homosexuals in the military, refer to current directives for guidance regarding this issue.

### **DRUG ABUSE REHABILITATION FAILURE**

A member who has been referred by his or her CO to a level II or III rehabilitation treatment program for personal drug abuse may be separated when he or she:

- demonstrates an inability or refusal to participate in, cooperate in, or successfully complete a level II or III rehabilitation program;
- has an alcohol incident or drug-related incident anytime in his or her career following completion of level II or III and there is no potential for further service;
- fails to follow a directed level II or III aftercare program; or
- returns to drug abuse following level II or III rehabilitation treatment and there is no potential for further service.

Characterization of service will be TWSR (honorable or general or ELS. Use the notification procedure. COs with SPCM CA may effect the separation provided the member does not object. If the member objects, the Chief of Naval Personnel (PERS-83) is the separation authority. Send the processed case by letter of transmittal to the Chief of Naval Personnel (PERS-83). The CO's comments must indicate if the member is or is not drug dependent as diagnosed by a physician or clinical psychologist. Message submission is optional.

For additional guidance on separation processing by reason of drug abuse rehabilitation failure, refer to the MILPERSMAN.



## **ALCOHOL ABUSE REHABILITATION FAILURE**

A member who has been referred by his or her CO to a level II or III rehabilitation treatment program for personal alcohol abuse may be separated when he or she:

- demonstrates an inability or refusal to participate in, cooperate in, or successfully complete such a level II or III program;
- has an alcohol incident or drug-related incident anytime in his or her career following completion of level II or III;
- fails to follow a directed level II or III aftercare program; or
- returns to alcohol abuse following level II or III and there is no potential for further service.

Nothing in this article prevents the separation under any other basis for separation, in appropriate cases, of a member who has been referred to such a program. Characterization is TWSR or ELS. Use the notification procedure. COs with SPCM CA may effect separation provided the member does not object. If the member objects the Chief of Naval Personnel (PERS-83) is the separation authority. Forward the processed case by letter of transmittal to PERS-83.

For additional guidance on separation processing by reason of alcohol abuse rehabilitation failure, refer to the MILPERSMAN.

## **MISCONDUCT**

You may separate a member for misconduct when it is determined that the member is unqualified for further military service by reason of one or more of the following:

- Minor disciplinary infractions
- Pattern of misconduct
- Commission of a serious offense (processing not mandatory)
- Commission of a serious offense (processing mandatory)
- Civilian convictions (processing not mandatory)
- Civilian conviction (processing mandatory)

You may not initiate separation processing for a series of minor disciplinary infractions or a pattern of misconduct until the member has been counseled. Reflect the counseling on a page 13 entry or letter. Counseling and rehabilitation are not required for commission of a serious offense of civilian felony conviction. Characterization of service is normally OTH, but characterization as general may be assigned when warranted. When a service member serving in paygrade E-4 or above is separated with an OTH, the member is administratively reduced to paygrade E-3.

Use the administrative board procedure. However, the notification procedure is authorized for use when processing for minor disciplinary infractions. COs with SPCM CA may effect the discharge only if an administrative board recommends separation with a general or honorable discharge and the member does not object. In cases where the member objects the Chief of Naval Personnel (PERS-83) is the separation authority. Regardless of the administrative board's recommendation, the Chief of Naval Personnel is the separation authority for members being separated by reason of misconduct due to commission of a serious offense as evidenced by sexual perversion or sexual harassment. Send the processed case to the Chief of Naval Personnel (PERS-83). Message submission is optional.

For additional guidance on separation processing by reason of misconduct, refer to the MILPERSMAN.

We will now explore each of the previous subcategories under the Misconduct heading in more detail.

### **Minor Disciplinary Infractions**

Minor disciplinary infractions are evidenced by a series of at least three but not more than eight minor violations of the UCMJ (none that could warrant a punitive discharge and none that are drug-related) within the current enlistment that were disciplined by not more than two punishments under the UCMJ. Before initiating processing the member must have violated counseling.

### **Pattern of Misconduct**

A pattern of misconduct is defined as discreditable involvement with civil and/or military authorities as evidenced by one or more of the following:

- Three or more civilian convictions within the current enlistment. The latest civilian conviction and

counseling to have occurred while assigned to the parent command.

- Three or more punishments under the UCMJ within the current enlistment. The latest offense and counseling must have occurred while assigned to the parent command.

- Any combination of three minor civilian convictions (and punishments under the UCMJ) within the current enlistment. The latest offense and counseling must occur at the parent command.

- Three or more periods of unauthorized absence of more than 3 days' duration, each within the current enlistment. The latest offense and counseling must occur at the parent command.

- Nine or more violations (specifications) of the UCMJ within the current enlistment that have been disciplined by punishment under the UCMJ. The latest offense and counseling must occur at the parent command.

- A set pattern of failure to pay just debts.

- A set pattern of failure to contribute adequate support to dependents or failure to follow orders, degrees, or judgments of a civil court.

#### **Commission of a Serious Offense (Processing not Mandatory)**

An individual may be processed when a punitive discharge would be authorized by the *Manual for Courts-Martial*, (MCM) for the same or a closely related offense.

#### **Commission of a Serious Offense (Processing Mandatory)**

An individual must be processed when the CO believes that an individual committed extremely serious misconduct that resulted in, or had the potential to result in death, or serious bodily injury, such as but not limited to homicide, arson, or armed robbery.

An individual must also be processed when an incident involves sexual behavior that deviates from socially acceptable standards of morality and decency. Such behavior may include, but is not limited to: lewd and lascivious acts, sodomy, indecent assault, indecent acts, and indecent exposure. If circumstances involve an incestuous relationship, notify the Chief of Naval Personnel (PERS-661/83) immediately upon discovery.

An individual must also be processed following punitive actions on the first substantiated incident of sexual harassment involving (1) threats or attempts to influence another's career or job for sexual favors, (2) rewards in exchange for sexual favors, or (3) physical contact of a sexual nature that could result in punitive discharge, if charged.

#### **Civilian Conviction (Processing not Mandatory)**

This subcategory allows for processing of a member based on a conviction by civilian authorities or action taken that is equivalent to a finding of guilty provided the offense could warrant a punitive discharge or the sentence includes confinement for 6 months or more without regard to suspension or probation. Separation processing may be initiated whether or not the member has filed an appeal or has stated an intention to do so.

#### **Civilian Conviction (Processing Mandatory)**

An individual must be processed based on a conviction by civilian authorities, or action taken that is equivalent to a finding of guilty, that involved an offense that either resulted in, or had the potential to result in death or serious bodily harm.

#### **MISCONDUCT DUE TO DRUG ABUSE**

A member must be mandatorily processed for separation by reason of misconduct due to drug abuse based upon one or more military or civil convictions for the following:

- Drug abuse—the illegal or wrongful use or possession of controlled substance(s)

- Drug trafficking—the sale, transfer, or possession with intent to sell or transfer, controlled substance(s)

- Drug paraphernalia—all equipment, products, and materials that are used, intended for use, or designed for use in injecting, ingesting, inhaling, or otherwise introducing into the body controlled substances

For guidance as to when separation processing is mandatory, refer to OPNAVINST 5350.4B.

Characterization of service is normally OTH. Assign a TWSR or an ELS characterization when separation processing is based solely on urinalysis test (fitness for duty) results or when separation processing is based solely on drug abuse divulged through the

voluntary self-referral program. Send all cases, except those where a TWSR or an ELS is assigned, to the Chief of Naval Personnel via the Enlisted Performance Division (PERS-83) for final approval. For members not in an entry level status, characterization of service as honorable is not authorized unless the member's record is otherwise so meritorious that any other characterization would be inappropriate.

Use the administrative board procedure. COs with SPCM CA may process a member under the notification procedure when separation processing is based solely on urinalysis results (fitness for duty). Send the processed case by letter of transmittal or message to the Chief of Naval Personnel (PERS-83).

You must include a medical officer's or clinical psychologist's evaluation of the member's drug dependency as evaluated subsequent to the most recent drug incident with the case.

For additional guidance on separation processing by reason of misconduct due to drug abuse, refer to the MILPERSMAN.

#### **SEPARATION IN LIEU OF TRIAL BY COURT-MARTIAL**

This category provides for a member to request separation in lieu of trial by court-martial. Charges must have been preferred against the accused with respect to an offense for which a punitive discharge is authorized to be awarded. The member's CO must determine that the member is unqualified for further naval service.

If a member is serving in paygrade E-4 or above, he or she must also request administrative reduction to paygrade E-3 before the request is approved.

Characterization of service will normally be OTH, but ELS may be assigned under certain cases.

Refer to the MILPERSMAN for the proper format for the member to use to submit the request.

Send the request for discharge via the chain of command to the officer exercising general court-martial jurisdiction (OEGCMJ). The member's CO must recommend approval or disapproval and certify the accuracy of the charges and enclose the proper enclosures.

The OEGCMJ is authorized to approve or disapprove such requests. The OEGCMJ may also order the discharge executed and direct reduction to paygrade E-3 if the member is serving in a higher paygrade.

When final action is taken, send the original request with all enclosures and endorsements to the Chief of Naval Personnel (PERS-83) for inclusion in the member's permanent record.

For additional guidance on separation processing by reason of separation in lieu of court-martial, refer to the MILPERSMAN.

#### **SECURITY**

This category permits separation of a member by reason of security when retention is clearly inconsistent with the interests of national security (for example, cases of treason or espionage).

Recommendations for separation must cite valid evidence that there is a reasonable basis for doubting the member's loyalty to the U.S. Government. When a CO determines that separation may be appropriate, obtain approval from the Chief of Naval Personnel (PERS-81) before initiating separation processing.

Characterization of service will be honorable, general, or OTH. Use the notification procedure except where circumstances warrant an OTH in which case use the administrative board procedure. The Chief of Naval Personnel (PERS-81) is the separation authority. Send the processed case by letter of transmittal to the Chief of Naval Personnel (PERS-81).

For additional guidance on separation processing by reason of security, refer to the MILPERSMAN.

#### **UNSATISFACTORY PERFORMANCE IN THE READY RESERVE**

This category permits separation of inactive duty members of the Ready Reserve who are serving in the Selected Reserve for unsatisfactory participation in the Selected Reserve.

Characterization of service will be honorable, general, or OTH. Use the notification procedure. However, when characterization of OTH is warranted, use the administrative board procedures. Send the processed case by letter of transmittal to the Chief of Naval Personnel (PERS-913).

For additional guidance on separation processing by reason of unsatisfactory performance in the Ready Reserve, refer to the MILPERSMAN.

## **SEPARATION IN THE BEST INTEREST OF THE SERVICE**

Regardless of any limitation on separations set forth in the MILPERSMAN, SECNAV may direct separation of any member at any time. In those cases where no other reason for separation is appropriate, but where separation of a member is considered to be in the best interest of the service, initiate separation processing under this article.

Characterization of service will be honorable, general, or ELS. Use the notification procedure. When separation is for this reason, the right of a member with 6 or more years of total service and Reserve service to request an administrative board is not applicable.

Send the processed case by letter of transmittal to the Chief of Naval Personnel (PERS-83).

For additional guidance on separation processing by reason of best interest of the service, refer to the MILPERSMAN.

## **COUNSELING**

As you have learned, counseling and rehabilitation efforts are a prerequisite to the initiation of separation processing for the following bases for separation:

- Convenience of the government due to parenthodor personality disorder
- Weight control failure
- Entry level performance and conduct
- Unsatisfactory performance
- Misconduct due to minor disciplinary infractions or pattern of misconduct

## **DRAFTING ADMINISTRATIVE DISCHARGE WARNINGS**

The counseling requirements must be accomplished by the member's parent command. If more than one entry is made, the last entry applies. Violation of the entry must have occurred before initiating administrative separation processing.

In any case that counseling is required, provide the member an opportunity to overcome his or her deficiencies. The command's efforts to counsel the member should be documented in the member's service record and must include the following information:

- Written notification about deficiencies or impairments
- Specific recommendations for corrective action, indicating any assistance that is available to the member
- Comprehensive explanation of the consequences of failure to successfully undertake the recommended corrective action
- A reasonable period of time for the member to undertake the recommended corrective action

A sample format for the counseling warning is illustrated in figure 9-2. This counseling warning may be a page 13 entry or a letter. The warning must be dated and signed by the service member. If the member refuses to sign, a notation to that effect should be made in the service record entry and signed and dated by an officer. Include a copy of the counseling warning entry or letter in the administrative separation package.

## **INFORMING MEMBERS OF THE MEANING AND EFFECT OF DISCHARGE WARNINGS**

As stated previously, you must inform the member of the meaning and effect of the discharge warning. Inform the member as clearly and precisely as possible of his or her deficiencies and the recommended corrective action. Advise the service member of the consequences of failure to correct the deficiencies and the time period authorized to correct the deficiency. You also must inform the member that if a new UCMJ violation occurs during that period, that in and of itself violates the warning. Ask the member if he or she has any questions about the warning and, if necessary, explain all elements of the warning until the member fully understands everything.

## **NOTIFICATION AND ADMINISTRATIVE BOARD PROCEDURES**

The two types of procedures used to effect administrative separation processing are the notification procedure and the administrative board procedure. You will use one of these procedures in every case of administrative separation that you process. We will address these procedures in further detail.

1. You are being retained in the naval service; however, the following deficiencies in your performance and/or conduct are identified:

\_\_\_\_\_

\_\_\_\_\_

2. The following are recommendations for corrective action:

\_\_\_\_\_

\_\_\_\_\_

3. Assistance is available through \_\_\_\_\_

\_\_\_\_\_

4. Any further deficiencies in your performance and/or conduct will terminate the reasonable period of time for rehabilitation that this counseling and warning entry implies and may result in disciplinary action and in processing for administrative separation. All deficiencies or misconduct during your current enlistment, occurring before and after the date of this action, will be considered. Subsequent violation(s) of the Uniform Code of Military Justice or conduct resulting in civilian conviction could result in an administrative separation under other than honorable conditions.

5. This counseling and warning entry is made to afford you an opportunity to undertake the recommended corrective action. Any failure to adhere to the guidelines cited above, that is reflected in your future performance and/or conduct, will make you eligible for administrative separation action.

6. This counseling and warning entry is based upon known deficiencies or misconduct. If any misconduct unknown to the Navy is discovered after this counseling and warning is executed, this letter of counseling and warning is null and void.

(Signature of commanding officer)  
Or person authorized "by direction"

(date): I hereby acknowledge the above page 13 entry and desire to (make a statement/not make a statement).

(Member's signature)

Witnessed: \_\_\_\_\_

(Person who actually counseled member)

Figure 9-2.-Sample letter of counseling/warning format.

## NOTIFICATION PROCEDURE

In each case of administrative separation, a member (hereafter referred to as respondent) must be notified in writing of the basis for separation processing by his or her CO or OIC. The entire notification procedure is an integral part of the separation processing and current procedures must be used.

## Notice

The notice of impending administration separation processing is accomplished by means of a letter from the respondent's CO or OIC. This letter is referred to as a letter of notification. The letter of notification sets forth the specific reasons for processing and the rights of the respondent. The format letter that you will use is contained in the MILPERSMAN, Article 3640200(5).

The original of the letter of notification is kept by the respondent and a copy is included as an enclosure to the transmittal letter requesting separation. The respondent endorses the letter by signing for receipt of it.

You should become familiar with the applicable regulations governing letters of notification so you have a clear understanding of a respondent's rights.

### **Counsel**

Respondents have the right to consult with counsel qualified under Article 27b, UCMJ, before signing their statement of awareness except under the following circumstances:

- When the respondent is attached to a vessel or unit operating away from or deployed outside the United States or away from its overseas home port, or to a shore activity remote from judge advocate resources
- When no qualified counsel is assigned and present at the vessel, unit, or activity
- When the CO does not anticipate having access to qualified counsel from another vessel, unit, or activity for at least the next 5 days
- When the CO determines that the requirements or needs of the naval service require processing before qualified counsel will be available

Appoint nonlawyer counsel whenever qualified counsel is not available. Any appointed nonlawyer counsel will be a commissioned officer with no prior involvement in the circumstances leading to the basis of the proposed separation and no involvement in the separation process itself.

The respondent may also consult with a civilian counsel at the respondent's own expense. The respondent's use of a civilian counsel does not relieve the CO of the requirement to furnish counsel. Consultation with civilian counsel will not delay timely processing.

### **Response**

The response of the respondent to the letter of notification is referred to as a statement of awareness.

The CO will allow a reasonable period of time of not less than 2 working days for the member to respond to the notice. An extension maybe granted on a timely showing of good cause by the respondent. The

respondent's election as to each of the rights, via the statement of awareness, is recorded and signed by the respondent and witnessed by respondent's counsel, if available locally. If the respondent declines to respond to the election of rights, consider it a waiver of rights and proceed with the separation processing. The format letter that you will use is contained in the MILPERSMAN, Article 3640200(6).

### **ACTION OF THE OFFICER EXERCISING SPCM CA**

Officers exercising SPCM CA are delegated authority to separate enlisted personnel with honorable, general, or entry level discharges when the member does not object to separation for the following reasons:

- Parenthood
- Designated physical or mental conditions (somniaambulism, enuresis, personality disorder, and excessive height)
- Weight control failure
- Dependency or hardship
- Pregnancy or childbirth
- Surviving son or daughter
- Erroneous enlistment
- Fraudulent enlistment
- Entry level performance and conduct
- Unsatisfactory performance
- Homosexuality (where no OTH is recommended)
- Drug abuse rehabilitation failure
- Alcohol abuse rehabilitation failure

In any case that must be initiated under the administrative board procedure vice the notification procedure an SPCM CA is delegated authority to separate the member when (1) an administrative discharge board recommends separation with a general or honorable characterization, (2) the member does not object to the discharge, and (3) the characterization is consistent with guidelines in the MILPERSMAN.

COs with SPCM CA effect the discharge by issuing a letter to the respondent directing the discharge. Figure 9-3 is a sample letter that a CO with SPCM CA may issue a respondent to effect the discharge. Send a copy

of this letter along with all pertinent documents to the Chief of Naval Personnel for inclusion in the member's permanent record.

If the CO does not have SPCM CA or the member objects to the separation, the case must be referred to the Chief of Naval Personnel for final determination. This is accomplished by either message submission or a standard letter of transmittal.

### Message Submission

Do not send cases by message in which an administrative board was held or the CO is the separation authority. While message submission hastens the process and is encouraged, COs must use discretion in determining which cases should be submitted via message. Discretion is appropriate in cases wherein the basis for processing is a character trait or physical or mental deficiency that if it were to become known by the command personnel could create

dissension or further personal embarrassment to the member.

Due to the limitations of the message format, commands processing USNR-R members and members being processed in the best interest of the naval service are not authorized to submit cases via message.

Message transmission will be sent by routine precedence in the format provided in the MILPERSMAN, Article 3640200(11). Make sure all information required is included. Include your servicing personnel support detachment (PSD) as an information addressee.

A message submission must be released by either the CO or the acting CO since it is taking the place of a letter of transmittal. File a copy of the released message in the member's service record.

When you submit an administrative separation case by message, send the supporting documentation

From: (Commanding Officer)

To: (Rate, name, USN(R), SSN of respondent)

Subj: ADMINISTRATIVE SEPARATION DUE TO (BASIS FOR SEPARATION)

Ref: (a) Notice of Notification Procedure Proposed Action dtd \_\_\_\_\_

(b) Statement of Awareness and Request for or Waiver of Privileges dtd \_\_\_\_\_

(c) MILPERSMAN (Article processing under)

1. Reference (a) notified you that you were being considered for an administrative discharge from the naval service by reason(s) of (list same as in paragraph 1 of letter of notification). By reference (b), you elected to waive the minimum 2 days to respond to this notification and additionally stated that you do not object to this separation.

2. I have determined that you meet the criteria for discharge included in reference (c). Therefore, I am directing that you be discharged from the naval service for (reason[s]) with a (type characterization) discharge in accordance with the authority vested in me by reference (c). By copy of this letter, PSD (applicable PSD) is directed to effect your separation and to make sure maximum collection of any indebtedness you may have to the government before your discharge.

(Signature of Commanding Officer)

Copy to:

PSD

CHNAVPERS (PERS-\_\_\_\_)

Figure 9-3.-Sample letter from CO with SPCM CA executing discharge.

required to complete the package within 15 working days after submission of the message. Supporting documentation includes the command's notice of administrative separation processing, the member's statement of awareness, and other supporting correspondence as required by the specific case. Include a cover memorandum indicating that the documentation supports a message case and include a copy of the message. Make sure the member's full name, rate, SSN, and UIC have been indicated on each page of the case.

### **Letter of Transmittal**

When a case is not submitted by message, the CO or acting CO must sign a letter of transmittal to the Chief of Naval Personnel submitting the case for final action. Letters of transmittal are required in each case when the CO is the separation authority. The letter of transmittal must indicate the date the member was discharged and a copy of the DD 214 must be provided. Make sure the member's full name, rate, and social security number (SSN) have been indicated on each page of the case. The MILPERSMAN, Article 3640200(9) illustrates a sample letter of transmittal.

### **ADMINISTRATIVE BOARD PROCEDURE**

Use the administrative board procedure to process administration separations in the following circumstances:

- When a member with 6 or more years of total active and/or Reserve military service being processed under the notification procedure requests a board
- When the proposed reasons for separation processing require a board
- When the proposed characterization of service is under OTH conditions

If a member being processed for administrative separation is entitled, and elects to present his or her case before a board, strict compliance with the MILPERSMAN is required.

If the CO or OIC of the member's command does not have SPCM CA and the member desires a board, the following procedures will be used. The CO or OIC will give the member the letter of notification and the statement of awareness. The next reporting senior with SPCM CA will convene the administrative discharge board. The member's command will send the case to

the Chief of Naval Personnel via the convening authority (CA), using a standard letter of transmittal.

### **Notice**

When a respondent is going to appear at an administrative discharge board, the respondent will be notified in writing by the CO or OIC who proposed the action by a letter. This letter is referred to as a notice of an administrative board procedure proposed action and is illustrated in the MILPERSMAN, Article 3640200(7). The notice will include the following matters:

The notice is delivered personally to the respondent and, if required, mailed by certified mail, return receipt requested (for a respondent who is in civil confinement).

If the respondent should refuse to acknowledge receipt of the notice, a sworn affidavit of service by mail, as shown in the MILPERSMAN, Article 3640200(10), is prepared and placed in the respondent's service record.

If everything goes normally, and the respondent acknowledges the notice, the respondent will sign and submit a statement of awareness.

### **Counsel**

A respondent has the same right to consult with counsel before electing or waiving any of his or her rights as that prescribed for the notification procedure.

If an administrative board is requested, the respondent will be represented by qualified counsel appointed by the CA or by individual counsel of the respondent's own choice, if that counsel is determined to be reasonably available.

The respondent has the right to consult with civilian counsel of his or her own choice and maybe represented at the hearing by that or any other civilian counsel, all at the respondent's own expense. Exercise by the respondent of this right will not waive any of the respondent's other counsel rights. Consultation with civilian counsel will not unduly delay administrative board procedures. If undue delay appears likely, the CA may direct the board to proceed without the desired civilian counsel after properly documenting the facts.

Nonlawyer counsel may represent a respondent before an administrative board if the respondent expressly declines appointment of qualified counsel and requests a specific nonlawyer counsel or the separation authority assigns nonlawyer counsel as assistant Counsel.



## **Response**

After a respondent is notified of the pending separation processing, the respondent submits to the CO or OIC a signed and witnessed letter indicating his or her choice of rights as outlined in the letter of notification. The response is referred to as a statement of awareness.

The CO or OIC will allow a reasonable period of time, not less than 2 working days, for the member to respond to the notice. An extension may be granted upon a timely showing of good cause. The election of the respondent as to each of the specified rights will be recorded and signed by the respondent and respondent's counsel.

If notice by mail is required and the respondent fails to acknowledge receipt or submit a timely reply, that fact will constitute a waiver of rights and an appropriate notation will be recorded on a retained copy of the form.

A sample format for the respondent's statement of awareness is illustrated in the MILPERSMAN, Article 3640200(8).

## **ADMINISTRATIVE BOARD**

As an LN you will see and be a part of an administrative board proceeding at some time in your career. Your contribution to an administrative board may be indirect such as typing the letter of appointment or direct as a reporter to record verbatim testimony or as a more senior LN, you may even be assigned to act as the recorder. No matter what your involvement, the existence of administrative boards in the overall scheme of separation processing is a fact of life and you must be aware of their purpose and mission. How a board is composed, the duties of board members, and the conduct of the hearing are important pieces to the overall board processes. As the assigned reporter, you maybe asked to record all the proceedings or just the testimony. The next section will allow you to see how the board functions from beginning to end.

## **CONVENING AUTHORITY**

One of the most important steps a CA must carry out is appointing the board members. An administrative board may, by written order, be appointed by any CO with the authority to convene SPCMs. The CA must make sure the appointment prevents the appearance of any impropriety in the assignment of any board members who may have a preconceived opinion about

the findings or recommendations, or both, to be made on the respondent's case.

The CA must appoint at least three commissioned, warrant, or noncommissioned officers well-qualified by reason of grade, leadership, experience, and judicial temperament. Enlisted personnel appointed to the board will be in paygrade E-7 or above and will be senior to the respondent. Enlisted personnel frocked to paygrade E-7 are not eligible for appointment. At least one member of the board will be a line officer serving in grade O-4 or higher.

If the respondent is on active duty when the board convenes, the senior member must be on the active duty list of the service in which the respondent serves. When the respondent is a reservist or holds an appointment as a Reserve commissioned or warrant officer, at least one member must be a Reserve commissioned officer.

To avoid split decisions, the CA should not appoint an even number of members to an administrative board.

If, during the session, one of the members is successfully challenged, the CA should appoint a similarly qualified substitute. Also, with respect to board challenges, if the board has no legal advisor assigned, the CA must rule on all challenges.

## **APPOINTING ORDER**

The CA must issue an appointing order for the administrative board. The order is addressed to the senior member and its purpose is to inform the senior member of the names of the other members, the name of the respondent, and the reason for processing. The recorder is named in the order as well as the lawyer assigned to the respondent. A sample appointing order is shown in figure 9-4.

## **PRESIDENT OF THE BOARD**

The president of an administrative board must make sure he or she and all the members are familiar with the MILPERSMAN articles pertaining to the separation for which the respondent is being processed. During the proceedings, the president presides at the hearing and is responsible for its proper conduct in an atmosphere of decorum and dignity. If there is no legal advisor assigned to the board, the president will rule on all matters of procedure and evidence. However, his or her rulings may be overturned by a majority of the board.

When no legal advisor is assigned, the president advises the CA, after consulting with a judge advocate, to spend funds for producing witnesses when the

From: (Convening Authority)

To: (Senior member of board, rank, name, component, and designator)

Subj: APPOINTMENT OF ADMINISTRATIVE BOARD

Ref: (a) MILPERSMAN 3640200

(b) MILPERSMAN 3640350

1. Per references (a) and (b), an administrative board consisting of yourself as senior member, and of (names of other members including rank or rate, component, and designator, if applicable) is appointed to conduct a hearing in the case of (rate, name, component, SSN) who is being processed for administrative separation by reason(s) of (fill in reason[s] for processing).

2. General procedural instructions and instructions for the conduct of the hearing and submission of the board's report are outlined in reference (b) and shall be followed. The board is directed to make findings of fact relative to the specific reason(s) the respondent is being processed and to make a recommendation with respect to final action of retention, separation, or suspension of separation and to characterization of service or description of separation. The report of an administrative board shall be signed by all members and the counsel for the respondent. The dissent of any member shall be duly recorded in the board report.

3. (Rank, name, component) is appointed to act as recorder for the board.

4. (Rank, name, component) a lawyer certified per Article 27(b), Uniform Code of Military Justice, is appointed to act as counsel for the respondent.

5. The board shall convene at (time, date, location) or as soon thereafter as practical.

(Signature of Convening Authority,)

Commanding Officer, Acting Commanding Officer, or

By direction

**Figure 9-4.-Sample appointing letter of administrative board.**

president has decided that the witnesses are material. The senior member authenticates the record of proceedings and signs the report of the administrative board.

#### **LEGAL ADVISOR**

At the discretion of the CA, a nonvoting legal advisor who is a judge advocate certified according to Article 27(b), UCMJ, may be appointed to the administrative board. If appointed, the legal advisor will rule finally on all matters of procedure, evidence, and challenges, except challenges to himself or herself. A legal advisor will not be junior to, and in the same chain of command as, any voting member of the board.

#### **RECORDER**

The CA will further detail an officer on active duty (if the respondent is on active duty) as recorder. The

recorder is not a member of the board, but the importance of the recorder cannot be overlooked. The following are the duties the recorder must perform before, during, and after the board adjourns:

- Performing the clerical and preliminary work of the hearing
- Conducting a preliminary review of available evidence and, before the hearing, interviewing prospective witnesses
- Assembling pertinent directives, regulations, and records for use by the board
- Informing the respondent, legal advisor, essential witnesses and counsel on the time, date, and place of the hearing
- Presenting the case against the respondent
- Preparing the record of proceedings

## REPORTER

There is no requirement that a reporter be appointed. Where witnesses are expected to testify, however, the presence of a reporter is desirable to record the witness' statements verbatim.

## WITNESS REQUESTS

The respondent may request the attendance of witnesses in his or her behalf at the hearing. The respondent's request will be in writing, dated, signed by the respondent or his or her counsel, and submitted to the CA, via the president of the board, for his or her decision.

If production of a witness will require expenditure of funds by the CA, the written request will also contain the following:

- A synopsis of the testimony the witness is expected to give
- An explanation of the relevance of such testimony to the issue of separation or characterization
- An explanation as to why written or recorded testimony would not be sufficient

The CA may authorize expenditure of funds for production of witnesses. If the CA determines that the personal testimony of a witness is required, the hearing will be postponed or continued, if necessary, to permit the attendance of the witness.

Military witnesses will be issued TAD orders and civilian witnesses will be issued invitational travel orders. Guidance for funding the travel of required witnesses is found in the *Manual of the Judge Advocate General* (JAGMAN).

## HEARING PROCEDURE

While board proceedings are not a judicial trial, they are formalized to the extent of assuring full opportunity for presentation of the respondent's case.

If objections are made at any stage, the president of the board, or legal advisor, will make a formal ruling on the objection and make sure both the objection and basis of the objection are noted in the record.

Any member of the board or legal advisor may be challenged only on grounds that show that the member cannot render a fair and impartial decision.

The president of the board, upon calling the board to order, directs the recorder to make a record as to the time, date, and place of the hearing. The recorder also records the identity and presence of the appointed members, the recorder, the respondent and respondent's counsel, and the qualifications of the counsel.

## Preliminaries

At the outset of the hearing, the president of the board inquires of the respondent about his or her knowledge of his or her rights, including the following rights:

- To appear in person, with or without counsel, or, in his or her absence, have counsel represent him or her at all open board proceedings
- To challenge any voting member of the board, for cause only
- To request the personal appearance of witnesses at the administrative board
- To submit, either before the board convenes or during the proceedings, sworn or unsworn statements, depositions, affidavits, certificates or stipulations, including depositions of witnesses not reasonably available or unwilling to appear voluntarily
- To testify, in his or her own behalf, under oath and submit to cross-examination or, in the alternative, to make or submit an unsworn statement and not be cross-examined
- To question any witnesses who appear before the board
- To examine all documents, reports, statements, and evidence available to the board
- To be informed of, and to interview, all witnesses to be called
- To have witnesses excluded except while testifying
- To make argument

**NOTE:** A failure on the part of the respondent to exercise any of these rights, after being advised of them, will not bar the board's proceedings.

The president explains the purpose of the board and that the proceedings are administrative in nature. The board is not a formal fact-finding tribunal nor a judicial trial; however, this does not prevent the board from

being conducted in a formal atmosphere. When the president is finished with the preliminaries, he or she turns the proceedings over to the recorder.

### **Rules of Evidence**

An administrative board functions as an administrative rather than a judicial body. Consequently, the strict rules of evidence applicable at courts-martial do not apply. Other than Article 31, UCMJ limitations, the board should consider any competent evidence that is relevant and material to the case. The respondent must be provided a Privacy Act statement whenever personal information is solicited. Make sure the respondent signs the Privacy Act statement (fig. 9-5) and that a copy is retained in the case file.

### **Presentation of Evidence**

The recorder presents the case for the government, providing the board with complete and impartial information. Next, the respondent has the opportunity to present matters in his or her behalf. Following any matter presented by the respondent, the recorder may, when he or she deems it appropriate, present rebuttal evidence. When the recorder introduces rebuttal evidence, the respondent is entitled to do likewise. Finally, before closing for deliberation, the board may call any witness or hear other evidence it deems appropriate. Witnesses are not present during open sessions except when testifying. After all evidence is in

and questioning and oral arguments are complete, the hearing closes with only the voting members present.

### **Burden of Proof**

The burden of proof before administrative boards is on the government and the standard of proof to be employed is the “preponderance of evidence” test.

### **BOARD DECISIONS**

The board deliberates and votes on its findings and recommendations in closed session. Only voting members of the board are present during deliberations and voting.

The board determines whether each allegation set forth in the notice of proposed separation is supported by a preponderance of the evidence. The board determines the specific reason(s) for separation and whether the findings warrant separation with respect to the reason(s) set forth in the notice. Also, if the respondent is being processed for more than one reason, there must be a separate determination for each reason. The board must make a recommendation as to retention or separation and suspension of the separation. The board states the following in open proceedings and on the record:

- The specific evidence it considered relating to each act, omission, or circumstance alleged in the notice
- Its determination for each alleged act, omission, or circumstance that the preponderance of evidence

Under the authority of 5 U.S.C. 301 and 10 U.S.C. 5031 and 5032, DOD Directive 1332.14, SECNAVINST 1910.4, and the MILPERSMAN, information regarding your personal background may be requested to provide the administrative board in your case with additional information upon which to recommend your retention or separation and, if separation is recommended, the characterization of service. The information provided by you will become a permanent part of the record of proceedings of the administrative board and may be used by officials of the Department of the Navy in making recommendations or decisions in your case and by employees and officials of the Department of Defense, the Department of Veterans Affairs, and other federal or state agencies in the performance of their official duties. Disclosure of this information is voluntary.

(Signature, rate, SSN and date)

**Figure 9-5.—Privacy Act statement of respondent.**

does or does not support that act, omission, or circumstance

- The specific reason(s) for separation set forth in the notice of proposed separation that each act, omission, or circumstance applies

The report of the administrative board should be completed immediately upon concluding the board in the format provided in the MILPERSMAN, Article 3640350(8).

## **RECORD OF PROCEEDINGS**

A record of proceedings is a summary of the facts and circumstances, accompanied by supporting documents, on which the recommendation of the administrative board is based, including a summary of the testimony of all witnesses heard at the board. In addition, it must contain the following:

- The identity of the members of the board
- The identity of the legal advisor, if assigned, and his or her qualifications
- The identity of the respondent's counsel and his or her qualifications
- The identity of the recorder
- A verbatim record of the board's findings and recommendation(s)

The findings and recommendations of the board must be verbatim and the entire record must be authenticated by the president of the board, or another member if the president is not available.

The respondent's counsel must be furnished with a copy of the record of proceeding. The counsel will indicate that he or she has examined the summary of the testimony heard and has examined all supporting documents in the record. If counsel is not in agreement, the counsel may send a statement of deficiencies to the CA for inclusion in the report of the administrative board. A sample format of the record of proceedings of an administrative board is contained in the MILPERSMAN, Article 3640350(7).

## **ACTION BY THE CONVENING AUTHORITY**

If the CA determines that the respondent should be retained, the case may be closed. However, any case in which processing is mandatory according to the

MILPERSMAN, the matter must be referred to the Chief of Naval Personnel for disposition.

If the CA decides that separation is warranted or separation processing is mandatory, the case is sent directly to the Chief of Naval Personnel for action. Any discharge recommendation must be signed by the CO personally; no By direction signature is authorized.

The CA will make and send to the Chief of Naval Personnel a recommendation with respect to (1) the specific reason(s) for separation, (2) the final action of retention, separation, or suspension of separation, (3) the characterization of service for those eligible for transfer to Fleet Reserve or Retired List and (4) the paygrade in which they should be transferred. The CA should not make a less favorable discharge characterization recommendation than what was made by the board.

Once all these requirements are met, the proceedings and all documents attached are sent by the CA via a letter of transmittal, as shown in the MILPERSMAN, Article 3640200(9).

## **PROCESSING GOALS**

To make sure efficient administration of enlisted separations is maintained, SECNAV has established processing time goals. The following is the established processing goals for administrative separation cases:

- By the date of expiration of current enlistment or fulfillment of service obligation for separations.
- A total of 15 working days from the date a command notifies a member of the commencement of a separation proceeding to the date of separation when the notification procedure is used and the CO has authority to effect the separation. Commands will send the case by letter of transmittal to the Chief of Naval Personnel indicating the date of separation.
- A total of 30 working days from the date a command notifies a member of the commencement of a separation proceeding to the date of separation, when the notification procedure or administrative board procedure (no board convened) is used and the case is sent to the Chief of Naval Personnel for final action. Commands should send the letter of transmittal or message request within 10 days from the date the member is notified.
- A total of 50 working days from the date a command notifies a member of the commencement of a separation proceeding to the date of separation when

an administrative board is convened. Commands should send the processed case to the Chief of Naval Personnel within 30 working days from the date the member is notified.

- A total of 55 working days from the date a command notifies a member of the commencement of a separation processing to the date of separation when final action on the case is required by SECNAV. Commands should send the letter of transmittal or message within 10 working days from the date the member is notified or submit a letter of transmittal within 30 working days from the date the member is notified and an administrative board has recommended retention, or the offense(s) being considered is evidenced by an SPCM or a GCM conviction that did not award a punitive discharge.

### **ACTION BY THE SEPARATION AUTHORITY**

Upon receipt of the administrative board proceedings, the Chief of Naval Personnel, as the separation authority, takes action regarding the recommended discharge and recommended characterization of service. The MILPERSMAN outlines all the possible choices of action that are available to the Chief of Naval Personnel.

If the Chief of Naval Personnel approves the board's findings and recommendations, in whole or in part, with respect to more than one reason for separation, he or she will designate the most appropriate basis as the primary reason for reporting purposes.

### **THE NAVAL DISCHARGE REVIEW BOARD AND THE BOARD FOR CORRECTION OF NAVAL RECORDS**

The purpose, jurisdiction, and scope of the NDRB and the BCNR will be explained during the separation processing of any member being discharged under OTH conditions, including members authorized to proceed home in a leave status to await final action on a punitive discharge. An entry will be made on the Administrative Remarks, NAVPERS 1070/613, page 13 of the service record, and signed by the member, to signify compliance.

The NDRB was established pursuant to the Servicemen's Readjustment Act of 1944 to review, as provided in 10 U.S.C. § 1553, upon the petition of whether under reasonable standards of naval administration and discipline, the type and nature of the

discharge should be changed, corrected, or modified; and if so, to decide what change, correction, or modification should be made.

The NDRB has no authority to revoke any discharge; reinstate any person in the military service or recall any person to active duty; waive discharges to permit enlistment in the naval service; cancel enlistment contracts, change, correct, or modify any document other than the discharge document; change the reason for discharge from or to physical disability; or determine eligibility for veterans' benefits.

The BCNR was established under the Legislative Reorganization Act of 1946 to relieve the Congress of the burden of considering private bills for the correction of naval records.

When a no-change decision has been rendered by the NDRB, a petition may then be filed with the BCNR within 3 years of the date of discovery of the error or injustice.

In connection with review of executed discharges by both the NDRB and the BCNR, there is no law or regulation that provides that an unfavorable discharge may be upgraded based solely on the passage of time or good conduct in civilian life subsequent to leaving the service.

Applications for review should be submitted on the Application for Correction of Military Records, DD Form 149, in the case of BCNR, and the Application for the Review of Discharge or Dismissal from the Armed Services, DD Form 293, in the case of NDRB. These forms may be obtained by writing to the Board for Correction of Naval Records, Washington, DC 20370 or the Naval Discharge Review Board Suite 905, 81 N. Randolph Street, Arlington, Virginia 22203.

### **SUMMARY**

As an LN the serious nature of administrative separations cannot be taken lightly. Although you may not encounter administrative separation processing on a daily basis, you should appreciate the detail that goes into the overall process. For example, as you saw during the Administrative Board section, if the CA is not careful when selecting board members the CA could jeopardize the entire case. Your familiarization with applicable regulations regarding specific administrative separation cases will enhance both your job performance and the Navy's as well. A case that is processed properly makes for a smooth transition of events from the command to BUPERS.

## CHAPTER 10

# DELIVERY OF PERSONNEL

Whether you are assigned to a small legal office or to a larger naval legal service office (NLSO) or NLSO detachment, you will probably become involved with the preparation of various documents associated with the delivery of personnel and waiver of extradition. This chapter is designed to provide you with background information associated with the delivery of personnel, waivers of extradition, and service of process and subpoenas.

### DELIVERY

There are varying circumstances you must consider when you receive a request for delivery of a member. Questions can arise on matters of jurisdiction, extradition, and agreements that must be executed. The following discussion of these circumstances is provided to give you an understanding of the factors involved.

#### PERSONS REQUESTED BY STATE AUTHORITIES IN CRIMINAL CASES

The first part of this chapter deals with requests by state authorities for the surrender of service members or civilians according to arrest warrants or similar process. This is commonly done in connection with a criminal prosecution. Responding to such requests by a state for delivery of service members or civilian employees involves balancing the federal interests in preserving sovereign immunity and the productivity, peace, good order, and discipline of the installation against the right of the state to exercise its jurisdiction. Additionally, by regulation, Navy and Marine Corps authorities are limited in the extent to which they can directly assist such an act. Commands should respond to such requests by using the minimum authority necessary to preserve federal interests without unduly restricting state jurisdiction.

#### WITHIN TERRITORIAL LIMITS OF REQUESTING STATE

When the delivery of any person in the Navy or Marine Corps is requested by local and state civil authorities of a state, territory, or commonwealth for

an alleged offense punishable under the laws of that jurisdiction, and such person is located at a Navy or Marine Corps installation within the requesting jurisdiction, or aboard a ship within the territorial waters of such jurisdiction, commanding officers (COs) are authorized to and normally will deliver such person when a proper warrant is issued. In the case of a service member, delivery can only be carried out after compliance with the *Manual of the Judge Advocate General (JAGMAN)* subject to the exceptions noted in the JAGMAN. You should consult a judge advocate of the Navy or Marine Corps before delivery is carried out if a judge advocate is reasonably available.

The previous rule applies equally to civilian employees and civilian contractors and their employees when located on a Navy or Marine Corps installation. Commands should normally not become actively involved in civilian law enforcement. When a command has determined that a person is to be delivered in response to a valid warrant, you should consider the following guidance. If the person to be delivered is a military member, the member may be ordered to report to the location designated by the CO and surrender to civil authorities under Article 14, *Uniform Code of Military Justice (UCMJ)*. If the person to be delivered is a civilian, the person may be invited to report to the designated space for delivery. If the civilian refuses, the civilian authorities may be escorted to a place where the civilian is located so delivery may be performed. A civilian who works in a classified area can be directed to leave his or her immediate work area to avoid any compromise of classified material. When it is required to have civilian law enforcement personnel go to the work center of an individual, it should be done with minimum interference to good order and discipline.

#### BEYOND TERRITORIAL LIMITS OF REQUESTING STATE

When the delivery of any person in the Navy or Marine Corps is requested by state, territory, or commonwealth civil authorities for an alleged crime or offense punishable by the laws of the jurisdiction making the request, and the person is not attached to a Navy or Marine Corps activity within the requesting

state territory, or commonwealth, or a ship within the territorial waters thereof, take the following action. Deliver the person for the purpose of making that person amenable to prosecution. The delivery must be approved by any officer exercising general court-martial jurisdiction (OEGCMJ), or by an officer designated by him or her, or by any CO. The OEGCMJ or CO must consult with judge advocate of the Navy or Marine Corps before authorizing delivery. Before delivery, the OEGCMJ or CO must follow the provisions of the JAGMAN subject to any exceptions that are discussed later in this chapter.

The member may be delivered upon formal or informal waiver of extradition, or upon presentation of a fugitive warrant. Both of these procedures are discussed later in this chapter.

The previous rule applies equally to civilian employees when located on a Department of the Navy (DON) installation not within the requesting state.

### **Waiver of Extradition**

Any person may waive formal extradition. A waiver must be in writing and witnessed. The waiver must include a statement that the person signing it has received counsel of either a military or civilian attorney before executing the waiver. The waiver must further state the name and address of the attorney consulted. The form used for the waiver should be substantially as shown in figure 10-1. Mail all executed copies of the waiver to the Judge Advocate General (JAG) immediately after their execution.

In every case where there is doubt about the voluntary nature of a waiver, such doubt is resolved against its use. All persons concerned must be advised to comply with the procedures set forth for fugitive warrants.

When an individual declines to waive extradition. You need to inform the nearest NLSO or Marine Corps staff judge advocate (SJA) since further representations to the civil authorities may be needed. Do not allow the transfer of the individual concerned out of the state in which he or she is then located without the permission of the Secretary of the Navy (SECNAV) (JAG), unless you have obtained a fugitive warrant.

### **Fugitive Warrants**

A fugitive warrant, as defined in this chapter, is a warrant issued by a state court of competent

jurisdiction for the arrest of an individual. Normally, a state requesting delivery of a member from another state will issue a fugitive warrant to the state where the member is then located.

Upon issuance of a fugitive warrant by the requesting state to the state where the member is located, the latter state will normally request delivery of the member to local state authorities. Delivery to local state officials should be arranged by authorized Navy or Marine Corps officers subject to the conditions set forth in the JAGMAN and the following discussion.

Upon receipt of a request for delivery of a member under fugitive warrant to state authorities, if the member voluntarily waives extradition, the provisions for the waiver of extradition apply. If the member is delivered to local authorities but refuses to waive extradition, he or she will have the opportunity to contest extradition in the courts of the state in which he or she is then located.

No delivery of a member by Navy or Marine Corps officers pursuant to a fugitive warrant or waiver of extradition can be done without the completion and execution of the delivery agreement required by the JAGMAN. The agreement is executed when (1) the authorities of both the requesting state and the state in which the member is located have signed it or (2) the authorities of the state in which the member is located have signed the agreement. This provision applies only if such authorities, on behalf of the requesting state, accept full responsibility for returning the member to a command designated by the DON.

### **PERSONNEL STATIONED OUTSIDE THE UNITED STATES**

Persons desired by local U.S. authorities—when delivery of any member of the Navy or Marine Corps, or any civilian employee or dependent, is desired for trial by state, territory, commonwealth, or local civil authorities and the individual whose presence is sought is stationed outside the United States, follow the provision of Department of Defense (DOD) Directive 5525.9 of 27 December 1988, Compliance of DOD Members, Employees, and Family Members Outside the United States with Court Orders, as implemented in SECNAVINST 5820.9. In all such cases, you should consult with the nearest judge advocate of the Navy or Marine Corps before any action is taken.

Members desired by U.S. federal authorities—when the delivery of any member of the Navy or



WAIVER OF EXTRADITION

"I, \_\_\_\_\_, United States Navy (United States Marine Corps), having been advised of my rights to formal extradition as provided for in section 0604 JAG Manual by \_\_\_\_\_ (name of military or civilian attorney) of \_\_\_\_\_ (address of attorney), waive such rights and agree to accompany \_\_\_\_\_, a representative of the State of \_\_\_\_\_, into the territorial limits of said State. I have been advised that the crime which I am charged to have committed in the State of \_\_\_\_\_ is as follows:

\_\_\_\_\_  
(Signature)

WITNESSES:

\_\_\_\_\_  
(Signature of witness)

Figure 10-1.—Waiver of extradition.

Marine Corps is desired for trial in federal district court, upon proper representation by the Department of Justice to the SECNAV (JAG), return the member to the United States. This transfer is at the expense of the DON. The member will be held at a military facility convenient to the DON and to the Department of Justice. Delivery may be done as set forth in JAGMAN, section 0608, subject to the exceptions in JAGMAN, section 0610.

### **DELIVERY AGREEMENTS**

In each case where a member is to be delivered to civil authorities for trial, you need to be familiar with the procedures involved in delivering that person to state, federal, or foreign authorities. You also need to be familiar with the circumstances under which delivery may be refused. Let us now look at these procedures in more detail.

### **DELIVERY TO STATE AUTHORITIES**

When delivery of any member of the Navy or Marine Corps to the civilian authorities of a state is authorized, the member's CO must, before making delivery, obtain from the governor or other authorized officer of the state a written agreement that conforms to the agreement shown in figure 10-2.

The state official completing the agreement must show that he or she is authorized to bind the state to the terms of the agreement. When indicating in the agreement the Navy or Marine Corps activity to which the member delivered is to be returned by the state, be careful to designate the closest activity (to the command that the member is attached) that has special court-martial jurisdiction.

The DON considers this agreement complied with when ( 1 ) the member is furnished transportation (under escort in case of delivery under JAGMAN, section 0613) to a Navy or Marine Corps activity as stated in the agreement; (2) the member is provided cash to cover incidental expenses en route; and (3) the DON is so informed. Any departure from the agreement must have prior approval from JAG. As soon as possible, send a copy of the delivery agreement to JAG.

When personnel are delivered under the Interstate Agreement on Detainers Act, special forms that are not contained in the JAGMAN are used. The Detainers Act is infrequently used and most requests for delivery are pursuant to Article 14, UCMJ. See the JAGMAN for a detailed discussion of the Interstate

Agreement on Detainers Act and Title 18, *U.S. Code*, for the special forms required.

### **DELIVERY OF PERSONNEL TO FEDERAL AUTHORITIES**

When federal law enforcement authorities display proper credentials and federal warrants for the arrest of service members, civilian employees, civilian contractors and their employees, or dependents residing at or located on a DON installation, CO's are authorized to and should allow the arrest of the individual sought. The exceptions in the JAGMAN may be applied to service members. You should consult with a judge advocate of the Navy or Marine Corps before the delivery is carried out.

The agreement shown in figure 10-2 is not a condition precedent to the delivery of service members to federal law enforcement authorities. Regardless of whether the member is convicted or acquitted, the member will be returned to the naval service (provided naval authorities desire his or her return) and the necessary expenses will be paid from an appropriation under the control of the Department of Justice.

### **DELIVERY OF PERSONNEL TO FOREIGN AUTHORITIES**

Except when delivery is provided for by agreement between the United States and the foreign government concerned, COs are not authorized to deliver service members or civilian employees of the DON, or their dependents residing at or located on a Navy or Marine Corps installation, to foreign authorities. When a request for delivery of these persons is received in a country that the United States has no agreement with or when the CO is in doubt, advice should be sought from JAG. Detailed information on the delivery of service members, civilian employees, and dependents to foreign authorities when a status of forces agreement is in effect is contained in SECNAVINST 5820.9. In addition, units that are deployed overseas should check their *Deployment Manual* for specific guidance on delivery of personnel in the areas that the deployed unit will be visiting.

### **CIRCUMSTANCES IN WHICH DELIVERY IS REFUSED**

There are situations in which delivery of personnel may be refused or that require specific approval by higher authorities before delivery may be done. Some

DELIVERY AGREEMENT

"In consideration of the delivery of \_\_\_\_\_,  
(name of person delivered)

United States Navy (United States Marine Corps), to  
\_\_\_\_\_, at \_\_\_\_\_,

for trial upon the charge of \_\_\_\_\_,

I hereby agree pursuant to the authority vested in me as  
\_\_\_\_\_ that \_\_\_\_\_,  
(name of person delivered)

United States Navy (United States Marine Corps) will be  
transported to the State of \_\_\_\_\_ without expense  
to him or her or to the United States and that the Commanding  
Officer of the \_\_\_\_\_ will be notified  
immediately of the outcome of the trial and that the said  
\_\_\_\_\_ will be returned to  
(name of person delivered)

\_\_\_\_\_, or to such place as the Secretary  
of the Navy shall designate, or transportation issued thereto,  
without expense to the United States or to the person delivered  
immediately upon dismissal of the charges or completion of the  
trial in the event he or she is acquitted, or immediately upon  
satisfying the sentence of the court in the event he or she is  
convicted and a sentence is imposed, or upon disposition of the  
case, provided that the Department of the Navy shall then desire  
his or her return."

Figure 10-2.—Delivery agreement.

of these situations and the procedures to follow when delivery is refused are discussed as follows.

### **Disciplinary Proceedings Pending**

When disciplinary proceedings involving military offenses are pending, obtain legal guidance from a judge advocate of the Navy or Marine Corps before delivery of personnel to federal, state, territory, commonwealth, or local authorities if reasonably practical.

### **When Delivery May Be Refused**

Delivery may be refused only in the following limited circumstances:

- Where the accused has been retained for prosecution for serious military offenses as defined in the JAGMAN
- When the CO considers that extraordinary circumstances exist that indicate delivery should be refused

### **REPORT REQUIRED WHEN DELIVERY IS REFUSED**

In any case where it is intended that delivery will be refused, you must report the circumstances to JAG by telephone, or by message if telephone is impractical. The initial report is confirmed by letter setting forth a full statement of the facts. The letter should be as shown in figure 10-3. You also must send a copy of the report to the area coordinator.

### **MEMBERS RELEASED ON BAIL OR ON THEIR OWN RECOGNIZANCE**

A member of the Navy or Marine Corps arrested by federal, state, or territory authorities and released on bail or on his or her own recognizance has a duty to return to his or her parent command. Accordingly, where a member of the Navy or Marine Corps is arrested by federal, state, or territory authorities and returns to his or her ship or station on bail or on his or her own recognizance, the CO after checking the facts, date of trial, and approximate length of time needed should grant liberty or leave to permit appearance for trial, unless this would have a serious negative impact on the command. If liberty or leave is not granted, a judge advocate of the Navy or Marine

Corps should immediately be requested to act as liaison with the court.

Nothing in this chapter is to be construed as permitting the member arrested and released to avoid the obligations of bond or of his or her recognizance by reason of his or her being in the military service.

### **REQUESTS TO INTERVIEW SERVICE MEMBERS OR CIVILIAN EMPLOYEES BY FEDERAL CIVILIAN INVESTIGATIVE AGENCIES**

Requests by the Federal Bureau of Investigations, Naval Criminal Investigative Service, or other federal civilian investigative agencies to interview service members or civilian employees of the DON suspected or accused of crimes should be promptly honored. If there is any refusal of such a request, you must immediately report it to JAG, or the Office of General Counsel, as appropriate, by telephone, or by message if telephone is impractical.

### **REQUEST FOR DELIVERY OF A SERVICE MEMBER SERVING SENTENCE OF A COURT-MARTIAL**

Authority to honor the requests for delivery of military personnel serving a sentence of court-martial is provided by Article 14, UCMJ (10 U.S.C. § 814). Although seldom used, additional authority and mandatory obligation to deliver such personnel are provided by the Interstate Agreement on Detainers Act (18 U.S.C. Appendix, Section 9) which applies to the federal agency holding the prisoner. The DON, as an agency of the federal government, must comply with the Detainers Act.

The Detainers Act is designed to avoid speedy trial issues and to aid in rehabilitation efforts by securing a greater degree of certainty about a prisoner's future. The act provides a way for the prisoner to be tried on charges pending before state courts, either at the prisoner's request or at the request of the state where the charges are pending. A report is required when delivery is refused.

Upon request under the Interstate Agreement on Detainers Act by either the prisoner or state authorities, the responsible Navy or Marine Corps SJA will communicate with the appropriate state officials and make sure the cognizant commanders act on all such requests.

From: Commanding Officer  
To: Judge Advocate General

Subj: DELIVERY REFUSED TO \_\_\_\_\_  
AUTHORITIES; CASE OF [RANK, FULL NAME, SOCIAL  
SECURITY NUMBER, U.S. NAVY/MARINE CORPS (OR  
RESERVE)]

Ref: (a) (Previous telephone call or message notification to JAG)  
(b) JAGMAN, section 0610

Encl: (1) Copy of warrant of arrest for

1. As reported by reference (a), and in accordance with reference (b), report is made that upon presentation of a valid warrant of arrest charging violation of (crime charged), (name of accused) was refused delivery to (sheriff, etc., of county, state, etc.) on (date) because (explain extraordinary circumstances).

2. Enclosure (1) is forwarded for information.

\_\_\_\_\_  
By direction

copy to:  
COMNAVMILPERSCOM/CMC (Code JAM-1)

**Figure 10-3.—Letter required when delivery is refused.**

## **STATE REQUESTS**

State officials may request delivery of prisoners in military custody under Section 2, Article IV, of the Interstate Agreement on Detainers Act. Where a detainer has been lodged against the prisoner and the prisoner is serving a sentence (regardless of whether an appeal is in process), delivery is mandatory unless the request is disapproved by the Director of the Bureau of Prisons, Washington DC 20537, as the designee of the Attorney General for this purpose. There is no further delegation to military authority.

The prisoner should be informed that he or she may request the Director of the Bureau of Prisons within 30 days after such request is received to deny the request. Upon the expiration of such 30-day period or upon the Director of the Bureau of Prisons' denial of the prisoner's request, whichever occurs first, the prisoner is then delivered to the requesting authority.

## **PRISONER REQUESTS**

The obligation to grant temporary custody under the Interstate Agreement on Detainers Act also applies to prisoners' requests to be delivered to state authority, Section 2, Article III(c), of the Detainers Act requires the custodial official to inform the prisoner of the existence of any detainer and of the prisoner's right to request disposition. The prisoner's request is directed to the custodial official who must send it to the appropriate prosecuting official and court, with a certificate of prisoner status.

## **ARTICLE 14, UCMJ**

When a request for custody does not invoke the Interstate Agreement on Detainers Act, delivery of custody is governed by Article 14, UCMJ, and JAGMAN, sections 0603 through 0610. The request will be honored unless, in the exercise of discretion, there is an overriding reason for retaining the accused in military custody; for example, additional courts-martial are to be convened or the delivery would severely prejudice the prisoner's appellate rights.

Execution of the agreement discussed previously is a condition precedent to delivery to state authorities. It is not required before delivery to federal authorities. Unlike delivery under the Detainers Act, delivery of custody pursuant to Article 14, UCMJ, interrupts execution of the court-martial sentence.

The form shown in figure 10-3 with proper modification should be used in reporting refusal of delivery of prisoners.

## **REQUEST FOR DELIVERY OF PERSONNEL SERVING SENTENCE OF A STATE COURT**

Ordinarily, personnel serving protracted sentences resulting from a state criminal conviction will be processed for administrative discharge by reason of misconduct. See the MILPERSMAN. It may, however, be in the best interest of the naval service to retain a member, charged with a serious offense subject to military jurisdiction, to try the member by court-martial. The vehicle available for obtaining temporary custody of incarcerated personnel for prosecution is a request to the state under the Interstate Agreement on Detainers Act.

Military authorities may use the Interstate Agreement on Detainers Act to obtain temporary custody of a member incarcerated in a state institution, pursuant to conviction by a state court and to resolve criminal charges against the member that are cognizable before a court-martial.

## **DETAINDER**

If a command chooses to use the Detainers Act, the CO of the responsible NLSO must file a detainer with the warden, commissioner of corrections, or other state official having custody of the member. The detainer must identify the member with exactness, listing the military charges pending against the member, and requesting the command be notified in advance of any intention to release the member from confinement.

## **REQUEST FOR DELIVERY**

As soon as possible after filing the detainer, the CO of the cognizant NLSO must prepare a written request for temporary custody of the incarcerated member addressed to the state official charged with administration of the state penal system. The request must designate the person(s) to whom the member is to be delivered and must be sent via the military judge to whom the member's case has been assigned. If the request is properly prepared, the military judge will approve, record, and send the request to the addressee official. The Detainers Act provides the state with a 30-day period after receipt of the request before the

request is to be honored. Within that period of time the governor of the state may disapprove the request, either on his or her own motion or upon the prisoner's request. If the governor disapproves the request, the requesting command should coordinate any further action with the Office of the Judge Advocate General (Litigation Division).

## **RESPONSIBILITIES**

The responsible command must make sure the responsibilities of a receiving jurisdiction shown in Section 2, Article IV, of the Detainers Act, are discharged. In particular, the Detainers Act requires that the receiving state:

- begins the prisoner's trial within 120 days of the prisoner's arrival, unless the court for good cause shown during an Article 39(a) session grants a continuance that is necessary or reasonable to promote the ends of justice.
- holds the prisoner in a suitable jail or other facility regularly used for persons awaiting prosecution, except for the period during which the prisoner attends court or travels to or from any place that his or her presence may be required.
- returns the prisoner to the state at the earliest practical time, but not before the charges that underlie the request have been resolved (premature returning of the prisoner will result in the dismissal of the charges).
- pays all costs of transporting, caring for, keeping, and returning the prisoner to the state, unless the command and the state should otherwise agree on some other allocation of the costs or responsibilities.

## **SERVICE OF PROCESS AND SUBPOENAS UPON PERSONNEL**

Afloat and ashore COs may permit service of process of federal or state courts upon service members, civilian employees, dependents, or contractors residing at or located on a naval installation, if located within their commands. Service is not to be made within the command without the CO's consent. The intent of this provision is to protect against interference with mission accomplishment and to preserve good order and discipline, while not unnecessarily impeding the court's work.

## **SERVICE OF PROCESS**

Service of process is generally defined as establishing the court's jurisdiction over a person by the handing of a court order to a person advising him or her of the subject of the litigation and ordering this person to appear or answer the plaintiff's allegations within a specified period or else be in default. When properly served, the process will make this person subject to the jurisdiction of a civil court.

### **Overseas**

A service member's amenability to service of process issued by a foreign court depends on international agreements (such as the North Atlantic Treaty Organization Status of Forces Agreement [NATO SOFA]). Where there is no agreement, guidance should be sought from a local judge advocate or OJAG.

### **Within the United States**

Within the jurisdiction. Where the member is within the jurisdiction of the court issuing the process, the CO will permit the service except in unusual cases where he or she concludes that compliance with the mandate of the process would seriously prejudice the public interest. Personnel serving on a vessel within the territorial waters of a state are considered within the jurisdiction of that state for the purpose of service of process. Process should not be allowed within the confines of the command until permission of the CO first has been obtained. Where practical, the CO should require that process be served in his or her presence or in the presence of an officer designated by the CO. COs are required to make sure the nature of the process is explained to the member. This can be done by a legal assistance officer.

Beyond the jurisdiction. Where the member is beyond the jurisdiction of the court issuing the process, COs should permit the service under the same conditions as within the jurisdiction, but need to make sure the member is advised that he or she need not indicate acceptance of service. Furthermore, in most cases, the CO should advise the person concerned to seek legal counsel. When a CO has been forwarded process with the request that it be delivered to a person within the command, it may be delivered if the service member voluntarily agrees to accept it. When the service member does not voluntarily accept the

service, it should be returned with a notation that the named person has refused to accept it.

**Arising from official duties.** Whenever a service member or civilian employee is served with federal or state court civil or criminal process arising from activities performed in the course of official duties, the CO should be notified and provided copies of the process and pleadings. After the pertinent facts are learned, notify JAG (Code 14) immediately by telephone and send the pleadings and process to the office.

A military member may remove civil or criminal prosecutions from state to federal court when the action is done under color of office or when authority is claimed under a law of the United States respecting the armed forces. The purpose of this action is to assure a federal forum for cases when service members must raise defense arising out of their official duties.

If a federal employee is sued in his or her individual capacity, that employee may be represented by Justice Department attorneys in state criminal proceedings and in civil and congressional proceedings. When an employee believes he or she is entitled to representation, a request—together with pleadings and process—must be submitted to JAG via the individual's CO. The CO will endorse the request and submit all pertinent data as to whether the employee was acting within the scope of employment at the time of the incident out of which the suit arose. If the Justice Department determines that the employee's actions reasonably appear to have been performed within the scope of employment and that representation is in the interest of the United States, representation will be provided.

### **Service Not Allowed**

In any case where the CO refuses to allow service or process, a report is made to SECNAV (JAG) as expeditiously as the circumstances allow or warrant.

### **Leave/Liberty**

In those cases where personnel either are served with process or voluntarily accept service of process, leave or liberty should be granted to comply with the process, unless it will prejudice the best interests of the naval service.

## **SUBPOENAS**

A subpoena is a court order requiring a person to testify in either a civil or criminal case as a witness. The same considerations exist in this instance as apply in the case of service of process, except for special rules where testimony is required on behalf of the United States in criminal and civil actions, or where the witness is a prisoner.

### **Witness on Behalf of the Federal Government**

Where DON interests are involved and departmental personnel are required to testify for the Navy, the Chief of Naval Personnel or Commandant, Marine Corps directs the witness' activity to issue TAD orders. Costs of such orders are borne by that same command. If DON interests are not involved, the Navy is reimbursed by the concerned federal agency.

### **Witness on Behalf of Accused in Federal Court**

When naval personnel are served with a subpoena and the appropriate fees and mileage are tendered, issue no-cost permissive orders unless the public interest would be seriously prejudiced by the member's absence from the command.

### **Witness on Behalf of Party to Civil Action or State Criminal Action With No Federal Government Interest**

The CO normally grants leave or liberty to the person, provided such absence will not prejudice the best interests of the naval service. If the member is being called as a witness for a nongovernmental party only because of performance of official duties, the CO is authorized to issue the member permissive orders at no expense to the government.

### **Witness Is a Prisoner**

Criminal cases. SECNAV (JAG) must be contacted for permission that normally will be granted. Failure to produce the prisoner as a witness may result in a court order requiring such production.

Civil action. The member cannot be released to appear regardless of whether it is a federal or state court making the request. A deposition may be taken at the place of confinement subject to reasonable conditions and limitations imposed by the prisoner's command.



## **Pretrial Interviews Concerning Matters Arising Out of Official Duties**

Send requests for interviews and/or statements by parties to private litigation to the CO/OIC of the cognizant NLSO or Marine Corps SJA. These interviews are conducted in the presence of an officer designated by the CO/OIC of the NLSO or Marine Corps SJA who assures that no line of inquiry is permitted that may disclose or compromise classified information or otherwise prejudice the security interests of the United States.

## **Release of Official Information for Litigation Purposes and Testimony by Department of the Navy Personnel**

SECNAVINST 5820.8 provides that DON personnel will not provide official information, testimony, or documents; submit to interviews; or permit a view or visit for use in federal courts, state courts, foreign courts, and other governmental proceedings without proper authorization. Additionally, DON personnel will not provide, with or without compensation, opinion or expert testimony concerning DOD information, subjects, personnel, or activities—except on behalf of the United States or a party represented by the Department of Justice—or with written special authorization. The previous instruction outlines determining authorities, the required contents of a proper request by a requester, and consideration in granting or denying a request for official information.

## **JURY DUTY**

Active duty service members are exempted from service on federal juries. Service members are exempt from jury duty when it unreasonably interferes with

the performance of their military duties or adversely affects the readiness of a unit, command, or activity. It is the responsibility of COs to make the decision and the decision is final. All personnel assigned to the Operating Forces, in a training status, or stationed outside the United States are exempt from serving on a state or local jury. Service members who serve on state and local juries will not be charged leave or lose any pay entitlements during the period of service. All fees accrued to members for jury service are payable to the U.S. Treasury. Members are entitled to any reimbursement from the state or local jury authority for expenses incurred in the performance of jury duty (such as for transportation, costs of parking fees). COs are responsible for notifying the responsible state or local official of this exemption when a service member is summoned.

## **SUMMARY**

As you can readily see there are many variables involved in processing and preparing documents for the delivery of military personnel to civil authorities when a request has been received from state, federal, territory, or commonwealth authorities. Additionally, you can see where you will be required to be familiar with the procedures required for waiver of extradition and the reports required when delivery is refused.

As in all other aspects of your duties as an LN, you should exercise care in preparing those documents required for the delivery of personnel and waivers of extradition. If you are in doubt as to what the proper procedures are for a particular case, you should consult the appropriate sections of the JAGMAN and, if reasonably available, a judge advocate of either the Navy or Marine Corps.



# CHAPTER 11

## LEGAL ASSISTANCE

As an LN, you may become involved with a section of law that is called legal assistance. This particular section of law is so diverse that it covers nearly every type of law practiced in the United States. Legal assistance cases, for example, run the gamut from domestic relations and taxation to veterans' rights.

Although your daily role in the legal assistance area is to assist the legal assistance attorney, you also maybe responsible for solving routine problems. You must, therefore, be able to distinguish complex legal problems from simple legal matters and also be able to identify areas of difficulty that merely concern administrative affairs. A complete discussion of your duties is explained later in this chapter.

### LEGAL ASSISTANCE PROGRAM

The legal assistance program has provided needed legal advice and assistance to military personnel and their dependents since 1943. Legal assistance is the giving of advice and assistance about personal legal problems of a civil nature, as distinguished from criminal or official service matters.

### PURPOSE

Personnel problems that remain unsolved adversely affect morale and efficiency and frequently result in behavior that requires disciplinary action. The purpose of the legal assistance program is to provide prompt assistance to resolve personal legal difficulties. The program serves as an effective preventive law measure that contributes to the morale and efficiency of commands.

### POLICY

The policy of the Department of the Navy is to maintain, from available resources, a legal assistance program to make eligible persons aware of their legal rights and obligations. The program is designed to help military personnel and their dependents obtain adequate legal advice and services from within the military service.

### LEGAL ASSISTANCE ATTORNEYS

All Navy and Marine Corps judge advocates on active duty, Regular or Reserve, and all civilian lawyers under the cognizance of the Judge Advocate General (JAG) who are members of the bar of a federal court or of the highest court of any state or in foreign countries who are authorized to practice law in the courts of the country concerned are designated legal assistance attorneys. Navy and Marine Corps judge advocates not on active duty may be designated as legal assistance attorneys by JAG.

While performing legal assistance duties, legal assistance attorneys are guided by the *Professional Conduct of Judge Advocates*, JAGINST 5803.1, and the *Standards of Conduct and Government Ethics*, SECNAVINST 5370.2J. Persons who are authorized to practice law in the courts of a foreign country are guided by similar standards that have been issued for the guidance of lawyers in the country concerned.

### NONLAWYER PERSONNEL

Nonlawyer legal officers, LNs, independent duty LNs, and legal clerks may assist attorneys, but they may not provide legal advice or provide services that call for the professional judgment of an attorney. Nonlawyer personnel may provide assistance not requiring the attention of an attorney, as outlined in the *Legal Assistance Manual*, JAGINST 5801.2.

### PERSONS ELIGIBLE FOR ASSISTANCE

Legal assistance is intended primarily for active duty personnel and may be provided to members of the Armed Forces of the United States on active duty, including reservists and members of the National Guard on active duty for 30 days or more.

As resources permit, legal assistance may also be provided to the following categories of people in the order listed:

1. Dependents of active duty personnel and dependents of personnel who died while on active duty.
2. Retired military personnel.

3. Dependents of retired members and dependents of deceased retired members.

4. Reservists on active duty for single periods of 29 days or less and their dependents, as authorized by the legal assistance area coordinator, in emergency cases. Additionally, for the purpose of enhancing the readiness of Reserve personnel for mobilization, active duty legal assistance attorneys and Reserve judge advocates who have been authorized by JAG may provide premobilization legal counseling and assistance to inactive Reserve personnel consistent with mobilization readiness needs. Premobilization assistance primarily consists of making sure wills and powers of attorney are current and may include drafting basic wills and basic powers of attorney.

5. Civilian personnel who are United States citizens, other than local hire employees, employed by, serving with, or accompanying the Armed Forces of the United States, when they are assigned to a foreign country or to a vessel or unit of the Armed Forces of the United States deployed in excess of 30 days.

6. Dependents living in a foreign country accompanying authorized civilians listed previously.

7. Members of allied forces and their dependents in the United States, serving with the Armed Forces of the United States.

8. Other persons authorized by JAG.

Persons who are separated from active service other than by retirement are not generally eligible for legal assistance. Normally, the various veterans organizations will help such individuals.

#### **CONFIDENTIAL AND PRIVILEGED CHARACTER OF SERVICE PROVIDED**

Information and files on legal assistance clients are confidential and privileged under law and applicable professional rules and guidelines. This confidentiality is separate and distinct from military security classification. Confidential and privileged matters may not be disclosed to anyone by the attorney providing legal assistance, except upon the specific permission of the client or when the responsible legal assistance attorney determines that disclosure is authorized or required by law or applicable rules of professional conduct. Disclosure of otherwise confidential and privileged information cannot be authorized or made lawful by order of superior military authority.

Other attorneys may be granted access to confidential and privileged information for supervisory

and quality assurance purposes or to obtain their assistance in the case. Attorneys granted access to information under this provision are bound to maintain the confidentiality of the information. Office records for prevention of conflicts of interest and statistical data may also be derived from information provided by the client.

If requested by a member's commanding officer (CO) or officer in charge (OIC), information on whether a member of a command reported to a legal assistance office will generally be provided. Information about a member's presence in the office will not be disclosed, however, if doing so would reveal the nature of conversations, advice, or resistance. The nature of the legal assistance or the substance of conversations or advice will not be provided without the client's consent.

#### **FUNCTIONS OF LEGAL ASSISTANCE ATTORNEYS**

A legal assistance attorney, in addition to his or her responsibility to discharge his or her assigned duties that are beyond the scope of a legal assistance role, must perform a myriad of legal functions to satisfy the legal assistance needs of his or her fellow Navy citizens. The breadth and variety of these functions are discussed as follows.

The legal assistance attorney and the LN in today's modern Navy have an increasingly important and significant role to play in helping to maintain the high morale and personal motivation needed in an all-volunteer force. As the concept of group legal services gains greater support throughout our society, the Navy's legal assistance program has provided and will continue to provide comprehensive and high-quality legal services to Navy and Marine Corps personnel. This is done through an expansion in scope of the traditional program and further through the expanded legal assistance program.

With the expansion of the traditional program and the development of the expanded legal assistance program, there is an increased need for effective liaison with other government agencies as well as with other naval activities. As the legal assistance attorney and the LN come into contact with the civilian legal practice, relationships with the local bar associations, courts, and the business community must be established on a sound footing. The net result should be better legal assistance for clients.

## ATTORNEY-CLIENT RELATIONS

The very nature of legal assistance requires good rapport between the legal assistance attorney, the LN, and the client. Striving for greater respect and understanding is a necessary ingredient of a successful legal assistance program.

For naval personnel to have faith and confidence in their lawyer and the LN, they must first know them and understand their services. It is at the level of daily contacts with clients that the greatest opportunities for fostering good rapport exist. Following are suggestions for developing such relations in these daily contacts.

### First Impressions

Very often a client's first impression of a Navy lawyer is obtained through a telephone call or a visit to the legal assistance office. As an LN, you should try to see your office as others might see it. Is it businesslike,

clean, comfortable, and efficient looking? Do you and the other personnel working in the outer office appear to be competent and friendly? Are the offices soundproof enough in the form of carpets, curtains, and other materials so that clients' problems can be discussed quietly, discreetly, and in private? The clients' waiting room as well as the lawyer's private office should present a professional appearance.

The LN's telephone manners are very important. A voice with a smile can encourage a prospect to follow up his or her phone call with a visit. A gruff or impatient telephone reception can discourage a prospective client from ever seeing the legal assistance attorney. By providing the receptionist with a checklist, the receptionist's contribution to the operation of the legal assistance office can be materially increased and the job made more interesting as well. See figure 11-1 for a sample checklist.

### TELEPHONE RECEPTIONIST CHECKLIST

**NOTE:** The individual subject-matter checklists should be transcribed onto a rotary card file (or onto 3 x 5 cards) and be available on the telephone receptionist's desk. Any change to the checklist, or addition of new subject-matter checklists, should be made in the receptionist's card file promptly.

#### 1. WILLS AND ESTATES

- a. Existing wills and codicils to existing wills
- b. Existing wills and codicils to existing wills of spouse
- c. Record of Emergency Data (or copy)
- d. Insurance policies or detailed list including name of company, type of insurance, amount of coverage, name of beneficiary, and policy number(s)
- e. Deeds
- f. Stocks and trends or detailed list of investments and savings

#### 2. DOMESTIC RELATIONS

- a. Matrimonial
  - (1) Certificate of marriage, or date and place of marriage, presiding official and name and address of at least one witness
  - (2) Copies of any prior court papers concerning the marriage, support, and so forth
  - (3) Itemized budget containing all sources and amounts of income and average monthly expenses and obligations
- b. Adoption
  - (1) Birth certificate of child
  - (2) Any court or agency papers concerning the custody, support, or adoption of the child

Figure 11-1.—Telephone receptionist checklist.

3. AUTOMOBILES (depending on type of problem)
  - a. Documents relating to purchase
  - b. Documents relating to financing of a vehicle
  - c. Warranties, guarantees, and repair documents
  - d. Insurance policies
  - e. Police reports (accident cases)
  - f. Data on other vehicles and drivers involved (accident cases)
  - g. Any correspondence or court documents regarding the accident
4. TAXES
  - a. Copy of returns for previous 3 years
  - b. All tax-withholding slips and information returns
  - c. Copy of PCS/TAD orders (if applicable)
  - d. Check stubs or receipts for moving, medical, casualty, or other deductible items
  - e. Rough filled-out return
5. FINANCES, CONTRACT AND CONSUMER LAW
  - a. Itemized budget containing all sources and amounts of income and average monthly expenses and obligations
  - b. Any correspondence or court documents regarding financial obligations
6. LANDLORD-TENANT AND REAL ESTATE
  - a. Lease
  - b. Security deposit receipt
  - c. Pictures of any disputed property, if possible
  - d. Any correspondence or court documents relating to the transaction
7. POWERS OF ATTORNEY
  - a. Record of Emergency Data (or copy)
  - b. Copy of orders

**Figure 11-1.—Telephone receptionist checklist—Continued.**

At the time the client first calls or comes into the office and speaks to the receptionist or LN, inquiry should be made as to the general nature of the assistance being sought; for example, taxes, wills, automobile registrations, and accidents. Once that has been determined, by consulting the telephone receptionist checklist, you or the receptionist can advise the client what documents or information the client should bring along at the time he or she consults with the legal assistance attorney. By following this procedure, one or

more trips to the office and much waiting time in the office can often be saved for the client as well as for the legal assistance attorney.

When you (or the legal assistance attorney) are busy, the client will appreciate recognition that his or her time is also valuable. An advance telephone call to set anew appointment or a few moments spent in explaining the delay to the client are merely applications of the Golden Rule in attorney-client relationships.

## Keeping the Client Informed

To the client his or her case may represent one of the most important things in his or her life. The case may also be a source of anxiety. Naturally he or she expects and is entitled to receive a continuing report on the progress of the case. This may be done with little or no extra effort on either your part or the legal assistance attorney's part by sending copies of correspondence to the client, or by an occasional telephone call to report the status of the case. A periodic letter, even though there is little to report, will be appreciated. This shows that the legal assistance attorney has not allowed the matter to be buried or forgotten. This could be done by the legal assistance office staff on a monthly diary basis to save the lawyer's time. Each month a brief status report from individual case records could be prepared, reviewed by the legal assistance attorney, and sent to the client concerned to bring him or her up to date on the status of the case.

## Legal Assistance References

To help the legal assistance client, you should be familiar with the various reference materials available in the office where you work. Some of these reference materials are common for all legal assistance offices and included in these are the *Legal Assistance Handbook*, DA PAM 27-121; the *Voting Assistance Guide*, NAVEDTRA 46007; the *All States' Income Tax Guide* published by OJAG, U.S. Air Force; the *Legal Assistance Newsletters* published by OJAG, U.S. Navy; the *Military Personnel Manual* (MILPERSMAN); and the *Manual of the Judge Advocate General* (JAGMAN). Additional reference materials will vary from office to office depending on the geographical location of the office and the types of services provided by that office.

## LEGAL ASSISTANCE SERVICES

The scope of the practice of law and the legal assistance attorney's duties and responsibilities are governed by JAGINST 5801.2. Advice and service regarding the following matters are normally available to eligible persons at legal assistance offices, but may be limited due to availability of resources:

- Basic wills, trusts, and estate planning—Complex estate planning and drafting is not routinely provided in the legal assistance program.

- Domestic relations—Advice about the legal and practical implications of divorce, legal separation,

annulment, custody, and paternity is provided. Assistance in domestic violence cases will be consistent with the Department of the Navy Family Advocacy Program, SECNAVINST 1752.3.

- Adoption and name changes—Advice and document preparation, including pleadings, are provided as appropriate.

- Nonsupport and indebtedness—Advice and assistance, including communication, correspondence, and negotiations with another party or lawyer, on behalf of the client, are provided as appropriate.

- Taxes—Basic advice and assistance on federal, state, and local taxes are provided as appropriate. Legal assistance attorneys do not sign returns as paid preparers, nor do they normally prepare tax returns.

- Landlord-tenant relations—Advice and assistance including review of personal leases and communication and correspondence in behalf of the client are provided as appropriate.

- Civil suits—Advice and appropriate assistance are given. In-court representation is prevented, except as provided in the expanded legal assistance program. Procedures and requirements of small claims courts and other courts of limited or special jurisdiction are explained and appropriate referral made.

- Soldiers' and Sailors' Civil Relief Act—Advice and assistance are provided as appropriate about the protection afforded and the effect of the act on the client.

- Criminal matters—Limited general advice may be provided regarding minor (misdemeanor) criminal matters and traffic offenses within the jurisdiction of the civilian courts. Serious criminal matters are not within the scope of legal assistance and are referred to military defense counsel or private civilian attorneys, as appropriate.

- Other services—Advice and assistance are given on powers of attorney, real estate, bankruptcy, contracts, consumer affairs, insurance, immigration, naturalization, and other areas if not inconsistent with legal assistance regulations. Advice and assistance regarding military matters may be provided subject to the limitation stated in the JAGMAN.

## LIMITATIONS ON SCOPE OF LEGAL ASSISTANCE SERVICES

Persons requiring the advice or assistance of an attorney on a personal legal matter, as contrasted with a

military justice problem, should be referred to a legal assistance attorney. Legal assistance is authorized for personal legal affairs only. Legal advice and assistance are not provided regarding business ventures or regarding matters that are not of a personal nature.

### **Advice or Assistance in Official Military Matters**

Legal assistance duties are separate and apart from responsibilities of trial counsel, defense counsel, or others involved in processing courts-martial, nonjudicial punishment, administrative boards or proceedings, and investigations.

### **Representation of Opposing Parties or Interests**

If two or more eligible persons with conflicting interests seek legal assistance from the same office on the same matters, the party first establishing an attorney-client relationship is provided representation. Other parties are advised that they are eligible for assistance, but that it must be obtained from another source. Every effort will be made to refer the party with a conflicting interest to another legal assistance attorney or to a private civilian attorney. If referral to another office or civilian counsel is not a reasonable option, guidance should be obtained from JAG.

### **Proceedings Involving the United States**

Legal assistance attorneys may not advise on, assist in, or become involved with individual interests opposed to or in conflict with the interests of the United States without the specific approval of JAG. Examples include a claim for monetary damages against the United States, filing for a restraining order against the United States, assisting in pursuing CHAMPUS claims, or filing Article 138, *Uniform Code of Military Justice* (UCMJ), petitions.

### **Telephone Inquiries**

In the absence of unusual or compelling circumstances, legal advice is not provided over the telephone. This does not prohibit appropriate follow-up telephone discussions between the legal assistance attorney and the client.

### **Advice to Third Parties**

The attorney-client relationship requires personal communication. Except when the client is unable to

communicate adequately, advice or assistance will not be provided through third parties. This includes drafting a will for one spouse based upon discussion with the other spouse.

### **REFERRALS AND FEES**

The legal assistance attorney may determine that the best interests of the client will be served by referring the case to another attorney, often a private civilian attorney. Referral may be for a variety of reasons, including expertise of the attorney or regulations that prohibit involvement of the legal assistance attorney. Should referral to a private civilian attorney be necessary payment of legal fees is the client's responsibility. The government will not reimburse the individual or pay any expenses associated with the referral. Reserve personnel providing legal assistance while on active duty may not refer legal assistance clients to themselves in their private practice nor to their law firm.

Services provided in the Department of the Navy legal assistance program are at no cost to eligible personnel. All active duty personnel and civilian employees involved in providing services or advice in the legal assistance program are prohibited from accepting or receiving, in any manner, any fee or compensation other than government compensation for legal services provided to persons eligible for assistance. Reserve personnel on inactive duty or in any official capacity are prohibited from receiving fees or compensation for the same matters about which they consulted with or advised the legal assistance client in an official capacity.

### **THE EXPANDED LEGAL ASSISTANCE PROGRAM**

Under the expanded legal assistance program, legal assistance attorneys in selected offices may provide legal services, including in-court representation to certain categories of clients, as follows, about matters listed in the JAGMAN, on a limited basis. The local legal assistance office should be consulted for specific information.

The expanded legal assistance program, as authorized by JAG, provides in-court legal services for eligible personnel who cannot afford private attorney fees.

Those personnel eligible for the expanded legal assistance program include the following:



- Active duty military personnel in paygrades E-3 and below without dependents.

- Active duty military personnel in paygrades E-4 and below, with dependents. Their dependents are also eligible.

- Other active duty military personnel of higher paygrades and their dependents who are unable to afford an attorney without substantial financial hardship. Representation under the expanded legal assistance program of persons in this category must be approved by JAG.

### **THE PREVENTIVE LAW PROGRAM**

The preventive law program is an integral part of the Department of the Navy legal assistance program and is intended to decrease the number of personal legal problems confronting military personnel and their families. The preventive law program is intended to help in avoiding noncriminal legal problems and to help prevent the recurrence and proliferation of legal problems affecting commands or installations. When a legal problem with widespread implications for morale or discipline arises, the legal assistance area coordinator must make sure all methods are used to highlight and resolve the problem.

The preventive law program requires full communication and cooperation among all judge advocates and civilian attorneys in the Department of the Navy and necessitates specific coordination with appropriate civilian officials. It is the goal of the program to improve the overall readiness, efficiency, and performance of military members of the Department of the Navy by enhancing morale and discipline through training and information.

In addition to improving overall mission readiness, other objectives include the following:

- Educating persons to recognize potential legal problems so professional legal counsel is sought before problems arise
- Providing COs and their personnel with a broad channel of communication on legal assistance matters
- Encouraging obedience to the law through self-discipline

Program responsibilities are generally the same as for the legal assistance program. Attorneys participating in preventive law services such as unit

education, training, legal assistance checkups, and briefings need to make sure eligible personnel are informed about the following:

- Counseling services available through the legal assistance program
- The importance of seeking legal advice before taking action on important matters such as signing purchase agreements, contracts, leases, or divorce settlements
- Rights, privileges, and responsibilities arising from laws concerning the member
- The importance and method of adequately preparing legal affairs before a deployment
- Rights, privileges, and responsibilities of the member as a consumer
- The expanded legal assistance program

### **LIAISON WITH OTHER GOVERNMENT AGENCIES**

A working relationship between the legal assistance office and certain government agencies should be established. Where there are frequent dealings, personal contact should be made. These agencies include the following:

- IRS and state tax agencies—Many tax rules and policies apply only to the military. Special information relative to service members' status should be gathered, and a supply of all the pertinent tax forms should be maintained in the office.

- Social Security Administration—Social Security rules and regulations are of special interest to career service members, retired service members and their dependents, and also dependents of deceased service members. A supply of (the several brochures issued by the Social Security Administration should be maintained.

- Department of Veterans Affairs—A working knowledge of the VA procedures is especially important.

- Department of Justice—The Justice Department is responsible for enforcing the Soldiers' and Sailors' Civil Relief Act and the Civil Rights Act on behalf of the U.S. Government and its agents and service members. Liaison with the attorneys in the Justice Department who are assigned to such duties will encourage proper enforcement under the Soldiers' and

Sailors' Civil Relief Act. Lack of proper enforcement should be brought to the attention of JAG.

- Immigration and Naturalization Service—The immigration statutes are of particular importance for counseling noncitizen service members such as those who come from the Philippines. The International Law Division of the Office of the Judge Advocate General maintains an expertise in this area as well.

- Customs Office—There are many service members who return from foreign duty stations and encounter problems with the Customs Service to make this more than a merely academic interest to the legal assistance attorney and his or her staff.

- Civilian Health and Medical Program of the Uniformed Services (CHAMPUS)—Dependents of active duty service personnel and retired service members and their dependents are eligible for CHAMPUS benefits. If a claimant believes that a claim has been improperly denied (not just returned for further substantiation), the claimant may send the claim to the Executive Director, CHAMPUS, Denver, Colorado 80240, for consideration.

- Consumer agencies (federal, state, and local)—The Federal Trade Commission, Food and Drug Administration, and the Federal Consumer Product Safety Commission maintain field offices in major cities in the United States. At the state and local level, many consumer protection divisions have been created in the state attorney general's offices and in the county prosecuting officer's agencies.

- State motor vehicle departments—The legal assistance office staff should be familiar with the location of the closest motor vehicle department office and the *modus operandi* of that office. Also, a supply of the department's brochures and forms should be obtained for use by clients.

#### **COOPERATION WITH OTHER NAVY AGENCIES**

The Navy and Marine Corps Relief Society is commonly known only for its financial assistance. However, the society provides other services such as budget counseling for individuals and families who need help in managing their financial affairs. The society can also make a loan to a service member.

The Navy Federal Credit Union provides services that include debt consolidation loans, savings plans, and financial advice.

#### **LEGAL ASSISTANCE RECORDS, FILES, AND REPORTS**

Command records showing client contact and the general nature of assistance are maintained by the legal assistance office for administrative and statistical purposes. Although such records should not contain privileged or confidential information and are, therefore, not privileged, maintenance of these records must comply with the Privacy Act. Information in these records is used to contact clients and former clients about assistance provided, to guard against conflicts of interest in providing legal assistance, to develop statistical evaluation of services provided, and to provide information for better assisting clients and administering the office.

Legal assistance case files (for example, those containing privileged or confidential information) belong to each legal assistance attorney who is solely responsible for their content and maintenance. The legal assistance office will provide storage facilities for files. Higher authority may from time to time make suggestions regarding the maintenance of files. Before transferring from a legal assistance office, the legal assistance attorney must store, destroy, or, if the client approves, turn over to another attorney the client case files.

The legal assistance office filing system should be simple enough to operate so it takes only a minimum amount of time for anyone in the office to file papers. Four types of files should be maintained. They are the client case file, the office reading file, the reference material file, and the forms file.

#### **THE CLIENT CASE FILE**

An individual client case file should normally be opened only for those matters that will require follow-up visits, correspondence, and similar material. Current active files should contain all documents, papers, notes, and so on, that relate to the client.

The record of each client's visit (or telephone call, if advice is given in this manner) should consist of, at a minimum, a completed Legal Assistance Case Record, NAVJAG 5801.9, or similar locally prepared form. The file should contain a detailed description of the client's problem and the advice given. Where there is inadequate space on this form, a supplementary sheet containing the attorney's notes should be attached. All action taken by an attorney, including consultation, telephone calls, research, and his or her opinion and

advice, must be clearly entered on the attorney's notes. The best time to do this is immediately after the action.

If the case is resolved in one visit (or perhaps one consultation and a follow-up visit to execute a document), a client case file would not normally be opened. The client's case can be opened, disposed of, and the Legal Assistance Case Record and any supplementary attorney's notes filed immediately.

### **LEGAL ASSISTANCE OFFICE READING FILE**

A copy of each outgoing piece of correspondence should be placed in chronological order, most recent on top, in the monthly legal assistance office reading file. This file should be maintained separately from the regular office reading file. These files may be destroyed after 2 years. Material contained in the legal assistance reading files, as well as the individual client case files, is privileged.

### **REFERENCE MATERIAL FILE**

A separate index and series of files should be kept for reference material other than that which normally would be placed in the library. Included in this category are notes, releases, pamphlets, and bulletins not subject to being serialized or kept by category in loose-leaf or bound form. It is important that this system be kept up to date since these items are often highly relevant to pending cases.

### **FORMS FILE**

A good, well-indexed form file can be of immeasurable importance to a legal assistance office, especially where it relates to matters of local practice. Considerable savings in time and effort can be made by reference to a previously drafted form. However, do not let the form file get too large; discard or change any forms in the file that are obsolete or no longer used.

### **FILING PRACTICES**

All papers filed, other than original documents not susceptible to being punched, should be secured in the file. Letters and replies should be in chronological order, with the most recent on top.

Every effort should be made to see that files are not retained on the lawyer's desk unless they are actually being used. In larger offices, a chargeout slip or card should be used to indicate where the file is located.

### **FILE RESPONSIBILITY**

Responsibility for the maintenance of the client files should be assigned to one person. It is a mistake to assign the newest person in the office to the important job of filing. Proper files management is vital to the smooth operation of an office and it requires an experienced clerical assistant be assigned this duty. Clear, written instructions must be given to the person responsible for the files.

### **FILE RETENTION**

When a matter has been concluded, the case file should be closed quickly to conserve valuable filing space. Only two items should be kept: (1) the Legal Assistance Case Record and (2) the attorney's notes containing the file history. All documents, including those drafted by the legal assistance attorney, should be returned to the client together with whatever correspondence and memorandums the legal assistance attorney determines that the client should have. The remainder of the file can then be destroyed.

January of each year should be scheduled for the destruction of all 2-year-old closed files. For example, in January 1994, all files closed during 1991 may be destroyed.

### **LEGAL ASSISTANCE OFFICE REPORTS**

Only one regular report is required for the legal assistance program. This is an annual report of the number of legal assistance cases handled during the calendar year. This is broken down by types of cases and includes time figures. The information required for the annual report is obtained from the individual Legal Assistance Case Record, NAVJAG 58 10/9. This should be tabulated and transferred onto a Legal Assistance Report, NAVJAG Form 5801/3, on a monthly basis. At the end of the year, the figures for the month of December can be added to the already prepared totals for the previous 11 months and the annual report quickly and conveniently prepared. This job should normally be done by an LN or secretary assigned to the legal assistance office.

Any legal assistance provided by Reserve lawyers must also be reported. If the Reserve lawyer provides the legal assistance at a base legal assistance office, then each of the matters handled by him or her should be included in the reports made by the active duty legal assistance officer, as these matters are part of that office. In some areas, legal assistance is rendered by the

Reserve lawyer in his or her office. In that event, a separate report must be made by the CO of the law firm to which the Reserve lawyer is attached.

### **SUMMARY**

As you can readily see, the legal assistance program is an important part of your duties as an LN. The

effectiveness of the legal assistance program is only as good as the personnel who are providing the assistance. Remember, you will be working very closely with both legal assistance clients and legal assistance attorneys and your attitude and ability to provide the type of assistance requested will be the measuring stick that legal assistance clients use to assess the value of the services provided by the legal assistance office.

## CHAPTER 12

# CLAIMS

A significant portion of your duties as an LN will entail the investigation and processing of claims. Claims involving the United States Government and its military activities are governed by a complex system of statutes, regulations, and procedures. This chapter is not a substitute for the official departmental claims regulations published in the *JAG Manual* and JAGINST 5890.1, *Administrative Processing and Consideration of Claims on Behalf of and Against the United States*. It is, however, a useful starting point for research into claims.

This chapter is organized to reflect the various claims statutes and their respective functions in the claims system. Claims involving the federal government are of two types:

1. Claims in which the federal government is a claimant seeking compensation.

2. Claims against the government for which a claimant seeks compensation. These can be further divided into two functional categories:

a. General claims statutes, such as the Federal Tort Claims Act (FTCA) and Military Claims Act (MCA), that provide for payment of claims arising out of a broad range of incidents and situations.

b. Specialized claims statutes, such as the Military Personnel and Civilian Employees' Claims Act and the Foreign Claims Act (FCA), that provide for payment of claims arising out of specific types of incidents or to only specific classes of claimants.

Claims are adjudicated by a complex system of interesting statutes, regulations, and procedures. Claims that are not covered by one of the general claims statutes are frequently payable under one of the specialized statutes. Thus, specialized statutes can fill gaps in areas where the general statutes do not provide coverage. Conversely, some claims are not cognizable under one of the general statutes because one of the specialized statutes may apply to the claim. Likewise, classes of persons barred by statute or regulation from collecting under a general claims statute often can be compensated under one of the specialized statutes. Examples in this chapter will demonstrate the interaction of the various claims statutes, regulations,

and procedures. The key to understanding claims law is to realize that it involves a logical system of interacting provisions and not just a perplexing labyrinth of seemingly unrelated rules.

### FEDERAL TORT CLAIMS ACT

The Federal Tort Claims Act, 28 U.S.C. § 1346, 2671-2680 (1982) (FTCA), was a product of many years of congressional deliberations and considerations. Before 1946, if a person was wrongfully injured by a federal employee who had acted within the scope of his or her federal employment, the doctrine of “sovereign immunity” barred that injured party from suing the government for compensation. This doctrine often had the effect of denying fair compensation to persons with meritorious claims. At that time, the only available form of redress was the “private bill”—a system whereby the injured party could be compensated for his or her injury by a special act of Congress. This system was cumbersome and resulted in thousands of private bills annually. This system was also unfair to those who lacked sufficient influence to have a representative introduce a private bill on their behalf.

The FTCA was enacted with the intent of providing a more equitable, comprehensive system. The FTCA provides for compensation for personal injury, death, and property damage caused by the negligent conduct of federal employees acting within the scope of federal employment. It also covers certain intentional, wrongful acts. There are, however, three general types of exceptions from government liability under the FTCA. First, the government is protected from liability arising out of certain types of governmental actions. Second, the FTCA will not provide compensation when one of the specialized claims statutes (discussed later in this chapter) covers the claim. Third, certain classes of claimants, such as active duty military personnel, are prevented from recovering under the FTCA, although they may be compensated under other statutes.

### SCOPE OF LIABILITY

The law defines negligence as the failure to exercise the degree of care, skill, or diligence that a reasonable person would exercise under the same circumstances.

Negligent conduct can arise either from an act or a failure to act. It can be either acting in a careless manner or failing to do those things that a reasonable person would do in the same situation.

Whether certain conduct was negligence—and, therefore, whether the government is liable—will be determined by the tort law of the place where the conduct occurred. Questions, such as whether the violation of a local law, by itself, constitutes negligence, are answered by applying the doctrines of the local tort law.

Example 1: Seaman Jones, while performing his duties in Virginia, injures Mr. Smith. Under Virginia law, Jones' conduct is not negligence. Therefore, Mr. Smith's FTCA claim will be denied.

Example 2: Seaman Door, while performing his duties in North Carolina, engages in exactly the same conduct that injured Mr. Smith in the previous example. Door injures Mr. Johnson in this example. Under North Carolina law, Door's acts constitute negligence. Therefore, Mr. Johnson's FTCA claim will be paid.

### **Limited Range of Intentional Torts**

The FTCA will compensate for intentional wrongful acts under very limited circumstances. On or after 16 March 1974, the FTCA applies to any claim arising out of the following intentional torts committed by federal law enforcement officers: assault, battery, false imprisonment, false arrest, abuse of process, and malicious prosecution. A federal law enforcement officer, for purposes of the FTCA, is any officer of the United States empowered by law to execute searches, to seize evidence, or to make arrests for violations of federal law.

Since Article 7, UCMJ, extends the authority to apprehend to commissioned officers and petty officers, these officers would be considered law enforcement officers for FTCA purposes when they are actually engaged in law enforcement duties. No other intentional tort claims are payable under the FTCA. Under very limited circumstances, however, the government may be liable for an intentional tort committed by a federal employee overseas under the FCA discussed later in this chapter. Federal employees have been held individually liable to the injured party for intentional torts committed while the employees are acting beyond the proper limits of their authority.

### **Government Employees**

Under the FTCA, the government is liable only for the wrongful acts of its employees. The term *government employee* is defined to include the following individuals:

- Officers or employees of any federal agency
- Members of the military or naval forces of the United States
- Persons acting on behalf of a federal agency in an official capacity, either temporarily or permanently, and either with or without compensation

The term *federal agency* includes not only the departments and agencies of the executive, legislative, and judicial branches of the federal government, but also independent entities that function primarily as federal agencies such as the U.S. Postal Service and the Commodity Credit Corporation.

**GOVERNMENT CONTRACTOR.**— A government contractor and its employees are not usually considered government employees under the FTCA. When, however, the government exercises a high degree of control over the details of the contractor's activities, the courts will find that the government contractor is, in fact, a government employee. The standard personnel qualifications and safety standards provisions in government contracts are not enough to turn a government contractor into an employee. Where the contract requires the contractor to follow extensive, detailed instructions in performing the work though, the contractor will usually be considered a government employee and the contractor's employees who work on the federal job will likewise be treated as government employees for FTCA purposes.

**NONAPPROPRIATED FUND ACTIVITIES.**— A nonappropriated fund activity is one that, while operating as part of a military installation, does not depend upon, and is not supported by, funds appropriated by Congress. Examples of nonappropriated fund activities include the Navy exchange and officers' clubs. Whether liability is incurred depends upon a two-pronged test. The FTCA applies to a nonappropriated fund activity if (1) the activity is charged with an essential function of the federal government and (2) the degree of control and supervision by the federal government is more than casual or perfunctory.

Every facet of the activity's operations must be examined. Is the activity entirely self-supporting? Does it own its own property? Does it use government property, equipment, or personnel in its operation? What control does the command have over the activity's operation? Does the activity provide essential services or benefits to military personnel?

Applying the two-pronged test and considering the specific points mentioned previously, the Navy exchange would clearly be a nonappropriated fund activity subject to the FTCA. On the other hand, an equestrian club, sponsored by a command but operating entirely independent of the command, would not be subject to the FTCA. Each case must be determined on its own merits.

Many nonappropriated fund activities carry commercial liability insurance to protect them against claims for property damage and personal injury attributable to their operations. Therefore, many FTCA claims against nonappropriated fund activities are handled by commercial insurance carriers. The procedures for negotiating and settling FTCA claims against nonappropriated fund activities covered by liability insurance are set forth in JAGINST 5890. 1.

### **Scope of Employment**

The government is liable under the FTCA for its employees' conduct only when the employees are acting within the scope of their employment. The scope-of-employment requirement is viewed by the courts as "the very heart and substance" of the act. While scope-of-employment rules vary from state to state, the issue usually turns to (1) the degree of control the government exercises over the employee's activities on the job and (2) the degree to which the government's interest were being served by the employee at the time of the incident.

Whether or not a government employee's acts were within the scope of employment is determined by the law of the state, including the principles of *respondeat superior*, where the incident occurred. This has led to many different results on the question of applicability of the FTCA involving PCS and TDY.

Example: Consider the following hypothetical situation. Seaman Doe, the command duty driver, is making an authorized run in the command vehicle. On the way back to the base, he stops at a local bar and drinks himself into a stupor. Barely able to stand, he gets back in the command vehicle and continues toward the base. In his drunken state, he fails to see a stop sign

and crashes into an automobile driven by a civilian. Both Seaman Doe and the civilian are seriously injured. For the purposes of the FTCA, Seaman Doe could be considered, in at least some jurisdictions, to have been acting within the scope of his employment (he was completing an authorized run when he was involved in the accident). Accordingly, the claim of the civilian would be cognizable under the FTCA.

Example: Seaman Doe, the command duty driver, is making an authorized run in the command sedan. While daydreaming, he becomes inattentive, fails to keep a lookout for pedestrians, and hits Mr. Hatch. Seaman Doe's negligence occurred within the scope of his employment.

Example: Seaman Doe, the command duty driver, takes the command sedan after hours on an unauthorized trip to the ball game. After the game, he and some buddies stop at several taverns and all become drunk. Because of his drunken condition, while driving back to the base, Seaman Doe runs over Mr. Smith. In this case, Seaman Doe's negligence occurred outside the scope of his employment. He and his friends were off on their own and their activities were entirely unrelated to the performance of a governmental or military function. Therefore, Mr. Smith will not be able to recover under the FTCA. Since a government vehicle is involved, however, Mr. Smith may be entitled to limited compensation under the nonscope claims procedures discussed later.

### **Territorial Limitations**

The FTCA applies only to claims arising in the United States, or in its territories or possessions (where a U.S. district court has jurisdiction). Any lawsuit under the FTCA must be brought in the U.S. district court in the district where the claimant resides or where the incident giving rise to the claim occurred.

### **EXCLUSIONS FROM LIABILITY**

Statutes and case law have established three general categories of exclusions from FTCA liability. The following specific exclusions are encountered frequently in claims practice in the military. A complete list of FTCA exclusions is set forth in JAGINST 5890. 1. In each of the following situations, the government will not be liable under the FTCA, although it maybe liable under some other claims statute. The following categories are exempted governmental activities:

- Execution of statute or regulation. The FTCA does not apply to any claim based on an actor omission of a federal employee who exercises due care while in the performance of a duty or function required by statute or regulation.

- Discretionary governmental function. The FTCA does not apply to any claim based upon the exercise or performance of, or the failure to exercise or perform, a discretionary governmental function. Perhaps no single exclusion under the FTCA has generated as much litigation as the discretionary function exclusion. The key issue usually is whether the government activity involved in the claim was a discretionary function. The problem is complicated by the fact that neither the FTCA nor any court has ever formulated a comprehensive definition of discretionary function. Each case must be decided on its own facts.

- Postal claims. The FTCA does not apply to claims for the loss, miscarriage, or negligent transmission of letters or postal matters. Such claims, under limited circumstances, may be payable under the MCA.

- Detention of goods. The FTCA does not apply to claims arising out of the detention of any goods or merchandise by a federal law enforcement officer, including customs of officials. This exception is commonly applied in situations where the claimant seeks compensation for property seized during a search for evidence. This exclusion also prevents compensation under the FTCA for alleged contraband seized by law enforcement officers.

- Combatant activities in time of war. The combatant activities exclusion has three requirements: the claim (1) must arise from activities directly involving engagement with the enemy; (2) must be conducted by the armed forces; and (3) occur during time of war (declared and undeclared). Combatant activities are given a very strict meaning by the courts. It does not include practice or training maneuvers, nor any operations not directly involving engagement with an enemy.

- Intentional torts. The government is not liable under the FTCA for the following intentional torts: assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. This exclusion will not protect the government from liability for assaults, batteries, false imprisonments, false arrests, abuses of process, or

malicious prosecutions committed by federal law enforcement officers.

### **Claims Cognizable Under Other Claims statutes**

Certain claims cannot be paid under the FTCA because they are cognizable under some other claims statute. Although the claimant may still recover under another statute, the amount may be significantly less than under the FTCA. Also, the claimant may not have the right under the other claims statute to sue the government if the claim is denied. Examples of claims cognizable under other situations and therefore not payable under the FTCA include the following:

- Personnel claims. Claims by military personnel or civilian federal employees for damage or loss to personal property incident to service are cognizable under the Military Personnel and Civilian Employees' Claims Act.

- Admiralty claims. Admiralty claims, arising from incidents such as ship collisions, are usually governed by the Suits in Admiralty Act and the Public Vessel Act.

- Overseas claims. Claims arising in a foreign country are not cognizable under the FTCA, but may be allowed under either the MCA or the FTCA.

- Injury or death to civilian federal employee. Claims arising out of personal injury or death of a civilian federal employee, while on the job, are usually covered by the Federal Employees' Compensation Act. Nonappropriated fund activity employees are compensated under the Longshoremen's and Harbor Workers' Compensation Act.

### **Excluded Claimants—Military Personnel**

In *Feres v. United States*, the U.S. Supreme Court held that military personnel cannot sue the federal government for personal injury or death occurring incident to military service. The Supreme Court reasoned that Congress did not intend the FTCA to apply to military personnel because it had already provided medical care, rehabilitation, and disability benefits for them. Since 1950, the *Feres* doctrine has been applied consistently by federal courts at all levels and was reaffirmed by the Supreme Court in 1987.

The rationale for the *Feres* doctrine can be explained by examining the policy reasons underlying the doctrine proscribing governmental liability. The



Court noted that there is a special relationship of “solider to his superiors.” Granting to him the right to bring an action would have an adverse effect upon discipline and would result in a judicial intrusion into the general area of military performance. Congress had established a system of uniform compensation for injuries or death of those in the armed services. This system provides adequate and comprehensive benefits for service personnel and compares favorably with workmen’s compensation statutes. To allow individual suits would circumvent the statutory schemes of veterans’ benefits.

The Court in *Feres* recognized the relationship existing between the United States and its military personnel as distinctively federal in character, so that it would be inappropriate to apply local law to that relationship by way of the FTCA. Applying the state law of the area where the injury took place, given the wide variety of local laws, would be unfair to the military member who has no choice as to his or her duty station.

A major exception to the *Feres* doctrine exists when the injury, death, or loss of the military member did not occur incident to military service. Under such circumstances, the *Feres* doctrine will not prevent FTCA recovery by a military claimant. The value of benefits received from the government, such as medical care, rehabilitation, and disability payments, however, will be deducted from the compensation paid to the claimant.

The central issue in determining whether the *Feres* doctrine will prevent a military member from recovering under the FTCA is whether the injury or loss occurred incident to military service. Courts decide this issue only after considering all the facts and circumstances of each case. As a general rule, however, all the following factors must be present for an injury, death, or loss of a military member to be held not incident to military service:

- The member must have been off duty.
- The member must not have been aboard a military installation.
- The member must not have been engaged in any military duty or mission.
- The member must not have been directly subject to military orders or discipline.

If any of the previous four factors are absent, the claim usually will be held by the courts to be incident to military service.

The *Feres* doctrine does not apply to claims by military members who are acting solely in a representative capacity (guardian, executor of an estate). It will bar FTCA claims by nonmilitary persons acting as legal representatives of injured or deceased military members. The following examples demonstrate these principles.

Example: Johnny Doe, the minor child of LT Doe, was the victim of medical malpractice at a military hospital. LT Doe presents a \$100,000 claim on behalf of Johnny. The *Feres* doctrine will not apply. LT Doe is presenting the claim solely as the parent and legal representative of his minor son and the *Feres* doctrine does not apply to injuries, death, or loss suffered by a military dependent—only to military members themselves.

Example: While on duty, LT Doe was negligently killed by a Marine Corps officer acting within the scope of federal employment. The executor of LT Doe’s estate, Mr. Rich, presents an FTCA claim for wrongful death. The *Feres* doctrine will bar this claim. Although Mr. Rich is a civilian, he is claiming only in his capacity as LT Doe’s legal representative. Because LT Doe’s death occurred incident to service the claim will be denied, just as if LT Doe had presented it himself.

**CIVILIAN FEDERAL EMPLOYEES.—** Civilian federal employees usually cannot recover under the FTCA for injury or death that occurs on the job because of Federal Employees Compensation Act (FECA) compensation benefits.

**INTRA-AGENCY CLAIMS.—** One federal agency usually may not assert an FTCA claim against another federal agency. Government property is not owned, for FTCA purposes, by any specific agency of the government. Therefore, the federal government will not normally reimburse itself for the loss of its own property.

## **MEASURE OF DAMAGES**

The phrase *measure of damages* refers to the method by which the amount of a claimant’s recovery will be determined. In FTCA cases, the measure of damages will be determined by the law of the jurisdiction where the incident occurred. For example, the measure of damages for a claim arising out of a tort that occurred in Maryland will be determined by Maryland law. When the local law conflicts with applicable federal law, however, the federal statute will govern.

The following amounts will be excluded from a claimant's recovery under the FTCA:

**Punitive damages.** Many states permit the plaintiff in a tort action to recover additional money from the defendant beyond the amount required to compensate the plaintiff for his or her loss. Such damages are known as punitive damages because they are awarded to punish a defendant who has engaged in conduct that is wanton, malicious, outrageous, or shocking to the court's conscience. Under the FTCA, the government is not liable for any punitive damages that might otherwise be permitted by state law.

- Interest before judgment.

- **Value of government benefits.** When the government is liable to pay an FTCA claim by a military member, and the claim is not barred by the *Feres* doctrine, the value of government benefits (such as medical care, rehabilitation, and disability benefits) will be deducted from the military member's recovery.

- While there is no maximum to the amount of recovery permitted under the FTCA, any FTCA payment in excess of \$25,000 requires the prior written approval of the Attorney General of the United States or his or her designee.

## **STATUTE OF LIMITATIONS**

The FTCA contains several strict time limits that include the following:

- **Two-year statute of limitations.** The claimant has 2 years from the date the claim against the government accrued in which to present a written claim. If the claimant fails to present his or her claim within 2 years, it is barred forever. A claim accrues when the act or incident giving rise to the claim occurs, or when the claimant learns or reasonably should have learned about the wrongful nature of the government employee's conduct. Thus, a claim arising out of an automobile accident would normally accrue when the accident occurred. A claim arising out of medical malpractice will not accrue, however, until the claimant learns or reasonably should have learned about the malpractice.

- **Six-month waiting period.** When a claimant presents an FTCA claim to a federal agency, the agency has 6 months in which to act on the claim. During this waiting period, unless the agency has made a final denial, the claimant may not file suit on the claim in federal court. If, after 6 months, the agency has not taken final action on the claim, the claimant may then

file suit under the FTCA in federal district court without waiting any longer for the agency to act.

- **Six-month time limit for filing suit.** After the federal agency mails written notice of its final denial on the claim, the claimant has 6 months in which to file suit on the claim in federal district court. If suit is not filed within 6 months, the claim will be barred forever. However, before this 6-month time limit expires, the claimant may request reconsideration of the denial of his or her claim. The agency then has 6 months in which to reconsider the claim. If the claim is again denied, the claimant has another 6 months in which to file suit.

## **PROCEDURES**

The following procedures apply not only to FTCA claims, but also, in large part, to claims cognizable under other claims statutes. Significant variations in procedures under other claims acts will be noted in the sections of this chapter dealing with those other statutes,

The first step is usually the presentment of the claim to a federal agency of the government. When a claim is properly presented, the statute of limitations is tolled. A claim against the government is presented when a federal agency receives a written claim for money damages. A claim may be presented by ( 1 ) the injured party for personal injury; (2) the owner of damaged or lost property; (3) the claimant's personal or legal representative; or (4) a subrogee who assumed the legal rights of another person.

### **Contents of the Claim**

As discussed previously, when a claim is properly presented, the statute of limitations stops running. To be properly presented, the claim must satisfy the following requirements:

- **In writing.** The claim must be in writing. Standard Form 95, Claim for Damage or Injury, should be used whenever possible. See figure 12-1.

- **Signed.** The claim must be signed by a proper claimant.

- **Claims money damages in a sum certain.** The claim must demand a specific dollar amount. The courts have consistently held that a claim is not presented until it states a sum certain. If the claimant fails to state a sum certain, then the claim does not constitute a claim for purposes of complying with the jurisdictional prerequisites of the FTCA. Observance of the sum certain requirement does not prevent the claimant from

CLAIM FOR DAMAGE, INJURY, OR DEATH		INSTRUCTIONS: Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary. See reverse side for additional instructions.			FORM APPROVED OMB NO. 1105-0008 EXPIRES 4-30-88	
1. Submit To Appropriate Federal Agency: Commanding Officer Naval Legal Service Office Naval Station San Diego, CA 92136-5138			2. Name, Address of claimant and claimant's personal representative, if any. (See instructions on reverse.) (Number, street, city, State and Zip Code) Josephine Doe 555 Sunset Drive Westho, CA 92345			
3. TYPE OF EMPLOYMENT <input type="checkbox"/> MILITARY <input checked="" type="checkbox"/> CIVILIAN	4. DATE OF BIRTH Nov. 1, 1958	5. MARITAL STATUS Married	6. DATE AND DAY OF ACCIDENT April 17, 1994	7. TIME (A.M. OR P.M.) 7:15 a.m.		
8. Basis of Claim (State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurrence and the cause thereof) (Use additional pages if necessary.) The claimant, accompanied by her husband, was driving her father's (Moe B. Banks) 1989 Ford Sedan north on Thruway Road, San Diego, California. She was stopped for a red traffic light at the intersection of Thruway Road and Aside Street when her vehicle was struck from the rear by a 1988 Navy pickup truck, Vehicle #5387765, driven by SN Ready M. Rickless, USN, from the Naval Station, San Diego, California.						
9. PROPERTY DAMAGE						
NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT (Number, street, city, State, and Zip Code) Moe B. Banks, 553 Sunset Drive, Westho, California 92345						
BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF DAMAGE AND THE LOCATION WHERE PROPERTY MAY BE INSPECTED. (See instructions on reverse side.) The rear bumper trunk and fenders of the 1989 Ford were damaged extensively. Refer to the attached police report and to the enclosed estimates of repair.						
10. PERSONAL INJURY/WRONGFUL DEATH						
STATE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE NAME OF INJURED PERSON OR DECEDENT. The claimant suffered severe neck pain which Dr. T.C. Banaid (302 Business Street, Westho, California) diagnosed as whiplash injury. See Dr. Banaid's statement and bills, copies of which are attached.						
11. WITNESSES						
NAME			ADDRESS (Number, street, city, State, and Zip Code)			
Richard Doe			(same as claimant)			
12 (See instructions on reverse) AMOUNT OF CLAIM (in dollars)						
12a. PROPERTY DAMAGE \$738.70	12b. PERSONAL INJURY \$800.00	12c. WRONGFUL DEATH N/A	12d. TOTAL (Failure to specify may cause forfeiture of your rights.) \$1,538.70			
I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE ACCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM						
13a. SIGNATURE OF CLAIMANT (See instructions on reverse side.) 			13b. Phone number of signatory 619-556-4274	14. DATE OF CLAIM April 17, 1994		
CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM The claimant shall forfeit and pay to the United States the sum of \$2,000 plus double the amount of damages sustained by the United States. (See 31 U.S.C. 3729.)			CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS Fine of not more than \$10,000 or imprisonment for not more than 5 years or both. (See 18 U.S.C. 287, 1001.)			

95-107  
Previous editions not usable.

NSN 7540-00-634-4046

STANDARD FORM 95 (Rev. 7-85)  
PRESCRIBED BY DEPT. OF JUSTICE  
28 CFR 14.2

Figure 12-1A.—Sample of Standard Form 95, Claim for Damage, Injury, or Death (front).

recovering more than the amount originally claimed. The claimant may amend the claim at anytime before final action on the claim. Once an action is initiated under the FTCA, the plaintiff is limited to the damage

amount specified in the claim presented "except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the agency, or upon allegation

PRIVACY ACT NOTICE

The Notice is provided in accordance with the Privacy Act, 5 U.S.C. 552(a)(3), and concerns the information requested in the letter to which this Notice is attached.  
**A Authority:** The requested information is solicited pursuant to one or more of the following: 5 U.S.C. 301, 28 U.S.C. 501 et seq., 28 U.S.C. 2671 et seq., 28 C.F.R. Part 14.

**B Principal Purpose:** The information requested is to be used in evaluating claims.  
**C Routine Use:** See the Notices of Systems of Records for the agency to whom you are submitting this form for this information.  
**D Effect of Failure to Respond:** Disclosure is voluntary. However, failure to supply the requested information or to execute the form may render your claim "invalid".

INSTRUCTIONS

Complete all items - Insert the word NONE where applicable

A CLAIM SHALL BE DEEMED TO HAVE BEEN PRESENTED WHEN A FEDERAL AGENCY RECEIVES FROM A CLAIMANT, HIS DULY AUTHORIZED AGENT, OR LEGAL REPRESENTATIVE AN EXECUTED STANDARD FORM 95 OR OTHER WRITTEN NOTIFICATION OF AN INCIDENT, ACCOMPANIED BY A CLAIM FOR MONEY DAMAGES IN A SUM CERTAIN FOR INJURY TO OR LOSS OF PROPERTY, PERSONAL INJURY, OR DEATH ALLEGED TO HAVE OCCURRED BY REASON OF THE INCIDENT. THE CLAIM MUST BE PRESENTED TO THE APPROPRIATE FEDERAL AGENCY WITHIN TWO YEARS AFTER THE CLAIM ACCRUES.

Any instructions or information necessary in the preparation of your claim will be furnished, upon request, by the office indicated in item #1 on the reverse side. Complete regulations pertaining to claims asserted under the Federal Tort Claims Act can be found in Title 28, Code of Federal Regulations, Part 14. Many agencies have published supplemental regulations also. If more than one agency is involved, please state each agency.

The claim may be filed by a duly authorized agent or other legal representative, provided evidence satisfactory to the Government is submitted with said claim establishing express authority to act for the claimant. A claim presented by an agent or legal representative must be presented in the name of the claimant. If the claim is signed by the agent or legal representative, it must show the title or legal capacity of the person signing and be accompanied by evidence of his/her authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian or other representative.

If claimant intends to file claim for both personal injury and property damage, claim for both must be shown in item 12 of this form.

The amount claimed should be substantiated by competent evidence as follows:

(a) In support of the claim for personal injury or death, the claimant should submit a written report by the attending physician, showing the nature and extent of injury, the nature and extent of treatment, the degree of permanent disability, if any, the prognosis, and the period of hospitalization, or incapacitation, attaching itemized bills for medical, hospital, or burial expenses actually incurred.

(b) In support of claims for damage to property which has been or can be economically repaired, the claimant should submit at least two itemized signed statements or estimates by reliable, disinterested concerns, or, if payment has been made, the itemized signed receipts evidencing payment.

(c) In support of claims for damage to property which is not economically repairable, or if the property is lost or destroyed, the claimant should submit statements as to the original cost of the property, the date of purchase, and the value of the property, both before and after the accident. Such statements should be by disinterested competent persons, preferably reputable dealers or officials familiar with the type of property damaged, or by two or more competitive bidders, and should be certified as being just and correct.

(d) Failure to completely execute this form or to supply the requested material within two years from the date the allegations accrued may render your claim "invalid". A claim is deemed presented when it is received by the appropriate agency, not when it is mailed.

Failure to specify a sum certain will result in invalid presentation of your claim and may result in forfeiture of your rights.

INSURANCE COVERAGE

In order that subrogation claims may be adjudicated, it is essential that the claimant provide the following information regarding the insurance coverage of his vehicle or property.

15. Do you carry accident insurance?  Yes. If yes, give name and address of insurance company (Number, street, city, State, and Zip Code) and policy number.  No

NOPAY Auto Insurance  
 1258 Gotham  
 Big City, California 92678

16. Have you filed claim on your insurance carrier in this instance, and if so, is it full coverage or deductible?

Yes, deductible

17. If deductible, state amount

\$200.00

18. If claim has been filed with your carrier, what action has your insurer taken or proposes to take with reference to your claim? (If is necessary that you ascertain these facts)

No action taken

19. Do you carry public liability and property damage insurance?  Yes. If yes, give name and address of insurance carrier (Number, street, city, State, and Zip Code)  No

NOPAY Auto Insurance  
 (same as above)

Figure 12-1B—Sample of Standard Form 95, Claim for Damage, Injury, or Death (back).

and proof of intervening facts, relating to the amount of the claim." The plaintiff has the burden of proving the existence of the newly discovered evidence or intervening facts.

- Describe the factual circumstances giving rise to the claim. To the maximum extent possible, the claimant must detail the facts and circumstances precipitating the claim.

- Submitted to a federal agency. The claim is not properly presented until it is submitted to a federal agency. The claim should be submitted to the agency whose activities give rise to the claim. If the claim is submitted to the wrong federal agency, that agency must promptly transfer it to the appropriate one. Although submission to any federal agency will stop the running of the statute of limitations, the 6-month waiting period does not begin until the claim is received by the appropriate agency. That the United States is aware of the potential claim or has actual notice does not relieve the claimant of the requirement of presenting the claim to a federal agency. Failure to formally present the claim can result in the dismissal of an action in court.

### Information and Supporting Documentation

Although the FTCA itself does not specify what information and supporting documentation are required for validating the claim, administrative regulations issued by the Attorney General of the United States and the Judge Advocate General of the Navy require that the claim include information such as the following:

- A reasonably detailed description of the incident on which the claim is based
- The identity of the federal agencies, employees, or property involved
- A description of the nature and extent of personal injury or property damage
- Documentation of the loss (such as physicians' reports, repair estimates, and receipts)

In some instances, failure to provide the required information may result in a court ruling that the claim was never properly presented. Minor technical failures will not nullify the claim.

Prompt action is necessary when a command receives a claim. The following steps must be taken:

1. Record the date of receipt on the claim.
2. Determine which military activity is most directly involved.
3. When the receiving command is the activity most directly involved, immediately convene an investigation according to chapter II of the *JAG Manual* and, when the investigation is complete, promptly send the report and the claim to the appropriate claims adjudicating authority.

4. When the receiving command is not the activity most directly involved, immediately send the claim to the activity that is most directly involved.

5. Report to JAG, if required by the *JAG Manual* or JAGINST 5890.1.

### Investigation

A *JAG Manual* investigation is required whenever a claim against the Navy is filed or is likely to be filed. An investigation not requiring a hearing usually suffices. Responsibility for convening and conducting the investigation usually lies with the command most directly involved in the incident upon which the claim is based. When circumstances make it impractical for the most directly involved command to conduct the investigation, responsibility may be assigned to some other command.

Because the government usually will have only 6 months in which to investigate and take final action on the claim, the investigation must be done promptly. Witnesses' memories fade quickly and evidence can become mislaid. Moreover, failure to investigate promptly could prejudice the government's ability to defend against the claim. A claim involving a command is an urgent and important matter involving substantial amounts of money. Therefore, when a person is appointed to investigate a claim, the investigation ordinarily takes priority over all other duties.

The general duties of the claims investigating officer include the following:

- Considering all information and evidence already compiled about the incident
- Conducting a thorough investigation of all aspects of the incident in a fair, impartial manner
- Interviewing all the witnesses as soon as possible
- Inspecting property damage and interviewing injured persons
- Determining the nature, extent, and amount of property damage or personal injury and obtaining supporting documentation

In addition to these general duties, the investigating officer also must make specific findings of fact. Great care must be used to make sure all relevant, required findings of fact are made. A major purpose of the claims investigation is to preserve evidence for use months, even years, in the future. An incomplete investigation can prejudice the government's ability to defend against

the claim. It could also deny a deserving claimant fair compensation.

Upon completion of the investigation, the CO or OIC takes action on the report of investigation. Depending on the circumstances, either the original report or a complete copy, together with all claims received, must be promptly sent to the appropriate claims adjudicating authority.

### **Adjudication**

An adjudicating authority is an officer designated by JAG to take administrative action (pay or deny) on a claim. In the Navy and Marine Corps, adjudicating authorities include certain senior officers in the Office of the Judge Advocate General (OJAG) and COs of NLSOs.

NLSOs and certain other commands have been assigned responsibility for adjudicating claims in their respective geographic areas. A claim usually will be sent by the command to the adjudicating authority serving the territory where the claim arose.

There is no maximum limit on the amount that can be paid under an FTCA claim. Payments in excess of certain amounts may require prior written approval by the Attorney General or his or her designee. An adjudicating authority can deny FTCA claims up to twice the amount authorized; therefore, if an adjudicating authority can pay FTCA claims up to \$20,000, FTCA claims up to \$40,000 can be denied. Claims in excess of \$40,000 could be denied only by an adjudicating authority in OJAG. Even though a claim may demand more than the payment or denial limits of an adjudicating authority serving a particular area, the command receiving the claim should send it to the appropriate local adjudicating authority who can attempt to compromise the claim for an amount within payment limits.

The adjudicating authority can take any of the following actions:

- Approve the claim, if within the payment limits
- Deny the claim, if within the denial limits
- Compromise the claim for an amount within payment limits
- Refer the claim to OJAG if (1) payments are recommended in an amount above the adjudicating authority's payment limits or (2) denial is recommended, but the amount claimed is above the adjudicating authority's denial limits

When a claimant accepts a payment in settlement of an FTCA claim, the acceptance releases the federal government from all further liability to the claimant arising out of the incident on which the claim is based. Any federal employees who were involved are also released from any further liability to the claimant. Therefore, if a claimant is not satisfied with the amount the adjudicating authority is willing to pay on an FTCA claim, the entire claim will be denied. The claimant then will have to bring suit in federal district court to recover on the claim. A claimant who accepts payment on an FTCA claim, even though unhappy with its amount, will be barred from recovering any additional amounts on that claim from the government or from any federal employee who was involved. The courts have held that acceptance of payment for property damage does not prevent a subsequent action for personal injury, unless the government can demonstrate that a settlement of all claims was contemplated by the parties.

### **Settlement and Payment**

A settlement agreement, signed by the claimant, must be received before payment in every case where the claim is either settled for less than the full amount claimed or the claim was not presented on a Standard Form 95. Refer to appendixes 1-2 and 1-3 of JAGINST 5890.1 for samples of settlement agreements.

### **Denial of the Claim**

Final denial of an administrative claim will be in writing and will be sent to the claimant or his or her duly authorized agent or legal representative by certified or registered mail, with return receipt requested. The notification of final denial will include the reason(s) for the denial. The notification will also include a statement informing the claimant of his or her right to file suit in the appropriate federal district court not later than 6 months after the date of the mailing of the notification.

### **Reconsideration**

Within 6 months of a final disposition of an FTCA claim by an adjudicating authority, the claimant may request reconsideration of the denial.

### **Claimant's Right to Sue**

Within 6 months after final denial of an FTCA claim by the adjudicating authority, the claimant may bring suit in federal district court. There is no right to a jury trial in an FTCA case. Although the Department of

Justice will represent the Department of the Navy in court, naval judge advocates assist by preparing litigation reports summarizing the pertinent facts in the case.

## **EXAMPLES**

The following examples demonstrate the operation of legal principles governing FTCA claims:

1. Facts. YN3 Daytona, the command's duty driver, was on an authorized run in Pensacola, Florida, when he was involved in an auto accident with Mr. Lucky. The police report clearly indicates that the accident was caused by YN3 Daytona's negligent failure to stop at a red light and that there was nothing Mr. Lucky could have done to avoid the collision. Mr. Lucky has filed, within 2 years of the accident, an FTCA claim for \$75,000 damage—including property damage to his automobile, medical expenses, and punitive damages. Can he collect?

Solution. Yes (except for the punitive damages). The accident was caused by the negligence of a government employee, YN3 Daytona, who was acting within the scope of his federal employment. None of the exclusions from liability apply. The claim does not arise out of an excluded governmental activity. It is not cognizable under any other claims statute and the claimant is not a member of any excluded class of claimants. Therefore, this claim is cognizable under the FTCA. Punitive damages are excluded from FTCA compensation. Because the claim is for \$75,000, it can be paid by a local adjudicating authority only if Mr. Lucky is willing to accept \$20,000 or less in full settlement of his claim. Otherwise, an adjudicating authority in OJAG will approve his claim.

2. Facts. Mrs. Shimmy, the dependent wife of an active duty naval officer, underwent surgery at the Naval Hospital, Portsmouth, Virginia. The surgeon, CDR Badknife, negligently severed a nerve in her neck. At first, Mrs. Shimmy was paralyzed from the neck down, but after 5 months' treatment and rehabilitation at the Naval Hospital she regained complete use of her arms, legs, and trunk. She has lost 5 months' wages from her civilian job, for which she was ineligible for state disability compensation. Also, she suffers from slight residual neurological damage that causes her shoulders to twitch involuntarily. This twitching is permanent. Mrs. Shimmy has presented an FTCA claim. Can she collect?

Solution. Yes (from the United States, but not from Dr. Badknife). The paralysis and lasting damage were

caused by the negligent acts of CDR Badknife, a federal employee acting within the scope of his employment. None of the three general types of exclusions from FTCA liability apply. The *Feres* doctrine does not apply to this claim because it involved personal injury to a military dependent not to active duty military personnel. Therefore, this claim is payable under the FTCA. The value of medical care and rehabilitation services Mrs. Shimmy received at the Naval Hospital will be deducted from her compensation; however, she will be compensated for all other nongovernmental medical services as well as for the pain and suffering she endured, the wages she has lost already (and likely will lose in the future), and the permanent nature and disfigurement of her injury. No claim will lie against CDR Badknife individually.

## **MILITARY CLAIMS ACT**

Like the FTCA, the Military Claims Act, 10 U.S.C. § 2733 (1982) (MCA), compensates for personal injury, death, or property damage caused by activities of the federal government. MCA claims are limited to two general types: (1) injury, death, or property damage caused by military personnel or civilian employees acting within the scope of their employment and (2) injury, death, or property damage caused by noncombatant activities of a peculiarly military nature.

The MCA provides compensation for certain claims that are not payable under the FTCA. First, its application is worldwide. Also, the claimant has no right to sue the government if his or her MCA claim is denied by the adjudicating authority. Finally, unlike the FTCA that creates statutory rights for claimants, the MCA is operative only "under such regulations as the Secretary of a military department may prescribe." Each service Secretary has issued regulations stating under what circumstances claims will be paid by his or her department under the MCA. A claimant has no greater rights than what is prescribed by each service's regulations.

## **SCOPE OF LIABILITY**

The MCA is limited to two rather broad categories of claims: those arising from the acts of military employees in the scope of their employment and those incident to noncombatant activities of a peculiarly military nature.

The Department of the Navy is liable under the MCA for injury, death, or property damage caused by its military members or civilian employees acting within

the scope of their employment. Although MCA regulations do not specifically require the claimant to establish governmental negligence to be able to recover damages under the MCA, OJAG has opined informally that the term *caused by* means negligently caused by. The concept, then, of causation under the MCA is the same as that required under the FTCA. Also, the scope of employment concept under the MCA is identical to that required under the FTCA claims.

The Department of the Navy also is liable under the MCA for injury, death, or property damage incident to noncombat activities of a peculiarly military nature. Examples include claims such as those arising out of maneuvers, artillery and bombing exercises, naval exhibitions, aircraft and missile operations, and sonic booms. Under this second theory of MCA liability, the claims need not show that the activities were belligerently conducted. In fact, the claimant's losses need not be traced to the conduct of any specific federal employees. The scope of employment concept does not apply.

The MCA applies worldwide. If a claim arising in a foreign country is cognizable under the FCA, however, it will be processed under that statute and not as an MCA claim. If the claim is denied, the claimant does not have the right to sue.

## **EXCLUSIONS FROM LIABILITY**

As with FTCA claims, there are three general categories of exclusions from liability under the MCA: certain exempted activities; claims cognizable under other claims statutes; and certain excluded classes of Claimants.

### **Exempted Governmental Activities**

A claim will not be payable under the MCA if it involves an exempted governmental activity. The most frequent examples include the following:

- Combat activities or enemy action
- Certain postal activities
- Property damage claims based on alleged contract violations by the government

### **Claims Cognizable Under Other Claims Statutes**

Claims that are governed by one of the following claims statutes are not payable under the MCA:

- Federal Tort Claims Act
- Military Personnel and Civilian Employees' Claims Act
- Foreign Claims Act
- Certain admiralty claims

### **Excluded Classes of Claimants**

Military members and civilian employees of the Department of the Navy may not recover under the MCA for personal injury or death occurring incident to service or employment. Compensation may be recovered for property damage under the MCA if it is not covered by another claims statute. As a practical matter, however, when a military member suffers property damage incident to service, it will usually be compensated under the Military Personnel and Civilian Employees' Claims Act.

Nationals of an ally of a country at war with the United States, unless the individual claimant is determined to be friendly to the United States, are excluded from MCA coverage.

Generally, a claim will not be paid under the MCA if the injury, death, or personal property damage was caused in whole or in part by the claimant's own negligence or wrongful acts. This contributory negligence is a complete bar to tort recovery in many states. However, if the law of the jurisdiction where the claim arose would allow recovery in a lawsuit, even though the claimant was negligent, the MCA claim can be paid. Under such circumstances, the negligent claimant will only recover that amount that local law would permit a negligent claimant to recover in its courts. This partial recovery concept is known as the comparative negligence doctrine.

### **MEASURE OF DAMAGES**

The rules for determining the amount of a claimant's recovery under the MCA are similar to those governing other claims.

The amount of compensation for property damaged is based on the estimated cost of restoring the property to its condition before the incident. If the property cannot be repaired economically, the measure of damage will be the replacement cost of the property minus any salvage value. The claimant also may recover compensation for loss of use of the property.



Compensation under the MCA for personal injury or death will include items such as medical expenses, lost earnings, diminished earning capacity, pain and suffering, and permanent disability. Usually, local standards are applied.

The following amounts are excluded from a claimant's MCA recovery:

- Interest
- Cost of preparing the claim
- Attorney's fees
- Compensation for inconvenience to the claimant

The Department of the Navy may pay MCA claims up to \$ 100,000. If the Secretary of the Navy considers that a claim in excess of \$100,000 is meritorious, a partial payment of \$100,000 may be made with the balance referred to the General Accounting Office for payment from appropriations provided therefore.

## **STATUTE OF LIMITATIONS**

A claim under the MCA may not be paid unless it is presented in writing within 2 years after it accrues. The statute of limitations may be suspended during time of armed conflict. The rules governing presentment of the claim are substantially similar to those under the FTCA.

## **PROCEDURES**

The investigation and adjudication procedures for MCA claims are substantially similar to those for FTCA claims. In fact, many claims paid under the MCA were initially presented as FTCA claims. The significant procedural differences under MCA are as follows:

- Advance payments. In limited circumstances, the Secretary of the Navy, or a designee, is authorized to make an advance payment not to exceed \$1,000 to, or on behalf of, any person suffering injury, death, or property damage resulting from an incident covered by the MCA or the FCA. This payment may be made before the claimant presents a written claim. Advance payments may be made only when the claimant or the claimant's family is in immediate need of funds for necessities (shelter, clothing, medical care, or burial expenses). Other resources must not be available, An advance payment is not an admission of government liability. The amount of the advance payment will be deducted from any settlement subsequently authorized.

- Dollar limits on adjudicating authorities. FTCA adjudicating authorities also adjudicate MCA claims. Dollar limitations are set forth in par. 9, enclosure (2) of JAGINST 5890.1. All adjudicating authorities may make advance payments.

- Claimant's right to appeal. There is no right to sue under the MCA after an administrative denial of an MCA claim. If an MCA claim is denied, in whole or in part, the claimant may appeal to JAG within 30 days after the denial.

## **Claim Form**

A claim is correct in form if it constitutes written notification of an incident, signed by the claimant or a duly authorized agent or legal representative, with a claim for money damages in a sum certain. A Standard Form 95 is preferred. A claim should be substantiated. A claim must be substantiated as required by JAGINST 5890.1 in order to be paid.

A proper claim maybe amended by the claimant at any time before final denial or payment of the claim. An amendment is submitted in writing and signed by the claimant or a duly authorized agent or legal representative.

## **Payment**

Claims approved for payment are sent to such disbursing officers as are designated by the Comptroller of the Navy for payment from appropriations designated for that purpose.

## **Final Disposition**

The adjudicating authority notifies the claimant, in writing, of the action taken on the claim. A final denial, in whole or in part, of any MCA claim will be in writing and sent to the claimant, or his or her attorney or legal representative, by certified or registered mail, return receipt requested. The notification of denial will include a statement of the reason(s) for denial and that the claimant may appeal. The notification will also inform the claimant of the following:

- The title of the appellate authority who will act on the appeal and that the appeal will be addressed to the adjudicating authority who last acted on the claim.
- No form is prescribed for the appeal, but the grounds for appeal should be set forth fully.

- The appeal must be submitted within 30 days of receipt by the claimant of notice of action on the claim.

## Appeal

A claim that is disapproved in whole or in part may be appealed by the claimant at any time within 30 days after receipt of notification of disapproval. An appeal will be in writing and state the grounds relied upon. An appeal is not an adversary proceeding and a hearing is not authorized; however, the claimant may obtain and submit any additional evidence or written argument for consideration by the appellate authority.

Processing of the appeal may be delayed pending further efforts by the adjudicating authority to settle the claim. Where the adjudicating authority does not reach a final agreement on an appealed claim, he or she will send the entire claim file to the next higher settlement authority who is the appellate authority for that claim.

The appellate authority will notify the claimant in writing of the determination on appeal; that such determination constitutes the final administrative action on the claim; and there is no right to sue under the MCA.

## EXAMPLES

1. Facts. A Navy aircraft crashed, utterly demolishing an automobile owned by Mr. Smashed, a civilian. Mr. Smashed has presented an MCA claim for the fair market value of his car. Can he recover?

Solution. Yes. This claim falls under the second theory of MCA liability—an incident arising out of noncombat activities of a peculiarly military nature. None of the exclusions from liability apply. This incident does not involve an exempted governmental activity. It is not covered by any other claim statute. The FTCA would not apply because the facts do not indicate any negligence by any federal employee. (If the crash had been caused by the Navy pilot's negligence, it would be compensable under the FTCA.) Mr. Smashed does not belong to an excluded class of claimants. There is no evidence that his actions in any way caused the incident; therefore, Mr. Smashed can recover the value of his car-less any salvage value.

2. Facts. While conducting gunnery exercises aboard USS *Shotinthedark*, naval personnel miscalculated and accidentally shot a shell into the fleet parking lot. The shell completely destroyed an automobile owned by ENS Noluck who was on duty aboard one of the ships tied up at a nearby pier. ENS

Noluck has filed an MCA claim. Is this claim payable under the MCA?

Solution. No. Although this incident involved noncombatant activities of a peculiarly military nature and was also caused by naval personnel acting within the scope of employment, the MCA does not apply. A claim that is cognizable under the Military Personnel and Civilian Employees' Claims Act is not payable under the MCA. Because compensation for this motor vehicle loss is available as a personnel claim, it is not payable under the MCA. However, ENS Noluck's recovery will be limited to the \$2,000 amount prescribed under the personnel claims regulations and not the greater amount payable under the MCA.

Special points. Perhaps you were thinking that, since the Military Personnel and Civilian Employees' Claims Act limits payments for automobile claims to \$2,000, the MCA could be used to pay the amount of ENS Noluck's loss that is in excess of the \$2,000 limit. No such luck. JAG has interpreted the phrase cognizable under the Military Personnel and Civilian Employees' Claims Act to mean payable under the Military Personnel and Civilian Employees' Claims Act. Accordingly, in this particular situation, the Military Personnel and Civilian Employees' Claims Act is considered to be the exclusive remedy available to pay for the damages to ENS Noluck's automobile.

## CLAIMS AGAINST THE GOVERNMENT-SPECIALIZED CLAIMS STATUTES

The general claims statutes discussed earlier in this chapter cover a broad range of losses and incidents. The specialized claims statutes are limited to certain types of losses suffered by specific classes of claimants occurring under certain specific circumstances. The specialized claims statutes interact with the general claims statutes in two ways. First, they may permit compensation for certain losses, claimants, or incidents not covered by one of the general claims statutes. Some of the specialized statutes were enacted to plug gaps in the general claims statutes. Second, the specialized claims statutes often act as exclusions from liability under general statutes. For example, a claim that otherwise would be payable under the FTCA or the MCA cannot be paid under those statutes if it is also cognizable under the Military Personnel and Civilian Employees' Claims Act.

## **MILITARY PERSONNEL AND CIVILIAN EMPLOYEES' CLAIMS ACT**

The Military Personnel and Civilian Employees' Claims Act of 1964, 31 U.S.C. § 3721 (1982) (hereafter called the Personnel Claims Act [PCA]), is a gratuitous payment statute intended to maintain morale by compensating service members and other federal employees for personal property that is lost, damaged, or destroyed incident to service.

Like the MCA, the PCA contemplated payment of claims under such regulations as the head of an agency may prescribe. Personnel claims regulations in other services are similar to the Navy's, but are not identical.

### **SCOPE OF LIABILITY**

The PCA is limited to recovery for personal property damage that includes the loss, destruction, capture, or abandonment of personal property. Damage to real property (land, buildings, and permanent fixtures) is not covered, but maybe compensated under the MCA. Also, remember that the PCA applies worldwide.

Only military personnel and civilian employees of the Department of Defense may recover compensation. Military personnel include commissioned officers, warrant officers, enlisted personnel, and other appointed military members. Civilian employees include those paid by the Department of the Navy on a contract basis.

To be payable under the PICA, the claimant's loss must have occurred incident to military service or employment. Eleven general categories of losses incident to service exist. These categories include the following:

1. Property losses in quarters or other authorized spaces designated by superior authority for storage of the claimant's personal property
2. Transportation losses, such as damage to household goods shipped pursuant to PCS orders
3. Losses caused by marine or aircraft disaster
4. Losses incident to combat or other enemy action
5. Property damage by being subjected to extraordinary risks
6. Property used for the benefit of the U.S. Government
7. Losses caused by the negligence of a federal employee acting within the scope of employment

8. Money deposited with authorized personnel for safekeeping, deposit, transmittal, or other authorized disposition

9. Certain noncollision damage to motor vehicles (limited to \$2,000, not including the contents of the vehicle)

10. Damage to house trailers and contents while on federal property or while shipped under government contract

11. Certain thefts aboard military installations from the possession of the claimant.

**NOTE:** Within each of these 11 categories are numerous specific types of incidents and circumstances. The rules governing each of these 11 areas can be complex and detailed. Therefore, it is absolutely necessary to refer to JAGINST 5890.1 to determine whether a particular personnel claim is contemplated by one of the 11 categories.

Not only must the property damage or loss occur incident to service, the claimant's possession and use of the damaged property must have been reasonable, useful, or proper under the circumstances. While the PCA provides broad protection for the military member's personal property, the government has not undertaken to insure all property against any risk. A personnel claim will usually be denied if the claimant's possession or use of damaged property was unreasonable under the circumstances. Thus, while possession of an inexpensive radio in a locker in the barracks is reasonable under most circumstances, keeping a \$1,500 stereo system in the locker usually is not. Whether the possession or use of the property was reasonable, useful, or proper is largely a matter of judgment by the adjudicating authority. Factors that are considered include, but are not limited to, the claimant's living conditions, reasons for possessing or using the property, efforts to safeguard the property, and the foreseeability of the loss or damage that occurred.

### **EXCLUSION FROM LIABILITY**

Exclusions from personnel claims liability fall into three general categories. The two most common examples are as follows:

- Caused by claimant's negligence. If the property damage was caused, either in whole or in part, by the claimant's negligence or wrongful acts, or by such conduct by the claimant's agent or employee acting in the scope of employment, the personnel claim will be

denied. Such contributory negligence is a complete bar to recovery.

- Collision damage to motor vehicle. Damage to motor vehicles is not payable as a personnel claim when it was caused by collision with another motor vehicle. "Motor vehicle" includes automobiles, motorcycles, trucks, recreational vehicles, and any other self-propelled military, industrial, construction, or agricultural equipment. Collision claims may be paid under other claims statutes—most frequently the FTCA or MCA—depending on the circumstances.

JAGINST 5890.1 limits or prohibits recovery for certain types of property damage. The most common examples are as follows:

- Currency or jewelry shipped or stored in baggage
- Losses in unassigned quarters in the United States
- Enemy property or war trophies
- Unserviceable or worn-out property
- Articles acquired for persons other than the claimant and members of his or her immediate household
- Inconvenience or loss of use expenses
- Items of speculative value
- Business property
- Sales tax
- Appraisal fees
- Quantities of property not reasonable or useful under the circumstances
- Articles being worn except under certain limited circumstances
- Intangible property representing ownership or interest in other property, such as bankbooks, checks, stock certificates, and insurance policies
- Government property
- Contraband (property acquired, possessed, or transported in violation of law or regulations)

## **MEASURE OF DAMAGE**

The rules for calculating the amount the claimant can recover on a personnel claim are not complicated. The provisions of JAGINST 5890.1, encl. (5), for

computing the amount of award may be summarized as follows:

- If the property can be repaired, the claimant will receive reasonable repair costs established either by a paid bill or an estimate from a competent person. Estimate fees may also be recovered under certain circumstances. Deductions may be made for any preexisting damage (damage or defects that existed before the incident that gave rise to the personnel claim) that also would be repaired. If the cost of repairing the property exceeds its depreciated replacement cost, however, the property will be considered not economically repairable.

- If the property cannot be economically repaired the claimant will recover an amount based on the property's replacement cost. This amount is reduced to reflect any depreciation. Schedules of depreciation deductions are published by JAG. The schedules do not normally require depreciation for items less than 6 months old. Older items are depreciated on a basis of a percentage of the replacement cost for each year the claimant owned the property. Depreciation deductions are not usually taken for certain expensive items that appreciate in value over time (antiques, heirlooms, valuable jewelry) or for relatively unique items such as original works of art. Deductions may also be taken when the claimant retains property that cannot be economically repaired, but nonetheless retains a significant salvage value.

The maximum amount payable under the PCA is \$40,000. Lower maximum amounts may be imposed for certain types of property. For example, noncollision damage claims for motor vehicles are limited to \$2,000, except when the vehicle is being shipped pursuant to PCS orders.

## **STATUTE OF LIMITATIONS**

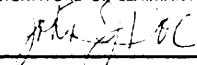
The statute of limitations for personnel claims is 2 years, although it can be suspended during time of armed conflict. In household goods claims, however, the claimant must act relatively promptly. Failure to take exceptions when the goods are delivered by the carrier, or within 70 days, may result in reduced payment. Also, failure to file the claim in time for the federal government to recover compensation from the earner under the carrier's contract with the government may also result in reduced payment.

**PROCEDURES**

Personnel claims procedures follow the same general pattern of presentment, investigation, and adjudication discussed with respect to FTCA claims. There are, however, some significant differences. Procedures in household goods shipment claims, which constitute the largest portion of personnel claims, can be

complicated. The most notable differences and distinctions are as follows:

- Claim forms. Personnel claims are presented on DD Form 1842, Claim for Loss of or Damage to Personal Property Incident to Service, a copy of which is reproduced in appendix 5-1 of JAGINST 5890.1, encl. (5), and illustrated in figure 12-2.

CLAIM FOR LOSS OF OR DAMAGE TO PERSONAL PROPERTY INCIDENT TO SERVICE			
PART I - TO BE COMPLETED BY CLAIMANT (See reverse side for Privacy Act Statement and Instructions)			
1. NAME OF CLAIMANT (Last, First, Middle Initial) Doe, John J.	2. BRANCH OF SERVICE USN	3. RANK OR GRADE E-5	4. SOCIAL SECURITY NUMBER 123-45-6789
5. HOME ADDRESS (Street, City, State and Zip Code) 1111 Navy Blvd Pensacola FL 32507		6. CURRENT MILITARY DUTY ADDRESS (If applicable) (Street, City, State and Zip Code) NAS Pensacola FL 32508-1000	
7. HOME TELEPHONE NO. (Include area code) (904) 123-4567	8. DUTY TELEPHONE NO. (Include area code) (904) 234-5678	9. AMOUNT CLAIMED \$673.98	
10. CIRCUMSTANCES OF LOSS OR DAMAGE (Explain in detail. Include date, place, and all relevant facts. Use additional sheets if necessary.)  HHGs were picked up by Bay Shore Lines on 11 February 1994 and delivered to residence on 12 March 1994. Upon inspection it was noted that one (1) cartoon was missing, and the sofa, king-size headboard, and the china cabinet were damaged.			
11. DID YOU HAVE PRIVATE INSURANCE COVERING YOUR PROPERTY? (E.g., say "Yes" on a shipment or quarters claim if you had transit, renter's or homeowner's insurance; say "Yes" on a vehicle claim if you had vehicle insurance. Attach a copy of your policy)			YES NO  X
12. HAVE YOU MADE A CLAIM AGAINST YOUR PRIVATE INSURER? (If "Yes," attach a copy of your correspondence. If you have insurance covering your loss, you must submit a del...and before you submit a claim against the Government)			X
13. HAS A CARRIER OR WAREHOUSE FIRM INVOLVED PAID YOU OR REPAIRED ANY OF YOUR PROPERTY? (If "Yes," attach a copy of your correspondence with the carrier or warehouse firm)			X
14. DID ANY OF THE CLAIMED ITEMS BELONG TO THE GOVERNMENT OR TO SOMEONE OTHER THAN YOU OR YOUR FAMILY MEMBER? (If "Yes," indicate this on your "List of Property and Claims Analysis Chart," DD Form 1844.)			X
15. WERE ANY OF THE CLAIMED ITEMS ACQUIRED OR HELD FOR SALE, OR ACQUIRED OR USED IN A PRIVATE PROFESSION OR BUSINESS? (If "Yes," indicate this on your "List of Property and Claims Analysis Chart," DD Form 1844.)			X
16. UNDER PENALTY OF LAW, I DECLARE THE FOLLOWING AS PART OF SUBMITTING MY CLAIM: If any missing items for which I am claiming are recovered, I will notify the office paying this claim. (For shipment claims.) Missing items were packed by the carrier; they were owned prior to shipment but not delivered at destination; after my property was packed, I/my agent checked all rooms in my dwelling to make sure nothing was left behind. I assign to the United States any right or interest I have against a carrier, insurer, or other person for the incident for which I am claiming; I authorize my insurance company to release information concerning my insurance coverage. I authorize the United States to withhold from my pay or accounts for any payments made to me by a carrier, insurer, or other person to the extent I am paid on this claim, and for any payment made on this claim in reliance on information which is determined to be incorrect or untrue. I have not made any other claim against the United States for the incident for which I am claiming. I understand that if any information I provide as part of my claim is false, I can be prosecuted.			
17. SIGNATURE OF CLAIMANT (or designated agent) 			18. DATE SIGNED (MMDDYY) 032194
PART II - CLAIMS APPROVAL (To be completed by Claims Office)			
19. PROCEDURE (X one) a. SMALL CLAIMS b. REGULAR CLAIMS		20. AMOUNT AWARDED. The claim is cognizable and meritorious under 31 U.S.C. 3721; the claimant is a proper claimant; the property is reasonable and useful; the loss has been verified in accordance with applicable procedures as prescribed by the controlling departmental regulation, and the following award is substantiated. \$	
21. SIGNATURES (Signatures at a and c not required if small claims procedure is utilized)			
a. CLAIMS EXAMINER	b. DATE SIGNED (MMDDYY)	c. REVIEWING AUTHORITY	d. DATE SIGNED (MMDDYY)
e. TYPED NAME AND GRADE OF APPROVING AUTHORITY		f. SIGNATURE OF APPROVING AUTHORITY	g. DATE SIGNED (MMDDYY)

DD Form 1842, DEC 88

Previous editions may be used until exhausted.

S/N 0102-LF-006-6000

1191250

Figure 12-2A.—Sample DD Form 1842, Claim for Loss of or Damage to Personal Property Incident to Service (front).

**Privacy Act Statement**

**AUTHORITY:** 31 U.S.C. 3721, and EO 9397, November 1943 (SSN).

**PRINCIPAL PURPOSE:** Filing, investigation, processing and settlement of claims for losses incident to service.

**ROUTINE USES:**

- a. Information is principally used to provide a legal basis for the administrative payment of claims against the Government. Information is also used in connection with:
  - (1) Recovery from common carriers, warehouse firms, insurers and other third parties.
  - (2) Collection from claimants of improper payments or overpayments.
  - (3) Investigation of possible fraudulent claims.
  - (4) Possible criminal prosecution by the Department of Justice or other agencies if fraud is established.
- b. Social Security Numbers are used to assure correct identification of claimants in order to assure payment to the proper claimant and avoid duplication of claims.

**DISCLOSURE:** Voluntary; however, failure to supply information will cause delay in settlement and may result in denial of a portion or all of the claim.

**INSTRUCTIONS TO CLAIMANTS**

- 1. You must submit your claim in writing within two years of the date of the incident giving rise to the claim. This two year time limitation may not be waived.
- 2. The claimant or an authorized agent must complete and sign Part I of this form, answering all questions. If the claim is signed by an agent (such as a spouse) or a survivor of a deceased proper claimant, that person must have a document showing his or her authority to present the claim, such as a power of attorney, etc.
- 3. If the claim is for property lost or damaged while being shipped or stored pursuant to travel orders, submit copies of your orders and all shipping documents, including your inventory and your "Joint Statement of Loss or Damage at Delivery/Notice of Loss or Damage," DD Forms 1840/1840R. If you notice damage after delivery, you must complete the DD Form 1840R and get it to the Claims Office within 70 days after delivery.
- 4. You may obtain further information from a Claims Office.
- 5. You are entitled to claim the following:
  - a. Reasonable local repair cost, if an item can be economically repaired. (You may claim small amounts without an estimate. Otherwise, submit an estimate of repair from a repair firm or, if repairs have been completed, your receipt. The claims office may waive this in appropriate cases.)
  - b. Reasonable local replacement cost if an item is missing, destroyed, or not economic to repair. (Replacement costs may be obtained from commercial catalogs or a military exchange. If you cannot find the item in a catalog or the exchange and the cost is more than \$100.00, obtain a statement from a commercial firm for the cost of a similar item. If you have purchase receipts, bring these to the Claims Office as well.)
  - c. Reasonable cost of obtaining local estimates of repair, if the cost of such estimates will not be credited if repair work is done. (Normally, you may not claim appraisal fees.)

**PART III - DENIAL OR SUPPLEMENTAL PAYMENT (To be completed by Claims Office)**

<p><b>23. DENIAL (X if applicable)</b></p> <p>The claim is not cognizable or meritorious under 31 U.S.C. 3721 and the applicable provisions of the controlling departmental regulation, and is denied.</p>	<p><b>24. SUPPLEMENTAL PAYMENT (X and complete if applicable)</b></p> <p>The claim is cognizable and meritorious under 31 U.S.C. 3721, and the following additional award is substantiated: \$ _____</p>		
<b>25. SIGNATURES</b>			
a. CLAIMS EXAMINER	b. DATE SIGNED (MMDDYY)	c. REVIEWING AUTHORITY	d. DATE SIGNED (MMDDYY)
<b>26. APPROVING/SETTLEMENT AUTHORITY (Settlement Authority is required for denial.)</b>			
a. TYPED NAME AND GRADE	b. SIGNATURE	c. DATE SIGNED (MMDDYY)	

DD Form 1842 Reverse, DEC 88

\*U.S. Government Printing Office: 1990-704-010/04257 2-1

**Figure 12-2B.—Sample DD Form 1842, Claim for Loss of or Damage to Personal Property Incident to Service (back).**

- **Supporting documentation.** Supporting documentation in personnel claims can be rather extensive. DD Form 1844, List of Property and Claims Analysis Chart, usually is required. A sample DD Form 1844 is reproduced in appendix 5-2 of JAGINST 5890.1, encl. (5), and illustrated in figure 12-3. Also,

other documentation (such as copies of orders, bills of lading, inventories, copies of demands on carriers, and written repair estimates) may be required. JAGINST 5890.1 sets forth the extent and type of documentation and supporting evidence required. These documents should not be treated lightly. DD Form 1840/1840R,



Notice of Loss or Damage (fig. 12-4), must be submitted to a personal property office within 70 days of the delivery. Failure to furnish it means the military member will not recover anything for lost or damaged articles because the government must file with the carrier by 75 days.

- Investigation. The CO of the military organization responsible for processing the claim refers

the claim to a claims investigating officer. At large commands, the claims investigating officer is often a full-time civilian employee. The claims investigating officer's duties include reviewing the claim and its supporting documentation for completeness and, if necessary, examining the property damage. The claims investigating officer will also prepare and present a concurrent claim on behalf of the federal government

NOTICE OF LOSS OR DAMAGE		
<p><b>INSTRUCTIONS TO MEMBER</b> You have up to 70 days to inspect your property and note all loss and/or damage. Should you find any loss or damage not reported on DD Form 1840 at the time of delivery, complete Section A below. Use only ballpoint or typewriter. THE COMPLETED FORM MUST BE DELIVERED TO YOUR LOCAL CLAIMS OFFICE NOT LATER THAN 70 DAYS FROM DATE OF DELIVERY. FAILURE TO DO SO MAY RESULT IN A REDUCTION OF THE AMOUNT PAYABLE ON YOUR CLAIM. Keep a copy of this form for your records, recompleted and dated by the Claims Office. If more than one page is needed, please number the pages.</p>		
SECTION A - (To be completed by member)		
1. STATEMENT OF PROPERTY LOSS/DAMAGE You are hereby notified of the loss and/or damage in the following shipment of personal property:		
a. MEMBER'S NAME (Last, First, Middle Initial)	b. DEPARTURE POINT	
JONES, John P.	San Diego, California	
c. ARRIVAL POINT	d. GBU NUMBER	e. DATE OF DELIVERY
Alexandria, Virginia	QB-123-456	29 FEB 1994
f. You are further notified that property owner intends to present a claim for this loss and/or damage. You are hereby extended an opportunity to inspect the property. The estimated amount of loss/damage is (x one): <input type="checkbox"/> under \$500 <input checked="" type="checkbox"/> over \$500		
2. LIST OF PROPERTY LOSS/DAMAGE. (NOTE: Tracer action is requested for items listed as missing)		
a. INVENTORY NO	b. NAME OF ITEM	c. GENERAL DESCRIPTION OF LOSS OR DAMAGE (If missing, so indicate)
35	Rug & Pad	Wet and mildewed
20	Lampshade	Shattered glass
42	Dresser	Gouged and Scratched
SECTION B - (To be completed by Claims Office) (NOTE: MAIL ORIGINAL TO HOME OFFICE OF CARRIER)		
3. TO: (Home Office of Carrier) (Include ZIP Code)		3a. DATE OF DISPATCH
WEMOVEIT Van Lines 1150 Moveit Street Jacksonville, TN 32223		
4. YOUR REPRESENTATIVE MAY CONTACT THIS CLAIMS OFFICE FOR ASSISTANCE:		
4a. NAME AND ADDRESS OF CLAIMS OFFICER		4b. SIGNATURE
		4c. DATE SIGNED
		4d. TELEPHONE NO

DD FORM 1840R (Reverse), 84 SEP

Figure 12-4.—Sample DD Form 1840R, Notice of Loss or Damage.



against any carriers liable for the damage under their government contract.

- **Adjudication.** Personnel claims adjudicating authorities and their respective payment limits are listed in section 7 of JAGINST 5890.1, encl. (5). For Marine Corps personnel, personnel claims are adjudicated at Headquarters, Marine Corps.

- **Advance payments.** When the claimant's loss is so great that the claimant immediately needs funds to provide fundamental necessities of life, the adjudicating authority may make an advance partial payment—normally one-half of the estimated total payment.

- **Reconsideration.** The claimant may request reconsideration of the claim, even though he or she has accepted payment, if the claim was not paid in full. If the adjudicating authority does not resolve the claim to the claimant's satisfaction, the request for reconsideration is forwarded to the next higher adjudicating authority. There is no right under the PCA to sue the government.

- **Effect of claimant's insurance.** If the claimant's property is insured in whole or in part, the claimant must file a claim with the insurer as a precondition to recovery under the PCA. The PCA is intended to supplement any insurance the claimant has; it is not intended to be an alternative to that insurance or to allow double recovery. If the claimant receives payment under his or her insurance policy for the claimed property damage, the amount of such payment will be deducted from any payment authorized on the PCA claim. Likewise, if the claimant receives payment on his or her personnel claim, and then is paid for the same loss by an insurance company, the claimant must refund the amount of the insurance payment to the federal government.

## EXAMPLES

1. **Facts.** Airman Hero was standing near the hangar when an aircraft crashed while landing. An officer told Hero to jump into a vehicle and go to the crash scene to help out in any way he could. Airman Hero immediately complied. At the scene, Airman Hero assisted an injured crew member from the wreckage. In doing so, Airman Hero badly ripped his uniform pants on a jagged piece of debris, and the intense heat melted the plastic case of his watch. Airman Hero has presented a personnel claim for his pants and watch. Will he collect?

**Solution.** Yes. Although damage to articles being worn is not usually payable under the PCA, an exception exists when the loss is caused by fire, flood, hurricane, theft or vandalism, or other unusual circumstances. In this case, Airman Hero was performing an official duty in response to an aircraft disaster and suffered property damage while trying to save lives. This situation meets the requirements of unusual occurrence and, therefore, the claim is payable.

2. **Facts.** While parked in an authorized parking space during working hours, Seaman Rolledover's automobile was destroyed by a runaway government steamroller operated by Mr. Pancake, a civilian Navy employee acting in the scope of his employment. The car, presently valued at \$3,800, is a total loss. Seaman Rolledover's insurance policy does not cover steamroller accidents, so Seaman Rolledover has filed a personal claim for \$3,800. Can he collect?

**Solution.** Yes (but not under the PCA). Although this loss appears to be incident to service, collision damage to automobiles is specifically excluded from payment under the PCA. Like many other vehicle collision claims, Seaman Rolledover's claim is payable under the MCA because his loss was caused by a federal employee acting in the scope of employment. This claim is not payable under the FTCA because the *Feres* doctrine effectively prevents such claims by military members. Where one act may not cover Seaman Rolledover's loss, another statute will. The fact that this claim is not payable under the PCA actually works in Seaman Rolledover's benefit. Under the MCA, Seaman Rolledover can recover the entire \$3,800 he claimed. Under the PCA, the maximum amount payable for noncollision vehicle damage is usually only \$2,000.

## FOREIGN CLAIMS ACT

The Foreign Claims Act, 10 U.S.C. § 2734-2736 (1982) (FCA), provides compensation to inhabitants of foreign countries for personal injury, death, or property damage caused by, or incident to noncombat activities of military personnel overseas. Although the U.S. Government's scope of liability under the FCA is broad, certain classes of claimants and certain types of claims are excluded from the statute's coverage. Procedures for adjudicating an FCA claim are substantially different from the general procedural pattern for other types of claims against the government.

Chapter VIII, part B, of the *JAG Manual* prescribes the requirements for the investigation and adjudication of FCA claims.

## **SCOPE OF LIABILITY**

The government's liability under the FCA is somewhat parallel to that under the MCA. Liability is based on two general theories: (1) loss caused by military personnel and (2) loss incident to noncombat military activities. The government's liability under the FCA is generally greater than under the MCA. On the other hand, the FCA is more limited than the MCA in terms of eligible claimants and territorial application.

### **Loss Caused by Military Personnel**

Under the FCA, the government is liable for personal injury, death, and property damage, including both real and personal property, caused by military members or civilian military employees. Unlike the FTCA and the MCA, the scope of employment doctrine does not apply except when the civilian employee is a native foreign national (for example, a Spanish citizen employed by the U.S. Government in Spain who must be acting within the scope of employment for a possible recovery under the FCA). Also, unlike FTCA claims, the acts that caused the loss need not be wrongful or negligent. The government assumes liability for virtually all acts ranging from mere errors in judgment to malicious criminal acts.

### **Loss Incident to Noncombat Military Activities**

The second theory of FCA liability is virtually identical to the second basis for liability under the MCA. The government assumes liability for personal injury, death, or property damage, both real and personal property, caused by, or incident to, noncombat military activities. Such activities are peculiarly military, having little parallel in civilian life, and involve situations in which the federal government historically has assumed liability. If such a loss incident to noncombat military activities is payable both under the FCA and also under the MCA, it will be paid under the FCA.

### **Effect of Claimant's Negligence**

A claimant whose negligent or wrongful conduct partially or entirely caused the loss might be prevented from recovery under the FCA. The effect, if any, of the claimant's contributory or comparative negligence is determined by applying the law of the country where the claim arose. Under such circumstances, the claimant recovers under the FCA only to the extent that his or her own courts would have permitted compensation.

## **Territorial Application**

The FCA applies to claims arising outside the United States, its territories, commonwealths, and possessions. The fact that the claim arises in a foreign country, but in an area that is under the temporary or permanent jurisdiction of the United States (for example, an overseas military base), does not prevent recovery under the FCA.

### **Relationship to Claims Under Treaty or Executive Agreement**

Certain treaties and executive agreements, such as Article VIII of the NATO Status of Forces Agreement, contain claims provisions that may be inconsistent with the FCA principles and procedures. When such treaty or executive-agreement (claims provisions conflict with the FCA, the treaty or the executive agreement usually governs. In countries where such treaty or executive-agreement provisions are in effect, directives of the cognizant area coordinator should be consulted before processing any claims by foreign nationals.

## **EXCLUSIONS FROM LIABILITY**

There are two general categories of exclusions from FCA liability: excluded types of claims and excluded classes of claimants.

### **Excluded Types of Claims**

The following types of claims are not payable under the FCA:

- Claims that are based solely on contract rights or breach of contract
- Private contractual and domestic obligations of individual military personnel or civilian employees (private debt owed to foreign merchant)
- Claims based solely on compassionate grounds
- Claims for support of children born out of wedlock where paternity is alleged against a service member
- Claims for patent infringements
- Claims arising directly or indirectly from combat activities
- Admiralty claims unless otherwise authorized by JAG

## **Excluded Classes of Claimants**

The following types of classes of claimants are excluded from recovering under the FCA:

- Inhabitants of the United States, including military members and dependents stationed in a foreign country and U.S. citizens and resident aliens temporarily visiting the foreign country
- Enemy aliens, unless the claimant is determined to be friendly to the United States
- Insurers and subrogee

## **MEASURE OF DAMAGES**

Damages under the FCA are determined by applying the law and local standards of recovery of the country where the incident occurred.

The maximum amount payable under the FCA is \$100,000. In the case of a meritorious claim above that amount, the Secretary of the Navy may pay up to \$100,000 and certify the balance to Congress for appropriation.

## **STATUTE OF LIMITATIONS**

The claim must be presented within 2 years after the claim accrues. If the claim is presented to a foreign government within this period, pursuant to treaty or executive agreement provisions, the statute of limitations requirement will be satisfied.

## **PROCEDURES**

Under the FCA, the investigation and adjudication functions are merged in a foreign claims commission that the commanding officer appoints. The foreign claims commission not only conducts an investigation similar to a *JAG Manual* investigation not requiring a hearing, but also is empowered to settle the claim within certain dollar limits.

## **EXAMPLE**

Facts. USS *Getunderway* was making a goodwill visit to Alexandria, Egypt. EM3 Party went on liberty. Wanting to see as much of the countryside as he could, he hot-wired a car parked near the pier. Later that night, while driving extremely fast, high on hashish, and carefully sipping his ouzo, EM3 Party smashed the car into a tree. The owner, Mr. Mycarbustad, an Egyptian citizen, wants to file a claim. Can he collect?

Solution. Yes, Even though EM3 Party's acts were not in the scope of his employment, were highly negligent, and involved criminal acts, the claim is payable under the FCA.

## **ADMIRALTY CLAIMS**

Admiralty is a vast, highly specialized area of law. The purpose of this section is merely to provide a brief introduction to admiralty claims, with specific focus on the command's responsibilities.

## **ADMIRALTY LAW DEFINED**

Admiralty law involves liability arising out of maritime incidents such as collisions, grounding, and spills. Admiralty claims may be asserted either against or in favor of the federal government. The Navy's admiralty claims usually are handled by attorneys in the Admiralty Division of OJAG. Other judge advocates with specialized admiralty training are located at larger NLSOs and at certain overseas commands. When admiralty claims result in litigation, attorneys with the Department of Justice, in cooperation with the Admiralty Division, represent the Navy in court. Thus, while the command has little involvement in the adjudication or litigation of admiralty claims, it often has critical investigative responsibilities.

## **STATUTORY AUTHORITY AND REFERENCES**

Suits in Admiralty Act, 46 U.S.C. § 741-752 (1982)—The Suits in Admiralty Act provides that a suit in admiralty may be brought against the federal government in all circumstances under which an admiralty suit could be brought against a private party or vessel.

Public Vessels Act, 46 U.S.C. § 781-790 (1982)—The Public Vessels Act supplements the Suits in Admiralty Act and provides for admiralty remedies in cases involving naval vessels.

10 U.S.C. § 7623 (1982)—Section 7623 of Title 10, U.S.C., provides for settlement of claims by the government against private parties and vessels.

*JAG Manual*— Chapter XII of the *JAG Manual* prescribes the Navy's regulations governing reporting, investigation, and adjudication of admiralty claims for and against the government.

## SCOPE OF LIABILITY

The federal government has assumed extensive liability for personal injuries, death, and property damage caused by naval vessels or incident to naval maritime activities. Examples of the specific types of losses that give rise to admiralty claims include incidents such as the following:

- Collisions
- Swell wash and wake damage
- Damage to commercial fishing equipment, beds, or vessels
- Damage resulting from oil spills, paint spray, or blowing tubes
- Damages or injuries to third parties resulting from a fire or an explosion aboard a naval vessel
- Damage to commercial cargo carried in a Navy bottom
- Damage caused by improperly lighted, marked, or placed buoys or navigational aids for which the Navy is responsible
- Personal injury or death of civilians not employed by the federal government (longshoremen, harbor workers, and passengers)

## EXCLUSIONS FROM LIABILITY

Certain categories of persons are prevented from recovering under an admiralty claim for personal injury or death incurred incident to maritime activities. Such potential claimants are compensated under other statutes. Such excluded claimants include the following:

- Military personnel cannot recover for personal injury, death, or property damage resulting from the negligent operation of naval vessels, except when they are injured or killed while aboard a privately owned vessel that collides with a naval vessel.
- Civil service employees and seamen aboard Military Sealift Command vessels are limited to compensation under the Federal Employees' Compensation Act, 5 U.S.C. § 8101-8150 (1982), for personal injury or death.

## MEASURE OF DAMAGES

A survey of damaged property is required in all collisions and any other maritime incidents involving potential liability for property damage. Surveys have been customary in admiralty law and are intended to eliminate burdensome and difficult questions concerning proof of damages. Section 1210 of the *JAG Manual* has an extensive discussion of survey procedures.

In personal injury cases, medical examinations are required for all injured persons. The function of the medical examination is similar to that of the property damage survey.

The Secretary of the Navy is authorized to settle admiralty claims up to \$1,000,000. Amounts in excess of that must be certified to Congress for appropriation. Certain other officials in the Department of the Navy are authorized to settle admiralty claims for smaller amounts.

## STATUTE OF LIMITATIONS

Suits in admiralty must be filed within 2 years after the incident on which the suit is based. Unlike the statute of limitations rule under the FTCA, filing an admiralty claim with the Department of the Navy does not toll the running of this 2-year period. Nor can the government administratively waive the statute of limitations in admiralty cases. If the admiralty claim cannot be administratively settled within 2 years after the incident, the claimant must file suit against the government to prevent the statute of limitations from running.

## PROCEDURES

The procedures for investigating and adjudicating admiralty claims are explained in sections 1204-1216 of the *JAG Manual*. For purposes of this brief introduction to admiralty claims, the following procedural aspects are most significant.

The most critical command responsibility in admiralty cases is to immediately notify JAG and an appropriate local judge advocate of any maritime incident that might result in an admiralty claim for, or against, the government. Section 1204 of the *JAG Manual* gives details concerning the requirement for immediate reports. Because of the highly technical, factual, and legal issues that may be involved in an admiralty case, it is absolutely vital that the Admiralty

Division of OJAG be involved in the case from the earliest possible moment.

After initially notifying JAG, the command must promptly begin an investigation of the incident. A JAGMAN investigation usually is required although, in some circumstances, a letter report is appropriate. Section 1205 of the *JAG Manual* provides guidance for determining whether a JAGMAN investigation is necessary, and, if one is necessary, the type of investigation that is most appropriate. Chapter II of the *JAG Manual* provides specific investigatory requirements for certain maritime incidents. Also, sections 1207 and 1210 of the *JAG Manual* prescribe requirements and procedures concerning witnesses and documents in admiralty investigations.

### **NONSCOPE CLAIMS**

Section 2737 of Title 10, U. S. C., and enclosure (4) of JAGINST 5890.1 provide for payment of certain types of claims not cognizable under any other provisions of law. Such claims are known as "nonscope claims" and arise out of either the use of a government vehicle anywhere or the use of government property aboard a federal installation. The personal injury, death, or property damage must be caused by a federal military employee, but there is no requirement that the acts be negligent or in the scope of federal employment (hence the term *nonscope claim*).

### **SCOPE OF LIABILITY**

As a precondition to payment under the nonscope claims provisions, the claim must not be cognizable under some other claims statute.

The resulting personal injury, death, or property damage must be caused by a federal military employee (either a military member or a civilian employee of the armed forces or Coast Guard). Acts by employees of nonappropriated fund activities are not covered by the nonscope claims statute.

Neither the nonscope claims statute nor the Navy's regulations require that the federal military employee's conduct causing the loss be negligent or otherwise wrongful.

The scope of employment concept, which is required under the FTCA and for some MCA claims, does not apply to nonscope claims.

Nonscope claims are limited to injury, death, or property damage arising out of either of the following circumstances:

- Incident to the use of a government vehicle anywhere.

- Incident to use of government property aboard a government installation. (Government installation means any facility having fixed boundaries and owned or controlled by the federal government. It includes both military bases and nonmilitary installations.)

There are no territorial limitations on nonscope claims.

### **EXCLUSIONS ON LIABILITY**

If the loss was caused, in whole or in part, by the claimant's negligence or wrongful acts, or by negligence or wrongful acts by the claimant's agent or employee, the claimant is barred from any recovery under the nonscope claims statute.

Subrogee and insurers may not recover subrogated nonscope claims.

### **MEASURE OF DAMAGES**

For personal injury or death, the claimant may recover no more than actual medical, hospital, or burial expenses not paid or furnished by the federal government.

The claimant may not recover any amount that he or she can recover under an indemnifying law or indemnity contract.

The maximum payable as a nonscope claim is \$1,000.

### **STATUTE OF LIMITATIONS**

A nonscope claim must be presented within 2 years after the claim accrues or it will be forever barred.

### **PROCEDURES**

Notable procedural aspects of nonscope claims include the following:

- Automatic consideration of other claims. Claims submitted pursuant to the FTCA or MCA, but which are not payable under those acts because of scope of employment requirements, automatically will be considered for payment as a nonscope claim.

- Adjudicating authority. All adjudicating authorities listed in JAGINST 5890.1 are authorized to adjudicate nonscope claims.

- Claimant's rights after denial. If a claim submitted solely as a nonscope claim is denied, the claimant may appeal to the Secretary of the Navy (Judge Advocate General) within 30 days of the notice of denial. There is no right to sue under the nonscope claims statute.

### EXAMPLE

Facts. SW1 Bad Boy resolved to kill his archenemy SWC Nice Guy, but he planned to make it look like an accident. He stole a government sedan, drove it off base, and rode around town looking for SWC Guy. When he spotted SWC Guy standing on a corner, SW1 Boy aimed the car at SWC Guy and bore down on him at a high speed. SWC Guy tried to jump out of the way, but not quickly enough to avoid being struck a glancing blow. As a result, SWC Guy suffered extensive injuries. Also, the clothes he was wearing and the radio he was carrying were destroyed. SWC Guy has filed an FTCA claim for \$15,000 (\$600 for property damage and \$14,400 for personal injury, pain and suffering, and lost wages from his part-time job). How much, if anything, will SWC Guy collect?

Solution. his claim is not payable under the FTCA for several reasons, not counting any possible *Feres* doctrine problem caused by the claimant being a military member. First, FTCA does not provide compensation for losses caused by intentional torts such as assaults and battery. Moreover, SW1 Boy's act was not within the scope of his federal employment. Under the FTCA, the government is liable only for acts within the scope of federal employment. The fact that SW 1 Boy's acts were outside the scope of his federal employment also prevent paying his claim under the MCA. However, under the automatic consideration provisions, this claim may be considered as a nonscope claim. It is not cognizable under another claims statute and the injuries and damage were caused by a federal employee. Neither negligence nor scope of employment is required. The claim involves the use of a government vehicle. Therefore, SWC Guy can recover under the nonscope claims statute. He will not be compensated for medical expenses that were provided by the U.S. Government. Pain and suffering and lost wages are likewise not compensable under the nonscope claims statute. Therefore, SWC Guy will recover only the \$600 property damage loss.

## ARTICLE 139, UCMJ, CLAIMS

Article 139 of the UCMJ provides compensation for private property damage caused by riotous, willful, or wanton acts of members of the naval service not within the scope of their employment or the wrongful taking of property by a member of the naval service. Article 139 claims are unique in that they provide for the checkage of the military pay of members responsible for the property damage. Overseas, these types of damages may be paid for under the FCA. Private citizens in the United States generally do not have an effective means by which to be reimbursed for property damage or loss in these situations. Historically, Article 139 claims have been extremely rare within the Department of the Navy because of the low dollar limit and a requirement that an investigation requiring a hearing be conducted to investigate the validity of the claim.

Because it is the only Victim's Rights Act that the Department of the Navy has, there is a new emphasis being placed on Article 139 claims within the Navy. Although the individual member, not the federal government, is liable for the damage, the member's command has significant procedural responsibilities that can be found in chapter IV of the *JAG Manual*,

### SCOPE OF LIABILITY

Article 139 claims are limited to damage, loss, or destruction of real or personal property.

The property damage, loss, or destruction must be caused by acts of military members that involve riotous or willful conduct, or demonstrate such a reckless and wanton disregard for the property rights of other persons that willful damage or destruction is implied. Only damage that is directly caused by the conduct will be compensated.

A claim that a marine accidentally bumped into and broke a mirror in the course of a drunken brawl with a Navy SEAL would be cognizable. Even though the marine did not specifically intend to break the mirror and you could characterize the act as simple negligence, the marine's conduct was riotous and damage resulted from it.

A claim that a sailor drove a car at 90 miles an hour down the highway and drifted over the center line into an oncoming car would not be cognizable.

A wrongful taking is essentially theft. Claims for property that was taken through larceny, forgery, embezzlement, misappropriation, fraud, or similar theft offenses are normally payable. Loss of property that

involves a dispute over the terms of a contract or over ownership of property is not normally payable unless the dispute is merely a cover for an intent to steal. Article 139 is not a way in which an individual can have his or her debts collected, nor is it to be used to mediate business disputes.

A claim that a marine borrowed a friend's VCR to tape a show and did not return it on the promised date would not be cognizable unless the marine borrowed the VCR on such a pretext and then sold it. This would prove a present intent to steal.

A claim that a sailor issued a worthless check would be cognizable if evidence establishes an intent to defraud. Such intent may be inferred when the sailor fails to make good on a bad check within 5 working days of receiving notice of insufficient funds, in the same way that a criminal intent to defraud may be inferred under Article 123a, UCMJ,

A claim that a sailor stole a check or credit card and used it to obtain items of value would be cognizable.

## **EXCLUSIONS FROM LIABILITY**

The following types of claims are not payable under Article 139:

- Claims resulting from conduct that involves only simple negligence (failure to act with the same care that a reasonable person would use under the circumstances)
- Subrogated claims (by insurers)
- Claims payable under other claims statutes or regulations
- Claims for personal injury or death
- Claims arising from conduct occurring within the scope of employment
- Claims for reimbursement for damage, loss, or destruction of government property
- Claims arising from contractual or fiduciary relationships
- Claims for indirect or consequential damages (such as lost business, lost earnings, carrying charges, interest, attorney fees, inconvenience, telephone calls, or time spent preparing the claim)

## **PROPER CLAIMANTS**

Any individual (including both civilians and service members), business entity, state or local government, or charity may submit a claim.

## **MEASURE OF DAMAGES**

The amount of recovery is limited to only the direct physical damage caused by the service member. Service members are not assessed for damage or property loss due to the acts or omissions of the property owner, his or her lessee or agent, that were a proximate contributing factor to the loss or damage of said property. In these cases, the standard for determining responsibility will be one of comparative responsibility.

The maximum amount that may be approved by an OEGCMJ under Article 139 is \$5,000 per offender, per incident. Where there is a valid claim for over \$5,000, the claim, investigation into the claim, and the CO's recommendation are sent to JAG (Code 35) or to Headquarters, U.S. Marine Corps (Code JAR), as appropriate, before checkage against the offender can begin. The amount that can be charged against an offender in any single month cannot exceed one-half of the member's basic pay.

## **STATUTE OF LIMITATIONS**

The claim must be submitted within 90 days of the incident upon which the claim is based.

## **PROCEDURES**

Article 139 claims involve certain unique procedures. The claimant may make an oral claim, but it must be reduced to a personally signed writing that sets forth the specific amount of the claim, the facts and circumstances surrounding the claim, and any other matters that will assist in the investigation. If there is more than one claimant from a single incident, each claimant must submit a separate and individual claim.

### **Investigation**

Claims cognizable under Article 139 may be investigated by an investigation not requiring a hearing. There is no requirement that the alleged offender be designated as a party to the investigation and afforded the rights of a party. The investigation inquires into the circumstances surrounding the claim, gathering all relevant information about the claim. Under no

circumstances should the investigation of a claim be delayed because criminal charges are pending.

The investigation makes findings of fact and opinions on whether the claim:

- is by a proper claimant (in writing and for a definite sum).
- is made within 90 days of the incident that gave rise to it.
- is for property belonging to the claimant that was the subject of damage, loss, or destruction by a member or members of the naval service.
- specifies the amount of damage suffered by the claimant.
- is meritorious.

The investigation also makes recommendations about the amount to be assessed against the responsible parties. If more than one service member is responsible, the investigation must make recommendations concerning the amount to be assessed against each individual.

A preponderance of the evidence is necessary for pecuniary liability under Article 139.

Normally, the measure of a loss is either the repair cost or the depreciated replacement cost for the same or similar item. Depreciation for most items depends on the age and condition of the item. The Military Allowance List-Depreciation Guide should be used in determining depreciated replacement cost.

### **Subsequent Action**

If all offenders are attached to the command convening the investigation, the CO assures that the offenders have an opportunity to see the investigative report and are advised that they have 20 days in which to submit a statement or additional information. If a member declines to submit further information, he or she will so state, in writing, during the 20-day period.

The CO reviews the investigation and determines whether the claim is in proper form, conforms to Article 139, and whether the facts indicate responsibility for the damage by members of the command. If the CO finds that the claim is payable, he or she fixes the amount to be assessed against the offender(s).

If the CO has authority to convene a GCM, no further review of the investigation is required. If the CO does not have GCM CA, the investigation and the CO's

action is forwarded to the OEGCMJ over the command for review and action. The OEGCMJ will then notify the CO of his or her determinations, and the CO will take action consistent with that determination.

If the offenders are members of different commands, the investigation is sent to the OEGCMJ over the commands to which the alleged offenders are assigned. The OEGCMJ makes sure the alleged offenders are shown the investigative report and are permitted to comment on it before action is taken on the claim.

The OEGCMJ reviews the investigation to determine whether the claim is properly within Article 139 and whether the facts indicate responsibility for the damage on members of his or her command. If the OEGCMJ determines that the claim is payable, he or she fixes the amount to be assessed against the offenders and direct their COs to take action accordingly.

The OEGCMJ may, upon request by either the claimant or the member assessed for the damage, reopen the investigation or take other action he or she believes is in the interest of justice. If the OEGCMJ anticipates acting favorably on the request, he or she will give all interested parties notice and an opportunity to respond.

If the claim is for \$5,000 or less, the claimant or the member against whom pecuniary responsibility has been assessed may appeal the decision to the OEGCMJ within 5 days of receipt of the OEGCMJ's decision. If good cause is shown, the OEGCMJ may extend the appeal time. The appeal is submitted via the OEGCMJ to JAG for review and final action. Imposition of the OEGCMJ's decision is held in abeyance pending final action by JAG.

### **RELATIONSHIP TO COURT-MARTIAL PROCEEDINGS**

Article 139 claims procedures are entirely independent of any court-martial or nonjudicial punishment proceedings based on the same incident. Acquittal or conviction at a court-martial may be considered by an Article 139 investigation, but it is not controlling on determining whether a member should be assessed for damages. The Article 139 investigation is required to make its own independent findings.

### **EXAMPLE**

Facts. YN3 Snootfull got uproariously drunk, stole a U.S. Government sedan, and drove down the main street of Anywhere, Florida, at 85 mph. Finding this less



than entirely challenging, he decided to drive in reverse with his eyes closed. In doing so, YN3 Snootfull smashed into the front window of Anywhere's Country Kitchen. Mama Cook has filed an Article 139 claim with YN3 Snootfull's CO. Is this claim payable under Article 139, UCMJ?

Solution. No. YN3 Snootfull's conduct certainly qualified as acts showing reckless and wanton disregard of the property rights of others. However, this claim would also be compensable under the nonscope claims statute because it involved use of a federal government vehicle while not within the scope of federal employment. Therefore, it is not payable under Article 139, UCMJ.

### **CLAIMS ON BEHALF OF THE GOVERNMENT FEDERAL CLAIMS COLLECTION ACT**

Under the Federal Claims Collection Act, 31 U.S.C. § 3711 (1982) (FCCA), the federal government may recover compensation for claims on behalf of the United States for damage to or loss or destruction of government property through negligence or wrongful acts.

### **GOVERNMENT'S RIGHTS**

The extent of any FCCA recovery by the federal government is determined by the law where the damage occurred. As a general rule, if a private person would be entitled to compensation under the same circumstances, the federal government may recover under the FCCA.

FCCA claims may be pursued against private persons, corporations, associations, and nonfederal governmental entities. An FCCA claim also can be asserted against any federal employee responsible for the damage and, if the responsible party is insured, the claim may be presented to the insurer. See Federal Drivers' Act, 28 U.S.C. § 2679(b) (1982), prescribing immunity for federal drivers.

### **MEASURE OF DAMAGES**

The amount of the government's recovery for an FCCA claim is determined by the measure-of-damages rules of the law where the damage occurred. There is no maximum limit to recovery.

### **STATUTE OF LIMITATIONS**

The government has 3 years after the damage occurs in which to make a written demand on the responsible party.

### **PROCEDURES**

Specific procedures and collection policies are issued in JAGINST 5890.1. Among the notable features of FCCA procedures are the following:

- Authority to handle FCCA claims. JAGINST 5890.1 lists the officers authorized to pursue, collect, compromise, and terminate action on FCCA claims. These include certain officers in OJAG and COs of NLSOs, except NLSOs in countries where another service has single service responsibility according to DOD Directive 5515.8. Claims over \$20,000 can be terminated or compromised only with permission of the Department of Justice.

- Repair or replacement in kind. In some cases, the party responsible for the damage, or that party's insurer, may offer to repair or replace the damaged property. If such a settlement is in the government's best interest, the CO of the property may accept repair or replacement under conditions described in JAGINST 5890.1.

- Collection problems. Collecting the full amount claimed under an FCCA claim can often be difficult for a number of reasons. Therefore, the Joint Regulations authorize specific procedures to resolve or overcome collection problems:

Collection by offset. The U.S. Government may deduct the amount of the FCCA claim from any pay, compensation, or payment it owes the responsible party.

Suspension or revocation of federal license or eligibility. This can be a strong incentive for an entity desiring to do business with the government to pay a claim.

Collection in installments. In cases where the responsible party is unable to make a lump-sum payment, an installment payment schedule may be used. Terms, conditions, and limitations on installment payment plans are set forth in JAGINST 5890.1. A substantial portion of FCCA claims against individuals are liquidated through installment payments.

Compromise. When the responsible party is unable to pay the full amount of the claim within

a reasonable time (usually 3 years), or when the responsible party refuses to pay and the government is unable to enforce collection within a reasonable time, the claim may be compromised.

- Referral to Department of Justice. Unsettled claims may be referred to the Department of Justice for litigation. The referral is made by OJAG and not by the local authority directly.

## **MEDICAL CARE RECOVERY ACT**

The Medical Care Recovery Act (MCRA) provides that, when the government treats or pays for the treatment of a military member, retiree, or dependent, it may recover its expenses from any third party legally liable for the injury or disease. The key to understanding the complexities of the MCRA is to realize that the federal government operates one of the largest health care systems in the world.

## **THE GOVERNMENT'S RIGHT**

The MCRA created an independent cause of action for the United States. Its right of recovery is not dependent upon a third party. The requirement that the United States furnish care to an injured party is merely a condition precedent to the government's independent right of recovery. If the tortfeasor has a procedural attack or defense against the injured party, it will not serve as a bar to a possible recovery by the government.

The extent of any MCRA recovery by the federal government is determined by the law where the injury occurred. The federal government enjoys no greater legal rights or remedies than the injured person would under the same circumstances. Thus, if the injured person would be legally entitled to compensation for injuries from the responsible party under the law where the injury occurred, the federal government may recover its expenses in treating the injured person.

MCRA claims may be asserted against private individuals, corporations, associations, and nonfederal governmental agencies. They also may be asserted against a federal employee responsible for the injuries, except that no such claim may be asserted against a service member injured as a result of his or her own willful or negligent acts for two reasons. First, the wording of the MCRA, 42 U.S.C. § 2651-2653 (1982), is explicit in providing a right of action against third parties. The injured member does not qualify as a third party. Second, to allow such a claim would violate the

provisions and spirit of 10 U.S.C. § 1074 (1982) that provides the entitlement of active duty service members to medical care free of charge. However, the United States can subrogate against any insurance coverage that the member may have that might cover medical care and treatment as a result of the self-injury.

If the party responsible for the injuries is insured, an MCRA claim maybe asserted against the insurer. Since a large portion of injuries resulting in MCRA claims involve automobile accidents, assertions against insurance companies are commonplace.

## **MEASURE OF DAMAGES**

The federal government may recover the reasonable value of medical services it provided, either directly at a U.S. Government hospital or indirectly through the CHAMPUS program.

The value of treatment at federal government facilities is computed on a flat rate per diem basis for inpatient care and a per-visit charge for outpatient treatment, rather than the itemized charges used by most civilian hospitals. These are issued by the Office of Management and Budget (OMB).

The federal government may recover the amount actually paid to, or on behalf of, a military dependent under the CHAMPUS program.

The federal government may recover amounts it paid to civilian facilities for emergency medical treatment provided active duty personnel.

## **STATUTE OF LIMITATIONS**

MCRA claims must be asserted within 3 years after the injury occurs.

## **PROCEDURES**

MCRA procedures tire governed by JAGINST 5890.1, enclosure (6), section B. Notable aspects of MCRA procedures include the following:

- JAG designees. Primary responsibility for assertion and collection of MCRA claims rests with JAG designees (officers delegated MCRA responsibilities by JAG). JAG designees include certain officers in OJAG and COs of most NLSOs. Designees outside of OJAG have been assigned geographic responsibility. JAG designees may assert and receive full payment of MCRA claims in any amount, but they may compromise, settle, or waive claims up to \$40,000. Claims in excess of \$40,000 may be compromised.

settled, or waived only with the approval of the Department of Justice.

- Initial action. JAG designees learn of potential MCRA claims from several sources.

- Investigations. When a military member, retiree, or dependent receives, either directly or indirectly, federal medical care for injuries or disease for which another party may be legally responsible, an investigation is required. One exception to this requirement is when the inpatient care does not exceed 3 days or outpatient care does not exceed 10 visits.

The responsibility for conducting the investigation of a possible MCRA claim normally lies with the CO of the local naval activity most directly concerned, usually the CO of the personnel involved in the incident or of the activity where the incident took place. This responsibility may be assigned to another CO under certain circumstances.

An investigation into a possible MCRA claim is conducted according to the *JAG Manual* and JAGINST 5890.1. An investigation of the same incident that was convened for some other purpose usually may be used to determine possible MCRA liability, provided it is complete.

If any investigation, regardless of its origin or initial purpose, involves a potential MCRA claim, a copy should be sent to the cognizant JAG designee.

### **Reports of Care and Treatment**

The second major way that the JAG designee learns of a possible MCRA claim is by a report from the facility providing medical care.

Military health care facilities are required to report medical treatment they provide when it appears that a third party is legally responsible for the injuries or disease. In the Navy, this reporting requirement is satisfied by submission of NAVJAG Form 5890/12, Report of Hospital and Medical Care - Third Party Liability Case (fig. 12-5) to the cognizant JAG designee. A NAVJAG 5890/1 2 is submitted when it appears that the patient will require more than 3 days' inpatient care or more than 10 outpatient visits. Preliminary, interim, and final reports are prepared as the patient progresses through the treatment. This report is, in essence, a hospital bill because it will reflect the value of the medical care provided to date, computed according to OMB rates. Military health care facilities in other services use forms similar to NAVJAG 5890/12.

Statements of CHAMPUS payments on behalf of the injured person are available from the local CHAMPUS carrier (usually a civilian health care insurance company that administers the CHAMPUS program under a government contract). Statements are sent automatically to JAG designees in cases involving potential third-party liability.

District medical officers are required to submit reports to cognizant JAG designees whenever they pay emergency medical expenses incurred by active duty personnel at a civilian facility and the circumstances indicate possible MCRA liability.

### **Injured Person's Responsibilities**

The JAG designee advises the injured person of his or her legal obligations under the MCRA. These responsibilities are as follow:

- Furnish the JAG designee with any pertinent information about the incident
- Notify the JAG designee of any settlement offer from the liable party or that party's insurers
- Cooperate in the prosecution of the government's claim against the liable party
- Give the JAG designee the name and address of any civilian attorney representing the injured party, since the civilian attorney may represent the government as well as the injured person if the claim is litigated in court
- Refuse to execute a release or settle any claim concerning the injury without the prior approval of the JAG designee
- Refuse to provide any information to the liable party, that party's insurer, or attorney without prior approval of the JAG designee

At first, these restrictions and obligations may appear unfair. But, it must be remembered that the government's rights under the MCRA are largely derivative from the injured person's legal rights. If the injured person makes an independent settlement with the liable party, the government's rights could be prejudiced. Also, if the injured person settles the claim independently and receives compensation for medical expenses, the government is entitled to recover its MCRA claim from the injured person directly out of the proceeds of the settlement.

### **JAG Designee Action**

The JAG designee formally asserts the government's MCRA claim by mailing a Notice of

HOSPITAL AND MEDICAL CARE  
3RD PARTY LIABILITY CASE  
NAVJAG 5890/12 (Rev. 3-78) S/N 0105-LF-105-8960 RCS JAG 5890-1

TO: \_\_\_\_\_ DATE: \_\_\_\_\_

FROM: \_\_\_\_\_ Submission:  Initial  Interim  Final

1. Patient Data (Include Name, Grade, Component, Organization and Station, Home Address, Branch of Service (i.e. Army, Navy, Air Force), Status (i.e. E.A.D., Retired, Inactive duty for training, etc.), Date of Admission) \_\_\_\_\_

2. Diagnosis (Use Standard Nomenclature) \_\_\_\_\_

3. Prognosis (Include expected length of hospitalization or number of outpatient visits expected) \_\_\_\_\_

4. Cause of Injury (Append statement of patient or accident report if available) \_\_\_\_\_

5. Agency Sponsoring Patient \_\_\_\_\_ 6. Disposition \_\_\_\_\_ 7. Date of Disposition \_\_\_\_\_

8. STATEMENT OF CHARGES

	This Facility (a)	Prev. Reports This Case (b)	Total To Date (c)	Unit Charges Per OMB (d)	Total Charges (e)
INPATIENT - NUMBER OF DAYS					\$
OUTPATIENT - NUMBER OF TREATMENTS					\$
GRAND TOTAL					\$

9. Signature (Patient Records Officer) \_\_\_\_\_

(Continue items 2, 3, and 4 on separate sheet if necessary)

PRIVACY ACT STATEMENT

1. AUTHORITY: 42 U.S.C. Sections 2651 - 2653; 31 U.S.C. Sections 951 - 953; Executive Order 16060

2. PRINCIPAL PURPOSE(S): To provide information for the collection of claims by the United States against third-party tortfeasors under the Medical Care Recovery Act and the Federal Claims Collection Act.

3. ROUTINE USES: Information furnished by individuals receiving treatment at Government expense for injuries caused by third-party tortfeasors is used by the Navy for the pursuit by the Navy of claims against third-party tortfeasors under the Medical Care Recovery Act and the Federal Claims Collection Act; for the preparation of litigation reports to the Department of Justice; and for use in civil litigation by the Department of Justice.

4. MANDATORY/VOLUNTARY DISCLOSURE, CONSEQUENCES OF REFUSAL TO DISCLOSE: The disclosure is voluntary. If the individual does not provide the requested information, the Navy may require a written assignment of the patient's medical care claim.

\*U.S. GOVERNMENT PRINTING OFFICE: 1986-405-009/35159

Figure 12-5A.—Sample NAVJAG form 5890/12, Report of Hospital and Medical Care—Third Party Liability (front).

Claim to the liable party or insurer the includes the following information:

- Reference to the statutory right to collect
- A demand for payment or restoration
- A description of damage
- The date and place of the accident

- The name, phone number, and office address of the claims personnel to contact

The JAG designee may accept full payment of the claim or may establish an installment payment plan with the liable party. Under appropriate circumstances, the JAG designee may waive or compromise the claim. Waivers or compromises of claims in excess of \$40,000 require prior Department of Justice approval. If the



incurred by the policyholder, his or her passengers who are riding in the insured vehicle, or a pedestrian who is struck by the insured vehicle. Assuming such coverage exists (and it is the claims officer's responsibility to determine if it does), medical payments clauses apply regardless of who was at fault and the United States may be entitled to recover as the provider of medical care. It is extremely important to note that recovery has been allowed, based on one of two theories: (1) that the United States is insured under the medical pay provisions of the insurance policy or (2) that the United States is a third-party beneficiary of the insurance contract. Recovery is not based upon the MCRA, but under the terms of the individual insurance policy.

### **UNINSURED MOTORIST COVERAGE**

Another potential source of recovery of medical care costs is the uninsured motorist coverage provisions of the typical automobile insurance policy. If an injured service member has obtained such coverage, and the tortfeasor is uninsured, the typical uninsured motorist coverage clause provides for payment to the policyholder of those sums that he or she would have been able to recover from the tortfeasor, but for the fact that the tortfeasor was uninsured. Like medical payments insurance coverage, the right of the United States to recover is based upon the terms of the insurance contract and not upon the MCRA. If the term *insured* includes any person, then the courts have generally held that the United States is entitled to recover.

### **NO-FAULT STATUTES**

The recovery of the United States under the MCRA in states that have enacted no-fault statutes will be determined by the language of the statute. It is necessary to determine if the United States is within the terms of the statute so as to be entitled to recover for medical care provided. If the state statute eliminates a cause of action against the tortfeasor, then the only probable source of recovery is under the injured party's no-fault insurance. If the United States is excluded and has no cause of action, then there maybe no recovery in the particular case.

### **AFFIRMATIVE CLAIMS AGAINST SERVICE MEMBER TORTFEASER**

The United States may not assert an affirmative claim against a service member or employee who, while in the scope of employment, damages government property or causes damage or injury for which the

United States must pay. Consideration, in the case of gross negligence or willful and wanton acts, should be given to whether such actions took the service member or employee outside the scope of employment.

## **CLAIMS MANAGEMENT**

As a senior LN, your knowledge in claims accounting procedures must be thorough. You need to be familiar with the many budget projects out of which claims are paid. The following will present an overview of how to manage a claims accounting system.

### **MANAGING NAVY CLAIMS FUNDS**

Managing claims funds should be no more difficult than taking care of a checking account. Checks (vouchers) and deposits (case collection vouchers and fund authorizations) are recorded in a checkbook (memorandum accounting logbook). They are processed by a bank (accounting activity) which then sends out bank statements (accounting reports). These are used to reconcile what actually has been recorded by the bank (accounting activity) against what should have been recorded as indicated in your checkbook (memorandum accounting logbook). While the bank statement is usually correct and reconciliation can be delayed, the accounting reports must be reconciled each month due to the possibility of input error or missing documents. Therefore, you must reconcile monthly with authorization accounting activities.

### **FUND AUTHORIZATIONS**

All funds are issued on a NAVCOMPT Form 372, Allotment/Suballotment Authorization (fig. 12-6), by budget project. Budget project 10 authorizes funds to pay NATO/SOFA claims; budget project 11 authorizes funds to pay federal tort claims; budget project 12 authorizes funds to pay military claims; and budget project 13 authorizes funds to pay personnel claims. If necessary and as long as JAG is notified immediately, funds can be transferred between budget projects.

The fiscal year runs from 1 October to 30 September. After the initial authorization at the beginning of the fiscal year, additional funds will be authorized at the beginning of each succeeding quarter and upon request. When funds are issued by message or telephone, obligation can be made before the actual receipt of the NAVCOMPT Form 372. For the first three quarters of the fiscal year, fund balances maybe carried forward from one quarter to the next, but the end-of-year balances cannot be carried forward to the next fiscal year.



it. Federal tort claims settled for over \$2,500 are not paid using Claims, Defense Appropriation funds. Payment is made by submitting a Voucher for Payment Under Federal Tort Claims Act, Standard Form 1145 (fig. 12-7), to the Claims Division, General Accounting office.

All payments using Navy claims funds should be made on a Voucher for Disbursement and/or Collection, NAVCOMPT Form 2277 (fig. 12-8), or its equivalent. The form identifies to whom the money is paid, the amount of payment, and the account from which the funds will be withdrawn (indicated by the accounting

Standard Form 1145 September 1973 U.S. Treasury Form 2000 1145-105	<b>VOUCHER FOR PAYMENT          UNDER FEDERAL TORT CLAIMS ACT</b>	Voucher No. Do not fill in Schedule No. Do not fill in Claim No. Do not fill in
U.S. Department of the Navy -- Naval Legal Service Office, Philadelphia <small>(Department, bureau, or establishment)</small> Voucher prepared at U.S. Naval Base, Philadelphia, PA 19112 17 Apr 94 <small>(Give place and date)</small> <b>THE UNITED STATES, Dr.,</b> To John Doe, Sr., as Guardian of John Doe, Jr., & Joseph Smith, Esq. <small>(Payee(s))</small> Address c/o Smith, Jones & Black 312 West Fourth St., P.O. Box 961, New York, NY 10000		<b>PAID BY</b>
Amount claimed, \$ 10,000.00 Date claim accrued January 18, 1994 Amount of award, compromise, or settlement FOUR THOUSAND DOLLARS AND NO CENTS \$ 4,000.00 <b>BRIEF DESCRIPTION OF CLAIM:</b> (See attachments for further explanation in detail.) On January 18, 1994 a U.S. Navy vehicle operated by Joe Doakes while acting within the scope of his Federal employment, struck a vehicle in which claimant was a passenger. The accident occurred at the intersection of Main and Broad Avenue, Paoli, Pennsylvania. The claimant was not contributorily negligent, and he has agreed in writing to accept the above sum in full settlement of his claim. This claim is considered proper for payment under the Federal Torts Claims Act (28 U.S.C. 2671-72, 2674-2680)		
<b>ACCEPTANCE BY CLAIMANT(S)</b> I, (We), the claimant(s), do hereby accept the within-stated award, compromise, or settlement as final and conclusive on me (us), and agree that said acceptance constitutes a complete release by me (us) of any claim against the United States and against the employee of the Government whose act or omission gave rise to the claim, by reason of the same subject matter.		
Date Do not fill in 1994 Not necessary. Enclose SF-95 (and settlement agreement if payment is less than amount stated on SF-95) This claim has been fully examined in accordance with the provisions of the Federal Tort Claims Act (28 U.S.C. 2672), and is approved in the amount of \$ 4,000.00 (signature) <small>(Head of Federal agency, or authorized designee)</small> Date May 3, 1994 <b>SIGN ORIGINAL ONLY</b> Title Commanding Officer NLSO, Philadelphia		SIGN ORIGINAL ONLY <small>(Claimant)</small> SIGN ORIGINAL ONLY <small>(Claimant)</small> Pursuant to the authority vested in me, I certify that this voucher is correct and proper for payment in the amount of \$ Do not fill in To be signed by GAO <small>(Authorized certifying officer)</small> Date Do not fill in, 1994 <b>SIGN ORIGINAL ONLY</b> Title Do not fill in
<b>ACCOUNTING CLASSIFICATION</b>		
U.S. GOVERNMENT PRINTING OFFICE : 1974-O-579-346		
Paid by Check No.		

Figure 12-7.—Sample Standard Form 1145, Voucher for Payment Under Federal Tort Claims Act.



VOUCHER FOR DISBURSEMENT AND/OR COLLECTION—NAVCOMPT FORM 2277 (8PT.) (2-81) S/N 0104-LF-702-2770										Page 1 of	Pages
1. Purpose DISB <input type="checkbox"/> COLLECT <input checked="" type="checkbox"/>		2. Date 6 APRIL 19		3. Reference Document No.			4. Bill Number		5. Voucher No.		
6. FROM: NAVAL LEGAL SERVICE OFFICE XXXX XX XXXXX XXXXX XXXX, XX XXXXX						7. PAID BY: CHECK NO.  S A M P L E					
8. TO:											
9. ARTICLES, SERVICES OR ITEMS											
A. INVOICE OR ORDER NO.	B. DATE OF DE. LIVERY/SERVICE	C. DESCRIPTION (REMITTER, EXPLANATION, DETAILS, ETC.)					D. QUAN- TITY	E. UNIT PRICE COST PER		F. AMOUNT	
		CARRIER RECOVERY ON CLAIM # ---- CHECK #----- DTD----- XYZ VAN LINES, INC.								\$156.00	
		CARRIER RECOVERY ON CLAIM # ---- CHECK #----- DTD----- ABC VAN LINES								15.00	
G. DISCOUNT TERMS									H. TOTAL \$171.00		
10. TYPE OF PAYMENT OR BILL: COMPLETE <input checked="" type="checkbox"/> PARTIAL <input type="checkbox"/> FINAL <input type="checkbox"/> PROGRESS <input type="checkbox"/> ADVANCE <input type="checkbox"/>											
11. ACCOUNTING CLASSIFICATION TO BE CREDITED (COLLECTION)											
A. ACRN	B. APPROPRIA- TION	C. SUB- HEAD	D. OBJ. CLASS	E. BUREAU CONTROL	F. SA	G. AAA	H. TT	I. PAA	J. COST CODE	K. AMOUNT (U.S. CURRENCY ONLY)	
	97_0102	1341	042	14048	0	65872	2D	000000	000000099250	\$171.00	
12. DEDUCTIONS											
A. ACRN	B. TRANSPORTATION	C. DISCOUNT	D. TAX	E. RESERVE	F. MISCELLANEOUS	G. TOTAL FOR ACRN (U.S. CURRENCY ONLY)					
H. CURRENCY:			EXCHANGE RATE			+\$1.00		I. TOTAL DEDUCTIONS			
13. ACCOUNTING CLASSIFICATION TO BE CHARGED (DISBURSEMENT)											
A. ACRN	B. APPROPRIA- TION	C. SUB- HEAD	D. OBJ. CLASS	E. BUREAU CONTROL	F. SA	G. AAA	H. TT	I. PAA	J. COST CODE	K. AMOUNT (U.S. CURRENCY ONLY)	
L. TOTAL NET AMOUNT TO BE PAID (BLOCK 9-H MINUS BLOCK 12-I)											
14. INSPECTION REPORT NOS:						15. GOV'T B/L NOS:					
16. APPROVED BY <u>A. PERSON, CDR, JAGC, USN</u> <u>4-6-</u> TITLE <u>CHIEF, CLAIMS DIVISION</u> (DATE)						17. CERTIFIED BY _____ TITLE _____ (DATE)					
18. PAYMENT RECEIVED: PAYEE-- PER-- TITLE--											

Figure 12-8.—Sample NAVCOMPT Form 2277, Voucher for Disbursement and/or Collection.

data entered on the document). If a claim is paid in one fiscal year, but an additional payment is required (for example, a reconsideration) in the next fiscal year, the claim should be paid using current fiscal year funds.

### DEPOSITS

Deposits are made on NAVCOMPT Form 2277. Deposits fall into two categories: (1) deposits back into

the Claims, Defense Appropriation and (2) deposits made into an appropriation other than Navy claims funds. Deposits received in foreign currency should be deposited with the local disbursing officer in the same manner as any other collection. It is the responsibility of the local disbursing officer to exchange the foreign currency for United States currency.

- Deposits—Claims, Defense Appropriations—carrier recoveries are the major type of deposits you will encounter in this category. Specific instructions for making deposits of carrier recoveries and any additional types of transactions related to carrier recoveries are found in JAGINST 5890.1.

- Deposits-other than into the Claims, Defense Appropriations. Money recovered under the MCRA and from affirmative tort claims related to damage of government property is not deposited into the Claims, Defense Appropriations but into a Navy general fund receipt account. The check or money order should be made payable to the order 01 the collecting organization or to the Treasurer, United States.

## FUNDS ADMINISTRATION

The primary report used to manage these funds is the Trial Balance Report, NAVCOMPT Form 2199A (fig. 12-9). This report must be reviewed to verify that the amount of funds authorized is accurately recorded on the report. To do this, compare your current authorization to the amount shown for the General Ledger Account (GLA) 1031. They should be equal. The amount currently reported as obligations in the GLA 0998 should be reviewed next. This figure should be as current as possible. If you are able to enter your obligations directly into the system, this should not be a problem. Next, review what has been disbursed by looking at the GLA 1060. Within several months after the end of each fiscal year, this should equal the total amount obligated. If this is not the case, determine the reasons for the differences. Finally, determine if there were any problems in liquidating the amounts obligated by looking at the GLA 1960. This will tell you what amounts have been disbursed against your account that have problems (for example, no corresponding obligation or erroneous accounting data). Make sure these problems are promptly corrected.

Your responsibilities do not end on 30 September. You must continue to review NAVCOMPT Form 2199A for prior years to make sure the obligations are promptly liquidated and erroneous expenditures are not charged against your operating budget.

## RECONCILIATION

Reconciliation compares what is recorded in your memorandum accounting logbook with what has been recorded in the accounting system. You must reconcile both obligations and expenditures. What makes reconciliation so crucial is that the authorization accounting activity (AAA) records are the official records accepted by higher authority. For this reason they must be correct. Although the responsibility for the error may not be yours, the responsibility for an overobligation is yours. This is why you are responsible for reconciliation, not the AAA.

To reconcile you must understand what happens to a voucher after it has been prepared. The original and copies are sent to the disbursing office. A copy is retained in the preparing office for its records and either (1) a copy is sent to the AAA or financial information processing center (FIPC) to record the obligations or (2) an obligation entry is made using your local AAA/FIPC automated system. The *Navy Comptroller Manual* states that an approved claim authorized by law is an obligation. Therefore, to maintain current obligations, the AAA/FIPC must receive and obligate advance copies of payment vouchers. Then, when a copy of the paid voucher is received from the disbursing officer, the claim payment is removed from the accounts payable and becomes classified as an expenditure.

Occasionally an AAA may not receive an advance copy of a payment voucher. In those rare instances, the AAA would have an immediate expenditure. At the end of each month, the AAA uses these entries to generate several accounting reports. One of these reports is the NAVCOMPT Form 2199A. This report gives cumulative figures for your claims authorization. If the cumulative obligations shown on the NAVCOMPT Form 2199A equal the cumulative amounts recorded in the memorandum accounting logbook, then they are in balance and reconciliation should normally be the case.

Reconcile by job order. First verify that the amount obligated in the job order is accurately reported. Then check the listing of unliquidated obligations to see what obligations have not yet been liquidated.

To reconcile, you need two reports from your AAA—a listing of expenditures processed against your authorization and a listing of all outstanding obligations. If you have not received the necessary reports from your AAA and the AAA will not cooperate, JAG should be advised. The AAA is responsible for cooperating in any way possible and responding to any reasonable requests.

**TRIAL BALANCE REPORT**

NAVCOMPT FORM 2199A (REV. 9-79)  
59 0104 11-702-1193

PAGE \_\_\_\_\_ OF \_\_\_\_\_  
FOR PERIOD ENDING \_\_\_\_\_

APPROPRIATION: \_\_\_\_\_ TO UIC NO. 1AAA OF OR GRANTEE FOR UIC NO. 100 GRANTEE

SUBHEAD: \_\_\_\_\_ FROM UIC NO. 1AAA OF OR HOLDER FOR UIC NO. 100 MOD/DCH

PROGRAM ELEMENT/REIMBURSABLE ELEMENT: \_\_\_\_\_

ACCOUNT NUMBER AND TITLE (1)	BALANCES PRIOR MONTH (2)		BALANCES CURRENT MONTH (4)		CHANGES FOR PERIOD (6)	
	DEBIT	CREDIT (3)	DEBIT	CREDIT (5)	DEBIT	CREDIT (7)
<b>TOTAL</b>						

REPORTING FISCAL OFFICER (Signature and Print) \_\_\_\_\_ DATE \_\_\_\_\_

*I certify that the amounts herein reported are in accordance with 31 U.S.C. 300 and prescribed accounting procedures.*

U.S. Government Printing Office: 198-708-011/1987 2-1

Figure 12-9.—Sample NAVCOMPT Form 2199A, Trial Balance Report.

The two reports discussed previously are the primary reports needed to reconcile with the memorandum accounting logbook. All claims and corresponding amounts presently in the accounting system can be verified using them. If the claim is not shown as being recorded on one report, it must be shown on the other report or else it will not have been recorded in the system. Reconciliations means, therefore, that starting with one report, you go through it comparing its entries to the entries in the memorandum accounting logbook. If you do not find a voucher on one report, you should then go to the other report. If it is not on this report, it is not in the accounting system and you should note this fact. Repeat this process until all vouchers recorded in the accounting system are reconciled against the memorandum accounting logbook. Besides verifying that all the vouchers have been recorded in the accounting system, you should also note the following items:

- Accounts recorded in the accounting system that are incorrect—both obligations and expenditures
- Canceled vouchers or vouchers improperly charged against a job order that are recorded in the accounting system—both obligations and expenditures

Report all errors to the appropriate person at your accounting activity.

**NOTE:** If you have access to an Integrated Disbursing and Accounting System terminal, you will be able to directly enter the obligations yourself. This should make reconciliation easier especially if you enter them in a timely manner.

You may also receive a weekly transaction listing. Although this enables a weekly reconciliation, a monthly reconciliation is adequate—except at the end of the fiscal year when it is critical that fund status be closely monitored.

The key to effective accounting is a good relationship with the AAA—keep the lines of communication open and whenever a problem arises consult with them. Try to cooperate with them and keep them informed. It is not always easy but it is worthwhile to make an effort to adjust and establish appropriate procedures. Of course make allowances for geographical separation and the fact that you are not the only command served by the AAA.

### UNLIQUIDATED OBLIGATIONS

You are not done managing Navy claims funds until all obligations have been liquidated. This means that you must establish procedures to review the status of unliquidated obligations. There also exists a category called unmatched disbursements that must be reviewed. Unmatched disbursements are expenditures against your authorization that have no corresponding obligation. You are required to prepare an annual report on your review of outstanding unliquidated obligations.

### MEMORANDUM ACCOUNTING LOGBOOK

A sample format for the memorandum accounting logbook is shown in figure 12-10.

While funds are not authorized by type of claim, JAG recommends that you internally allocate specific amounts for each type of claim up to the amount of your authorization if you pay more than one type of claim. You should then enter this amount in the memorandum accounting logbook and adjust internally as needed. To facilitate reconciliation, number vouchers consecutively by job order as they are prepared. Use this number in the last four positions of the Navy standard document number assigned to the voucher. If a claimant is due additional funds (for example, a reconsideration), prepare a new voucher assigned the next consecutive voucher number to the voucher. If you do not enter the obligations yourself and vouchers are

CLAIMANT	DATE	VOUCHER #	AMOUNT	FUND INCREASE	BALANCE	REMARKS

Figure 12-10.—Sample format for memorandum accounting logbook page.

sent out in batches, always run a new total after each batch is sent out. This will facilitate reconciliation if the accounting activity has not recorded the last batches forwarded in the month, then you will need only to look through the memorandum accounting logbook for the last batch recorded for use as the point of reconciliation.

**NOTE:** The accounting activity can establish a cutoff date as to the last day in the month that documents can be forwarded to them for posting. This is to make sure all documents forwarded before that date will be posted on the report for that month. If you do not enter the obligations yourself, it is usually a good policy to stop sending vouchers to the accounting activity 3 working days before the end of the month. Of course this policy does not apply at the end of the fiscal year, when the allottee must coordinate with the AAA to make sure all obligations have been received and posted.

## **CORRECTIONS**

Occasionally you may need to adjust the amount of a payment or deposit recorded in the accounting system. When this is necessary, your AAA should be contacted to make the necessary adjustments.

Incorrect payments or overpayments to claimants made using Claims, Navy funds should be deposited back into the operating budget out of which they were originally paid.

When a claim is paid out of the wrong account (for example, a personnel claim is paid citing the accounting data for a federal tort claim), contact your AAA to make the corrections. The only action required is to notify the AAA of the mistake. No adjustments need to be made in the memorandum accounting logbook. Handle refunds to carriers as if the carrier was a regular claimant and pay out of your own authorization. The entry in the memorandum accounting logbook is the same as a regular personnel claims payment.

To correct an erroneous payment of a federal tort claim out of Claims, Defense funds, send a letter to the Payment Branch, Claims Group, U.S. General Accounting Officer (GAO), 441 G Street, N.W.,

Washington, DC 20226-0007. The letter should state that due to an administrative error the claim was paid out of Claims, Defense funds. Then prepare a Transfer Between Appropriations, Standard Form 1080, citing the Claims, Navy funds (the accounting data should be the same as that of the erroneous payment). Forward the claim itself with the letter prepared in the same manner as any claim submitted to GAO with the necessary documentation. Finally, include a copy of the paid voucher with the letter. Upon receipt of this package, GAO will effect the necessary corrections.

If adjustments after the end of the fiscal year are necessary, use the following procedures. If the adjusted amount does not exceed the total unobligated balance, then the AAA/FIPC may make the adjustment authorizations locally and authorization holders need not notify JAG. If the adjusted amount exceeds the total unobligated balance, holders should notify JAG immediately so that appropriate action may be taken.

## **REPORTS**

To provide information required by the Office of the Secretary of Defense, you will have to submit a report of the cumulative number and dollar amount of claims obligated as of the end of the report month for the current fiscal year (for each type of claim). This report must be received in JAG within 5 working days after the end of the month. Use the assigned reports control system for this reporting requirement

## **SUMMARY**

Claims, claims management, and claims investigations are important office functions, and the total dollar amount involved in claims for or against the government is substantial. The importance of accurate recordkeeping should be the focus of claims management and you should strive for accurate records in your claims office procedures. Accurate, efficient claims processing not only serves the government but the claimant as well. The steps necessary to achieve this goal are your responsibility.



## CHAPTER 13

# ADMINISTRATIVE INVESTIGATIONS

Almost every LN will have contact with an administrative fact-finding body, commonly called a JAGMAN investigation. The regulations that govern these investigations are contained in the *Manual of the Judge Advocate General (JAGMAN)* and JAGINST 5830.1. The primary purpose of an administrative fact-finding body is to provide the convening authority (CA) and reviewing authorities with adequate information upon which to base decisions. In so providing the CA, an administrative fact-finding body searches out, develops, assembles, analyzes, and records all available information about the matter under investigation. As the name indicates, these investigations are purely administrative in nature—not judicial. The investigation is advisory only; the opinions are not final determinations or legal judgments, nor are the recommendations made by the investigating officer (IO) binding upon the convening or reviewing authorities.

### TYPES OF INVESTIGATIONS

There are three types of administrative fact-finding bodies (courts of inquiry, fact-finding bodies required to conduct a hearing, and fact-finding bodies not required to conduct a hearing); however, for purposes of procedures, there are only two types of fact-finding bodies.

1. Fact-finding bodies required to conduct a hearing. These include courts of inquiry and investigations required to conduct a hearing. A court of inquiry consists of at least three commissioned officers and appointed legal counsel for the court. It is convened by written appointing order, takes all testimony under oath, and records all proceedings verbatim. A court of inquiry has the power to subpoena civilian witnesses. A fact-finding body required to conduct a hearing consists of one or more commissioned officers and should have appointed legal counsel for the proceedings. It is convened by a written appointing order. The appointing order should direct that all testimony be taken under oath and/or all proceedings recorded verbatim. A collateral function of a court of inquiry and a fact-finding body required to conduct a hearing is to provide a hearing to individuals who have been designated as parties to the investigation.

2. Fact-finding bodies not required to conduct a hearing. This category includes only the investigation not requiring a hearing. It is normally composed of a single investigator who obtains statements, rather than taking testimony, and who is not authorized to designate parties.

The importance of an administrative fact-finding body cannot be stressed enough. It is not only an efficient management tool, but also can be used in a wide variety of situations ranging from the proper disposition of claims to the timely and accurate reply to public inquiry. Various directives establish requirements for conducting of inquiries into specific matters. The JAGMAN, however, is the most inclusive. Some incidents involve conducting an inquiry for several different purposes that can be handled by one investigation; others may not. A CA must be careful to determine why an investigation is being conducted, who is supposed to conduct it, and whether it will satisfy all requirements or only a portion of them. The following situations are examples of the various different types of investigations:

- Aircraft accidents
- Vehicle accidents
- Explosions
- Stranding of a ship of the Navy
- Collisions
- Accidental or intentional flooding of a ship
- Fires
- Loss or excess of government funds or property
- Claims for or against the government
- Reservists (an investigation is required if a reservist is injured or killed while performing active duty or training for 30 days or less, or inactive-duty training)
- Admiralty matters
- Firearm accidents
- Pollution incidents

- Combined investigations of maritime incidents
- Security violations
- Postal violations
- Injuries and diseases incurred by service members
- Quality of medical care reasonably in issue
- Redress of damage to property
- Death cases

## **DEATH CASES**

A fact-finding body must be convened in the following death cases: (1) when the death of a member of the naval service occurred, while on active duty, from other than a previously known medical condition; (2) when civilians or other nonnaval personnel are found dead on a naval installation under peculiar or doubtful circumstances, unless the incident is one that the Naval Criminal Investigative Service (NCIS) has exclusive jurisdiction; and (3) when death, or permanent disability, in which the adequacy of medical care is reasonably in issue.

You do not have to send a report to the Judge Advocate General (JAG) when death occurs as a result of enemy action. A fact-finding body should be convened and the record forwarded in any case when it is unclear if enemy action caused the death. Because some commercial life insurance policies contain certain restrictions and/or certain types of double-indemnity provisions, it is desirable to make sure the essential facts are recorded while witnesses are known and available. When feasible, the facts reported should permit determinations as to whether death resulted from accidental causes, natural causes, or enemy action.

Progress status reports are required on all death investigations from all command and reviewing activities every 14 days. Send a message to the Chief of Naval Personnel, with JAG and all intermediate commands/reviewing authorities as information addressees. The requirement for the status report ceases once the investigation has been sent to the next higher level of command/reviewing authority.

Advise the next of kin that they may request copies of the death investigation from JAG (Code 33). It is most important, therefore, that mature, experienced officers complete these investigations in an accurate, professional, and expeditious manner. Send an advance copy of each death investigation, with the GCM CA's

endorsement, to JAG. If it would unduly delay submission of the investigation to await a final autopsy report, autopsy protocols, death certificates, or similar documents, submit an initial report promptly upon completion of the investigation. Submit a supplemental report via the review chain, with an advance copy to JAG, once the autopsy has been completed. The advance report is usually released to the requesting next of kin by JAG (after exclusion of material protected by the exemptions to the Freedom of Information/Privacy Act), unless JAG has been alerted that subsequent reviewers may significantly alter findings, opinions, or recommendations; in which case, release is withheld until the investigative report is finally reviewed.

## **INVESTIGATIONS REQUIRED BY OTHER REGULATIONS**

If an investigation is required under the JAGMAN, it must be conducted in addition to any other investigation required by other regulations. Situations in which two investigations may be required are listed in JAGMAN § 0208a.

A JAGMAN investigation is not required if there is no reason for the investigation other than possible disciplinary action. To avoid interference, a JAGMAN investigation should not normally proceed at the same time as a law-enforcement type of investigation by the Federal Bureau of Investigations (FBI), NCIS, or local civilian law-enforcement units.

If an investigation is required for other than disciplinary action, the IO should communicate with the law-enforcement personnel, explaining the need for the JAGMAN investigation, and request that the police investigators keep him or her informed of what information is obtained.

Other types of investigations that have additional instructions and guidance include the following:

- Safety investigations—OPNAVINST 5100.14
- Aircraft accident reports and aircraft mishap investigations—OPNAVINST 3750.6
- Accidental inquiry to personnel—OPNAVINST 5100.12
- Admiralty—JAGINST 5880.1
- Felonies involving both naval and civilian personnel—SECNAVINST 5820.1



- Crimes involving exclusive NCIS jurisdiction—SECNAVINST 5520.3 and OPNAVINST 5450.97
- Security violations—OPNAVINST 5510.1
- Stolen government property—SECNAVINST 5500.4
- Claims for or against the government—JAGINST 5830.1
- Postal violations—OPNAVINST 5112.6

### **INVESTIGATIONS NOT REQUIRING A HEARING**

The type of fact-finding body to be convened is determined by the purpose(s) of the inquiry, the seriousness of the issues involved, the time allotted for completion of the investigation, and the nature and extent of the powers required to conduct a thorough investigation. This section will concentrate on the most common administrative fact-finding body, the investigation not requiring a hearing. Courts of inquiry and investigations requiring a hearing will be discussed later in this chapter. Keep in mind, however, that many of the basic rules and principles discussed in this section also apply to other types of investigations. As is the case with any fact-finding body, the primary function of an investigation not requiring a hearing is to gather information. A fact-finding body not requiring a hearing does not have the power to designate parties and, therefore, does not have the collateral function of providing a hearing to a party.

Any officer in command may order an investigation not requiring a hearing. For purposes of the JAGMAN, officer in command means an officer authorized to convene any type of court-martial or authorized to impose disciplinary punishment under Article 15, *Uniform Code of Military Justice* (UCMJ). This also includes officers in charge (OICs).

An officer in command is responsible for initiating investigations of incidents occurring within his or her command or involving his or her personnel. If an officer in command feels that investigation of an incident by the command is impractical, another command can be requested to conduct the investigation.

If an incident requiring the convening of an investigation occurs at a place geographically distant from the command, or the command deploys before an investigation can be completed, another command can be requested to conduct the investigation. This request

should be made to the area coordinator in whose geographical area of responsibility the incident occurred.

A single investigation should be conducted into an incident involving more than one command, convened by an officer in command of any of the activities involved. If difficulties arise concerning who should convene the investigation, the common superior of all commands involved will determine who will convene it. If the conduct or performance of one of the officers in command may be subject to inquiry (as in the case of a collision between ships), the common superior of all the officers involved will convene the investigation.

### **THE INVESTIGATORY BODY**

An investigation not requiring a hearing may be composed of a single investigator or a board consisting of two or more members. The most common is the one-officer investigation. The IO should normally be a commissioned officer, but may be a warrant officer, senior enlisted, or a civilian employee, when appropriate. IOs must be those individuals who are best qualified for the duty by reason of age, education, training, experience, length of service, and temperament. Unless impractical, the IO should be senior to any person whose conduct or performance of duty will be subject to inquiry. An expert may participate as IO or for the limited purpose of using his or her special experience. The report should make clear any participation by an expert. Ordinarily, counsel is not appointed for an investigation not requiring a hearing, although a judge advocate is often made available to help the IO with any legal problems or questions that may arise.

### **APPOINTING ORDER**

An investigation not requiring a hearing is convened by a written order called an appointing order. An officer in command is responsible for initiating investigations of incidents occurring within his or her command or involving his or her personnel.

An appointing order must be in official letter form, addressed to the IO of the one-officer investigation. When circumstances warrant, an investigation may be convened by an oral or message order. The IO must include the signed, written confirmation of oral or message orders in the investigative report.

The written appointing order for a JAGMAN investigation not requiring a hearing will contain the following:

1. Subject line (fig. 13-1)

2. Witness warnings, purpose, and scope of the investigation (fig. 13-2)

The paragraphs in figure 13-2 serve several purposes. They recite the specific purpose(s) of the investigation, give explicit instructions as to the scope of the inquiry, and direct the IO to the required witness warnings.

These instructions help the IO accomplish all the objects of the investigation, not just the CA's immediate objectives. For example, the following case of a vehicle accident involving a member of the naval service may give rise to various concerns that include (1) the CA who orders the investigation may be concerned whether local procedures regarding the use of government vehicles should be changed and whether disciplinary action may be warranted; (2) JAG may be concerned with a line of duty/misconduct determination; and (3) the cognizant naval legal service office (NLSO) claims officer will be concerned with potential claims for or against the government. A properly completed investigation requires the IO to satisfy the special requirements for each of these different determinations.

All fact-finding bodies are required, as directed in paragraph 2 of figure 13-2, to make findings of fact. In the typical investigation not requiring a hearing, the appointing order directs the IO to conduct a thorough investigation into all the circumstances connected with the subject incident and to report findings of facts, opinions, and recommendations concerning the following:

- The resulting damage
- The injuries to members of the naval service and their line of duty and misconduct status
- The circumstances attending the death of members of the naval service
- The responsibility for the incident under investigation, including any recommended administrative or disciplinary action
- Claims for and against the government
- Any other specific investigative requirements that are relevant, such as those contained in the JAGMAN

During the course of the investigation, on advice of the investigative body or on his or her own initiative, the

Subj: INVESTIGATION TO INQUIRE INTO THE CIRCUMSTANCES SURROUNDING THE MOTOR VEHICLE ACCIDENT INVOLVING, AND INJURIES SUSTAINED BY YNSN JOHN A. DOE, USN, 111-11-1111, NAVAL AIR STATION, PENSACOLA, FLORIDA, WHICH OCCURRED IN PENSACOLA, FLORIDA, ON 17 JULY 1994

**Figure 13-1.—Sample subject line for JAGMAN investigation.**

Ref: (a) Oral appointing order at 0500 hours, 17 July 1994  
(b) JAG Manual

1. Pursuant to reference (a), and under Chapter II, Part B, of reference (b), you are appointed to inquire, as soon as practical, into the circumstances surrounding the motor vehicle accident and injuries sustained by YNSN John A. Doe, which occurred in Pensacola, Florida, on 17 July 1994.
2. You are to investigate all facts and circumstances surrounding the motor vehicle accident that occurred at Pensacola, Florida on 17 July 1994. You must investigate the cause of the motor vehicle accident, resulting injuries and damages, potential claims for or against the government, and any fault, neglect, or responsibility therefore. You must express your opinion of the line of duty and misconduct status of any injured naval member. You should recommend appropriate administrative or disciplinary action. Report your findings of fact, opinions, and recommendations by 16 August 1994, unless an extension of time is granted. In particular, your attention is directed to sections 0202e, 0213 0215b, 0227a, 0229, 0803-0804, and appendix A-2-e of reference (b).

**Figure 13-2.-Sample witness warnings, purpose, and scope of investigation.**

CA may broaden or narrow the scope of the inquiry by issuing supplemental directions amending the appointing order.

Paragraph 2 of figure 13-2 also directs the IO to report opinions and recommendations. Unless specifically directed by the appointing order, opinions or recommendations are not made. The CA may require recommendations in general, or in limited subject areas.

The appointing order may direct that testimony or statements of some or all witnesses be taken under oath and may direct that testimony of some or all witnesses be recorded verbatim. When a fact-finding body not requiring a hearing takes testimony or statements of witnesses under oath, it should use the oaths prescribed in JAGMAN 0212b.

The Privacy Act requires that a Privacy Act statement be given to anyone who is requested to supply personal information in the course of a JAGMAN investigation when that information will be included in a system of records. Note that witnesses will rarely provide personal information that will be retrievable by a witness' name or other personal identifier. Since such retrievability is the cornerstone of the definition of system of records, in most cases the Privacy Act will not require warning anyone unless the investigation may eventually be filed under that individual's name.

Social security numbers should not be included in JAGMAN investigation reports unless they are necessary to precisely identify the individuals involved, such as in death or serious injury cases. If a service member or civilian employee is asked to voluntarily provide their social security number for the investigation, a Privacy Act statement must be provided. If the number is obtained from other sources, the individual does not need to be provided with a Privacy Act statement. The fact that social security numbers were obtained from other sources should be noted in the preliminary statement of the investigation.

If prosecution for a suspected offense under the UCMJ appears likely, the witness suspected of the offense should be warned under Article 31(b), UCMJ,

and JAGMAN 0170. Appendix A-1-m of the JAGMAN shows the proper form to be used. The IO should collect all relevant information from all sources—other than from those persons suspected of offenses, misconduct, or improper performance of duty—before interviewing the suspect.

A member of the armed forces, before being asked to provide any statement relating to the origin, incurrence, or aggravation of any disease or injury suffered, should be advised of the statutory right not to make such a statement. Appendix A-2-f of the JAGMAN contains a proper warning format and without this warning the statements are invalid.

As figure 13-2 illustrates, all sections of the JAGMAN that may apply to the particular incident under investigation should be listed, along with any applicable chain of command directives.

Paragraph 2 of figure 13-2 directs completion of the IO's report within 30 days of the date of the appointing order. JAGMAN 0202c established the following time limits for processing JAGMAN investigations:

(a) The CA prescribes the time limit the fact-finding body has to submit its investigation. This period should not normally exceed 30 days from the date of the appointing order; however, this period may be extended for good cause. Always include requests and authorizations for extension as enclosures to the investigation.

(b) The CA and each subsequent reviewer have 30 days (20 days in death cases) to review the investigation. Reasons for exceeding these time limits must be documented by the responsible endorser, and deviations must be requested and approved in advance by the immediate senior in command who will next review the investigation.

### 3. Attorney work product statement (fig. 13-3)

Figure 13-3 is an attorney work product statement. This language must be included in the appointing order if the possibility of litigation or a claim for or against the government exists.

3. This investigation is appointed in contemplation of litigation and for the express purpose of assisting attorneys representing interests of the United States in this matter. You will contact LCDR Mary N. Christmas, JAGC, USN, for direction and guidance as to those matters pertinent to the anticipated litigation.

Figure 13-3.—Attorney work product statement.

#### 4. Administrative support (fig. 13-4)

Figure 13-4 directs the SJA office of the command to provide clerical support to the IO. It is extremely important to designate who provides that support in order for the IO to obtain assistance in typing the investigation and producing the necessary number of copies.

### THE INVESTIGATION

Upon first appointment as an IO, the universal question is, "Where do I begin?" The first step is to examine the appointing order to determine the specific purpose and scope of the inquiry, remembering that the general goal is to find out who, what, when, where, how, and why an incident occurred. Next, the IO should decide exactly which procedures to follow and become fully acquainted with part A of chapter II and the specific sections of the JAGMAN listed in the appointing order. Most importantly the IO should begin work on the investigation immediately upon notification of appointment, whether or not a formal appointing order has been received. The investigation should start as soon as possible after the incident has occurred, since:

- witnesses may be required to leave the scene;
- a ship's operating schedule may require leaving the area of the incident;
- events will be fresh in the minds of witnesses; and
- damaged equipment/material are more apt to be in the same relative position/condition as a result of the incident.

The circumstances surrounding the particular incident under investigation will dictate the most effective method of conducting the investigation. For example, an investigation of an automobile accident, in which one or more of the parties were injured, would involve (1) interviews at the hospital with the injured parties; (2) collection of hospital records and police

reports; (3) eyewitness accounts; (4) vehicle damage estimates; (5) mechanical evaluation; (6) inspection of the scene; and (7) other matters required by JAGMAN, sections 0215-0224, 0227, 0229, and 0231. On the other hand, an investigation of a shipboard casualty or the loss of a piece of equipment could involve merely the calling and examination of material witnesses.

The IO may use any method of investigation he or she finds most efficient and effective. Relevant information may be obtained from witnesses by personal interview, correspondence, telephone inquiry, or other means. One of the principal advantages of an investigation not requiring a hearing is that the interviewing of witnesses maybe done at different times and places, rather than at a formal hearing.

The IO is not bound by formal rules of evidence and may collect, consider, and include in the record any matter relevant to the inquiry that a person of average caution would consider to be believable or authentic. The IO must authenticate real and documentary items and enclose legible reproductions in the investigative report, with certification of correctness of copies or statements of authenticity. The IO may not speculate on the causes of an incident; however, inferences may be drawn from the evidence gathered to determine the likely course of conductor chain of events that occurred. In most cases, it is inappropriate for the IO to speculate on the thought process of an individual that resulted in a certain course of conduct.

As stated previously, the IO is not bound by the formal rules of evidence; however, there are certain things that cannot be combined with an investigative report.

NCIS investigations. An NCIS investigation consists of a narrative summary portion (called the Report of Investigation, where the participating agents detail the steps taken in the investigation) and enclosures. The IO is forbidden from including the narrative summary portion of the NCIS investigation in the JAGMAN investigation; however, the enclosures, which frequently comprise the bulk of an NCIS

4. By copy of this appointing order the Staff Judge Advocate's Office, Naval Air Station, Pensacola, Florida, is directed to furnish any necessary clerical assistance for recording the proceedings and preparing the record. Social security numbers of military personnel should be obtained through PSD or other official channels.

Figure 13-4. Administrative support statement.

investigation, can be used. The JAGMAN investigation should not interfere with the completion of the NCIS investigation; therefore, it is advisable that the IO wait until NCIS completes its investigation before obtaining a copy for use of the statements gathered by NCIS.

**Aircraft mishap investigative report.** Aircraft accidents are investigated by one or more investigative bodies under existing instructions and legal requirements. For the sole purpose of safety and accident prevention, the Chief of Naval Operations (CNO) issues special instructions for the conduct, analysis, and review of investigations of aircraft mishaps. These investigations are known as Aircraft Mishap Investigation Reports (AMIRs). Because these investigations are directed toward safety problems, confidentiality is essential in order to allow personnel to be honest when giving statements. Therefore, a statement obtained in an AMIR is not available to the IO from any official source. IOs from both the aircraft safety investigation and the JAGMAN investigation, however, should have equal access to all real evidence and have separate opportunities to question and obtain statements from all witnesses.

**Other mishap investigation reports.** For the reasons specified previously, these mishap investigation reports cannot be included in JAGMAN investigations.

**Inspector General reports.** These reports cannot be included in JAGMAN investigations.

**Polygraph examinations.** Neither polygraph reports nor their results should be included in the JAGMAN investigative report; however, if essential for a complete understanding of the incident, the location of the polygraph report should be cross-referenced in the report.

**Medical quality assurance investigations.** A naval hospital will conduct its own investigation (much the same as the AMIR). Confidentiality is essential here also. Therefore, statements obtained in a medical quality assurance investigation cannot be used in a JAGMAN investigation.

Photographs, records, operating logs, pertinent directives, watchlists, and pieces of damaged equipment are examples of evidence that the IO may have to identify, accumulate, and evaluate. To the extent consistent with mission requirements, the IO will make sure all evidence is properly preserved and safeguarded until the investigation is complete and all relevant actions have been taken.

Photographs and videotapes that have sufficient clarity to depict actual conditions are invaluable as evidence. Although, in some instances, color photos present the best pictorial description, they are more difficult to reproduce and normally require more time to develop; therefore, it may be more prudent to use black and white film. Polaroid prints offer instant review to make sure the desired picture is obtained, but are somewhat difficult to reproduce or enlarge. Photographs and videos should be taken from two or more angles, using a scale or ruler to show dimensions. The investigative report should include the negative plus complete technical details relating to the camera used. In cases of personal injury or death, photographs and videos that portray the results of bodily injury should be included only if they contribute to the usefulness of the investigation. Lurid or morbid photographs and videos that serve no useful purpose should not be taken.

Sketches instead of or in conjunction with photographs or videos provide valuable additional information. Insignificant items can be omitted in sketching, providing a more uncluttered view of the scene. Where dimensions are critical but may be distorted by camera perspective, accurate sketches can be more valuable. Sketches should be drawn to scale, preferably on graph paper. They can also be used as a layout to orient numerous photos and measurements.

Carefully handle pieces or parts of equipment and material to make sure this physical evidence is not destroyed. If attaching real evidence to the report is inappropriate, preserve it in a safe place under proper chain of custody-reflecting its location in the report of investigation. Tag each item with a full description of its relationship to the accident. If it is to be sent to a laboratory for analysis, package it with care. Accompany the item(s) with a photo or sketch showing the "as found" location and condition.

Make verbatim copies of relevant operating logs, records, directives, memos, medical reports, police or shore patrol reports, motor vehicle accident reports, and other similar documents. To assure exactness, reproduce by mechanical or photographic means if at all possible. Check copies for clarity and legibility and examine closely for obvious erasures and markovers that might not show up when reproduced.

If the IO observes an item and gains relevant sense impressions (noise, texture, smells, or any other impression not adequately portrayed by photograph, sketch, or map), those impressions should be recorded and included as an enclosure to the report.

## **WITNESSES**

The best method for examining a witness depends on the witness and the complexity of the incident. The most common method used by IOs is the informal interview. Whatever method is employed, however, the witness' statement should be reduced to writing and signed by the witness whenever possible. Sworn statements may be taken unless the appointing order directs otherwise. A sworn statement is considered more desirable than an unsworn statement since it adds to the reliability of the statement and can expedite subsequent action (such as pretrial investigations). The statement should be dated and should properly identify the person making the statement; for example, a service member by full name, grade, service, and duty station; a civilian by full name, title, business or profession, and residence. If necessary, the IO can certify that the statement is an accurate summary, or verbatim transcript, of oral statements made by the witness.

To make sure all relevant information is obtained when examining a witness, the IO should use the appointing order and the requirements in JAGMAN, chapter II, part B, Investigations of Specific Types of Incidents, as a checklist. In addition to covering the full scope of the investigation requirements, witness statements should be as factual in content as possible. Vague Opinions (such as pretty drunk a few beers, and pretty fast) are of little value to the reviewing authority who is trying to evaluate the record. The IO should be able to separate conclusions from observations; therefore, when a witness makes a vague statement, try to pin down the actual facts. For example, instead of accepting the witness' opinion that a person was pretty drunk, the IO should ask the kind of questions that go to supporting that kind of opinion. For example, (1) How long did you observe the person? (2) Describe the clarity of speech? (3) Did you observe him walk? (4) What was the condition of his eyes? (5) What was he drinking? (6) How much was he drinking? (7) Over what period of time?

In many instances, limitations on availability of witnesses will prevent the IO from obtaining a written, signed statement in the previous manner. When this happens, an IO may take testimony or collect evidence in any fair manner he or she chooses. Unavailable witnesses may be examined by mail or by telephone. If the telephone inquiry method is used, the IO should prepare a written memorandum of the call, identifying the person by name, rank armed force, and duty station (if a service member) or by name, address, and occupation (if a civilian). The memorandum should

state the substance of the conversation, the time and date it took place, and any rights or warnings provided.

## **COMMUNICATIONS WITH THE CA**

If at any time during the investigation it should appear, from the evidence presented or otherwise, that the CA might consider it advisable to enlarge, restrict, or otherwise modify the scope of the inquiry or to change in any respect any instruction provided in the appointing order, an oral or written report should be made to the CA. The CA may take any such action on this report deemed necessary. There is no requirement that such communications with the CA be included in the report or the record of the investigation.

## **INVESTIGATIVE REPORT**

The investigative report, submitted in letter form, consists of the following items:

- A preliminary statement
- Findings of fact
- Opinions
- Recommendations
- Enclosures

### **Preliminary Statement**

The purpose of the preliminary statement is to inform the convening and reviewing authorities that all reasonably available evidence was collected and that the directives of the CA have been met. The preliminary statement should refer to the appointing order and set forth the following information:

- The nature of the investigation
- Any limited participation by a member and/or the name of any individual who assisted and the name and organization of any judge advocate general who assisted
- Any difficulties encountered in the investigation and the reasons for any delay
- If the evidence in the enclosures is in any way contradictory, a factual determination in the findings of fact section along with an explanation of the basis for that determination (this explanation should be reserved for material facts)
- Any failure to advise individuals of their rights

- The fact that all social security numbers were obtained from official sources

- An attorney work product statement when a claim, or litigation by or against the United States, is reasonably possible

- Any other information necessary for a complete understanding of the case

Do not include a synopsis of facts, recommendations, or opinions in the preliminary statement. These should appear in the pertinent sections of the investigative report. It is not necessary for the IO to provide an outline of the method used to obtain the evidence contained in the report. A preliminary statement does not eliminate the necessity for making findings of fact. Even though the subject line and preliminary statement may talk about the death of a person in a car accident, findings of fact must describe the car, time, place of accident, identity of person, and other relevant information.

### **Findings of Fact**

Findings of fact must be as specific as possible as to times, places, persons, and events. Each fact is made a separate finding. Each fact must be supported by testimony of a witness, statement of the IO, documentary evidence, or real evidence attached to the investigative report as an enclosure. Also, each enclosure on which the fact is based must be referenced. For example, the IO may not state: "The car ran over Seaman Doe's foot," without a supporting enclosure. He or she may, however, have Doe execute a statement such as "The car ran over my foot." Include this statement as an enclosure and, in the findings of fact, state: "The car ran over Seaman Doe's foot," referencing enclosure (X). When read together, the findings of fact should tell the whole story of the incident without requiring reference back to the enclosures.

The IO may only make findings of fact that are supported by a preponderance of evidence. A preponderance is created when the evidence as a whole shows that the fact sought to be proved is more probable than not. Weight of evidence in establishing a particular fact is not to be determined by the sheer number of witnesses or volume of evidence, but depends upon the effect of the evidence in inducing belief that a particular fact is true.

In order that the acts of a deceased member may have caused harm and/or loss of life, including his or her own, through intentional acts, findings of fact relating

to those issues must be established by clear and convincing evidence. Clear and convincing means a degree of proof beyond the preponderance of evidence discussed earlier. It is proof that should (1) leave no reasonable doubt in the minds of those considering the facts and (2) create a firm belief or conviction. It is that degree of proof that is intermediate, being more than a preponderance, but not reaching the extent of certainty as beyond any reasonable doubt.

If the evidence is in any way contradictory, the IO still must make a factual determination in the findings of fact section. The following problem should make this clear.

Problem. The enclosures in an investigation reveal the following information. Mr. Doe states he had seen a vehicle speeding by him at 90 mph; he was almost hit by the car; he does not own a car, is 80 years old, and has not driven since 1945. Mr. Hatch, an off-duty police officer, states that, as the car passed him, he glanced at his speedometer and he was traveling 35 mph; he estimates the speed of the other car at 45 mph. The police report reveals that the car left only 7 feet of skid marks on dry, smooth, asphalt pavement before stopping. How should the IO record this information?

Solution. The IO should note the conflicting account in the preliminary statement as follows: "Two conflicting accounts of the speed of the vehicle in question appear in witness statements, but only encl (x), the statement of Mr. Hatch, is accepted as fact because of his experience, ability to observe, and emotional detachment from the situation." Findings of fact should reflect only the IO's evaluation of the Fact: "That the vehicle left skid marks of 7 feet in length in an attempt to avoid the collision (encl [x]); "That the skid marks were made on a dry, smooth, asphalt surface (encl [y]); and "That the speed of the vehicle was 45 mph at the time brakes were applied (encl [z])."

In some situations, it may not be necessary to show a discrepancy in the preliminary statement. In other situations, it maybe impossible to find a particular fact. If, in the opinion of the IO, the evidence does not support any particular fact, this difficulty should be properly noted in the preliminary statement as follows: "The evidence gathered in the forms of encls (x) and (y) does not support a finding of fact as to the . . . and, hence, none is expressed."

Only rarely will the conflict in evidence or the absence of it prevent the IO from making a finding of fact in a particular area. Thus, this should not be used as a way for the IO-who is either unwilling to evaluate

the facts or too lazy to gather the necessary evidence—to make the required findings of fact.

## **Opinions**

Opinions are reasonable evaluations, inferences, or conclusions based on the facts. Each opinion must reference the findings of fact supporting it. In certain types of investigations, the CA will require the IO to make certain opinions.

## **Recommendations**

Recommendations are proposals derived from the opinions expressed, made when directed by the CA, and may be specific or general in nature. If corrective action is recommended, the recommendation should be as specific as possible.

Disciplinary action is an area commonly addressed by the recommendations. If trial by court-martial is recommended, the IO submits a signed, sworn charge sheet as an enclosure to the investigative report. Unless specifically directed by proper authority, an IO must not notify an accused of the charges. If a punitive letter of reprimand or admonition is recommended, the IO will prepare a draft of the recommended letter and submit it with the investigative report. If a nonpunitive letter is recommended, a draft is not included in the investigation, but should be forwarded to the appropriate authority separately for issuance. If an award is recommended, the IO should draft the appropriate citation and include it as an enclosure.

## **Enclosures**

The first enclosure is either the signed written appointing order and any modifications or the signed written confirmation of an oral or message appointing order. Include any requests for extensions of time as enclosures, in addition to letters granting or denying such requests.

JAGMAN 0229a requires the IO to properly identify all persons involved in the incident under investigation with complete name, grade or title, service or occupation, and station or residence. The list of enclosures is a suggested place for ensuring compliance with that section.

Enclosures are listed in the order referenced in the investigative report. Separately number and completely identify each enclosure. Make each statement, affidavit, transcript of testimony, photograph, map, chart, document, or other exhibit a separate enclosure. If the

IO's personal observations provide the basis for any finding of fact, a signed memorandum detailing those observations should be attached as an enclosure. Enclose a Privacy Act statement for each party or witness from whom personal information was obtained as an attachment to the individual's statement. The signature of the IO on the investigative report serves to authenticate all the enclosures.

Figure 13-5 is an example of a completed JAGMAN investigative report (without enclosures).

## **Classification of Report**

Because of the wide circulation of JAGMAN investigative reports, classified information should be omitted unless inclusion is essential. When included, however, the investigative report is assigned the classification of the highest subject matter contained in it. Encrypted versions of messages are not included or attached to investigative reports where the content or substance of such message is divulged. To assist in the processing of requests for release of investigations and to simplify handling and storage, declassify enclosures whenever possible. If the information in question cannot be declassified, but contributes nothing to the report, consider removing the enclosure from the investigation with notification in the forwarding endorsement.

## **ACTION BY THE CONVENING AND REVIEWING AUTHORITIES**

The IO submits the JAGMAN investigative report to the CA who reviews it and transmits it by endorsement to the appropriate superior officer. The endorsement will accomplish one of the following actions:

- Return the report for further inquiry or corrective action noting any incomplete, ambiguous, or erroneous action of the IO.
- Forward the record setting forth appropriate comments, recording approval or disapproval, in whole or in part, of the proceedings, findings, opinions, and recommendations.

In line of duty/misconduct investigation, the CA is required to specifically approve or disapprove the line of duty/misconduct opinion. This is accomplished as shown in paragraph 2 of figure 13-6.



From: Lieutenant Close D. Hatch, USNR, 111-11-1111/1105

To: Commanding Officer, U.S. Naval Support Activity, Naples, Italy

Subj: INVESTIGATION TO INQUIRE INTO THE CIRCUMSTANCES SURROUNDING THE MOTOR VEHICLE ACCIDENT INVOLVING, AND INJURIES SUSTAINED BY, YNSN JANE A. DOE, USN, 222-22-2222, NAVAL SUPPORT ACTIVITY, NAPLES, ITALY, WHICH OCCURRED IN GAETA, ITALY, ON 28 AUGUST 1994

Ref: (a) JAG Manual

Encl: (1) CO, NSA Naples, appointing order, ltr 5830 Ser 01L/1128 of 29 August 1994

(2) NSA Det Gaeta Shore Patrol Report of 28 Aug 94

(3) Statement of YNSN Jane A. Doe, USN, 222-22-2222, Naval Support Activity, Naples, Italy, of 7 Sep 94, with attached Privacy Act statement and JAGMAN § 0215b warning attached

(4) Chronological record of medical care with medical board attached

(5) NAVCOMPT 3065 (Leave Authorization) ICO SNM

#### PRELIMINARY STATEMENT

1. Pursuant to enclosure (1), and in accordance with reference (a), a one-officer JAGMAN investigation not requiring a hearing was conducted to inquire into the circumstances surrounding the motor vehicle accident involving and the injuries suffered by YNSN Jane A. Doe that occurred on 28 August 1994 in Gaeta, Italy. All reasonably available relevant evidence was collected. There were no difficulties encountered during the conduct of this investigation. While certain minor conflicts appear in the evidence, none was of sufficient degree or materiality to warrant comment.

2. All documentary evidence included is certified to be either the original or a copy that is a true and accurate representation of the original document represented.

3. All social security numbers were obtained from official sources and not solicited from individual service members.

4. This investigation is being conducted and this report is being prepared in contemplation of litigation and for the express purpose of assisting attorneys representing interests of the United States in this matter.

5. LCDR Mary N. Christmas, JAGC, USN, was consulted on the possibility of claims for or against the government as a result of the vehicle accident.

#### FINDINGS OF FACT

1. On 28 August 1994, YNSN Jane A. Doe, USN, 222-22-2222, age 21, was on authorized annual leave from U.S. Naval Support Activity, Naples, Italy, where she was assigned [encl (5)].

2. At approximately 0325, 28 August 1994, a motor vehicle accident occurred on Via Pachcria, Gaeta, Italy [encl (2)].

3. At the time of the motor vehicle accident, the vehicles involved were being driven by Antonio Franco of 39909 Via Ripperia, Gaeta, Italy and Salvatore Garllino of Naples, Italy [encl (2)].

**Figure 13-5.-Sample JAGMAN Investigation.**

4. The vehicle driven by Mr. Franco was a 1978 Fiat 132, Naples registration NA 99999 [encl (2)].
5. The vehicle driven by Mr. Garllino was a 1992 BMW, Rome registration ROMA 12345 [encl (2)].
6. YNSN Jane A. Doe, USN, was a passenger in the vehicle driven by Mr. Garllino [encls (2) and (3)].
7. YNSN Jane A. Doe, USN, and Mr. Garllino were both wearing seat belts at the time of the accident [encls (2) and (3)].
8. Early in the evening of 27 August 1994, YNSN Doc and Mr. Garllino went to The Castle, a nightclub in Gaeta, Italy [encls (2) and (3)].
9. Over the course of several hours at The Castle, Mr. Garllino consumed approximately one and one-half bottles of Asti Spumonte champagne and YNSN Doe drank approximately one-half bottle of Asti Spumonte [encls (2) and (3)].
10. Mr. Garllino and YNSN Doe left The Castle at approximately 0310 on 28 August 1994 [encls (2) and (3)].
11. Upon leaving The Castle, Mr. Garllino drove the vehicle away from the nightclub [encl (3)].
12. Upon entering Mr. Garllino's vehicle, and "without thinking," YNSN Doe permitted Mr. Garllino to drive his vehicle [encl (3)].
13. After leaving The Castle, entering the vehicle, and driving away, Mr. Garllino proceeded up the Tangenzilla at an "excessively high speed" for the road conditions [encl (3)].
14. The posted speed limit on the Tangenzilla was 120 km [encl (2)].
15. YNSN Doe attempted to get Mr. Garllino to pull over and allow her to drive, or to at least slow down, but Mr. Garllino failed to comply with her request [encls (2) and (3)].
16. The road was covered with dew and the weather was foggy [encls (2) and (3)].
17. Mr. Garllino turned north off of the Tangenzilla onto Via Pacheria and began to slide into the southbound lane of Via Pacheria, Gaeta, Italy [encls (2) and (3)].
18. Upon going into the southbound lane of Via Pacheria, Mr. Garllino lost control of the vehicle and struck the oncoming vehicle driven by Mr. Franco [encls (2) and (3)].
19. The speed of Mr. Garllino's vehicle at the time of the accident was 80-100 km [encls (2) and (3)].
20. As a result of the collision, YNSN Doe sustained injuries to her pelvic area and right sacroiliac (lower back) and suffered a mild concussion [encl (4)].
21. Mr. Garllino and Mr. Franco reported no major injuries. Mr. Franco had only a few minor abrasions to his face [encl (2)].
22. As a result of YNSN Doe's injuries, she was transported to the Saint Benzollini Hospital, Gaeta, Italy, on 28 August 1994 [encls (2) and (3)].

**Figure 13-5.-Sample JAGMAN investigation—Continued.**

23. After she was stabilized, YNSN Doe was transported to the U.S. Naval Hospital, Naples, Italy, via ambulance [encls (2) and (3)].
24. On 28 August 1994, after admission to the Naval Hospital, YNSN Doe underwent surgery to remove her spleen [encl (4)].
25. YNSN Doe was hospitalized from 28 August 1994 to 8 September 1994, a period of 12 days [encl (4)].
26. The attending physician was CDR Drag A. Line, MC, USN, Naval Hospital, Naples, Italy [encl (4)].
27. YNSN Doe's prognosis is permanent disability, and no outpatient treatment is expected [encl (4)].
28. YNSN Doe is presently on limited duty attached to the Naval Support Activity, Naples, Italy, subsequent to the findings rendered by a medical board convened at Naval Hospital, Naples, Italy [encl (4)].
29. Mr. Garllino was arrested and cited by the Gaeta Polizia for driving under the influence on 28 August 1994 [encl (2)].

#### OPINIONS

1. The voluntary intoxication of Mr. Garllino was the proximate cause of the accident [FOF (9), (11), (18), and (29)].
2. Excessive speed played a significant role in causing the accident [FOF (13), (14), (15), (16),(17), and (19)].
3. YNSN Doc used poor judgment in allowing Mr. Garllino to drive from The Castle, but available evidence indicated that YNSN Doc attempted to get Mr. Garllino to stop and allow her to drive—r, in the very least, to slow down—and was unsuccessful [FOF (12) and (15)].
4. YNSN Jane A. Doe's personal injuries were incurred in the line of duty and not due to her own misconduct [FOF (1), (7), (8), (11), (15), and (29)].

#### RECOMMENDATIONS

1. That no administrative or disciplinary action be taken against YNSN Doe.
2. That any claim submitted to the government by Mr. Franco for vehicle damage or personal injuries be forwarded to the insurance company of Mr. Garllino.

/s/ Close D. Hatch

**Figure 13-5.-Sample JAGMAN investigation—Continued.**

If the CA corrects, adds, or disapproves findings of fact, opinions, or recommendation, the following language would be added in the endorsement:

- The findings of fact are hereby modified as follows:
- The following additional findings of fact are added: (numbers start after the last findings of fact in the basic investigation).

- Opinion \_\_\_\_ in the basic correspondence is not substantiated by the findings of fact because \_\_\_\_\_ and is therefore either disapproved or modified to read as follows: \_\_\_\_\_.

The following additional opinions are added: (numbers start after the last opinion in the basic investigation).

- Recommendation \_\_\_\_ is not appropriate for action at this command; however, a copy of this

DEPARTMENT OF THE NAVY  
COMMANDING OFFICER  
U.S. NAVAL SUPPORT ACTIVITY  
FPO AE 09619-1000

5830  
00/Ser 1649  
14 Sep 94

FIRST ENDORSEMENT on LT Close D. Hatch, USN, 111-11-1111/1105, 5800 [code] ltr of [date]

From: Commanding Officer, U.S. Naval Support Activity, Naples, Italy

To: Judge Advocate General

Via: Commander Fleet Air Mediterranean

Subj: INVESTIGATION TO INQUIRE INTO THE CIRCUMSTANCES SURROUNDING THE MOTOR VEHICLE ACCIDENT INVOLVING, AND INJURIES SUSTAINED BY, YNSN JANE A. DOE, USN, 222-22-2222, U.S. NAVAL SUPPORT ACTIVITY, NAPLES, ITALY, WHICH OCCURRED IN GAETA, ITALY, ON 28 AUGUST 1994

1. Readdressed and forwarded.
2. The opinion that YNSN Doe's injuries were incurred in the line of duty and not as a result of her misconduct is approved.
3. The basic proceedings, findings of fact, opinions, and recommendations of the investigating officer are approved.

/s/ WATER E. TIGHT

copy to:  
CO, NLSO Naples  
LT Hatch

Figure 13-6.-First endorsement of JAGMAN investigative report.

investigation is being furnished to \_\_\_\_\_  
for such action as deemed appropriate.

- Additional recommendations: (numbers start after the last recommendation in the basic investigation).

- The action recommended in recommendation \_\_\_\_ has been accomplished by \_\_\_\_\_ (has been forwarded to \_\_\_\_\_ for action).

If corrective action had been taken on the investigation, paragraph 4 of figure 13-6 would read:

4. Subject to the foregoing remarks, the basic proceedings, findings of fact, opinions, and

recommendations of the investigating officer are approved.

#### **DISCIPLINARY ACTION**

Whenever punitive or nonpunitive disciplinary action is contemplated or taken respecting an individual as a result of the incident under inquiry, the action will be noted in the endorsement of the CA. Disciplinary action should be taken in a timely manner and should not await the concurrence of higher authority.

#### **COPIES AND FORWARDING**

Send one complete copy of the investigation with the original for each intermediate reviewing authority

and an additional copy for JAG. In cases involving death or injury to service members, JAG receives the original and three copies. When certain types of incidents are investigated, send advance copies of the investigative report as soon as possible. Investigations requiring advance copies include the following:

- Admiralty cases
- Collisions
- Loss or stranding of a ship
- Postal losses
- Serious incidents
- Deaths/serious inquiries
- Material property damages
- Claims investigations

In all cases where it is appropriate to send an advance copy of an investigation to JAG, the advance copy will be sent by an officer exercising general court-martial jurisdiction (OEGCMJ) and will include that officer's endorsement.

## **RELEASING INVESTIGATIONS**

Convening and reviewing authorities are not authorized to release JAGMAN investigations. The CNO (OP-09N) is the release authority for investigations involving classified information and JAG is the release authority for all other JAGMAN investigations.

The other types of administrative investigations conducted are the court of inquiry and the investigation required to conduct a hearing. As stated earlier, procedural y there are only two types. Let's look at the second type of administrative investigations now.

## **COURTS OF INQUIRY AND INVESTIGATIONS REQUIRED TO CONDUCT A HEARING**

Other than conducting a hearing, the common thread that runs between a court of inquiry and an investigation required to conduct a hearing is the concept of parties.

## **PARTIES**

A party is a person subject to the UCMJ who has properly been designated as such in connection with a

court of inquiry or an investigation required to conduct a hearing whose conduct is the subject of the inquiry or who has a direct interest in the inquiry. Upon request, an employee of the Department of Defense (DOD) having a direct interest in the subject of the inquiry must be designated as a party. Designation as a party affords that individual a hearing on possible adverse information concerning him or her.

A person's conduct or performance is subject to inquiry when that person is involved in the incident under investigation in such a way that disciplinary action may follow, that rights or privileges may be adversely affected, or that personal reputation or professional standing may be jeopardized.

A person has a direct interest in the subject of inquiry when (1) the findings, opinions, or recommendations may, in view of his or her relation to the incident or circumstances under investigation, reflect questionable or unsatisfactory conduct or performance of duty or (2) the findings, opinions, or recommendations may relate to a matter over which the person has a duty or a right to exercise control.

The CA of the court of inquiry or investigation required to conduct a hearing may designate parties, or the fact-finding body may be expressly authorized by the CA to designate parties.

A person designated as a party before a court of inquiry or an investigation required to conduct a hearing has the following rights:

- To be given due notice of such designation
- To be present during the proceedings, except when the investigation is cleared for deliberations
- To be represented by counsel
- To be informed of the purpose of the investigation and be provided with a copy of the appointing order
- To examine and object to the introduction of physical and documentary evidence and written statements
- To object to the testimony of witnesses and to cross-examine witnesses other than his or her own
- To request that the court of inquiry or investigation obtain documents and testimony of witnesses, or pursue additional areas of inquiry
- To introduce evidence

- To testify at his or her own request, but not be called as a witness
- To refuse to incriminate himself or herself and, if accused or suspected of an offense, to be informed of the nature of the accusation and advised that no statement regarding the offense that he or she is accused or suspected is required, and that any statement made by him or her maybe used as evidence against him or her in a trial by court-martial
- To make a voluntary statement, oral or written, sworn or unsworn, to be included in the record of proceedings

- To make an argument at the conclusion of presentation of evidence
- To be properly advised concerning the Privacy Act
- To challenge members of the court of inquiry and the IO or, when assigned, the president and any member of the investigation required to conduct a hearing for cause

Figure 13-7 illustrates the circumstances under which particular fact-finding bodies may designate parties as well as who may be designated (military and/or civilian personnel).

COURT OF INQUIRY		
<u>Designee</u>	<u>When Designated</u>	<u>Designation</u>
Any person subject to the UCMJ	Conduct or performance of duty subject to inquiry	Mandatory
Any person subject to the UCMJ or employed by DOD	Direct interests in subject of inquiry	Mandatory upon his or her request
Any member of of the USNR or USMC not subject to the UCMJ by virtue of his or her status	Conduct or performance of duty subject to inquiry	Optional upon his or her request
No other person without SECNAV (JAG) approval	_____	_____
INVESTIGATIONS REQUIRED TO CONDUCT A HEARING		
<u>Designee</u>	<u>When Designated</u>	<u>Designation</u>
Any member of the naval service subject to the UCMJ	Conduct or performance of duty subject to inquiry	Optional
Any member of any other armed force other than Navy or Marine Corps, subject to the UCMJ, DOD employees, any member of the USNR or USMC not subject by virtue of his or her status	Conduct or performance of duty subject to inquiry	Optional upon his or her request
No other person without SECNAV (JAG) approval	_____	_____

Figure 13-7.-Chart showing circumstances under which particular fact-finding bodies may designate parties.

## COURT OF INQUIRY

The court of inquiry is the traditional means by which serious military incidents have been investigated. Originally adopted by the British Army, it has remained in its present form with only slight modifications since the adoption of the Articles of War of 1786. A court of inquiry is not a court in the sense of the term used today; rather, it is a board of senior officers charged with searching out, developing, assembling, analyzing, and recording all available information about the incident under investigation. When directed by the CA, the court will offer opinions and recommendations about an incident.

The court is convened by any person authorized to convene a GCM or by any person designated by the Secretary of the Navy (SECNAV). It consists of three or more commissioned officers. When practical, the senior member who is the president of the court should be a least an O-4. All members should also be senior to any person whose conduct is subject to inquiry. Legal counsel, certified under Article 27(b), UCMJ, and sworn under Article 42(a), UCMJ, appointed for the court and under the direct supervision of the president of the court assists in matters of law, presenting evidence, and in keeping and preparing the record. Counsel does not perform as a prosecutor, but must make sure all evidence is presented to the court of inquiry.

The court is convened by a written appointing order, the contents of which are much the same as those discussed for fact-finding bodies not required to conduct a hearing. The required contents, with an example, can be found in JAGINST 5830.1, end (1).

All testimony is under oath (except for a person designated as a party who makes an unsworn statement) and transcribed verbatim. Using a formal hearing procedure, witnesses and evidence are presented in the following order after opening statements are made: counsel for the court; a party; counsel for the court in rebuttal; and, subsequently as requested by the court. After testimony and statement by the parties, if any, counsel for the court and counsel for the parties may present arguments.

Although a court of inquiry uses a formal hearing procedure, it is administrative and not judicial. Therefore, as in any other administrative fact-finding body, the Military Rules of Evidence (Mil.R.Evid.) will not be followed, except for (1) 301, self-incrimination, (2) 302, mental examination, (3) 303, degrading questions, (4) 501-504, dealing with privileges, (5) 505, classified information, (6) 506, government information

other than classified information, and (7) 507, informants.

A court of inquiry has the power to subpoena witnesses who may be summoned to appear and testify before the court the same as at trial by court-martial.

## INVESTIGATION REQUIRED TO CONDUCT A HEARING

The investigation required to conduct a hearing is intended to be an intermediate step between an investigation not requiring a hearing and a court of inquiry. Such investigations are used, for example, when a hearing with sworn testimony is desired or designation of parties may be required, but only a single IO is necessary to conduct the hearing.

The principal characteristics of an investigation required to conduct a hearing include the following:

- The investigation is convened by any person authorized to convene a general or special court-martial.
- It consists of one or more commissioned officers.

The investigation should normally be composed of a single officer; however, if multiple members are considered desirable, a court of inquiry should be considered. Usually, it consists of one commissioned officer, but a Department of the Navy (DON) civilian employee may be used if appropriate. The IO should be senior to any designated party and at least an O-4 or GS-13. It may consist of two or more commissioned officers with the senior member who will be the president of the board at least an O-4. If appropriate, warrant officers, senior enlisted, or DON civilian employees may be assigned as members, in addition to at least one commissioned officer. No member of the board should be junior in rank to any person whose conduct or performance of duty is subject to inquiry.

Legal counsel should be appointed for the proceedings, with duties and requirements identical to those for a court of inquiry. The investigation is convened by written appointing order. The required contents, with an example, can be found in JAGINST 5830.1, encl (2). All testimony is under oath and all proceedings are transcribed verbatim. A formal hearing procedure, similar to the court of inquiry is used. The CA may designate those persons whose conduct is subject to inquiry or who have a direct interest in the subject inquiry as parties in the convening order. The CA may authorize the fact-finding body to designate parties during the proceedings. Unless convened to

investigate a claim under Article 139, UCMJ, and JAGMAN, chapter II, an investigation does not possess the power to subpoena civilian witnesses.

## **USES OF THE RECORD OF INVESTIGATION**

If an individual is accorded the rights of a party with respect to the act or omission under investigation, punishment may be imposed without further proceedings. The individual may, however, submit any matter in defense, extenuation, or mitigation. If an individual has not been accorded the rights of a party, a hearing conducted according to paragraph 4 of part V, *Manual for Courts-Martial* (MCM), 1984, must be conducted before punishment is imposed.

In cases where a GCM is contemplated, it is sometimes possible to use the record of a court of inquiry instead of a formal pretrial investigation of the offenses. If a court of inquiry is used in place of an Article 32, UCMJ, investigation, the accused can demand to recall witnesses for further cross-examination and to offer any new evidence on his or her own behalf. Normally, the convening of a separate Article 32, UCMJ, investigation is the most efficient method for bringing an accused to trial.

Sworn testimony contained in the record of proceedings of a court of inquiry or investigation required to conduct a hearing before which an accused was not designated as a party may not be received in evidence against the accused unless that testimony is admissible independently of the provisions of Article 50, UCMJ.

A party is entitled to a copy of the record of an Article 32, UCMJ, pretrial investigation where trial by GCM has been ordered, subject to the regulations applicable to classified material. If a letter of censure or other nonjudicial punishment (NJP) is imposed, the party upon whom it was imposed has a right to have access to a copy of the record in order to appeal.

## **SELECTION OF FACT-FINDING BODIES**

Deciding which type of fact-finding body to convene depends upon the purpose of the inquiry, the relative seriousness of the subject under inquiry, the complexity of the factual issues involved, the time allotted for completion of the investigation, and the nature and extent of powers required to conduct the investigation. The type of fact-finding body selected is left to the judgment and discretion of the officer in

command. Before convening an investigation, the CA must consider the powers the fact-finding body will require and the desirability of designating parties. If the subject of the inquiry involves disputed issues of fact and a risk of substantial injustice if an individual is not afforded the rights of a party, a court of inquiry or an investigation required to conduct a hearing should be ordered. If the ability to subpoena witnesses is necessary, a court of inquiry should be convened.

If the subject of the investigation is a major incident, a court of inquiry should be convened. For less serious cases, an investigation not requiring a hearing will normally be adequate.

Section 0202a(3) of the JAGMAN describes a major incident as "An extraordinary incident occurring during the course of official duties resulting in (1) multiple deaths, (2) substantial property loss, or (3) substantial harm to the environment where the circumstances suggest a significant departure from the expected level of professionalism, leadership, judgment, communication, state of material readiness, or other relevant standard." These cases are often accompanied by national public/press interest and significant congressional attention, as well as having the potential of undermining public confidence in the naval service. It may be apparent when first reported that the case is a major incident, or it may emerge as additional facts become known.

Notwithstanding the fact that a death case maybe a major incident as defined, the circumstances surrounding the death or resulting media attention may warrant the convening of a court of inquiry or investigation required to conduct a hearing as the appropriate means of investigating the incident.

The first flag or general officer exercising general court-martial convening authority over the incident or in the chain of command, or any superior flag or general officer, takes immediate control over the case as the CA. If the CA determines that an incident initially considered major is not, or that a court of inquiry is not warranted under the circumstances, those conclusions must be reported to the next flag or general officer in the chain of command before any other type of investigation is convened.

Because investigating major incidents are sometimes complicated by the premature appointment of a board of inquiry or investigation required to conduct a hearing, the CA may wish to initially convene a one-officer investigation not required to conduct a hearing to immediately begin to collect and preserve



evidence and locate and interview witnesses. To decide which course of action to pursue, the CA should set a specific date for the IO to submit an interim oral report. Summaries of testimony or evidence developed by the IO may be used as an aid by any subsequent investigative body, and the initial IO maybe detailed to assist the fact-finding body.

Courts of inquiry and investigations required to conduct a hearing are only used to investigate the most serious incidents. These incidents frequently have extraordinary media and congressional interests, and considerable pressure is often exerted to complete the investigations in a limited period of time. Because of the nature of these investigations, CAs are tasked with providing support for the investigations. Personnel assigned to support these investigations are under the command of the president of the court of inquiry or the IO in an investigation requiring a hearing. The investigation becomes the primary duty of all support personnel. The following types of support will be provided when appropriate:

- Technical advisors
- Court reporters
- Interpreters
- Evidence custodians
- Security
- Administrative support personnel
- Public affairs officers
- Messages

### **LINE OF DUTY/MISCONDUCT DETERMINATIONS**

To assist in the administration of naval personnel, the CO is required to inquire into certain cases of injury, disease, or death incurred by members of his or her command. When these inquiries are conducted, the CO is required to make what is referred to as line of duty/misconduct determinations. As in most matters, the type of inquiry and the degree of formality of the report will depend upon the circumstances of each case.

Normally, the CO of the service member involved is responsible for making the determination as to the type of, and necessity for, inquiry required. If a service member is injured and admitted to a naval hospital, the CO of the naval hospital will, if no investigation has been ordered, report the matter to the local area

coordinator or other comparable authority who will take action to cause an investigation to be conducted.

The results of the inquiry and the subsequent line of duty/misconduct determination can affect several benefits and/or rights administered by the DON to which the injured party may be entitled. Some of these rights include the following:

- Extension of enlistment
- Longevity and retirement multiplier
- Forfeiture of pay
- Disability retirement and severance pay

This report also may be made available to the Department of Veterans Affairs to assist them in making determinations concerning Veterans Administration benefits.

### **WHEN LINE OF DUTY/MISCONDUCT DETERMINATIONS ARE REQUIRED**

Findings concerning line of duty/misconduct must be made in every case where a member of the naval service incurs a disease or injury that (1) might result in permanent disability or (2) results in the physical inability to perform duty for a period exceeding 24 hours (as distinguished from a period of hospitalization for evaluation or observation).

Opinions concerning line of duty are prohibited in death cases. Misconduct will not be attributed to a deceased member. If such an opinion has been made or recorded after the incurrance of an injury, but before death, the convening or reviewing authority will note the error and its lack of validity in the endorsement. Because federal agencies must make determinations with respect to survivor benefits, all significant and relevant facts will be recorded in a timely manner when the command is required to investigate the death of a member.

### **WHAT CONSTITUTES LINE OF DUTY**

An injury or disease incurred by naval personnel while on active service is presumed to have been incurred in the line of duty unless there is clear and convincing evidence that it was incurred during one of the following situations:

- While absent without leave, and such absence materially interfered with the performance of required military duties. Generally speaking, absence in excess

of 24 hours constitutes a material interference unless there is evidence to establish the contrary.

- While confined under sentence of a court-martial that included an unremitted dishonorable discharge.

- While confined under sentence of a civil court following conviction of an offense that is defined as a felony by the law of the jurisdiction where convicted.

- While avoiding duty by deserting the service.

- As a result of the member's own misconduct, as defined in JAGMAN § 0218.

## WHAT CONSTITUTES MISCONDUCT

An injury or disease suffered by a member of the naval service is presumed not to be the result of his or her own misconduct unless there is clear and convincing evidence that (1) the injury was intentionally incurred or (2) the inquiry was the result of grossly negligent conduct that demonstrates a reckless disregard for the foreseeable and likely consequences.

Foreseeability is defined as the reasonable anticipation of the danger created by a negligent act committed by a person of ordinary intelligence and prudence. Injury or disease from a course of conduct is foreseeable if, according to ordinary and usual experience, injury or disease is the probable result of that conduct. On the other hand, gross negligence is defined as a conscious and voluntary act, or omission, that is likely to result in grave injury of which the member is aware. It involves a willful, wanton, or reckless disregard for the life, safety, and well-being of self or others. Simple or ordinary negligence or carelessness, standing alone, does not constitute misconduct. The fact that the conduct violated a law, regulation, or order, or was engaged in while intoxicated, does not, of itself, constitute a basis for a determination of misconduct.

Misconduct can never be in the line of duty. Thus, a finding that an injury was the result of the member's own misconduct must be accompanied by a finding that the injury was incurred not in the line of duty. Accordingly, if a service member is properly performing his or her military duty and is injured as a result of that duty, a misconduct finding would be wrong since no military duty can require a service member to commit an act that would constitute misconduct.

Intoxication is a factor in many of the injuries in which misconduct is found and is often coupled with evidence of recklessness or disorderly conduct. Intoxication may be produced by alcohol, drugs, inhalation of fumes, gas, or vapor. In order for intoxication alone to be the basis for a misconduct finding, there must be a clear showing that the following three elements existed:

1. The member's physical or mental faculties were impaired due to intoxication at the time of the injury.

2. The extent of such impairment.

3. The impairment was the proximate cause of the injury.

Proximate cause is conduct that, in a natural and continuous sequence unbroken by any efficient intervening cause, produces injury, and without which the result would have not occurred.

Careful attention must be paid to the facts of each case, especially when the blood alcohol content (BAC) of the injured member is above that constituting a legal state of intoxication in the particular jurisdiction (normally between 0.08 and 0.10 percent BAC). A showing of a blood alcohol level of above .10 mg/dl will, in many cases, be sufficient to satisfy the first two elements; however, additional evidence should be sought in determining whether or not there existed any physical impairment that directly contributed to the injury of the service member. The investigation should include a description of the service member's general appearance, along with information regarding whether the member staggered or otherwise displayed a lack of coordination, was belligerent or incoherent, or displayed slow reflexes or slurred speech.

Inability to perform duty resulting from a disease that is directly attributable to a specific, prior, proximate, and related intemperate use of alcohol or habit-forming drugs is the result of misconduct and therefore, not in the line of duty.

If a member unreasonably refuses to submit to medical, surgical, or dental treatment, any disability that proximately results from such refusal will be deemed to have been incurred as a result of the member's own misconduct.

Any disability resulting from venereal disease is the result of misconduct if the member has not complied with the regulations that require reporting and receiving treatment for such disease.

A member may not be held responsible for his or her acts and their foreseeable consequences if, as the result of a mental defect, disease, or derangement, he or she was unable to comprehend the nature of such acts or to control his or her actions. In the absence of evidence to the contrary, it is presumed that all persons are mentally responsible for their acts.

Because of the strong instinct for self-preservation, an unsuccessful, but bona fide, attempt to kill oneself creates a strong inference of lack of mental responsibility. In all cases of attempted suicide, evidence bearing on the mental condition of the injured person must be obtained. This includes all available evidence as to social background, actions, and moods immediately before the attempt, any troubles that might have motivated the incident, and any pertinent examination or counseling session.

Self-inflicted injury not prompted by a serious intent to die is, at most, a suicide gesture and such injury, unless lack of mental responsibility is otherwise shown, is deemed to be incurred as a result of the member's own misconduct. The mere act alone does not raise a question of mental responsibility because there is no intent to take one's own life; the intent was to achieve some secondary gain.

#### **RELATIONSHIP BETWEEN MISCONDUCT AND LINE OF DUTY**

There are only three possible determinations for findings in a line of duty/misconduct determination. They include the following:

1. In line of duty, not due to member's own misconduct.

2. Not in line of duty, not due to member's own misconduct. This determination would occur when misconduct is not involved, but an injury or disease is contracted by a service member that falls within one of four other exceptions to the line of duty presumption (desertion; unauthorized absence (UA); confinement as a result of civilian conviction; or confinement pursuant to sentence by a GCM that included an unremitted dishonorable discharge). Example: A service member has been UA for 8 months and is injured while lawfully crossing a street. The injuries were not the result of negligence.

3. Not in line of duty, due to member's own misconduct. A determination of misconduct always requires a determination of not in the line of duty.

An adverse determination as to misconduct or line of duty is not a punitive measure. Disciplinary action, if warranted, is taken independently of any such determination. A favorable determination as to line of duty/misconduct does not prevent separate disciplinary action, nor is such a finding binding on any issue of guilt or innocence in any disciplinary proceeding. The loss of rights or benefits resulting from an adverse determination may be relevant and, at the request of the accused, admissible as a matter in extenuation and mitigation in a disciplinary proceeding.

#### **RECORDING LINE OF DUTY/MISCONDUCT DETERMINATIONS**

The inquiry into, and findings concerning, injuries or disease can be recorded in one of three ways.

1. Health and dental record entries. Use health and dental records when the member's physical inability to perform duty exceeds 24 hours and the medical representative and CO agree that the injury or disease is not likely to result in permanent disability and was incurred in the line of duty and not as a result of the member's own misconduct.

2. Form reports. Use an injury report form (NAVJAG Form 5800.15) when all the following conditions are met:

a. In the opinion of the medical representative, as concurred by the CO, the injury or disease was incurred in the line of duty and not as a result of the member's own misconduct.

b. In the opinion of the medical officer, a permanent or permanent partial disability will likely result.

c. A fact-finding body is not required under the *JAG Manual* and is not otherwise contemplated.

In any case, even if a health and dental record entry would suffice, a form report maybe made to JAG if there appears to be any reason for maintaining a record in that office, Send the form report to JAG via a GCM CA for review. Never use a form report when an injury is self-inflicted, either intentionally or accidentally, since a finding of misconduct often results in either case.

3. A fact-finding body must be convened, and the CO must make findings concerning misconduct and line of duty in any case that:

- the injury was incurred under circumstances that suggest a finding of misconduct might result.

- the injury was incurred under circumstances that suggest a finding of not in line of duty might result.

- there is a reasonable chance of permanent disability, and the CO considers the appointment of a fact-finding body the appropriate means to make sure an adequate official record is made concerning the circumstances surrounding the incident.

- the injured party is a member of the Naval or Marine Corps Reserve, and the CO determines an investigation to be the appropriate means for recording the circumstances.

## **ACTION BY REVIEWING AUTHORITIES**

The CA must specifically comment on the line of duty/misconduct opinion and take one of the following actions:

- The CA must approve, disapprove, or modify the opinion expressed by the fact-finding body by simply stating his or her conclusion in the endorsement.

- If, upon review of the report or record, the CA believes the injury or disease was incurred not in line of duty and due to the member's own misconduct, the member may be afforded an opportunity to submit any desired information.

If provided the opportunity to submit additional information, the member will be advised that ( 1 ) no statement against his or her interest relating to the origin, incurrance, or aggravation of any disease or injury suffered need be made and (2) if the member is suspected of having committed an offense, he or she will be advised of his or her Article 31, UCMJ, rights. If the member elects not to provide further information, that election will be set forth in the reviewing authority's endorsement.

The CA should make sure appropriate time lost, enlistment extension, and similar entries are made in service and/or medical records before sending the report of investigation of an injury concluded to have been incurred not in the line of duty. In the event the not in the line of duty opinion is later disapproved by the OEGCMJ, corrective entries can be made at that time.

## **FORWARDING**

Unless the CA is empowered to convene GCMs, send the record or report to an OEGCMJ. This officer may take any action on the report that could have been taken by the CA. With respect to conclusions

concerning misconduct and line of duty, he or she will indicate his or her approval, disapproval, or modification of such conclusion unless he or she returns the record for further inquiry. A copy of this action will be sent to the CO of the member concerned so that appropriate entries may be made in the service and medical records. Reviewing authorities subsequent to the OEGCMJ need neither comment nor record approval or disapproval of the prior actions concerning line of duty and misconduct.

## **INVESTIGATIVE REQUIREMENTS FOR SPECIFIC INCIDENTS**

The IO should be aware of particular problem areas in line of duty/misconduct investigations. Examples of situations commonly encountered are listed in the following paragraphs, along with a listing of various facts that should be included in investigative reports. The examples are not intended to be comprehensive, nor do the listed factors purport to cover every fact situation that may arise.

### **Speeding**

It is impossible to state categorically when excessive speed becomes gross negligence and requires a finding of misconduct. The investigative report should contain information about the type and condition of the road; the number and width of the lanes; the type of area (densely populated or rural); any hills or curves that played a part in the accident; the traffic conditions; the time of day and weather conditions; the posted speed limit in the area; the mechanical condition of the car (particularly the brakes and tires); and the prior driving experience of the member. The speed of the vehicle is also important; however, estimates of speed based solely upon physical evidence at the scene of the crash, such as skid marks and damage to the vehicle, are somewhat conjectural unless corroborated by other evidence. Therefore, attempts should be made to secure estimates of speed from witnesses, passengers, and drivers. In this way, the postaccident estimates of the police may be corroborated.

### **Falling Asleep at the Wheel**

Falling asleep at the wheel is one of the most common causes of accidents, but is one of the most difficult situations in which to establish misconduct. The act of falling asleep, in itself, does not constitute gross negligence; however, the act of driving while in a condition of such extreme fatigue or drowsiness that the

driver must have been aware of the danger of falling asleep at the wheel may amount to such a reckless disregard of the consequences as to warrant a finding of gross negligence and misconduct. Before a finding of misconduct can be made, there must be clear and convincing evidence showing that the service member experienced premonitory symptoms of drowsiness that should have put the driver on notice of the imminent danger of falling asleep. This information should include how long the service member had been driving and how many miles the member had driven before the accident; the amount of sleep the member had before starting the trip; the member's activities for the 24 hours before the injury; whether any momentary periods of drowsiness were experienced before finally falling asleep; and any evidence of drinking or intoxication.

### **Passenger Misconduct**

If a passenger knows or should know that the driver is unlikely to drive safely because of negligence, lack of sleep, recklessness, or intoxication, the passenger is guilty of misconduct upon voluntarily exposing himself or herself to the danger. The investigation should contain information showing whether the service member had an opportunity to leave the vehicle after the driver's condition became apparent; whether the driver and passenger had been drinking together and how much each had to drink; and what action, if any, was taken by the passenger to have the driver drive more carefully. Also determine the operator's driving experience; any signs of intoxication; whether the passenger noticed the driver was tired or exhibited any other symptoms; whether the passenger took any action to have the driver rest or to personally assume the driving responsibilities.

### **Disorderly Conduct and Fighting**

Injuries incurred by a service member while voluntarily and wrongfully engaged in a fight or similar encounter, whether or not weapons were involved, are due to misconduct where they might reasonably have been expected to result directly from the fight and the service member is at least equally culpable with the adversary in starting or continuing the affair.

Not all injuries resulting from fighting necessarily must be determined to have resulted from the member's misconduct. For example, if an adversary employs unexpectedly violent methods or means, such as a dangerous weapon, a conclusion that the resulting injuries were not due to the member's own misconduct could be appropriate.

In investigating such incidents, you should determine (1) who instigated or provoked the fight and/or struck the first blow; (2) any history of prior altercations between the participants; (3) whether either participant was armed; (4) whether either participant attempted to terminate the fight; (5) the relative size and capabilities of the participants; and (6) the part that drinking, if any, played in the altercation. If there are inconsistent statements from witnesses about the incident, the IO should indicate in the report which witnesses the officer chose to believe in making the findings of fact and opinions.

### **Intentionally Self-Inflicted Injuries**

Include any medical reports and opinions in the investigative report when the investigation concerns an intentionally self-inflicted injury. In these cases, the IO should primarily look for evidence, or lack thereof, of a bona fide suicide intent. The investigative report should contain information about the following:

- Whether the methods used to cause injury were likely to cause death under the circumstances
- The service member's expressed reasons for attempting suicide
- Whether the service member took action to avoid being found before the injury as opposed to being certain he or she would be discovered and treated quickly
- Whether the service member had threatened suicide before the incident under investigation
- Statements of shipmates and friends about the member's apparent state of mind on the date of the act

### **Accidentally Self-Inflicted Injuries: Gunshot Wounds**

A form report should not be used when an injury results from an accidental self-inflicted gunshot wound because of the strict, high standard of care required in the use of firearms or other dangerous weapons. In cases of this kind, mere failure to take proper precautions to prevent a casualty normally constitutes simple negligence or carelessness and, therefore, does not justify a finding of misconduct. However, in the event the record clearly and convincingly shows that the service member has displayed a lack of care that amounts to gross negligence, taking into account the higher standard of care required of persons using and

handling dangerous weapons, a finding of misconduct is appropriate. The IO's report should include information about the following:

- Whether the subject member was familiar with guns in general and with the gun in question
- Whether the member was aware of the weapon's safety features
- Whether there were any defects in the weapon and whether the member knew of such defects
- Whether the member knew the gun was loaded or had checked the chamber for its possible loaded condition
- Whether the member had cocked the weapon
- How the weapon was positioned in relation to the service member's body and why it was placed in that position

- The possible cause of the weapon's discharge
- The mental attitude of the handler, including any alcohol or drug involvement
- Any intervening factors

### **SUMMARY**

Your knowledge of the proper procedures involved with the conduct and preparation of the various types of JAGMAN investigations is an important aspect of your duties as a senior LN. Additional information concerning these investigations can be found in chapter II of the *Manual of the Judge Advocate General* and JAGINST 5890.1. Whenever you are involved with working on a JAGMAN investigation, you should take the time to review the applicable sections of the JAGMAN and JAGINST 5890.1 to make sure all procedures and any special requirements are followed.

## CHAPTER 14

# OFFICE ORGANIZATION AND MANAGEMENT

This chapter is designed to give you an insight into both the organizational makeup of naval legal service offices and the major elements that an office manager must deal with to have an effective and well-run office. As a senior LN, you will probably be in charge of a staff judge advocate (SJA) office or a naval legal service office (NAVLEGSVCOFF or NLSO for short) division and have a title such as administrative supervisor or administrative assistant. Just because you have reached this level does not mean you can sit back and be a supervisor. To ensure an efficient office, you must be aggressively involved in its operations. Involvement is the key to effective management. Your involvement starts at the top and carries through the entire command structure. You have to know not only your command's organizational structure but also its mission.

How many times during your career have you experienced effective and ineffective management techniques by superiors that can only be termed as unforgettable? You should learn from both good and bad experiences. As you progress through your career, apply all your experiences and strive to achieve the best possible results from any situation.

Good office managers keep their minds open and have the ability to make changes when they are needed. Before you make any changes to your office, you must first understand exactly how it operates. Analyze the office and the functions it performs in the light of how performance can be improved. You may not be able to change the present organization, nor may you want to; however, you must understand it thoroughly. This is where involvement is important. For instance, there may be many occasions where you will have to perform the work as well as supervise the work of your subordinates. After it is clear in your mind what is to be done and by whom, you may want to consider modification, consolidation, or reorganization of your office. Knowing how your office currently operates is the first step in managing it yourself. And remember that you must always consider your office's operation within the larger context of your command's overall mission.

### ORGANIZATION OF THE NAVAL LEGAL SERVICE COMMAND

The Deputy Judge Advocate General of the Navy has the additional duty to the Chief of Naval Operations (CNO) as the Commander, Naval Legal Service Command. In this capacity he or she administers the legal services program and provides command direction for all naval legal service activities and resources. The Commander, Naval Legal Service Command has command over all NLSOs. Each NLSO is headed by a commanding officer (CO). Most NLSOs also have detachment and branch offices under them that are commanded by officers in charge (OICs).

The primary purpose of the Naval Legal Service Command and its subordinate offices is to provide necessary legal services to commands and personnel in specified geographical areas. This service is done with a minimum of judge advocates through consolidation of available legal resources at locations with a high concentration of naval commands and personnel. It also places defense counsel under the authority of the Commander, Naval Legal Service Command to nullify any possibility of command control in their defense of court-martial accused.

### NAVAL LEGAL SERVICE OFFICES

NLSOs, under the command of the Commander, Naval Legal Service Command, are placed throughout the world to meet Navy needs. Every NLSO provides legal as well as administrative and educational services for naval activities and personnel within its specified geographical area.

NLSOs provide all necessary legal services and counsel for command legal matters such as military justice, investigations, claims, legal assistance, and administrative proceedings. NLSOs also perform the following functions:

- Provide clerical assistance in the preparation of records and board hearings
- Process and adjudicate claims within the limits of assigned authority

- Review court-martial records, records of investigation, and nonjudicial punishment appeals
- Provide advice on all legal matters, including legal assistance
- Maintain liaison with local, state, and federal courts and law enforcement agencies
- When appropriate, provide advice on admiralty matters, international law, environmental law, labor law, litigation, and jurisdictional questions

NLSOs provide the previous services as requested by commands when the requesting command does not have the necessary legal personnel assigned. Functional responsibilities do not include business and commercial law matters under the cognizance of the Office of General Counsel. Each NLSO has five major departments within its organizational structure: Military Justice, Command Services/Administrative Law, Claims, Command Administration, and Legal Assistance. Additional or fewer departments may be necessary as determined by local conditions.

When a detachment or branch office is assigned to an NLSO, these offices provide the services required to help the parent NLSO meet its responsibilities. The detachment acts as an extension of the parent NLSO and is directly responsible to the CO of the parent NLSO.

### **SHIP, STATION, OR STAFF JUDGE ADVOCATE OFFICE**

In addition to NLSOs and their detachments, you may work at a ship, station, or an SJA office, usually at the convening authority (CA) or officer exercising general court-martial jurisdiction (OEGCMJ) level. OEGCMJs are the reviewing authorities for the CAs placed under their jurisdiction. These offices are usually small, independent offices. They provide the primary legal advice and services required by the commands to which they are assigned or, as in the case of reviewing authorities, are the offices that handle all reviewing requirements for the CAs under their command. You may have one or two LNs assigned to you, but it is just as likely that you may be the only LN at the command. Most of the work in these offices concerns military justice and investigations, but you should also know how to handle claims and legal assistance.

## **ADMINISTRATIVE PROCEDURES**

When you begin work in a new billet, whether it be in an NLSO or an SJA office, one of your first jobs is to learn as much as possible about your organization. You should learn what the primary functions of your office are and what duties it performs as well as its relationship to the overall command organization. After you understand the function of your office; for example, claims, military justice, or legal assistance, you will see how your own duties, and those of your subordinates, fit into these functions.

Thinking of your office in relation to your ship or station, you should study the ship or station organization, and the names, titles, and ranks of those above your office in the chain of command. You should know which other offices relate to yours in their duties. You also should learn what reports are due and in what form. To understand the Navywide program of which you are a part, study the publications related to your work. Remember, as the supervisor it will be ultimately your responsibility to be sure each of your subordinates is knowledgeable in these areas as well.

## **OFFICE MANAGER**

Traditionally, an office manager's job has been viewed as the planning, organizing, directing, and controlling of his or her operations so the activity can carry out its mission.

Many modern management authorities consider this concept inadequate because it fails to recognize the major role people play in achieving the objectives of the activity. To get the job done, managers organize, direct, and attempt to control the activities of people. Therefore, many management authorities prefer a concept of a manager as someone who is responsible for matching the interests and needs of the people with those of the activity or command. Assuming enough resources are available, managing people is the central and most important managerial task.

## **ASSIGNING PERSONNEL**

After interviewing your personnel and reviewing their service records, you should have a good idea of their experience level, past performance, and knowledge of the duties associated with the LN rating.

All LNs are expected to perform the duties of their rating at the rate level they hold. This is a necessary condition of naval organizations, but it should not prevent you from remembering that each individual has



special talents or preferences. A good supervisor always finds out what each person likes to do well enough to put extra effort into it. You cannot make all assignments on this basis, particularly when manning levels and office workload override individual desires. However, it does pay dividends in quantity and quality of work and better office morale if individuals are able to work at some of the tasks they do and like better than others.

Since transfers, leave, temporary additional duty, or hospitalization will cause changes of personnel within your office, rotate your subordinates in the various jobs occasionally. By doing this you will take the first step in preventing office routine from breaking down when a key person is absent and be able to give each individual an insight into how each task contributes to the overall function of the office. Prepare for the unexpected by training your people to replace each other and to replace you.

One method to make sure individuals clearly understand their job assignments is to establish those assignments in writing. By establishing job assignments for each desk in your office, you will make sure each individual is fully aware of his or her responsibilities and you will provide for a smooth and orderly transition when they are relieved or rotated to other assignments. It also will help you make sure those tasks that are done once a month are not forgotten. A formal memo is not necessary to set up the requirements of a job. Just make a list on the desk leaf or directly in front of the desk where the work is done. You should keep a copy of the list so you can refer to it as necessary.

When you assign duties, give similar or related tasks to the same person. Proper combination of duties speeds up operations by cutting out wasted motion and improving accuracy. Divide the workload as fairly as possible. An uneven workload lowers morale and creates bottlenecks that decrease office productivity.

## **CORRESPONDENCE AND DIRECTIVES**

In chapter 1 you were given instruction on how to write the Navy's various forms of correspondence. As the senior LN, you will be handling them in a much different way. One of your primary duties as an office supervisor is to control the correspondence and directives that your office deals with in its normal daily routine. Your responsibility is to handle and route all incoming and outgoing correspondence and to make sure all directives of a legal nature are kept current and prepared following command policy. It will be up to you to determine which correspondence has the highest

priority and how to route it to each worker so there is a smooth coordination of work in your office.

Knowing exactly what to do with incoming correspondence is important to the efficient operation of your office and command. You must be sure you have set up a system of routing correspondence to your workers for action that considers the priority with which the action is taken. The system you set up must also allow for your subordinates to understand not only the content of the correspondence but the timeliness with which they should act on it. A correspondence read file and an action message board are two commonly used routing systems for making sure workers read and initial appropriate action items. It is also important that all your personnel are familiar with the different types of naval correspondence and directives as covered by the *Correspondence Manual* and the *Directives Issuance System Manual*.

## **TRAINING**

A very important aspect of your role as a supervisor is to make sure you maintain a comprehensive training program. The primary goal of any training given to your subordinates is to improve their efficiency on the job plus enhance their advancement opportunities. A formal training program intended to ready your personnel for advancement should be based on occupational standards. Since advancement examinations are written based on occupational standards established for each rating, any training received within the occupational standards guidelines benefits all concerned. Another reason for comprehensive training, especially for those LNs who are new to the rating, is to indoctrinate them as soon as possible to the many facets of the rating. When an NLSO or SJA office receives new LNs recently out of school, the new LNs possess only the basic administrative tools. It will take some time for these LNs to experience the many phases of the rating. Usually one tour is not enough to do the job. The importance of a sound training program cannot be overemphasized.

Many sources are available to you when putting your training program together. Good guidelines for selecting and organizing your subject matter are contained in *Military Requirements for PO 3 & 2*. Its contents are extremely helpful at guiding you through the training development process and should result in a program that will meet the needs of your subordinates as well as the LN community as a whole.

## **CIVILIAN PERSONNEL MANAGEMENT**

In most of your billet assignments as an LN you will work side by side with civilian personnel who augment the staffing of NLSOs or SJA offices. Quite often you will supervise some of them. Together, civilian employees with military counterparts are an integral team that contributes significantly to the mission success of your office as well as the command. In the next section we will address civilian employees and two important aspects of your supervision, namely, writing position descriptions and performance appraisals.

### **THE FEDERAL EMPLOYEE**

Too often the unfamiliarity with civil service regulations causes problems in carrying out good management practices. Again, involvement is important in achieving office efficiency. To understand the world of a civil servant you should not hesitate to pursue whatever is available in the way of training. A visit to your servicing civilian personnel office should be your first stop. They not only keep up the records of civilian employees but also maintain publications and regulations governing civil service; for example, copies of the *Federal Personnel Manual*, the *Civil Service Reform Act* pamphlet, and the *Manager's Handbook*. The most helpful and highly recommended guide is the local standard operating procedures (SOP). You can obtain the SOP from the servicing civilian personnel office also. The local SOP explains in specific detail how actions are handled by that servicing personnel office. Each SOP is different and should never be used at another location because it would not apply. There are procedural differences at each Servicing civilian personnel office. The local SOP defines the procedures for all personnel actions. For instance, it explains the procedures for staffing, classification, and employee relations. These offices also conduct seminars and training for military supervisors. Your efforts to get as much information as possible will enhance your understanding of the civilian personnel who staff your office.

### **POSITION DESCRIPTIONS**

One of the major tasks concerning civilian employees that you may find yourself involved in is the writing of position descriptions. Positions must be classified before employees can be hired. A position description is an official record of the work assigned by management to an employee. Position descriptions are

useful in setting qualifications used in filling jobs and promoting employees. They can be used to orient new employees in their duties. The duties and responsibilities in a position description are also used in developing performance standards for the work and in deciding on (training courses related to the work).

Although different position descriptions are required for different classifications of federal employees, we will touch briefly on the General Service (GS) position description because, in most cases, it will be the GS civil service employee that you supervise. The following is a broad outline of the major elements that make up a GS position description.

Most GS position descriptions are now written in a Factor Evaluation System (FES) format. The FES is a method of assigning grades in the classification of nonsupervisory positions, GS-1 through GS-15. Under the FES, position descriptions consist of a brief listing of the major duties followed by a description of those duties in nine FES evaluation factors. The nine factors are as follows:

1. Knowledge required (by the position)
2. Supervisory controls
3. Guidelines (for the work)
4. Complexity (of the work)
5. Scope and effect (of the work)
6. Personal contacts
7. Purpose of contacts
8. Physical demands
9. Work environment

For additional information on writing position descriptions using the FES format, refer to the guide *How to Write Position Descriptions Under the Factor Evaluation System*. All servicing civilian personnel offices should have this guide.

### **PERFORMANCE APPRAISALS**

Another important task is the writing of the performance appraisals of your civilian personnel. Performance appraisals are used as a basis for decisions to train, reward, assign, promote, demote, retain, or remove (for reasons other than misconduct) employees. Because most performance appraisals are based on locally prepared criteria, we will only briefly cover the major areas that supervisors need to be concerned with

when writing performance appraisals. Specifically, they are as follows:

- Advise employees on what the critical elements of their jobs are
- Establish performance standards that will permit accurate evaluation of job performance on the basis of objective, job-related criteria
- Assist employees in improving unacceptable performance
- Reassign, demote, or remove those employees whose performance continues to be unacceptable, but only after they are given an opportunity to show that they can perform acceptably and do not improve

Remember, the aforementioned writing guidelines are very general. Specifics depend on the location of your organization, the type of federal employees you are supervising, and the type of job that they are assigned. Again, you should contact your servicing civilian personnel office to obtain both the governmentwide and local directives that are established for your particular employees' job descriptions and performance appraisals.

### **INDEBTEDNESS**

Your office may be tasked with being the central point for the processing of all indebtedness complaints concerning members of the command. Therefore, you must be familiar with the Navy's policy regarding indebtedness of its members. As the office supervisor, you will decide how to handle indebtedness correspondence by setting priorities and setting up files and tickler systems to track cases. This section briefly discusses the major parts of that policy, as well as when and how complaints of indebtedness must be addressed by the command.

Keep in mind that an indebtedness problem is of a personal nature and is treated as a confidential matter between the service member, his or her division officer (or whoever the CO appoints as advisor), and your office. Public knowledge is not required unless administrative proceedings or disciplinary action becomes necessary.

### **POLICY**

From start to final settlement, a monetary obligation is a private matter between the service member and the creditor. A member of the naval service, however, is

expected to settle his or her just financial obligations in a proper and timely manner. The failure to pay just debts or the repeated undertaking of obligations beyond one's ability to pay is regarded as evidence of irresponsibility. It is considered in retaining security clearances, making advancement in rate or special duty assignments, recommending reenlistments, or authorizing extensions. In aggravated circumstances, indebtedness problems may become grounds for disciplinary action or administrative separation. The naval service has no authority to require a member to pay any private debtor to divert any portion of his or her salary to payment. No CO may adjudicate claims or arbitrate controversies respecting alleged debts; however, all COs should cooperate with creditors to the limited extent of referring qualified correspondence to the member concerned.

Before discussing what is qualified correspondence or qualified indebtedness complaints, we will look at two acts that a creditor must follow before a CO is obligated to cooperate with the creditor.

### **FEDERAL TRUTH IN LENDING ACT**

The Federal Truth in Lending Act requires a disclosure of credit terms so the consumer may compare the various terms available to him or her and avoid the misinformed use of credit. To this end, the act requires that credit terms and costs be explained to the consumer in a uniform manner revealing the annual percentage rate of the total finance charge.

### **FAIR DEBT COLLECTION PRACTICES ACT**

The Federal Fair Debt Collection Practices Act prohibits contact by a debt collector with third parties, such as COs, to aid in debt collection unless there has been prior consent by the debtor, or the debt collector obtains a court order. The act defines what a debt collector is and is not. Generally, those prohibited from contacting the CO are those firms engaged in the collection of debts as their primary purpose. In other words, the original creditor has given up trying to collect and turned it over to a professional debt collector. The act does not prohibit the original creditor from contacting the command.

### **PROCESSING OF COMPLAINTS**

Complaints of indebtedness are referred to the service member when the creditor's correspondence contains evidence that the debt complained of has been reduced to judgment. If it has not been reduced to

judgment, the correspondence must contain a certificate of compliance (or its equivalent) and proof that the credit transaction was made following the Truth in Lending Act and its Standards of Fairness. The creditor also must submit a Statement of Full Disclosure showing the terms of the transaction disclosed to the service member when the contract was executed.

If the debt collector is in violation of the Fair Debt Collection Practices Act or a state statute regulating debt collection practices, return the correspondence to the sender, along with a letter similar to the sample letter in figure 14-1.

### **REFERRAL TO SERVICE MEMBER DEBTOR**

Normally a division officer or you, as the senior LN, refers a qualified indebtedness complaint to the service member at a conference where the member is confronted with the alleged debt. If the service member acknowledges the debt and his or her ability to pay, instruct the member on the fact that he or she is expected to make good on the debt as soon as possible. If the service member disputes the debt or states an inability

to pay, refer him or her to the nearest legal assistance officer.

### **CORRESPONDENCE WITH THE CREDITOR**

When you refer a complaint to a service member debtor, you should notify the creditor of the referral and some indication of the debtor's intentions. Prepare and send a letter similar to the sample letter in figure 14-2 to the creditor and make sure the member's intentions reach the creditor either directly or through a legal assistance officer.

When the correspondence shows the complaining creditor has no judgment, is subject to the Truth in Lending Act, and contains no evidence of the compliance-disclosure requirements already discussed, prepare and send a letter similar to the sample letter in figure 14-3, enclosing a copy of the Standards of Fairness and forms for a Statement of Full Disclosure and the Certificate of Compliance. Hold the complaint in abeyance pending reply from the creditor.

If the creditor resubmits the complaint and includes the completed, required forms, or their equivalent, the complaint is considered qualified and you should

Dear Sir/Madam:

This is in reply to your letter of (date) concerning the alleged indebtedness of (rate, name).

The policy of the Department of the Navy concerning indebtedness is that members of the naval service shall honorably discharge their just debts. The Department of the Navy, however, has no authority to enforce settlement of any private claims made against members of the naval service, nor is adjudication of disputed claims a matter under the cognizance of the Department of the Navy.

The Navy will forward complaints of indebtedness to members advising them to communicate directly with the claimant regarding their intention in the matter, provided that the letter of indebtedness complies with statutory and regulatory requirements.

A careful review of the contents of your correspondence suggests that it is in violation of (statute [federal or state or both]), in that (brief description of apparent violation, for example, correspondent is a member of the class of persons prohibited from contacting third parties). Therefore, the correspondence is returned to you without action.

You are advised to communicate directly with (rate, name) about this matter.

Sincerely,

**Figure 14-1. Sample letter to debt collector in violation of Fair Debt Collection Practices Act or state statute.**

Dear Sir/Madam:

This is in reply to your letter of (date) concerning the alleged indebtedness of (rate, name).

In view of your letter, we have advised (rate, name) to communicate directly with you regarding his or her intention in the matter. We hope the above action will result in the matter being satisfactorily resolved.

Sincerely,

**Figure 14-2.-Sample letter of complaint referred to service member debtor.**

Dear Sir/Madam:

This is in reply to your letter of (date) concerning the alleged indebtedness of (rate, name).

The policy of the Department of the Navy concerning indebtedness is that members of the naval service shall honorably discharge their just and fair debts. The Department of the Navy has no authority to enforce settlement of private claims made against members of the naval service, nor is adjudication of disputed claims a matter under the cognizance of the Department of the Navy.

Department of Defense directives require that as a condition precedent to forwarding complaints of indebtedness to a service member the enclosed forms be completed and the Standards of Fairness followed. If, after review, it appears that the provisions of the Department of Defense directives have been fully satisfied, we will refer the matter to the service member so that he or she may reply to you.

Sincerely,

Encl: (1) Standards of Fairness and forms for a Statement of Full Disclosure and a Certificate of Compliance

**Figure 14-3.-Sample letter to creditor who provides no evidence of meeting compliance-disclosure requirements.**

process it accordingly. If the resubmitted complaint contains neither form, or a set incompletely or insufficiently completed forms, return the creditor's correspondence with a cover letter similar to the sample letter in figure 14-4.

Refer cases of questionable qualifications to a legal assistance officer or an appointed command representative for review and opinion. In such instances, correspondence to the creditor is tailored appropriately.

Occasionally, a disgruntled creditor who did not qualify his or her complaint for referral writes to his or her Congressman. This leads to a congressional inquiry. The most important thing to know about a congressional inquiry is that it must be answered quickly and courteously and provide sufficiently complete information to answer the question without violating anyone's rights. A congressional inquiry is dealt with by using a letter similar to the sample letter in figure 14-5.

#### **ADMINISTRATIVE OR DISCIPLINARY ACTION**

Actions discussed here are reserved for aggravated cases of service members who show no inclination to settle qualified debts referred to them through their commands. Such cases involve members who

continually overextend themselves despite prior difficulties from, and warnings regarding, living beyond their means. Repeated complaints from the same creditor or multiple complaints from different sources are the usual indications of these problems.

#### **Administrative Separations**

Service members may be separated for misconduct due to a pattern of misconduct when they exhibit an established pattern of dishonorable failure to pay just debts. Processing for misconduct could result in an other than honorable separation with attendant loss of service benefits. In each case, the member must have received prior counseling from an appropriate financial counselor or, if necessary, full family counseling if it appears that domestic relations or alcohol abuse might be, in part, responsible for the indebtedness. He or she must also be given a reasonable time to show progress in his or her efforts to become solvent. Following counseling, a warning entry is made on page 13 of the member's service record.

#### **Disciplinary Action**

Article 134, *Uniform Code of Military Justice* (UCMJ), includes the offense of dishonorable failure to pay a just debt that carries a maximum punishment of 6 months' confinement, forfeiture of all pay and

Dear Sir/Madam:

This is in reply to your letter of (date) concerning the alleged indebtedness of (rate, name).

After a careful review of the contents of your correspondence, it does not appear that you have met the Full Disclosure test and the Standards of Fairness requirements. (Specify particulars to the extent appropriate.) We are not permitted to assist you until the Standards of Fairness have been followed or until such time as you have obtained a civil judgment in a court of competent jurisdiction which follows the provisions of the Soldiers' and Sailors' Civil Relief Act.

By copy of this letter the Chief of Naval Personnel is being advised of the foregoing.

Sincerely,

Encl: (1) Correspondence in this case

copy to:  
CHNAVPERS

**Figure 14-4. Sample letter to creditor who continues to show no evidence of meeting compliance-disclosure requirements.**

My dear (Congressman/Congresswoman):

This is in reply to your letter of (date) concerning the alleged indebtedness of (rate, name), United States Navy.

Navy personnel are well indoctrinated in the Department of the Navy's policy of expecting all members of the naval service to discharge their acknowledged debts and just obligations. The Department desires to cooperate and be of assistance to persons who are experiencing difficulty in collecting from naval personnel acknowledged personal debts. There is no legal authority to exercise control or direction over Federal pay in matters of personal indebtedness. Cooperation is restricted to bringing the matter of delinquency in indebtedness to the attention of the member concerned, with the request that they communicate with the creditor regarding their intentions in the matter.

Department of Defense directives require that as a condition precedent to forwarding complaints of indebtedness to a service member the enclosed forms must be completed and the Standards of Fairness complied with. Your constituent should be advised to send the forms to the Commanding Officer, (fill in).

Sincerely yours,

Encl: (1) Standards of Fairness and forms for a Statement of Full Disclosure and a Certificate of Compliance

Figure 14-5. Sample letter to answer congressional inquiry.

allowances, and a bad-conduct discharge. Deceit, willful evasion, false promise, or other circumstances showing deliberate nonpayment or gross indifference must be proved to establish the offense. Nonjudicial punishment or court-martial action may be initiated under Article 134, UCMJ, at the discretion of the command. Remember, however, that disciplinary action is never an appropriate vehicle for assisting creditors in the collection of debts. Moreover, disciplinary action not resulting in discharge is likely to produce financial hardship in the form of reduction or forfeiture, an end not likely to rehabilitate the debtor. Accordingly, it must be decided in each case whether administrative actions, rather than disciplinary measures, may offer better solutions to aggravated indebtedness situations.

### CUSTOMER SERVICE

Earlier in this chapter we discussed that the primary purpose of the Naval Legal Service Command and its subordinate offices is to provide necessary legal services to commands and personnel in specified geographical areas. It is possible that you maybe supervising one of the legal offices that is tasked with providing those legal services to Navy commands and their personnel in your area. This is nothing more than a customer service

function on a command scale. Although you are not a lawyer, many customers will look to you as the senior LN for the legal advice and service they require. Therefore, it is essential that you establish a well-run liaison with those commands.

Although each command that you service will have similar, and often the same, legal problems that need attention, the problems and the urgency with which they are attended could vary greatly depending on the size of the command and its primary mission. For instance, a ship about to get underway would need court-martial services done much more quickly than a naval station whose accused and other interested parties are stationed ashore and will be readily available for some time to come. As the office supervisor, you should recognize the differences in the needs of the commands you service and assign your personnel accordingly.

Coordination between your office and the commands you service will run more smoothly if you establish reliable contacts at each command. Although the point of contact will usually be the person who handles the command's legal work, that person may be junior to most of the people he or she may be dealing with in the command. Therefore, you may need to develop a point of contact with a more senior person who has the power to make sure things you need the command to do

to help you better serve it are done in a timely and efficient manner. It does no good to have your best workers servicing other commands if they are constantly being frustrated by a lack of cooperation on the other end. Liaison is a two-way street, and the smoother the coordination between each command, the better the personnel who really need the help are serviced.

## **SUMMARY**

This chapter emphasized office organization and management. Their importance to command mission cannot be overstated. Your understanding of both the mission and the people that contribute to its success is an integral element to your success as a manager. Lastly, it is important for you to remember that in office management the key is involvement.



## APPENDIX I

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## APPENDIX II

# GLOSSARY OF WORDS AND PHRASES

The following words and phrases are those most frequently encountered in military justice that have special connotations in military law. The list is by no means complete. It is designed solely as a ready reference for the meaning of certain words and phrases. Where it has been necessary to explain a word or phrase in the language of or in relation to a rule of law, no attempt has been made to set forth a definitive or comprehensive statement of such rule of law.

- ABANDONED PROPERTY**—Property to which the owner has relinquished all rights, title, claims, and possession with intention of not reclaiming it or resuming ownership, possession, or enjoyment.
- ABET**—To encourage, incite, or set another on to commit a crime, Article 77, UCMJ.
- ACCESSORY AFTER THE FACT**—Any person subject to the Code who, knowing that an offense punishable by the Code has been committed, receives, comforts, or assists the offender in order to hinder or prevent the offender's apprehension, trial or punishment. NOTE: Article 78, UCMJ, deals with accessories.
- ACCESSORY BEFORE THE FACT**—One who counsels, commands, procures, or causes another to commit an offense—whether present or absent at the commission of the offense. NOTE: Under Article 77, UCMJ, an accessory before the fact is a principal.
- ACCUSATION**—A formal charge against a person, to the effect that the person is guilty of a punishable offense, laid before a court having jurisdiction to inquire into the alleged crime.
- ACCUSED**—One who is charged with an offense under the Code.
- ACCUSER**—Any person who signs and swears to charges; any person who directs that charges normally be signed and sworn to by another; and any other person who has an interest other than an official interest in the prosecution of the accused.
- ACQUITTAL**—The legal and formal certification of the innocence of a person who has been charged with a crime; a deliverance or setting free a person from a charge of guilt.
- ACTIVE DUTY**—The status of being in the active federal service of any of the armed forces under a competent appointment or enlistment or pursuant to a competent muster, order, call, or induction.
- ACTUAL KNOWLEDGE**—A state wherein the person in fact knows of the existence of an order, regulation, fact, and so forth, in question.
- ADDITIONAL CHARGES**—New and separate charges preferred after others have been preferred against the accused while the original charges are still pending.
- AD HOC**—For this; for this special purpose.
- AD INTERIM**—In the meantime. An officer “ad interim” is one appointed to fill a temporary vacancy.
- ADJOURNMENT**—The putting off or postponing of a trial until a stated time or indefinitely; a cessation of the proceedings for a period extending beyond the same day.
- ADJUDICATE**—To determine whether a claim is proper and decide what amount, if any, should be paid the claimant.
- ADMINISTRATIVE BOARD**—A board appointed to render findings based on facts pertaining, or believed to pertain, in a case and to recommend retention, separation, or suspension of separation, and the reason for separation and the characterization of service or description of separation.
- ADMINISTRATIVE SEPARATION**—A discharge or release from active duty upon expiration of enlistment or required period of service, or before, by administrative means and not by a court-martial.

- ADMIRALTY**—That body of law and regulation dealing with civil maritime cases.
- ADMISSION**—A self-incriminatory statement falling short of a complete acknowledgement of guilt.
- AD VALOREM**—According to value; ad valorem tax is a tax or duty upon the value of the article or thing subject to taxation.
- AFFIANT**—The person who makes and subscribes an affidavit.
- AFFIDAVIT**—A statement or declaration reduced to writing and confined by the party making it by an oath taken before a person who has authority to administer the oath.
- AGENT**—A person authorized by another to act for that person. One entrusted with another's business.
- AIDER AND ABETTOR**—One who shares the criminal intent or purpose of a perpetrator, and hence is liable as a principal, Article 77, UCMJ.
- ALIBI**—A defense that the accused could not have committed the offense alleged because the accused was somewhere else when the crime was committed.
- ALLEGATION**—The assertion, declaration, or statement of a party in a pleading of what the party expects to prove.
- ALLEGE**—To assert or state in a pleading; to plead in a specification.
- ALL WRITS ACT**—A federal statute, 28 U.S.C. § 1651(a) (1982), that empowers all courts established by Act of Congress, including the Court of Military Appeals, to issue such extraordinary writs as are necessary or appropriate in aid of their respective jurisdictions and agreeable to the usage and principles of law.
- APPEAL**—A complaint to a superior court of an injustice done or error committed by an inferior court whose judgment or decision the court above is called upon to correct or reverse. See Appellate Review.
- APPELLANT**—The party who takes an appeal from one court or jurisdiction to another.
- APPELLATE REVIEW**—The examination of the records of cases tried by courts-martial by proper reviewing authorities, including, in appropriate cases, the convening authority, the Court of Military Review, the Court of Military Appeals, the U.S. Supreme Court, and the Judge Advocate General.
- APPREHENSION**—The taking of a person into custody.
- APPROVED FINDINGS OF AN ADMINISTRATIVE BOARD**—Final approval of the findings of an administrative board rests with the separation authority and, unless the separation authority modifies the findings and recommendation, approval of the board's recommendations as to characterization or separation, or both, constitutes approval of such findings and recommendations.
- ARBITRATION**—The act of determining a decision in a controversy by a disinterested third party.
- ARRAIGNMENT**—The reading of the charge(s) and specification(s) to the accused or the waiver of their reading, coupled with the request that the accused plead thereto.
- ARREST**—Moral restraint imposed upon a person by oral or written orders of competent authority limiting the person's personal liberty pending disposition of charges. Arrest is not imposed as punishment for an offense.
- ARREST IN QUARTERS**—A moral restraint limiting an officer's liberty, imposed as a nonjudicial punishment by a flag or general officer in command.
- ARTICLE 15**—The Article of the UCMJ that grants the power of a commander to impose nonjudicial punishment.
- ARTICLE 32 INVESTIGATION**—See Pretrial Investigation.
- ARTICLE 39a SESSION**—A session of a court-martial called by the military judge, either before or after assembly of the court, without the members of the court being present, to dispose of matters not amounting to a trial of the accused's guilt or innocence.
- ASPORTATION**—A carrying away; felonious removal of goods; refers to one of the ways in which larceny under Article 121, UCMJ, may be committed.
- ASSAULT**—An attempt or offer with unlawful force or violence to do bodily harm to another, whether or not the attempt or offer is consummated, Article 128, UCMJ.
- ASSEMBLED**—A court is said to be assembled when its preliminary organization is complete, the members have gathered in the courtroom, and the presiding officer announces the court assembled.

- ATTEMPT**—An act, or acts, done with a specific intent to commit an offense under the Code, amounting to more than mere preparation, and tending but failing to effect the commission of such offense.
- ATTEST**—To signify by subscription of the signer's name that the signer has witnessed the execution of the particular instrument.
- ATTORNEY, POWER OF**—An instrument authorizing another to act as one's agent or attorney. The instrument by which authority of one person to act in place and stead of another as attorney in fact is set forth.
- AUTHENTICATION**—An official statement certifying that a writing is true and accurate.
- AUTHENTICITY**—The quality of being genuine in character, which in the law of evidence refers to a piece of evidence actually being what it purports to be.
- BAD-CONDUCT DISCHARGE**—One of two types of punitive discharges that may be awarded an enlisted member as a court-martial sentence; designed as a punishment for bad conduct, rather than as a punishment for serious offenses of either a civil or military nature; maybe awarded by GCM or SPCM.
- BAIL**—To procure the release of a person from legal custody, by undertaking that the person will appear at the time and place designated and submit to the jurisdiction and judgment of the court.
- BATTERY**—An assault in which the attempt or offer to do bodily harm is consummated by the infliction of that harm, Article 128, UCMJ.
- BEYOND A REASONABLE DOUBT**—The degree of persuasion based upon proof such as to exclude not every hypothesis or possibility of innocence, but any fair and rational hypothesis except that of guilt; not an absolute or mathematical certainty but a moral certainty.
- BIGAMY**—The criminal offense of willfully and knowingly contracting a second marriage (or going through the form of a second marriage) while the first marriage, to the knowledge of the offender, is still substituting and undissolved.
- BODILY HARM**—Any physical injury to or offensive touching of the person of another, however slight.
- BONA FIDE**—In good faith; actual; genuine.
- BREACH OF ARREST**—Going beyond the limits of arrest as set by orders, Article 95, UCMJ.
- BREACH OF PEACE**—An unlawful disturbance of the peace by an outward demonstration of a violent or turbulent nature, Article 116, UCMJ.
- BREAKING ARREST**—Going beyond the limits of arrest before being released by proper authority.
- BURGLARY**—The breaking and entering in the nighttime of the dwelling of another with intent to commit murder, manslaughter, rape, carnal knowledge, larceny, wrongful appropriation, robbery, forgery, maiming, sodomy, arson, extortion, or assault, Article 129, UCMJ.
- BUSINESS ENTRY**—Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, made in the regular course of any business, profession, occupation, or calling of any kind.
- CAPITAL OFFENSE**—An offense for which the maximum punishment includes the death penalty.
- CAPTAIN'S MAST**—The term applied, through tradition and usage in the Navy and Coast Guard, to nonjudicial punishment proceedings.
- CARNAL KNOWLEDGE**—An act of sexual intercourse under circumstances not amounting to rape, by a person with a female who is not his wife, and who has not attained the age of 16, Article 120, UCMJ.
- CASE LAW**—Law obtained from cases that have been decided.
- CAVEAT EMPTOR**—Let the buyer beware (or take care).
- CHALLENGE**—A formal objection to a member of a court or the military judge continuing as such in subsequent proceedings. May be either (1) a challenge for cause—such objections based on a fact or circumstance that has the effect of disqualifying the person challenged from further participation in the proceedings or (2) peremptory challenge—such objection is permitted without grounds or basis, except that the military judge cannot be peremptorily challenged.
- CHANGE OF VENUE**—Removal of a trial from one jurisdiction to another.
- CHARGE**—A formal statement of the Article of the UCMJ that the accused is alleged to have violated.

**CHARGE AND SPECIFICATION**—A description in writing of the offense that the accused is alleged to have committed; each specification, together with the charge under which it is placed, constitutes a separate accusation.

**CHARGE SHEET**—A two-page document, DD Form 458, that contains (1) information about the accused, (2) the charges and specifications, (3) the preferring of charges and their referral to a summary, special, or general court-martial; and (4) in the case of a summary court-martial, the record of trial.

**CHIEF WARRANT OFFICER**—A warrant officer of the armed forces who holds a commission or warrant in warrant officer grades W-2 through W-4.

**CIRCUMSTANTIAL EVIDENCE**—Testimony not based on actual personal knowledge or observation of the facts in controversy, but of other facts from which deductions are drawn, showing indirectly the facts sought to be proved.

**CLEMENCY**—Discretionary action by proper authority to reduce the severity of a punishment.

**CLOSED SESSIONS**—Those periods during a court-martial where the members or the military judge (in a judge alone case) is deliberating alone on findings and sentence.

**CODIFICATION**—Process of collecting and arranging the laws of a country or state into a code; for example, U.S. Code.

**COLLATERAL ATTACK**—An attempt to impeach or challenge the integrity of a court judgment in a proceeding other than that in which the judgment was rendered and outside the normal chain of appellate review.

**COLLISION**—Striking together of two objects, one of which may be stationary. The act of ships or vessels striking together. In its strict sense, collision means the impact of two vessels, both moving, and is distinguished from allision, which designates the striking of a moving vessel against one that is stationary.

**COMMAND**—(1) An order; (2) any demanding of another to do an act toward commission of a crime, Article 77, UCMJ.

**COMMANDING OFFICER**—A commissioned officer in command of a unit or units, an organization, or an area of the armed forces.

**COMMISSIONED OFFICER**—An officer of the naval service who holds a commission in an officer grade, chief warrant officer W-2, and above.

**COMMON TRIAL**—A trial in which two or more persons are charged with the commission of an offense or offenses that, although not jointly committed, were committed at the same time and place and are provable by the same evidence.

**COMPETENCY**—The presence of those characteristics, or the absence of those disabilities (for example, exclusionary rules), that renders a particular item of evidence fit and qualified to be presented in court.

**CONCURRENT JURISDICTION**—Jurisdiction that is possessed over the same parties or subject matter at the same time by two or more separate tribunals.

**CONCURRENT SERVICE OF PUNISHMENT**—Two or more punishments being served at the same time.

**CONFESSION**—An acknowledgement of guilt of an offense.

**CONFINEMENT**—The physical restraint of a person, imposed by either oral or written orders of competent authority, depriving a person of freedom.

**CONSECUTIVE SERVICE OF PUNISHMENT**—Two or more punishments being served in series, one after the other.

**CONSPIRACY**—A combination of two or more persons who have agreed to accomplish, by concerted action, an unlawful purpose or some purpose not in itself unlawful but by unlawful means, and the doing of some act by one or more of the conspirators to effect the object of that agreement.

**CONSTRUCTIVE ENLISTMENT**—A valid enlistment arising where the initial enlistment was void but the enlistee submits voluntarily to military authority, is mentally competent and at least 17 years old, receives pay, and performs duties.

**CONSTRUCTIVE KNOWLEDGE**—A state wherein a person is inferred to have knowledge of an order, regulation, or fact as a result of having a reasonable opportunity to gain such knowledge (for example, presence in an area where the relevant information was commonly available).

**CONTEMPT**—In military law, the use of any menacing words, signs, or gestures in the presence



- of the court, or the disturbance of its proceedings by any riot or disorder.
- CONTINUANCE**—The adjournment or postponement of a case to another day or time.
- CONTRABAND**—Items, the possession of which is in and of itself illegal.
- CONVENING AUTHORITY**—The officer having authority to convene a court-martial and who convened the court-martial in question, or that officer's successor in command.
- CONVENING ORDER**—The document by which a court-martial is created, specifies the type of court, details the members, and, when appropriate, the specific authority by which the court is created.
- CORPUS DELICTI**—The body of a crime; facts or circumstances showing that the crime alleged has been committed by someone.
- COUNSELING**—Directly or indirectly advising or encouraging another to commit an offense, Article 77, UCMJ.
- COURT-MARTIAL**—A military court, convened under authority of the government and the UCMJ for trying and punishing offenses committed by members of the armed forces and other persons subject to military law.
- COURT-MARTIAL ORDER**—A published order announcing the results of a court-martial trial.
- COURT OF INQUIRY**—A formal administrative fact-finding body convened under the authority of Article 135, UCMJ, whose function it is to search out, develop, analyze, and record all available information relative to the matter under investigation.
- COURT OF MILITARY APPEALS**—The highest appellate court established under the UCMJ to review the records of certain trials by court-martial, consisting of three judges appointed from civil life by the President, by and with the advice and consent of the Senate, for a term of 15 years.
- COURT OF MILITARY REVIEW**—An intermediate appellate court established by each Judge Advocate General to review the record of certain trials by court-martial—formerly known as Board of Review.
- CREDIBILITY OF A WITNESS**—A witness' worthiness of belief.
- CROSS-EXAMINATION**—The examination of a witness at a trial or hearing, or at a deposition, by the party opposed to the one who produced him or her, upon his or her evidence given in the case-in-chief, to test its truth, to further develop it, or for other purposes.
- CULPABLE**—Deserving blame; involving the breach of a legal duty or the commission of a fault.
- CULPABLE NEGLIGENCE**—Culpable negligence is a degree of negligence greater than simple negligence. This form of negligence is also referred to as recklessness and arises whenever an accused recognizes a substantial unreasonable risk yet consciously disregards that risk.
- CUSTODY**—That restraint of free movement that is imposed by lawful apprehension.
- CUSTOM**—A practice that fulfills the following conditions: (a) it must be long continued; (b) it must be certain or uniform; (c) it must be compulsory; (d) it must be consistent; (e) it must be general; (f) it must be known; and (g) it must not be in opposition to the terms and provisions of a statute or lawful regulation or order.
- DAMAGE**—Any physical injury to property.
- DANGEROUS WEAPON**—A weapon used in such a manner that it is likely to produce death or grievous bodily harm.
- DECEIVE**—To mislead, trick, cheat, or to cause one to believe as true that which is false.
- DEFENSE COUNSEL**—The person who defends the accused in any proceeding.
- DEFERRAL**—Discretionary action by proper authority, postponing the running of the confinement portion of a sentence, together with a lack of any posttrial restraint.
- DEFRAUD**—To obtain, through misrepresentation, an article or thing of value and to apply it to one's own benefit or to the use and benefit of another—either permanently or temporarily.
- DEMONSTRATIVE EVIDENCE**—Anything such as charts, maps, photographs, models, and drawings used to help construct a mental picture of a location or object that is not readily available for introduction into evidence.
- DEPOSITION**—The testimony of a witness taken out of court, reduced to writing, under oath or affirmation, before a person empowered to

administer oaths, in answer to interrogatories (questions) and cross-interrogatories submitted by the parties desiring the deposition and the opposite party, or based on oral examination by counsel for the accused and the prosecution.

**DERELICTION IN THE PERFORMANCE OF DUTIES**—Willfully or negligently failing to perform assigned duties or performing them in a culpably inefficient manner.

**DESIGN**—On purpose, intentionally, or according to plan and not merely through carelessness or by accident; specifically intended.

**DESTROY**—Sufficient injury to render property useless for the purpose that it was intended, not necessarily amounting to complete demolition or annihilation.

**DETENTION OF PAY**—A less severe form of punishment than a forfeiture in that the amount detained is ultimately returned to the accused when the accused is separated from service, or within a specific period of 1 year or less.

**DIRECT EVIDENCE**—Evidence that tends directly to prove or disprove a fact in issue.

**DISCHARGE**—Complete severance from all naval status gained by the enlistment or induction concerned.

**DISCOVERY**—The right to examine information disscscsd by the opposing side before or during trial.

**DISHONORABLE DISCHARGE**—The most severe punitive discharge; reserved for those warrant officers (W-1) and enlisted members who should be separated under conditions of dishonor, after having been convicted of serious offenses of a civil or military nature warranting severe punishment; it may be awarded only by a GCM.

**DISMISSAL**.—A court-martial punishment of separation from the service with dishonor. Only officers, commissioned warrant officers, cadets, and midshipmen may receive a dismissal and it can only be awarded by a GCM. It is considered the equivalent of a dishonorable discharge.

**DISORDERLY CONDUCT**—Behavior of such a nature as to affect the peace and quiet of persons who may witness the same and who may be disturbed or provoked to resentment thereby.

**DISRESPECT**—Words, acts, or omissions that are synonymous with contempt and amount to behavior

or language that detracts from the respect due the authority and person of a superior.

**DOCUMENTARY EVIDENCE**—Evidence supplied by writings and documents.

**DOMINION**—Control of property; possession of property with the ability to exercise control over it.

**DRUNKENNESS**—(1) As an offense under the UCMJ, intoxication that is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties that may be caused by liquor or drugs; (2) as a defense in rebuttal of the existence of a criminal element involving premeditation, specific intent, or knowledge, intoxication that amounts to a loss of reason preventing the accused from harboring the requisite premeditation, specific intent, or knowledge; (3) as a defense to general intent offenses, involuntary intoxication that amounts to a loss of reason preventing the accused from knowing the nature of his or her act or the natural and probable consequence thereof.

**DUE PROCESS**—A course of legal proceedings according to those rules and principles that have been established in our system of jurisprudence for the enforcement and protection of private rights; such an exercise of the powers of the government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe.

**DURESS**—Unlawful constraint on a person whereby the person is forced to do some act that he or she otherwise would not have done.

**DYING DECLARATION**—A statement by a victim, concerning the circumstances surrounding his or her death, made while in extremis and while under a sense of impending death and without hope of recovery.

**ELEMENTS**—The essential ingredients of an offense that are to be proved at the trial; the acts or omissions that form the basis of any particular offense,

**ENLISTED PERFORMANCE EVALUATION SYSTEM**—The formal servicewide rating system used to record an individual's fitness for service, performance of duties, and conduct based on alphanumerical scores accumulated in the formal servicewide rating system. The performance and conduct scores of an individual as recorded during the current enlistment are used in determining the characterization of service and reenlistment eligibility.

**ENTRAPMENT**—A defense available when actions of an agent of the government intentionally instill in the mind of the accused a disposition to commit a criminal offense, when the accused has no notion, predisposition, or intent to commit the offense.

**ENTRY LEVEL STATUS**—Upon enlistment, a member qualifies for entry level status during either (1) the first 180 days of continuous active military service or (2) the first 180 days of continuous active service after a break of more than 92 days of active service. A member of a Reserve component who is not on active duty or who is serving under a call or order to active duty for 180 days or less begins entry level status upon enlistment in a Reserve component.

**ERROR**—A failure to comply with the law in some way at some stage of the proceedings.

**EVIDENCE**—Any species of proof, or probative matter, legally presented at trial, through the medium of witnesses, records, documents, concrete objects, demonstrations, and so forth, for the purpose of inducing belief in the minds of the triers of fact.

**EXCULPATORY**—Anything that would exonerate a person of wrongdoing.

**EXECUTION OF HIS OR HER OFFICE**—Engaging in any act or service required or authorized to be done by statute, regulation, or the order of a superior.

**EX POST FACTO LAW**—A law passed after the occurrence of a fact or commission of an act that makes the act punishable, imposes additional punishment, or changes the rules of evidence to the disadvantage of a party.

**EXTENUATION**—Information that renders a crime less heinous than it would be without it and is presented in an effort to lessen the punishment that could be awarded at a court-martial or a nonjudicial punishment proceeding.

**EXTRA MILITARY INSTRUCTION**—Extra tasks assigned to one exhibiting behavioral or performance deficiencies for the purpose of correcting those deficiencies through the performance of the assigned tasks; also known as additional military duty or additional military instruction.

**FEIGN**—To misrepresent by a false appearance or statement; to pretend, to simulate, or to falsify.

**FINDINGS**—The determination of the issue as to whether an accused is guilty or innocent.

**FINE**—A type of court-martial punishment in the nature of a pecuniary judgment against an accused, which, when ordered executed, makes him or her immediately liable to the United States for the entire amount of money specified.

**FORFEITURE OF PAY**—A type of court-martial or nonjudicial punishment depriving the accused of all or part of the accused's pay.

**FORMER JEOPARDY**—A defense in bar of trial that no person will be tried for the same offense by the same sovereign a second time without his or her consent; also known as double jeopardy.

**FORMER PUNISHMENT**—A defense in bar of trial that no person may be tried by court-martial for a minor offense for which punishment under Article 15, UCMJ, has been imposed.

**FORMER TESTIMONY**—Testimony of a witness given in a civil or military court at a former trial of the accused, or given at a formal pretrial investigation of an allegation against the accused, in which the issues were substantially the same.

**FRISK**—Contact of the outer clothing of a person to detect by the sense of touch whether a concealed weapon is being carried.

**GENERAL COURT-MARTIAL**—The highest trial court within the military judicial system.

**GENERAL DISCHARGE**—An administrative discharge given to military personnel who do not qualify for an honorable discharge.

**GRANT OF IMMUNITY**—A promise of immunity from prosecution in return for courtroom testimony.

**GRIEVOUS BODILY HARM**—A serious bodily injury; does not include minor injuries, such as a black eye or a bloody nose, but does include fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other serious bodily injuries.

**GROSS NEGLIGENCE**—A wanton, careless, and reckless disregard of the rights and safety of others; an utter indifference to the consequences of one's actions; a total abandonment of the standard of reasonable care coupled with a wanton disregard for the safety of others; that degree of negligence that is substantially higher in magnitude than simple inadvertence, but falls short of intentional wrong.

**HABEAS CORPUS**—“You have the body”; an order from a court of competent jurisdiction that requires the custodian of a prisoner to appear before the court to show cause why the prisoner is confined or detained.

**HARMLESS ERROR**—An error of law that does not materially prejudice the substantial rights of the accused.

**HEARSAY**—An assertive statement, or conduct, that is offered in evidence to prove the truth of the assertion, but that was not made by the declarant while a witness before the court in the hearing in which it is offered.

**IMPROVIDENT PLEA**—A plea of guilty that cannot be accepted if (1) the presiding officer is not satisfied that the accused understands the meaning and effect of his or her pleas, or (2) the elements of the offense have not been admitted, or (3) the accused is not convinced of his or her own guilt.

**INCAPACITATION**—The physical state of being unfit or unable to perform properly.

**INCULPATORY**—Anything that implicates a person in a wrongdoing.

**INDECENT**—An offense to common propriety; offending against modesty or delicacy; grossly vulgar or obscene.

**INDIVIDUAL MILITARY COUNSEL**—Counsel requested specifically by the accused or respondent to represent them before a court-martial or administrative board instead of the appointed counsel.

**INFERENCE**—A fact deduced from another fact or facts shown by the state of the evidence.

**INFORMANT**—A person who has furnished information resulting in an investigation of a possible violation of law to a person whose official duties include the discovery, investigation, or prosecution of a case.

**IN LOCO PARENTIS**—In place of a parent. Used to signify that a person other than the parent exercises rights and responsibilities over a child.

**INSANITY**—See Mental Capacity and Mental Responsibility.

**INSPECTION**—An official examination of persons or property to determine the fitness or readiness of a person, organization, or equipment, not made with a view to any criminal action.

**INTENTIONALLY**—Deliberately and on purpose; through design, or according to plan, and not merely through carelessness or by accident.

**INTERROGATION**—In criminal law, the process of questions propounded by police to persons arrested or suspected to seek solutions of crime.

**IPSO FACTO**—By the very fact itself.

**JOINT OFFENSE**—An offense committed by two or more persons acting together in pursuance of a common intent.

**JOINT TRIAL**—The trial of two or more persons charged with committing a joint offense.

**JURISDICTION**—The power of a court to hear and decide a case and to award any appropriate punishment.

**KNOWINGLY**—With knowledge; consciously, intelligently.

**LASCIVIOUS**—Tending to excite lust; obscene; relating to sexual impurity; tending to deprave the morals with respect to sexual relations.

**LEGAL ADVISOR**—A lawyer, uniformed or civilian, under the professional supervision of either the Judge Advocate General or General Counsel of the Navy, certified under or otherwise meeting the professional requirements of Article 27(b), UCMJ.

**LESSER INCLUDED OFFENSE**—An offense necessarily included in the offense charged; an offense containing some but not all of the elements of the offense charged, so that if one or more of the elements of the offense charged are not proved, the evidence may still support a finding of guilty of the included offense.

**LEWD**—Lustful or lecherous; incontinence earned on in a wanton manner.

**MATTER IN AGGRAVATION**—Any circumstance attending the commission of a crime that increases its enormity.

**MATTER IN EXTENUATION**—Any circumstance serving to explain the commission of the offense, including the reasons that actuated the accused, but not extending to a legal justification.

**MATTER IN MITIGATION**—Any circumstance having for its purpose the lessening of the punishment to be awarded by the court and the furnishing of grounds for a recommendation for clemency.

- MENTAL CAPACITY**—The ability of the accused at the time of trial to understand the nature of the proceedings against him or her and to conduct or cooperate intelligently in his or her defense.
- MENTAL RESPONSIBILITY**—The ability of the accused at the time of the commission of an offense to appreciate the nature and quality of the wrongfulness of his or her acts.
- MILITARY DUE PROCESS**—Due process under protections and rights granted military personnel by the Constitution or laws enacted by Congress.
- MILITARY JUDGE**—A commissioned officer, certified as such by the respective Judge Advocates General, who presides over all open sessions of the court-martial to which he or she is detailed.
- MILITARY RECORD**—An individual's overall performance record while a member of the naval and military services of the United States including personal conduct.
- MINOR OFFENSE**—An offense for which confinement for less than 1 year is authorized; generally it is also misconduct not involving moral turpitude or any greater degree of criminality than is involved in the average offense tried by summary court-martial.
- MISTRIAL**—Discretionary action of the military judge, or the president of a special court-martial without a military judge, in withdrawing the charges from the court where such action appears necessary in the interest of justice because of circumstances arising during the proceedings that cast substantial doubt upon the fairness of the trial.
- MITIGATION**—Action by proper authority reducing punishment awarded at NJP or by court-martial.
- MORAL TURPITUDE**—An act of baseness, vileness, or depravity in private or social duties, which a man owes to fellowmen or to society in general, contrary to the accepted and customary rule of right and duty between man and man.
- MOTION TO DISMISS**—A motion raising any defense or objection in bar of trial.
- MOTION TO GRANT APPROPRIATE RELIEF**—A motion to cure a defect of form or substance that impedes the accused in properly preparing for trial or conducting his or her defense.
- MOTION TO SEVER**—A motion by one or more to two co-accuseds that they be tried separately from the other or others.
- NAVET**—A prior service veteran whose last tour of active duty or active duty for training was in the USN or USNR, who has been discharged or released for more than 2 hours, and who has completed a minimum of 180 consecutive days of active duty.
- NEGLECT**—Omission or failure to do an act or perform a duty due to want of due care or attention.
- NEGLIGENCE**—Unintentional conduct that falls below the standards established by law for the protection of others against unreasonable risk of harm. The failure of a person to exercise the care that a reasonably prudent person would exercise under similar circumstances; something that a reasonable man, guided by those ordinary considerations that ordinarily regulate human affairs, would or would not do.
- NONJUDICIAL PUNISHMENT**—Punishment imposed under Article 15, UCMJ, for minor offenses, without the intervention of a court-martial.
- NONPUNITIVE MEASURES**—Those leadership techniques, not a form of informal punishment, that may be used to further the efficiency of a command.
- OATH**—A formal external pledge, coupled with an appeal to the Supreme Being, that the truth will be stated.
- OBJECTION**—A declaration to the effect that the particular matter or thing under consideration is not done or admitted with the consent of the opposing party, but is by him or her considered improper or illegal, and referring the question of its propriety or legality to the court.
- OFFICE HOURS**—The term applied through tradition and usage in the Marine Corps to nonjudicial punishment.
- OFFICER**—Any commissioned or warrant officer of the armed forces, warrant officer W-1, and above.
- OFFICER IN CHARGE**—A member of the armed forces designated as such by appropriate authority.
- OFFICIAL RECORD**—A writing made as a record of a fact or event, whether the writing is in a regular series of records or consists of a report, finding, or certificate, and made by any person within the scope of his or her official duties provided those duties include a duty to know, or to ascertain through appropriate and trustworthy channels of information, the truth of the fact or event, and to record such fact or event.

- ON DUTY**—(As used in UCMJ, Article 112). In the exercise of duties of routine or detail, in garrison, at a station, or in the field; does not relate to those periods when, no duty being required of military personnel by order of regulations, they occupy the status of leisure known as “off duty” or “on liberty.”
- OPINION OF THE COURT**—A statement by a court of the decision reached in a particular case, expounding the law as applied to the case, and detailing the reasons upon which the decision is based.
- ORAL EVIDENCE**—The sworn testimony of a witness received at trial.
- OSVET**—A prior service veteran whose last tour of active duty was in a branch of service other than Navy, has been discharged or released more than 2 hours, and has completed a minimum of 180 consecutive days’ active duty.
- PAST RECOLLECTION RECORDED**—Memorandum prepared by a witness, or read by him or her and found to be correct, reciting facts or events that represent his or her past knowledge possessed at a time when his or her recollection was reasonably fresh as to the facts or events recorded.
- PER CURIAM**—“By the court”; a phrase used in the report of the opinion of a court to distinguish an opinion of the whole court from an opinion written by any one judge.
- PER SE**—Taken alone; in and of itself; inherently.
- PERPETRATOR**—One who actually commits the crime, either by his or her own hand, by an animate or inanimate agency, or by an innocent agent.
- PLEADING**—The written formal indictment by which an accused is charged with an offense; in military law, the charges and specifications.
- PLEAS**—The accused’s response to each charge and specification.
- POSSESSION**—Actual physical control and custody over an item of property.
- PREFERRAL OF CHARGES**—The formal accusation against an accused by an accuser signing and swearing to the charges and specifications.
- PREJUDICIAL ERROR**—An error of law that materially affects the substantial rights of the accused and requiring corrective action.
- PRELIMINARY INQUIRY**—The initial investigation of a reported or suspected violation of the UCMJ.
- PRESIDENT OF A COURT-MARTIAL**—The detailed senior member in rank present at the trial.
- PRESIDING OFFICER**—In a special court-martial without a military judge, it is the president of the court; in a court-martial with a military judge, the presiding officer is the military judge.
- PRESUMPTION**—A fact that the law requires the court to deduce from another factor facts shown by the state of the evidence unless that fact is overcome by other evidence before the court.
- PRETRIAL AGREEMENT**.—An agreement offering the accused to plead guilty to one or more specifications in exchange for a limit on some type of punishment.
- PRETRIAL INVESTIGATION**—An investigation pursuant to Article 32, UCMJ, that is required before convening a GCM, unless waived by the accused.
- PRIMA FACIE CASE**—Introduction of substantial evidence that, together with all proper inferences to be drawn therefrom and all applicable presumptions, reasonably tends to establish every essential element of an offense charged or included in any specification.
- PRINCIPAL**—(1) One who aids, abets, counsels, commands, or procures another to commit an offense that is subsequently perpetrated in consequence of such counsel, command, or procuring, whether the individual is present or absent at the commission of the offense; (2) the perpetrator.
- PRIOR ENLISTMENT OR PERIOD OF SERVICE**—Service in any component of the armed forces, including the Coast Guard, that culminated in the issuance of a discharge certificate or certificate of service.
- PROBABLE CAUSE**—(1) For apprehension, a reasonable grounds for believing that an offense has been committed and that the person apprehended committed it; (2) for pretrial restraint, reasonable grounds for believing that an offense was committed by the person being restrained; and (3) for search, a reasonable grounds for believing that items connected with criminal activity are located in the place or on the person to be searched.

**PROCESSING COMMAND**—The parent command to which a member is permanently assigned has primary responsibility for administrative processing.

**PROVOKING**—Tending to incite, irritate, or enrage another.

**PROXIMATE CAUSE**—That which, in natural and continuous sequence, unbroken by an efficient intervening cause, produces a result, and without which the result would not have occurred.

**PROXIMATE RESULT**—A reasonably foreseeable result ordinarily following from the lack of care complained of, unbroken by any independent cause.

**PUNITIVE ARTICLES**—Articles 78 and 80 through 134, UCMJ, that generally describe various crimes and offenses and state how they may be punished.

**PUNITIVE DISCHARGE**—A discharge imposed as punishment by a court-martial, either a bad-conduct discharge or a dishonorable discharge.

**QUALIFIED COUNSEL**—Counsel qualified under Article 27(b), UCMJ, and who does not have any direct responsibility for advising the convening authority or separation authority on the proceedings involving the respondent.

**RAPE**—An act of sexual intercourse with a female, not the accused's wife, done by force and without her consent.

**REAL EVIDENCE**—Any physical object offered into evidence at trial.

**RECESS**—A short period of time during which a trial is not in progress.

**RECKLESSNESS**—An act or omission exhibiting a culpable disregard for the foreseeable consequences of that act or omission; a degree of carelessness greater than simple negligence.

**RECONSIDERATION**—The action of the convening authority in returning the record of trial to the court for renewed consideration of a ruling of the court dismissing a specification on motion, where the ruling of the court does not amount to a finding of not guilty.

**REFERRAL OF CHARGES**—The action of a convening authority in directing that a particular case be tried by a particular court-martial previously created.

**RELEASE FROM ACTIVE DUTY**—Termination of active duty status and transfer or reversion to a

Reserve component not on active duty including transfer to the Individual Ready Reserve.

**RELEVANCY**—That quality of evidence that renders it properly applicable in proving or disproving any matter in issues; a tendency in logic to prove or disprove a fact that is in issue in the case.

**REMEDIAL ACTION**—Action taken by proper reviewing authorities to correct an error or errors in the proceedings or to offset the adverse impact of an error.

**REMISSION**—Action by proper authority interrupting the execution of a punishment and canceling out the punishment remaining to be served, while not restoring any right, privilege, or property already affected by the executed portion of the punishment.

**REPROACHFUL**—Censuring, blaming, discrediting, or disgracing of another's life or character.

**RESISTING APPREHENSION**—An active resistance to the restraint attempted to be imposed by the person apprehending.

**RESPONDENT**—A member who has been notified that action has been initiated to separate the member.

**RESTRICTION**—Moral restraint imposed as punishment, or pretrial restraint upon a person by oral or written orders limiting him or her to specified areas of a military command, with the further provision that he or she will participate in all military duties and activities of his or her organization while under such restriction.

**REVISION**—A procedure to correct an apparent error or omission or improper or inconsistent action of a court-martial with respect to a finding or a sentence.

**SEARCH**—A quest for incriminating evidence.

**SEIZURE**—To take possession of forcibly, to grasp, to snatch, or to put into possession.

**SELF-DEFENSE**—The use of reasonable force to defend oneself against immediate bodily harm threatened by the unlawful act of another.

**SELF-INCRIMINATION**—The giving of evidence against oneself that tends to establish guilt of an offense.

**SENTENCE**—The punishment awarded an accused who is found guilty of an offense by a court-martial.

**SEPARATION**—A general term that includes discharge, release from active duty, transfer to the

Fleet Reserve or Retired List, release from custody and control of the military services, transfer to the Individual Ready Reserve, and similar changes in active or Reserve status.

**SEPARATION AUTHORITY**—Chief of Naval Personnel is authorized to take final action with respect to the specified types of separation, or any officer so designated by the Chief of Naval Operations. The Secretary of the Navy is separation authority for release from active duty of member of the Reserve components who are within 2 years of eligibility for retirement or retainer pay. The separation authority for active duty members being involuntarily separated who have 18 years or more service is the Chief of Naval Operations.

**SERIOUS OFFENSE**—Offenses under the UCMJ for which a punitive discharge is authorized by the *Manual for Courts-Martial*.

**SET ASIDE**—Action by proper authority voiding the proceedings and the punishment awarded and restoring all rights, privileges, and property lost by virtue of the punishment imposed.

**SIMPLE NEGLIGENCE**—The absence of due care; for example, an actor omission by a person who is under a duty to use due care that exhibits a lack of that degree of care for the safety of others that a reasonably prudent man would have exercised under the same or similar circumstances.

**SLIP LAW**—The first officially published form of congressional legislation. The main purpose of a slip law publication is speed. Slip law is normally available long before bound volumes containing the legislation are published and disseminated.

**SOLICITATION**—Any statement, oral or written, or any other act or conduct, either directly or through others, that may reasonably be construed as a serious request or advice to commit a criminal offense.

**SPECIAL COURT-MARTIAL**—The intermediate of the three types of court-martial.

**SPECIFICATION**—A formal statement of specific acts and circumstances relied upon as constituting the offense charged.

**SPONTANEOUS EXCLAMATION**—An utterance concerning the circumstances of a startling event made by a person while he or she was in such a condition of excitement, shock, or surprise, caused by his or her participation in or observation of the

event, as to warrant a reasonable inference that he or she made the utterance as an impulsive and instinctive outcome of the event, and not as a result of deliberation or design.

**STAFF JUDGE ADVOCATE**—A certified military lawyer attached to the staff of a convening or supervisory authority who exercises general court-martial jurisdiction.

**STATUTE OF LIMITATIONS**—The rule of law that, unless waived, establishes the time within which an accused must be charged with an offense to be tried successfully.

**STIPULATION**—An agreement between the trial and defense counsel, to which the accused agrees, as to the existence or nonexistence of any fact or the content of the testimony that an absent witness would give if he or she were present in the proceedings.

**STRAGGLE**—To wander away, to rove, to stray, to become separated from, or to lag or linger behind.

**STRIKE**—To deliver a blow with anything by which a blow can be given.

**SUBPOENA**—A formal written instrument or legal process that serves to summon a witness to appear before a certain tribunal and to give testimony.

**SUBPOENA DUCES TECUM**—A formal written instrument or legal process that commands a witness who has in his or her possession or control some documents or evidentiary object that is pertinent to the issues of a pending controversy to produce it before a certain tribunal.

**SUBSCRIBE**—To write one's signature on a written instrument as an indication of consent, approval, or attestation.

**SUBSTANTIVE LAW**—That portion of the body of law that contains rights and duties and regulation of the government.

**SUMMARY COURT-MARTIAL**—The lowest of the three types of court-martial.

**SUPERIOR COMMISSIONED OFFICER**—A commissioned officer who is superior in rank or command.

**SUPERVISORY AUTHORITY**—An officer exercising general court-martial jurisdiction who acts as reviewing authority for SCM and SPCM records after the convening authority has acted.



**SUSPECT**—A person who is suspected of a crime but who has not been formally charged with its commission by the preferral of charges.

**SUSPENSION**—Action by proper authority to withhold the execution of a punishment for a probationary period pending good behavior on the part of the accused.

**TESTIMONY**—Statements made by a witness, under oath, before a court or hearing.

**THREAT**—An avowed present determination or intent to injure the person, property, or reputation of another presently or in the future.

**TOLL**—To suspend or interrupt the running of.

**TORT**—A private civil wrong or injury committed against a person or property and is independent of any contract.

**TRIAL COUNSEL**—The person who prosecutes a case in the name of the government.

**TRUE OWNER**—The person who, at the time of the taking, obtaining, or withholding of property, had the superior right to possession of the property involved in the light of all conflicting interests therein involved in the particular case.

**TYPE WARRANTED BY SERVICE RECORD DISCHARGE**—Characterization of service is determined by the final average in performance and conduct marks and the final average of the marks in personal behavior.

**USAGE**—A general habit, mode, or course of procedure.

**UTTER**—To make any use of, or attempt to make any use of, an instrument known to be false by representing, by words or actions, that it is genuine.

**VERBATIM**—In the exact words, word for word.

**VOIR DIRE**—Preliminary examination of court members to determine their competency to sit on the court.

**WAIVER**—A voluntary or intentional giving up of a known right.

**WANTON**—Behavior of such a highly dangerous and inexcusable character as to exhibit a callous indifference or total disregard for the probable consequences to the personal safety or property of other persons; heedlessness.

**WILLFUL**—Deliberate, voluntary, and intentional, as distinguished from acts committed through inadvertence, accident, or ordinary negligence.



# INDEX

- A**
- Abbreviations, 3-7
- Action by the convening authority, 8-6
- Administrative board, 9-18
- action by the convening authority, 9-23
  - action by the separation authority, 9-24
  - appointing order, 9-19
  - convening authority, 9-19
  - hearing procedure, 9-21
  - legal advisor, 9-20
  - president of the board, 9-19
  - processing goals, 9-23
  - record of proceedings, 9-23
  - recorder, 9-20
  - reporter, 9-21
  - witness request, 9-21
- Administrative discharge warnings, 9-14
- Administrative procedures, 14-2
- Administrative separations, 9-1
- administrative board procedure, 9-18
  - bases for, 9-2
  - in lieu of trial by court-martial, 9-13
  - notification procedure, 9-15
  - processing goals, 9-23
  - types of, 9-1
- Admiralty Claims, 12-23
- admiralty law defined, 12-23
  - exclusions from liability, 12-24
  - measure of damages, 12-24
  - processing procedures, 12-24
  - scope of liability, 12-24
  - statute of limitations, 12-24
  - statutory authority and references, 12-23
- Admonition and reprimand, 5-24
- Alcohol abuse rehabilitation failure, 9-11
- Amending orders, 6-7
- Appeals, 5-29
- Appellate leave, 8-20
- Appointing orders, 9-19, 13-3
- Arrest in quarters, 5-24
- Article 14, UCMJ, 10-8
- Article 32, investigation, 7-21
- appointing order, 7-22, 7-23
  - Article 34 advice, 7-28
  - investigating officer, 7-22
  - Investigating Officer's Report, DD Form 457, 2-26, 7-25
  - nature of the pretrial investigation, 7-21
  - rules of evidence, 7-24
  - statements, 7-24
  - testimony, 7-24
  - witnesses, 7-22
- Article 139, UCMJ, claims, 12-26
- exclusions from liability, 12-27
  - measure of damages, 12-27
  - processing procedures, 12-27
  - proper claimants, 12-27
  - relationship to court-martial proceedings, 12-28
  - scope of liability, 12-26
  - statute of limitations, 12-27
- Attorney-client relations, 11-3
- B**
- Board for Correction of Naval Records, 9-24
- C**
- Captain's mast guide, 5-19
- Charge Sheet, DD Form 458, 6-1
- Civilian personnel management, 14-4

- Claims, 12-1
- Claims management, 12-34
  - Allotment/Suballotment Authorization, NAVCOMPT Form 372, 12-35
  - deposits, 12-37
  - fund authorizations, 12-34
  - funds administration, 12-2-38
  - memorandum accounting logbook, 12-40
  - Navy claims funds, 12-34
  - payments, 12-35
  - reconciliation, 12-38
  - reports, 12-41
  - Trial Balance Report, NAVCOMPT Form 2199A, 12-39
  - unliquidated obligations, 12-40
  - Voucher for Disbursement and/or Collection, NAVCOMPT Form 2277, 12-37
  - Voucher for Payment Under Federal Tort Claims Act, Standard Form 1145, 12-36
- Classified material, information, 1-10
- Cleansing warnings, 4-3
- Clemency, 8-10
  - Naval Clemency and Parole Board, 8-34
- Confinement, 5-19
  - deferment of, 8-2
  - pretrial review, 6-34
- Confinement on bread and water or diminished rations, 5-23, 5-25, 7-19
- Contempt proceedings, 3-18
- Convenience of the government, 9-5
- Convening and amending orders, 6-7, 7-2, 9-19, 13-3
- Convening authority's review, 8-5
  - action by the convening authority, 8-6
  - DC's acknowledgement of receipt of SJA recommendation, 8-10
  - DC's response to SJA recommendation, 8-10
  - matters submitted by the accused, 8-5
- Convening authority's review—Continued
  - memorandum forwarding SJA recommendations to DC, 8-9
  - recommendation of the SJA or legal officer, 8-6
- Correctional custody, 5-25
- Correspondence, 1-1, 14-3
  - business letter, 1-2
  - drafting, 1-3
  - endorsement, 1-2
  - filing, 1-3
  - memorandum, 1-2
  - message, 1-2
  - multiple-address letter, 1-2
  - preparation, 1-1
  - routing, 1-3
  - standard letter, 1-2
  - subject classification, 1-3
- Counseling, 9-14
  - drafting administrative discharge warnings, 9-14
- Court-martial member's question form, 6-29
- Court of Military Appeals (COMA) review, 8-32
- Court reporter, 3-1
  - appointment and detailing of, 3-1
  - duties of, 3-2
  - functions of, 3-1
  - oaths, 3-2
- Court reporting, 3-1
  - contempt proceedings, 3-18
  - loss of recordings, 3-3
  - methods and equipment, 3-4
  - reporter's log, 3-4
  - retention of trial notes, 3-4
  - verbatim reporting, 3-2
- Courts-martial review, 8-31
  - appellate leave, 8-20
  - COMA review, 8-32

Courts-martial review—Continued

convening authority's review, 8-5

JAG review, 8-31

NMCMR review, 8-31

OEGCMJ SJA review, 8-30

U.S. Supreme Court review, 8-32

waiver or withdrawal of appellate review, 8-20

Courts of Inquiry and Investigations Required to Conduct a Hearing, 13-17

parties, 13-15

use of the record of investigation, 13-18

Customer service, 14-9

**D**

Death cases, 13-2

Defective enlistment, 9-8

Delivery agreements, 10-4, 10-5

to federal authorities, 10-4

to foreign authorities, 10-4

to state authorities, 10-4

Delivery of personnel, 10-1

Article 14, UCMJ, 10-8

beyond territorial limits of requesting state, 10-1

circumstances in which delivery is refused, 10-4

delivery agreements, 10-4, 10-5

fugitive warrants, 10-2

members released on bail or own recognizance, 10-6

personnel stationed outside the United States, 10-2

persons requested by state authorities in criminal cases, 10-1

prisoner requests, 10-8

report required when delivery is refused, 10-6, 10-7

service member serving sentence of a state court, 10-8

service member serving sentence of court-martial, 10-6

state requests, 10-8

Delivery of personnel—Continued

waiver of extradition, 10-2, 10-3

within territorial limits of requesting state, 10-1

Depositions, 3-22

procedures for taking, 3-29

types of, 3-22

Directives, 1-3

change transmittals, 1-7

Directives Issuance System, 1-6

drafting of, 1-7

filing, 1-7

instructions, 1-6

notices, 1-6

Drafting administrative discharge warnings, 9-14

Drug abuse detection, 4-22

collection process, 4-25

general guidance, 4-22

types of tests, 4-22

urinalysis consent form, 4-23

use of urinalysis results, 4-24

Drug abuse rehabilitation failure, 9-10

Drug detector dogs, 4-20

**E**

Entry level performance and conduct, 9-9

Erroneous enlistment, 9-8

Evidence, 6-35

Executive officer's screening, 5-12

Exhibits, 3-11

Expanded Legal Assistance Program, 11-6

Expiration of enlistment or fulfillment of service obligation or EAOS, 9-5

Extra duty, 5-24

**F**

Fair Debt Collection Practices Act, 14-5

- Federal Claims Collection Act, 12-29
  - government's rights, 12-29
  - measure of damages, 12-29
  - processing procedures, 12-29
  - statute of limitations, 12-29
- Federal Legal Information Through Electronics (FLITE), 2-18
- Federal Tort Claims Act, 12-1
  - Claim for Damage, Injury, or Death, Standard Form 95, 12-6, 12-7
  - exclusions from liability, 12-3
  - measure of damages, 12-5
  - processing procedures, 12-6
  - scope of liability, 12-1
  - statute of limitations, 12-6
- Federal Truth in Lending Act, 14-5
- Fifth Amendment rights, 4-1
- Files, 1-7
  - disposal of, 1-8
  - maintenance of, 1-8
- Finding tools, 2-1
- Findings, 3-13
- Findings worksheet, 3-3, 6-26
- Foreign Claims Act, 12-21
  - exclusions from liability, 12-22
  - measure of damages, 12-23
  - processing procedures, 12-23
  - scope of liability, 12-22
  - statute of limitations, 12-23
- Fraudulent entry into the naval service, 9-9
- Freedom of Information Act, 1-11
  - exemptions, 1-13
  - identifying records, 1-12
  - mailing lists, 1-13
  - minimum requirements, 1-12
  - NJP results, 1-13
  - privacy interest, 1-13
- Freedom of Information Act—Continued
  - public interest, 1-13
  - records requiring special handling, 1-12
  - time limits, 1-13
- Fugitive warrants, 10-2
- Fund authorizations, 12-34
- G**
- General administration, 1-1
- General court-martial (GCM), 7-21, 7-30
  - trial procedures, 7-30
- Grants of immunity, 6-16
  - sample order to testify, 6-20
  - sample testimonial grant of immunity, 6-19
  - sample transactional grant of immunity, 6-18
- H**
- Homosexuality, 9-10
- I**
- Indebtedness, 14-5
  - administrative and disciplinary action, 14-8
  - correspondence with the creditor, 14-6
- Fair Debt Collection Practices Act, 14-5-5
- Federal Truth in Lending Act, 14-5
  - policy, 14-5
  - processing of complaints, 14-5
  - referral to service member debtor, 14-6
- Individual military counsel, 6-21
- Investigation not requiring a hearing, 13-3
  - action by the convening and reviewing authorities, 13-10
  - appointing order, 13-3
  - communication with the convening authority, 13-8
  - copies and forwarding, 13-14
  - disciplinary action, 13-14
  - investigative body, 13-3

Investigation not requiring a hearing—Continued

- investigative procedures, 13-6
- investigative report, 13-8
- releasing investigations, 13-15
- witnesses, 13-8

Investigations, 13-1

- investigations required by other regulations, 13-2
- selection of fact-finding bodies, 13-18
- special incidents, 13-22

**J**

JAG Manual Investigations, 13-1

Judge Advocate General Management Information System (JAGMIS), 1-9

- productivity report, 1-9

Jury duty, 10-11

**L**

Law library, 2-1

- Field Law Library Section, OJAG, 2-6
- finding tools, 2-1
- minimum requirements, 2-3
- primary sources, 2-1
- secondary sources, 2-1
- sources of the law, 2-1
- standard minimum list, 2-4

Law library maintenance, 2-8

- accountability, 2-11
- arrangement, 2-8
- filing, 2-10
- ordering materials, 2-12
- reports, 2-13

Legal assistance, 11-1

- attorney-client relations, 11-3
- attorneys, 11-1
- confidential and privileged character of service provided, 11-2
- cooperation with other Navy agencies, 11-8

Legal assistance—Continued

- files, 11-9
- functions of legal assistance attorneys, 11-2
- legal assistance services, 11-5
- liaison with other government agencies, 11-7
- limitations on scope of services, 11-5
- nonlawyer personnel, 11-1
- persons eligible for assistance, 11-1
- policy, 11-1
- preventive law program, 11-7
- purpose, 11-1
- records, 11-8
- referrals and fees, 11-6
- reports, 11-9

Legal research, 2-14

- court decisions, 2-17
- Federal Legal Information Through Electronics (FLITE), 2-18
- finding tools, 2-1, 2-15
- primary sources, 2-1, 2-14
- secondary sources, 2-1, 2-16
- statutes, 2-16

Letters of censure, 5-34, 7-17, 7-19

Line of duty/misconduct determinations, 13-19

- action by reviewing authorities, 13-22
- forwarding, 13-22
- recording, 13-21
- relationship between, 13-21
- what constitutes line of duty, 13-19
- what constitutes misconduct, 13-20
- when determinations are required, 13-19

**M**

Matters submitted by the accused, 8-5

Medical Care Recovery Act, 12-30

- government's rights, 12-30
- measure of damages, 12-30

Medical Care Recovery Act—Continued

medical payments insurance coverage, 12-33

no-fault statutes, 12-34

processing procedures, 12-30

Report of Hospital and Medical Care—Third Party Liability, NAVJAG Form 5890/12, 12-32, 12-33

statute of limitations, 12-30

uninsured motorist coverage, 12-34

Memorandum accounting logbook, 12-40

Military Claims Act, 12-11

exclusions from liability, 12-12

measure of damages, 12-12

processing procedures, 12-13

scope of liability, 12-11

statute of limitations, 12-13

Military Personnel and Civilian Employees Claims Act, 12-15

Claim for Loss of or Damage to Personal Property Incident to Service, DD Form 1842, 12-17, 12-18

exclusions from liability, 12-15

List of Property and Claims Analysis Chart, DD Form 1844, 12-19

measure of damages, 12-16

Notice of Loss or Damage, DD Form 1840R, 12-20

processing procedures, 12-17

scope of liability, 12-15

statute of limitations, 12-16

Minority, 9-9

Misconduct, 9-11

Misconduct due to drug abuse, 9-12

**N**

Naval Clemency and Parole Board, 8-34

Naval Discharge Review Board, 9-24

Naval legal service offices, 14-1

Navy claims funds, 12-34

Nonjudicial punishment (NJP), 5-1

accused's acknowledgement of appellate rights, 5-29

appeals, 5-29

captain's mast guide, 5-19

checklist for report chit/NJP processing, 5-46

clemency and corrective action on review, 5-26

combination of punishments, 5-26

confinement on bread and water or diminished rations, 5-25

enlisted service record entries, 5-35

execution of punishments, 5-25

executive officer's screening, 5-12

hearing requirements, 5-19

limitations on punishment, 5-22, 5-23

log entries, 5-45

offenses punishable under Article 15, UCMJ, 5-3

persons on whom NJP may be imposed, 5-2

possible actions by the CO at mast, 5-22

preheating advice, 5-11

preheating rights forms, 5-13, 5-15, 5-17

preliminary inquiry, 5-5

Preliminary Inquiry Officer's Report, 5-8

report and disposition of offense(s), 5-4

Report and Disposition of Offense(s), NAVPERS Form 1626/7, 5-6, 5-7

sample action by supervisory authority on NJP appeal, 5-33

sample first endorsement to NJP appeal, 5-32

sample letter of notification to set aside NJP, 5-27

sample NJP appeal, 5-31

Suspect's Rights Acknowledgement/Statement, 5-9, 5-10

unit punishment book, 5-45

who may impose, 5-1

Nonlawyer personnel, 11-1

Nonscope claims, 12-25

exclusions from liability, 12-25



Nonscope claims—Continued

- measure of damages, 12-25
- processing procedures, 12-25
- scope of liability, 12-25
- statute of limitations, 12-25

Notification procedure, 9-15

**O**

Oaths, 3-2

Office manager, 14-2

Office organization and management, 14-1

- assigning personnel, 14-2
- civilian personnel management, 14-4
- correspondence and directives, 14-3
- training, 14-3

**P**

Parties, 13-15

Performance appraisals, 14-4

Physical disability, 9-8

Position descriptions, 14-4

Posttrial duties, 8-1

- Confinement Order, NAVPERS 1640/4, 8-1
- deferment of confinement, 8-2
- extra duty, 8-4
- report of results of trial, 8-1
- restriction, 8-4

Preferral of charges, 7-3

Preinterrogation warnings, 4-1

- Article 31, UCMJ, 4-1,5-9
- cleansing warnings, 4-3
- consequences of violating the rights against self-incrimination, 4-7
- factors affecting voluntariness, 4-6
- Fifth Amendment rights, 4-1
- how to give the warnings, 4-7
- right to counsel, 4-5

Preinterrogation warnings—Continued

- right to terminate the interrogation, 4-6

Pretrial agreements, 6-12

Pretrial paper work, 6-1

- court-martial member's question form, 6-29
- findings worksheet, 3-3, 6-26
- flyers, 6-26
- seating chart, 6-29
- sentence worksheet, 6-28

Pretrial restraint, 6-29

- arrest, 6-31
- conditions on liberty, 6-31
- confinement, 6-33
- restriction, 6-31
- sample letter to initial review officer, 6-36

Preventive law program, 11-7

Primary sources, 2-1

Privacy Act, 1-13

- collection of information, 1-15
- disclosure to others, 1-14
- procedures, 1-14
- responsibilities, 1-14

Proceedings in revision, 3-20

Processing goals, 9-23

Promulgating orders, 8-11

Publications, 1-3

- maintenance of, 1-5
- ordering of, 1-6
- use of, 1-4

**R**

Reconciliation, 12-38

Record of Authorization for Search, 4-14

Recorder, 9-20

Records disposal, 1-9

Records of trial, 3-15

- authentication of, 3-16

## Records of trial—Continued

- certification of correction, 3-19, 3-21
- copies and distribution, 3-15
- correction of, 3-16
- distribution of, 3-15, 3-17
- general content and arrangement, 3-15
- proceedings in revision, 3-20
- security classification, 3-15
- service of, 3-16
- summarized record of trial, 3-17
- summary court-martial records, 3-20
- types, 3-15

Reduction in grade, 5-23, 7-17, 7-19

Referral of charges, 7-3

Refusal to deliver, 10-6, 10-7

- Release of information for litigation purposes, 1-15
  - production of official records without a court order, 1-15
  - relationship with FOIA and Privacy Act, 1-15
  - responsibilities, 1-15

Report and disposition of offense(s), 5-4

Report of results of trial, 8-1

Reporters, 3-1, 9-21

Reporter's log, 3-4

- Reports Control System, 1-8
  - establishment of, 1-8
  - tiling, 1-9
  - maintenance of, 1-8
  - reports, 1-9
  - tickler file, 1-8

- Requests for release of government information, 1-11
  - Freedom of Information Act, 1-11
  - litigation purposes, 1-15
  - Privacy Act, 1-13

Restriction, 5-24, 8-4

Review of courts-martial, 8-5

## S

Search and seizure, 4-8

- categories of searches, 4-10
- inspections and inventories, 4-21
- language of the law of search and seizure, 4-9
- objects of a search or seizure, 4-10
- Record of Authorization for Search, 4-14
- sources of the law of search and seizure, 4-9
- use of drug detector dogs, 4-20

Secondary sources, 2-1

Security, 1-10

- destruction of classified material, 1-11
- purpose, 1-10
- responsibility, maintenance, and safeguarding, 1-10

Sentence worksheet, 6-28

Sentences, 7-17

Separation in lieu of trial by court-martial, 9-13

- Service of process, 10-9
  - overseas, 10-9
  - service not allowed, 10-9
  - within the United States, 10-9

SJA's recommendation, 8-6

Sources of the law, 2-1

- Special court-martial (SPCM), 7-9
  - composition of, 7-12
  - creation of, 7-9
  - punishment chart, 7-19
  - punishments, 7-17
  - qualifications of counsel, 7-13
  - qualifications of members, 7-12
  - qualifications of the military judge, 7-13
  - records of trial, 3-15
  - referral of charges, 7-13
  - trial procedure, 7-14

Standard minimum list, 2-4

Standard stock entries (SSEs), 3-10

Subpoenas, 10-10

action with no federal government interest, 10-10

witness is a prisoner, 10-10

witness on behalf of accused in federal court, 10-10

witness on behalf of party to civil action or state criminal, 10-10

witness on behalf of the federal government, 10-10

Summarized record of trial, 3-17

Summary court-martial (SCM), 7-1

creation of, 7-1

distribution of, 3-22

posttrial responsibilities of the SCM, 7-9

prefferal and referral of charges, 7-2

pretrial preparation, 7-4

record of trial, 3-20, 7-10

Summary Court-Martial Acknowledgement of Rights and Waiver, 7-6

trial proceedings, 7-8

Suspect's Rights Acknowledgement/Statement, 5-9, 5-10

Suspension of punishment, 5-28

**T**

Tickler file, 1-8

Training, 14-3

Transcription, 3-4

abbreviations, 3-7

grammar and punctuation, 3-7

identification of speakers, 3-8

Transcription—Continued

margins, 3-4

marking exhibits, 3-11

numbering pages, 3-7

reporter's remarks, 3-9

sample pleas and findings, 3-12

slips of the tongue, false starts, 3-9

standard stock entries (SSEs), 3-10

Trial notes, 3-4

**U**

Uninsured motorist coverage, 12-34

Unit punishment book, 5-45

Unsatisfactory performance, 9-10

Unsatisfactory performance in the Ready Reserve, 9-13

Urinalysis, 4-22

**V**

Vacation of suspension, 8-33

**W**

Warrant of attachment, 6-23

Waiver of Extradition, 10-2, 10-3

Weight control failure, 9-8

Witnesses, 6-22

civilian, 6-23

military, 6-22

Subpoena, DD Form 453, 6-23

Travel Order, DD Form 453-1, 6-23



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# *Assignment Questions*

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**Information:** The text pages that you are to study are provided at the beginning of the assignment questions.



# ASSIGNMENT 1

Textbook Assignment: "General Administration," chapter 1, pages 1-3 and 1-7; "Legal Research," chapter 2, pages 2-14 through 2-18; "Pretrial Matters," chapter 6, pages 6-23 through 6-26, 6-34 and 6-35, and 6-40 through 6-46; "Administrative Separations," chapter 9, pages 9-14 and 9-15; "Delivery of Personnel," chapter 10, pages 10-9 through 10-11.

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IN ANSWERING QUESTIONS 1-1 AND 1-2, REFER TO CHAPTER 1, PAGES 1-3 AND 1-7.

1-1. Naval writing standards and sample letters may be found in which of the following publications?

1. MILPERSMAN
2. *Correspondence Manual*
3. SECNAVINST 5210.11D
4. SECNAVINST 5215.1C

1-2. The content and format elements of a letter-type directive are contained in what table of the SECNAVINST 5215.1C?

1. Table 1
2. Table 2
3. Table 3
4. Table 4

IN ANSWERING QUESTIONS 1-3 THROUGH 1-16, REFER TO CHAPTER 2, PAGES 2-14 THROUGH 2-18.

1-3. Into what total number of categories are legal reference materials classified?

1. One
2. Two
3. Three
4. Four

1-4. Which of the following sources of information are published by jurisdiction, either chronologically or in compilations called codes?

1. Regulations
2. Court decisions
3. Digests
4. Statutes

1-5. Federal regulations are officially published in what publication?

1. *Statutes at Large*
2. *Federal Register*
3. *United States Code*
4. *Code of Federal Regulations*

1-6. When legal research is conducted, which of the following publications is considered a primary source?

1. *American Jurisprudence Second*
2. *Federal Digest*
3. *Federal Register*
4. *Prosser on Torts*

1-7. Which of the following items are aids in helping locate the information contained in primary sources?

1. Statutes
2. Finding tools
3. Secondary sources
4. Regulations

1-8. Which of the following publications would best help a legal researcher determine the history or status of a case?

1. *Words and Phrases*
2. *Corpus Juris Secundum*
3. *Uniform System of Citations*
4. *Shepard's Citations*

- 1-9. Which of the following is NOT a function of *Shepard's Military Justice Citations*?
1. To find the law on all sides of an issue
  2. To trace the judicial history of each reported case
  3. To find later cases that have cited the main case
  4. To find citations to the case in other authorities such as periodicals and the Attorney General's opinions

- 1-10. Which, if any, of the following sources is considered secondary?
1. Words and phrases
  2. Periodicals
  3. Digests
  4. None of the above

- 1-11. Which of the following publications contains only decisions of COMA?
1. *Court-Martial Reports*
  2. *Military Justice Reporter*
  3. *United States Code*
  4. *Decisions of the United States Court of Military Review*

(A)            (B)(C)   (D)   (E)        (F) U.S. V. Lamb, 6 M.J. 542 (NCMR 1978)
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Figure 1A

IN ANSWERING QUESTIONS 1-12 THROUGH 1-14, REFER TO THE LETTERED ELEMENTS IN FIGURE 1A.

- 1-12. What element of the citation indicates the publication where the case can be found?
1. A
  2. B
  3. C
  4. E
- 1-13. The court that decided the case can be identified by what element(s)?
1. A only
  2. E only
  3. A and E
  4. C

- 1-14. The place where the case can be found in the cited publication is identified by what element(s)?
1. A
  2. B only
  3. D only
  4. B and D

- 1-15. FLITE is operated by which of the following government agencies?
1. Department of Justice
  2. Department of the Navy
  3. Department of the Air Force
  4. Department of Defense

- 1-16. Which of the following items is NOT a service provided by FLITE?
1. Supplies legal opinions and memorandums
  2. Creates and maintains full-text data bases of legal information
  3. Provides computer-assisted research to all federal agencies
  4. Produces and distributes computer-generated research tools such as indexes, digests, and citations

IN ANSWERING QUESTIONS 1-17 THROUGH 1-20, REFER TO CHAPTER 6, PAGES 6-23 THROUGH 6-26.

- 1-17. Under which of the following conditions may a warrant of attachment be issued?
1. When a witness cannot be located
  2. When a witness is located overseas
  3. When a witness has refused or willingly neglected to appear at the time and place specified on a subpoena
  4. When the witness is a foreign national in a foreign country



- 1-18. When a DOD civilian witness is directed to appear at a court-martial, what form(s) should be sent to the witness?
1. Subpoena
  2. Cost travel orders
  3. Both 1 and 2 above
  4. No-cost travel orders
- 1-19. What person/personnel is/are responsible for the computation and payment of travel money to witnesses?
1. CO, NLSO
  2. Trial counsel
  3. Convening authority
  4. Disbursing personnel
- 1-20. A naval member is required to testify in a federal case where the interest of the Navy is concerned. Who will direct the witness' command to issue TAD orders to the member?
1. OEGCMJ
  2. BUPERS
  3. Concerned federal agency
  4. Attorney General
- IN ANSWERING QUESTIONS 1-21 THROUGH 1-28, REFER TO PAGES 6-34 AND 6-35.
- 1-21. What official conducts the pretrial confinement review?
1. Military magistrate
  2. Brig officer
  3. Initial reviewing officer (IRO)
  4. Investigating officer
- 1-22. If the IRO orders the immediate release of an accused from pretrial confinement, what option, if any, does the accused's commanding officer have in ensuring the accused's continued confinement?
1. Overrule the order to release
  2. Appeal the order to release to the next higher authority
  3. Order a new hearing
  4. Do nothing because the order to release is final and binding
- 1-23. Permission to continue pretrial confinement in excess of 30 days must be obtained from which of the following officials?
1. Trial counsel
  2. OEGCMJ
  3. CA
  4. IRO
- 1-24. An IRO must be an officer serving in what minimum paygrade?
1. 05
  2. 02
  3. 03
  4. 04
- 1-25. In which of the following manners may an accused present matters to the IRO?
1. In person
  2. Through written statements
  3. Through his or her appointed counsel
  4. Each of the above
- 1-26. The IRO'S memorandum and all documents considered in a case are maintained until which of the following events occurs?
1. The accused is released from pretrial confinement
  2. Conclusion of the court-martial
  3. Completion of appellate review
  4. The 2-year retention period for records expires
- 1-27. If an IRO orders an accused released from pretrial confinement, what authority will issue the release order?
1. Accused's CO
  2. IRO
  3. OEGCMJ
  4. Brig officer

- 1-28. An IRO maintains the authority to continue or release an accused from pretrial confinement up to and until what event?
1. Preferral of charges
  2. Referral of charges
  3. Completion of trial
  4. Sentencing

IN ANSWERING QUESTIONS 1-29 THROUGH 1-33, REFER TO PAGES 6-40 THROUGH 6-46.

- 1-29. The chain of custody of an item of evidence is maintained up and until what event?
1. The evidence is released to the court for trial
  2. Completion of the court-martial
  3. The evidence is disposed of
  4. The review process for the court-martial that the evidence was used in is completed

- 1-30. U.S. v. Solaria decided what issue regarding jurisdiction?

1. That jurisdiction continues into subsequent enlistments
2. That jurisdiction over an offense terminates at the conclusion of an enlistment
3. That off-base offenses must be service connected in order for the military to have jurisdiction
4. That a member's status as a person subject to the UCMJ was the test for court-martial jurisdiction

- 1-31. Normally, what number of interviewers should be present when conducting an interview of a witness?

1. One
2. Two
3. Three
4. Four

- 1-32. What are the two classifications of interviews?

1. Indirect and direct
2. Formal and informal
3. Brief and intensive
4. Initial and follow-up

- 1-33. When you are conducting an interview, which of the following individuals should be interviewed first?

1. Witnesses
2. Victims
3. Complainants
4. Suspects

IN ANSWERING QUESTIONS 1-34 THROUGH 1-40, REFER TO PAGES 9-14 AND 9-15.

- 1-34. Which of the following statements is correct concerning administrative discharge warnings?

1. A violation of any administrative discharge warning in a member's service record is grounds for separation processing
2. A member may have only one administrative discharge warning per enlistment
3. If a member refuses to sign an administrative discharge warning, a letter of reprimand must be issued in its place
4. Counseling must be accomplished by the member's parent command

- 1-35. A counseling/warning entry may be delivered in which of the following formats?

1. Orally
2. Page 13 entry
3. Letter
4. Both 2 and 3 above

- 1-36. If a member refuses to sign an administrative discharge warning, what action should be taken?
1. The CO must issue a formal letter of reprimand
  2. The counselor must make a notation to that effect and have the entry signed by an officer
  3. The counselor must make a notation to that effect and have the entry initialed by himself or herself and two witnesses
  4. The warning is annotated with the words *refused to sign* and two witnesses must sign the entry
- 1-37. Which of the following actions by the counseled member violates the terms of a page 13 administrative discharge warning?
1. Deficiencies in performance
  2. Further military misconduct
  3. Civilian conviction
  4. Each of the above
- 1-38. Unknown misconduct discovered after the execution of an administrative discharge warning will make the page 13 null and void.
1. True
  2. False
- 1-39. What official(s) may sign an administrative discharge warning?
1. CO only
  2. CO or XO only
  3. CO, XO, or legal officer only
  4. CO or anyone with "by direction" authority
- 1-40. What person must sign as a witness on an administrative discharge warning?
1. The person who counseled the member
  2. CO
  3. Legal officer
  4. Counseled member's defense counsel
- IN ANSWERING QUESTIONS 1-41 THROUGH 1-50, REFER TO PAGES 10-9 THROUGH 10-11.
- 1-41. Service of process may not be allowed within a command without the permission of what official?
1. Legal officer
  2. The member being served
  3. CO
  4. OEGCMJ
- 1-42. What is meant by the term *service of process*?
1. The delivery of a request to appear before a certain civil court
  2. The handing of a court order to a person directing him or her to appear or answer allegations before a civil court
  3. The delivery of a court's judgment of civil action to an affected party
  4. The delivery of an affidavit by a member of a civil court
- 1-43. Where service of process is concerned, personnel located on a vessel operating within the territorial waters of a state are considered within the jurisdiction of that state.
1. True
  2. False
- 1-44. When within the jurisdiction of the court issuing the process, what responsibility does a CO have regarding service of process on a member of his or her command?
1. To ensure the nature of the process is explained to the member
  2. To review the legality of the service
  3. To provide counsel to the member being served before service
  4. To ensure the member is advised that he or she need not accept service

- 1-45. A member of your command is served with a state court process arising from activities relating to his or her official duties. What reporting requirements must be met by your CO?
1. The OEGCMJ must be advised and provided the details of the request
  2. The CO of the servicing NLSO must be advised immediately
  3. JAG must be notified by phone and forwarded a copy of the process and pleadings
  4. SECNAV (JAG) must be notified via telephone for direction
- 1-46. Requests for Justice Department representation of a federal employee sued in his or her individual capacity arising from activities performed in the course of official duties must be submitted to what official or department?
1. Attorney General
  2. Justice Department
  3. COMNAVLEGSVCCOM
  4. JAG
- 1-47. If a CO refuses to allow the service of process on a member of his or her command, a report is made to what official or department?
1. CO, NLSO
  2. SECNAV (JAG)
  3. OEGCMJ
  4. Justice Department
- 1-48. A member receives a subpoena to appear in federal court to testify in a case where DON interests are involved. Costs associated with the member appearing are the responsibility of what command or agency?
1. JAG
  2. SECNAV
  3. Member's command
  4. Concerned federal agency
- 1-49. In which, if any, of the following types of cases may a subpoenaed prisoner be released to testify?
1. A state criminal case
  2. A state civil case
  3. A federal civil case
  4. A small claims court case
- 1-50. Which of the following statements is correct concerning members serving on local jury duty?
1. They must take leave in order to receive reimbursement for transportation expenses
  2. All fees accrued by the member for jury service are deductible from basic pay
  3. The only reimbursement a member may receive is for expenses incurred while performing jury duty
  4. The member is not entitled to any fees or reimbursement for expenses

## ASSIGNMENT 2

Textbook Assignment: "Claims," chapter 12, pages 12-1 through 12-41.

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- 2-1. What doctrine prevented injured persons from receiving fair compensation for meritorious claims prior to the FTCA being passed?
1. Private bill doctrine
  2. Sovereign immunity doctrine
  3. Liability doctrine
  4. Tort doctrine
- 2-2. What term best describes a failure to exercise the degree of care that a reasonable person would exercise under the same circumstance?
1. Liability
  2. Tort
  3. Negligence
  4. Wrongful
- 2-3. The authority for commissioned officers and petty officers to apprehend is extended by what article of the UCMJ?
1. Article 5
  2. Article 6
  3. Article 7
  4. Article 8
- 2-4. What is the maximum amount of recovery, if any, under the FTCA?
1. \$25,000
  2. \$50,000
  3. \$75,000
  4. None
- 2-5. Written approval to pay an FTCA claim must be obtained from the Attorney General if the claim exceeds what specific amount?
1. \$20,000
  2. \$25,000
  3. \$30,000
  4. \$50,000
- 2-6. Under the FTCA, what amount of time does a claimant have from the date a claim against the government accrues to present a written claim?
1. 1 year
  2. 2 years
  3. 3 years
  4. 4 years
- 2-7. Under the FTCA, when a claimant presents a claim to a federal agency, the agency must act on the claim within what maximum number of months?
1. 6
  2. 9
  3. 12
  4. 18
- 2-8. Under the FTCA, after a federal agency mails written notice of its final denial of the claim, the claimant is allowed what maximum number of months to file suit on the claim in federal district court?
1. 6
  2. 9
  3. 12
  4. 18
- 2-9. Whenever possible, what form should a claimant use when preparing an FTCA claim?
1. NAVJAG Form 5890/12
  2. DD Form 1843
  3. DD Form 1842
  4. Standard Form 95

- 2-10. When a claim is initially presented for adjudication, what action must be taken by the receiving command?
1. The claim must be forwarded to the nearest NLSO
  2. The claim must be stamped or marked with the date of receipt
  3. The maximum amount that may be adjudicated must be determined
  4. The date, type, and amount of the claim is reported to JAG
- 2-11. What command usually convenes a claims investigation?
1. The area coordinator for the command involved
  2. The command most directly involved in the incident
  3. The NAVLEGSVCOFF serving the command involved
  4. A designated impartial command that is not directly involved
- 2-12. When a person is appointed to investigate a claim, what should be the investigator's main concern about his or her normal duties?
1. The investigator should make sure he or she always performs normal duties
  2. The investigator should find a temporary relief to take over his or her normal duties pending the completion of the investigation
  3. The investigation ordinarily takes priority over his or her normal duties
  4. The investigation should be secondary to normal duties and will be done on the investigator's own time
- 2-13. An adjudicating authority can pay an FTCA claim up to \$40,000. The same adjudicating authority could deny an FTCA claim up to what amount?
1. \$120,000
  2. \$80,000
  3. \$40,000
  4. \$20,000
- 2-14. At what moment is the government no longer liable concerning an FTCA claim?
1. When the investigation is completed
  2. When the review is completed
  3. When the adjudicating authority pays the claim
  4. When the claimant accepts a paid settlement
- 2-15. A settlement agreement is required in which of the following circumstances?
1. The claim is settled for less than the full amount claimed
  2. The claim was presented on a SF-95
  3. Both 1 or 2 above
  4. The claim was settled by an adjudicating authority other than OJAG
- 2-16. A claimant may submit a reconsideration of an FTCA claim denial within what maximum number of months?
1. 1
  2. 6
  3. 9
  4. 12
- 2-17. What is the maximum payment that may be approved under the Military Claims Act (MCA) without referral to the General Accounting Office?
1. \$50,000
  2. \$100,000
  3. \$150,000
  4. \$200,000
- 2-18. A claim under the MCA may not be paid unless it is presented in writing within what maximum number of years after it accrues?
1. 1
  2. 2
  3. 3
  4. 4

- 2-19. Under the MCA, the Secretary of the Navy, or a designee, is authorized to make an advance payment up to what maximum amount?
1. \$1,000
  2. \$2,500
  3. \$5,000
  4. \$10,000
- 2-20. A claimant may bring suit within what maximum period of time, if any, after an administrative denial of an MCA claim?
1. 30 days
  2. 60 days
  3. 90 days
  4. There is no right to sue under the MCA
- 2-21. Which of the following types of claims is payable under the Personnel Claims Act?
1. Damage to property in unassigned quarters in the United States
  2. Loss of personal property used for the benefit of the government
  3. Damage of property owned by the United States that is used for personal benefit
  4. Loss of jewelry shipped in baggage
- 2-22. Normally, the schedules of depreciation do not require the depreciation for items less than what maximum number of months old?
1. 6
  2. 8
  3. 9
  4. 12
- 2-23. Under normal circumstances, what is the maximum amount payable for a claim submitted under the Personnel Claims Act?
1. \$20,000
  2. \$30,000
  3. \$40,000
  4. \$50,000
- 2-24. Except when motor vehicles are being shipped under PCS orders, what is the maximum amount payable under the Personnel Claims Act for noncollision damage claims?
1. \$1,000
  2. \$1,500
  3. \$2,000
  4. \$2,500
- 2-25. Except during time of armed conflict, what is the statute of limitations for personnel claims?
1. 1 year
  2. 2 years
  3. 3 years
  4. 4 years
- 2-26. Personnel claims are presented on which of the following forms?
1. Standard Form 95
  2. Standard Form 1145
  3. DD Form 1842
  4. DD Form 1845
- 2-27. A Notice of Loss or Damage, DD Form 1840/1840R, must be submitted to a personal property office within a total of what maximum number of days of delivery of household effects?
1. 30
  2. 45
  3. 60
  4. 70
- 2-28. An adjudicating authority may authorize advance partial payments on a Personnel Claims Act claim in which of the following amounts?
1. \$500
  2. \$1,000
  3. One-fourth of the estimated total payment
  4. One-half of the estimated total payment

- 2-29. Persons in which of the following situations would normally be eligible to submit a claim under the Foreign Claims Act?
1. A citizen of a foreign country for damage caused to personal property in that country by the noncombatant activities of a member of the U.S. Armed Forces
  2. A member of a foreign armed force for damage to personal property while serving in the U.S. Armed Forces in the United States
  3. A dependent of a member of the U.S. Armed Forces living in a foreign country for damage done to personal property
  4. An active duty member stationed in a foreign country for damage done to personal property
- 2-30. What is the maximum amount payable under the Foreign Claims Act?
1. \$25,000
  2. \$50,000
  3. \$100,000
  4. \$150,000
- 2-31. After incurring a loss, an eligible person has what maximum amount of time to submit a claim under the Foreign Claims Act?
1. 1 year
  2. 2 years
  3. 3 years
  4. 6 months
- 2-32. In which of the following manners are claims submitted under the Foreign Claims Act investigated?
1. By a one-officer investigation not requiring a hearing
  2. By an NLSO appointed claims adjudicator
  3. By a foreign claims commission
  4. By a court of inquiry
- 2-33. The Secretary of the Navy is authorized to settle admiralty claims up to what maximum amount?
1. \$100,000
  2. \$500,000
  3. \$1,000,000
  4. \$10,000,000
- 2-34. Which of the following statements is NOT correct concerning nonscope claims?
1. The claim must not be able to be dealt with under some other claims statute
  2. Acts by employees of nonappropriated fund activities are not covered by the nonscope claims statute
  3. The property damage, personal injury, or death must be caused by a military member or civilian employee of the armed forces or Coast Guard
  4. The acts giving rise to the claims must show negligence and be within the scope of employment
- 2-35. What is the maximum amount payable by an OEGCMJ under an Article 139 claim for damage in a single incident?
1. \$750
  2. \$2,000
  3. \$5,000
  4. \$7,500
- 2-36. What maximum amount of time does a person have to file a complaint under Article 139?
1. 180 days
  2. 2 years
  3. 90 days
  4. 30 days



- 2-37. Under the Federal Claims Collection Act, what is the maximum amount of time after damage occurs that the government has to make a written demand on the responsible party?
1. 1 year
  2. 2 years
  3. 3 years
  4. 4 years
- 2-38. Under the Federal Claims Collection Act, claims over what amount can be terminated or compromised only with the specific permission of the Department of Justice?
1. \$20,000
  2. \$40,000
  3. \$60,000
  4. \$75,000
- 2-39. Against which of the following entities may a Medical Care Recovery Act claim be asserted?
1. Private individuals
  2. Corporations and associations
  3. Nonfederal government agencies
  4. Each of the above
- 2-40. What person has primary responsibility for assertion and collection of Medical Care Recovery Act claims?
1. Action JAG designee
  2. CO of the concerned Navy medical facility
  3. Patient
  4. JAG
- 2-41. Without prior approval of the Department of Justice, what is the maximum amount that may be settled, waived, or compromised under the Medical Care Recovery Act?
1. \$20,000
  2. \$40,000
  3. \$50,000
  4. \$75,000
- 2-42. When it appears that a third party is legally responsible for an injury or a disease, what official or activity is responsible for preparing the NAVJAG Form 5890/12?
1. The cognizant JAG designee
  2. The CO of the NLSO nearest the concerned Navy medical facility
  3. The OEGCMJ nearest the concerned Navy medical facility
  4. The concerned Navy medical facility
- 2-43. What form is used to issue all fund authorizations?
1. NAVCOMPT Form 372
  2. NAVCOMPT Form 2277
  3. Standard Form 1145
  4. Standard Form 2199A
- 2-44. When specifically requested, end-of-year fund balances may be carried forward to the next fiscal year.
1. True
  2. False
- 2-45. What form should be used to make all payments using Navy claims funds?
1. NAVCOMPT Form 372
  2. NAVCOMPT Form 2277
  3. Standard Form 1038
  4. Standard Form 1145
- 2-46. What is the primary report used to manage Navy claims funds?
1. Resource authorization report
  2. Trial balance report
  3. Voucher for disbursement report
  4. Claims record report

2-47. Which of the following reports is/are needed for reconciliation with the memorandum accounting logbook?

1. Listing of expenditures processed against your authorization
2. Listing of all outstanding obligations
3. Both 1 and 2 above
4. Trial balance report

2-48. To facilitate reconciliation, you should identify vouchers in what manner, if any?

1. Consecutively numbered by job order as they are prepared
2. Consecutively lettered by job order as they are prepared
3. Alphabetically by name of claimant
4. None

2-49. Which of the following types of information should be recorded in a memorandum accounting logbook?

1. Voucher number
2. Balance
3. Fund increases
4. Each of the above

2-50. After discovering that a personnel claim was paid citing the accounting data for a military claim, you should take what action?

1. Charge the account from which the claim was paid
2. Make appropriate adjustments in the memorandum accounting logbook
3. Contact the authorization accounting activity
4. Send a letter to the U.S. General Accounting Officer

## ASSIGNMENT 3

Textbook Assignment: "Administrative Investigations," chapter 13, pages 13-1 through 13-24; "Office Organization and Management," chapter 14, pages 14-1 through 14-10.

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IN ANSWERING QUESTIONS 3-1 THROUGH 3-38,  
REFER TO CHAPTER 13.

- 3-1. What type of fact-finding body can subpoena civilian witnesses?
1. Board of investigation required to conduct a hearing
  2. Board of investigation not required to conduct a hearing
  3. Single investigation not required to conduct a hearing
  4. Court of inquiry
- 3-2. Which of the following statements describes a distinguishing feature of a fact-finding body not required to conduct a hearing?
1. May be convened in writing
  2. Uses hearing procedures in collecting evidence
  3. Has the power to subpoena civilian witnesses
  4. May not designate parties
- 3-3. Progress status reports on all death investigations are required at what specific time intervals?
1. Every 14 days
  2. Every 10 days
  3. Every 7 days
  4. Every 5 days
- 3-4. What copy of a death investigative report is usually released to the next of kin?
1. The initial report
  2. The advance report
  3. The preliminary report
  4. The supplemental report
- 3-5. What statutory requirement must an officer in charge possess before he or she can convene an investigation not requiring a hearing?
1. Be authorized to administer NJP under Article 15, UCMJ
  2. Be designated in writing by SECNAV
  3. Be designated in writing by a superior in the chain of command
  4. Be a commissioned officer
- 3-6. A member is injured while on leave from a deployed ship. What action regarding the investigation should his or her CO take?
1. Send an investigator TAD to complete the investigation
  2. Request that the area coordinator where the incident occurred conduct the investigation
  3. Request the naval hospital in the geographic area where the incident occurred to conduct the investigation
  4. Request JAG to designate a command to conduct the investigation

- 3-7. A vehicle accident involving members from three different commands occurs. If the commands cannot determine who should conduct the investigation, what action should be taken?
1. Each command must investigate the incident independently
  2. The senior command involved will convene the incident
  3. The common superior of all commands involved will determine who convenes the investigation
  4. The command whose geographic location is closer to the incident will convene the investigation
- 3-8. What is the least number of members that can comprise a board of investigation not required to conduct a hearing?
1. One
  2. Two
  3. Three
  4. Four
- 3-9. Under what circumstances, if any, may a CA issue supplemental instructions to an investigation already in progress?
1. When he or she discovers new evidence
  2. When he or she desires to broaden or narrow the scope of the investigation
  3. When he or she is relieved of command due to PCS, TAD, or leave
  4. None
- 3-10. Opinions and recommendations may not be included in an investigative report unless they are directed by what official?
1. The counsel for the government
  2. The counsel for the party
  3. The convening authority
  4. The investigating officer
- 3-11. An investigating officer must prepare a Privacy Act statement for a witness to sign under what circumstance?
1. When a witness is suspected of committing an offense under the UCMJ
  2. When the witness is a member of the armed forces on active duty
  3. When the witness is a civilian
  4. When a witness supplies personal information
- 3-12. An investigating officer obtains a member's social security number from the local administration office. To use this information in the investigative report, he or she must perform which of the following actions?
1. Have the member sign a Privacy Act statement
  2. Note the source of the SSN in the preliminary statement of the investigation
  3. Contact the member and advise him or her of the method used to obtain the SSN
  4. Note the source of the information in the findings of fact
- 3-13. Article 31, UCMJ, warnings must be given to a witness at an investigation not required to conduct a hearing under what circumstances?
1. When the witness is suspected of an offense
  2. When the appointing order states it as a requirement
  3. When the witness' statement is made orally
  4. When the witness is providing expert testimony

- 3-14. The CA prescribes the time period a fact-finding body has to submit its investigative report. Normally, the time allocated should not exceed what number of days?
1. 30 days from the date of the appointing order
  2. 30 days from the date of the incident
  3. 60 days from the date of the appointing order
  4. 60 days from the date of the incident
- 3-15. When an investigation not required to conduct a hearing is conducted, what person determines the method of procedure to be followed?
1. The CA
  2. The command legal officer
  3. The investigating officer
  4. The counsel for the board
- 3-16. In an investigation not required to conduct a hearing of an automobile accident, which of the following steps may an investigator employ during the investigation?
1. Interview injured parties
  2. Collect hospital records
  3. Inspect the scene of the accident
  4. All of the above
- 3-17. Evidence to be used in an investigation not required to conduct a hearing may be obtained by the investigating officer by which of the following methods?
1. Informal personal interview
  2. Telephone inquiry
  3. Correspondence
  4. Each of the above
- 3-18. What part of a NCIS Report of Investigation (ROI) may be included in an investigative report?
1. Narrative summary portion
  2. Enclosures to the ROI
  3. Both 1 and 2 above
  4. Name of participating agents
- 3-19. Which of the following documents may be included in an investigative report?
1. Operating logs
  2. Polygraph examination record
  3. Inspector General report
  4. Aviation mishap investigation Report
- 3-20. An investigative report includes photographs of an accident site. What disposition is made of the negatives?
1. They are maintained by the Navy photo lab processing the film
  2. They are maintained by the investigating officer
  3. They are forwarded with the investigation
  4. They are held by the appointing authority
- 3-21. In an investigation not required to conduct a hearing, what should be included to show the "as found" location and condition of a piece of equipment that will be sent to a laboratory for analysis?
1. An affidavit by the investigating officer
  2. A sketch or photograph
  3. A chain of custody document
  4. An unsworn statement by the investigating officer
- 3-22. What information must be documented on a written statement from a civilian witness in an investigation not required to conduct a hearing?
1. Full name and residence only
  2. Full name, title, and residence only
  3. Full name, business or profession, and residence only
  4. Full name, title, business or profession, and residence

- 3-23. What is the purpose of the preliminary statement?
1. To inform the CA that all available evidence was collected
  2. To inform the CA of the investigating officer's itinerary
  3. To inform the CA of the investigating officer's summary of the investigation
  4. To inform the CA of the identity of the command that furnished the necessary clerical assistance
- 3-24. Which of the following documents should always be the first enclosure to an investigative report?
1. Exhibits
  2. Any special communications from the CA
  3. The appointing order
  4. Findings of fact
- 3-25. In what order should enclosures be listed in an investigative report?
1. In the order received by the investigating officer
  2. In the order referenced in the report
  3. In order of importance
  4. In chronological order
- 3-26. In what manner are enclosures authenticated in an investigative report?
1. By enclosing a command seal on each document
  2. By the investigating officer's signature on each enclosure
  3. By the signature of the investigating officer on the investigative report
  4. By typing the words "For Official Use Only" on each enclosure
- 3-27. If during the CA's review, the CA finds the investigative report incomplete or in error, what action should the CA take?
1. Indicate the problems in the forwarding endorsement and send the report to the next superior in the chain of command
  2. Appoint a new investigation independent of the first body to complete or correct the report
  3. Forward the report as is without further action
  4. Return the report to the investigator(s) for further inquiry
- 3-28. If the CA takes punitive action on an individual as a result of an incident under investigation, by what means is that action reflected in the record of investigation?
1. By noting the action in forwarding endorsement
  2. By enclosing a copy of the action as an enclosure
  3. By indicating the action via separate cover
  4. By having the Investigator(s) issue a supplement to the basic report
- 3-29. In death cases, JAG should receive what total number of copies of the investigative report?
1. Original and one copy only
  2. Original and two copies only
  3. Original and three copies only
  4. Original and four copies
- 3-30. What official may release JAGMAN investigations involving classified material?
1. JAG
  2. CNO
  3. CA
  4. SECNAV (JAG)

- 3-31. A designated party is NOT accorded which of the following rights?
1. To be present during deliberations
  2. To examine any written statements
  3. To introduce evidence
  4. To make a voluntary oral or written statement in the record of proceedings

- 3-32. The authority to convene courts of inquiry is possessed by which of the following officials?
1. GCM convening authorities
  2. A person designated by the SECNAV
  3. Both 1 and 2 above
  4. Any OIC or CO

- 3-33. A fact-finding body required to conduct a hearing should normally be composed of what number of officers?
1. One
  2. Two
  3. Three
  4. Four

- 3-34. The record of a court of inquiry may be used instead of an Article 32, UCMJ, pretrial investigation.
1. True
  2. False

- 3-35. Investigations involving line of duty determinations affect which of the following entitlements?
1. Severance pay
  2. Disability retirement
  3. Veteran's benefits
  4. Each of the above

- 3-36. In death cases, opinions concerning line of duty are not made.
1. True
  2. False

- 3-37. If a member refuses to submit to needed medical care and suffers a disability as a proximate result of the refusal, which of the following line of duty determinations should be made?
1. In the line of duty and not due to member's own misconduct
  2. In the line of duty and due to member's own misconduct
  3. Not in the line of duty and not due to member's own misconduct
  4. Not in the line of duty and due to the member's own misconduct

- 3-38. With regard to line of duty and misconduct determinations, what finding CANNOT be made by a fact-finding body?
1. In the line of duty, not due to member's misconduct
  2. Not in the line of duty, not due to member's misconduct
  3. In the line of duty, due to member's misconduct
  4. Not in the line of duty, due to member's own misconduct

IN ANSWERING QUESTIONS 3-39 THROUGH 3-65, REFER TO CHAPTER 14.

- 3-39. What is the key to the effective management of a Navy legal service office (NLSO)?
1. Aggressiveness
  2. Knowledge of the command's organization
  3. Supervision
  4. Involvement

- 3-40. Who has command over all NLSOs?
1. JAG
  2. COMNAVLEGSVCCOM
  3. OEGCMJ
  4. Attorney General

- 3-41. Defense counsels fall under the authority of which of the following authorities?
1. Convening authority of each court-martial
  2. OEGCMJ
  3. Commander, Naval Legal Service Command
  4. Assistant Judge Advocate General (Operations and Management)
- 3-42. What number of major departments makes up a Navy legal service office?
1. Six
  2. Five
  3. Three
  4. Four
- 3-43. NLSO detachments report to what authority?
1. Commander, Naval Legal Service Command
  2. Parent NLSO
  3. OEGCMJ over the detachment
  4. Deputy JAG
- 3-44. As a Legalman at an SJA office, what areas of the legal field should be your primary concerns?
1. Military justice and investigations
  2. Military justice and claims
  3. Military justice and legal assistance
  4. Military justice and posttrial review
- 3-45. Upon arriving at a new office, you should have what major concern about reports?
1. A report tickler system is in place
  2. The number of reports
  3. Reports due and in what format
  4. Frequency of submission
- 3-46. Modern management authorities prefer which of the following concepts of a manager?
1. Someone who plans, organizes, directs, and controls operations
  2. Someone who matches interests and needs of people with those of the command
  3. Someone who organizes, directs, and controls the activities of people
  4. Someone who recognizes the role people play in achieving the objectives of the activity
- 3-47. Managing people is the central and most important managerial task.
1. True
  2. False
- 3-48. What method is used to prevent office routine from breaking down during the absence of other personnel?
1. Rotating personnel in various jobs
  2. A comprehensive training plan
  3. Creation of a master turnover file
  4. Effective supervision
- 3-49. What end is accomplished by making job assignments in writing?
1. It prevents dereliction of duty
  2. It ensures all aspects of a job are covered
  3. It ensures each person is aware of his or her job responsibilities
  4. It prevents duplication of effort
- 3-50. What is the primary goal of training subordinates?
1. Improving efficiency on the job
  2. Preparing for advancement
  3. Indoctrinating new personnel to the rating
  4. Maintaining currency of rating standards



- 3-51. What guidelines should be used as the basis for an effective training program?
1. Advancement examinations
  2. Occupational standards
  3. Basic administrative tools
  4. *Military Requirements for Petty Officer 3 & 2*
- 3-52. What should be the most important aspect(s) of supervising civilians?
1. Monitoring performance
  2. Writing performance descriptions and appraisals
  3. Using proper management techniques
  4. Enforcing civil service regulations
- 3-53. What publication(s) contains specific details on civilian personnel matters?
1. *Federal Personnel Manual*
  2. *Civil Service Reform Act* pamphlet
  3. *Manager's Handbook*
  4. Local standard operating procedures
- 3-54. What is a federal position description?
1. An official record of work assigned by management
  2. An organization's task statement
  3. A job qualification statement
  4. A chain of command billet structure
- 3-55. The Factor Evaluation System assigns grades in the classification of what nonsupervisory positions?
1. GS-7 only
  2. GS-9 only
  3. GS-14 only
  4. GS-1 through GS-15
- 3-56. What number of evaluation factors are under the Factor Evaluation System?
1. Five
  2. Six
  3. Seven
  4. Nine
- 3-57. Military members are expected to settle their financial obligations in what manner?
1. Expeditiously
  2. Properly and timely
  3. Maturely and responsibly
  4. Justly and expediently
- 3-58. A commanding officer may arbitrate controversies regarding alleged debts.
1. True
  2. False
- 3-59. What act requires the annual percentage rate of the total finance charge be explained to the consumer?
1. Federal Truth in Lending Act
  2. Fair Debt Collection Practices Act
  3. Consumer Credit Act
  4. Standards of Fairness Act
- 3-60. Which of the following individuals or businesses are prohibited from contacting a commanding officer regarding an alleged debt?
1. Private firms
  2. Private individuals
  3. Collection agencies
  4. Credit bureaus

- 3-61. What action is taken on a creditor's correspondence that is in violation of the Fair Debt Collection Practices Act?
1. The correspondence is forwarded to the member stating he or she doesn't have to reply to the letter
  2. The correspondence is forwarded to the local NLSO and reported as a violation of the Fair Debt Collection Practices Act
  3. The correspondence is returned to the sender stating the violation and that no action was taken
  4. The correspondence is forwarded to the local general court-martial convening authority for action by the armed forces disciplinary control board

- 3-62. While you are counseling a member regarding an indebtedness letter, he or she disputes the alleged debt. What action should you take?
1. Advise the member to contact the debtor personally
  2. Reply to the creditor that the debt is disputed and that he or she should contact the member directly
  3. Refer the member to a legal assistance officer
  4. Attempt to resolve the matter between the creditor and the member

- 3-63. Members who establish a pattern of dishonorable failure to pay just debts should be administratively separated under which of the following separation categories?
1. Convenience of the government
  2. Best interest of the service
  3. Misconduct due to a pattern of misconduct
  4. Misconduct due to a minor civilian offense

- 3-64. A member may not be administratively separated for failure to pay just debts until what action has been taken?
1. A judgment has been rendered against the member by a creditor
  2. The member has been counseled and given a reasonable time to become solvent
  3. The member has been charged and found guilty for a violation of the UCMJ, Article 134
  4. The member has received letters of indebtedness from at least two separate creditors

- 3-65. What is the maximum punishment a member may receive at court-martial for a violation of Article 134, UCMJ, failure to pay just debts?
1. Bad-conduct discharge only
  2. Other than honorable discharge
  3. Bad-conduct discharge, 6 months' confinement, and forfeiture of all pay and allowances
  4. Dishonorable discharge, confinement for 1 year, and forfeiture of all pay and allowances



