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THIS FOURTH VOLUME of Career Development Course (CDC) M6AKL5J051 0P5A, *Military Justice*, covers the area of our practice where we can have the most impact in assisting commanders with maintaining good order and discipline. We begin in Unit 1 with the report of an offense under the Uniform Code of Military Justice (UCMJ). It covers the jurisdiction and the initiation of charges, preliminary inquiry, and evidentiary matters. Unit 2 covers nonjudicial punishment (NJP) and preferral of charges. Unit 3 will cover the convening authority's options including convening orders, types of courts-martial, preliminary hearings, and alternate dispositions. Unit 4 covers pretrial matters. Finally, Unit 5 will cover the trial portion, post-sentencing activities, and appellate review.

A glossary is included for your use.

Code numbers on figures are for preparing agency identification only.

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To get a response to your questions concerning subject matter in this course, or to point out technical errors in the text, unit review exercises, or course examination, e-mail Mr Gordon Morrison at afjags.registrar@us.af.mil. Be sure your request includes your name, address, and course/volume number and the course edit code.

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Unit 1. Report of an Offense Under the UCMJ

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THIS UNIT COVERS how to handle misconduct in the military justice system. The unit starts by covering the system as a whole and then breaks the process into more detail. We cover jurisdiction and initiation of charges, preliminary inquiry, and evidentiary matters.

1–1. Jurisdiction and Initiation of Charges

Before we dive into the process of how the military justice system handles misconduct, we will first cover miscellaneous matters within the military justice system.

601. Jurisdiction

Two primary questions must be answered regarding jurisdiction: (1) do we have jurisdiction over the person and (2) what is the offense? In determining jurisdiction, your first step is to determine the status of the accused. Once you know the status, the next step is to determine if the offense committed is a violation of the Uniform Code of Military Justice (UCMJ). Finally, determine the type of jurisdiction and with whom you may or may not share jurisdiction. Using the information in this lesson, you will be able to determine who has jurisdiction for courts-martial and adverse actions.

Although jurisdiction may be the first logical step where you get involved, this certainly is not the first step in the process. You must understand that to get to this point someone must have been suspected of committing an offense followed by an investigation of some kind; otherwise, there would have been no offense for us to determine jurisdiction over.

Jurisdiction as to persons

The term “jurisdiction” means the power to hear a case and render a legally competent decision. Of the persons listed in Article 2, UCMJ, your primary concern is Air Force (AF) military members serving on active duty, Air Force Reserve (AFR) on active duty or inactive duty training (IDT), and the Air National Guard when in federal service (Title 10). Jurisdiction also extends to personnel awaiting discharge after expiration of their terms of enlistment; volunteers from the time of their acceptance into the armed forces; and other persons lawfully called or ordered to duty or training in the armed forces from the dates when the terms require them of the call or order to obey it.

You must take affirmative action as soon as practicable to preserve jurisdiction for personnel whose enlistment has expired, but are awaiting discharge. You can do this by apprehension, arrest, confinement, or preferral of charges. If an individual is nearing his or her expiration of term of service (ETS), or if that term has already expired and pretrial confinement (PTC) is not required, prefer

charges to perfect and maintain jurisdiction. To avoid explaining delays, do not postpone preferring charges in such cases. Why? Because the general rule is that jurisdiction to try a military member by court-martial *ceases upon discharge or other separation, not including military retirement*.

However, there are exceptions. There are instances where an accused remains on active duty beyond their term of service, and the trial process continues; this is usually because the case falls within one of the exceptions to the general rule that permits the continued jurisdiction over the accused or the offense. In these cases, the record of trial (ROT) must contain competent evidence establishing the jurisdiction of the court-martial.

Military members who secure a fraudulent discharge from the armed forces are subject to apprehension and are triable by court-martial for that offense. If convicted of the fraudulent discharge, they may also be tried by court-martial for any offenses they may have committed before discharge. Furthermore, in the event an accused is apprehended for fraudulent discharge and violates the UCMJ, the military can later charge the accused for that violation after the conviction for fraudulent discharge. Termination of jurisdiction is *not* affected by a change of status (e.g., an officer is discharged from a reserve component to accept a commission in a regular component). Additionally, a discharged prisoner in the custody of an armed force may be tried for an offense committed while that person was a member of the armed forces and before the execution of the discharge. Some exceptions apply in cases where military members are no longer on active duty, but are still receiving pay (e.g., members retired from active duty).

The voluntary and unauthorized absence of an accused does not terminate the jurisdiction of the court. If the trial commenced with the accused present and arraignment was completed before the absence, the court proceeds with the trial to findings and sentencing, notwithstanding the accused's absence.

Jurisdiction as to offenses

Before 25 June 1987, military jurisdiction for offenses committed off base, other than purely military offenses, was very limited. However, on 25 June 1987 the United States (US) Supreme Court ruled in *Solorio v. United States* that the jurisdiction of a court-martial depends solely on the accused's status as a member of the armed forces.

The requisites for the exercise of UCMJ jurisdiction apply to active duty and reserve personnel; this means there must be jurisdiction over the individual at the time of the commission of the offense and at the time of trial. Based on the *Solorio* decision, the AF now has court-martial and nonjudicial punishment (NJP) jurisdiction over AF personnel for offenses committed both on- and off-base. If an AF member commits an off-base offense that violates the UCMJ and civil statutes, trial in a state court is not a bar to a later trial for the same offense in a federal court (court-martial), including a military court-martial. However, if state or nonmilitary federal authorities have prosecuted an offender, for the AF to prosecute the offender under the UCMJ the Secretary of the Air Force (SAF) is the approval authority. (**NOTE:** These cases are approved only in the most unusual cases when the ends of justice and discipline can be satisfied in no other way.)

If civilian or foreign authorities wish to exercise or express their intent to exercise jurisdiction over the member, neither a court-martial nor NJP may proceed as a matter of comity (mutual courtesy) until the state or foreign jurisdictions have completed their proceedings. If the state or foreign proceedings end without jeopardy attaching or if the AF receives clear intent that state or foreign proceedings will not continue pending UCMJ action, the principle of comity is satisfied, and the AF may proceed with NJP or court-martial action. The AF follows the law of the state where the offense was committed when determining whether jeopardy attaches at any point in the proceeding. At a minimum, jeopardy attaches when the jury is impaneled and sworn or when the first witness testifies in a judge-alone trial. If jeopardy attaches in the state or foreign proceedings, UCMJ action cannot be taken without SAF approval.

Statute of limitations

Another consideration regarding jurisdiction over the offense deals with whether or not the statute of limitations allows prosecution of the offense. There are offenses in the UCMJ that do not have a statute of limitations. As of 2019, these offenses are absent without leave or missing movement in time of war, murder, rape or sexual assault, or rape or sexual assault of a child, or any other offense punishable by death.

As specified in Article 43, UCMJ, for courts-martial jurisdiction, the statute of limitations is *normally no more than five years after the commission of the offense*. A person charged with an offense under the UCMJ is not liable for trial by court-martial unless the statute of limitations is tolled or suspended. The statute of limitations is tolled if sworn charges are received by the officer exercising summary court-martial (SCM) jurisdiction over the command within the specific period.

Certain offenses, such as wrongful cohabitation, are continuing offenses. Absent without leave (AWOL), desertion in peacetime, and fraudulent enlistment are not continuing offenses and are committed, respectively, on the date the person is absent or first received pay or allowances under the enlistment. Effective 14 November 1986, Public Law 99-661, 805 eliminated the requirement that the summary court-martial convening authority (SCMCA) receipt for charges alleging either desertion or AWOL to toll the running of the statute of limitations (Public Law 99-661, 805(a); Article 43, UCMJ).

Any other regulation notwithstanding, preferral of charges in cases of absences initiated on or after 14 November 1986 is not required. However, for all lengthy absence cases for which charges are preferred, and in which the accused has not yet returned to military authority, the SCMCA receipts for the charges. Staff judge advocates (SJA) must promptly obtain any delays required by Rules for Courts-Martial (R.C.M.) 707(c)(1) of the Manual for Courts-Martial (MCM). Enclose documentation of approved delays with the charge sheet in the member's personnel records before sending the records to the Air Force Personnel Center (AFPC).

Jurisdiction over members of reserve components

The National Defense Authorization Act for fiscal year 1987 made significant changes to jurisdiction over reservists. Under Article 2, UCMJ, the AF now exercises court-martial and Article 15, UCMJ jurisdiction over reserve members serving on active duty or IDT, and over Air National Guard members serving in federal status. The requirement for reservists to voluntarily accept orders stipulating UCMJ jurisdiction no longer applies. Jurisdiction over reservists does not terminate when the IDT or active duty training ends, as long as the alleged offense was committed during the period of active duty or IDT, and as long as the reservist's military status is not terminated completely after committing the offense.

A reservist who commits an offense while on active duty or IDT may be retained on active duty, pending disposition of offenses or be released to reserve status and recalled as necessary for a pretrial investigation, trial by courts-martial, or both. Prior consultation with the member's reserve component chain of command through judge advocate channels is required. Once the consultation requirement has been met, the Reserve or Air National Guard member may be recalled by a person authorized to convene general court-martials (GCM) in a regular component of the armed forces. In the AF, this is the active-duty general court-martial convening authority (GCMCA) for the unit to which the reservist is attached for training purposes or the unit at which the reservist was performing duty when the offense occurred. Reservists performing duties at reserve units or attached to such a unit when the offense occurred may be ordered to active duty by the supporting active-duty GCMCA in accordance with the applicable host-tenant support agreement or by the Air Force Reserve Command commander (AFRC/CC), Fourth Air Force commander (4 AF/CC), Tenth Air Force commander (10 AF/CC), or Twenty-second Air Force commander (22 AF/CC) for members assigned or attached to their respective commands.

A reservist recalled to active duty for court-martial cannot be required to serve a punishment consisting of confinement or restriction on liberty (restriction, extra duties, correctional custody, or arrest in quarters) during the recall period of duty, unless approved by SAF. If ordered to active duty with the concurrence of the SAF, the reservist can be retained on active duty as long as necessary to serve any punishment that imposes confinement or restrictions on liberty. However, once the reservist serves the confinement or restrictions on liberty, that individual may not be further retained on active duty. Any punishment left unserved may be carried over to subsequent normal periods of IDT or active duty.

A reservist who is to be tried by a GCM or special court-martial (SPCM) must be on active duty before arraignment at the trial. Note that the date of entry to active duty for disciplinary action starts the speedy-trial rule. The procedures for conducting an SCM are different in that a reservist can be tried by SCM while on active or IDT. An SCM conducted during an IDT period may be in session only during the normal IDT period. Additionally, NJP can be imposed on the reservist while on either duty status. Confinement or restrictions on liberty imposed by SCM or NJP during a normal IDT period are served only during that or subsequent IDT or active duty periods unless the reservist is serving on recall to active duty, which has been approved by the SAF.

Types of jurisdiction

Along with jurisdiction to the status of persons and the offense(s), different types of jurisdiction apply to military installations and facilities. The following table describes the types of jurisdiction:

Jurisdiction Types	Explanation
Concurrent	Concurrent jurisdiction exists when a state has ceded land to the US, but has reserved to itself the right to exercise its state authority. In these jurisdictions, both the state and federal governments may prosecute those who violate their laws.
Exclusive	With exclusive jurisdiction, the AF possesses all of the legislative authority (jurisdiction) of the state over the installation, and the state has not reserved the right to exercise any of that authority concurrently with the AF. The AF is solely responsible for law enforcement on the installations where there is exclusive jurisdiction.
Proprietary	Proprietary is jurisdiction exercised by any owner of the property—the right to grant or deny entrance to the property, and so forth. It carries with it virtually no legislative authority. The federal government maintains supremacy and immunity for inherently governmental functions on the property. The only federal laws that apply are those that do not rely upon federal jurisdiction over the area and include specific statutory federal crimes (i.e., bank robbery, espionage, sabotage, and counterfeiting). The AF has acquired ownership of an area, but has not obtained any measure of the state's legislative authority. Only the state has the power to enact general municipal laws over the area. The state may not regulate the federal government because of the "supremacy clause" of the US Constitution nor tax federal property. In other words, jurisdiction belongs to the installation commander.
Reciprocal	A commander of a unified or specified combatant command may convene a court-martial over members of any armed forces. However, the convening authority must be in command of a unified or specified command, or a commander of a subordinate joint command or subordinate joint task force, who has been authorized by the commander of the unified or specified command to convene such a court. A trial could also proceed if the AF member could not be delivered to the AF for trial due to exigencies of the service, preventing such a transfer.
	Ordinarily, an AF member would not be tried under such circumstances unless such conditions existed as described above. However, failure to comply with this policy does not prevent the court from proceeding, as long as the referral is valid. In addition, nothing prevents the detailing of a military judge from another armed force to the trial. Once complete, the armed force of which the accused is a member completes any required review. If there is disagreement over jurisdiction between the secretaries of the armed forces, or a secretary of an armed force and a commander

Jurisdiction Types	Explanation
	of a unified or specified combatant command, the Secretary of Defense designates which service is to exercise jurisdiction.
Foreign Criminal	AF members serving or deployed at overseas locations are subject to criminal proceedings by both the host nation (HN) and by the US for offenses they have allegedly committed. The terms of the specific status-of-forces agreement (SOFA) with the particular HN governs the primary jurisdiction of the case. In certain peace operations, especially those run by the United Nations, a status-of-mission agreement (SOMA) may be used instead of a SOFA.

For additional information concerning the different types of jurisdiction, refer to Air Force Instruction (AFI) 31-118, *Security Forces Standards and Procedures*, and MCM, R.C.M. 201.

602. Victim and witness assistance

In December 1982, the President's Task Force on Victims published a report that found the justice system ignored the victim, and the system's resources were geared toward preserving the rights of the accused. This led to the passage of the Victim and Witness Protection Act (VWPA) of 1982, the Victims of Crime Act (VOCA) of 1984, and the Victims' Rights and Restitution Act (VRRRA) of 1990. The AF has specifically set forth the commander's and legal office's responsibilities regarding these acts in AFI 51-201, *Administration of Military Justice*.

Article 6b, UCMJ, rights of the victim of an offense

Congress codified rights of the victim of an offense into the UCMJ. These rights mirror many of the rights afforded to victims of crime in federal civilian courts. They are enumerated in Article 6b, UCMJ (10 United States Code (U.S.C.) 806b) and include the following:

- The right to be reasonably protected from the accused.
- The right to reasonable, accurate, and timely notice of any of the following:
 - A public hearing concerning the continuation of confinement prior to trial of the accused.
 - A preliminary hearing under section 832 of this title (article 32) relating to the offense.
 - A court-martial relating to the offense.
 - A public proceeding of the service clemency and parole board relating to the offense.
 - The release or escape of the accused, unless such notice may endanger the safety of any person.
- The right not to be excluded from any public hearing or proceeding [described above] unless the military judge or preliminary hearing officer, as applicable, after receiving clear and convincing evidence, determines that testimony by the victim of an offense under this chapter would be materially altered if the victim heard other testimony at that hearing or proceeding.
- The right to be reasonably heard at any of the following:
 - A public hearing concerning the continuation of confinement prior to trial of the accused.
 - A sentencing hearing relating to the offense.
 - A public proceeding of the service clemency and parole board relating to the offense.
- The reasonable right to confer with the counsel representing the government at any proceeding described in paragraph (2).
- The right to receive restitution as provided in law.
- The right to proceedings free from unreasonable delay.

- The right to be treated with fairness and with respect for the dignity and privacy of the victim of an offense under this chapter.

Victim and Witness Protection Act of 1982

The purpose of the VWPA is to enhance and protect the crime victims and witnesses in the criminal justice system. It applies to all federal and state agencies, specifically those agencies that are responsible for law enforcement, prosecution, and correction, including the military. The key components of the act include the following requirements:

- Victims receive prompt social and medical services.
- Victims are notified of important criminal justice proceedings and scheduling changes.
- The prosecution can obtain views of victims of serious crimes for plea bargaining and pretrial release.
- Employers are encouraged to continue to pay victims and witnesses for work absences to assist investigations and prosecutions.
- Law enforcement personnel receive training in victim assistance.
- Victims or witnesses are informed of the legal steps for protection from intimidation.

Victims of Crime Act of 1984

The 1984 VOCA created the Crime Victim's Fund. Under certain limited circumstances, it permits the compensation of crime victims from money obtained from criminal fines, penalties, court costs, or other assessments against convicted federal criminals. Fines paid from base tickets are included. The victims of crime are awarded compensation from state programs that receive VOCA grant funds for losses incurred as a result of a violent crime. The basic provisions are covered in the following table:

Issue	Response
Who is entitled to compensation?	Innocent victims of violent crimes are reimbursed for out-of-pocket expenses they incur as a direct result of their personal injuries. Family members of victims may also be entitled to certain types of compensation.
What expenses are paid?	Medical expenses, mental health counseling, lost wages, funeral expenses, and lost support. Property loss (damaged or stolen property is usually not covered). The amount of available medical or auto insurance limits compensation.
How can a victim receive compensation?	The victim must: <ul style="list-style-type: none">• Be innocent of wrongdoing.• Report the crime promptly to the police.• Cooperate with the criminal justice system.• Submit a timely application through the state victim's compensation agency.

Victims' Rights and Restitution Act of 1990

The VRRRA was the first legislation that contained a listing of rights for crime victims. This act mandates that the AF and all other federal agencies engaging in the detection, investigation, or prosecution of crime provide specific rights and services to crime victims. These rights include the right to the following:

- Be treated with fairness and with respect for the victim's dignity and privacy.
- Be reasonably protected from the accused or suspect.
- Be notified of court-martial proceedings.

- Be present at all public court-martial proceedings, unless the military judge determines the victim's testimony would be materially affected if the victim heard other testimony.
- Confer with trial counsel in the case.
- Information about the accused's conviction, sentencing, imprisonment, and release.
- Appropriate restitution or compensation.

The victim may be entitled to restitution or victim compensation. The restitution may be a condition of a plea agreement in a court-martial or made part of the post-trial submission of clemency matters (i.e., the convening authority can waive forfeitures of pay and allowances under Article 58b). The victim could also receive restitution from the offender as a condition for suspension of NJP. The victim may also file a claim under Article 139, UCMJ.

Purpose of the Air Force Victim and Witness Assistance Program

The AF Victim and Witness Assistance Program (VWAP) was established to implement the applicable laws as described above. It provides for the treatment of victims and witnesses of offenses under the UCMJ and victims and witnesses of offenses under the jurisdiction of local, state, other federal or foreign authorities during those stages of the criminal justice process conducted primarily by the AF. The objectives of the AF VWAP are as follow:

- Mitigate the physical, psychological, and financial hardships suffered by victims and witnesses of offenses investigated by AF authorities.
- Foster cooperation of victims and witnesses within the military criminal justice system.
- Ensure best efforts are made to accord to victims of crime certain enumerated rights (e.g., provide a victim with a victim information packet and appropriate VWAP forms that describe his or her rights).

The VWAP ensures the victim is afforded the following rights:

- Be treated with fairness and respect for the victim's dignity and privacy.
- Have reasonable protection from a suspect or the accused.
- Be notified of all court-martial proceedings.
- Be present at all public court-martial proceedings, unless the military judge determines the victim's testimony would be materially affected if the victim heard other testimony.
- Confer with trial counsel in the case.
- Have appropriate restitution, when available.
- Have information about an accused's conviction, sentencing, confinement, and release.

Roles and responsibilities

The Judge Advocate General (TJAG) is the AF responsible official (RO). The RO is responsible for coordinating, implementing, and managing the AF VWAP. At the installation level, each installation commander is known as the local responsible official (LRO) and is responsible for identifying victims and witnesses of crimes and for providing the services required by the VWAP. The installation commander normally delegates, in writing, the LRO duties to the SJA. The SJA may further delegate the LRO duties and responsibilities in writing, to a VWAP coordinator while maintaining oversight and overall responsibility for the program. In addition, the VWAP coordinator is selected to implement and manage the VWAP and is responsible for ensuring the accomplishment of required training by all local agencies. The coordinator may also serve as victim liaison as appropriate under the circumstances of a particular case.

If not fulfilled by the VWAP coordinator, the LRO may designate a victim liaison to assist a victim during the military justice process. The designation does not need to be in writing. The victim liaison may be a medical or mental-healthcare provider, judge advocate, paralegal, or another person

appropriate under the circumstances of a particular case. A liaison is responsible for making contact between victims and service agencies and arranging for those services, when appropriate. Communications between a liaison and a victim are neither confidential nor privileged.

The installation LRO shall establish a VWAP council, when practicable, to ensure victim and witness service providers follow an interdisciplinary approach. If present on the installation, security forces, Air Force office of special investigations (AFOSI), surgeon general, Airman and Family Readiness Center, chaplain, and SJA will each designate a representative for the council. The installation commander will appoint a squadron commander and a first sergeant to the VWAP council and may appoint other representatives as appropriate. The LRO will chair the VWAP council, which will meet, at a minimum, annually.

Eligibility

AF VWAP applies in all cases in which criminal conduct adversely affects victims or in which witnesses provide information regarding criminal activity if any portion of the investigation is conducted primarily by the Department of Defense (DOD) components. Generally, this refers to victims and witnesses of offenses under the UCMJ committed by an individual subject to the UCMJ.

As a practical matter, if dependents, civilian employees, or others with an installation affiliation are victims of a non-UCMJ offense committed by someone not subject to the UCMJ, the spirit of the program encourages assistance in directing these individuals to the appropriate state or local VWAP.

Duties of a victim liaison

The duties of a victim liaison are numerous; they are outlined in AFI 51-201. Some examples of the victim liaison duties are informing the victims of are listed:

- Where they may receive emergency medical and social services, and when necessary, provide appropriate assistance in securing the care; and any restitution or relief they may be entitled to and how to obtain the relief.
- The availability of limited transitional compensation benefits, waiver of mandatory forfeitures, and possibly entitlement to a portion of the active duty member's retirement benefits (family abuse offenses).
- Available protection from intimidation and threats, and, if appropriate, arrange for the victim to receive reasonable protection from an accused and from individuals acting together with the accused.
- The status of the investigation of the crime, to the extent it will not interfere with the investigation.
- The accused's pretrial status and any subsequent change in that status (i.e., placement in, release or escape from PTC).
- Preferral and referral of charges or a decision not to pursue prosecution.
- PTC hearings and/or Article 32 investigations.
- The scheduling, including changes and delays, of each court-martial proceeding the victim is entitled to or required to attend.
- The acceptance of a guilty plea or announcement of findings.
- The sentence imposed, including the date on which the accused becomes eligible for parole or release from confinement.
- The escape, work release, furlough, or any other form of release from custody by the accused.
- If the accused dies while in custody.

In addition to informing the victims of the above, the victim liaison will also be responsible for providing a victim information packet (model packet in AFI 51-201) and arranging such things as

transportation, childcare, lodging, and courtroom translators or interpreters. They will also ensure any property being held for evidentiary purposes will be maintained in good condition and returned to the victim as soon as it is no longer needed. These certainly do not cover all the responsibilities of a victim liaison; however, they give you a good idea on how important the role of the victim liaison is.

Keep in mind, the VWAP program also cares for witnesses as well as victims. You may also perform some of these same duties when dealing with witnesses during the court-martial process.

Identify forms to provide to victim/witness

As a victim liaison or VWAP coordinator, there are certain forms the victim/witness receives at different stages of the investigation and possible court-martial that follows. Here is a brief description of each form and when they must be given to the victim/witness:

Forms Provided to Victim/Witness	
Form	Description
Department of Defense (DD) Form 2701, Initial Information for Victims and Witnesses of Crime	<p>Law enforcement and investigative personnel provide the pamphlet at the earliest opportunity after identification of a victim/witness of a crime.</p> <p>It explains what victims and witnesses can do if they are threatened or harassed; where to look for compensation if they were injured; their options if they were a victim of spousal or child abuse; restitution; what to expect if property was stolen; that the investigative agency/legal office can call their employer or commander if they have problems at work due to the investigation or the crime; their rights to be notified of an arrest; trial and confinement; emotional impact; their rights as a victim; and most importantly, names and contact numbers for assistance with status of the investigation, other assistance available, assistance with the status of the prosecution, and assistance with compensation.</p>
DD Form 2702, Court-Martial Information for Victims and Witnesses of Crime	<p>This pamphlet is given to the victim/witness prior to trial.</p> <p>It explains the military trial process, covering preferral of charges, pretrial conferences, Article 32, UCMJ hearings, court-martial, testimony, pointers when testifying, closing arguments, sentencing, punishment, and their participation. It also lists the names and contact numbers for the LRO and the trial counsel.</p>
DD Form 2703, Post-Trial Information for Victims and Witnesses of Crime	<p>This pamphlet is given to the victim/witness at the conclusion of the trial; however, it may be given prior to the end of the trial.</p> <p>It explains the confinement process, convening authority action, clemency and parole considerations, victim/witness notification rights, how to exercise their rights, their points of contact for the confinement facility, and a list of their rights as a victim/witness. It lists points of contact for the service central repository, confinement facility, service clemency and parole board, and any other additional points of contact.</p>
DD Form 2704, Victim/Witness Certification and Election Concerning Prisoner Status	<p>Normally, this form is filled out the day of trial and provided to the victim/witness upon completion.</p> <p>If the accused is sentenced to confinement, the victim/witness uses this form to indicate whether to exercise the right to be notified when the inmate is moved to a new facility, to receive prior notice of parole hearings, and to receive notice of accused's release from confinement.</p> <p>It also informs the victim/witness that it is his or her responsibility to notify the appropriate military service central repository of any change of address and/or phone number to be used for notification when/if any of the above events occurs.</p> <p>Each victim and/or witness receives a redacted copy of this form.</p>

Forms Provided to Victim/Witness	
Form	Description
DD Form 2705, Notification to Victim/Witness of Prisoner Status	<p>This form is used when the victim/witness has requested notification of changes in status on the DD Form 2704.</p> <p>This form notifies the victim/witness of any status change of the inmate. It provides notification of release eligibility, parole eligibility, clemency/parole approval, release (to include temporary home parole), death, escape, transfers to another facility, and work release. This form may also be used to notify the victim/witness when the request to be notified of the inmate's release has been canceled, either upon the victim's/witness' request or other specified reason.</p>

Victim transitional compensation

The victim may also be entitled to compensation under 10 U.S.C. § 1059 (dependents of members separated for dependent abuse: transitional compensation; commissary and exchange benefits) and the Uniformed Services Former Spouse Protection Act. AFI 36-3012, *Military Entitlements*, provides guidance for these programs.

Transitional compensation

It is DOD policy to provide monthly transitional compensation payments and other benefits for dependents of members who separated because of dependent abuse. To be eligible to receive compensation under 10 U.S.C. § 1059, individuals must be dependents of members of the armed forces who have been on active duty for more than 30 days and who, after 29 November 1993, are:

- Separated from active duty under a court-martial sentence resulting from a dependent-abuse offense.
- Administratively separated from active duty if the basis for separation includes a dependent-abuse offense.
- Sentenced to forfeiture of all pay and allowances by a court-martial, which has convicted the member of a dependent-abuse offense.

A dependent-abuse offense is an offense by a military member on active duty for more than 30 days involving abuse against a current spouse or a dependent child of the member. This is a criminal offense as defined by Title 10 U.S.C., Sections 801-940 or other criminal code and is applicable to the jurisdiction where the act of abuse is committed. Examples include crimes such as sexual assault, rape, sodomy, battery, murder, and manslaughter.

Payments are made to eligible dependents as follows:

- If the member was married when the offense occurred, payment is made to that spouse. The spouse receives compensation for himself or herself and each dependent child in his or her custody. A "dependent child" is determined as of the date the member is convicted of the offense or as of the date of the member's administrative separation.
- If the spouse is ineligible to receive payment because of remarriage, cohabitation, or active participation, payments are made to each dependent child of the member not residing in the household of the member or spouse.
- If there is no eligible spouse, payments are made to the dependent children of the member who did not reside in the household of the member. For example, the member has no dependent spouse, or the spouse has died.
- If recipients are incapable of handling their affairs, payment may be made only to a court-appointed guardian. For a dependent child under 18 years of age, payments are made only to a court-appointed guardian or natural parent (who is not a spouse of the member), if the natural parent has legal custody.
- Children residing away from an eligible spouse are not entitled to apply for compensation.

In court-martial cases, the compensation does not begin until after the entry of judgement (in accordance with 10 U.S.C. 1059) and approves the court-martial sentence for a dependent-abuse case offense that includes a dismissal, dishonorable discharge (DD), bad conduct discharge (BCD), or forfeiture of all pay and allowances. In administrative discharge cases, the compensation begins when the commander starts administrative separation action. The duration of payments is the lesser of 36 months except if as of the starting date of payment, the unserved portion of the member's obligated active duty service is less than 36 months. In this case, the duration of payment is the duration of the unserved portion or 12 months, whichever is greater.

Monthly payments to a spouse are at the rate in effect for the payment of dependency and indemnity compensation under 38 U.S.C. § 1311(a)(1), which is at the rate of \$1,154. Additional guidance for payment to dependent children falls under 38 U.S.C. § 1311(b) and 1313.

When payment is to cease, the spouse or dependent must be notified in writing. Payment will cease for the following reasons:

- Punishment, including a dismissal, DD, BCD, or forfeiture of all pay and allowances, is remitted, set aside, or mitigated to a lesser punishment.
- A competent authority disapproves a proposed administrative separation.

Payment will stop the first day of the first month following the month the recipient is notified. The recipient is not required to repay transitional compensation received before the cessation effective date was determined.

Transitional compensation will be terminated when any of the following occurs:

- A spouse remarries.
- If the member lives in the same house as the spouse or dependent child to whom compensation is payable.
- If the victim was a dependent child and the installation commander finds the spouse actively participated in the conduct constituting the criminal offense or actively aided or abetted the member in such conduct against the dependent child.

In addition to monetary compensation, recipients are also entitled to other forms of compensation. They may use the commissary and exchange stores while receiving compensation payments, the same as dependents of members on active duty for a period of more than 30 days. Lastly, when a sponsor is discharged or separated from service for family member abuse, the abused individuals or those affected by the knowledge of the abuse may request a military identification card for medical care.

Uniformed Services Former Spouse Protection Act

Under the Uniformed Services Former Spouses Protection Act, a former spouse or legally separated spouse may be entitled to a percentage of retirement pay designated by a court if the member had twenty-plus years of active service, even if the member was not eligible to receive the retirement pay. However, an applicant cannot receive both the percentage of retirement pay and transitional compensation at the same time. If a spouse or former spouse is receiving transitional compensation payments and later is determined to be eligible for a percentage of the retirement pay, then any amount of transitional compensation received by the individual must be recouped.

Annual report

TJAG is required to submit an annual report to the Under Secretary of Defense for Personnel and Readiness on DD Form 2706, Annual Report on Victim and Witness Assistance. Each legal office must submit this report for the preceding calendar year to their major command (MAJCOM) by 15 February each year. MAJCOMs, direct reporting units (DRU), and field operating agencies (FOA) consolidate their reports and submit them to Air Force Legal Operations Agency, Military Justice

Division (AFLOA/JAJM) to arrive no later than 15 February each year. These reports will include the number of victims and witnesses who:

- Received a DD Form 2701 from law enforcement or criminal investigations personnel.
- Received a DD Form 2702 from the government trial counsel or designee.
- Received a DD Form 2703 from the government trial counsel or designee.
- Elected via the DD Form 2704 to be notified of changes in confinement status.

Each confinement facility reports the following to the central repository at Headquarters Air Force Security Forces Center, Corrections Division (HQ AFSFC/SFC), which forwards a consolidated report to AFLOA/JAJM no later than 15 February of each year:

- The number of victims and witnesses who were notified by confinement facility victim and witness assistance coordinators via the DD Form 2705 of changes in confinee status.
- The cumulative number of confinees for whom victim or witness notifications must be made by each confinement facility.

AFLOA/JAJM consolidates the numbers from the MAJCOMs, FOAs, DRUs, and HQ AFSFC/SFC, records them on a DD Form 2706, and forwards the form to TJAG.

603. Processing administrative hold

Members under security forces squadron (SFS) or AFOSI investigation may be placed on administrative hold by those agencies. If this is not accomplished during the investigation stage, processing administrative hold for the accused and witnesses must be completed prior to courts-martial. Imagine being two weeks from your big court-martial only to realize your star witness is deployed to Iraq. Putting your accused and witnesses on administrative hold at the beginning of the court process prevents delays when it is time to go to court.

Putting a member on administrative hold ensures his or her presence at trial, and prevents a permanent change of station (PCS), retirement, or separation. It also puts the military personnel section (MPS) on notice that the legal office will need to be coordinated with regarding temporary duty (TDY) and leave for that member. To place a member on administrative hold, you must send MPS a memorandum requesting it. AFI 36-2110, *Total Force Assignments*, table 2.1 lists the assignment availability codes (AAC) required to put a member on hold.

Commonly Used Assignment Availability Codes	
Code	Description
14 – Material Witness (applies to officers and enlisted)	Member is identified by the SJA as a material witness for courts-martial, trial in a foreign country or certain non-criminal trials in the US, state, or federal courts. The effective date is the date determined by the SJA plus estimated period needed to complete trial proceedings, not to exceed six months without Headquarters Air Force Personnel Center, Assignment Programs and Processing Branch (HQ AFPC/DPAPP) approval.
15 – Court-Martial or Civilian Criminal Court (applies to officers and enlisted)	Member is under criminal charges and/or awaiting trial by military court-martial, or under charges and/or awaiting trial by a civilian criminal court for an offense for which the maximum punishment for the same or a closely related offense under the MCM is confinement for one year or more. The effective date is the date charges are preferred plus six months, not to exceed six months without prior approval from AFPC/DPAPP.

Commonly Used Assignment Availability Codes	
Code	Description
21 – Commander-Directed Hold	Member is placed on hold for completion of the separation, demotion, desertion or unauthorized absence, or Article 32, UCMJ investigation. Placing members on hold for any other reason(s) must be approved by AFPC/DPAPP. The deferment period is the date the member is officially notified (in writing) of the action plus the estimated period for completion of the action, not to exceed four months without prior approval from AFPC/DPAPP, except for members being processed for dual action or lengthy service separation which may not exceed 12 months.

When drafting the memorandum to place a member on administrative hold, first determine which AAC to use. Address the memorandum to the member's base MPS from your office, requesting the individual be placed on administrative hold and the length of time you request the hold to remain in effect. Ensure your request includes a statement concerning coordination through your office for any TDY or leave for the member. Include the member's name, rank, social security number (SSN), rule and code from AFI 36-2110, table 2.1, and any remarks such as "material witness."

After the memorandum is signed, it must be processed; you can email, fax, or hand carry the letter to the MPS. It is a good idea to use an indorsement to the letter for the MPS to return to you acknowledging receipt of the request for administrative hold. Ensure you keep a copy for your case file, and a copy for your administrative hold file, if you have one. Remember that once the trial is complete, you will need to take the member off administrative hold. Now that you have permission to proceed and your accused and witnesses are on administrative hold, you are ready to prepare your charge sheet and begin the process of preferring charges (fig. 1-1).

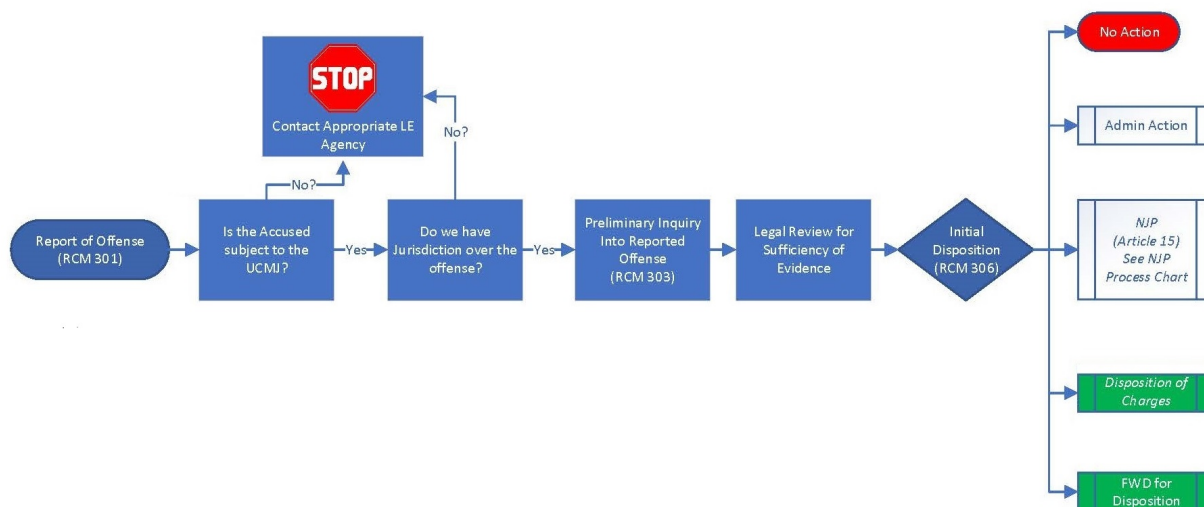


Figure 1-1. Initial disposition of a suspected UCMJ violation.

604. Pretrial restraint/confinement

Pretrial restraint is defined by the MCM, R.C.M. 304, as moral or physical restraint on a person's liberty that is imposed before and during the disposition of offenses. Placement of pretrial restraint or confinement here in part of the CDC is not an indication of when this may occur in the process. The accused is subject to restraint or confinement throughout the process from the report of the offense up to post-trial confinement.

The following table explains the four types of pretrial restraint:

Types of Pretrial Restraint	
Type	Explanation
Conditions on liberty	These are orders by a commander to an individual to do or refrain from doing specified acts. Examples of such orders in a pending court-martial case may be orders to an accused to periodically report to his or her first sergeant, not to go to the scene of an alleged offense, or not to have contact with a specified person, such as a victim or witness. Such 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. The restraint imposed is binding upon the person arrested, not by physical force, but by virtue of that person's moral and legal obligation to obey the order of arrest. The proper authority to release the accused from arrest is normally the officer (commander) who imposed the arrest. A person who has been arrested may not be required to perform full military duty while in the status of arrest, such as supervising personnel or bearing arms. If the assigned duty is inconsistent with the status of arrest, the member's arrest is terminated. The status of an arrest does not keep the arrested person from being required to do ordinary cleaning or policing, or to take part in routine training and duties. Do not confuse this arrest with arrest in quarters. Remember, this type of arrest is not imposed as a punishment and arrest in quarters is a type of punishment that may be imposed upon officers under NJP.
Restriction in lieu of arrest	Restriction, like arrest, involves a moral rather than a physical restraint of an accused. Officers (commanders) authorized to arrest may restrict an accused person under their command to remain within specified limits. Unlike arrest, the person will perform full military duties and activities while restricted. Thus, an accused may be required to remain within a specified area at specified times, either to keep the person from again being exposed to the temptation of misconduct or because the person's presence may be necessary to the investigation.
Pretrial confinement	PTC is a physical restraint imposed by order of competent authority, depriving a person of freedom pending the disposition of charges. Confinement is not imposed pending trial unless it is deemed necessary to ensure the presence of the accused at the trial or because the person may continue to commit serious criminal misconduct if not confined.

Only a commanding officer, to whose authority the individual is subject, may order a civilian or commissioned and warrant officers into pretrial restraint. Any commissioned officer may order pretrial restraint of an enlisted person. The authority to order pretrial restraint of civilians and commissioned and warrant officers may not be delegated. However, a commanding officer may delegate to warrant, petty, and noncommissioned officers (NCO) the authority to order pretrial restraint of enlisted members of his or her command or subject to his or her authority.

Probable cause must be determined before a person may be ordered into restraint before trial. Probable cause to order pretrial restraint exists when there is a reasonable belief that:

- An offense triable by court-martial has been committed.
- The person to be restrained committed it.
- The restraint ordered is required by the circumstances.

A commanding officer's decision to place a person in pretrial restraint and the type(s) of restraint should be made on a case-by-case basis. The restraint should not be more rigorous than the circumstances require.

When a person is placed under restraint, he or she must be informed of the nature of the offense orally or in writing as to the basis for the restraint and the terms and limitations of the restraint. Pretrial restraint is not a punishment and must not be used as such. The person may not be subjected to punishment or penalty for the offense that is the basis for that restraint. A person may be released

from pretrial restraint by a person authorized to impose it, except as otherwise provided in R.C.M. 305, PTC.

Pretrial confinement

Although PTC is a form of pretrial restraint as covered above, PTC is the most severe of all the restraints. Because it is the actual physical restraint of a person, additional steps must occur to determine if it is appropriate to continue PTC. R.C.M. 305 outlines the requirements for PTC. Figure 1-2 shows the process for pretrial confinement.

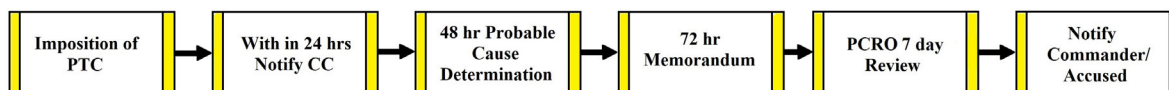


Figure 1-2. Pretrial confinement process.

A person should not be confined as a matter of convenience. Less serious forms of restraint must always be considered before PTC may be approved or continued. Each person confined shall promptly be informed of the following:

- The nature of the offenses for which 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 US, and the right to request assignment of military counsel.
- The procedures by which PTC will be reviewed.

If the prisoner requests military counsel, one shall be provided to the prisoner before the 48-hour probable cause determination or within 72 hours of such a request being first communicated to military authorities, whichever occurs first.

PTC is initiated by preparing a DD Form 2707, Confinement Order (fig. 1-3). As you may have guessed, the legal office will normally prepare this form. The form must include the accused's name, SSN, date, branch of service, grade, and military organization. Mark "yes" for the type of confinement being pretrial and "no" as the result of NJP. DNA (deoxyribonucleic acid) processing is required in all cases where a person is placed in PTC. List the offense(s) for which the person is accused. Lastly, annotate the name, grade, and title of the person directing confinement and the name, grade, and title of the judge advocate general (JAG) performing the legal review. Each person will sign and date the form, and the person directing confinement will annotate the time. It is important to understand, someone other than the person directing confinement must conduct the legal review.

When the confinement facility physically receives the person to be confined, it will annotate on the DD Form 2707 the facility name and location, date, and time. In addition, the person receiving for the inmate will annotate his or her name, grade, title and will sign, date, and annotate the time. The dates and times are extremely important here because these will begin the PTC review process (fig. 1-3). Security forces personnel must ensure the confinee receives a medical examination within 24 hours after entry into confinement or the next duty day for processing on weekends or holidays as required by AFMAN 31-115, Volume 1, *Air Force Corrections System*. They also ensure medical personnel complete the medical portion of the DD Form 2707 and a completed copy is returned to the legal office.

CONFINEMENT ORDER				
1. PERSON TO BE CONFINED			2. DATE (YYYYMMDD)	
a. NAME (Last, First, Middle Initial)		b. SOCIAL SECURITY NUMBER		
c. BRANCH	d. GRADE	e. UNIT/AGENCY (Parent unit)		
3. TYPE OF CONFINEMENT				
a. PRE-TRIAL <input type="checkbox"/> NO <input type="checkbox"/> YES		b. RESULT OF NJP <input type="checkbox"/> NO <input type="checkbox"/> YES		c. RESULT OF COURT MARTIAL: <input type="checkbox"/> NO <input type="checkbox"/> YES
d. TYPE OF COURT MARTIAL: <input type="checkbox"/> SCM <input type="checkbox"/> SPCM <input type="checkbox"/> GCM <input type="checkbox"/> VACATED SUSPENSION				
4. OFFENSES/CHARGES OF UCMJ ARTICLES VIOLATED (List all charge(s) if prisoner is pre-trial. List guilty finding(s) only if prisoner is post-trial.)				
5. SENTENCE ADJUDGED (Annotate sentence from the result of trial)				b. ADJUDGED DATE (YYYYMMDD):
6. IF THE SENTENCE IS DEFERRED, THE DATE DEFERMENT IS TERMINATED:				
7. PERSON DIRECTING CONFINEMENT				
a. TYPED NAME (Last, First, Middle Initial), GRADE AND TITLE		b. SIGNATURE	c. DATE (YYYYMMDD)	d. TIME
8. LEGAL REVIEW AND APPROVAL REQUIRED (Review required by different name at 7.a and b.)				
a. DNA PROCESSING <input type="checkbox"/> IS <input type="checkbox"/> IS NOT REQUIRED UNDER 10 U.S.C. 1565. COLLECTED: <input type="checkbox"/> YES <input type="checkbox"/> NO KIT# _____				
b. SEX OFFENDER REGISTRATION <input type="checkbox"/> IS <input type="checkbox"/> IS NOT REQUIRED UNDER 42 U.S.C. 14071.				
c. TYPED NAME (Last, First, Middle Initial), GRADE AND TITLE		d. SIGNATURE	e. DATE (YYYYMMDD)	
9. MEDICAL CERTIFICATE (Required completion only when applicable by Service regulation)				
a. The above named prisoner was examined by me at _____ on _____ and found to be <input type="checkbox"/> Fit <input type="checkbox"/> Unfit (Time) (YYYYMMDD) for confinement. I certify that from this examination the execution of the foregoing sentence to confinement <input type="checkbox"/> will <input type="checkbox"/> will not produce serious injury to the prisoner's health.				
b. The following irregularities were noted during the examination: (List only non-medical information. Refer to SF 600 for all medical information, including HIV, TB and pregnancy tests and results.)				
10. EXAMINER				
a. TYPED NAME (Last, First, Middle Initial), GRADE AND TITLE		b. SIGNATURE	c. DATE (YYYYMMDD)	d. TIME
11. RECEIPT FOR PRISONER (Completed by the correctional facility staff upon arrival of the prisoner)				
a. THE PRISONER NAMED ABOVE HAS BEEN RECEIVED FOR CONFINEMENT AT (Facility Name and Location)				
ON _____ AND TIME: _____ (YYYYMMDD) (Time)				
b. PERSON RECEIPTING FOR PRISONER (Typed name (Last, First, Middle Initial), Grade and Title)		c. SIGNATURE	d. DATE (YYYYMMDD)	e. TIME

DD FORM 2707, MAR 2013

PREVIOUS EDITION IS OBSOLETE.

Adobe Professional X

Figure 1-3. DD Form 2707.

PTC review process

Unless the individual's commander ordered the PTC, the confinement facility will inform the member's immediate commander the name of the prisoner, the offenses charged against the prisoner, and the name of the person who ordered or authorized confinement within 24 hours after entry into PTC.

Within 48 hours of the imposition of confinement under military control, a neutral and detached officer must review the adequacy of probable cause to continue PTC. Factors to consider in determining whether an officer is neutral and detached include whether the officer is the formal accuser on the charge sheet (if there is one), is the officer who ordered the accused into confinement, or is directly or particularly involved in the command's law enforcement functions.

PTC can be continued only if the commander believes probable cause exists that:

- an offense triable by a court-martial has been committed;
- the prisoner committed it; *and*
- confinement is necessary because it is foreseeable that:
 - the prisoner will not appear at trial, pretrial hearing, or investigation, *or*
 - the prisoner will engage in serious criminal misconduct; *and*
- less severe forms of restraint are inadequate.

The 48-hour probable cause determination should be in writing and included in the ROT, if applicable.

The member's commander shall decide whether to continue PTC no later than 72 hours after a military member is ordered into PTC or after receipt of a report that a member has been confined. The commander must address the probable cause requirements for confinement and should consider the factors outlined above under the discussion section of R.C.M. 305(h)(2)(B). If the commander decides to continue PTC, he or she must prepare a written memorandum that states the reasons for the conclusion that the requirements of probable cause have been met. The memorandum may include hearsay and may incorporate, by reference, other documents, such as witness statements, investigative reports, or official records.

The memorandum is forwarded to the pretrial confinement review officer (PCRO) through the SJA and special court-martial convening authority (SPCMCA). If a court-martial results, the commander's decision memorandum must be included in the ROT. The 72-hour commander's decision memorandum will satisfy the 48-hour probable cause determination requirement *only* if the commander is neutral and detached *and* acts within 48 hours of the imposition of confinement (R.C.M. 305[h][2][A]).

Within seven days of the imposition of PTC under military control, a PCRO must review the probable cause determination and make a decision about the necessity for continued PTC. The PCRO must be a neutral and detached officer and appointed in writing by the SPCMCA. Chaplains, SJA office personnel, AFOSI and security forces members, and court-martial convening authorities may not serve as a PCRO.

The PCRO must review the commander's decision to continue PTC (72-hour commander's memorandum) and should consider any matters submitted by the accused. A hearing is then held at which the pretrial confinee and defense counsel shall be allowed to appear and make a statement before the PCRO. A government representative, usually a judge advocate, may also make a statement. The PCRO may exercise his or her discretion by allowing the pretrial confinee, defense counsel, or government representative to present evidence or cross-examine witnesses. The PCRO must complete a written summary of the testimony of any witnesses.

Upon completion of the review, the PCRO will determine whether to continue PTC or order immediate release. The PCRO must find the probable cause requirements have been proven by a preponderance of the evidence if PTC is to continue. If the requirements have not been proven, the PCRO must order the immediate release of the pretrial confinee. If the PCRO orders the confinee released, they may not impose conditions on release; however, the commander may impose any alternative lesser form of pretrial restraint authorized.

Within 24 hours of making the PTC decision, the PCRO must complete a memorandum outlining the findings and conclusion on which the decision was based. A copy of all documents and summaries of all oral statements considered must be attached to the memorandum. The memorandum with all attachments is forwarded to the SPCMCA, the SPCMCA's SJA, the confinement officer, the pretrial confine, and the defense counsel.

As you can see, this is a detailed process, which must be accomplished in its entirety within seven days of the imposition of PTC (fig. 1-4). There is nothing within the rule that bars any of these reviews from being accomplished immediately upon the imposition of confinement. As a matter of fact, the seven-day PTC review may satisfy the 48-hour probable cause determination requirement if the PTC review decision is completed within 48 hours of the imposition of confinement. In these cases, the PTC review memorandum must specifically state when the probable cause determination was made.

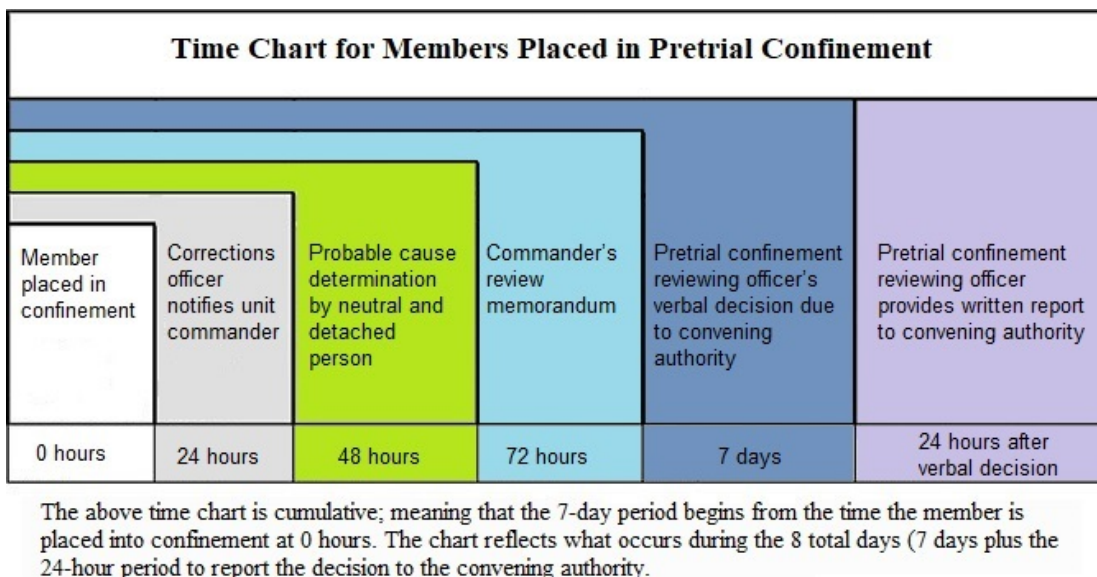


Figure 1-4. Time chart for members placed in PTC.

Once the charges are referred to trial, the military judge may review the propriety of PTC upon a motion for appropriate relief. The military judge shall order release from PTC only if the seven-day reviewing officer's decision was an abuse of discretion and there is not sufficient information presented to the military judge to justify the continuation of PTC, information not presented to the seven-day reviewing officer establishes the prisoner should be released, or the 48-hour or seven-day review has not been complied with and information presented to the military judge does not establish sufficient grounds for continued confinement.

Speedy trial

R.C.M. 707(a) requires the accused be brought to trial within 120 days after the earlier of preferral of charges, the imposition of restraint (restriction, arrest, or confinement, but not conditions on liberty), or entry on active duty under R.C.M. 204 (jurisdiction over certain reserve personnel). The convening authority must approve any request for a pretrial delay—in advance—if it is before referral and by the military judge after referral. The remedy for a violation of R.C.M. 707 is a dismissal of the affected charges, or in a sentence-only rehearing, sentence relief as appropriate. Other sources of the right to a speedy trial in the military are Article 10, UCMJ; Article 43, UCMJ; and the Fifth and Sixth Amendments of the US Constitution.

Apprehension

Apprehension is the act of taking a person into custody. It is the equivalent of “arrest” in civilian terminology. R.C.M. 302 of the MCM states that all commissioned officers, warrant officers, petty officers, NCOs, and military law enforcement officials may apprehend persons subject to the UCMJ. Petty officers and NCOs not otherwise performing law enforcement duties should not apprehend a commissioned officer unless directed to do so by a commissioned officer or to prevent disgrace to the service or the escape of one who has committed a serious offense.

Any person subject to the UCMJ may be apprehended for an offense triable by court-martial if probable cause exists. Probable cause exists when there are reasonable grounds to believe an offense has been or is being committed and the person to be apprehended committed or is committing it. Reasonable grounds means there must be the kind of reliable information a reasonable, prudent person would rely on that makes it more likely than not that something is true. Mere suspicion is not enough, but the proof required to support a conviction is not necessary.

An apprehension is made by clearly notifying the person to be apprehended that he or she is in custody. The notice should be given orally or in writing but may be implied by the circumstances. The use of force and means as reasonably necessary under the circumstances may be used. Neither warrants nor any other authorization shall be required for an apprehension, except as required under the rules for private dwellings. Further requirements for private dwellings can be found in R.C.M. 302(e)(2).

For example, a security forces patrolman arrives at the scene of an altercation at the fitness center and finds an airman with multiple stab wounds and covered in blood. The Airman is unconscious, so he is unable to identify his attacker; however, a staff sergeant (SSgt, E-5), identified as his supervisor, is found holding a knife and covered in blood. In this case, probable cause would exist to apprehend the SSgt for the stabbing. There is reliable information, by way of the physical evidence (knife wounds to the Airman and the SSgt holding a knife covered in blood) that a reasonable, prudent person could rely on to make an apprehension. The apprehension may continue until the proper authority is notified and acts under R.C.M 304—Pretrial Restraint or R.C.M. 305—Pretrial Confinement.

Self-Test Questions

After you complete these questions, you may check your answers at the end of the unit.

601. Jurisdiction

1. What does the term “jurisdiction” mean?
2. Could James Smith be court-martialed for an offense committed subsequent to his discharge? Explain.
3. What factor establishes the court-martial jurisdiction over the accused?
4. Technical sergeant (TSgt) Carlin committed an assault upon Mr. Alvin Redman, a civilian, while off base. Can TSgt Carlin be tried by court-martial? Explain.

5. Is it possible for the AF and civil courts to try an individual for the same offense? Explain.
6. How may the statute of limitations be tolled?
7. When does the AF exercise court-martial jurisdiction over AFR and Air National Guard personnel?
8. Can a reservist be tried for an offense committed on IDT that has terminated? Explain.
9. Who can order a reservist to active duty for court-martial purposes when the reservist is performing duties at a reserve unit?
10. If a reservist is to be tried by GCM or SPCM, when must he or she return to active duty?
11. How do the procedures for conducting an SCM for a reservist differ from those of a special or general court-martial?
12. When may a member of an armed force be tried by a court-martial convened by a member of another armed force?

602. Victim and witness assistance

1. The findings in the President's Task Force on Victims led to the passage of what three acts?
2. What are the six key components of the VWPA of 1982?
3. Which act created the Crime Victims Fund?
4. What criteria must victims of crimes meet to be entitled to compensation from the Crime Victims Fund?

5. What was the first legislation that contained a listing of rights for victims of crimes?
6. Under the VRRRA of 1990, what are the rights for victims of crimes?
7. What are the objectives of the VWAP?
8. Who is designated the LRO at installation level? To whom is this responsibility normally delegated?
9. When does AF VWAP normally apply?
10. Who is responsible for providing the victim with a victim information packet?
11. What form does law enforcement and investigative person provide to victims and witnesses at the earliest opportunity after identification of a victim/witness of a crime?
12. What is the purpose of the DD Form 2704, Victim/Witness Certification and Election Concerning Prisoner Status?
13. What is transitional compensation?
14. What criteria must be met to receive transitional compensation under 10 U.S.C. § 1059?
15. What situations would require transitional compensation to terminate?
16. What conditions must be met for a former or legally separated spouse to receive compensation under the Uniformed Services Former Spouse Protection Act?
17. When must legal offices submit reports on victim and witness assistance to their MAJCOM?

18. Match the act/statute in column B with its associated right in column A. Items in column B may be used more than once.

Column A

- ____ (1) The right to be reasonably protected from the accused.
- ____ (2) The right to reasonable, accurate, and timely notice of a court-martial relating to the offense they as a victim were victimized.
- ____ (3) The right to be treated with fairness and with respect for the dignity and privacy of the victim of an offense under this chapter.
- ____ (4) Victims receive prompt social and medical services
- ____ (5) Victims are notified of important criminal justice proceedings and scheduling changes.
- ____ (6) Employers are encouraged to continue to pay victims and witnesses for work absences to assist investigations and prosecutions.
- ____ (7) Information about the accused's conviction, sentencing, imprisonment, and release.
- ____ (8) Receive reimbursement for out-of-pocket expenses incurred as a direct result of their personal injuries.

Column B

- a. Article 6b, UCMJ.
- b. Victim and Witness Protection Act of 1982.
- c. Victims of Crime Act of 1984.
- d. Victims' Rights and Restitution Act of 1990.

603. Processing administrative hold

1. What does placing a member on administrative hold ensure?
2. Which AFI lists assignment availability codes needed to place a member on administrative hold?
3. Once an administrative hold memorandum is signed, where is a copy sent to ensure the member is placed on hold?

604. Pretrial restraint/confinement

1. Define conditions on liberty, arrest, restriction, and PTC.
2. Who may impose pretrial restraint?
3. What must first be determined before a person may be ordered into restraint before trial?

4. How is pretrial restraint, other than PTC, imposed on a person?
5. What information must a person placed in PTC be informed of?
6. What is the first notification that must take place in the PTC review process?
7. When must the member's commander decide whether to continue PTC?
8. What is the next step after the member's commander completes his or her review memorandum?
9. When must the PCRO make the determination whether to continue PTC?
10. When must the PCRO complete their memorandum? What must it contain?
11. Within how many days from preferral of charges or imposition of restraint should a person be brought to trial or risk dismissal of the charges if a delay is not approved in advance?
12. Who has the authority to apprehend persons subject to the UCMJ? What rule governs this?
13. When probable cause exists to apprehend, what is the first thing you should do when apprehending that person?

1-2. Preliminary Inquiry

Now that we know who is subject to the UCMJ and when offenses can be disposed of by the military, let's look at the investigation into those offenses

605. Preliminary inquiry into the reported offense

Upon receipt of information that a member of the command is accused or suspected of committing an offense or offenses triable by court-martial, the immediate commander shall make or cause to be made a preliminary inquiry into the charges or suspected. There are several ways an investigation, (preliminary inquiry) can take place—through security forces office of investigations, the AFOSI, or a commander may direct a formal or informal investigation; the type of investigation is dependent on the nature of offenses.

A preliminary inquiry by the accused's commander usually begins as the result of a report or complaint. The commander, with the assistance of the SJA, evaluates the facts relating to the offense or offenses. The preliminary inquiry is usually informal, it may include an examination of the allegations, an investigative report, or a discussion of evidence that the prosecution expects to introduce at the trial. In other cases, a more extensive investigation may be necessary. Regardless of the formality or if law enforcement is involved in collecting evidence, evidence is needed to determine if an offense has been committed.

Searches

According to the Military Rules of Evidence (M.R.E.) 315, an "authorization to search" is express permission, written or oral, issued by a competent *military* authority to search a person or an area for specified property or evidence, or for a specific person, and to seize such property, evidence, or person. It may contain an order directing subordinate personnel to conduct a search in a specified manner. On the other hand, a "search warrant" is express permission to search and seize issued by competent *civilian* authority.

Probable cause

Probable cause must be proven before a search authorization can be issued. Probable cause to search exists when there is a reasonable belief the person, property, or evidence sought is located in the place or on the person to be searched. The probable cause determinations may be based on written statements, oral statements (made in person or via telephone, including hearsay), or information known by the person authorizing the search, as long as it does not affect his or her impartiality.

Once probable cause has been determined, a search authorization may be issued for a search of the following:

- The person or anyone subject to military law or the law of war wherever found.
- Military property of the US or of non-appropriated fund (NAF) activities of an armed force of the US, wherever located.
- Persons or property situated on or in a military installation, encampment, aircraft, vehicle, or any other location subject to military control, wherever located.
- Nonmilitary property within a foreign country; property owned, used, occupied by, or possessed by an agency of the US other than the DOD when situated in a foreign country.

Exceptions to probable cause

M.R.E. 314 outlines searches *not requiring probable cause*:

- Government property. Government property may be searched unless the person to whom the property is issued or assigned has a reasonable expectation of privacy therein at the time of the search. Under normal circumstances, a person does not have a reasonable expectation of privacy in government property that is not issued for personal use. Wall or floor lockers in living quarters issued for the purpose of storing personal possessions [are normally] issued

for personal use, but the determination to a reasonable expectation of privacy depends on the facts and circumstances at the time of the search.

- Lawful consent. A person may consent to a search of his or her person or property, or both unless control over such property has been given to another. A person may grant consent to search property when the person exercises control over that property. The consent may be limited in terms of time, place, or property and may be withdrawn at any time.
- Searches incident to a lawful stop. Persons authorized to apprehend under R.C.M. 302(b) and others performing law enforcement duties may stop another person temporarily when the person making the stop has information or observes unusual conduct that leads him or her reasonably to conclude in light of his or her experience that criminal activity may be afoot. The purpose of the stop must be investigatory in nature. The person stopped may be frisked for weapons when that person is reasonably believed to be armed and presently dangerous. Contraband or evidence located in the process of a lawful frisk may be seized. When a person lawfully stopped is the driver or a passenger in a motor vehicle, the passenger compartment of the vehicle may be searched for weapons if the official who made the stop has a reasonable belief that the person stopped is dangerous and the person stopped may gain immediate control of a weapon.

Seizures

As outlined in M.R.E 316, probable cause to seize property or evidence exists when there is a reasonable belief the property or evidence is an unlawful weapon, contraband, evidence of a crime, or might be used to resist apprehension or to escape.

The following is a list of property or evidence that *may be lawfully seized*:

- Any person, without probable cause and without a search warrant or authorization, may seize abandoned property. (**NOTE:** As defined in The Wolters Kluwer Bouvier Law Dictionary Desk Edition, abandoned property is any property with no owner, in which the immediate past owner of the property intentionally relinquished any claim, possession, right, and title to ownership of the property without ensuring there would be a subsequent owner. It may also be inferred that property has been abandoned if it has been lost and unclaimed for a significant amount of time.)
- Property or evidence may be seized with consent.
- Government property may be seized without probable cause and without a search warrant or authorization *unless* the individual to whom the property is issued or assigned has a reasonable expectation of privacy.
- Property may also be seized if there are exigent (urgent; requiring immediate action or aid) circumstances and probable cause to seize.
- Property may be seized when it is in plain view when the person observing the property is lawfully present and has probable cause to seize it.

Only military judges, military magistrates (not currently used in the AF), and qualified commanders have the authority to grant search authorizations. This authority is not delegable. A commander is only qualified to grant a search authorization if the commander has control over the place where the property or person to be searched is situated or found, or if the place is not under military control, if the commander has control over persons subject to military law or law of war. This means, the commander must have jurisdiction over the place, and or the person. A commander may authorize a search of persons or place under his or her jurisdiction based on probable cause. For example, a commander may authorize a search of people or of a dormitory assigned to his or her unit.

The Fourth Amendment to the US Constitution reads:

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.

Understanding investigative techniques

Now, let's look at some proven investigative techniques. Keep in mind these are suggestions to help in your part of any investigation, as well as help you in working your case.

Investigative Techniques	
Principle	Discussion
Always look for the best evidence	Always strive to obtain testimony from witnesses with direct knowledge of the issue being investigated and original documents.
Assess credibility/motivation/bias/interest	Weigh the reliability of the information received. During an interview, the investigator is in the best position to assess body language, voice inflection, and a host of interpersonal signals that a reviewer would not see. However, they should never "investigate" their witnesses. The focus should be on the facts of the testimony and the relationships with the subject or complainant.
Corroborate as much as possible	Some witnesses' memories may be inaccurate, or their testimony may be in conflict with statements of other parties in the case. Therefore, always look for more information to support witness testimony and evaluate its truthfulness. This can be done through the testimony of other witnesses, documentary evidence, and the natural inferences to be drawn from them. If testimony is corroborated, then the witness' credibility is enhanced. If contradictions arise, clarify them before finalizing the investigation.
Create a chronology	A chronology is the arrangement of events in the order of occurrence and is one of the most useful documents an investigator can create to assist him/her and those reviewing the report. This single document can provide an instant overview of the sequence of events, allowing the reader to evaluate the recollection of witnesses and put their testimony in context. A complaint chronology is required for reprisal investigations but is highly recommended for all investigations.
Watch for additional allegations	During the conduct of any investigation, additional information might come to the attention of the investigator that could indicate potential areas for review. Consult with your attorneys immediately to see if the scope of the investigation should be expanded. If the issue is closely related to the investigation, the attorney may want to consider it as part of the ongoing investigation. If the issue is not closely related to the ongoing investigation, the attorney may initiate a separate investigation or have it mentioned as an observation in the final report.

Finally, avoid becoming sidetracked by collateral issues, and remain responsive to the focus of the investigation.

Types of evidence

As defined in the Wolters Kluwer Bouvier Law Dictionary Desk Edition, evidence is anything or statement that demonstrates, makes clear, or proves the truth of the fact at issue. Generally, there are two types of evidence to find the truth as to the facts of a case. One is *direct evidence*—you walk outside and rain is falling from the sky. The direct evidence is that it is, in fact, raining. The other is *circumstantial evidence*—you walk outside, the sidewalk is wet, cars are wet, and there is water dripping from the leaves of trees. The circumstantial evidence is that it recently rained; the proof

being a chain of circumstances pointing to the existence or nonexistence of certain facts. Within those two types of evidence, there are many different kinds of evidence. There is physical, demonstrative, real, testimonial, documentary, and derivative:

Types of Evidence	
Type	Description
Demonstrative evidence	Physical evidence is evidence that one can see and inspect. Examples of demonstrative evidence may include maps, diagrams, photographs, models, charts, or X-rays.
Real evidence	Physical evidence that itself plays a direct part in the incident in question. Examples of real evidence may include the actual knife used to stab someone, the clothing, or the knife wound itself.
Testimonial evidence	A person's testimony offered to prove the truth of the matter asserted; evidence elicited from a witness.
Documentary evidence	Evidence supplied by a writing or other document must be authenticated before the evidence is admissible. This includes private writings, records of regularly conducted business activity, and public records. Documentary evidence is often the most frequently utilized form of evidence at courts-martial.
Derivative evidence	Evidence that is discovered as a result of illegally obtained evidence and is therefore inadmissible because of the primary taint is commonly referred to as "fruit of the poisonous tree." For example, if a law enforcement officer conducts an illegal search of a person's vehicle, obtains a key to a locked glovebox, and subsequently finds contraband, the contraband may be suppressed at trial since it was derivative of the initial illegal search of the vehicle.

Handling evidence

It is imperative that evidence is collected, handled, and preserved properly to ensure its use at future judicial proceedings. Improper evidence handling and storage cannot only damage the evidence, rendering it worthless, but can also render the evidence inadmissible in court. The first law enforcement officer assuming custody or finding evidence ensures the evidence itself is marked for future identification. The evidence is marked with the time and date seized and the initials of the person seizing it. When marking an item would reduce the evidentiary or financial value of the item, place those items in sealed bags or containers, and mark the bag or container with the appropriate information as previously discussed.

When practical, all evidence will remain in its initial position and condition until the on-scene investigator (i.e., AFOSI agent, security forces investigator or other SFS member) directs its removal. The crime scene is photographed as soon as possible and before any evidence is disturbed. One of the most important elements in investigative photography is maintaining perspective. Photographs must reproduce the scene as it would appear to someone standing in the photographer's shoes. All photographs are documented in a photograph log with camera positions indicated on a sketch. The log records the photograph; describes the type of photograph and precise photograph location, and the identifying data is recorded as each shot is taken.

If items are to be checked for fingerprints, extreme caution should be used in collecting these items to prevent smudging. Full documentation is made of each person who handles the item(s) and that documentation is provided to the on-scene investigator. All personnel handling or transporting the evidence must account for it using the chain-of-custody on the back of the AF Form 52, Evidence Tag.

The AF Form 52 is used to record a detailed description of all evidence and to maintain a complete chain of custody accounting of all personnel who handled the evidence. The AF Form 52 is attached to each item of evidence or evidence container and is completed in accordance with AFI 31-115, *Security Forces Investigations Program*. Unless unusual circumstances arise, physical evidence will be released to the evidence custodian no later than the first working day after it is acquired. The

evidence will be controlled by the person securing it until released to the custodian. Once received by the custodian, all evidence will be stored and recorded in ink in a permanently bound evidence log. If for any reason, the evidence is released from the evidence storage area temporarily, the location of the evidence must be recorded in the evidence log. Further information on collecting, handling, and preserving evidence can be found in AFI 31-118 and AFI 31-115.

SFS and AFOSI

Typically, the AFOSI and security forces have primary and alternate evidence custodians. They are responsible for reviewing all AF Forms 52 for accuracy and compliance and logging all evidence in the evidence log book. Items of evidentiary value are not accepted until compliance issues are met. All evidence will be stored in an approved evidence room, safe, or locker. If the evidence room does not meet physical security requirements for controlled substances, including prescribed medication, they will be stored in a General Services Administration (GSA) approved safe in the evidence room. Drugs and classified material are not to be stored in the same safe.

Large items (e.g., vehicles, motorcycles, and bicycles) will be stored in the security forces impound lot or another designated area. If large evidence items are obtained, attempts must be made to protect them from weather damage. Firearms (including BB guns), ammunition, or explosives (including firecrackers) will be stored in approved containers in the security forces armory or investigations office. The entrance door will be secured except when the primary or alternate evidence custodian is physically present in the evidence room. Keys to the entrance door and the combination to the safe will be maintained and secured at all times by the evidence custodian.

Inventory of all evidence is determined at the local level; however, it must be done at least quarterly and when changing primary or alternate evidence custodians. All discrepancies will be reported in writing to the defense force commander. Once a case is closed, and evidence is no longer required, written approval from the SJA must be obtained before disposing of any evidence.

Chain of custody

As defined in the Wolters Kluwer Bouvier Law Dictionary Desk Edition, a chain of custody is the documented movement of evidence from one location to another from an individual to another; from the time it is obtained to the time it is presented in court. Evidence can be used in court to convict persons of crimes. It must be handled in a precise and careful manner to avoid later allegations of tampering or misconduct, which can compromise a case or overturn a guilty verdict upon appeal. The idea behind recording the chain of custody is to establish the alleged evidence is, in fact, related to the alleged crime.

Establishing a chain of custody is especially important when the evidence consists of moveable, perishable goods. In practice, this most often applies to illegal drugs seized by law enforcement personnel. In such cases, the defendant, at times disclaims any knowledge of possession of the controlled substance in question. Accordingly, the chain of custody documentation and testimony is presented by the prosecution establishes the defendant possessed the substance in evidence.

An identifiable person must always have the physical custody of a piece of evidence. In practice, this means a police officer or detective takes charge of a piece of evidence, documents its collection, and hands it over to an evidence clerk for storage in a secure place. These transactions and every succeeding transaction between the collection of the evidence and its appearance in court should be documented completely in chronological order so that it can withstand legal challenges to the authenticity of the evidence. Documentation should include the conditions under which the evidence is gathered, the identity of all evidence handlers, duration of evidence custody, security conditions while handling or storing the evidence, and the manner in which evidence is transferred to subsequent custodians and each time such a transfer occurs (along with the signatures of persons involved at each step).

Reports of investigation

Once an investigation is completed, and evidence has been properly collected and stored, a report of investigation (ROI) is drafted by the appropriate investigative agency. Although paralegals do not have a direct role in actually drafting the report, we do play a significant role in the investigation. Our working relationship with security forces and AFOSI during an investigation results in a strong report of investigation we can rely upon as evidence for a pending case. To assist in this investigative relationship, former TJAG, Lieutenant General Jack Rives, established guidance within AFI 51-201. With his vision, and as implemented in our guidance, judge advocates, and investigative personnel, particularly AFOSI, must develop a collaborative relationship focused on integrating investigative efforts and the legal process. The goal is thorough, case-ready ROIs, robust litigation preparation, and timely resolution of military justice cases.

At a minimum, the SJA designates an attorney to provide initial counsel to the AFOSI case agent on the new investigation. In addition, the SJA will designate an investigative support team consisting of JAGs, civilian attorneys, and paralegals as deemed appropriate. This team will assist the case agent during his or her investigation and provide legal support. Throughout the investigation, the team will work with the case agent to identify potential criminal offenses for investigation and coordinate on subject interviews. It is important to note, members of this team are not investigators and must take great care not to depart from their legal role.

Throughout case development, designated investigative support team members or judge advocate staff members will attend AFOSI case review meetings, and likewise, AFOSI personnel are encouraged to attend judge advocate military justice meetings relevant to their case. Furthermore, the support team will review and update the initial proof analysis to address the elements, evidence, anticipated objections, and potential defenses for each specification. This continuous review of the proof analysis will be accomplished as the case develops and changes. The review will be accomplished at least monthly for judge advocate use (AFI 51-201, para. 22.5.2). The judge advocate will discuss the results of the proof analysis with AFOSI, and a final proof analysis will be completed contemporaneously with the publication of the ROI.

The goal, while working together with AFOSI and SFS, is to ensure the expeditious processing of all cases by closely monitoring the investigative activities of all agencies from the date of discovery of the offense through preferral of charges. In cases where an ROI is published, it should be completed within 75 days of the date of discovery of the offense for GCMs and 30 days for SPCM. As you can see, your expertise on the investigative support team will contribute greatly to the investigation itself and to the production of a thorough and complete ROI to be used at trial.

Typically, the noncommissioned officer in charge (NCOIC), military justice, acts as the custodian for all ROIs and any applicable evidence. Custodians must ensure ROIs are safeguarded at all times. Depending upon what action was taken on a particular case, you may store an ROI either in a pending court case file/folder or within your office's military justice file plan. If a case does not go through to trial, the ROI will remain in the military justice file plan until properly disposed of in accordance with the file plan disposition instructions. Each legal office will have variations for storing their ROIs; however, no matter what they do, the ROIs must always be kept safe.

Applicability of Privacy Act

The Privacy Act (PA) of 1974, 5 U.S.C. § 552a, applies to ROIs. In all correspondence relating to ROIs, commanders must refrain from using personal names, but may use the individual's duty title. This is to protect the privacy of the individuals involved. Additionally, complainants, witnesses, and others are not entitled to know what command action was taken against subjects or suspects. Commanders should consult the legal office with any questions relating to the PA.

Commanders may receive requests for copies of ROIs under the Freedom of Information Act (FOIA). If a commander receives an FOIA request directly, he should send it to the FOIA office for proper

coordination. Once tasked by the FOIA office, the commander should work closely with the legal office to determine what, if any, portions of the ROI may be releasable.

Confessions/Article 31 rights

The Fifth Amendment of the Constitution states that no person shall be compelled in any criminal case to be a witness against himself. In addition, Article 31, UCMJ, explains no person subject to this chapter may compel any person to incriminate himself or to answer any question, which may tend to incriminate them. Confessions, simply put, are self-incriminatory statements, which may be used against a person in a criminal or administrative proceeding as evidence of the commission of an offense. A confession may be oral or written. It may be voluntary or involuntary.

Involuntary self-incrimination occurs when the admission is not the product of the accused's informed free choice. Involuntary self-incrimination cannot be used against the accused in most cases. Prior to any questioning, military suspects must first be advised of their rights and privileges under Article 31, UCMJ, before statements can be used as evidence. Suspects must be informed of the following:

- The nature of the accusation. The description need not be detailed or technical as long as it is sufficient to orient the person to the incident in question and put him or her on notice as to the subject of the interrogation.
- The right to remain silent.
- Any statement made, oral or written may be used as evidence against them in a trial by court-martial or in other judicial or administrative proceedings.

Furthermore, M.R.E. 305 affords members the right to consult with counsel, to have the counsel present at the interrogation, and to be warned of these rights prior to the interrogation. The right to military or civilian counsel is afforded if the interrogation is conducted by a person subject to the code

- who is required to give warnings under Article 31, and the accused or suspect is in custody, could reasonably believe himself or herself to be in custody, or is otherwise deprived of his or her freedom of action in any significant way.
- acting in a law enforcement capacity or the agent of such a person. The interrogation is conducted subsequent to the preferral of charges, and the interrogation concerns the offenses or matters that were the subject of the preferral of the charges.

Even though the right to military or civilian counsel is not included in the statutory language of Article 31, UCMJ, the Advisement of Rights card, Air Force Visual Aid (AFVA) 31-231 (fig. 1-5) combines both the rights under Article 31, and those afforded under M.R.E. 305.

Here is an example of a situation where all the above would apply.

A first sergeant suspects a member of his or her unit of committing a violation of the UCMJ and wants to question the individual. The first sergeant brings the member into his or her office and closes the door. Right here, we have a situation where a member would be afforded his or her rights under both Article 31 and M.R.E. 305. You can see the first sergeant has already suspected the member of committing a crime and has the intent of questioning him or her concerning that crime. In addition, it is reasonable to believe the member believes he or she is in "custody." The first sergeant should bring out the AFVA 31-231 and read it to the member *before* any questioning begins.

ADVISEMENT OF RIGHTS <i>(For military personnel)</i>	ADVISEMENT OF RIGHTS <i>(For civilian personnel)</i>
<p>I am _____ (grade, if any, and name), a member of the (Air Force Security Forces/AFOSI). I am investigating the alleged offense(s) of _____ of which you are suspected. I advise you that under the provisions of Article 31, UCMJ, you have the right to remain silent, that is, say nothing at all. Any statement you make, oral or written, may be used as evidence against you in a trial by courts-martial or in other judicial or administrative proceedings. You have the right to consult a lawyer and to have a lawyer present during this interview. You have the right to military legal counsel free of charge. In addition to military counsel, you are entitled to civilian counsel of your own choosing, at your own expense. You may request a lawyer at any time during this interview. If you decide to answer questions, you may stop the questioning at any time. Do you understand your rights? Do you want a lawyer? (If the answer is yes, cease all questions at this point). Are you willing to answer questions?</p>	<p>I am _____ (grade, if any, and name), a member of the (Air Force Security Forces/AFOSI). I am investigating the alleged offense(s) of _____ of which you are suspected. I advise you that under the Fifth Amendment to the Constitution you have the right to remain silent, that is, say nothing at all. Any statement you make, oral or written, may be used as evidence against you in a trial or in other judicial or administrative proceedings. You have the right to consult with a lawyer and to have a lawyer present during this interview. You may obtain a civilian lawyer of your own choosing, at your own expense. If you cannot afford a lawyer, and want one, one will be appointed for you by civilian authorities before any questioning. You may request a lawyer at any time during this interview. If you decide to answer questions, you may stop the questioning at any time. Do you understand your rights? Do you want a lawyer? (If the answer is yes, cease all questions at this point). Are you willing to answer questions?</p>
<p>Superseded AFVA125-19, Mar 88 Distribution: F</p> <p>AFVA 31-231 1 January 1999</p>	<p>Superseded AFVA125-19, Mar 88 Distribution: F</p> <p>AFVA 31-231 1 January 1999</p>

Figure 1-5, AFVA 31-231.

It is extremely important the legal office provides the correct advice concerning this area because no statement obtained from any person in violation of Article 31 may be received in evidence against him or her in a trial by court-martial or in any other judicial or administrative proceeding. Moreover, the government is prohibited from using coercion, unlawful influence, or unlawful inducements to obtain a confession.

606. Conducting interviews

Interviewing witnesses is important in any investigation, regardless of the type of investigation. The witness' ability to recall all facts and events accurately can make or break a case. Paralegals will be involved in witness interviews for many different situations, such as courts-martial, magistrate court, and claims. We cover witness interviews within the military justice arena because of your involvement with court-martial. You will gain most of your experience conducting interviews, whether as part of the prosecution or defense team. This lesson covers the purpose of an interview, considerations prior to the interview, interviewee classifications, how to interview a witness, what to look for while interviewing, and how to prepare witness statements. This is not an all-inclusive list; experience will show every interviewer has his or her own methods.

Purpose of the interview

The purpose of an interview is to gain information to establish the facts of an incident or crime and to develop background information on specific incidents, crimes, or offenses. The interview itself is the questioning of a person who has or is believed to have, information of official interest to the interviewer. A successful interview will result in the maximum amount of accurate and relevant information. Interview specifically to do the following:

- Verify or corroborate previously learned information.
- Identify any additional witnesses.
- Discover details of offenses committed but not previously known.

Witness interview considerations

There are two specific considerations you must account for when interviewing:

1. Interviewing members of the opposite sex—When interviewing an individual of the opposite sex, especially if the accused is charged with a sexual offense, another person of the same sex as the witness or victim should be present.
2. Interviewing juveniles—As in the case with members of the opposite sex, another individual from the legal office should be present. Also, do not interview a juvenile without a parent or legal guardian's consent.

Human factors

Because human factors influence the outcome of an interview, you must understand the witness' motivation, fears, and mental make-up.

Perception of memory

The quality of the information received is affected by the witness' ability to recall correctly and relay the facts accurately during the interview. Many things may influence the perception of events, but the most common mistakes made in recalling information are attributed to the following:

- Weaknesses in the interviewee's ability to see, hear, smell, touch, or taste.
- The location of the witness in relation to the incident.
- The lapse of time between the incident and the interview.
- The ability to cope with a traumatic event (in cases where the witness is also the victim).

Prejudice

A number of external factors, such as culture, religion, and the way someone was raised can influence witnesses. When preparing for an interview, take these factors into consideration to prevent them from influencing the information you receive.

Reluctance to talk

Some witnesses may be reluctant to disclose information. Some of the more common reasons for this are for being reluctant to talk are listed:

- Fear of involvement—Some people, not being familiar with the military legal system, may fear the security forces, trial counsel, or you, the paralegal. Their knowledge of the military may be limited to what they have seen in the news media or in a movie. Additionally, the fear of publicity or the fear that the accused may seek reprisals against them or their families often keeps them from divulging information.
- Inconvenience—Many people feel getting involved in an incident may require a great deal of time and do not want to get involved.
- Resentment—Resentment toward the legal office or the military justice system may keep persons from giving information. They may have had a negative experience with the military justice system or the legal office and, because of that, take the accused's side and refuse to divulge information.
- Personality conflicts between the interviewee and interviewer—You should be aware that personality conflicts do occur. If this occurs, inform the trial counsel immediately. The trial counsel will ask another paralegal or attorney to assist during the interview.

Interviewee classification

The interviewee falls into one of four classifications:

1. Victims—A victim is a person who suffered direct physical, emotional, or financial harm as the result of an offense/incident. Normally, they are interviewed to develop facts in an investigation. Because the victim may be emotionally upset, take care when conducting the interview.
2. Witnesses—A witness is a person other than the accused/victim that has information pertinent to the investigation being conducted. Witnesses may come forward voluntarily, but sometimes must be sought out by the investigator. Normally, a witness in a criminal matter is identified in the AFOSI or the security force ROI. Witnesses should be able to share information about who committed the offense, how it was committed, or when it was committed.

3. **Complainants**—A complainant is a person who reports the incident. A complainant may be the victim, a witness, or both.
4. **Suspects (accused)**—A suspect is one who is suspected of being involved in committing an offense or causing an incident. This is not limited to military justice issues, but can encompass equal employment opportunity (EEO), labor complaints, as well as claims. After rights advisement from investigations personnel, commander, or first sergeant, the suspect may invoke his or her right to remain silent and to counsel. If this occurs, the legal office may not interview the suspect without permission from counsel.

The interviewing process

There are a number of methods for conducting a witness interview. A little research will show some techniques involve eight steps, while others involve much more or less. Some believe a structured interviewing process is the key to gaining the most relevant information, and others believe an interview is part art, part science. Whenever possible, keep the interview as just that, an interview and not an interrogation. For our purposes, we will look at a four-step process that involves preparing, planning, conducting, and closing.

Preparation

No matter what interview technique(s) you use, thorough preparation is the key to an effective interview. You must review all evidence and know as much as possible about the person to be interviewed and the details of the case. There are times when an interview must be conducted on the spot; however, when adequate time is available, the interviewer should thoroughly prepare prior to the interview. Preparation steps should include:

- **Familiarity with the case**—Prior to interviewing a witness, become familiar with the case by reading the investigation report and all witness statements. This gives you an idea what the witness had previously stated and gives you an opportunity to develop questions not previously answered or needing clarification. Do your homework and be prepared to ask the right questions.
- **Background of the interviewee**—When time permits, a background check should be conducted prior to the interview. Facts of particular interest could be age, nationality, race, military service history, educational level, habits, and prior misconduct, if applicable to the situation.
- **Information sought**—Prior to the interview, the interviewing personnel should decide what information they hope to obtain during the interview — outline topics to be covered and in what order. Creating a list of questions to ask the witness or victim is advisable. However, be flexible and do not stick to a rigid line of questioning. It is more important to focus on listening to answers and asking follow-up questions than reading questions. Remember, all interviewees may require a recall of their previous statements.

Planning

After you have prepared for the interview, the next step is to plan the time and location of the interview. As a courtesy, plan the interview as far in advance as possible. You may want to interview witnesses and victims at a time and place of their choosing if necessary. Victims, especially, may feel more comfortable and be more willing to talk in a neutral environment. When scheduling your interview, keep in mind time plays a factor in witness'/victim's ability to recall information; therefore, interviews should take place as soon after the incident as possible or as soon as a witness is identified.

Conducting the interview

The first step in conducting the interview is to establish rapport. Identify yourself and any additional personnel witnessing the interview. When interviewing potential witnesses, especially government witnesses, interviewing personnel must represent to the witness that they are representing the AF's

interests in the investigation. However, when involved in an interview as part of the defense in a criminal case, you would inform the victim/witness you represent the interests of the accused.

Explain the purpose of the interview and help the interviewee to feel comfortable. For example, ask the interviewee if he or she would like anything to eat or drink. Verify all administrative data (name, rank, organization, or local address [if civilian], etc.) that applies to the interviewee at this time. The introduction allows the individual time to relax and get in the proper frame of mind. The interviewer should then open up the interview with a general statement about the investigation without divulging pertinent information or specific facts about the case.

Interview approaches

When planning for an interview, you must determine what approach to take with the interviewee. The classification of the person you are interviewing will primarily determine your approach. However, asking open-ended questions and allowing the interviewee time to respond is the best way to begin. Taking the time to listen is essential; be patient and avoid interrupting him or her. The following table covers three common types of approaches to interviewing witnesses:

Interview Approaches	
Type	Explanation
Direct	Use the direct approach when the interviewee is unable or unwilling to give information freely. In this approach, you ask direct questions to elicit responses, making the interview interviewer led. This approach is primarily used during interrogations.
Indirect	Use the indirect approach with a cooperative witness. You ask a general question and allow the interviewee to tell his or her story, becoming a "listener" instead of a "questioner." This type of interview is directed by the interviewer but led by the witness.
Alternating	This approach involves a combination of direct and indirect approaches. The interviewer alternates between the two approaches to obtain relevant facts. The alternating approach is best used with witnesses who have forgotten facts and need to be led in order to recall those facts.

Special considerations

When conducting interviews, keep in mind the interviewee may have suffered emotional trauma because of the incident in which they were involved. Keep in mind the following special considerations:

- **Victims**—Keep in mind the emotional state of victims, especially victims of violent crime. If the victim is emotionally upset, terminate the interview, and reschedule it for a later date when the victim is emotionally capable of handling the interview. Contact the VWAP coordinator prior to interviewing a victim and allow him or her to sit in on the interview. When interviewing the victim, it is best to display concern and consideration for the victim, so they feel that they have come to the right place.
- **Photos and sketches**—Photographs or sketches may be used to refresh the person's memory or help the witness explain relationships of people and things at the scene. Take care to ensure all photographs and sketches are properly identified for further use in court.
- **Interviews of civilians**—Normally, interviewing civilians is conducted on those who volunteered to speak to security forces or the AFOSI. As such, they are probably willing to speak to the prosecution. However, if a civilian decides not to speak, then the prosecution cannot compel him or her to talk. Once the case is referred to courts-martial, the prosecution has subpoena authority to compel the individual to testify.

Recording the interview

Taking notes during an interview helps you recall facts and statements months after the interview. Notes should contain the case name, date and time of the interview, and the person interviewed. Remember these notes are considered “attorney work products” and are not disclosed to the adversarial counsel.

Closing the interview

The last step in the interview process is to close the interview properly. Prior to releasing the interviewee, the interviewer should review the information and clarify any points that are in contradiction to previously obtained information or are just unclear or vague. Upon completion of the interview, the interviewer should display his or her appreciation for the cooperation of the interviewee. Provide the interviewee one last opportunity to provide information about matters that have not been covered specifically. Ensure you provide your contact information if the interviewee should recall or learn anything more.

Preparing witness statements

The ability to take a good statement is crucial to the success of any case in which you may be involved. Depending on the type of case, witness statements can take many forms. For example, during a commander-directed investigation (CDI), you may be tasked to take notes during an interview. Once the interview is complete, formalize your notes into an official statement that the witness will verify and sign as to a true and accurate reflection of the interview. It is important to recognize that the quality of your witness statement is a direct reflection of the success or failure of your interview.

In opening an interview, some important information you should obtain from the witness is his or her full name, SSN, permanent and temporary addresses, work and home telephone numbers, and his or her future availability. Throughout an interview, it is imperative to take detailed notes. When preparing a statement, list all the facts as the witness recalls them. You may ask questions to help develop the statement, but do not put words in his or her mouth. Listen for and annotate key persons, places, and things. Ask follow-up questions as necessary. It is often helpful to have a witness draw a picture to show his or her location at the time of the accident or incident. Have the witness describe the area and all activity before, during, and after the accident or incident. Remember, we need the facts in their most detailed form. This means we need to assist the witness in accurately recalling events and provide him or her with an environment where he or she can freely relay the information to us.

There is no outline, formula, or guide that can be substituted for your own expertise to help you prepare for an interview and determine what facts should be included in the statement. Remember, your primary objective in an interview is to document the facts as the witness recalls them.

Self-Test Questions

After you complete these questions, you may check your answers at the end of the unit.

605. Preliminary inquiry into the reported offense

1. What causes a preliminary inquiry?
2. What is the difference between an “authorization to search” and a “search warrant”?

3. What may probable cause determinations for searches be based on?
4. When does probable cause to seize property or evidence exist?
5. What is a chronology?
6. If during the scope of the investigation additional information is discovered that could reveal additional misconduct what should you do?
7. What are the two types of evidence from which members may find the truth as to the facts of a case?
8. What type of evidence is discovered as a result of illegally obtained evidence and is therefore inadmissible because of the primary taint?
9. What form is used to record a detailed description of all evidence and to maintain a complete chain of custody accounting of all personnel who handled the evidence?
10. What is the chain of custody?
11. In cases where an ROI is published, within how many days of the date of discovery of the offense should an ROI be completed for a GCM and for a SPCM?
12. Who typically acts as the custodian for all ROIs?
13. When does involuntary self-incrimination occur?

14. What rule affords members the right to consult with counsel prior to an interrogation?

606. Conducting interviews

1. What are the three specific reasons why you interview a witness?
2. During a witness interview, what affects the quality of the information you receive?
3. List the reasons why a witness/victim may be reluctant to talk.
4. When conducting an interview of a witness (rather than a victim, complainant, or suspect), what should the witness be able to tell you concerning the incident?
5. What should you do prior to conducting a witness interview?
6. When should you plan to conduct the interview session?
7. What is the first step in conducting an interview?
8. List three common approaches you may use during an interview.
9. When can the prosecution compel a civilian witness to testify?
10. What is the final step in the interview process? What does it involve?
11. What kind of identifying material must a statement contain about the witness?

1-3. Evidentiary Matters

This section will cover the steps you will take once law enforcement officials receive evidence. It will detail the review of evidence for legal sufficiency, how to compare any that apply to the correct punitive article of the UCMJ by taking that information and developing a proof analysis to ensure there is sufficient evidence to charge an individual under the UCMJ, and finally how the case paralegal can affect the strategy that trial counsel will employ to prosecute a case.

607. Legal review for sufficiency of evidence

The immediate commander is typically the one who will dispose of offenses. The legal office is not always involved in this disposition. After the report of the offense, the commander may decide that the accusation is of a minor offense (e.g. the member was late with no previous misconduct); in that case the commander may decide that a verbal counseling is adequate to deal with the misconduct. In a similar situation, the commander may decide that based on the member's record, an administrative action such as a letter of counseling, admonishment, or reprimand is appropriate.

In cases where the commander is contemplating offering NJP under Article 15, UCMJ or preferring charges, the legal office will have to get involved. The commander assembles all available evidence and presents it to your office for evaluation and determination if the evidence supports an offense. In the case of an Article 15, there is no established requirement for sufficiency of evidence. However, the member may decline to subject to NJP and demand trial by court-martial. Because of this, the commander must keep in mind that the burden of proof in a court-martial is beyond a reasonable doubt. In these cases, there must be evidence of each element of the offenses to be charged. This review is also a test of the collected evidence; the evidence cannot have been collected in violation of the accused's rights.

The test for legal sufficiency of the evidence is whether, when considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt. This is the standard determined in *US v. Turner*, 25 M.J. 324 (Court of Military Appeals [C.M.A.] 1987). It is the standard used by appellate courts today. Verifying the sufficiency of the evidence is similar to choosing the correct punitive article for the offense. In addition to ensuring the evidence meets all the elements of the punitive article, you must also ensure the evidence was received legally—otherwise, it will not be allowed to be used. The rules regarding evidence are outlined in the M.R.E.

The M.R.E. can be found in Part III of the MCM. It provides guidance on evidentiary rules applicable in a court-martial. The rules are construed to secure fairness in administration, eliminate unjustifiable expense and delay, and promote growth and development of the law of evidence to ascertain the proceedings are justly determined. Some of the areas covered are questions of admissibility, self-incrimination, search and seizures, and eyewitness identification. For example, by following the guidelines of the M.R.E., you will know if evidence seized during the search of a dormitory room will be admissible in a court-martial.

608. Punitive articles of the Uniform Code of Military Justice

Articles 77 through 134 of the UCMJ are known as the "punitive articles" and can be found in Part IV of the MCM. They are specific offenses that, if violated, may result in punishment by court-martial. The MCM divides the punitive articles into five parts: the text of the statute, elements of the offense, an explanation, maximum permissible punishments, and sample specifications. We will review each part in detail in the following table using Article 107, UCMJ, False Official statements, as an example.

Part	Explanation	Example
Text of statute	This is the exact text of the article, as Congress approved it in the UCMJ.	<p>"Any person subject to this chapter who, with intent to deceive—</p> <p>(1) signs any false record, return, regulation, order, or other official documents, knowing it to be false; or</p> <p>(2) makes any other false official statement knowing it to be false; shall be punished as a court-martial may direct.</p>
Elements	The specific act or omission by the member that must be proven by the evidence. All elements of the offense must be met before the accused can be charged for a violation of the UCMJ.	<ul style="list-style-type: none"> • That the accused signed a certain official document or made a certain official statement; • That the document or statement was false in certain particulars; • That the accused knew it to be false at the time of signing it or making it; and • That the false document or statement was made with the intent to deceive.
Explanation	The explanation defines terms and clarifies the elements, based on previous court decisions.	<p>(1) <i>False official statements.</i></p> <p>(a) <i>Statements.</i> Statements may be made orally or in writing and include records, returns, regulations, orders, or other documents.</p> <p>(b) <i>Official statements.</i> Official statements are those that affect military functions, which encompass matters within the jurisdiction of the military departments and Services. There are three broad categories of official statements under this offense:</p> <p>(i) Where the accused makes a statement while acting in the line of duty or where the statement bears a clear and direct relationship to the accused's official duties;</p> <p>(ii) Where the accused makes a statement to a military member who is carrying out a military duty at the time the statement is made; or</p> <p>(iii) Where the accused makes a statement to a civilian, who is necessarily performing a military function at the time the accused makes the statement.</p> <p>(c) <i>Status of victim of deception.</i> The rank or status of any person intended to be deceived is immaterial if that person was authorized in the execution of a particular duty to require or receive the statement from the accused. The Government may be the victim of this offense.</p> <p>(d) <i>Intent to deceive.</i> The false representation must be made with the intent to deceive. It is not necessary that the false statement be material to the issue inquiry.</p> <p>If, however, the falsity is in respect to a material matter, it may be considered as some evidence of the intent to deceive, while immateriality may tend to show an absence of this intent.</p>

Part	Explanation	Example
		<p>(e) <i>Material gain</i>. The expectation of material gain is not an element of this offense. Such expectation or lack of it, however, is circumstantial evidence bearing.</p> <p>(f) <i>Knowledge that the statement was false</i>. The false representation must be one, which the accused actually knew was false. Actual knowledge may be proved by circumstantial evidence. An honest, although erroneous, belief that a statement made is true is a defense.</p>
Maximum permissible punishments	This is the maximum punishment a GCM can be given for a particular offense.	A DD, forfeiture of all pay and allowances, and confinement for five years.
Sample specification	Gives you the groundwork to draft your specific specification.	<p>(at/on board—location), (subject-matter jurisdiction data, if required), on or about ____ 20 __, with intent to deceive, [sign an official (record) (return) (____)], to wit: ____] [make to ____, an official statement, to</p> <p>wit: ____], which (record) (return) (statement) (____) was (totally false) (false in that ____), and was then known by the said ____ to be so false.</p>

Specifications for courts-martial are drafted in the same way as for Articles 15, with one exception. As you recall, Article 15 specifications were drafted in the second person. Court-martial specifications are drafted with the exact language from the MCM. Following the sample specification above, here is how to write a court-martial specification for Article 107, UCMJ.

In that STAFF SERGEANT ROBERT B. PARDON, United States Air Force, 42d Security Forces Squadron, did, at or near Maxwell Air Force Base, Alabama, on or about 18 January 2011, with intent to deceive, make to Master Sergeant Nice Guy an official statement, to wit: "I did go to sick call," which statement was totally false and was then known by the said Staff Sergeant Robert Pardon to be so false.

As you can see, we used the language straight from the sample specification under Article 107, UCMJ, filled in the appropriate blanks, and chose the specific words in parentheses that fit our particular situation. In the blank space, insert the identity of the accused: rank, first name, middle initial or initials, and last name, all written in uppercase letters. After the accused's last name, state the branch of service, followed by the organization of the accused. Spell out in its entirety everything in the specification, no abbreviations. Never use a SSN in the specification to identify the accused.

Before you can choose the correct punitive article(s) of the UCMJ you suspect the member may have committed, read through all the evidence. Once this is done, you will have a general idea of the offense. One of the easiest ways to search for the punitive article(s) you believe may have been violated is to look in the MCM, Appendix 2, Subchapter X. This area lists the statute, the punitive articles of the UCMJ, and their respective titles. Next is a listing of the articles with a short description of each. Using Subchapter X will help narrow your offense down to one or two Articles. From here, you can then go to Part IV of the MCM to check your evidence against the elements of the offense you have chosen.

Here is an example scenario:

Senior Airman (SrA, E-4) Smith went to Technical Sergeant (TSgt, E-6) White's home on a night when SrA Smith knew TSgt White would not be home to steal his plasma television and sell it to a pawn shop. SrA Smith found the back door unlocked when he arrived at the home, entered TSgt White's home, and stole the television. He sold it at a local pawn shop the next day. SrA Smith confessed when confronted by TSgt White.

Using the facts above, you can look in Subchapter X to determine the offenses may likely be:

- Article 121, larceny, wrongful appropriation.
- Article 122, robbery.
- Article 129, burglary, unlawful entry.

Now, you can use the listing in Subchapter X to read the short descriptions to narrow it further, or you can go to Part IV to check the evidence against the elements of all four Articles. If you read the short description of each article in Part IV, you will note only one of them specifies the offense must have occurred in the nighttime: Article 129, Burglary. We can also rule out Article 122 because we know from the evidence no one else was in the home when the television was taken. Article 121 and Article 129 are a great start to narrowing down the offenses. The facts tell us SrA Smith broke and entered into someone's home at nighttime and that he took a television. At this point, you are ready to go to Part IV of the MCM to check the evidence against the elements of the offense. We will start with Article 121.

- Element one for larceny requires that the accused wrongfully took, obtained, or withheld certain property (the television) from the possession of the owner or of any other person (TSgt White).
- Element two requires that the property belonged to a certain person (TSgt White).
- Element three requires that the property was of a certain value or of some value.
- Element four requires that the taking, obtaining, or withholding by the accused was with the intent to permanently deprive or defraud another person of the use and benefit of the property or to permanently appropriate the property for the use of the accused or for any person other than the owner.
- Element five requires that if the property is alleged to be military property, add the following element: that the property was military property. This element only has to be met if the property is deemed military property.

The difference between larceny and wrongful appropriation is that the taking, obtaining, or withholding is either permanent (larceny) or temporary (wrongful appropriation). We know from the facts the accused intended to deprive TSgt White of the television permanently because he sold it to a pawn shop, so this case would be larceny, not wrongful appropriation. We also know this property to be personal to TSgt White and not military property, so we do not have to prove the fifth element.

Next, look at the elements for Article 129.

- Element one requires that the accused unlawfully broke and entered the dwelling house of another. This is explained further in the explanation of "breaking." Even though the door was unlocked and the accused did not have to "physically" break the door down, he is "breaking" by opening the closed door to enter the home.
- Element two requires that both the breaking and entering were done in the nighttime, which the accused did.

- Element three requires that the breaking and entering were done with the intent to commit an offense punishable under Article 118 through 128, except Article 123a. In the explanation for “intent to commit an offense,” the fact the accused did actually steal the television infers the accused intended to commit larceny in violation of Article 121 of the UCMJ at the time of the breaking and entering.

We have been able to determine from the evidence the accused can be charged with two offenses; Article 121 and Article 129. You can now draft the specifications and give them to the attorney assigned to the case to review.

609. Proof analysis

Historically, as part of their pretrial responsibilities, attorneys have prepared the proof analysis on pending court cases. Now, however, paralegals with the necessary training and supervision should be prepared to draft this document with little to no assistance from their attorney. A detailed proof analysis gives the case paralegal, chief of justice, deputy staff judge advocate (DSJA), and SJA an overview of the important facts and issues of the case and can help determine whether we have enough evidence to proceed with the trial.

Purpose of the proof analysis

A proof analysis provides a brief summary of key issues relating to a pending court. It consists of the following:

- The charge(s) and specification(s).
- Lesser included offense (LIO). (found in Appendix 12A, MCM)
- Maximum punishment.
- Elements to the charge.
- Evidence to prove each element.
- Any information regarding potential defenses.
- Any notes of potential evidentiary problems.

Preparing the proof analysis

You should reference the actual legal instructions a judge would use at trial when putting together the proof analysis and analyzing the evidence.

The first step in preparing a proof analysis is to list the charge and the elements to the charge the accused has allegedly violated. When listing the elements, compare the elements in the MCM with the elements in Department of the Army (DA) Pamphlet 27-9, *Military Judges' Benchbook*. If the elements are different, refer to DA Pamphlet 27-9 as this is the book the judge will use during court proceedings.

The second step is to list the evidence the government will use to prove each element of the charge (e.g., an expert witness, AFOSI agent, and/or litigation package).

The third step is to consider and list any potential defenses that may arise. A potential defense is any defense the accused could use to defend his or her actions. For example, if you are preparing a proof analysis for an accused being charged with Article 112a (use of cocaine), a defense could be the accused unknowingly ingested the cocaine which was put in his drink by a civilian acquaintance.

Last, consider and list any potential evidentiary problems. When listing potential evidentiary problems, consider the correctness of the procedures. A sample proof analysis is depicted in figure 1-6.

Remember, this is just a sample proof analysis. The attorney you are writing the proof analysis for may prefer a different format, different headings, or different content. The proof analysis is a living document and will continue to change, sometimes right up to and through trial.

SAMPLE PROOF ANALYSIS FORMAT		
MCM Model Specification Actual Specification	US v. Case	LIOs Max punishment
ELEMENTS	EVIDENCE	DEFENSE POINTS (In addition to attacking elements, see RCM 916 and Military Judges' Benchbook, Chap 5 for defenses)
Specification Jurisdictional Element In that Sr.A . . . , Any AFB . . .	TESTIMONY OF GOVT WITNESS 1	
Specification Element 1 (Copy relevant parts verbatim.) Military Judges' Benchbook, Chap 3 MCM Element MCM Part IV, para XX b, p XX MCM Explanation MCM Part IV, para XX c, p XX MCM Analysis (as needed) MCM App 23, para XXb, p XX	TESTIMONY OF GOVT WITNESS 2 -[Verbatim from statement, split into bullets.] (Statement to XX, date, p. XX) [Copy relevant parts verbatim:] MRE XXX Military Judges' Benchbook, Chap 7, Inst X-X p. X -Identify PROS EX _ FOR ID [Copy relevant parts verbatim:] MRE XXX Military Judges' Benchbook, Chap 7, Inst X-X p. X -During preparation, identify gaps and questions to ask witness. Use different formatting.	TESTIMONY OF DEFENSE WITNESS A -[Verbatim from statement, split into bullets.] (Statement to XX, date, p. XX) [Copy relevant parts verbatim:] MRE XXX Military Judges' Benchbook, Chap 7, Inst X-X p. X GOVT RESPONSE CROSS-EXAM OF DEF WITNESS A [Verbatim from notes or statements] (Interview w/ Trial Counsel, witnessed by Paralegal, Date) PROS EX _ FOR ID
	TESTIMONY OF GOVT WITNESS 3 -[Verbatim from statement, split into bullets.] (Statement to XX, date, p. XX) [Copy relevant parts verbatim:] MRE XXX Military Judges' Benchbook, Chap 7, Inst X-X p. X	CROSS-EXAM OF GOVT WITNESS 3 -[Where applicable, address bias, motive to fabricate, source of knowledge, ability to observe, character for truthfulness] GOVT RESPONSE REDIRECT OF GOVT WITNESS 3
Specification Element 2 (Copy relevant sources with page cites as above)	INFERENCE -Copy verbatim from MCM Part IV Explanation and Military Judges' Benchbook, Chap 3	
	APP EX ___, EXCERPT OF ___, para XX (verbatim) MRE 201 Judicial Notice (Copy verbatim)	

Figure 1-6. Proof analysis.

610. Evidence strategy

Evidence strategy is the art of devising or employing evidence toward the goal of successful prosecution or desired outcome of a discharge board. The facts and circumstances of each case, as well as attorney's preference will dictate your evidence strategy, but communication and understanding the case theory is key to developing an evidence strategy. Understanding the case and theory can help determine what evidence (the who, what, when, where, and why of your case) should be collected and presented in the trial. Although case facts can vary greatly, there are basic questions that should be considered to determine an appropriate and effective evidence strategy:

- Order of evidence introduction:
 - If applicable, when will the victim or investigative agents testify?
 - How do other witnesses support the testimony of key witnesses?
 - What testimony best paints a picture for fact-finders?
 - What physical evidence supports the testimony best, and which witnesses will support it?
- Volume of evidence:
 - How many witnesses support our case theory? Which ones are most credible?
 - What evidence most clearly illustrates the facts?
 - Can an expert break things down into plain language?
 - Use of physical evidence versus photographic evidence?
- Evidence availability:
 - What evidence will your team present at trial?
 - Is the evidence supporting the case in chief or for use in rebuttal?
 - Who is the custodian of the evidence? How do you get it to trial?

- What is the need for certified copies, sealed evidence, and so forth, and chain of custody issues?
- How to store evidence in lengthy trials?
- How will you return the evidence to the investigative agency post-trial?

As the case paralegal, you will be responsible for the efficient and timely processing of the courts-martial and other administrative hearings, but you can be an integral part of the trial team. Evidence strategy is one facet of trial preparation and execution that can bring a trial team together for a common goal. These basic questions are a starting point, and trial counsel will ultimately be responsible for presenting the evidence, but a case paralegal can greatly impact the effectiveness of counsel's evidence strategy.

Before any evidence (AFOSI ROI, security forces office of investigations report, etc.) is released in preferral, discovery, or any other time during the investigation phase, or even after the court-martial process, you will need to redact particular pieces of information. "Redaction," also known as "masking," is the practice of selectively concealing part of a document otherwise being produced pursuant to a discovery obligation or to be otherwise tendered as evidence in proceedings. Although not an exhaustive list, the following information will need to be redacted from documents:

- SSNs.
- Home mailing addresses.
- Telephone numbers.
- Personal email addresses.
- Names and rank (if applicable) of any victims, whether adult or child.
- Rank, unit, or duty title of any military victim.
- Names (but not ranks) of witnesses and other third parties with the following considerations:
 - A greater public interest exists in public participants in the trial, such as the military judge, counsel (trial, defense, and victim's), the convening authority, the accuser, and sitting (but not excused) court members. As such, the names of these individuals are generally releasable.
 - As a matter of AF policy, the names of individuals in the grade of O-7 or higher involved in the court-martial process are generally releasable.
 - Birthdates and ages of victims and third parties. A victim's age may be relevant to an offense (e.g., cases involving child victims); however, in such cases, legal offices should consider whether the public interest in this information is adequately served by referencing a general age range (e.g., age description provided on a charge sheet) rather than by referencing the specific age.
 - Any matters ordered sealed by a military judge.
 - M.R.E. 404(b) evidence or uncharged misconduct deemed irrelevant or inadmissible by a military judge.
 - Evidence related to a victim's or witness' ancillary misconduct deemed irrelevant or inadmissible by a military judge.

There are many methods to use to redact a document. While using white out and a permanent black marker will serve its purpose, the preferred method, when available is to use a computer program to redact the information digitally. Regardless of which method is used, verify that the information is truly redacted and not just hidden.

Self-Test Questions

After you complete these questions, you may check your answers at the end of the unit.

607. Legal review for sufficiency of evidence

1. What standard is used to “test” evidence during the legal review for sufficiency of evidence?
2. What type of guidance is provided by the M.R.E.?

608. Punitive articles of the Uniform Code of Military Justice

1. Into what five parts does the MCM divide the punitive articles (77 through 134)?
2. If three of four elements of an offense are met, can the accused be charged with that offense? Explain.
3. What task must you accomplish before choosing the punitive article(s) you believe a member may have committed?
4. After you narrow down the punitive article(s) by reviewing the information in the MCM, Appendix 2, Subchapter X, what is your next step in determining the appropriate punitive article to charge?

609. Proof analysis

1. What is the purpose of a proof analysis?
2. What information should be in the proof analysis?
3. What is the first step in preparing a proof analysis?
4. Why do you refer to the *Military Judges' Benchbook* if the elements of the specification differ from those in the MCM?

610. Evidence strategy

1. What basic questions regarding evidence do you need to consider before trial?
2. Who has the primary responsibility for evidence strategy?

Answers to Self-Test Questions**601**

1. The power to hear a case and to render a legally competent decision.
2. Yes, if he committed additional offenses while in military custody for fraudulently obtaining a discharge.
3. Jurisdiction depends solely on the accused's status as a member of the armed forces.
4. Yes, as long as TSgt Carlin was subject to the UCMJ at the time of the offense and at the time of trial.
5. Yes, if the offense constituted a crime under the UCMJ and civil statutes, and the ends of justice could be met in no other way.
6. By the charges being received by the officer exercising SCM jurisdiction within the specific time period.
7. When reservists are serving on active duty or IDT and when Air National Guard members are serving in federal status.
8. Yes, as long as the alleged offense was committed during the period of active duty or IDT and the reservist's military status has not been completely terminated after the commission of the offense.
9. The supporting active duty GCMCA in accordance with the applicable host-tenant support agreement.
10. Prior to arraignment at the trial.
11. A reservist can be tried by an SCM while on active or IDT but must be on active duty status when being tried by a special or general court-martial.
12. When that member is serving as a member of a unified or specified combatant command.

602

1. VWPA of 1982, the VOCA of 1984, and the VRRRA of 1990.
2. (1) Victims receive prompt social and medical services.
(2) Victims are notified of important criminal justice proceedings and scheduling changes.
(3) The prosecution can obtain views of victims of serious crimes for plea bargaining and pretrial release.
(4) Encourage employers to continue to pay victims and witnesses for work absences to assist investigations and prosecutions.
(5) Training law enforcement personnel in victim assistance.
(6) Informing victims or witnesses on legal steps for protection from intimidation.
3. The VOCA of 1984.
4. Be innocent of wrongdoing; report the crime promptly to the police; cooperate with the criminal justice system, and submit a timely application through the state victims' compensation agency.
5. VRRRA of 1990.
6. (1) To be treated with fairness and with respect for the victim's dignity and privacy.
(2) To be reasonably protected from the accused or suspect.
(3) Be notified of court-martial proceedings.
(4) Be present at all public court-martial proceedings, unless the military judge determines the victim's testimony would be materially affected if the victim heard other testimony.
(5) Confer with trial counsel in the case.

- (6) Information about the accused's conviction, sentencing, imprisonment, and release.
- (7) Appropriate restitution or compensation.
7. (1) Mitigate the physical, psychological, and financial hardships suffered by victims and witnesses of offenses investigated by AF authorities.
- (2) Foster cooperation of victims and witnesses within the military criminal justice system.
- (3) Ensure best efforts are made to give to victims of crime certain enumerated rights.
8. Each installation commander; the SJA.
9. In all cases in which criminal conduct adversely affects victims or in which witnesses provide information regarding criminal activity if any portion of the investigation is conducted primarily by the DOD components.
10. Victim liaison.
11. DD Form 2701, Initial Information for Victims and Witnesses of Crime.
12. In cases where the accused is sentenced to confinement, the victim/witness uses this form to indicate whether or not to exercise the right to be notified when the inmate is moved to a new facility, to receive prior notice of parole hearings, and to receive notice of accused's release from confinement.
13. Monthly payments and other benefits for dependents of members who are separated for dependent abuse.
14. Individuals must be dependents of members of the Armed Forces who have been on active duty for more than 30 days and who after 29 November 1993 are separated from active duty under a court-martial sentence resulting from a dependent-abuse offense, administratively separated from active duty if the basis for separation includes a dependent-abuse offense, or sentenced to forfeiture of all pay and allowances by a court-martial which has convicted the member of a dependent-abuse offense.
15. When a spouse remarries, if the member lives in the same house as the spouse or dependent child to whom compensation is payable, or if the victim was a dependent child and the installation commander finds the spouse actively participated in the conduct constituting the criminal offense or actively aided or abetted the member in such conduct against the dependent child.
16. The member had 20-plus years of active service.
17. By 15 February each year.
18. (1) a; (2) a; (3) a; (4) b; (5) b; (6) b; (7) d; (8) c.

603

1. His or her presence at trial and prevents PCS, retirement, or separation.
2. AFI 36-2110, *Total Force Assignments*.
3. Send the letter to the MPS.

604

1. Conditions on liberty—orders by a commander to an individual to do or refrain from doing specified acts. Arrest—the restraint of a person by oral or written order not imposed as punishment, directing the person to remain within specified limits. Restriction—a moral rather than a physical restraint of an accused. Unlike arrest, the person will perform full military duties and activities while restricted. PTC—a physical restraint imposed by order of competent authority, depriving a person of freedom pending the disposition of charges.
2. Only a commanding officer to whose authority the individual is subject may order a civilian or commissioned and warrant officers into pretrial restraint. Any commissioned officer may order pretrial restraint of an enlisted person.
3. Probable cause.
4. By notifying the person either orally or in writing of the restraint, including the terms and limitations.
5. The nature of the offenses for which 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 United States and the right to request assignment of military counsel, and the procedures by which PTC will be reviewed.
6. Unless the commander of the prisoner ordered the PTC, the confinement facility will, within 24 hours after commitment, inform the member's immediate commander the name of the prisoner, the offenses charged against the prisoner, and the name of the person who ordered or authorized confinement.

7. No later than 72 hours after the commander orders a military member into PTC or after receipt of a report that a member of the commander's unit has been confined.
8. The memorandum is forwarded to the PCRO through the SJA and SPCMCA.
9. Within seven days of the imposition of PTC under military control.
10. Within 24 hours of making the PTC decision. It must outline the findings and conclusion on which the decision was based.
11. 120 days.
12. All commissioned officers, warrant officers, petty officers, NCOs, and military law enforcement officials. R.C.M. 302.
13. Clearly notify the person being apprehended that he or she is in custody.

605

1. A report or complaint.
2. An "authorization for search" is express permission, written or oral, issued by a competent *military* authority to search a person or an area for specified property or evidence or for a specific person and to seize such property, evidence, or person. A "search warrant" is express permission to search and seize issued by competent *civilian* authority.
3. Written statements, oral statements (made in person or via telephone, including hearsay), or information is known by the person authorizing the search as long as it does not impugn his or her impartiality.
4. When there is a reasonable belief the property or evidence is an unlawful weapon, contraband, or evidence of a crime or might be used to resist apprehension or to escape.
5. The arrangement of events in order of occurrence.
6. Consult with your attorney immediately to see if the scope of the investigation should be expanded.
7. Direct and circumstantial.
8. Derivative.
9. AF Form 52, Evidence Tag.
10. The movement and location of real evidence, and the history of those persons who had it in their custody, from the time it is obtained to the time it is presented in court.
11. 75 days for a GCM and 30 days for a SPCM.
12. NCOIC, military justice.
13. When the admission is not the product of the accused's informed free choice and cannot be used against the accused in most cases.
14. M.R.E. 305.

606

1. Verify or corroborate previously learned information; identify any additional witnesses; and discover details of offenses committed but not previously known.
2. The witness' ability to recall correctly and relay facts accurately.
3. Fear of involvement, inconvenience, resentment, and personality conflicts between the interviewee and interviewer.
4. Who committed the offense, how it was committed, or when it was committed.
5. Prepare for the interview by becoming familiar with the case, researching the background of the interviewee, and determining what information will be sought.
6. As far in advance as possible.
7. Establish rapport.
8. Direct, indirect, and alternating.
9. After referral of charges, only then does the prosecution have subpoena authority.
10. Closing the interview. Review the information and clarify any points that are in contradiction to previously obtained information or are just unclear or vague, display appreciation for the cooperation of the

interviewee, provide the interviewee one last opportunity to provide information about matters that have not been specifically covered, and provide your contact information.

11. Full name, SSN, permanent and temporary addresses, work and home telephone numbers, and his or her future availability.

607

1. The test for legal sufficiency of the evidence is whether, when considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.
2. On evidentiary rules applicable in a court-martial.

608

1. (1) Text of the statute; (2) elements of the offense; (3) an explanation; (4) maximum permissible punishments; and (5) sample specifications.
2. No. All elements of the offense must be met before the accused can be charged for violating the offense.
3. You must read through *all* the evidence.
4. Go to Part IV of the MCM to check the evidence against the elements of the offense.

609

1. It provides a brief summary of key issues relating to pending court action.
2. (1) Charge(s) and specification(s).
(2) LIOs.
(3) Maximum punishment.
(4) Elements to the charge.
(5) Evidence to prove each element.
(6) Any information regarding potential defenses.
(7) Any notes of potential evidentiary problems.
3. List the charge and the elements to the charge the accused has violated.
4. This is the book the judge will use during court proceedings.

610

1. What evidence will your team present at trial? Is the evidence supporting the case in chief or for use in rebuttal? Who is the custodian of the evidence? How do you get it to trial? Consider the need for certified copies, sealed evidence, and so forth, and chain of custody issues. Evidence storage in lengthy trials? How will you return the evidence to the investigative agency post-trial?
2. Trial counsel.

Student Notes

Unit 2. Immediate Commander's Disposition

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THE MILITARY JUSTICE SYSTEM of the United States Armed Forces adjudicates punishable offenses and provides a means for commanders to impose punishment. Among other things commanders can offer nonjudicial punishment under Article 15, prefer charges, or forward the charges to a superior commander. Article 15 of the UCMJ is the authority commanders use to impose NJP. Part of your legal office duties is to process NJP actions and prepare the charge sheet and preferral package. These decisions by the member's immediate commander are the initial disposition decision of an allegation of a violation of the UCMJ; keep in mind that in certain cases the authority to dispose of certain offenses has been withheld. This unit is designed to help you perform these tasks. Figure 2–1 displays these options.

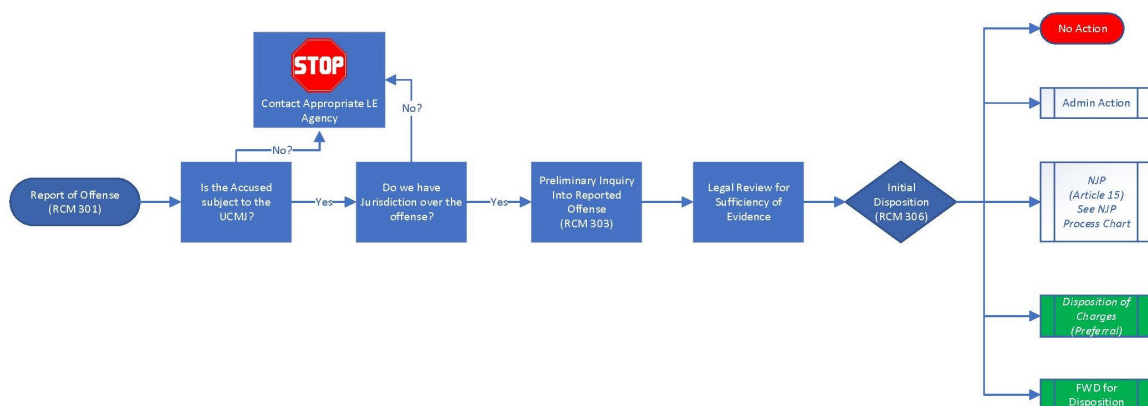


Figure 2–1. Initial disposition of a suspected UCMJ violation.

2–1. Nonjudicial Punishment under Article 15, Uniform Code of Military Justice

When an allegation of misconduct is brought to the attention of a commander, an informal or formal investigation results. One option a commander has is to dispose of an offense as an Article 15. In this unit, we review NJP under Article 15, UCMJ in general and then jump into the process and supplemental actions.

611. Nonjudicial punishment under Article 15, Uniform Code of Military Justice

This lesson discusses general guidance for administering NJP, the authority to impose NJP, delegation of this authority, and those subject to punishment under Article 15, UCMJ and a discussion on responsibilities of the commander and the SJA. This lesson closes with a discussion on the SJA's responsibility in regard to completing the legal review. Let's begin by looking at the purpose of NJP.

Purpose

Commanders are responsible for maintaining good order and discipline within their units. Article 15, UCMJ provides commanders with an essential and prompt way of disposing of minor disciplinary infractions. It also promotes positive behavior changes in service members without the stigma of a court-martial conviction. NJP is a consideration when other nonpunitive disciplinary measures (i.e., counseling, letters of reprimand, and administrative withholding of privileges) are not effective or appropriate. These measures are not necessary before imposing NJP, and each situation is reviewed on a case-by-case basis. AFI 51-202, *Nonjudicial Punishment*, and Part V. of the MCM outline the rules and procedures for NJP administration.

Article 15 is a rehabilitative tool for commanders; punishments under Article 15 are nonjudicial and corrective. A commander typically uses NJP only for “minor” offenses. Commanders determine if an offense is minor by looking at several factors, including the following:

- Nature of the offense.
- Circumstances surrounding its commission.
- Age, rank, duty assignment, record, and experience of the offender.
- Maximum sentence impossible if tried by a GCM.

According to the MCM, minor offenses would not include a DD or confinement for more than one year if tried by a GCM.

NOTE: There are jurisdictional limits over certain offenses (e.g., only GCMs have jurisdiction over violations of Articles 120 and 120b, UCMJ).

To illustrate how these factors determine if an offense is minor and whether NJP is appropriate, let’s consider the offense of assault (Article 128, UCMJ). Factors that can weigh heavily in determining the course of action include the circumstances leading up to the assault, the extent of the injury, or the ranks of those involved. Because the maximum punishment in a GCM varies based on the aggravating factors, a less aggravated assault may be considered “minor” and may warrant NJP.

Commanders must consult with their servicing SJA to determine whether NJP is appropriate. In many cases, you will be the commander’s (or the first sergeant’s) first contact and you will need to review the investigative file. Your initial review of the case file is important because of its potential impact on the commander’s determination of the type and amount of punishment. In deciding the commander considers the advice of the servicing SJA—input that derives from your review of the file—along with the circumstances (e.g., age, rank, experience, background, and prior record of the member) and any other facts in the case. Regardless of the SJA’s recommendation, the commander bears sole responsibility for the final decision on whether to offer NJP.

The member must be allowed to present matters in mitigation, extenuation, or defense—orally, in writing, or both. Following full and fair consideration of the evidence, including any matters presented by the member, the commander indicates his or her decision of the following actions in item 4a of the AF Form 3070, Record of Nonjudicial Punishment Proceedings, by initialing the appropriate block on the form. The commander must consider all matters presented by the member before making this decision. Regardless of the SJA’s recommendation, the commander bears sole responsibility for the final decision on type and amount of punishment, if any.

Standard of proof

While no specific standard of proof applies to NJP proceedings, including appeals, commanders should recognize a member is entitled to demand trial by court-martial, in which case proof beyond a reasonable doubt of each element of every offense by legal and competent evidence is a prerequisite to conviction. Whether such proof is available should be considered before initiating action under Article 15, UCMJ. If such proof is lacking, NJP action is usually *not* warranted. This responsibility requires the commander to furnish the legal office with all available evidence for review. Your review

of the circumstances and facts of the offense is very important. If the member exercises the right to trial by court-martial, trial counsel must prove the accused guilty beyond a reasonable doubt. (AFI 51-202, Paragraph 3.4, *Standard of Proof*)

Authority to impose NJP

Commanders have the authority to impose NJP for minor offenses on members of their command. The definition of “commander” determines the right to exercise this authority. In this case, the term commander means a commissioned officer, who, by virtue of rank and assignment, exercises primary command authority over a military organization recognized as a command. An AF officer who commands, by assumption or appointment, an AF organization in accordance with AFI 51-509, *Appointment to and Assumption of Command*, is a commander for NJP actions.

The term “members of their command” includes assigned members of the element or organization commanded and members on TDY with, or otherwise attached to, the element or organization. In cases of personnel on TDY, the commander of the TDY unit has NJP jurisdiction concurrently with the commander of the member’s permanent organization if the TDY commander exercises the “usual” responsibilities of command over the TDY member.

Along the same lines as the concurrent authority mentioned above, it is important to understand who has NJP authority over members of a tenant unit. All members of a tenant unit or AF element whether designated a unit or not, are attached to the host command and its appropriate subordinate and higher commands for the exercise of NJP authority. However, commanders of tenant units, and other AF element officers authorized to impose NJP under AFI 51-202, retain concurrent authority to take such action.

Determining who has the authority to impose NJP is more involved in the case of joint forces. The joint force commander has the authority to impose NJP on AF members assigned or attached to the command, regardless of the commander’s parent service, unless such authority is withheld by a superior joint commander. Joint force commanders normally allow the appropriate AF commander to exercise NJP authority over AF members. However, should the joint force commander decide to personally initiate NJP proceedings against an AF member, the process should be coordinated with the appropriate AF commander before taking action. This ensures procedural awareness and compliance. Regardless of who imposes punishment, the NJP action must be processed through the servicing AF SJA for the host command.

It is important to recognize the authority to administer NJP rests in the position and not with the individual. For example, when Major Roger Smith, commander of the force support squadron (FSS), is reassigned to another base, he does not take NJP jurisdiction with him. If Major Susan Jones is filling in for Major Smith for a day, does she automatically assume NJP jurisdiction? No—because Major Smith is the commander of record. Before Major Jones can assume NJP jurisdiction, an assumption of command order (also known as G-series orders, AF Form 35, Announcement of Appointment to/Assumption of Command) must be published. This order must state that Major Jones assumes command during the temporary absence of Major Smith. Because of this order, Major Jones could impose NJP on members of the command.

A G-series order is not always required for a commander to proceed with NJP or other UCMJ actions that require an appointment to or assumption of command. The authority to proceed with such actions exists if the following conditions are met:

- The officer is assigned to the organization.
- The officer has properly assumed or been appointed to command verbally, telephonically, or by electronic mail by the appointing authority. The highest-ranking officer within the unit (who is eligible to command—chaplains cannot command, and doctors may only assume command of medical units) has inherent authority and duty to assume command of a unit if the appointed commander is unavailable or unable to command.

- The officer is in reasonable communication with the organization.

These conditions do not eliminate the requirement for a G-series order to be accomplished. It simply means that the G-series order does not have to be completed for the officer to assume command and take NJP action. If the order is being routed, there is nothing to stop the officer from proceeding with a NJP action.

The imposition of NJP is strictly a function of command authority. As a paralegal journeyman in a military justice section, you must know which commanders on your base have the authority to impose punishments under Article 15, the MCM, and AFIs. Your office maintains a file copy of appointment orders for all commanders in your organization. It also maintains orders published for assumptions of command. Confirm that these are present and maintained in your office's file plan.

The statute of limitations under Article 43(b)(3), UCMJ, requires that a person charged with an offense is not liable to be punished under Article 15, UCMJ if the offense was committed more than two years before imposition of punishment. In other words, if an offense is committed on 1 January 2018, Article 15 punishment must be imposed by 31 December 2019, two years from the offense date.

Limitations

Listed are some limitations on the authority to impose NJP:

- Only the commandant of cadets, a superior commander at the United States Air Force Academy (USAFA), or a commander designated by the SAF may impose NJP on USAFA cadets.
- A commander who is the victim of a crime in a personal capacity (i.e., victim of assault), as opposed to official capacity (i.e., violation of commander's orders), should forward the report of the incident to the next higher commander for review and appropriate action.
- Only commanders in the rank of colonel or above may impose Article 15 punishment upon officers. Only a GCMCA or general officer may impose forfeitures and arrest in quarters to officers.
- Chief master sergeants (CMSgt, E-9) and senior master sergeants (SMSgt, E-8) may only be reduced one grade by MAJCOM commanders, commanders of unified or specified commands, or commanders to whom promotion authority to these grades has been delegated.
- Master sergeants (MSgt, E-7) may only be reduced one grade by commanders who are lieutenant colonel or above.

Delegation of authority

A commander who is a general officer or a GCMCA may delegate his or her NJP powers to a principal assistant. The delegation of authority must be in writing or be incorporated in a permanent directive. The original written delegation or directive must be filed in the SJA's office that services the commander concerned. The principal assistant assumes the commander's NJP authority on members of the command. However, the principal assistant may impose only the amount of punishment authorized for his or her grade.

Withholding NJP authority

A commander at any echelon may withhold from any subordinate commander all or part of the NJP authority the subordinate would otherwise have under the UCMJ, MCM, or AFI 51-202. This is done in writing or in a permanent directive, clearly setting forth the specific authority withheld. Any such action is addressed by duty title and not by name. The original letter or directive is filed in the office of the SJA servicing the commander withholding the authority. A copy must be filed in the SJA's office servicing the commander whose authority has been withheld. Withholding of authority stays in effect until expressly revoked.

Commander's responsibility

A commander's responsibility starts when information about misconduct committed by a member of his or her unit is first received. This information may result from an investigation by the AFOSI, the security forces, or statements from supervisors or others who know of the misconduct. As a representative of the legal office, you get involved at this stage by reviewing the facts from such reports and, with the approval of the chief, military justice, determining whether NJP should be offered.

The impartial and timely administration of military justice helps sustain good order and discipline and, as such, the commander should initiate NJP immediately after being made aware of misconduct. Because swift, corrective action is more likely to rehabilitate the member, the commander should offer NJP within 21 days of the date of discovery of the offense or be able to explain why this was not appropriate. The date of discovery of the offense is defined as the date when an investigative agency (office of special investigations [OSI], security forces office of investigations inspector general [IG]), legal office, commander, supervisor, or first sergeant becomes aware of an allegation and a subject has been identified, including when notification is made by civilian authorities. Keep in mind, a commander's failure to meet this processing goal does not prevent him or her from initiating NJP after the 21-day time period.

To meet AF metrics, commanders must complete 80 percent of all NJP actions (date of discovery through servicing SJA review date) within 39 days. (AFI 51-202, Paragraph 3.3, *Timeliness of Actions*.)

The 39-day goal is broken down as follows:

- Commanders should offer NJP within 21 days of the date of discovery.
- Punishment should be served on the member within 9 days of service of the NJP.
- Servicing SJA review should be complete within 9 days of the commander serving the punishment on the member.

You are instrumental in reminding commanders and their representatives of the importance of timely actions. You will be asked to explain any NJP action that does not meet the required metrics.

SJA's responsibility

The SJA's responsibilities in the NJP process include the following:

- Evaluating the facts and helping the commander determine what offense was committed, if any.
- Advising commanders on all legal aspects of NJP, both substantive and procedural.
- Conducting legal sufficiency review on NJP after the conclusion of all appeals and unfavorable information file (UIF) and selection record decisions.
- Ensuring copies of all documents and attachments that will comprise the record of punishment, as set forth in AFI 51-202, Paragraph 6.15, *Contents of Record*, are provided to the member and each level of command involved (AFI 51-202, Paragraph 6.3, *Copies*).
- Signing and dating the Servicing SJA Legal Review block of the AF Form 3070 (or of the AF Form 366, Record of Proceedings of Vacation of Suspended Nonjudicial Punishment or AF Form 3212, Record of Supplementary Action under Article 15, UCMJ, when applicable) when the record is found legally sufficient. The NJP action is then final and admissible in courts-martial for purposes of R.C.M. 1001(b)(2) (AFI 51-202, Paragraph 6.5, *Action by the Servicing SJA*).
- Advising commanders on their responsibilities regarding criminal indexing and DNA collection related to NJP (AFI 51-202, Para. 1.2.4, *The Servicing Staff Judge Advocate Shall*).

- Forwarding a copy of all final AF Forms 3070, 366 and 3212 to the local AFOSI detachment, local security forces office of investigations, and AFOSI's Warfighting Integration Directorate (AFOSI/XI), in accordance with criminal indexing requirements.

While the above list outlines the SJAs responsibilities, commanders must bring the allegations to the SJA's attention for those allegations to be disposed of in an Article 15. Notice of misconduct may come from commanders, first sergeants, or law enforcement agencies. If this notification indicates a possible offense under the UCMJ has occurred, the legal office contacts the first sergeant or the FSS and requests an Automated Military Justice Analysis and Management System (AMJAMS) report on individual person (RIP). This RIP, along with all available supporting evidence, helps the SJA and the commander determine whether NJP is appropriate and how the offense should be stated. Once the SJA, or another judge advocate, finds sufficient evidence exists, you, as the paralegal, must prepare the appropriate allegation (specification) to be cited. You then complete one of the following forms through AMJAMS:

- AF Form 3070A, Record of Nonjudicial Punishment Proceedings (AB thru SSgt).
- AF Form 3070B, Record of Nonjudicial Punishment Proceedings (TSgt thru CMSgt).
- AF Form 3070C, Record of Nonjudicial Punishment Proceedings (Officer).
- AF Form 3070D, Record of Nonjudicial Punishment Proceedings (TSgt thru CMSgt)—Air National Guard only.
- AF Form 3070E, Record of Nonjudicial Punishment Proceedings (Officer)—Air National Guard only.

612. Nonjudicial punishment process

As a paralegal assigned to the military justice section, you will have the opportunity to work with commanders and first sergeants throughout the entire Article 15 process. Furthermore, you will be responsible for managing this important area, ensuring the process is accomplished correctly and in a timely manner as prescribed by AF metrics. First sergeants will seek your guidance and you will often be their first point of contact. Your attorneys rely heavily upon your expertise to review the evidence, draft specifications and punishments, coordinate appeals, finalize AF Forms 3070, and keep AMJAMS up-to-date throughout the entire process. In essence, you will see this process through from start to finish. An excellent working knowledge of the Article 15 process and communication with your chief of military justice, and the first sergeants is essential to your success. In this lesson, we will cover the Article 15 process in its entirety, from the initial receipt of evidence through the final review.

Drafting specifications

Before we can draft specifications, we must first determine whether sufficient evidence exists to support an Article 15. As briefly mentioned above, the commander provides the SJA with the AMJAMS RIP and all supporting evidence needed to prepare the Article 15. Upon receipt, you first review the evidence and then compare it to the elements listed under the particular article of the UCMJ the member is accused of violating. Each punitive article of the UCMJ, found in Part IV of the MCM, has one or more elements that must be met before a member can be charged with violating that article. This step is vitally important. Remember, a member may turn down an Article 15 and proceed to court-martial, where commission of an offense must be proven beyond a reasonable doubt.

Once the evidence supporting all the elements has been established, we may begin drafting the specification(s). The formal "charge" indicates the UCMJ article the accused is alleged to have violated. The "specification" is a plain, concise, definite statement of essential facts that constitutes the offense charged. Each punitive article of the UCMJ contains sample specifications for use in preparing charges and specifications.

These sample specifications start with, “In that _____ did. . . .” The sample specifications are designed for use in courts-martial and must be slightly modified for use in the Article 15 process. Instead of using “In that” and inserting the member’s personal data, we simply write in second person and use the word “you” in its place. After this modification, follow the sample specification to describe the offense(s) committed accurately. Some portions of the sample specifications are enclosed in parentheses, while other portions are not. Include in the specification those portions not in parentheses; those portions in parentheses are included to provide alternatives for a particular offense. Now, look at the sample specification from Article 86, Failure to Go:

In that _____ (personal jurisdiction data), did (at/on board—location), on or about _____ 20 __, without authority, (fail to go at the time prescribed to) (go from) (his) (her) appointed place of duty, to wit: (here set forth the appointed place of duty).

Now that we have the sample court-martial specification, let’s draft an Article 15 specification:

You, did, on or about 24 October 2019, without authority, fail to go at the time prescribed to your appointed place of duty, to wit: 33rd Maintenance Squadron, building number 415.

Check specifications

Sometimes you have a case where a member bounced several checks or let obligations to a bank or other institution lapse. These are handled differently than other specifications. Where a check or other instrument appears regularly in all respects, the contents do not need to be written out in separate specifications. For example, a member bounces six checks at the same establishment. In such cases, consider using the model specifications in DA Pamphlet 27-9, *Military Judges’ Benchbook*, or the samples provided in AFI 51-201, *Administration of Military Justice*. AFI 51-201 has very good examples of specifications for various situations. However, these are written for use in courts-martial and must be written in second person for use in Articles 15.

After you have completed the draft specification(s), present them to your chief, military justice for review. The chief, military justice will review the evidence and confirm the evidence supports the elements of the offense and if any additional punitive articles may have been violated. Upon completion of his or her review, you will prepare the AF Form 3070 for the first stage of the process, which is “offering” the Article 15 to the member. For our purposes here, we will use the AF Form 3070A (fig. 2-2a and fig. 2-2b).

Whether you are using AMJAMS or the Air Force E-Publishing Website to produce the AF Form 3070, you must understand what is required in each block of the form and at what stage of the process information is added. Essentially, for a commander to offer an Article 15 to a member of his or her unit, you must prepare page 1, blocks 1-3, and page 2, block 14. However, keep in mind, the AF Form 3070 is one continuous original document. Block 4, Commander’s Decision, and block 5, Member’s Acknowledgement, are not used in the offer phase; however, having these blocks prefilled with the imposing commander’s name, rank, and organization and the member’s name will prevent the first sergeant from having to return the form to you to type in the information.

The top of page 1 in the To block requires the information of the member receiving the Article 15. Block 1, Offer of Nonjudicial Punishment, is broken into subparagraphs a-e. When preparing this block, verify subparagraph c includes the area defense counsel’s (ADC) location and phone number. The commander offering the Article 15 fills the rest of the subparagraphs.

RECORD OF NONJUDICIAL PUNISHMENT PROCEEDINGS (AB thru SSgt)			
TO (Name, Rank, Organization, SSN, and Major Command of Service Member)			ATCH(S)
<p>1. Offer of Nonjudicial Punishment.</p> <p>a. (Commander initials one block):</p> <p>(1) I am considering whether I should punish you under Article 15, Uniform Code of Military Justice (UCMJ).</p> <p>(2) I am considering whether I should recommend that _____ punish you under Article 15, UCMJ. (See Note 1)</p> <p>b. Your alleged misconduct is in violation of the punitive Article(s) of the UCMJ as listed in item 14.</p> <p>c. You have the rights listed on Page 3 under "Rights of Member," including the right to consult a lawyer before making any decision, and to have a lawyer assist you throughout the proceedings. You have an appointment scheduled with the Area Defense Counsel, in bldg _____, (phone) _____, at _____ (time), _____ (date). ADC consultation is not mandatory and if you choose not to consult the AOC, you should cancel the scheduled appointment.</p> <p>d. If you accept nonjudicial punishment proceedings and are found to have committed one or more of the offenses alleged, the maximum punishment the commander taking action may impose on you is listed on Page 3.</p> <p>e. You will notify me of your decision by _____ (time), _____ (date) unless I grant you an extension of time. (See Note 2)</p>			
NAME/RANK/ORGANIZATION OF COMMANDER		SIGNATURE	DATE
2. Service.			
NAME/RANK/ORGANIZATION PERSON SERVING MEMBER (See Note 3)		SIGNATURE	TIME SERVED DATE SERVED
<p>3. Member's Acknowledgement and Elections. I understand the rights listed on Page 3 of this form and acknowledge the recoupment statement on Page 3. (Member initials one block on each line)</p> <p>a. I have consulted a lawyer. I have not consulted a lawyer.</p> <p>b. I waive my right to court-martial and accept nonjudicial punishment proceedings. I demand trial by court-martial in lieu of nonjudicial punishment.</p> <p>c. I have attached a written presentation. I have not attached a written presentation.</p> <p>d. I request a personal appearance before you and that it not be public. I request a personal appearance before you and that it be public. I do not request a personal appearance before you.</p>			
NAME/RANK OF SERVICE MEMBER		SIGNATURE	TIME DATE
<p>4. Commander's Decision.</p> <p>a. I have considered the evidence, including any matters you have presented, and find that: (Commander initials all appropriate blocks)</p> <p>(1) Nonjudicial punishment is not appropriate or you did not commit the offense(s) alleged. I hereby terminate these proceedings.</p> <p>(2) You committed one or more of the offenses alleged. I lined out and initialed the offense(s), if any, for which I determined nonjudicial punishment is not appropriate or which you did not commit. I hereby impose punishment as listed in item 14.</p> <p>b. Reductions in grade, forfeitures in pay, and suspensions of any punishment are effective immediately. All other punishments take effect when you are notified of the punishment, unless otherwise stated.</p> <p>c. You must notify me by _____ (time), _____ (date) whether you appeal, unless I grant you an extension of time. You are entitled to advice of counsel in making this decision. You must notify me of your appeal decision and submit any matters you wish considered within the time provided or your right to appeal is waived. Any documents supporting your appeal must be submitted at the same time you make your appeal decision. Your decision not to appeal is final. (See Note 4)</p>			
NAME/RANK/ORGANIZATION OF COMMANDER		SIGNATURE	DATE
5. Member's Acknowledgement. I acknowledge receipt of the punishment and my right to appeal.			
NAME/RANK OF SERVICE MEMBER		SIGNATURE	TIME DATE

Figure 2-2a. AF Form 3070A page 1.

6. Member's Appeal Decision. (Member initials one block) Member's decision ends the time limit to appeal.			
a. I do not appeal.			
b. I appeal and submit matters in writing.			
c. I appeal and do not submit matters in writing.			
NAME/RANK OF SERVICE MEMBER	SIGNATURE	TIME	DATE
7. Commander Action on Appeal. (Commander initials one block) After considering all matters in your appeal, I hereby deny your appeal; grant your appeal; grant your appeal in part, as shown in item 14, (See Note 5)			
NAME/RANK/ORGANIZATION OF COMMANDER	SIGNATURE	DATE	
8. Appellate Authority Action on Appeal. (Appellate authority initials one block) After considering all matters presented in your appeal, I hereby deny your appeal; grant your appeal; grant your appeal in part, as shown in item 14.			
NAME/RANK/ORGANIZATION OF APPELLATE AUTHORITY	SIGNATURE	DATE	
9. Unfavorable Information File (UIF) Action. (Commander initials one block) This action will be filed in your UIF; will not be filed in your UIF. (See Note 6)			
10. Member's Acknowledgement. I have been informed of the UIF decision. I have seen the action taken on any appeal.			
NAME/RANK OF SERVICE MEMBER	SIGNATURE	DATE	
11. Servicing SJA Legal Review. Record is legally sufficient and the action is final.			
NAME/RANK/ORGANIZATION OF REVIEWING ATTORNEY	SIGNATURE	DATE	
12. MPF and AFO Distribution. Copy received by MPF on _____ and AFO on _____. (date/initials) (date/initials)			
13. GCMCA SJA Administrative Supervisory Review. Record is in compliance with AFI 51-202 and Part V, MCM.			
NAME/RANK/ORGANIZATION OF REVIEWING ATTORNEY	SIGNATURE	DATE	
14. (See Note 7)			
SERVICE MEMBER'S LAST NAME & SSN:		DATE OF COMMANDER'S OFFER:	

Figure 2-2b. AF Form 3070A page 2.

Block 2, Service, requires the information of the commander who physically serves the Article 15 on the member. In some situations, this may be a different commander than the member's unit commander who is offering the Article 15 and may even be the member's first sergeant. For example, the member's unit commander has the authority to offer NJP; however, he or she may not be available to serve it physically. In this case, either another commander or the first sergeant can accomplish this in order to keep the process flowing.

Block 3, Member's Acknowledgements and Elections, will only have the member's name and rank at this point. Page 2, block 14 will reflect the UCMJ article(s) violated and the specification(s) as a continuation of block 1b. In addition, the bottom of block 14 will have the member's last name and SSN and the date of the commander's offer.

After the member is advised of the commander's intent to impose NJP by an AF Form 3070, the commander (or the server) signs and indicates the time and date the notification was served in block 2 of the form. Service of the offer starts the running of the three duty-day period for the member to either accept NJP proceedings or demand trial by court-martial. In calculating this period, normally weekends and holidays are not counted unless they are normally scheduled duty days for the member. In practical application, the member is not required to accept or reject NJP in less than 72 hours following notification of the intent to impose NJP. Upon receipt of the member's written request, the initiating commander may grant an extension for good cause. The member's various legal rights appear on page 3 of the AF Form 3070. The member must be provided a copy of the entire AF Form 3070 and any evidence against him or her.

Once the three duty-day time period has expired, the member will return to the commander's office. At this time, the member must reflect his or her NJP decision by initialing the appropriate boxes in block 3, sign, and then annotate the time and date signed. The member must initial whether she or he:

- Consulted a lawyer.
- Demands trial by court-martial or waives the right to court-martial and accepts NJP proceedings.
- Has attached a written presentation.
- Requests a personal appearance before the commander and whether the requested personal appearance can be public.

If a member fails to reply within the specified time frame, the commander may continue with the proceedings and note in block 3 "member failed to respond" and initial. The member's failure to respond in time is deemed an acceptance of NJP proceedings under Article 15. However, if the commander has reason to believe a failure to respond resulted from reasons beyond the individual's control, the commander may not, without good cause, proceed with NJP action.

When accepting NJP proceedings, the member is entitled to present matters in defense, mitigation, or extenuation to the commander in writing, in person, or both. Acceptance of NJP is a choice of forum, not an admission of guilt. Accordingly, the commander must carefully consider all matters submitted.

Oral presentations

Oral presentations provide the member a chance to speak to the commander face to face. They are not adversarial proceedings, and the rules of evidence *do not apply*. The presentation may be open to the public at the member's request; however, the commander may open the hearing even though the member does not request it or agree the appearance should be open.

If the commander should decide to open the personal appearance to the public, certain restrictions will apply. For example, public NJP at commander's calls, unit training assemblies, or other public gatherings is inappropriate without the consent of the member. In addition, NJP proceedings may be attended by a limited number of people in a more private setting (i.e., the commander's office) and normally should be limited to those in the member's supervisory chain or to people who can assist the

decision authority. Public NJP during the offer portion of the process at commander's calls, unit training assemblies, and other public gatherings is permissible with the consent of the member. The member must be given an opportunity to consult with counsel before deciding whether to consent to any such public proceeding (AFI 51-202, Paragraph 3.12, *Member's Presentation*).

When practicable, a personal appearance is given before the commander imposing punishment. If a personal appearance before a superior commander is prevented by the unavailability of the superior commander or by extraordinary circumstances, the member may appear personally before the subordinate commander who served him or her with the AF Form 3070. Under any other circumstances where a personal appearance is prevented by the unavailability of the imposing commander or by other extraordinary circumstances, the member can appear before a person designated by the imposing commander. In both cases, the subordinate commander or appointed designee sends a summary of the presentation, with copies of all written matters submitted by the member, to the commander who will impose punishment.

Upon a full and fair consideration of all the evidence, the commander determines appropriate action and indicates so by initialing the applicable portion of block 4a:

- NJP is not appropriate or the member did not commit the offense(s), and the proceedings are terminated. At this point, a copy of the form is sent to the servicing SJA to complete the required AMJAMS inputs.
- The member committed one or more of the offenses alleged. If the commander decides that the individual did not commit one of the offenses, the commander lines out that offense and initials the line out.

If the commander believes the member committed one or more of the offenses alleged, the commander must seek the SJA's advice on the proper authority to impose punishment. If the commander has authority to impose the kind and amount of punishment he or she deems appropriate (if punishment is determined to be appropriate), the commander notifies the member via the AF Form 3070.

Demanding trial by court-martial

When the member demands trial by court-martial, this prevents the commander from imposing NJP. In this situation, the commander immediately refers the matter to the servicing SJA. The commander is not required to prefer court-martial charges. However, if court-martial charges are preferred, the commander is not limited to the charge(s) originally included in the notification to the alleged member. The commander may change the form of the charge(s) to meet the requirements of the law or proof, and add new charges, whether or not they were known at the start of NJP proceedings (AFI 51-202, Section 3D, *Action When the Member Demands Trial by Court-Martial*).

A member may only withdraw a demand for court-martial with the commander's approval. Additionally, the convening authority's concurrence is required if charges have been preferred. The member must submit a written request to the commander who will then indorse approval or disapproval. This request will become an attachment to the AF Form 3070. If withdrawal is granted, pen-and-ink changes are made in block 3 to reflect the member's new decision to accept NJP proceedings, and the commander continues with the NJP process (AFI 51-202, Section 3D).

Additional offenses

Suppose a commander has initiated NJP action, but before imposing punishment, receives evidence of further misconduct. Several options are available. If the commander decides to dispose of the newly discovered offense(s) under NJP, then the commander may withdraw the initial AF Form 3070 and initiate a new action to include all offenses, or proceed with the initial NJP proceeding and offer a second NJP for the additional offense(s). The commander retains these options until the member is notified of the punishment or the action is forwarded to a superior commander. In case of the latter, the superior commander must agree to withdraw and reinitiate NJP.

If the member does not demand trial by court-martial and the commander decides the member is guilty of one or more of the alleged offenses, and NJP is appropriate, the proceedings will move on to the next phase of the process—punishment. This is the next phase where you will be directly involved (AFI 51-202, Paragraph 3.10, *Discovery of Additional Offenses*).

Imposing punishment

Any commander imposing or recommending NJP has a fundamental responsibility to act only on the basis of reliable information and to take temperate, well-conceived action that is just and conducive to good order, morale, and discipline. You are responsible for assisting the SJA in helping commanders evaluate the facts, understand the punishment options, and determine a just punishment. Of course, the decision as to the kind and amount of punishment rests solely with the commander.

At this point, the AF Form 3070 is returned to the legal office for the appropriate punishment indorsement to be entered on page 2, block 14 as a continuation of block 4a. (See AFI 51-202, attachment 4, *Sample Format for Request for Suspension, Mitigation, Remission, or Set Aside of Nonjudicial Punishment*, for examples of punishment language). If the AF Form 3070 was produced in AMJAMS, normally the first sergeant will call or send you an email explaining the punishment the commander would like to impose and the date he or she will impose it. Then, you can simply input the punishment in AMJAMS and attach page 2 of the AF Form 3070 to an encrypted email to the first sergeant. Of course, your chief of military justice needs to reviewed the punishment and ensured the punishment is legal prior to sending it to the first sergeant.

The maximum permissible punishments are based on the grade and status of the commander and the grade of the member. AFI 51-202 and page 3 of AF Form 3070 outlines the maximum permissible punishments. If the punishment includes an unsuspended reduction in grade, include a statement indicating the new rank and date of rank (DOR). Also, if the punishment includes a reduction of rank (suspended or not), combined with a forfeiture of pay, the forfeiture is based on the reduced rank.

As described above, when the commander has determined the member has committed one or more of the offense(s) alleged, the commander will initial in block 4a(2) and sign and date the form in the indicated blocks. The date of imposition of NJP is the date the form is signed by the commander in the signature block in block 4. The member should be informed of the punishment and acknowledge receipt of the action on the same date punishment is imposed. The member will sign and input the time and date notified of the punishment in block 5. In addition, the member must write in his or her current rank next to his or her name. The rank is intentionally left blank in block 5 and succeeding blocks because reduction in rank is a punishment option. From the date the member acknowledges his or her punishment, he or she will have five calendar days to decide whether to appeal.

Changing commanders after service

There may be times when the commander who initiated the AF Form 3070 is unable to impose punishment due to illness, change of station, TDY, or other reasons. If a new commander assumes responsibility for the case after the member was offered NJP, but before findings are made, and punishment, if any, has been imposed, the successor in command has two options:

1. Withdraw the old AF Form 3070 and initiate a new action on a new AF Form 3070.
2. Notify the member in writing of the change in commanders by using the notification format in AFI 51-202, Attachment 3, *Format of Nonjudicial Punishments*. When using the memorandum, ensure a copy is attached to the AF Form 3070.

A member must always be informed of the identity of the commander who will actually make the findings and punishment decisions before he or she makes the decision to accept NJP or demand trial by court-martial. The options above are designed to provide the member three duty days to accept NJP proceedings or demand trial by court-martial.

Effective dates of punishments

Unsuspended reductions in grade and forfeitures of pay take effect on the date the commander imposes punishment. All other unsuspended punishments take effect immediately upon notification to the member, unless the commander provides otherwise in the punishment indorsement. The suspension of a punishment takes effect on the date the commander imposes punishment, *not* the date the member was notified of the punishment.

Once started, punishments involving restraint (i.e., correctional custody, restrictions, or arrest in quarters) or extra duties run continuously (AFI 51-202, Paragraph 3.17, *Punishment Effective Date*). However, these punishments may be stayed pursuant to the member's request based upon an appeal not being acted upon within five days after the appeal was submitted. If, after five days, no action has been taken, the member may request that any remaining restraint or extra duty be stayed, pending the outcome of the appeal. For example, on 2 Jan 2016, Airman First Class (A1C, E-3) Sandra Jones received NJP consisting of seven days extra duty. That same day, she appealed the punishment and began performing extra duty. As of 7 Jan 2016, no action had been taken on the appeal. Upon A1C Jones' request, the two remaining days of extra duty will be stayed until the appeal is decided.

Combination of punishments

All authorized punishments may be imposed in a single case to the maximum authorized, except for these limitations:

- Arrest in quarters may *not* be imposed in combination with restriction.
- Correctional custody may *not* be imposed in combination with restriction or extra duties.
- Restriction and extra duties may run concurrently, but the combination may *not* exceed the maximum imposed for extra duties. For example, a commander (major [O-4]) may combine 45 days extra duty (maximum authorized) and 45 days restriction for a MSgt.

It is imperative you understand the maximum permissible punishments and the rules governing dates of rank, forfeitures of pay, and combinations of punishments. First sergeants and commanders will come to you to draft punishments and you, along with your chief, military justice, must ensure the punishments are legal.

Appeals

You know the commander imposes NJP by using the AF Form 3070. If the commander has decided the member is guilty and has punished the member, the member can appeal the action. A member may appeal the finding that an offense was committed, or the member may appeal the punishment.

Under the NJP process, a member must acknowledge receipt of the punishment. At the same time, the member is informed of his or her right to appeal. Additionally, the member is informed that:

- The appeal can be filed anytime within five calendar days and a decision not to appeal is final.
- If an appeal is not filed within five calendar days, appellate rights will be waived. (The commander may grant an extension of time to appeal for good cause and upon written application received within the five-day appeal period.)
- Any documents supporting the appeal must be submitted at the same time the member makes the appeal decision.
- The member is entitled to the advice of legal counsel in making the appeal decision.

The member must indicate his or her appeal decision within five calendar days by initialing only one area in block 6a-c, Member's Appeal Decision, of the AF Form 3070. He or she must also sign, and annotate the time and date signed, along with his or her current rank. The member makes a choice between not appealing, appealing, and submitting matters in writing, or appealing and not submitting matters in writing.

The member's appeal decision is a one-time decision, and all documents supporting the member's appeal must be submitted at the same time as the appeal decision. If the member decides not to appeal, the imposing commander makes the UIF determination in block 9, Unfavorable Information File (UIF) Action, of the AF Form 3070 and continues processing the NJP action. If the member decides to appeal, the imposing commander continues to process the appeal.

The member's decision to appeal or not to appeal in block 6 of the AF Form 3070 ends the member's time limit to make their appeal decision. There is no time limit established for the imposing commander to act on an appeal; however, they should act as soon as practicable. A member may withdraw their appeal as long as the imposing commander has not acted on it. Pen-and-ink changes should be made in block 6 of the AF Form 3070 to reflect the member's decision not to appeal.

If the member refuses to sign his or her appeal decision within the time limit for appeal, the commander notes in block 6 of the AF Form 3070 "member refused to make appeal decision within the time limit for appeal" and initial. *The member's failure to respond in time is deemed a waiver of his or her right to appeal* (MCM 2019, Part V(7)(d)).

Processing procedure

NJP appeals are made to the next superior authority—generally the immediate AF commander superior to the officer who imposed the punishment. Some situations call for application of special rules. Here are a few of the more common ones (see AFI 51-202, Paragraph 4.2, *Appellate Authority*, for a more exhaustive list):

- When a principal assistant to a commander imposes punishment, the next superior authority is the next AF commander superior to the commander who delegated the power.
- When a detachment commander imposes punishment, the next superior authority is the detachment commander's immediate commander and *not* the commander of the host installation.
- When a section commander of a squadron imposes punishment, the next superior authority is the squadron commander's superior commander. However, when a section commander for all other units or elements imposes punishment (i.e., group, wing, numbered air force [NAF], MAJCOM, FOA, and DRU), the next superior authority is the section commander's immediate commander.
- When the commander of a MAJCOM, DRU, or FOA imposes punishment, the SAF has designated the AF element commander as the appellate authority and authorized AF element commander to delegate this authority to the AF element vice commander. Forward such appeals directly to AFLOA/JAJM.
- When a joint force commander, including an AF officer acting in his or her capacity as a joint force commander, imposes punishment, the next superior authority is the next superior joint commander.
- When a unique command structure or situation exists, AFLOA/JAJM may designate another individual to act as the appellate authority. Applications for such designation must be submitted in writing to AFLOA/JAJM through appropriate command channels.

If the member elects to appeal and submit written matters in support of the appeal, they are sent to the commander who initially imposed the punishment. The imposing commander examines any written material submitted by the member. After consulting with the SJA, the commander may grant the relief requested, if appropriate, by using his or her powers to suspend, mitigate, remit, or set aside the punishment. The imposing commander records his or her decision on the appeal in block 7, Commander Action on Appeal, of the AF Form 3070 by initialing the appropriate area and signing and dating the form. If relief is granted, page 2 of the AF Form 3070 is sent back to your office where you will type in the relief granted in block 14 as a continuation of block 7. If the appeal is granted in full, the NJP need not be sent to the appeal authority.

If less than full relief is granted, the appeal must be sent to the appeal authority, through the SJA. If the appeal is forwarded, the imposing commander adds written comments by indorsement through the servicing SJA (MCM, Part V, Paragraph 7e). The comments should address each issue raised by the member unless the issues are addressed in supporting documentation clearly and whether the member has served any portion of the punishment. In addition, the imposing commander includes in the package all written material referred to in imposing the punishment, including a summary of any oral presentation, as well as a summary of any other information considered and its source. The indorsement may state the commander's rationale for imposing punishment and a recommendation for action on the appeal. Since the indorsement includes the deliberative process, the member is not entitled to a copy.

Action on appeals

The appeal authority may grant the relief requested in whole or in part, by using the same power as may be exercised by the imposing commander to suspend, mitigate, remit, or set aside the punishment. The appellate authority records his or her decision on the appeal in block 8, Appellate Authority Action on Appeal, of the AF Form 3070 by initialing the appropriate area and signing and dating the form. If relief is granted, page 2 of the AF Form 3070 is sent back to your office where you will type in the relief granted in block 14 as a continuation of block 8. Unless otherwise stated, relief granted as a result of an appeal is effective from the date the punishment was initially imposed. If all punishment is disapproved, the entire action must be set aside and removed from the member's record; an NJP action cannot consist of "no punishment." The NJP action is then returned to the unit for further processing.

Final action by the commander

Before sending the AF Form 3070 back to your office, but after completing all other action, including any appeal action, the commander records the decision to file or not file the NJP in the member's UIF in block 9 of the AF Form 3070. The decision is indicated by initialing the appropriate area. However, if the imposing commander is *not* available, any person authorized by AFI 36-2907, *Unfavorable Information File (UIF) Program*, may make the UIF determination. For enlisted members, a record of any suspended punishment under Article 15 or unsuspended Article 15 punishment with any portion of the punishment exceeding one month (31 days or more) must be filed in a UIF. UIFs are mandatory for officers who receive NJP. The member acknowledges that he or she was informed of the commander's UIF decision and any action taken on appeal, if applicable, by signing and dating block 10, Member's Acknowledgement, along with annotating his or her current rank on the AF Form 3070. If the member refuses to sign, the commander notes and initials in block 10, "member refused to sign."

All commissioned officers, senior noncommissioned officers (SNCO), and TSgts have promotion selection records at AFPC, Joint Base San Antonio-Randolph, Texas, or at Headquarters, United States Air Force (HQ USAF). AFI 36-2608, *Military Personnel Records System*, is the governing directive for filing procedures. When the member is an officer or enlisted member required to meet an evaluation board, the commander imposing punishment decides whether to file the NJP in the member's promotion selection record. However, there are a few unique circumstances as to when and who may make the NJP filing decision.

- If an NJP for a SNCO results in a reduction to a grade below MSgt, the commander makes a filing determination because the NJP was received as a SNCO.
- In a joint command, if a commander from a different Service imposes NJP on a member of the AF element, the senior AF officer or commander of the element decides whether to file an NJP in the selection record, provided that official is senior to the commander imposing the NJP.
- If the senior AF officer or commander of the element is unavailable or is *not* senior to the commander imposing the NJP, the GCMCA of the AF host command (AFI 25-201, *Intra-Service, Intra-Agency, and Inter-Agency Support Agreements Procedures*) who is senior to

the commander imposing NJP makes the filing decision. If there is *not* a GCMCA in the AF host command senior to the commander imposing punishment, a GCMCA of the host service, who is senior to the commander imposing punishment, makes the filing decision.

The filing decision is made after punishment is imposed and any appeal is resolved. The member should submit a statement, if any, of rebuttal, mitigation, or circumstances for consideration at the time of appeal. After reviewing the member's statement and circumstances, the commander determines whether the NJP is appropriate for filing in the selection record. If the commander decides *not* to file the NJP in the selection record, the commander annotates the decision in block 9, Commander Action on Senior NCO (or Officer) Selection Record, on the AF Form 3070B, C, D, or E. In addition, for AF Form 3070B only, the imposing commander makes his or her UIF decision in block 11, Unfavorable Information File (UIF) Action. The imposing commander will then inform the member of any decision on appeal, if applicable, and of the selection record and UIF decisions. The member will acknowledge these decisions in block 10 (AF Form 3070C) and block 12 (AF Form 3070B), Member's Acknowledgement. At this point, the NJP action is returned to the legal office for final processing as described below in the next lesson.

If the commander decides to file the NJP in the selection record, the commander initials in block 9 on the AF Form 3070B, C, D, or E and forwards it to the senior commander for review. The decision to file the NJP in the appropriate selection record is subject to review by the next senior AF commander to the imposing the NJP. However, there are two *exceptions* to this rule:

- If the commander imposing NJP exercises GCMCA or is a higher-level commander, the decision to file in the appropriate selection record is *not* subject to review.
- In a joint command if an officer other than the senior AF officer assigned (host command or service GCMCA) makes the decision, the decision to file is not subject to review.

The review authority may concur or nonconcur with the commander imposing the NJP, and this decision is final. If the review authority decides not to file the NJP in the selection record, he or she prepares a memorandum and forwards it with the NJP to the commander imposing punishment. If the review authority agrees to file the NJP in the selection record, he or she signs the decision memorandum and returns it, the NJP, and related correspondence to the commander imposing punishment. In either case, the reviewing authority will annotate his or her decision in block 10, Reviewing Authority Action on Senior NCO (or Officer) Selection Record, on the AF Form 3070B or C. The imposing commander will notify the member of any appeal, selection record, and UIF decision as described above.

613. Completing records and supplementary action

This lesson covers the necessary actions to complete the NJP process and the various types of supplementary actions that can become a continuation of the NJP process. There are still options afforded to the commander and the member when the member shows he or she has been rehabilitated or, in the alternative, continues to violate the UCMJ.

Completion and disposition of NJP records

Up to this point in the process, your office was consulted about the need for NJP action, the appropriate format, and coordination of proposed punishments and appeals. Now that the action is final, you need to verify it is entered into the member's records properly and forwarded to the GCMCA's SJA for review.

Servicing SJA responsibilities

After receipt of the completed NJP action from the commander, the SJA or designee reviews the NJP action for legal sufficiency. The reviewing attorney signs and dates block 11, Servicing SJA Legal Review, of the AF Form 3070 when the record is found legally sufficient. At this point, this is the final action for purposes of the timeliness metric as was covered in the first unit.

The SJA then sends:

- One copy of the record to the officer who supervises the correctional custody program when the case involves unsuspended correctional custody.
- Two copies of the record, with an AF Form 1373, MPO Document Control Log-Transmittal, to the accounting and finance office (AFO) if the punishment affects the member's pay. The SJA keeps a copy of the AF Form 1373. The person who provided the copies of the record to AFO dates and initials block 12, MPF and AFO Distribution, of the AF Form 3070 or marks "N/A" (not applicable).
- One copy of the record to the unit UIF monitor if the record will be filed in a UIF.
- One copy of the record to the servicing MPS, with an AF Form 1373, in all cases. The SJA keeps a copy of the AF Form 1373. The person who provided the copy of the record to MPS dates and initials block 12 of the AF Form 3070.
- In cases involving O-6 selects and above, one copy of the record and all supporting documents to the member's commander for forwarding in accordance with AFI 90-301, *Inspector General Complaints Resolution*.
- The original record (and two complete copies for officer cases) directly to the SJA for the officer exercising GCMCA, after providing the record copy to the MPS and AFO, and noting the dates of receipt. File the receipted copy of the AF Form 1373 separately from the NJP file and in chronological sequence;
- Forward a copy of all final AF Forms 3070, 366, and 3212 to the local AFOSI detachment, local security forces office of investigations, and AFOSI/XI, in accordance with criminal indexing requirements in AFI 51-202, Section 6D, *Criminal Indexing Required*.

Action by the GCMCA SJA and disposition of original record

The GCMCA SJA or designated attorney performs an administrative supervisory review on behalf of the GCMCA and returns legally deficient proceedings for correction. When the proceedings comply with AFI 51-202, the reviewing attorney signs and dates block 13, GCMCA SJA Administrative Supervisory Review, of the AF Form 3070 and sends a copy of it to the servicing SJA. The GCMCA SJA sends the original record for filing in the master personnel record group at AFPC. In officer and SNCO cases, the GCMCA SJA simultaneously forwards the original memorandum regarding the final decision to file or not to file the NJP action in the promotion selection record at AFPC, including required attachments, with the original NJP action.

The record of punishment consists of the AF Form 3070, the decision letter under AFI 36-2608, (decision to file in promotion selection records), and, if applicable, AF Form 366, AF Form 3212 and any of their attachments. Evidence and other written materials considered as a basis for imposing punishment, or vacating a suspended punishment, or submitted by the member in mitigation, extenuation, or defense or on appeal are *not* considered part of the record. Such evidence and other written materials are filed in the office of the SJA servicing the commander who initiated the NJP as attachments to the file copy of the action. The servicing SJA retains copies of NJP actions for three years, or when no longer needed, whichever is later.

Keep in mind in the text above, we referenced the AF Form 3070A. You will find the AF Form 3070B, C, D, and E have additional blocks and, therefore, are different.

Supplementary action under Article 15, UCMJ

Part V of the MCM authorizes certain types of supplementary actions. These supplementary actions are designed to relieve the member of some or all of the punishment based upon the member's good behavior or to set aside punishment in its entirety in cases where the punishment has resulted in a clear injustice. Use AF Form 3212 to suspend, mitigate, remit, or set aside a punishment previously imposed under NJP. Normally, this form is produced through AMJAMS like the AF Form 3070;

however, when AMJAMS is not available, it can also be found on the Air Force E-Publishing Website.

A member may request the commander or successor in command to suspend, mitigate, remit, or set aside a punishment in whole or in part. Such a request must be in writing. A commander or a successor in command, however, may take such action upon his or her own initiative without such a request from the member. A commander's powers to suspend, mitigate, remit, or set aside NJP passes to any successor in command.

A commander can suspend, mitigate, remit, or set aside punishment under Article 15, UCMJ only if the commander has the authority to impose that punishment (AFI 51-202, Paragraph 5.2, *Consultation Required*). For example, a commander in the grade of captain or lieutenant cannot suspend, mitigate, remit, or set aside punishment imposed by a field grade commander beyond what the captain or lieutenant could impose. A commander not empowered to act may recommend any supplementary action to the next superior commander empowered to impose such punishment(s). Commanders must consult the servicing SJA before taking action to suspend, mitigate, remit, or set aside a previously imposed punishment.

Suspension

Suspension is the postponement of the application of all or part of the executed or unexecuted punishment for a specific probationary period, until a specified date. It will be canceled at the end of that period automatically, if the member does not violate the condition(s) of suspension. Suspension is often warranted for a first-time offender or when there are persuasive matters in extenuation or mitigation. The period of the suspension may not exceed six months from the date of suspension. The six-month time limitation on suspensions may or may not be 180 days. For example, a punishment imposed on 1 Mar 2019 may be suspended until 31 Aug 2019, even though this period is 183 days. A suspension action will set a specific date after which, unless sooner vacated, the suspension will terminate and the punishment will be remitted. This date should not exceed the member's ETS at the time suspension action is taken.

At any time, a commander or successor in command may suspend any part or amount of the unexecuted punishment imposed. An executed punishment of reduction in grade or forfeiture of pay may be suspended at any time within four months after the date imposed. A successor in command must have the authority to impose the punishment he or she intends to suspend; otherwise, the successor can only recommend a superior commander in the chain of command suspend the punishment. Should a reduction in grade be suspended after its execution, the member's original DOR reverts to that date held before the reduction; however, the effective DOR is the date of the document directing the suspension.

Suspension of punishment automatically includes a condition that the service member does not violate any punitive articles of the UCMJ during the suspension period. Additionally, commanders may specify in writing, within the punishment indorsement, additional conditions of the suspension. The written condition must be clearly stated and capable of being completed during the suspension period. For example, if a military member wrongfully appropriates a roommate's car, which does not have collision insurance coverage, and hits a tree causing \$500 damage to the car, the commander could suspend punishment upon the condition the military member pays \$100 per month for five months (providing the suspension period is at least five months). The commander could later vacate the suspended punishment based on the member's violation of the conditions of the suspension, regardless of whether or not the violation is a punitive article of the UCMJ.

A member with a suspended reduction in grade is ineligible for promotion, including testing or consideration, if already tested. In addition, a member serving any suspended punishment is ineligible to reenlist, but may be eligible for an extension of enlistment.

Mitigation

Mitigation is a reduction in either the quantity or the quality of a punishment with its general nature remaining the same. With the exception of reduction in grade, only the unexecuted part or amount of the punishment can be mitigated. The commander could mitigate:

- Reduction in grade to forfeiture.
- Unexecuted forfeiture of pay to a lesser forfeiture of pay.
- Correctional custody to extra duties, restriction, or both.
- Arrest in quarters to restriction.
- Extra duties to restriction.

The mitigated punishment may not be for a greater period than that remaining for the original punishment. For example, if a punishment of correctional custody for 30 days was imposed and, after 10 days, the commander mitigates the remaining 20 days of correctional custody to restriction, the maximum restriction may not exceed 20 days. A reduction in grade, whether or not executed, can only be mitigated to forfeiture and must be done within four months after the date of execution. The amount of the forfeiture may not be greater than the amount that could have been imposed by the officer who initially imposed the NJP. For example, if a commander in the grade of captain or below imposed the reduction, a successor in command—who is in the grade of major or above—could only mitigate to forfeiture of seven days' pay. This is the maximum forfeiture permitted for “the officer who imposed the original punishment.” If a reduction in grade is later mitigated to forfeiture, both the effective date and DOR is the date of the indorsement mitigating the punishment.

Remission

Remission means doing away with “unexecuted” punishment. A commander or a successor in command may, at any time, remit any part or amount of the unexecuted portion of the punishment imposed. For example, a commander imposes 30 days correctional custody upon a member. After serving 15 days, the member shows dramatic improvement to the extent the commander feels no additional punishment should be served. Remission would be appropriate in this case and would cancel the remaining portion. The expiration of the current enlistment or term of service of the member automatically remits any unexecuted punishment.

Setting aside

Set aside occurs when the punishment, or any part or amount thereof, whether executed or unexecuted, is removed from the record and any rights, privileges, pay, or property affected by the relevant portion of the punishment is restored. A set aside of all punishment voids the entire NJP action. A commander may not set aside punishment more than four months after execution of the punishment, unless the commander determines unusual circumstances exist and explains them in an attachment to the AF Form 3212 (fig. 2-3).

Normally, a set-aside action, unlike suspension, remission, and mitigation, is *not* considered a rehabilitation tool. Setting aside can be used when the commander wants to do away with illegal punishment or NJP that was imposed on a person now known to be innocent of that offense (a clear injustice, or when a commander exceeded their punishment authority). There are also rare circumstances where it is in the best interest of the AF to clear the member's record.

Setting aside a punishment in its entirety restores the member to the position held before imposition of the punishment, as if the NJP action had never been initiated. For example, if a member has been reduced in grade through NJP, and the reduction is later set aside, the effective date and DOR reverts to that held before the reduction.

Once mitigation, remission, or set-aside action is taken, the punishments that were reduced, changed to a lesser amount or less severe form, or eliminated *may not be reinstated*. This includes punishment imposed by the original commander, a successor in command, or a superior commander.

RECORD OF SUPPLEMENTARY ACTION UNDER ARTICLE 15, UCMJ		
NAME, RANK, SSN, ORGANIZATION, AND MAJOR COMMAND OF SERVICE MEMBER		
1. Action (See Note). a. The service member identified above received nonjudicial punishment under Article 15, UCMJ, on _____ (date). b. (Commander initials one block) : (1) <input type="checkbox"/> The entire nonjudicial punishment action is set aside. Any property, privileges, or rights affected by the punishment set aside are restored. (2) <input type="checkbox"/> All of the nonjudicial punishment is suspended and will be remitted without further action if not vacated before _____ (date). (3) <input type="checkbox"/> All of the nonjudicial punishment is mitigated to: (4) <input type="checkbox"/> That portion of the nonjudicial punishment which called for: is (Commander initials one block if item 1.b.(4) is selected) : (a) <input type="checkbox"/> Suspended and will be remitted without further action if not vacated before _____ (date). (b) <input type="checkbox"/> Remitted. (c) <input type="checkbox"/> Set aside. Any property, privileges, or rights affected by the portion of the punishment set aside are restored. (d) <input type="checkbox"/> Mitigated to: c. I am (initial one block) : <input type="checkbox"/> the officer who imposed the punishment. <input type="checkbox"/> the successor in command to the officer who imposed the punishment. <input type="checkbox"/> Other (specify):		
NAME/RANK/ORGANIZATION OF COMMANDER	SIGNATURE	DATE
2. Member's Acknowledgement. I have seen the action taken above on my nonjudicial punishment.		
NAME/RANK OF SERVICE MEMBER	SIGNATURE	DATE
3. Servicing SJA Legal Review. Record is legally sufficient and the action is final.		
NAME/RANK/ORGANIZATION OF REVIEWING ATTORNEY	SIGNATURE	DATE
4. MPF and AFO Distribution. Copy received by MPF on _____ (Date/Initials) and AFO on _____ (Date/Initials)		
5. GCMCA SJA Administrative Supervisory Review. Record is in compliance with AFI 51-202 and Part V, MCM.		
NAME/RANK/ORGANIZATION OF REVIEWING ATTORNEY	SIGNATURE	DATE
Note: If applicable, see AFI 36-2907, <i>Unfavorable Information File (UIF) Program</i> , for further guidance regarding UIF actions.		

Figure 2-3. Air Force Form 3212.

Completion and disposition of supplementary actions

You will also be involved in processing supplementary actions. These actions are much simpler than processing an NJP action and do not require any specific timeliness metrics; however, they need to be accomplished as quickly as possible. Like NJP, the first sergeant will notify you when the commander wishes to take supplementary action. Prior to providing the AF Form 3212 to the commander, verify the member's information is correctly annotated in the top block, along with the name, rank, and organization of the commander taking the supplementary action in block 1 and the member's name and rank in block 2. Depending upon the commander's choice to set aside, remit, mitigate, or suspend, there may be additional information you will need to add to block 1b (2), (3), or (4). The commander will initial the appropriate area in block 1b and sign and date. Once the member is notified of the commander's intention (normally the same day), the member will sign and date in block 2. The form is returned to your office for final processing.

The GCMCA SJA or designated attorney performs an administrative supervisory review on behalf of the GCMCA and returns legally deficient proceedings for correction. When the record complies with AFI 51-202, the reviewing attorney signs and dates block 5, GCMCA SJA Administrative Supervisory Review, of the AF Form 3212 and sends a copy of it to the servicing SJA.

All requests for suspension, mitigation, remission, or setting aside of punishment, and any actions taken in response, are processed and filed with the original NJP record to ensure inclusion with other official file copies.

Vacation of suspension

There are times when suspension of NJP is warranted. On other hand, commanders may be faced with another situation if the suspension period is not satisfactorily completed. If the member violates any punitive article of the UCMJ or a condition of suspension specified in writing by the commander during the period of suspension, the commander who imposed the punishment or a successor in command may vacate the suspension. Should the successor in command not have the authority to impose the kind or amount of punishment that was imposed originally (and suspended), the commander may recommend such action to the next higher commander in the chain of command. For example, if a major imposed correctional custody for 30 days, but suspended the execution of the punishment, the suspension could not be vacated by a lower grade successor since the successor could only impose seven days of correctional custody. However, the successor could recommend a higher commander take such action. The proceedings to vacate a suspended punishment must be in writing using an AF Form 366. This form is produced through AMJAMS or found on the Air Force E-Publishing Website.

During the proceeding to vacate a suspended punishment, the commander must notify the member of substantially the same rights as for the original NJP. The primary difference is the member does not have the option of demanding trial by court-martial or the right to appeal the action to a superior commander once the punishment previously suspended is ordered executed.

Vacation of a suspended punishment is not in itself NJP; thus, additional action to impose NJP for a violation of a punitive article of the UCMJ upon which the vacation action is based is not precluded. For example, a SSgt receives NJP that includes a suspended reduction to SrA. During the suspension period, the SSgt steals a government computer. The commander may take vacation action and, if appropriate, offer the (now) SrA a new NJP, based on the same offense. A commander may, in a suitable case, initiate NJP action for a new offense while leaving the suspended punishment previously imposed in effect. A separate punishment may be imposed for the new offense.

When a commander wants to vacate a suspended punishment based on a new offense, ensure the new offense occurred during the period of probation. The commander must present the member with the AF Form 366 before the end of the suspension period. For example, on 1 Sep 2016, Airman (Amn, E-2) Jones is given a suspended reduction to AB by NJP. Then, on 10 Sep 2016, the commander contacts your office to start vacation action because Amn Jones was involved in an offense on 5 Sep

2016. In this instance, vacation would be proper. If, however, the offense occurred before 1 Sep 2016, it would not qualify as a new offense as it *did not* occur during the probationary period.

The member has three duty days to present matters in writing, orally, or both. Upon review of any matters presented, the commander makes a decision. The member then acknowledges the commander's decision, and the AF Form 366 is returned to the legal office for processing in the same manner as the original action was processed.

If a reduction in grade is suspended, but later vacated, the DOR in the grade to which the member is reduced is the date the original reduction was imposed by the commander; however, the effective date is the date of the vacation action.

Self-Test Questions

After you complete these questions, you may check your answers at the end of the unit.

611. Nonjudicial punishment under Article 15, Uniform Code of Military Justice

1. State the purpose of NJP.
2. What are the factors that determine if an offense is "minor"?
3. Who has the final authority on whether or not to impose NJP?
4. What proof should be considered before initiating action under Article 15, UCMJ?
5. What document must be published before a successor can have NJP jurisdiction in the temporary absence of the commander?
6. When a commander is a victim of a crime in a personal capacity, to whom is the report of incident submitted?
7. What officers may delegate their NJP powers to principal assistants?
8. If a GCMCA commander withholds NJP authority from a base commander, what office keeps the original withholding document, and what office keeps a copy?
9. To ensure the timely administration of military justice, when should a commander offer NJP?

10. How soon should the SJA review be completed after discovering the commission of an offense by a member?

612. Nonjudicial punishment process

1. Upon receipt of all evidence, what is the first thing you should do?
2. Where can you find sample language for NJP specifications?
3. Where do you look for model specifications on check cases?
4. What is the first stage of the NJP process?
5. What date starts the running of the three duty-day period for the member to either accept NJP proceedings or demand trial by court-martial?
6. In NJP, what is the purpose of oral presentations?
7. What should the commander do when a member refuses NJP and elects trial by court-martial?
8. Who can grant a member permission to withdraw a previous request for trial by court-martial?
9. What are two primary considerations in determining the kind or amount of punishment authorized under NJP?
10. When forfeiture of pay is imposed along with a reduction in grade (whether or not the reduction is suspended), on what pay grade is the forfeiture of pay based?
11. In a case where the initiating commander is unable to impose punishment, what two options does a successor in command have?

12. An unsuspended reduction in grade or forfeiture of pay takes effect upon what date?
13. What is the rule when combining the punishments of restriction and extra duties?
14. After a member has acknowledged his or her punishment, what must the member do within five calendars days from the receipt of that punishment?
15. If a member's appeal is not granted in full by the imposing commander, what happens next in the NJP process?
16. What is the effective date of relief when granted as a result of an appeal?
17. Under what circumstances must an enlisted member's NJP action be filed in a UIF?
18. When must a decision to file a member's NJP action in his or her promotion selection record be made?

613. Completing records and supplementary action

1. What is the next step in the NJP process after the legal office receives the completed NJP action from the commander?
2. What document records MPS's receipt of the NJP action?
3. After providing a copy of the NJP record to the MPS and AFO, and noting the dates of receipt, where is the original NJP sent?
4. After the GCMCA SJA review, where is the original NJP record filed?
5. What office maintains the evidence supporting NJP action?

6. What supplementary actions may be taken on NJP actions?
7. Who may take supplementary action on NJP actions?
8. Indicate the type of supplementary action that each of the following statements represents:
 - (a) Illegal punishments are done away with.
 - (b) Unexecuted legal punishments are done away with.
 - (c) Punishment is reduced in quantity or quality.
 - (d) A punishment is changed from executed to unexecuted and the member is placed on probation.
 - (e) The commander did not have authority to impose the punishment.
 - (f) Warranted for a first-time offender or when there are persuasive matters in extenuation or mitigation.
 - (g) The member shows dramatic improvement to the extent the commander feels no additional punishment should be served.
9. Where are requests for suspension, mitigation, remission, or set aside of punishment, and any actions in response, filed?
10. When may a previously suspended punishment under NJP be vacated? Who may take vacation action?
11. In a vacation action, what rights does the member *not* have?
12. What is the AF policy regarding vacation and new NJP action based on a single offense?
13. When a commander wants to vacate a suspended punishment based on a new offense, when must the new offense have taken place?
14. If a reduction in grade is suspended, but later vacated, what is the member's new DOR?

2-2. Preferral of Charges, Forwarding to a Superior Commander

Commanders have the responsibility to investigate allegations of misconduct, and to dispose of those allegations. We will begin with the preparation of a disposition of a sexual assault allegation.

614. Preparing an initial disposition of a sexual assault allegation

Each commander has the discretion to dispose of offenses by members of his or her command. Article 33, UCMJ directs that the Secretary of Defense publish disposition guidance for commanders and judge advocates to take into consideration when deciding how to dispose of an allegation of misconduct; this guidance is not binding. The member's immediate commander typically determines this; however, a superior commander may withhold this authority for individual cases, types of cases, or generally.

The Secretary of Defense has withheld initial disposition authority from all DOD commanders who do not possess at least SPCMCA and who are not in the grade of O-6 (colonel) or higher, concerning the following alleged offenses (regardless of the date the offense was allegedly committed):

- Rape or sexual assault in violation of Article 120, UCMJ;
- Forcible sodomy, in violation of Article 125, UCMJ; and
- Attempts to commit the offenses above, in violation of Article 80, UCMJ.

When making their decision, the SPCMCA **shall**, at a minimum, consider:

- Matters transmitted (from lower commanders).
- Court-martial charges (if any).
- Any independent review and recommendation received.
- Victim input, if any.
- Consultation with the SJA.

The SPCMCA **may** consider the disposition guidance contained in Appendix 2.1 of the MCM.

When the decision is made not to prosecute, an initial disposition of a sexual assault allegation (IDA) memo is drafted by the office of the SJA for the SPCMCA. The GCMCA is required to acknowledge, in writing, the written report of disposition and return the acknowledgment to either the AFOSI or security forces office of investigations. This task is not delegable. AFOSI and security forces office of investigations are not permitted to close the investigation until the required memorandum is received from the GCMCA.

As you are gathering information to draft the IDA memo, you will need to realize every case will be different. You will need to include in the disposition memorandum if the victim in the case no longer wishes to testify or participate in the investigation. The victim's decision not to participate in the investigation should be honored; however, the victim should be notified that the investigation may continue regardless of his or her participation. Victims should not be forced to participate in investigations, but may be ordered to do so, only with the approval of the GCMCA. You may also consider noting if the victim has a propensity to lie or has significantly inconsistent statements.

615. Preparing the charge sheet and preferring charges

The DD Form 458, Charge Sheet, is used to charge an accused of violations of the UCMJ formally and to refer the case to a particular type of court. Normally, a paralegal assigned to military justice will prepare the DD Form 458. Part I, Personal Data, of the charge sheet contains important personal data concerning the accused. Because it can affect the sentence, you must confirm the accuracy of this data. You can get most of the personal data required for the charge sheet from the accused's personnel records when you import the data from AFPC into AMJAMS. However, you must ensure the accuracy of this data from the accused's AMJAMS RIP. If AMJAMS is not available and you

need to prepare a charge sheet, you can find one on the Executive Services Directorate Website located at https://www.esd.whs.mil/Directives/forms/dd0001_0499/ and use the AMJAMS RIP to obtain the personal data required, as covered in the NJP process.

If several individuals are charged with the commission of a joint offense on a DD Form 458 (fig. 3-1a and b), complete a separate page 1 with the personal data for each accused. The following table provides information about filling in the charge sheet. Whenever possible, spell out all information on the charge sheet; do not abbreviate. Only abbreviate when the field within the block is too small.

Filling in the Charge Sheet (DD Form 458)		
Block	Entry	
Name of Accused	Enter the name of the accused in uppercase letters—use last name, first name, and middle initial sequence.	
SSN	Insert the accused's SSN.	
Grade or Rank	Use the accused's rank at the time the charges are preferred. Spell out the rank (i.e., Airman First Class).	
Pay Grade	Use the pay grade at the time the charges are preferred (i.e., E-3).	
Unit or Organization	Enter the accused's organization and station (i.e., 60th Field Maintenance Squadron, Travis Air Force Base, California 45420-1584). Include the MAJCOM in parenthesis (i.e., AMC [Air Mobility Command]).	
Current Service	Show the beginning date of the accused's current enlistment and number of years of enlistment (i.e., 12 Jul 1998 for six years). The current service is the date the current enlistment began for enlisted members and the total active federal military service date (TAFMSD) for officers.	
Pay per Month	Fill in each of the three blocks.	
	Basic pay	Basic pay is the pay the accused is entitled to receive at the time of preferral of court-martial charges. This is determined by the accused's rank and time in service. In calculating the time in service for pay purposes, refer to the accused's pay date. This does <i>not</i> include such matters as subsistence, clothing allowance, flight, or any other additional pay.
	Sea or foreign duty pay	Sea or foreign duty pay is pay the accused is entitled to draw by virtue of serving on board a ship or vessel, or in an overseas area. Normally, \$0.00 is reflected in this block. <i>Never</i> leave it blank.
	Total	This is a total of the basic pay and any sea or foreign duty pay.
Nature of Restraint of Accused	Insert information concerning the type of restraint placed on the accused, and include any civil confinement at the request of the AF. If restraint does not apply, insert the word "None." <i>Never</i> leave it blank.	
Date(s) Imposed	Show the dates of any restraint imposed on the accused. If restraint does not apply, insert "N/A." <i>Never</i> leave it blank.	
Charge and Specification	Part II—List charges and specifications. Type the words "CHARGE" and "ADDITIONAL CHARGE" in all capital letters. "Specification" includes upper- and lower-case letters. Where more than one charge or specification is alleged, charges are numbered with Roman numerals (i.e., I, II, III) and specifications with Arabic numbers (i.e., 1, 2, 3). A single charge or specification is not numbered. After the word "CHARGE," the actual violation of the UCMJ suspected of being committed is listed (i.e., Violation of the UCMJ, Article 107). .	

CHARGE SHEET				
I. PERSONAL DATA				
1. NAME OF ACCUSED <i>(Last, First, Middle Initial)</i>		2. SSN	3. GRADE OR RANK	4. PAY GRADE
5. UNIT OR ORGANIZATION			6. CURRENT SERVICE	
			a. INITIAL DATE	b. TERM
7. PAY PER MONTH			8. NATURE OF RESTRAINT OF ACCUSED	
a. BASIC	b. SEA/FOREIGN DUTY	c. TOTAL	9. DATE(S) IMPOSED	
		0.00		
II. CHARGES AND SPECIFICATIONS				
10. CHARGE: VIOLATION OF THE UCMJ, ARTICLE SPECIFICATION:				
III. PREFERRAL				
11a. NAME OF ACCUSER <i>(Last, First, Middle Initial)</i>		b. GRADE	c. ORGANIZATION OF ACCUSER	
d. SIGNATURE OF ACCUSER			e. DATE (YYYYMMDD)	
<p>AFFIDAVIT: Before me, the undersigned, authorized by law to administer oath in cases of this character, personally appeared the above named accuser this _____ day of _____, _____, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.</p> <div style="display: flex; justify-content: space-between; margin-top: 10px;"> <div style="width: 45%;"> <p>_____ <i>Typed Name of Officer</i></p> <p>_____ <i>Grade</i></p> <p>_____ <i>Signature</i></p> </div> <div style="width: 45%;"> <p>_____ <i>Organization of Officer</i></p> <p>_____ <i>Official Capacity to Administer Oath</i> <i>(See R.C.M. 307(b)_ must be commissioned officer)</i></p> </div> </div>				

DD FORM 458, MAY 2000

PREVIOUS EDITION IS OBSOLETE.

Reset

Adobe Professional 7.0

Figure 2-4a. DD Form 458, front.

12. On _____, _____, 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.)		
<div style="display: flex; justify-content: space-between;"> <div style="width: 45%;"> _____ <i>Typed Name of Immediate Commander</i> </div> <div style="width: 45%;"> _____ <i>Organization of Immediate Commander</i> </div> </div>		
_____ <i>Grade</i>		
_____ <i>Signature</i>		
IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY		
13. The sworn charges were received at _____ hours, _____, _____ at _____ <i>Designation of Command or Officer Exercising Summary Court-Martial Jurisdiction (See R.C.M. 403)</i>		
<div style="text-align: right;">FOR THE ¹ _____</div>		
<div style="display: flex; justify-content: space-between;"> <div style="width: 45%;"> _____ <i>Typed Name of Officer</i> </div> <div style="width: 45%;"> _____ <i>Official Capacity of Officer Signing</i> </div> </div>		
_____ <i>Grade</i>		
_____ <i>Signature</i>		
V. REFERRAL; SERVICE OF CHARGES		
14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY	b. PLACE	c. DATE (YYYYMMDD)
Referred for trial to the _____ court-martial convened by _____ _____, _____, _____, subject to the following instructions: ² _____ _____		
By _____ of _____ <i>Command or Order</i>		
<div style="display: flex; justify-content: space-between;"> <div style="width: 45%;"> _____ <i>Typed Name of Officer</i> </div> <div style="width: 45%;"> _____ <i>Official Capacity of Officer Signing</i> </div> </div>		
_____ <i>Grade</i>		
_____ <i>Signature</i>		
15. On _____, _____, I (caused to be) served a copy hereof on (each of) the above named accused.		
<div style="display: flex; justify-content: space-between;"> <div style="width: 45%;"> _____ <i>Typed Name of Trial Counsel</i> </div> <div style="width: 45%;"> _____ <i>Grade or Rank of Trial Counsel</i> </div> </div>		
_____ <i>Signature</i>		
<small>FOOTNOTES: 1 - When an appropriate commander signs personally, inapplicable words are stricken. 2 - See R.C.M. 601(e) concerning instructions. If none, so state.</small>		

Figure 2-4b. DD Form 458, back.

Charge and specification

Part II, Charges and Specifications, of the charge sheet contains the charges and specifications the accused has allegedly violated. Previously, we covered how to draft specifications for both NJP and courts-martial; however, there are some additional factors you must take into consideration when drafting court-martial specifications. When identifying an accused who is a member of a reserve component, identify the accused in the specification in the following manner:

In that AIRMAN FIRST CLASS JERRY W. LIMPKE, United States Air Force Reserve, 3388th Air Base Squadron, on active duty or on inactive duty training, did...

If the accused has a different grade than on the date of the offense, identify the accused by present grade, followed by the grade on the date of the alleged offense. Use all capital letters for the current grade, former grade, and aliases, if applicable. For example:

In that TECHNICAL SERGEANT RONALD T. WHITE, United States Air Force, then MASTER SERGEANT RONALD T. WHITE, alias CAPTAIN TATER R. WHITE, United States Air Force, 301st Maintenance Squadron, did...

Preferral

Preferral of charges is covered under R.C.M. 307 and specifically outlines the steps that must be taken to prefer charges on an accused. As a military justice paralegal, you will prepare what is known as a “preferral package” for the accuser.

This package contains the following:

- Charge sheet (DD Form 458).
- Commander’s indorsement.
- Personal data sheet (PDS).
- ROI.
- Statement of understanding regarding recoupment.

The commander’s indorsement

The commander’s indorsement is addressed to the SPCMCA from the member’s immediate (squadron) commander. This indorsement addresses the accused’s character of service before the date of the offense(s), rehabilitation potential, recommendations for referral of charges to a specified court (summary, special, general), whether the evidence supports the charge(s), and a retention recommendation. The commander will sign this at the time of preferral. The PDS and ROI are attachments to this document.

The accuser must:

1. Be a person subject to the UCMJ and sign the charges and specifications under oath before a commissioned officer of the armed forces authorized to administer oaths.
2. Have personal knowledge of or investigated the offense(s) alleged and attest they are true in fact to the best of that person’s knowledge and belief.

In most cases, the accuser is the accused’s immediate commander. Part III, Preferral, of the charge sheet is the actual preferral of charges on the accused and is signed by both the accuser and the person administering the oath. Before the preferral, verify that the accuser’s name, grade, and organization are reflected accurately, as well as the date the actual preferral will take place. Also type in the name, grade, organization, and the official capacity of the officer who will administer the oath. The person administering the oath to the accuser must be a commissioned officer and, normally, is a judge advocate, administrative officer, director of administration, or chief of administration. *Public notaries cannot administer oaths to accusers.* The officer administers the affidavit before preferral of charges.

When charges are preferred, the accuser signs in block 11d of the DD Form 458. This is signed under oath in front of the person who signs the affidavit. The immediate commander will then personally inform the accused of the charges by reading them to the accused and will sign in block 12 of the charge sheet. In cases where someone other than the accused's immediate commander prefers charges, the immediate commander will still inform the accused of the charges preferred and sign in block 12.

At this point, the accused receives a copy of the charge sheet, along with the commander's indorsement, PDS, ROI, and recoupment statement.

Recoupment statement

The recoupment statement is signed by the accused and addresses the understanding that a portion of education assistance, special pay, or bonus money received by the accused, if any, may be recouped if the accused is separated before completing the period of active duty agreed to serve.

Receipt of sworn charges

Part IV, Receipt by Summary Court-Martial Convening Authority, of the charge sheet is used for receipt of sworn charges. When the charges arrive at the legal office, they are reviewed and, if found to be in proper order, the sworn charges must be received by the SCMCA. This is normally the installation commander, who is also the SPCMCA. An SJA may perform this function under the authority line of the commander if the convening authority delegates that authority. If delegated, the SJA receive the charges "FOR THE COMMANDER" in block 13 of the DD Form 458. Normally, the receipt of sworn charges is accomplished the same day as preferral. This step is important because it stops the running of the statute of limitations.

Forwarding charges

The immediate commander forwards the charges to the SPCMCA, through the SJA. The commander forwards the charge sheet, indorsement, PDS, ROI, and any other evidence supporting the charge(s). Upon thorough review, the SPCMCA may dismiss the charges; forward the charges to a subordinate commander for disposition; forward any charges to a superior commander for disposition; refer charges to an SCM or SPCM; or direct a pretrial investigation under R.C.M. 405, and, if appropriate, forward the report to a superior commander for disposition.

If the SPCMCA desires to dispose of a case before either an SCM or SPCM, no additional investigation is required. The convening authority establishes "convenes" a court to which the charges are to be referred. A court is established by preparing a convening order detailing members to sit as a court. We discuss convening orders and referral in detail later in this unit.

If the SPCMCA desires to dispose of the case by a GCM, the SPCMCA forwards the preferred charges to a preliminary hearing under Article 32, UCMJ. This is the same preliminary hearing we referenced above under R.C.M. 405. Once the preliminary hearing is complete, if the SPCMCA believes a GCM is warranted, he or she forwards the investigation to the GCMCA.

Self-Test Questions

After you complete these questions, you may check your answers at the end of the unit.

614. Preparing an initial disposition of a sexual assault allegation

1. What kind of offenses is withheld from initial disposition by the Secretary of Defense from a commander not in the grade of O-6 or higher and does not possess SPCMCA?
2. What are the mandatory items that the SPCMCA must consider when making a decision?

3. What information may the SPCMCA consider when making their decision?
4. What office is required to draft the legal review, and who must acknowledge the disposition decision in writing?

615. Preparing the charge sheet and preferring charges

1. Why is it important to check that the personal data on the DD Form 458 is accurate?
2. What information is included in the Current Service block on the DD Form 458?
3. Who can sign a charge sheet as an accuser?
4. What must an accuser do before he or she can prefer charges on an accused?
5. In the preferral process, what happens after the accuser signs the DD Form 458 in block 11d?
6. After the accused is notified of the charges against him or her, what important step must take place and why is it so important?
7. Once the SPCMCA receives the charges, what options does the SPCMCA have?
8. If the SPCMCA desires to dispose of the case by a GCM, what must happen?

Answers to Self-Test Questions

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1. Article 15, UCMJ provides commanders with an essential and prompt way of disposing of minor disciplinary infractions.
2. Nature of the offense; circumstances surrounding its commission; age, rank, duty assignment, record, and experience of the offender; and the maximum sentence imposable if tried by a GCM.
3. The commander bears sole responsibility for the final decision.

4. While no specific standard of proof applies to NJP proceedings, including appeals, commanders should recognize a member is entitled to demand trial by court-martial, in which case proof beyond a reasonable doubt of each element of every offense by legal and competent evidence is a prerequisite to conviction. Whether such proof is available should be considered before initiating action under Article 15, UCMJ.
5. Before a successor in command can assume NJP jurisdiction, an assumption of command order (also known as G-series orders, AF Form 35) must be published.
6. The commander who is the victim of the crime should forward the report of the incident to the next higher commander.
7. A commander who is a general officer or a GCMCA may delegate his or her NJP powers to a principal assistant.
8. The original letter or directive is filed in the office of the SJA servicing the commander withholding the authority. A copy must be filed in the SJA's office servicing the commander whose authority has been withheld.
9. Commanders should offer NJP within 21 days of the date of discovery of the offense, or be able to explain why this was not appropriate.
10. Commanders must complete 80 percent of all NJP actions (date of discovery through servicing SJA review date) within 39 days.

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1. Review the evidence and compare it to the elements listed under the particular article of the UCMJ the member is accused of violating.
2. Each punitive article of the UCMJ contains sample specifications for use in preparing charges and specifications.
3. Department of the Army (DA) Pamphlet 27-9, *Military Judges' Benchbook*, or the samples provided in AFI 51-201, *Administration of Military Justice*.
4. The first stage in the NJP process is "the offer"
5. Service of "the offer" of NJP.
6. They provide the member a chance to speak to the commander face to face.
7. Immediately refers the matter to the servicing SJA.
8. The commander, with the concurrence of the convening authority.
9. The grade and status of the commander, and the grade of the accused.
10. The forfeiture is based on the reduced grade.
11. (1) Withdraw the old AF Form 3070 and initiate a new action on a new AF Form 3070.
(2) Notify the member in writing of the change in commanders by using the notification format in AFI 51-202, Attachment 3. When using the memorandum, verify a copy is attached to the AF Form 3070.
12. The date the commander imposes punishment.
13. Restriction and extra duties may run concurrently, but the combination may *not* exceed the maximum imposable for extra duties.
14. The member must indicate his or her appeal decision within five calendar days by initialing only one area in block 6a-c, Member's Appeal Decision, of the AF Form 3070.
15. If less than full relief is granted, the appeal must be sent to the appeal authority, through the SJA.
16. Unless otherwise stated, relief granted as a result of an appeal is effective from the date the punishment was initially imposed.
17. For enlisted members, a record of any suspended punishment under Article 15 or unsuspended Article 15 punishment with any portion of the punishment exceeding one month (31 days or more) must be filed in a UIF.
18. When the member is an officer or enlisted member required to meet an evaluation board the commander imposing punishment decides whether or not to file the NJP in the member's promotion selection record. When the member is an officer or enlisted member required to meet an evaluation board the commander imposing punishment decides whether or not to file the NJP in the member's promotion selection record. The filing decision is made after punishment is imposed and any appeal is resolved.

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1. The SJA or designee reviews the NJP action for legal sufficiency.
2. An AF Form 1373.
3. To the SJA for the officer exercising GCMCA.
4. The GCMCA SJA sends the original record for filing in the master personnel record group at AFPC.
5. Evidence and other written materials are filed in the office of the SJA servicing the commander who initiated the NJP as attachments to the file copy of the action.
6. Set-aside, remission, mitigation, suspension.
7. The commander or a successor in command.
8. (a) set-aside; (b) remission; (c) mitigation; (d) suspension; (e) set-aside; (f) suspension; (g) remission.
9. All requests are processed and filed with the original NJP record to ensure inclusion with other official file copies.
10. If the member violates any punitive article of the UCMJ or a condition of suspension specified in writing by the commander during the period of suspension, the commander who imposed the punishment or a successor in command may vacate the suspension.
11. The member *does not* have the option of demanding trial by court-martial or the right to appeal the action to a superior commander once the punishment previously suspended is ordered executed.
12. The commander may take vacation action and, if appropriate, offer new NJP, based on the same offense
13. The new offense occurred during the period of probation.
14. It is reduced is the date the original reduction was imposed by the commander; however, the effective date is the date of the vacation action.

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1. Rape or sexual assault in violation of Article 120, UCMJ; forcible sodomy, in violation of Article 125, UCMJ; and attempts to commit the offenses above, in violation of Article 80, UCMJ.
2. Matters transmitted from lower commanders, court-martial charges (if any), any independent review and recommendation received, victim input, and/or consultation with the SJA.
3. The SPCMCA may consider the disposition guidance contained in Appendix 2.1 of the *Manual for Courts-Martial*.
4. The office of the SJA drafts the legal review for the SPCMCA and forwards it to the GCMCA for acknowledgement.

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1. Because it can affect the sentence.
2. The beginning date of current enlistment and number of years of enlistment.
3. A person subject to the UCMJ.
4. He or she must sign the charges and specifications under oath before a commissioned officer of the armed forces authorized to administer oaths and have personal knowledge of or must have investigated the offense(s) alleged and that they are true in fact to the best of that person's knowledge and belief.
5. The immediate commander will personally inform the accused of the charges by reading them to the accused and will sign in block 12 of the charge sheet.
6. The SCMCA must receive the sworn charges. It is important because it stops the running of the statute of limitations.
7. Dismiss the charges; forward the charges to a subordinate commander for disposition; forward any charges to a superior commander for disposition; refer charges to an SCM or SPCM; or direct a pretrial investigation under R.C.M. 405, and, if appropriate, forward the report to a superior commander for disposition.
8. The SPCMCA forwards the preferred charges to a preliminary hearing under Article 32, UCMJ.

Unit 3. Convening Authority's Options

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THE CONVENING AUTHORITY has many options when they are in receipt of charges. Figure 3-1 outlines the options. This diagram focuses on the options of a GCMCA. Once in receipt of charges (previously preferred charges) the GCMCA may dismiss the charges, forward the charges to a subordinate commander for disposition, refer the charges to a summary court-martial, refer the charges to a special court-martial after receiving pretrial advice from the SJA, or refer the charges to a general court-martial after an Article 32, UCMJ preliminary hearing and pretrial advice from the SJA.

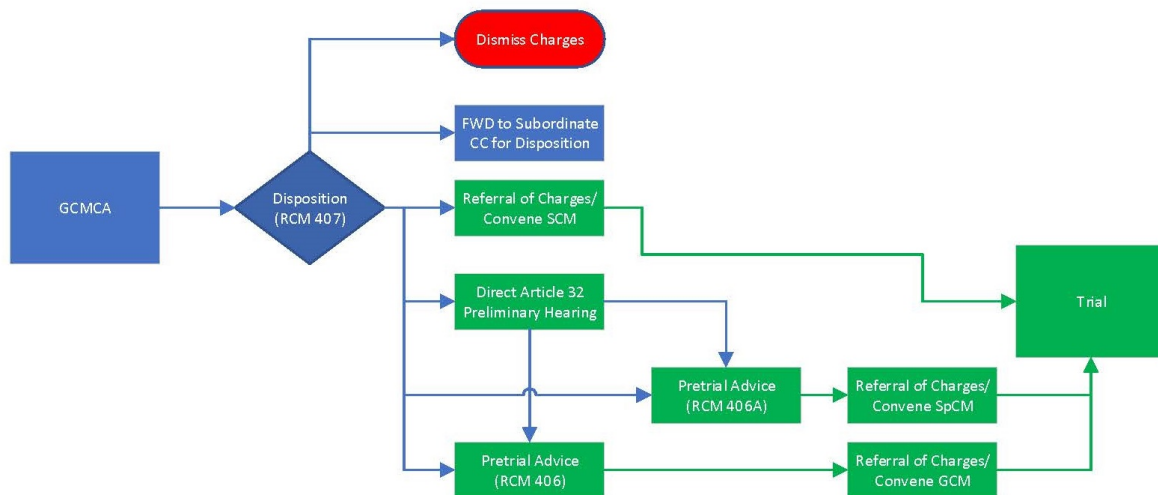


Fig. 3-1. GCMCA options regarding charges.

616. Referring charges to court-martial and convening orders

In this lesson, we cover referring charges to court-martial and some special circumstances involving charges and specifications after referral. Additionally, we cover the general requirements for each type of court-martial's convening orders, as well as order composition, authentication, and amendments.

Referring charges to courts-martial

R.C.M. 403, 404, 407, and 601 discuss referral of charges. Specifically, R.C.M. 601 states, “a referral is the order of a convening authority sending charges against an accused to a specific court-martial (GCM/SPCM/SCM).” The convening authority must have a basis for referral. If they find or are advised by a judge advocate that there is probable cause to believe that an offense triable by a court-martial has been committed, the accused committed it, and the specification alleges an offense, the convening authority may refer it. The convening authority may base their finding on hearsay, in whole or in part, and may consider information from any source; the information shall not be limited to information reviewed by any previous authority.

As covered earlier, a referral package is prepared and sent to the convening authority for consideration and disposition in the case. Regardless of the level of court, SPCM or GCM, this

package will be prepared and forwarded to the appropriate convening authority. Generally, charges should be tried at the lowest level that has the power to adjudge an appropriate punishment for the offenses to be referred for trial. Even though the maximum punishment chart in the MCM may authorize a punishment above what an SPCM may give, it may be in the best interest of the AF to dispose of the case by an SPCM. This is, of course, at the discretion of the convening authority.

Only a GCM has jurisdiction over the following offenses (R.C.M. 201(f)(1)(D)):

- Rape under Article 120(a), UCMJ.
- Sexual assault under Article 120(b), UCMJ.
- Rape of a child under Article 120b(a), UCMJ.
- Sexual assault of a child under Article 120b(b), UCMJ.
- Attempts to commit the above offenses, in violation of Article 80, UCMJ.

The type of court-martial the case is referred to determines which legal office will prepare the referral of charges and the convening order. If the case is referred to an SCM or SPCM, it will be handled at the base-level legal office. For a GCM, it is handled at the GCM legal office; for example, a case where a member is accused of abusing prescription medication. This is a serious offense, but may not rise to the level of a GCM. If the SPCMCA decides from the very beginning to dispose of the case as an SPCM, the base-level legal office will prepare the referral package for the SPCMCA.

On the other hand, if we have a case where a member is accused of rape, this will be forwarded by the SPCMCA to the GCMCA since a GCM has jurisdiction over these offenses. That assumes, of course, that the Article 32, UCMJ preliminary hearing has taken place and there is probable cause and a GCM is still warranted. Only then will the package be sent to the GCM SJA where the pretrial advice and referral package would be accomplished at that level.

Once the GCMCA determines which type of court is appropriate for the case, they will either personally sign the DD Form 458, Charge Sheet Part V, Referral, Service of Charges, or delegate that authority to sign to a judge advocate (normally the SJA). The referral of charges to trial is a command, rather than a staff, function; therefore, an SJA does not have the sole authority by reason of position to make referrals. If the convening authority personally signs the referral, strike out “by ... Command or Order ... of ...” and include the convening authority’s signature block. If the convening authority delegated authority to sign the referral block to the SJA, the SJA signs the referral “FOR THE COMMANDER.”

Occasionally, a special instruction may be necessary to dispose of a case properly. For example, it may be necessary to include such special instructions such as:

- “To be tried as a capital case.”
- “To be tried as a noncapital case” when a capital case is referred as noncapital.
- “To be tried in a (joint/common) trial with Airman First Class John C. Smith” when referring charges to a joint or common trial.
- “To be tried by a special court-martial consisting of a military judge alone pursuant to Article 16(c)(2)(A), UCMJ” when a case is referred to a SPCM by a military judge alone.
- If no such special instructions apply, type in the word “None”—do not leave the area blank.

In addition to deciding as to the type of court and signing the charge sheet, the convening authority will select an appropriate number of court-martial panel members from the list provided in the referral package. The convening authority only selects panel members for SPCMs and GCMs. An SCM is composed of only one commissioned officer and does not have panel members.

Generally, between 8 and 12 members are selected for an SPCM, and between 10 and 15 members for a GCM. However, the number may vary depending on local policy. Enough members should be detailed so that after challenges, a GCM will consist of at least eight members with or without

alternates, and a SPCM will consist of at least four members with or without alternates. The only exception is GCMs where an accused may be sentenced to death—these require a panel of 12 members minimum.

In a case where an enlisted accused requests enlisted members, the convening authority should detail enough enlisted members so that, after challenges, the court will consist of at least one-third enlisted members.

Check that the enlisted members are senior in grade or rank to the accused. If a CMSgt, (E-9) is being court-martialed, and requests enlisted members on the court, only other CMSgts could sit as members. However, all would need to have earlier dates of rank than the accused. The request may be in writing or orally on the record; however, the request must be made before the members are assembled. If physical conditions or military exigencies prevent the detailing of enlisted members to the court, the convening authority must make a detailed written statement to be appended to the ROT stating why the enlisted members could not be detailed. Once the convening authority has selected members, the referral package will be sent back to the appropriate-level legal office for preparation of the convening order.

One last item to be considered is the nationality of the accused. If the accused is a foreign national United States Air Force (USAF) member, the SPCMCA SJA must have the accused's records examined to ascertain the accused's nationality no later than 24 hours after referral, even if a claim of foreign nationality has not been made. A foreign national USAF member is a member of the USAF who is a national of a foreign country and not a citizen or national of the United States (AFI 51-201, Paragraph 9.4.1.3, *Completing the Referral Block on the Charge Sheet*). Notify Headquarters United States Air Force, Operations and International Law Directorate (HQ USAF/JAO) upon referral of charges (AFI 51-201, para. 23.5.4, *When to Report*).

Service of charges

Once charges are referred for trial, the trial counsel must serve the charges on the accused. The trial counsel signs and indicates the date he or she either served or caused to be served, a copy of the charge sheet on the accused. This is accomplished in Part V of the charge sheet. In the absence of a waiver by the accused, the statutory waiting period requires that no charges may be brought to trial before an SPCM within three days after charges are served on the accused or to trial before a GCM within five days after the charges are served on the accused. When calculating these periods, exclude the date of service of charges and the date of the trial.

Changes to charges and/or specifications

As explained in R.C.M. 603, changes may be made to charges and/or specifications after referral. These changes are made on the original charge sheet and the person making the changes, normally the trial counsel, will initial and date by each change. Changes are made by lining through the material while ensuring the form remains legible. *Do not use white-out tape or liquid for any changes.* Changes are made for several reasons and are classified as either minor or major. As you might imagine, the process for making these changes differs depending on whether it is a minor or major change.

Minor changes

A minor change in a charge or specification is any change other than a major change. (R.C.M. 603(b)(2)) These changes include those necessary to draft poorly written or redundant specifications, correct a misnaming of an accused, to allege the proper article, or to correct other slight errors. They may include those that reduce the seriousness of an offense.

Major changes

A major change is one that adds a party, an offense, a substantial matter not fairly included in the preferred charge or specification, or that is likely to mislead the accused as to the offense charged.

Major and minor changes before referral

Before referral, a major or minor change may be made to any charge or specification so long as it does not require reopening the Article 32, UCMJ preliminary hearing.

Major changes after referral or preliminary hearing

After referral, a major change may not be made over the objection of the accused unless the charge or specification is withdrawn, amended, and referred anew. In the case of a GCM, a major change made to a charge or specification after the preliminary hearing may require reopening the preliminary hearing.

Minor changes after referral

Minor changes may be made to the charges and specifications after referral and before arraignment. After arraignment, the military judge may, upon motion, permit minor changes in the charges and specifications at any time before findings are announced if no substantial right of the accused is prejudiced.

The new preferral and referral of the changed or amended charge and/or specification is accomplished by attaching an indorsement to the original charge sheet containing the new preferral, notification to the accused, receipt by the SCMCA, referral, and service of charges upon the accused.

Numbering additional charges and/or specifications

New and separate charges preferred are referred to as “additional charges.” Ordinarily, these additional charges are related to misconduct not known at the time or to offenses committed after the original charges were preferred. Additional charges may be incorporated in the trial at any time prior to arraignment. The arraignment of a trial is complete when the military judge formally asks how the accused pleads. The plea is *not* part of the arraignment.

When there are additional charges, prepare an additional DD Form 458. Number the additional charges in the same basic manner as initial charges. For example, designate a single additional charge simply as “ADDITIONAL CHARGE;” however, if there is more than one additional charge, designate them as ADDITIONAL CHARGE I, ADDITIONAL CHARGE II, and so forth.

When numbering specifications under additional charges, never use the term “additional specification”; if there is more than one specification under any additional charge, show them as “Specification 1, Specification 2,” and so forth. Remember to include proper instructions in the referral portion (Part V, Referral, Service of Charges) of the additional charge sheets, such as:

To be tried with the original charge(s) dated _____ [date of preferral of original charge(s)].

Convening orders

The convening order designates the type of court, details the members of the court, and states the place it is to meet. There are many rules and procedures that you must be familiar with whether the accused is to be tried by an SCM, SPCM, or GCM. Also, it is important that you follow the rules carefully for the specific type of court. When preparing convening orders, follow the guidelines outlined in R.C.M. 504, R.C.M. 1302, and AFI 51-201.

Summary courts-martial

A convening order for an SCM shall designate that it is an SCM, detail the SCMO, and may designate where the court-martial will meet. The convening order may be a separate order prepared in accordance with R.C.M. 504(d)(2), or it may consist of a notation on the charge sheet signed by the convening authority.

For example, after the heading, the body of the order would read:

A summary court-martial is hereby convened. It may proceed at this station to try such persons as may be brought before it. MAJOR PAMELA A. AGUILAR, 101 FS/CC, Bolling AFB, DC, is detailed as the summary court-martial.

If notating the charge sheet, use the following format for Block 14 of the DD Form 458:

Referral for trial to the summary court-martial convened by Special Order AC-1, this headquarters, dated 22 November 2011, subject to the following instructions: Lt Col John Q. Smith, 101 FS/CC, Bolling AFB, DC, is detailed as the summary court-martial.

NOTE: The words “by” and “of” on the fifth line of Block 14 are lined out, and the officer exercising SCMCA personally signs Block 14 once his or her name, grade, and duty title are completed.

Special and general courts-martial

As in the case of SCMs, SPCMs and GCMs are created by a convening order issued by the convening authority. Appendix 6 of the MCM offers additional guidance for drafting SPCM, and GCM convening orders and AFI 51-201 provides a sample of each.

Orders composition

The special orders convening a court-martial are composed of three basic parts as shown below:

Special Order Convening a Court-martial	
Order Segment	Description
Heading	<p>The first part contains the Department of the Air Force (DAF) complete unit designation, MAJCOM, special order number, and date.</p> <p>NOTE: The special order number is reflected in Part V, Referral, Service of Charges, of the charge sheet. In addition, the date of referral designated on the charge sheet and the date of the convening order are the same.</p>
Body	<p>The second part identifies the type of court convened, where it may proceed, and the members detailed to the court.</p> <p>NOTE: Identification of members should contain the rank, name, unit, MAJCOM, and base of all persons detailed to the court. If a detailed member is not under the command of the convening authority, the order must clearly indicate the member has been detailed with the concurrence of the member's commander.</p>
Close	<p>The third part contains the convening authority's signature block, distribution, and SO number in the lower right-hand margin. If the authority to sign the convening order has been delegated to the SJA, his or her signature block will appear below that of the convening authority.</p> <p>NOTE: The designation of the convening authority on the charge sheet and the convening order are the same.</p>

If the convening authority derives the jurisdiction by designation from the SAF according to Article 22(a)(8), UCMJ, to convene GCMs or Article 23(a)(7), UCMJ, to convene SPCMs, the first paragraph of the convening order must cite the order designating that authority (AFI 51-201). If the authority to convene the court-martial is derived by the specific statute of the UCMJ and *not* designated or delegated as above, then no reference is made to that authority in the convening order.

Numbering orders

AFI 51-201 is the authority for assigning a series of special orders to a specific action. Orders convening courts-martial are special orders numbered consecutively on a fiscal year basis, starting

with number 1. The number follows an A-series prefix. Use an A letter prefix for a GCM, an AB letter prefix for a SPCM, and an AC letter prefix for an SCM and an AD for SPCM by military judge alone. The first order of the year has a statement at the top, before the heading, giving the number of the last order of the year; for example: “Special order AB–2 dated 20 September 2018 was the last special order of this headquarters published in fiscal year 18.” If there were no special orders published the year prior, then write that in the statement: “There were no special orders published in fiscal year 18.”

Amendments to convening orders

There are times when amending a convening order may be necessary, as commonly seen when members are excused and replaced before trial. If it is necessary to amend an order or to add or delete members, first prepare an amendment to the original order. Issue no more than two amendments to the original order. If a third amendment is required, your next step is to publish a new order convening the court with a savings clause that transfers all cases the court has not yet assembled to the new order. You must ensure all amendments to a convening order, and all convening orders with a savings clause cite all prior orders.

Furnish a copy of the convening order and any amendments to the military judge. Include the order and any amendments in all copies of the ROT.

Authenticating convening orders

A GCM or SPCM convening order may be authenticated by the convening authority that does the following:

1. Personally signs the order.
2. Designates a representative to sign the order. However, in this instance, the close of the order must bear the signature element of the convening authority.

Before the court-martial is assembled, the convening authority can excuse members or change the members of a court-martial without showing cause. The convening authority may delegate the authority to excuse individual members of a court-martial to the SJA, legal officer, or another principal assistant. The convening authority’s delegate may *not excuse more than one-third* of the total number of members. After assembly, no member may be excused from the court, except by the convening authority or military judge for good cause shown on the record or as a result of a challenge.

Self-Test Questions

After you complete these questions, you may check your answers at the end of the unit.

616. Referring charges to court-martial and convening orders

1. When may a convening authority refer a case to a court-martial?
2. What situation determines which level of legal office will prepare the referral of charges and convening order?
3. What is the next step in the referral process after the convening authority determines what type of court is appropriate?

4. If two individuals are being tried jointly, what information must be included in the referral for trial?
5. In general, what is the maximum number of members detailed to an SPCM?
6. What is the minimum number of members that are required to be detailed to the court for a GCM where the death penalty may be imposed?
7. If enlisted members are requested by the accused, what portion of the court members must be enlisted?
8. What must take place if the accused is a foreign national USAF member?
9. Once charges are referred to trial, what must occur? Who verifies it is accomplished?
10. How are changes made to charges and/or specifications?
11. What is a major change to a charge and/or specification?
12. What is the most significant difference between making minor and major changes to a charge and/or specification?
13. How are additional charges numbered on the DD Form 458?
14. What is the purpose of a convening order?
15. In what two ways may an SCM be convened?
16. What date is placed on a court-martial convening order?

17. How are members identified in a convening order?
18. How are orders convening courts-martial numbered?
19. How many amendments may be issued to the convening order before publishing a new order?
20. What is the purpose of a savings clause?

617. Types of court proceedings

In this lesson, we cover the four types of courts-martial you will encounter as a paralegal. We will begin by covering the SCM.

Summary court-martial

The SCM may try enlisted members subject to the UCMJ for any noncapital case offense made punishable by the UCMJ. The SCM is designed to reach a judicial decision promptly for minor offenses under a simple procedure that does not result in a federal conviction. The summary court is composed of one active duty commissioned officer who is normally a judge advocate in the rank of captain (O-3) or above. The summary court-martial officer (SCMO) is detailed in a convening order and must be impartial. The SCMO ensures that justice is served. The SCMO is responsible for thoroughly and impartially inquiring into both sides of the matter and safeguarding the interests of the government and the accused.

A member may object to trial before an SCM; however, he or she must do so before arraignment. When a member refuses trial by SCM, the convening authority may dispose of the case by other means, such as dismissing any or all of the charges, forwarding any or all of the charges to another commander for disposition, or referring any or all of the charges to a court-martial the commander is empowered to convene. In other words, objecting to trial by SCM will not alleviate a member from going to either a SPCM or GCM, as applicable.

Conditions for seeking legal advice

Although the SCMO may seek the advice of a judge advocate or legal officer on questions of law, he or she may not seek advice on factual conclusions, or the sentence, which the SCM should impose. It is the independent duty of the SCMO to make these determinations.

On the other end of the spectrum, neither the Constitution nor any other statute establishes the right for the member to have counsel at an SCM. However, the appearance of counsel is not prohibited, and the member may have civilian counsel at his or her own expense. It is common practice in the AF to provide a military attorney to represent the accused at the SCM.

Punishment

An SCM may impose any of the following punishments (R.C.M. 1003/1301):

- Confinement for 30 days.
- Hard labor without confinement for 45 days.
- Restriction for two months.

- Forfeiture of two-thirds pay for one month.
- Fine.
- Reduction to the lowest pay grade.
- A reprimand.

NOTE: Enlisted members in the grade of E-5 (SSgt) or above may *not* receive confinement, hard labor without confinement, or reduction, except to the next pay grade. In addition, when a fine is adjudged, any fine or combination of fine and forfeitures may not exceed the total amount of forfeitures that may be adjudged in the case.

Trial

R.C.M. 1304 and Appendix 9 of the MCM guides SCM trial procedures. As you may imagine, these are quite detailed. Because of this, only the main components will be highlighted here. Before an actual trial begins, the SCMO shall examine the charge sheet, allied papers (convening orders, investigative reports, correspondence relating to the case, and witness statements), and the accused's personnel records to verify they are complete and free from errors or omissions which might affect admissibility. Any substantial irregularity is reported to the convening authority. The SCMO may correct errors on the charge sheet and amend charges and specifications in accordance with R.C.M. 603.

After the review is complete, the trial will begin with a preliminary proceeding. This proceeding is where the accused receives a copy of the charge sheet and is informed of numerous rights and details concerning the trial (R.C.M. 1304(b)(1)(A-N)). The accused is allowed to object to trial by SCM before arraignment. If the accused objects, the charges are returned to the convening authority for disposition. If the accused does not object, the SCMO will read and show the charges and specifications to the accused and ask him or her to plead to each specification and charge. Before receiving these pleas, the SCMO will allow the accused to make motions to dismiss or for other relief. The SCMO rules on motions, and then receives the pleas.

In the next phase of the SCM, the SCMO examines all available evidence and hears witness testimony while gathering evidence that tends to disprove the accused's guilt or establish extenuating circumstances. After evidence and witnesses, the SCMO must determine guilt or innocence, and, if found guilty, adjudge a sentence. The SCMO announces the findings and sentence to the accused in open session. Once announced, the accused is advised of the right to submit written matters to the convening authority and to request that TJAG review the final conviction. The SCM ROT is prepared on the DD Form 2329, Record of Trial by Summary Court-Martial.

SPCM and GCM

Trials by SPCM and GCM are quite different from the SCM. Since the accused, if found guilty, could face much more severe forms of punishment, trial by SPCM or GCM generally involve more serious offenses.

SPCM by military judge alone

This court cannot proceed over the objection of the accused and may adjudge up to a *maximum* of:

- Confinement for six months.
- Forfeiture of two-thirds pay per month for six months.
- Fine.
- Hard labor without confinement for three months.
- Reduction to airman basic (E-1).
- Reprimand.

SPCM

A SPCM not referred to a military judge alone forum, regardless whether an accused requests trial by military judge alone may adjudge up to a *maximum* of:

- Confinement for one year.
- Forfeiture of two-thirds pay per month for one year.
- Fine.
- Hard labor without confinement for three months.
- Reduction to E-1.
- Reprimand.

GCM

A GCM may adjudge up to a *maximum* of:

- Dismissal (officers) or a DD (enlisted).
- Total forfeiture of pay and allowances.
- Confinement for life.
- Death.

The punishments listed are the maximum authorized, and many other punishments and combinations of punishments may be authorized. Guidance on punishments for SPCM and GCM are found in R.C.M. 201 and R.C.M. 1003.

Special courts are composed of a military judge and four members with or without alternates, or referred to a military judge alone if requested by the accused and approved by the military judge.

General courts are composed of a military judge and eight members with or without alternates, or a military judge alone if requested by the accused and approved by the military judge. In non-capital GCM cases, the quorum may fall to six members after impanelment without having to return to the convening authority to detail new members to the court. In all capital cases, GCMs shall consist of a military judge and not less than 12 members with or without alternates.

Trial procedures for SPCMs and GCMs are quite extensive and can be found in the MCM, Chapter IX and X.

Self-Test Questions

After you complete these questions, you may check your answers at the end of the unit.

617. Types of court proceedings

1. Who may be tried by an SCM?
2. What punishment restrictions in an SCM apply to military members E-5 or above?
3. Before an SCM begins, what must the SCMO accomplish?
4. On what form is the SCM ROT prepared?

5. What is the composition of a SPCM?

6. What is the composition of a GCM?

618. Article 32, Uniform Code of Military Justice, preliminary hearing

Unlike the civilian criminal codes, the military justice system does not provide for grand jury panels. The closest form to such an inquiry is the Article 32, UCMJ, preliminary hearing. These hearings are related to serious cases requiring a test of the evidence against the accused before referral to a GCM.

Purpose of Article 32, UCMJ

Charges cannot be referred to a GCM for trial unless there has been a hearing conducted in accordance with Article 32 of the UCMJ. The primary purpose of an Article 32, UCMJ preliminary hearing is to determine the following:

- Whether the specification alleges an offense under the UCMJ.
- Whether there is probable cause to believe the accused committed the offense charged.
- Whether the convening authority has court-martial jurisdiction over the accused and the offense.
- A recommendation as to the disposition that should be made of the case.

The preliminary hearing officer (PHO) is charged with conducting an impartial hearing. The PHO is not an advocate for the government; rather, the PHO is charged with determining whether probable cause exists to believe that the accused committed the offense or offenses charged. All witnesses, other than the accused, must be sworn or affirmed before their testimony may be received. The accused may make a sworn or unsworn statement.

The accused may submit in writing, a waiver to a preliminary hearing. However, the convening authority authorized to direct the preliminary hearing may order the preliminary hearing notwithstanding the waiver.

Article 32, UCMJ process

When an SPCMCA believes trial by GCM is warranted, the convening authority must personally appoint a PHO in writing. Whenever practicable, the PHO should be senior in rank to the accused, must be a designated judge advocate, and certified under Article 27(b), UCMJ. The accuser may not act as the PHO, and the PHO must be impartial. When appointing the PHO, the convening authority should consider the appointment in the context of the officer's normally assigned duties and assess whether the PHO's impartiality could be questioned based upon his or her relationship with the case, the parties, and the base legal office. The PHO is disqualified from acting later in the same case in any other capacity. As soon as you know who the PHO will be, ensure that he or she has a copy of the *AFLOA/JAJM Article 32 Preliminary Hearing Officer's Guide* and script for review.

Sequential actions of the Article 32 process:

1. PHO informs accused of their rights under R.C.M. 405(f).
2. Counsel for the government presents evidence.
3. Defense counsel may cross-examine adverse witnesses.
4. PHO may question witnesses.
5. Defense counsel may present matters.

6. Counsel for the government may cross-examine adverse witnesses.
7. PHO may question witnesses.
8. Hearing closes.
9. The government, accused, and named victim have 24 hours to submit supplemental information for consideration by the convening authority (R.C.M. 405(k)(1), AFI 51-201, Paragraph 7.6, *Supplementary Information*).
10. If counsel for the government or the victim submits matters, defense counsel has five days from the closure of the preliminary hearing to rebut (R.C.M. 405(k)(2)).
11. The PHO assembles the preliminary PHO report and delivers it to the SJA within eight days of the closure of the hearing or receipt of supplementary information.
12. The accused has five days to submit objections to the PHO report (R.C.M. 405(l)(5) AFI 51-201, Paragraph 7.9, *Objecting to the PHO Report*).
13. The SPCMCA decides to recommend a GCM.
14. SPCMCA makes the recommendation in writing to the GCMCA.
15. SPCMCA directs the SPCMCA SJA to send the charge sheet, all evidence, and a list of potential members to the GCMCA.
16. GCMCA receives written pretrial advice from the GCMCA SJA.
17. GCMCA decides on a GCM, selects the court members, and completes the referral of charges.
18. GCMCA directs the GCMCA SJA to prepare the convening order and forward all documents back to the base for trial.

Conducting the hearing

An Article 32, UCMJ preliminary hearing is conducted in somewhat the same manner as a trial by court-martial, in that the accused is present and may have counsel at the hearing. The primary difference between a court-martial and a preliminary hearing is that a preliminary hearing is concerned only with finding facts and does not place blame or impose punishment. A suitable recording device must record all preliminary hearings. The government is not required to complete a verbatim transcript of all or any part of the preliminary hearing, but the SJA may authorize a verbatim transcript. If the SJA authorizes a verbatim transcript, then the accused and the victim may request, have access to, and be provided a copy of the verbatim transcript.

At the beginning of the hearing, the PHO must inform the accused of the following:

- Charges under investigation.
- Identity of the accuser.
- Right to be present throughout the taking of evidence (except under the circumstances described in R.C.M. 804(c)(2).
- Right to have counsel.
- Notice of the witnesses and other evidence then known which the PHO expects the government to present.
- Purpose of the preliminary hearing.
- Right against self-incrimination under Article 31, UCMJ.
- Right to cross-examine witnesses against the accused on matters relevant to the issues for determination.

- Right to present matters relevant to the issues for determination.
- Right to make a sworn or unsworn statement, orally or in writing relevant to the issues for determination.

Prior to the hearing, the PHO must review the charge sheet and the evidence, which forms the basis for the charge(s), and other documents attached to the PHO appointment letter. The PHO may contact the prosecution and defense counsel to discuss administrative matters, including setting the date and time for the formal hearing.

Counsel for the government arranges for the presence of military witnesses directly or through the witness' commander. Counsel for the government may invite civilian witnesses to attend, but cannot subpoena civilians to appear at an Article 32, UCMJ hearing.

When all parties are ready to proceed, the hearing will take place. The Article 32, UCMJ preliminary hearing is usually open to the public, and all efforts to keep it open should be explored before closing it. Special victim's counsel (SVC) is entitled to attend all open sessions of Article 32, UCMJ preliminary hearings and all closed sessions involving their clients. Within the hearing, evidence will be presented, and witnesses will testify. The PHO may allow the accused or the accused's counsel to make a brief argument, if requested. Objections may be made. If the accused elects to make a statement, such a statement may be made under oath or it can be an unsworn statement. Afford the accused the opportunity of signing and swearing to the truth of the substance of such statement after it is reduced to writing. However, the accused is *not* required to make any statement whatsoever.

If evidence received at an Article 32, UCMJ preliminary hearing indicates the accused committed uncharged misconduct then the PHO may investigate the subject matter of the offense and make a recommendation as to its disposition prior to preferral of charges on that offense. The PHO should ensure the accused is present at the hearing, is informed of the nature of each uncharged offense investigated, and is afforded the right to counsel, cross-examination, and presentation of evidence. If the uncharged misconduct is subsequently referred "charged," no further investigation is required provided the uncharged misconduct is addressed in the SJA's pretrial advice (R.C.M. 405(b)).

Upon conclusion of the hearing, the PHO should consider all testimony and evidence that is relevant to the issues for determination and not cumulative prior to coming to any conclusions and making recommendations.

Drafting and assembling the report

The PHO uses the DD Form 457, Preliminary Hearing Officer's Report, with supplemental pages, if necessary, to record findings and recommendations at the conclusion of the hearing. This formal report includes the following:

- A statement of the names, organizations or addresses of defense counsel, and information as to the presence or absence of counsel throughout the proceedings, and if absent, why.
- The recording of the preliminary hearing.
- For each specification, the preliminary hearing officer's reasoning and conclusions with respect to the issues whether each specification alleges an offense; whether there is probable cause to believe that the accused committed the offense or offenses charged; whether the convening authority has court-martial jurisdiction over the accused and over the offense; and to recommend the disposition that should be made of the case. Include a summary of relevant witness testimony and documentary evidence presented at the hearing and any observations concerning the testimony of witnesses and the availability and admissibility of evidence at trial.
- If applicable, a statement that an essential witness may not be available for trial.
- An explanation of any delays in the preliminary hearing.

- A notation if counsel for the government refused to issue a prereferral investigative subpoena that was directed by the preliminary hearing officer and the counsel's statement of the reasons for such refusal.
- Recommendations for any necessary modifications to the form of the charges and specifications.
- A statement of whether the preliminary hearing officer examined evidence or heard witnesses relating to any uncharged offenses, and, for each such offense, the preliminary hearing officer's reasoning and conclusions as to whether there is probable cause to believe that the accused committed the offense and whether the convening authority would have court-martial jurisdiction over the offense if it were charged.
- A notation of any objections if required.
- The recommendation of the preliminary hearing officer as to the disposition that should be made of the charges and specifications in the interest of justice and discipline. In making this disposition recommendation, the preliminary hearing officer may consider any evidence admitted during the preliminary hearing and supplementary matters submitted for the convening authority's consideration within 24 hours of the closing of the preliminary hearing.
- The written summary and analysis of the supplementary information submitted to the convening authority.

The report must clearly state what evidence the PHO considered. The standard of proof is whether reasonable grounds exist to believe the accused committed the offense(s) alleged. Reasonable grounds exist when the evidence convinces a reasonable, prudent person there is probable cause to believe a crime was committed and the accused committed it. However, a finding that reasonable grounds exist does not require a recommendation of trial by court-martial.

The PHO will receive a copy of the recording of hearing as soon as practicable following the conclusion of the hearing for attaching to the PHO report. Upon written request from the victim or the victim's counsel, the victim will be provided a copy of, or access to, the recording upon completion of the PHO's report. The Government Counsel, or Counsel for the Government, will also provide a copy of the recording to defense counsel at the same time.

When complete and assembled, the PHO report is the first indorsement to the PHO appointment letter. The final report includes the DD Form 457, testimony, and other evidence, whether or not considered. The PHO forwards the report through the convening authority's SJA to the convening authority who directed the Article 32, UCMJ preliminary hearing. The SJA makes photocopies of the report and delivers it to the convening authority. The convening authority that directed the preliminary hearing, or the SJA on behalf of the convening authority, will promptly cause a copy of the report to be served on both the accused and accused's counsel. Upon delivery, the accused and his or her counsel will sign receipts of service showing the date and time of service. The receipts will become attachments to the PHO appointment letter. Any objection to the report must be made within five days of its receipt by the accused. Additionally, upon written request from the victim or the victim's counsel, the victim will be provided a copy of, or access to, the recording upon completion of the PHO's report.

Disposition of the Article 32, UCMJ preliminary hearing and pretrial advice

Based on the facts developed in the preliminary hearing, and the recommendation of the PHO, the SPCMCA can decide on the disposition of the case. The convening authority may decide to dispose of it within his or her jurisdictional limits or recommend to the officer exercising GCM jurisdiction (GCMCA) the case be tried by a GCM. In cases where a GCM is recommended, the SPCMCA prepares a forwarding letter, which includes a recommendation for disposition of charges. This letter is forwarded to the GCMCA through the GCMCA SJA. It must include the charge sheet, commander's indorsement, and PHO appointment letter with attachments.

Once received by the GCMCA SJA, he or she prepares the SJA's pretrial advice. Another person may prepare the advice, but the SJA is, unless disqualified, responsible for it and must sign it personally. An assistant judge advocate performing the duties because of the SJA's absence or disqualification, signs as the "Acting SJA." It is not possible for every commander to know all facets of the law. Thus, the SJA gives the commander the necessary advice before referring charges to trial. The SJA must carefully examine charges before referral to trial. The advice and recommendation to the convening authority must be impartial. An SJA's advice is required for all GCMs and SPCMs and optional for SCMs. When a referral to a GCM is recommended, the SJA's pretrial advice must contain a written, signed statement setting forth (R.C.M. 406(b)) the following conclusion/recommendation:

- Conclusion concerning whether each specification alleges an offense under the UCMJ.
- Conclusion concerning whether there is probable cause to believe that the accused committed the offense charged in the specification.
- Conclusion concerning whether a court-martial would have jurisdiction over the accused and the offense.
- Recommendation as to the disposition that should be made of the charges and specifications by the convening authority in the interest of justice and discipline.

In cases where referral as a capital case is recommended, the pretrial advice must specify the aggravating circumstances relied upon and provide the convening authority with conclusions as to whether capital referral is warranted based on the analysis outlined in R.C.M. 1004(b)(4). At least one of the aggravating circumstances outlined in the R.C.M. 1004(c) must be present to support a recommendation for referral as a capital case. In addition, the SJA shall include information about an accused's outstanding combat or overseas record, if applicable. Pretrial advice does not need to contain any underlying analysis or rationale for the conclusions contained in it.

Once the pretrial advice is finalized, a "referral package" is prepared to send to the convening authority. The referral package includes the charge sheet, commander's indorsement, forwarding letters or other indorsements, and, if applicable, the investigating officer's appointment letter with attachments and any other evidence the SJA deems pertinent. In cases where the Article 32, UCMJ hearing was waived by the accused, forward the accused's waiver along with any evidence the SJA relied upon to conclude the charges and specifications are warranted.

The convening authority for each case is required to detail qualified persons for courts-martial; a list of available members for the convening authority to choose from is included in the referral package. The list should include a sufficient number of members to allow the officer exercising GCM jurisdiction wide latitude in the selection. The convening authority details the "best qualified" persons for courts-martial in accordance with the criteria in Article 25(e)(2), UCMJ. The term *best qualified* is determined by age, education, training, experience, length of service, and judicial temperament. This list, however, does not relieve the officer exercising GCM jurisdiction of the responsibility of personally selecting the court members. The convening authority may consider a person on the nomination list provided in the referral package, as well as any other eligible person subject to his or her command or others made available by their commanders.

When complete, the referral package is sent to the GCMCA for disposition of the case. As previously mentioned, the GCMCA has a wide range of options when disposing of a case. R.C.M. 407 states the GCMCA may dismiss any charges, forward charges (or, after dismissing charges, the matter) to a subordinate commander for disposition, forward any charges to a superior commander for disposition, refer charges to an SCM, SPCM, or GCM. If charges are referred to a GCM for trial, provide a copy of the SJA's advice to the defense.

The preceding information has been provided to give you a basis for performing your duties in relation to Article 32, UCMJ preliminary hearings. As you may imagine, there is much more to an Article 32, UCMJ preliminary hearing than we have the opportunity to explore here. Normally, you are responsible for not only assisting the convening authority in obtaining personnel to participate in

the preliminary hearing, but also assisting the PHO in preparing the report. This may include acting as a reporter for an Article 32, UCMJ preliminary hearing and providing the PHO with a DD Form 457.

Self-Test Questions

After you complete these questions, you may check your answers at the end of the unit.

618. Article 32, Uniform Code of Military Justice, preliminary hearing

1. State the purpose of an Article 32, UCMJ preliminary hearing.
2. What are the general qualifications of an officer who can be appointed as an Article 32, UCMJ PHO?
3. What is one of the first things you should do when you know who the PHO will be?
4. What is the primary difference between a court-martial and an Article 32, UCMJ preliminary hearing?
5. What must the PHO do before the Article 32, UCMJ preliminary hearing?
6. What form does the PHO use to make his or her report after the investigation? How is it used?
7. What is the next step in the process after the PHO forwards the report to the SJA of the convening authority who directed the Article 32, UCMJ preliminary hearing?
8. What options are available to the SPCMCA after an Article 32, UCMJ preliminary hearing is conducted?
9. When is a formal written pretrial advice of the SJA required?
10. What information must be included in the SJA's pretrial advice?

11. What is the next step after pretrial advice is finalized?
12. What does a referral package include?
13. What are some of your duties when Article 32, UCMJ preliminary hearings are conducted?

619. Alternative disposition

Violations of the UCMJ may be disposed of in numerous ways, such as administrative discharge, NJP, and courts-martial. The type of alternate disposition covered in this lesson is requested by an accused who is facing a court-martial. Enlisted members have the right to request administrative discharge, and officers have the right to request resignation rather than risking conviction by courts-martial. We begin by covering the process for enlisted members facing trial by court-martial.

Request for discharge in lieu of trial by court-martial

Airmen may request discharge in lieu of trial if they are subject to trial by courts-martial. This is often referred to as a “Chapter 4 Request.” A discharge may be requested after preferral of charges of an offense for which a punitive discharge (bad conduct or dishonorable) is authorized. AFI 36-3208, *Administrative Separation of Airmen*, Chapter 4, *Request for Discharge in Lieu of Trial by Court-Martial*, governs these requests.

Discharge characterizations

A member suspected of committing an offense grave enough to warrant a court-martial that could adjudge a punitive discharge reflects the serious nature of the conduct. Therefore, in most cases, the service of Airmen discharged under this provision is characterized as under other than honorable conditions (UOTHC). However, if the charges are referred to an SCM and the member requests discharge in lieu of trial, the Airman’s service may not be characterized as UOTHC unless the SAF approves such characterization. If the Airman is in entry-level status and discharge UOTHC is not warranted, the separation will be characterized as an entry-level separation. For other Airmen, as warranted under the guidelines, the separation may be characterized as general or honorable.

Processing the request

An Airman is entitled to legal counsel before submitting a request for discharge. The Airman may waive this, but this waiver statement must be included in the discharge case file. To begin the process, the Airman submits the discharge request to his or her unit commander and must acknowledge an understanding of the following:

- The elements of the offense or offenses charged.
- The fact an SCM cannot impose a punitive discharge (required only if charges are or will be referred to as an SCM).
- The fact that characterization of service as UOTHC is authorized.
- The adverse nature of such a characterization and the possible consequences.
- The fact that any special pay, bonuses, and education assistance funds may be subject to recoupment.

After the unit commander receives the request, the Airman is scheduled for a standard medical examination. It is the commander’s responsibility to guarantee the Airman shows up for the examination. The commander will continue to process the case while the member is being evaluated.

If there is evidence of mental illness, a determination of mental responsibility and capacity is accomplished. Upon completion, the medical examination report is forwarded to the MPS career development element and is attached to the case file.

While continuing to process the case, the unit commander will review the discharge request and make a recommendation as to approval or disapproval. The commander's recommendation letter must include factual details of the reasons for the decision and a recommendation as to the type of separation. AFI 36-3208 provides a sample commander's recommendation letter. Upon completion, the commander will send the case file, along with the recommendation letter to the MPS. MPS will then forward the case file to the legal office for a legal review. The SJA will review the case for legal sufficiency before convening authority acts on it.

Upon SJA's completion of the legal review, the completed case file is forwarded to the SPCMCA. A copy of the charge sheet, ROIs, statements, and any other applicable information is attached. The SPCMCA must personally act on these cases; authority may not be delegated. If the Article 32, UCMJ, investigation has been forwarded to the GCMCA, the SPCMCA sends the case to the GCMCA recommending approval or disapproval. Recommendations for approval sent to the GCMCA must include a recommendation as to the type of separation. Specific reasons must be included if the type recommended is not UOTHC.

If the Article 32, UCMJ preliminary hearing has *not been forwarded* to the GCMCA, the SPCMCA authority may:

- Disapprove the request and return it to the unit commander.
- Send it to the GCMCA, recommending approval.

The GCMCA must personally take final action on requests for discharge in lieu of trial by court-martial when approval is recommended, except in cases where the charges were referred to an SCM, and GCMCA wishes to seek SAF approval for a UOTHC. If charges have not been referred to an SCM and the GCMCA has *approved the request*, the GCMCA must:

- Determine the type of discharge to be issued.
- Give reasons for the service characterization directed (only if the characterization is *not* a UOTHC or is less favorable than the type recommended by the commander).

If the GCMCA *disapproves the request*, the GCMCA must:

- Return the case to the SPCMCA with appropriate comments.
- Give disposition instructions separately.

The processing times for administrative and disciplinary actions are vitally important and in the best interest of the member involved. The processing time goal for discharge in lieu of trial by court-martial is 25 workdays after submission. Keep in mind this is only a goal. As you might imagine, cases forwarded to SAF for final approval may take longer than 25 workdays.

Occasionally, additional misconduct occurs or is discovered after the case has been forwarded. If this happens, the unit commander reports the misconduct to the SPCMCA at once. If the case has been forwarded to the GCMCA, the information is forwarded immediately. The information will detail the facts of the alleged misconduct and whether there is a change in the previous recommendation due to this additional misconduct. In cases already forwarded to SAF for disposition, the report must be given as fast as possible and may be made by telephone and confirmed by message or letter.

An Airman who has submitted a request for discharge in lieu of trial by courts-martial may request the application be withdrawn any time prior to the decision of the GCMCA or SAF. When this happens, the unit commander sends the request to the SPCMCA through the MPS to be referred to the GCMCA or SAF, as applicable, for final approval or disapproval. Both the unit commander and SPCMCA give their recommendations before forwarding. The GCMCA will forward his or her recommendation in cases referred to SAF.

Resigning for the good of the service

Commissioned officers have the option of asking to resign for the good of the service rather than facing trial by court-martial. However, the submission of a resignation does not automatically postpone trial pending a decision.

General procedures

Resigning for the good of the service is outlined in AFI 51-201, AFI 36-3206, *Administrative Discharge Procedures for Commissioned Officers*, and AFI 36-3207, *Separating Commissioned Officers*. Officers may submit a resignation for the good of the service with the understanding the SAF may direct a discharge UOTHC when their conduct makes them subject to trial by court-martial. Before making any recommendations, commanders at all levels must consider the best interest of the AF and the effect a resignation accepted by SAF will have on good order and discipline in the AF. The expense of a court-martial should rarely be the deciding factor in making a recommendation on a tendered resignation. Commanders should not recommend the SAF accept resignation for the good of the service for the sole purpose of expediency when the member's conduct would be more appropriately processed under the UCMJ.

All resignations in lieu of (RILO) submitted before referral, in which approval is recommended, and all post-referral RILOs must be immediately forwarded to AFLOA/JAJM through command channels. However, to permit the full development of the facts of the case and appropriate consideration of dispositions other than a trial, officers are encouraged *not* to tender a resignation for the good of the service before charges are referred to trial by court-martial. SPCMAAs, GCMCAAs, and MAJCOM commanders are authorized to deny RILOs submitted prior to referral of charges. When a resignation is declined at any level before referral of charges, the officer is advised in writing that he or she may resubmit the resignation if charges are referred to trial by court-martial. Once referral of charges occurs, RILOs may be acted upon only at the secretarial level. A RILO may not be submitted post-arraignment.

Each commander required to review the RILO must make a recommendation as to its disposition. To begin the process, the wing commander or equivalent authority indorses the resignation to the GCMCA. The GCMCA then indorses the resignation to the officer's MAJCOM of assignment. The MAJCOM commander, or MAJCOM vice commander if delegated, of assignment indorses the resignation and refers it to AFLOA/JAJM with an information copy to the Air Force Personnel Center, Separations Branch (AFPC/DPSOS). AFLOA/JAJM then forwards the resignation to SAF. If approved, AFLOA/JAJM will notify AFPC/DPSOS, which will schedule the officer's date of separation as soon as possible.

In addition to the officer's resignation and any supporting documents submitted by the officer, the RILO package should include, as applicable, copies of the following:

- Any ROIs, statements, or other documents supporting the charges or accusations against the officer.
- The charge sheet, forwarding letters, and any indorsements with attachments, including the PDS.
- The Article 32 report with attachments.
- Recommendations on disposition from each commander required to review the RILO.
- A comprehensive legal review from the base level, or equivalent, legal office where the RILO originated, including the view of each victim of the alleged offense(s). Written legal reviews are not required at intermediate levels of command between the originating legal office and AFLOA/JAJM, unless an intermediate-level legal office disagrees with a lower-level legal office review or needs to add and discuss omitted matters. Otherwise, written coordination indicating concurrence is all that is required.

To guarantee accuracy and the required procedures are followed, legal offices at each level of command shall use the comprehensive RILO checklist located on the AFLOA/JAJM Website. You must forward the original and two copies of the package to AFLOA/JAJM.

Counsel

Before an officer resigns for the good of the service, he/she is allowed to meet with counsel unless the officer expressly declines one. If an officer refuses counseling by military counsel, this is stated in the resignation memorandum. The AF will not reimburse an officer for civilian counsel. In addition, the MPS commander advises the officer that if SAF accepts his or her resignation, he or she may be required to reimburse a portion of advanced education assistance, special pay, or bonuses received if he or she leaves active duty before completing the period of active duty he or she agreed to serve. The officer must sign a recoupment statement, which will be included in the resignation package. MPS will also include the MPS commander's statement verifying this counseling with the resignation for the good of the service.

Withdrawing a resignation

When an officer decides to withdraw a RILO, base legal office forwards relevant materials to the officer's MAJCOM of assignment through the GCMCA. The base legal office also asks the command or headquarters to hold a pending resignation when the officer files a withdrawal request. When forwarding a request, the package must include:

- The request to withdraw the resignation.
- The wing commander's, or equivalent authority, indorsement.
- A copy of the resignation with indorsements and attachments.

When the GCMCA receives the withdrawal request, he or she will indorse the request and forward it to the officer's MAJCOM of assignment. In turn, the MAJCOM commander, or vice commander if delegated, indorses the withdrawal request, and forwards it to AFLOA/JAJM for action with an information copy to Headquarters Air Force Personnel Center, Separations Branch (HQ AFPC/DPSOS).

Trials pending resignation

In cases where action on a RILO is pending, prior authorization from AFLOA/JAJM is required before proceeding to trial. For our purposes, the start of the trial is defined as the acceptance of pleas at arraignment. The request to proceed must include justification why the trial should proceed before a decision on the resignation. In deciding whether to proceed to trial, AFLOA/JAJM follows a seven-day rule. Normally, AFLOA/JAJM approves requests to proceed to trial while a RILO is pending if the RILO was submitted more than seven calendar days after service of charges on the accused under R.C.M. 602. On the other hand, if a RILO was submitted within seven days of service of charges under R.C.M. 602, requests to proceed to trial pending action on the RILO are normally disapproved.

RILO processing should not be stopped, delayed, or rejected for processing based solely upon the time submitted, unless it is submitted post-arraignment. All timely RILOs must be forwarded through channels for secretarial action.

Self-Test Questions

After you complete these questions, you may check your answers at the end of the unit.

619. Alternative disposition

1. What chapter in AFI 36-3208 provides guidance on an enlisted member's request for discharge in lieu of court-martial?

2. In most cases, what is the service characterization for an enlisted Airman administratively discharged in lieu of court-martial?
3. To whom does an enlisted accused submit his or her request for discharge in lieu of court-martial?
4. What happens to a request for discharge in lieu of court-martial after the unit commander makes his or her recommendations?
5. Who is the final approval authority on a discharge request in lieu of trial by court-martial?
6. If an officer requests to resign for the good of the service (RILO) and charges have *not* been referred, who may deny the resignation?
7. How does the RILO process begin?
8. What level legal office is required to do a comprehensive legal review on all RILO requests?
9. What is the GCMCA required to do after he or she receives a RILO withdrawal request?
10. When a RILO is pending, what is required before a case can proceed to trial?

Answers to Self-Test Questions

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1. When the convening authority finds or is advised by a judge advocate that there is probable cause to believe that an offense triable by a court-martial has been committed, that the accused committed it, and that the specification alleges an offense, then the convening authority may refer it.
2. The type of court-martial the case is referred to.
3. The convening authority will either personally sign Part V, Referral, Service of Charges, of the charge sheet or delegate the authority to sign to a judge advocate.
4. "To be tried in a (joint/common) trial with (name)."
5. 12.

6. Twelve.
7. At least one-third.
8. The SPCMCA SJA must have the accused's records examined to ascertain the accused's nationality no later than 24 hours after referral, even if a claim of foreign nationality has not been made.
9. The charges must be served on the accused. The trial counsel ensures it.
10. The changes are made on the original charge sheet by lining through the material while ensuring the form remains legible, and the person making the changes will initial and date by each change.
11. It is one that adds a party, an offense, or a substantial matter not fairly included in the preferred charge or specification, or that is likely to mislead the accused as to the offense charged.
12. Major changes cannot be made over the objection of the accused unless the charge and/or specification are referred anew.
13. When there are additional charges, prepare an additional DD Form 458. Number the additional charges in the same basic manner as initial charges. For example, designate a single additional charge simply as "ADDITIONAL CHARGE;" however, if there is more than one additional charge, designate them as ADDITIONAL CHARGE I, ADDITIONAL CHARGE II, and so forth.
14. It designates the type of court, details the members of the court, and states the place it is to meet.
15. It may be convened by a separate order that is prepared in accordance with R.C.M. 504(d)(2) or it may consist of a notation on the charge sheet signed by the convening authority.
16. The same date as designated in the referral portion of the charge sheet.
17. Rank, name, unit, MAJCOM, and base.
18. They are numbered consecutively on a fiscal year basis, starting with number 1, with the number following an A-series prefix.
19. No more than two.
20. Transfers all cases that have not yet been assembled to the new order by the court.

617

1. Enlisted members subject to the UCMJ for any noncapital case offense made punishable by the UCMJ.
2. They may not receive confinement, hard labor without confinement or reduction, except to the next pay grade.
3. The SCMO shall examine the charge sheet, allied papers (convening orders, investigative reports, correspondence relating to the case, and witness statements), and the accused's personnel records to verify they are complete and free from errors or omissions which might affect admissibility.
4. DD Form 2329, Record of Trial by Summary Court-Martial.
5. A military judge and four members with or without alternates or a military judge alone if requested by the accused and approved by the military judge.
6. In non-capital GCM cases, the quorum may fall to six members after impanelment without having to return to the convening authority to detail new members to the court. In all capital cases, GCMs shall consist of a military judge and not less than 12 members with or without alternates.

618

1. The primary purpose of an Article 32, UCMJ preliminary hearing is to determine:
Whether the specification alleges an offense under the UCMJ.
Whether there is probable cause to believe that the accused committed the offense charged.
Whether the convening authority has court-martial jurisdiction over the accused and the offense.
A recommendation as to the disposition that should be made of the case.
2. The PHO should be senior in rank to the accused, must be a designated judge advocate, and should be certified under article 27(b), UCMJ.
3. Ensure the PHO has a copy of the AFLOA/JAJM *Article 32 Preliminary Hearing Officer's Guide* and script for review.
4. An Article 32, UCMJ preliminary hearing is concerned only with finding facts. A court-martial determines guilt or innocence and imposes punishment.

5. Review the charge sheet and the evidence that forms the basis for the charge(s), and any other documents attached to the PHO appointment letter.
6. The DD Form 457 with supplemental pages, if necessary, to record findings and recommendations.
7. The SJA makes photocopies of the report and delivers it to the convening authority and, if delegated, will promptly cause a copy of the report to be served on both the accused and accused's counsel.
8. The convening authority may decide to dispose of it within his or her jurisdictional limits or recommend to the officer exercising GCM jurisdiction (GCMCA) a GCM tries the case.
9. In any case that may be referred to a GCM.
10. Conclusion concerning whether each specification alleges an offense under the UCMJ; Conclusion concerning whether there is probable cause to believe that the accused committed the offense charged in the specification; conclusion concerning whether a court-martial would have jurisdiction over the accused and the offense; and recommendation as to the disposition that should be made of the charges and specifications by the convening authority in the interest of justice and discipline.
11. A referral package is prepared.
12. It includes the charge sheet, commander's indorsement, forwarding letters or other indorsements, and, if applicable, the investigating officer's appointment letter with attachments, any other evidence the SJA deems pertinent. In cases where the Article 32, UCMJ was waived by the accused, forward the accused's waiver along with any evidence the SJA relied upon to conclude the charges and specifications are warranted.
13. Normally, you are responsible for not only assisting the convening authority in obtaining personnel to participate in the preliminary hearing but also assisting the PHO in preparing the report. This may include acting as a reporter for an Article 32, UCMJ preliminary hearing and providing the PHO with a DD Form 457.

619

1. Chapter 4.
2. UOTHHC.
3. Unit commander.
4. The commander sends the case file, along with the recommendation letter to the MPS.
5. The GCMCA, except in cases where the charges were referred to an SCM, and GCMCA wishes to seek SAF approval for a UOTHHC.
6. SPCMCAs, GCMCAs, and MAJCOM commanders.
7. The wing commander or equivalent authority indorses the resignation to the GCMCA.
8. The base level, or equivalent, legal office where the RILO originated.
9. Indorse the request and forward it to the officer's MAJCOM of assignment.
10. Prior authorization from AFLOA/JAJM.

Student Notes

Unit 4. Pretrial Matters

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AFTER ALL YOUR HARD work with preliminary procedures, it is now time to get ready for trial. In this unit, we will cover the numerous duties you will perform in preparation for trial. This is an extensive area, and pretrial is where you will spend the majority of your efforts when involved in a court-martial. Pretrial can be both frustrating and rewarding, but have no doubt, your hard work will pay off when the case makes it to its first day of trial.

620. Discovery requests

Black's Law Dictionary, Eighth Edition, defines discovery as the act or process of finding or learning something previously unknown. Discovery is an important part of the court-martial process because it protects the rights of the accused and guarantees an impartial and fair trial. Whether you are working for the prosecution or the defense, you can offer a great deal of assistance to your attorney by becoming involved in the discovery process.

Disclosure and discovery requests

Discovery emphasizes the right of defense to obtain access to evidence necessary to prepare its case. This right also belongs to prosecution. AFI 51-110, *Professional Responsibility Program*, outlines specific rules for discovery, which all courts-martials must follow:

It is important to note here that these standards apply to all military and civilian lawyers, paralegals, and nonlawyer assistants in TJAG Corps, USAF, including host nation lawyers, paralegals, and other host nation personnel employed overseas by the DAF. They also apply to all lawyers, paralegals, and nonlawyer assistants who practice in AF courts and other proceedings, including civilian defense counsel and their assistants, even if they have no other connection to the Air Force.

The MCM (Article 46, UCMJ and R.C.M. 701) specifically provides that both the prosecution and the defense will have equal opportunity to talk to witnesses and examine the evidence. This lesson covers mandatory disclosure, what must be specifically requested, discretionary discovery, what is not subject to discovery, and continuing disclosure, a sample discovery request, and a sample discovery response.

Mandatory

Mandatory disclosure means both sides must turn over the information automatically; no request is required. Do not wait to receive a discovery request before providing the following types of information:

Mandatory disclosures by the prosecution

The following information and evidence must be disclosed without any prior request from the defense in accordance with R.C.M. 701:

- Papers accompanying charges, convening orders, and statements.
- The names of witnesses.

- Any prior convictions of the accused.
- Evidence favorable to the defense that reasonably tends to:
 - Negate the guilt of the accused of an offense charged.
 - Reduce the degree of guilt of the accused of an offense charged.
 - Reduce the punishment.
 - Adversely affect the credibility of any prosecution witness or evidence.

Depending upon the type of case you are working, there may be additional disclosures required by the prosecution. For example, if a sanity board is convened, a full copy of the sanity board report must be provided to the defense.

Mandatory disclosures by the defense

The following information and evidence must be disclosed without any prior request from the prosecution in accordance with R.C.M. 701:

- The names of witnesses and statements;
- Notice of certain defenses:
 - The intent to offer the defense of alibi;
 - The intent to offer the defense of innocent ingestion;
 - The intent to offer the defense of lack of mental responsibility;
- The intent to introduce expert testimony as to the accused's mental condition.
- Inadmissibility of withdrawn evidence.

Must request

Some types of information are discoverable, but only upon request. These items are not turned over to opposing counsel automatically as with the information above. These types of items are shown in the following table:

Type	Description
Tangibles and documents	The defense counsel may request access to various documents, papers, photographs, buildings, and other tangible evidence in the possession or control of the government. These items can only be requested after service of charges upon the accused, and only if the requested information is material to the preparation of the defense, something the prosecution is going to use in its case-in-chief, or something belonging to or taken from the accused (R.C.M. 701(a)(2)(A)). Once defense makes a discovery request, the prosecution, upon granting the request, is entitled to request similar disclosure.
Reports, tests, results, or examinations	The defense, upon request, is entitled to "inspect" this information and evidence. These items can only be requested after service of charges upon the accused and only if the requested information is material to the preparation of the defense, something the prosecution is going to use in its case-in-chief, or something belonging to or taken from the accused (R.C.M. 701(a)(2)(B)). Once defense makes a discovery request, the prosecution, upon granting the request, is entitled to request similar disclosure.
Sentencing evidence	You must allow defense counsel access and opportunity to inspect written materials that will be presented in sentencing (R.C.M. 701(a)(5)(A)) and inform the defense of names and addresses of witnesses (R.C.M. 701(a)(5)(B)). The prosecution is also allowed to inspect any written materials the defense intends to introduce during sentencing and gets the names and addresses of any sentencing witnesses the defense will call (R.C.M. 701(b)(1)(B)(i) and (ii)).

Discretionary

The military judge resolves any issue when there is a disagreement of whether or not information or evidence is discoverable. The military judge becomes involved when a *motion to compel* is filed by a party that believes it is entitled to the requested information. The military judge has the power to control the discovery process, including entering any appropriate order that limits or grants access to evidence and information (R.C.M. 701(g)(2)).

Failure to provide appropriate discovery may result in the military judge taking the following actions:

- Ordering the noncompliant party to permit discovery.
- Granting a continuance.
- Prohibiting the noncompliant party from introducing evidence, calling a witness, or raising a defense not disclosed.
- Entering such other order as is just under the circumstances.

Not subject to discovery

Some materials and information are *not subject to discovery*. This means counsel does *not* have to disclose the information or material, even if it is requested. Items that fall under this rule include the following:

- Privileged information protected under the MCM, Part III, *Military Rules of Evidence*, Section V, *Privileges*. This includes lawyer-client privilege, communications to clergy, husband-wife privilege, classified information, government information other than classified information, the identity of informants, political vote, deliberations of courts and juries, and psychotherapist-patient privilege.
- Disclosure barred by regulation. This includes information regarding the drug self-identification program.
- Attorney work product. Opposing counsel does not have access to work product unless privilege is waived. Work product includes notes, memoranda, and working papers prepared by counsel and their assistants or representatives.
- Irrelevant information. Evidence is irrelevant when it does not tend to prove or disprove any issue of fact involved in the case. This is a judgment your trial or defense counsel will make. If you receive a discovery request that asks for information you feel is irrelevant, have your trial or defense counsel make the decision.

Continuing disclosure

If either the prosecution or defense discovers additional information that is subject to disclosure or has been requested, before or during the trial, the party must promptly notify the other party or the military judge of the existence of the additional evidence (R.C.M. 701(d)). A sample discovery request and a sample discovery response are shown in figures 4-1 and 4-2.

Date

MEMORANDUM FOR CAPTAIN RON B. DEFENDER (AFLOA/ADC)

FROM: Captain Steven C. Roads
 77 ABW/JA
 50 Beach Street
 Eglin AFB FL 32542

SUBJECT: Discovery Request – *United States v. SSgt Ricky Bobb*

1. I represent the United States in the above-entitled case and on behalf of the United States; I now request you provide me with the information and evidence listed below.

2. The Prosecution requests you provide:

a. Notice of the names, addresses and telephone numbers of all witnesses anticipated to be called during the defense case-in-chief, and provide all sworn statements made by such witnesses in connection with the case. **R.C.M. 701(b)(1)(A)**

b. Notice of the names, addresses and telephone numbers of all witnesses anticipated to be called during presentencing proceedings, to include all character witnesses. **R.C.M. 701(b)(1)(B)(i)**

c. Copies of any written material the defense intends to offer during presentencing proceedings. **R.C.M. 701(b)(1)(B)(ii)**

d. Notice of all certain defenses together with the names, addresses and telephone numbers of all witnesses anticipated to be called in support thereof. **R.C.M. 701(b)(2)**

e. Copies of all books, papers, documents, photographs, tangible objects, or portions thereof, and any demonstrative material fixed in an electronic media, which are in the possession, custody, or control of the defense and which the defense intends to introduce as evidence in its case-in-chief at trial. **R.C.M. 701(b)(3)**

f. Copies of reports of physical or mental examinations and of scientific tests, experiments or comparisons of any kind, which were made in connection with the case that are in the custody and control of the defense that the defense intends to introduce as evidence during the defense case-in-chief, or that were prepared by a witness whom the defense intends to call at trial when the results or reports relate to that witness' testimony. **R.C.M. 701(b)(4)**

g. Notice of anticipated pleas and choice of forum with the court.
Uniform Rules of Practice before Air Force Courts-Martial 3.2(A)

h. Notice of the substance of any anticipated motions, including motions in limine, in accordance with any Scheduling Order or other order of the military judge.
Uniform Rules of Practice before Air Force Courts-Martial 3.2(D)

i. Notice of anticipated evidentiary objections or other issues which are to be litigated at trial. **Uniform Rules of Practice before Air Force Courts-Martial 3.6(A)**

3. This is a continuing request pursuant to R.C.M. 701(d). Timely response is required in accordance with the Uniform Rules of Practice before Air Force Courts-Martial 3.3(B). Please notify this office immediately in writing if you are unable to comply with this request.

4. If you have any questions or concerns, please feel free to contact me at DSN 872-5555.

STEVEN C. ROADS, Capt, USAF
 Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that on _____, I receipted for the prosecution's discovery request in the case of *U.S. v. SSgt Ricky Bobb*.

RON B. DEFENDER, Capt, USAF
 Defense Counsel

Figure 4-1. Discovery request second part.

Date _____

MEMORANDUM FOR CAPTAIN RON B. DEFENDER (AFLOA/ADC)

FROM: Captain Steven C. Roads
 77 ABW/JA
 50 Beach Street
 Eglin AFB, FL 32542

SUBJECT: Discovery Response for *United States v. SSgt Ricky Bobb*

1. The government provides the following response to the defense's discovery request, dated _____. The Report of Investigation was previously provided to the defense on _____. The government's responses below correspond to each request specifically made in the defense's discovery request.
2. The charge sheet with 1st indorsement and personal data sheet have been previously provided to the defense.
3. The government responds as follows:
 - a. Contact the legal office to coordinate inspection of any items listed in item 3a of the discovery request which are in the possession, custody, or control of military authorities.
 - b. There is no classified information in this case.
 - c. The government conducted a derogatory check on all witnesses and was unable to find any at this time. If any derogatory data becomes known to the government, such data will be made known to the defense at that time.
 - d. Will be provided at a later date.
 - e. The government is not aware of any physical or mental health examinations, scientific experiments, or laboratory reports. If the government becomes aware such documents exist, the government will notify the defense.
 - f. The government provides the following potential witness list:
 - (1) Amn Sally Potter, Eglin AFB, FL, duty 872-4444
 - (2) AIC Ron John, Eglin AFB, FL, duty 872-6767
 - (3) Amn Susan Jones, Eglin AFB, FL, duty 872-7676
 - g. To the government's knowledge, the accused has not made any written statements in any form regarding this case. The contents of any oral statements made by the accused known to the government will be disclosed pursuant to MRE 304(d)(1) at a later date; prior to arraignment of the accused.
 - h. None at this time.
 - i. None at this time.
 - j. Not available at this time. Will be provided after referral.
4. The government is aware that, pursuant to R.C.M. 701(d), this is a continuing request and will provide any additional information material to this request as it becomes available. If you have any questions regarding this response, please feel free to contact me at DSN 872-5555

STEVEN C. ROADS, Capt, USAF
 Trial Counsel

I certify that I served or caused to be served a copy of the foregoing response and attachments on Defense Counsel on _____.

STEVEN C. ROADS, Capt, USAF
 Trial Counsel

Figure 4-2. Discovery response.

Self-Test Questions

After you complete these questions, you may check your answers at the end of the unit.

620. Discovery requests

1. Which regulation outlines specific rules for discovery that must be followed for all courts-martial?
2. What does mandatory disclosure mean?
3. Who resolves the issue when there is a disagreement of whether or not information or evidence is discoverable?

621. Case docketing and notifying trial participants

The USAF judiciary is a vital part of the AF military justice system and oversees docketing of court-martial cases. This section covers docketing procedures and the importance of notifying trial participants.

Trial docket

Docketing of courts-martial is established by Headquarters United States Air Force, Air Force Trial Judiciary (HQ USAF/JAT). The chief trial judge (CTJ) has worldwide responsibility for the docketing of courts-martial and detailing of military judges. The CTJ delegates the authority to the chief regional military judges (CRMJ) of Europe and the Pacific to docket courts-martial and detail judges within their respective regions. In addition, the CTJ may delegate the authority to the deputy chief trial judge (DCTJ) to docket cases worldwide. To assist the CTJ in the administration of the docket, the Central Docketing Office (CDO) serves as the focal point for all courts-martial docketing and detailing decisions, to include the detailing of continental United States (CONUS) judges for outside the continental United States (OCONUS) courts-martial. The JAG designates the geographical areas as USAF trial judiciary regions

The CDO maintains a current docket of all pending CONUS and OCONUS courts-martial; pending Article 32, UCMJ, investigations; administrative discharge proceedings; and other miscellaneous hearings for which a military judge has been detailed or assigned.

To facilitate efficient docketing management, your office will immediately notify the CDO (and OCONUS CRMJ and/or detailed military judge, as appropriate) of the following events:

- Preferral of court-martial charges when a GCM or SPCM is contemplated—email a copy of the complete charge sheet to the CDO.
- The imposition of any form of pretrial restraint and any status change—email a copy of the confinement order to the CDO.
- Referral of charges to trial by GCM or SPCM—email a copy of the complete charge sheet and all convening orders to the CDO after service on the accused. In addition, the names of the trial counsel and defense counsel.
- Chapter 4 or resignation request—indicate whether permission to proceed to trial will be sought or whether the trial will be directed to proceed. Notify the CDO and the detailed judge of the action taken on the request.

- Withdrawal, dismissal, or other disposition short of trial—email a copy of the convening authority action to the CDO.
- Major modification of charges and specifications after referral—email a copy of the modified charge sheet to the CDO and the detailed military judge.
- Any other events or circumstances that may interfere with the scheduled case—email motions to delay or continue to the CDO and the detailed military judge. Email all other motions to the detailed military judge only.
- OCONUS SJAs must also provide this information to their respective CRMJ.

Many factors must be balanced in arriving at a trial date. These include conflicts with cases already docketed, availability of a military judge, witnesses, consultants, experts, local and regional or civilian counsel, estimated length of the trial, and requests for discharge, resignation, and so forth. Both side should discuss these factors prior to calling in the case for docketing.

Immediately after referral and service of the charges on the accused, the legal office tasked with prosecuting the case notifies the CDO of the referred charges and detailed counsel by email. There is a sample memo for this on the Air Force Trail Judiciary Website. The legal office also sends the charge sheet and convening order, as noted above. The CDO will contact the detailed counsel to request their schedules, the earliest date they can try the case, and their estimate of how long it will take to try the case.

Docketing conference

The clerk of trial courts or the docketing judge holds a docketing conference with counsel in all cases. The docketing conference should be held within two duty days following the day of notice of referral. After determining how long counsel estimates it will take to try the case, the clerk of trial courts sets a presumptive trial date. This is the earliest day that a military judge is available to try the case after the statutory waiting period has elapsed, based on the estimated length of the trial. If the parties are unable to proceed to trial on the presumptive trial date, they are required to account for their inability to do so during the docketing conference.

It is the obligation of the responsible base SJA to identify the likely detailed trial counsel and to notify the responsible ADC at the point the charges are forwarded to the convening authority for a referral decision so the counsel can coordinate their schedules, determine availability of prospective witnesses and co-counsel, and discuss potential trial dates well before the docketing conference. The ADC also must coordinate with civilian defense counsel well ahead of the docketing conference to discuss the same matters and alert the civilian counsel to the pending docketing conference. After holding the docketing conference, the clerk of trial courts or docketing judge coordinates an initial trial date and any request to exclude time from accountability under speedy trial with the CTJ or DCTJ. The CTJ or DCTJ decides whether to exclude time from speedy trial accountability.

Within 24 hours after a trial date is established, the CDO prepares a docketing memorandum with the initial trial date, identification of the detailed trial judge, speedy trial exclusions, if any, and any other relevant data, including the presumptive trial date and government and defense case ready dates. The memorandum is emailed to the detailed trial counsel, defense counsel, and civilian defense counsel.

Pretrial scheduling conference

The military judge will conduct a pretrial scheduling conference with detailed counsel as soon as possible and not later than seven calendar days after the case is docketed for trial. The purpose of the pretrial scheduling conference is to promote a fair and expeditious trial and discuss issues that are outstanding or foreseeable and capable of early resolution, such as approval of experts, discovery, evidentiary motions, requests for sanity boards, and so forth. Upon request of the military judge, the trial counsel will coordinate all conference communications. Scheduling conferences should be held either face-to-face or by video teleconference. The conference may be held telephonically when the military judge determines this to be the most expeditious and effective means available. During the

conference, the military judge will undertake a detailed examination of all potential issues with counsel to confirm the trial is held on, or before, the initial trial date.

After the scheduling conference, the military judge will issue a scheduling order to establish timelines, resolve issues, and move the case forward most effectively. The military judge will proactively manage case progress and conduct additional conferences as necessary. The military judge will remain alert to the opportunity to move the trial date forward in time. The trial date may be advanced at the discretion of the military judge.

Requesting delays

The military judge is the appropriate person to whom a request for a delay is addressed. Requests for delay or continuance are made in writing and addressed to the military judge assigned to the case with copies to opposing counsel. All schedule changes in trial or hearing dates are coordinated through the CDO. The trial counsel ensures the appropriate GCM legal office receives a copy of all continuance requests and responses for all cases, including SPCMs. In addition, the request for delay and action taken on them are included as required in the ROT.

Request for trial by military judge alone

The defense counsel will file a notice of probable pleas and choice of forum with the court, with a copy to trial counsel and the court reporter, in writing no later than 24 hours after the accused is served with referred charges or seven calendar days prior to the scheduled trial date, whichever is later. The pleas will be expressed in the precise form counsel anticipates announcing in open court. The defense counsel will promptly notify the judge and trial counsel of any change in anticipated plea or choice of forum.

Article 16, UCMJ, states that an accused, after knowing the identity of the military judge and after consultation with the defense counsel, may request, in writing or orally, to be tried before the military judge alone. For a written request, a DD Form 1722, Request for Trial Before Military Judge Alone, is used. The request is approved by the military judge during the Article 39(a) proceeding and only after the military judge has made certain inquiries of the accused and is convinced the accused understands the meaning and effect of trial by military judge alone.

A request for trial by military judge alone may be withdrawn by the accused anytime, before or after approval, if there is a change of the military judge. Failure to request or failure to withdraw a request for trial by military judge alone in a timely manner (any time before assembly) *waives the right* to submit or to withdraw such a request. The DD Form 1722, if used, is included in the ROT.

NOTE: Trial by military judge alone is not permitted in capital cases or SPCMs in which no military judge has been detailed.

Notifying trial participants

One last item, but an important one, is notifying the trial participants of the established trial date. You begin notifying the trial participants immediately after a docketed court-martial. In cases where members have been detailed, notify them of the date, time, place, and the uniform required for courts-martial. It is good practice to notify members in writing, and advise them they should not depart the base on leave or TDY without notifying the base SJA. You also must notify the witnesses, civilian, and military, so they have plenty of time to travel and be in place before they are needed. They need to be aware of the proper dress/uniform for courts-martial. A few days before trial, ensure the assigned bailiff is briefed on his or her court-martial duties. Preparing and briefing the participants prior to the proceeding prevents many unnecessary and avoidable delays.

Self-Test Questions

After you complete these questions, you may check your answers at the end of the unit.

621. Case docketing and notifying trial participants

1. Who serves as the focal point for all courts-martial docketing and detailing decisions?
2. What action must the legal office tasked with prosecuting the case take after referral and service of charges on the accused?
3. Who is responsible for holding a docketing conference with counsel? When should it be held?
4. What is the purpose of a pretrial scheduling conference?
5. When is a request for trial by the military judge alone approved?
6. What information should you notify members who have been detailed to a court-martial, them?

622. Witnesses and funding

Witnesses play a crucial role in the court-martial process. As the case paralegal, you will determine the status and funding authority of witnesses, process certain witness documents to ensure their appearance at trial, coordinate travel and billeting arrangements, and prepare and process travel orders and payment vouchers. AFI 65–601, Volume 1, *Budget Guidance and Procedures*, AFI 51–201, and R.C.M. 703 are your governing directives for witnesses and travel funding. Let's begin by looking at how witnesses are requested for trial.

Witnesses

According to R.C.M. 703, the prosecution, defense, and the court-martial have equal opportunity to obtain witnesses and evidence. The trial counsel must take timely and appropriate action to secure the attendance of all witnesses requested by the defense. For the trial counsel to honor their request, the defense counsel must first submit a written request for the attendance of witnesses to the trial counsel. The request should include the name, telephone number, and address or location of the witness along with a synopsis of the expected testimony sufficient to show its relevance and necessity.

If there is a disagreement between the trial counsel and defense counsel as to whether or not the testimony of any of the requested witnesses is necessary, the matter is referred for decision to the detailed military judge. Where a requested defense witness is an essential witness and it is possible to obtain the witness, the witness' presence at the trial may not be denied to the accused on the basis the trial counsel is willing to stipulate to testimony or take a deposition. This also applies to witnesses requested by the accused in extenuation or mitigation.

When a party believes government employment of a civilian expert witness is necessary, a written request from that party is sent to the convening authority, with notice to the opposing party, to

authorize the employment and fix the expert's compensation. The request shall include a complete statement of the reasons why the expert is necessary and the estimated cost of employment. The convening authority determines whether to grant or deny the use of the expert witness. The military judge may renew a request for an expert witness if the convening authority denied the request. The military judge then determines whether the testimony of the expert is necessary and, if so, whether the government has provided or will provide an adequate substitute.

Production of witnesses

Your first step when a witness is required for courts-martial is to determine the status of the witness. This is accomplished for two primary reasons: (1) to determine proper notification procedures (ensuring their presence at trial), and (2) to determine who will be responsible for funding his or her travel. How we request the witness's presence at trial depends on whether he or she is a military or civilian witness and, of course, whether or not the witness is willing to testify.

To secure the attendance of a military witness, the trial counsel notifies the witness informally, normally by telephone or in person, that his or her presence at the trial is necessary. Provide notice to the witness and his or her commander of the time, place, and date the witness's presence is required, and request the commander issue any necessary orders to the witness. If practicable, a request for the attendance of a military witness should be made with at least 48 hours' notice before the start of travel to attend the court-martial.

Civilian witnesses can be a bit more challenging because, unlike active duty military, we do not have a commanding officer to reach out to and order their presence at trial. The trial counsel has the power to compel witnesses to appear and testify before courts-martial, including any Article 39(a) session. However, civilian witnesses are usually willing to attend a trial voluntarily when it is clearly understood their fees and mileage will be paid. To obtain the presence of civilian witnesses and to authorize reimbursement for their travel expenses, you will prepare a DD Form 453, Subpoena, and a DD Form 453-1, Travel Order. Depending on the willingness of the witness to testify, these documents can be served either informally or formally.

Informal service is accomplished by mail and is used for witnesses who are willing to testify. A sample letter to accompany the subpoena and travel order is provided in AFI 51-201. This letter includes an explanation for signing the subpoena and returning the original signed copy to the legal office, when the trial is set to begin and when and where their presence is required, travel and billeting arrangements, advance payment (if applicable), and any other fees and allowances that will be paid. The letter provided in AFI 51-201 is only a guide, and you may include much more than is listed above. You want to ensure your letter provides as much information as possible to assist the witness during his or her travel and testimony.

The formal service of a subpoena is accomplished personally; it is used for witnesses who are unwilling to testify. The subpoena is served personally on the witness along with travel orders and any prescribed fees. Appropriate fees and mileage must be paid or tendered when formally serving the subpoena to meet the threshold requirement for requesting a DD Form 454, Warrant of Attachment, and subject the witness to federal prosecution under Article 47, UCMJ. Before the service of the subpoena, you must consult with the base AFO to determine the proper method of obtaining the necessary funds. The trial counsel or a designee will serve the subpoena when the witness is in the local area, or you may contact the SJA or commander of the military installation nearest the witness if outside the local area. You may also request service through the local law enforcement office or AFOSI detachment nearest the witness.

There are a few *exceptions* to the rules as established above.

- A civilian witness may not be subpoenaed to testify at a court-martial outside of the United States or at an Article 32, UCMJ hearing. Invitational travel orders are issued to a civilian who voluntarily agrees to appear at these proceedings. In addition to the travel order, you will use the same sample letter as described above in informal service.

- The convening authority approves civilian expert witnesses who are not employees of the United States as described above. In addition, a memorandum of agreement (MOA) for employment of civilian expert witnesses, invitational travel orders, and a DD Form 453-1 are used. The MOA outlines the services the expert witness will provide and how much the government agrees to pay the expert for those services. Both the SJA, or trial counsel, and the expert witness must sign and date this agreement. AFI 51-201 provides a sample MOA and a sample invitational travel order. In the absence of an authorization for a certain amount of compensation, only ordinary witness fees are paid to the expert witness. Like ordinary witness fees, you obtain advance approval from finance for the funds to pay these fees.
- Civilian witnesses employed by the United States can be required to testify incident to their employment with appropriate travel orders issued for this specific purpose. Subpoenas are not required. For DOD civilian employee witnesses, prepare a DD Form 1610, Request and Authorization for TDY Travel of DOD Personnel. For non-DOD federal civilian employees providing testimony incident to their employment, the employee's agency will prepare the appropriate travel order. Invitational travel orders are not used for federal civilian employees, contractors, or non-appropriated fund employees.

When requesting the testimony of civilian witnesses, we want to ensure the best experience possible. In accordance with R.C.M. 703, you should provide a civilian witnesses with a subpoena and travel order at least 24 hours before he or she has to leave home. However, you should always notify and request a witness's presence at trial as soon as possible to allow adequate time for him or her to prepare.

Determine funding authority

Depending on the nature of your case, witnesses may include active duty AF members, DAF civilians, experts, members of other services, and so forth. It is important to understand their status in this context as well because this is what governs who will pay for the witness. When it comes time to fund witness travel and fees, your second step is to determine who will provide the funding.

AFI 51-201 provides the rules on who is responsible for funding witnesses. Funding requests for active duty AF military and DAF civilian employees are categorized as either intra-command (meaning the same MAJCOM where the court-martial is convened) or inter-command (meaning the witness comes from another MAJCOM). Normally, the convening authority funds intra-command witnesses (SPCMCA for SPCMs and GCMCA for GCMs). AFLOA/JAJM normally funds inter-command witnesses. We will begin by covering procedures for witnesses funded by AFLOA/JAJM.

Central witness funding responsibilities

AFLOA/JAJM centrally funds and manages travel for witnesses identified in AFI 51-201. It is your responsibility to explain the funding process and travel requirements to your witness. Witnesses should not call AFLOA/JAJM seeking guidance regarding the process, uniform requirements, travel, or billeting arrangements. To assist you with this, there is a central witness funding (CWF) guide posted on the AFLOA/JAJM Virtual Military Justice Deskbook.

When requesting funding through AFLOA/JAJM, you must complete a request via the Witness Funding Management System (WFMS) at least ten days before the proceed date requested in WFMS. WFMS can be accessed on TJAG's home page, under the Reports tab, by selecting Jaguars, and then Witness Funding. All personnel assigned to the requesting legal office can create a request in the system; however, only WFMS managers can approve, cancel, and forward the request to AFLOA/JAJM. Typically, the SJA, chief, and NCOIC of military justice are appointed as WFMS managers.

When preparing a request, you are responsible for ensuring all information necessary for funding approval is included in your request — for example, airfare, per diem, lodging, and any other expenses associated with travel. In addition, you will ensure the witness has a valid Defense Travel System (DTS) account, as DTS is mandatory for all witness travel.

Convening authority funding

When AFLOA/JAJM is not required to fund witnesses, it is the responsibility of the convening authority to provide the funds. SPCM witnesses are funded by the SPCMCA at the base level, and the GCMCA funds GCM witnesses. It is important to understand that, depending on the policy at your base, you could be handling witnesses from start to finish for both SPCMs and GCMs.

AF active duty and DOD civilian witness travel

Witnesses are categorized as either intra-command or inter-command. To begin travel procedures for intra-command witnesses, contact your local resource advisor (RA) to ensure the availability of funds before requesting a civilian witness to appear before an SPCM. In the event of a GCM, you request funds from the GCMCA legal office. Generally, all travel orders are processed in DTS at the base level. You must establish a close working relationship with both your local RA and your GCM legal office to ensure you have the proper funding and are following appropriate procedures for your base.

Procedures for travel of inter-command witnesses are quite different. Active duty and DOD civilian witnesses may travel from all over the world, both theater and non-theater. This section will address non-theater travel only and will not pertain to those witnesses who are deployed. Active duty and DOD civilian witnesses are testifying incident to service and are *not* entitled to receive witness fees.

AFLOA/JAJM is responsible for ensuring the witness is present the day before the court is scheduled to convene; funding of additional TDY days for court preparation is *not* authorized. The maximum number of TDY days AFLOA/JAJM can fund for CONUS travel is five days, and OCONUS travel is seven days. Justification is required for witnesses requiring more than the authorized TDY days. Prior approval from AFLOA/JAJM is required for any deviations to the travel itinerary, or the organization approving the deviation may be responsible for additional costs.

AFLOA/JAJM will verify the WFMS request and then provide a fund-cite authorization letter. This letter will state a restricted cross-organization has been added to the DTS profile. Witnesses will review the funding authorization letter received from the base and coordinate with the local RA to complete the orders. The restricted cross- organization forces the orders and voucher to be routed to AFLOA/JAJM for approval; therefore, the local RA should not be able to approve the orders or voucher. Witnesses will complete their orders in DTS and notify AFLOA/JAJM.

One last item to consider is witness travel for Guard and Reserve personnel. Before funding is approved for Reservists, you must attest that they will be on Title 10 orders; however, they do not have to be on Title 10 orders to begin the CWF process. Guard personnel are funded by the convening authority; therefore, CWF does not apply to these personnel unless they are on Title 10 status at the time travel is required if it involves inter-command travel between the Title 10 duty station and the UCMJ proceeding.

DTS

DTS is the only method by which any member (active duty, civilian, DOD employee, etc.) can travel for a court-martial or any other travel funded by the DOD. DTS is an online program that essentially provides two functions, the travel authorization (order) and the travel voucher. In order for anyone to use DTS, they must have a profile created in DTS. A new paralegal needs to understand what a DTS profile is, how to create authorizations, and file travel vouchers. Finally, another important aspect of DTS is what pot of money is paying for the travel, including the use of cross- organizations.

A traveler must have a DTS profile created before any authorizations/vouchers can be created. Military members and DOD employees should already have profiles. Expert witnesses who are commonly used in courts-martial will also typically have DTS profiles. However, layman civilians or experts who have never been used by the DOD will most likely not have a DTS profile. For civilian witnesses without a DTS profile, the paralegal will need to facilitate the creation of a DTS profile in order to travel a civilian member. You will need the civilian traveler's personal information, including full name, SSN, date of birth, address, bank account information, and phone number to

create a profile. To build a DTS profile with the given information, the local finance office will have the DTS permissions to do so. Legal offices usually have paralegals who have permission to build profiles; however, the bank account information is usually reserved only for the finance office to input. Once you have a DTS profile established for the traveler, they are clear to create travel authorizations.

Military members and DOD employees are responsible for creating their own travel authorizations. However, civilians, including both experts and layman witnesses, cannot create their own travel. These members have no access to DTS and, therefore, the case paralegal is responsible for creating the travel authorizations. Paralegals creating authorizations for civilian witnesses will have to ensure they are providing the itinerary information to the traveler, coordinating lodging, and generally managing all aspects of the travel. Paralegals managing civilian witness travel are entirely responsible for all logistics involved in the travel.

Travel vouchers must be completed once a traveler completes his or her trip. The voucher is the only way a traveler can be reimbursed for his or her travel expenses. Military members and DOD employees are responsible for filing their own travel vouchers. For civilian witnesses, the paralegal is again responsible for the entire voucher process. The paralegal will need to attain copies of all receipts, to include lodging, rental cars, airfare, and any other non-meal expenses exceeding \$75. They must also obtain a hard-copy travel voucher signed by the witness.

It is important to note that a civilian witness must agree to the reimbursement amount. This is accomplished by having them sign a DD Form 1351-2, Travel Voucher or Subvoucher. The DD Form 1351-2 is then uploaded in DTS as proof that the civilian traveler agrees to the claimed reimbursement amount. Remember, the paralegal is doing everything in DTS for the civilian witness, so he or she must have the hard-copy voucher because someone will be digitally signing on behalf of the traveler. If there are any disputes on reimbursement, the signed DD Form 1351-2 is proof that the traveler agreed to that amount. The reimbursement amount in DTS should match exactly to the DD Form 1351-2. The paralegal will sign on the traveler's behalf in DTS claiming the reimbursed amount; subsequently, the approving official will approve the voucher, and the final payout will be deposited directly to the bank account information listed in the traveler's DTS profile.

Finally, paralegals should be aware that different pots of money pay for travel in DTS. The pot of money used depends on who is funding the travel, the convening authority, or AFLOA/JAJM. Once a paralegal has completed the appropriate process to request funds from the convening authority or AFLOA/JAJM, the correct money will be placed on the traveler's profile in DTS. This is done through a process called a cross- organization. A cross- organization is simply assigning a pot of money to a member's DTS profile. Once the cross- organization is complete, the traveler may now create an authorization using the correct funds.

Expert witnesses

The convening authority funds expert witnesses, except for urinalysis experts, who are funded by AFLOA/JAJM. AFLOA/JAJM funds travel for forensic experts (e.g., chemists, toxicologists, and qualified physicians approved by the convening authority) to testify at courts-martial relating to urinalysis testing. AFLOA/JAJM *does not* fund laboratory technicians or expert consultants in urinalysis cases; your convening authority should fund those.

Urinalysis expert witness availability

The first step in procuring expert witnesses for urinalysis cases is to check the availability of DOD experts. To do so, you will send an email to Headquarters (HQ) Air Force Drug Testing Laboratory that must include the date the court/board is expected to start; your telephone number; laboratory accession number of the service member; and your contact information.

If no DOD expert or another expert under contract with the AF is available, you will need to submit a request for a non-DOD expert in WFMS.

Expert witness request and approval

Regardless of whether an expert witness is DOD or non-DOD, you first must obtain approval in writing from the convening authority. Once you have received convening authority approval, a copy of the request for an expert witness and the convening authority's approval must be provided to AFLOA/JAJM before they will grant approval. Your office submits a request in WFMS, secures his or her lodging, and arranges for a government-owned vehicle while the expert is TDY.

If a government-owned vehicle is not available for your office's use to transport witnesses, consider shuttle or taxi availability. Use rental cars as a last resort; AFLOA/JAJM reserves the right to deny a request for rental cars. If it appears a rental car is more advantageous to the government, provide a cost analysis for the rental car to AFLOA/JAJM in the initial witness request.

Expert witnesses will travel on DTS orders regardless of whether they are civilian, military, contractor, or from another service. DOD experts will accomplish their own travel arrangements through DTS, while you will be required to accomplish travel arrangements in DTS for non-DOD experts.

Non-DOD expert witness fees funded by AFLOA/JAJM

Civilian expert witnesses are authorized \$1,000 per day, with a maximum of \$4,000 per witness, per case. This is for in-court testimony only and does *not* include travel days. Any agreement to pay amounts exceeding AFLOA/JAJM's limit may result in the convening authority paying the difference.

AFLOA/JAJM will only pay inconvenience or cancellation fees of \$500 per witness, per case, to civilian urinalysis expert witnesses who were approved by the convening authority to testify. To receive payment for inconvenience or cancellation fees, these items must be included in the MOA. In every case, there must be a showing of actual inconvenience and financial loss to the witness. If cancellation occurs within five days of the authorized travel date, the expert witness must demonstrate actual inconvenience and financial loss to be reimbursed. More than mere cancellation is required.

Vouchers

After the witness has testified and returned to his or her home or base, the next step is to complete a travel voucher. The requesting legal office is responsible for ensuring travelers promptly prepare and submit their travel vouchers. Witnesses will complete their travel vouchers through DTS within five calendar days of returning from the TDY. All DTS users will accomplish their vouchers through DTS. In cases where CWF was provided, it is the base's responsibility to ensure AFLOA/JAJM promptly receives a copy of the paid DTS voucher.

The Standard Form (SF) 1034, Public Voucher for Purchases and Services Other Than Personal, is used for processing expert fee vouchers. For non-DOD expert witnesses funded by the convening authority, you must ensure the expert witness prepares and submits the appropriate forms to the finance office servicing the base where the court convened. For non-DOD expert witnesses funded by AFLOA/JAJM, you must provide completed copies of the SF 1034, a completed direct deposit form, the expert's itemized invoice, and the completed SJA memo to AFLOA/JAJM. The SJA or delegate signs the memo certifying the dates of attendance, scheduled expert fees for in-court testimony, and any inconvenience or cancellation fees. AFI 51-201 provides a sample certification memorandum for civilian expert witnesses. AFLOA/JAJM will finalize and submit the SF 1034 to the joint base Andrews finance office for payment where CWF is the responsible funding authority. This includes expert and cancellation fees. After payment is made, AFLOA/JAJM will notify the case paralegal of the payment amount and the date payment is expected to be deposited. The case paralegal is responsible for notifying the expert witness of payment.

Self-Test Questions

After you complete these questions, you may check your answers at the end of the unit.

622. Witnesses and funding

1. If there is a disagreement between the trial counsel and defense counsel as to whether the testimony of a witness is relevant, to whom is the matter referred for a decision?
2. What are the primary reasons the status of a witness is determined?
3. Who has the power to compel a witness to appear and testify before a court-martial?
4. When is formal service of a subpoena required?
5. After you determine the status of a witness, what is the next step in funding witness travel and fees?
6. What is the first step in requesting witness funding from AFLOA/JAJM?
7. When not funded by AFLOA/JAJM, who funds witnesses for a GCM?
8. Who funds forensic experts for urinalysis cases?
9. How much is CWF authorized to pay civilian expert witnesses per day and per case?
10. What is the maximum number of days witnesses have to complete their travel vouchers through DTS?
11. What documentation is used to process expert fee vouchers?

623. Depositions

A deposition is the out-of-court testimony of a witness under oath in response to questions by the parties, which is transcribed or recorded on videotape, 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, which are written down before submission to a witness whose testimony is to be taken by deposition. The answers, also written down and properly sworn to, constitute the deposition testimony of the witness. A deposition may be taken by agreement of the parties without the necessity of an order.

When depositions are used

A deposition may be taken to preserve the testimony of a witness who is likely to be unavailable at the investigation under Article 32 or at the time of trial. A deposition may be admitted in a capital case only upon offer by the defense. A deposition may be ordered any time it is in the interest of justice the testimony of a prospective witness be taken and preserved for use at an investigation under Article 32 or a court-martial.

In any case, any party may use a deposition to contradict or impeach the testimony of the person testifying under oath, to include writing. If trial counsel offers only a part of a deposition in evidence, defense counsel may require trial counsel to offer all that is relevant to the part offered and any party may offer other parts of the deposition. A transcribed deposition is ordinarily read to the court-martial by the party offering it. The members may not inspect the transcript of a deposition. 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. Part or all of a deposition may be used in presentencing proceedings as independent evidence.

Request for deposition

A convening authority who has the charges for disposition or, after referral, the convening authority or the military judge may order a deposition be taken on the request of a party. At any time after charges have been preferred, any party may request in writing a deposition to be taken (fig. 4-3). A copy of the request and any accompanying documents ordinarily should be served on the other parties when the request is submitted. A request for a deposition shall include: the name and address of the person whose deposition is requested (if the name of the person is unknown, a description of the office or position of the person); a statement of the matters on which the person is to be examined; a statement of the reasons for taking the deposition; and whether an oral or written deposition is requested.

A request for a deposition may be denied only for good cause. Good cause for denial includes failure to state a proper ground for taking a deposition; failure to show the probable relevance of the witness' testimony, or that the witness' testimony would be unnecessary. The fact the witness is or will be available for trial is good cause for denial in the absence of unusual circumstances, such as improper denial of a witness request at an Article 32 hearing, unavailability of an essential witness at an Article 32 hearing, or when the government has improperly impeded defense access to a witness.

A request for a written deposition may not be approved without the consent of the opposing party except when the deposition is ordered solely instead of producing a witness for sentencing under R.C.M. 1001, and the authority ordering the deposition determines the interests of the parties and the court-martial can be adequately served by a written deposition. A request for an oral deposition may be approved without the consent of the opposing party. The authority who acts on the request shall promptly inform the requesting party of the action on the request and if the request is denied, the reasons for the denial. Failure to review a request for a deposition before the military judge that has been denied by a convening authority waives further consideration of the request. When a request for a deposition is approved, the convening authority will detail an officer to serve as deposition officer or request an appropriate civil officer to serve as deposition officer.

**IN A GENERAL COURT-MARTIAL OF THE UNITED STATES
US AIR FORCE TRIAL JUDICIARY**

UNITED STATES OF AMERICA)	
)	
vs.)	
	)	REQUEST FOR DEPOSITION
)	
Squadron,)	
Wing)	
Base, State Zip	)	DATE
)	

1. Pursuant to Rule for Courts-Martial (R.C.M.) 702, the Government hereby requests the oral deposition of SrA _____, Squadron, Wing, Base, State Zip+4.
2. SrA _____ is to be examined on all matters relating to two alleged assaults committed upon SrA _____ by the accused.
3. This deposition is necessary due to SrA _____ impending deployment on _____. Due to mission requirements, SrA _____ will be unavailable to testify at both the Article 32(b) investigative hearing and the court-martial of the accused. See attached memorandum for record from Lt Col _____, Commander, Squadron.
4. An oral deposition is requested. Request that you direct the deposition be videotaped as well as verbally transcribed.
5. A deposition officer must be detailed IAW R.C.M. 702(d)(1). Request that the undersigned be detailed as the deposition officer.
6. Maj _____, Defense Counsel, has been retained as counsel for the accused. IAW R.C.M. 702(d)(2), request that you assign Maj _____ as counsel for the accused. Maj _____ is qualified to so serve under R.C.M. 502(d).
7. I certify that a copy of this document was served on Maj _____ and Mr. _____, attorney at law, by electronic mail on _____.

KATHLEEN G. MADIGAN, Capt, USAF
Trial Counsel

Figure 4-3. Request for deposition.

When a deposition is taken far from where the court will be, a base closer to the person being deposed may be asked to perform the deposition. For example, if someone witnesses a crime while stationed in Europe, then does a PCS to the US. If a deposition suffices for the testimony, then a base office located close to the witness will take the deposition. If charges have not yet been referred to a court-martial when a request to take a deposition is approved, the convening authority who directed the deposition is required to ensure that qualified counsel are assigned to represent each party.

Oral depositions

At an oral deposition, the accused has the right to:

- Be present except when:
 1. the accused, absent good cause shown, fails to appear after notice of time and place of the deposition;
 2. the accused is disruptive within the meaning of R.C.M. 804(c)(2); or

3. the deposition is ordered instead of production of a witness on sentencing under R.C.M. 1001, and the authority ordering the deposition determines 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 as provided in R.C.M. 506.

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

Written depositions

At a written deposition, the accused has the right to be represented by counsel as provided in R.C.M. 506 for the purpose of taking a written deposition, except when the deposition is taken for use at an SCM.

No party has the right to be present at a written deposition. The party requesting a written deposition shall submit to the opposing counsel a list of written questions to be asked of the witness. Opposing counsel may examine the questions and be given a reasonable time to prepare cross-interrogatories and objections if any. The party who requested the deposition should send the interrogatories and cross-interrogatories to the deposition officer.

Each question presented by the parties shall be read to the witness and the responses recorded. The testimony by the witness shall be recorded by video, audio, or similar digital material, or transcribed. When transcribed, the deposition shall be submitted to the witness for examination, unless impracticable and signed by the witness, if available.

Recording

In the discretion of the authority who ordered it, a deposition may be recorded by a reporter or by other means including video, audio, or digital material. At the discretion of the military judge, recorded depositions may be played for the court-martial or may be transcribed and read to the court-martial. A deposition read in evidence, or one that is played during a court-martial is recorded and transcribed by the reporter in the same way as any other testimony. The deposition need not be included in the ROT.

If the oral deposition is recorded and transcribed, the transcriber shall certify the transcription is true and accurate, and the deposition officer must authenticate the record of deposition. The following figures show a transcribed oral deposition (fig. 4-4a), certification page, and authentication page (fig. 4-4b). Depositions recorded by video, audio, or digital material do not require a written transcript unless directed by the convening authority or military judge.

UNITED STATES)	
)	
v.)	
	)	DEPOSITION
A1C RONALD T. WHITE)	
Squadron)	
Base, State Zip)	
)	

DO: The proceedings will now come to order at _____ hours, _____, Base, State.

The persons present are:

Captain Ernest McFeron - Deposing Officer (DO)
 Major Michael R. Earl - Government Representative (GR)
 Captain James M. Alderman - Defense Counsel (DC)
 Airman First Class Ronald T. White - Accused (ACC)
 Senior Airman First M. Last - Witness (WIT)
 Gerald A. Snyder - Reporter

For the record, the witness to be deposed, Senior Airman First M. Last, is also present in the courtroom. Counsel and the reporter have been previously sworn.

The purpose of this proceeding is to take the deposition of **Senior Airman First M. Last**, to be used in evidence in the case of the *United States v. Airman First Class Ronald T. White*. Charges were referred to trial on _____, by order of Major General Rodney J. Carrington. Authority to take the deposition is vested in me, Captain McFeron, as the deposition officer, by order of Major General Terry L. Harper, by letter dated _____, a copy of which is furnished to the reporter for insertion in the record of this deposition as Exhibit 1.

I am a judge advocate certified according to Article 27(b), Uniform Code of Military Justice.

Major Michael R. Earl, a judge advocate certified according to Article 27(b), Uniform Code of Military Justice, will represent the government in the taking of the deposition of Senior Airman First M. Last, Squadron, Base, State.

I will advise the accused and counsel for the government that objections are to be noted by the reporter and will be ruled upon at the time of the trial. However, objections as to the form of any question which could be corrected should be made at this time.

DO: Before we go any further, I will advise the accused of his rights to counsel. Airman White, you have the right to be represented by Captain James M. Alderman, your detailed military defense counsel. He is provided to you at no expense to you. You also have the right to request a different military lawyer to represent you. If the person you request is reasonably available, he or she would be appointed to represent you, free of charge. If your request for this other military lawyer were granted, however, you would not have the right to keep the services of your detailed defense counsel because you are entitled only to one military lawyer. You may ask his superiors to let you keep your detailed counsel, but your request would not have to be granted.

In addition, you have the right to be represented by a civilian lawyer. A civilian lawyer would have to be provided by you at no expense to the government. If you are represented by a civilian lawyer, you can also keep your military lawyer on the case to assist your civilian lawyer, or you could excuse your military lawyer and be represented only by your civilian lawyer. Do you understand these rights to counsel?

ACC: Yes, ma'am.

DO: Do you wish to be represented by Captain Alderman?

ACC: Yes, ma'am.

DO: At this time, I will administer the oath to the witness, Senior Airman Last.

(The witness was sworn.)

EXAMINATION BY GOVERNMENT REPRESENTATIVE

[Questions and answers here]

EXAMINATION BY DEFENSE COUNSEL

[Questions and answers here]

DO: Okay. At this time, the deposition is closed.

(The hearing adjourned at _____ hours, _____.)

Figure 4-4a. Transcribed oral deposition.

AUTHENTICATION OF DEPOSITION
of
SENIOR AIRMAN FIRST M. LAST

In the Case of

UNITED STATES

v.

AIRMAN FIRST CLASS RONALD T. WHITE

I certify that on the _____ day of _____, at Base, State, the above deposition was duly taken by me in the presence of the accused and his counsel, and that the above-named witness, having been duly sworn by me, gave the foregoing testimony. I further certify that the detailed reporter, Gerald A. Snyder, was duly sworn by one-time oath at a time prior to the taking of such deposition, and that said reporter will sign in my presence the reporter's certificate appearing below.

ERNEST MCFERON, Capt, USAF
Deposing Officer

REPORTER'S CERTIFICATE

I certify that I recorded the above deposition and the foregoing transcript is a true, accurate, and verbatim account of the testimony of the above-named witness.

GERALD A. SNYDER
Reporter

Figure 4-4b. Deposition authentication and certification.

Self-Test Questions

After you complete these questions, you may check your answers at the end of the unit.

623. Depositions

1. What is a deposition?
2. Why are depositions used?
3. What is considered good cause for denial of a deposition request?
4. Who has the discretion to decide whether depositions recorded by videotape, audiotape, or sound film may be played for the court-martial or may be transcribed and read to the court-martial?

624. Immunity requests

Immunity is requested when a witness is needed to testify without fear his or her testimony may be used against him or her. For example, all conspiracy cases must involve at least two people. By giving one of the co-conspirators immunity, we may be able to use that person's testimony to prosecute the "big fish" or the person most responsible for the conspiracy.

R.C.M. 704 of the MCM discusses immunity. It states that immunity ordinarily should be granted only when testimony or other information from the person is necessary to the public interest, including the needs of good order and discipline, and when the person has refused or is likely to refuse to testify or provide other information on the basis of the privilege against self-incrimination. There are two types of immunity: transactional and testimonial.

1. Transactional immunity—bars *any* subsequent court-martial action against the immunized person concerning the immunized transaction, regardless of the source of the evidence against that person.
2. Testimonial immunity—or "use" immunity bars the testimony, statements, and information directly or indirectly related to the testimony and statements to be used against that person later in a court-martial. This immunity is preferred because it does not prevent the Air Force from trying the person on a criminal offense. It only prevents the government's use of information obtained (directly or indirectly) from the immunized person against him or her.

A GCMCA possesses the authority to grant immunity to witnesses. The authority to grant immunity under R.C.M. 704 may be delegated to subordinate SPCMCAs. A GCMCA may grant immunity to any person subject to the code. However, a GCMCA may grant immunity to a person subject to the code extending to a prosecution in a United States District Court only when specifically authorized to do so by the Attorney General of the United States or other authority designated under 18 U.S.C. § 6004. A GCMCA may grant immunity to persons not subject to the code only when specifically authorized to do so by the Attorney General of the United States or other authority designated under 18 U.S.C. § 6004.

A grant of immunity must be in writing and signed by the convening authority who issues it. The grant includes a statement of the authority under which it is made and identifies the matters to which it extends. Unless limited by the superior competent authority, the decision to grant immunity is a matter within the sole discretion of the appropriate GCMCA or designee.

If a defense request to immunize a witness has been denied, the military judge may, upon motion by the defense, grant appropriate relief by directing that either an appropriate convening authority grants testimonial immunity to a defense witness or, as to the affected charges and specifications, the proceedings against the accused be done away with, but *all* the following conditions must be met (R.C.M. 704(e)):

1. The witness intends to invoke the right against self-incrimination to the extent permitted by law if called to testify.
2. The government has engaged in discriminatory use of immunity to obtain a tactical advantage, or the government, through its own overreaching, has forced the witness to invoke the privilege against self-incrimination.
3. The witness' testimony is material, clearly exculpatory, not cumulative, not obtainable from any other source, and does more than merely affect the credibility of other witnesses.

As a military justice paralegal, you will most likely process immunity requests from both the trial counsel and the defense counsel. Figure 4-5 is an example of what an immunity request looks like. As you can see, you have to be very particular in what the witness will be testifying to, why you believe immunity is necessary, and, if it is a civilian witness not subject to the code, that you have coordinated the request with the local US attorney's office. The immunity request is addressed from the local wing commander to the NAF commander.

Once the actual immunity request is completed, it is sent to the NAF SJA for coordination. The SJA will attach a legal review to the request and forward it to the GCMCA for approval or disapproval, along with a memorandum to the witness granting immunity for signature (fig. 4-6). If the MAJCOM commander agrees to grant immunity, the memorandum is signed and then routed back to the originating legal office that requested immunity.

Date _____

MEMORANDUM FOR _____/CC

FROM: WING/CC

SUBJECT: Immunity Request, *U.S. v* _____

1. The [United States / defense] is requesting _____ be granted [testimonial / transactional] immunity. I recommend [testimonial / transactional] immunity be granted for the [general / special] court-martial that is scheduled to convene on [DATE]. The accused in this case is charged with violating Article ____ - [NAME OF ARTICLE], Article ____ - [NAME OF ARTICLE], Article ____ - [NAME OF ARTICLE], and Article ____ [NAME OF ARTICLE].
2. The witness [is / is not] currently facing charges. {Charges were brought against the witness by [NAME OF PROSECUTING ENTITY] for [STATE THE CHARGES OR ACT THAT CONSTITUTED THE CRIMINAL ACT]}. The witness [is / is not] currently incarcerated. {The cause for incarceration is _____. It is expected the witness will remain incarcerated until _____}.
3. The witness is expected to testify that [EXPECTED WITNESS' TESTIMONY]. We believe the witness will assert the privilege against self-incrimination because [FACTUAL BASIS AND THE NATURE OF THE OFFENSES THAT THE WITNESS MAY BE INCRIMINATED IN]. If the witness asserts the privilege, then the government will not be able to elicit the testimony it needs from this witness. It is (most likely) / (likely) / (probable) / (not likely) that the witness will testify if immunity is granted.
4. {ONLY USE THIS PARAGRAPH IF DOJ HAS AN INTEREST IN INVESTIGATING AND PROSECUTING PURSUANT TO DoD DIRECTIVE 5525.7 OR IF THE WITNESS IS SUSPECTED OF CRIMINAL ACTIVITY INVOLVING NATIONAL SECURITY} _____. The local U.S. Attorney's Office [supports / does not support] our request. Our request was coordinated with [POC NAME], [POC TITLE], U.S. Attorney's Office, [STREET ADDRESS], [CITY], [STATE]. [POC NAME] may be reached at telephone number _____. [NAME OF STATE PROSECUTING ENTITY] [supports / does not support] our request. The request was coordinated with [POC NAME], [POC TITLE], [NAME OF STATE PROSECUTING ENTITY], at [STREET ADDRESS], [CITY], [STATE]. [POC NAME] may be reached at telephone number _____.

FRANK J. CALIENDO, Lt Col, USAF
Commander

Figure 4-5. Immunity request.

Date

MEMORANDUM FOR SENIOR AIRMAN TATTLE L. TALE

FROM: 2 AF/CC
1234 Storm Street
Keesler AFB, MS 39534

SUBJECT: Grant of Testimonial Immunity for SrA Tattle L. Tale

1. An investigation revealed you have knowledge of offenses allegedly committed by SrA Iam A. Badboy, 1 CMS, Keesler AFB, MS. The offenses in question involve the wrongful use and distribution of controlled substances including marijuana, cocaine, and ecstasy.
2. By the authority vested in me in my capacity as a general court-martial convening authority, under Rules for Court-Martial 704(c)(1), Manual for Courts-Martial, United States, 2008, I hereby grant you testimonial immunity and order you to answer any questions posed to you by investigators and counsel pertaining to, and to testify at any proceeding held pursuant to the Uniform Code of Military Justice (Title 10, United States Code, Sections 801, *et seq*) concerning any offenses alleged against the military member identified above.
3. Under this immunity, your testimony and statements, as well as information directly or indirectly derived there from, may not be used against you in a later trial by court-martial. However, this immunity does not bar the use of your testimony, or information derived from it, in prosecuting you for perjury, giving false statement, or otherwise failing to comply with this order to testify.

BILLY BOB BRUEBAKE
Lieutenant General, USAF
Commander

Figure 4-6. Grant of immunity.

Self-Test Questions

After you complete these questions, you may check your answers at the end of the unit.

624. Immunity requests

1. Why do we request immunity?
2. What are the two types of immunity?
3. Who has the authority to grant immunity to a witness?
4. To whom may a GCMCA grant immunity?

625. Stipulations and motions

Stipulations and motions make trials go faster and smoother. They decrease the time required to question witnesses, argue facts, and argue and present evidence. Counsel uses motions and stipulations to agree on facts, testimony, and the type of evidence that can be admitted in trial.

Stipulations

Stipulations are governed by R.C.M. 811 in the MCM. This rule states the parties may make an oral or written stipulation to any fact, the contents of a document, or the expected testimony of a witness. The term *stipulation* merely refers to an agreement between two or more parties. In military justice, the term is used in reference to an agreement between the prosecution and defense with the consent of the accused being tried at a court-martial. Since you may be called on to draft such a document before trial or to become familiar with stipulations while in the courtroom as a court reporter, it is necessary you have a basic understanding of these documents.

Usually, stipulations are put in writing by the counsel desiring the stipulation and bear the signature of the requesting counsel, opposing counsel, and accused. However, stipulations may be presented orally at trial, where the military judge will ensure counsel and the accused agree to such stipulations before accepting it.

There are two types of stipulations:

1. Stipulation of fact—is an agreement to the existence or nonexistence of any fact. For example, counsel for both sides and the accused may agree (or stipulate) the distance between two points is three miles. Stipulations of fact are important because they can reduce the time and expense of a court-martial. Mark these stipulations as either prosecution or defense exhibits, depending on the side offering it.
2. Stipulation of expected testimony—indicates both counsel and the accused agree that, if a particular witness were to testify at the hearing or trial, the testimony of that witness would be as stated in the stipulation. The stipulation of expected testimony *does not* guarantee the content of the stipulation is the absolute truth, but that the witness would state, such if present in the room. These stipulations do not carry more weight than any other testimony. Stipulations of expected testimony are read into evidence and are marked as appellate exhibits.

Stipulation acceptance procedures

Before accepting a stipulation in evidence, the military judge must be satisfied with the parties' consent to its admission. Ordinarily, before accepting any stipulation, the military judge should inquire to ensure the accused understands the right not to stipulate, understands the stipulation, and consents to it. If the stipulation practically amounts to a confession to an offense to which a not guilty plea is outstanding, it may not be accepted unless the military judge ascertains:

- from the accused, that the accused understands the right not to stipulate and that the stipulation will not be accepted without the accused's consent;
- that the accused understands the contents and effect of the stipulation;
- that a factual basis exists for the stipulation;
- that the accused, after consulting with counsel, consents to the stipulation;
- from the accused and counsel for each party whether there are any agreements between the parties in connection with the stipulation, and, if so, what the terms of such agreements are.

The military judge should not accept a stipulation that is unclear or ambiguous or a stipulation of fact which amounts to a complete defense to any offense charged. If a stipulation is rejected, the parties may be entitled to a continuance.

When offered, a written stipulation shall be presented to the military judge and shall be included in the record, whether accepted or not. Once accepted, a written stipulation of expected testimony shall be read to the members, if any, but shall not be presented to them; a written stipulation of fact or a

document's contents may be read to the members, if any, presented to them, or both. Once accepted, an oral stipulation shall be announced to the members if any. A stipulation of fact that has been accepted is binding on the court-martial; it may not be contradicted. On the other hand, stipulations of expected testimony may be attacked, contradicted, or explained.

Drafting stipulations

When drafting stipulations, the first step is to make the heading; be sure to include in which region you are. Next, enter the court information, the accused's name, SSN, squadron, base, and state. For a stipulation of fact, print "stipulation of fact" in the right portion under the heading and, for a stipulation of expected testimony, print "stipulation of expected testimony" in the right portion, along with whose testimony it is and the date. Figures 4-7a/b and 4-8a/b provide examples of both a stipulation of fact and expected testimony.

UNITED STATES AIR FORCE TRIAL JUDICIARY IN THE WESTERN REGION		
UNITED STATES)	
)	
v.)	
	)	STIPULATION OF FACT
AIRMAN FIRST CLASS GEE I. JANE)	
123-45-6789)	
Squadron)	
Base, State Zip	)	Date
<p>It is hereby stipulated and agreed by and between the Prosecution and the Defense, with the express consent of A1C Jane, that the following facts are true and admissible for all purposes in this court-martial:</p> <ol style="list-style-type: none"> 1. At all times material to the charged offenses, the Accused, A1C Gee I. Jane, was an active-duty member of the United States Air Force. She has served on active duty from _____ to the present, and she is currently assigned to the Squadron, Base, State. 2. A1C Gee I. Jane did, at or near Base, State, between on or about _____ and on or about _____, on divers occasions, wrongfully use cocaine. <p style="margin-left: 40px;">On approximately Friday, _____, A1C Jane was in her Base dormitory room with Thomas Riddik, a civilian. A1C Jane was dating Thomas Riddik at the time. At the Base dormitory room, Thomas Riddik produced a clear, plastic bag containing a white, powdery substance and asked A1C Jane if she wanted to use it. At one point, Thomas Riddik called the substance cocaine. He put the white, powdery substance on a CD case and divided it into one and a half inch lines. After Thomas Riddik snorted some lines, A1C Jane ingested the substance by snorting two lines through her nose using a rolled up dollar bill. When she ingested the substance, she believed it to be cocaine because the white powdery substance looked like cocaine she had seen in movies. She knowingly and voluntarily snorted the cocaine, a substance she knew to be an illegal drug. A1C Jane felt her heart race and had a high, euphoric feeling after using the substance. A1C Jane did not have legal justification or authorization to use cocaine.</p> <ol style="list-style-type: none"> 3. A1C Jane has saved the government time, effort, and expense by pleading guilty and entering into this stipulation of fact. 		
GEE I. JANE, A1C, USAF Accused		Date

Figure 4-7a. Stipulation of fact page 1.

FRANK J. CALIENDO, Capt, USAF
Defense Counsel

Date

RONALD T. WHITE, Capt, USAF
Trial Counsel

Date

Figure 4-7b. Stipulation of fact page 2.

**UNITED STATES AIR FORCE TRIAL JUDICIARY
IN THE ATLANTIC REGION**

UNITED STATES)	
)	
v.	)	STIPULATION OF
	)	EXPECTED TESTIMONY:
TECHNICAL SERGEANT GI JANE	)	MASTER SERGEANT
123-45-6789	)	JOHN DOE
Squadron)	
Base, State Zip	)	Date
)	

The Accused, the Defense, and Prosecution stipulate and agree that if called to testify, Master Sergeant John Doe would testify substantially as follows:

1. My name is Master Sergeant John Doe. I am currently assigned to Squadron at Base, State. Until my recent permanent change of station (PCS), I was the first sergeant at the Squadron at Base, State.
2. I knew Technical Sergeant GI Jane while I was at Base. I was her first sergeant. I knew about the alleged DUI on _____. TSgt Jane called and asked for my help early that morning when the Security Forces had apprehended her at her home.
3. TSgt Jane insisted that she did not drive and that she did not have even have her car keys because she had left them at Technical Sergeant Carlos Mencia's house. However, at the clinic before the blood draw, I heard TSgt Jane tell Major Scibelli she had an extra set of car keys in her china hutch.
4. The following morning, at TSgt Jane's request, I picked up a set of about three (3) or four (4) keys from TSgt Mencia's home. It looked like a set of car keys and door keys.
5. I delivered the keys I had retrieved from TSgt Mencia's home to TSgt Jane that same day. Master Sergeant Ihavea Beard was present when I returned the keys to TSgt Jane and witnessed me handing the keys to TSgt Jane.

BETTY J. BOOP, Capt, USAF
Trial Counsel

DATE

JANET D. SNYDER, Capt, USAF
Assistant Trial Counsel

DATE

Figure 4-8a. Stipulation of expected testimony page 1.

_____ JAMES O. CULBREATH, Capt, USAF Defense Counsel	_____ DATE
_____ MARTIN N. HILLS, Capt, USAF Assistant Defense Counsel	_____ DATE
_____ GI JANE, TSgt, USAF Accused	_____ DATE

Figure 4–8b. Stipulation of expected testimony page 2.

Under the identifying information, start the body of the stipulation. If a stipulation of fact, state the prosecution, defense, and accused stipulate and agree to the following facts. If a stipulation of expected testimony, state the prosecution, defense, and accused stipulate and agree if the witness were called to testify, they would testify substantially to what follows. The order of accused, defense, or prosecution does not matter in the first paragraph of the stipulation; it will usually depend on who is typing it.

The next paragraph is where the stipulation of fact differs from the stipulation of expected testimony. For a stipulation of fact, lay out the facts starting with where the accused was stationed (from when to when) and that he or she was on active duty in the USAF. Next, document the facts of the offense or facts they are stipulating to. The last paragraph is a statement the accused has saved the government time, effort, and expense by entering into the stipulation. The final part of the stipulation of fact is the signature line and date for the accused, defense counsel, and trial counsel.

For a stipulation of expected testimony, the first statement will be the accused, defense, and prosecution stipulate and agree the witness, if called to testify, would testify substantially the same as what is in the following paragraphs. The first numbered paragraph is the identifying information for the witness, including where he or she is stationed now, how long he or she was stationed at his or her previous duty station, and if he or she has had a PCS since the offense occurred. The next paragraphs will document how the witness would testify and what he or she knows about the offense and the accused. The final part of the stipulation of expected testimony is the signature line and date for the trial counsel, defense counsel, and accused.

Motions

We write motions because we want the court to rule in our favor on a particular issue. Motions are important because they can influence the kind of evidence either party can present at trial. Both prosecution and defense may make pretrial motions or may raise motions during trial.

A motion is an application to the military judge for particular relief. Motions may be oral or at the discretion of the military judge, written. A motion states the grounds on which it is made. A motion sets forth the ruling or relief sought. Motions may be motions to suppress, motions for appropriate relief, motions to dismiss, or motions for findings of not guilty. Any defense, objection, or request, which can be determined without the trial, of the general issue of guilt may be raised before trial.

Failure by a party to raise defenses or objections or to make motions or requests, which must be made before pleas, constitutes a waiver. The military judge may grant relief from the waiver if good cause is shown. Other motions, requests, defenses, or objections, except lack of jurisdiction or failure of a

Figure 4–9a. Motion for judicial notice part one.

ARGUMENT

1. The existence of Base Instruction 600-3, dated 25 October 2001, is a fact not subject to reasonable dispute. This fact is generally known and capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned.

2. The fact that Base Instruction 600-3, dated 25 October 2001, was in effect at the time the Accused is charged with violating it, is a fact not subject to reasonable dispute. This fact is generally known and capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned.

CONCLUSION

Based on the above, the Prosecution requests that the Court approve the Prosecution's requested relief.

Served on defense counsel and this Court via electronic mail on _____.

KATHLEEN G. MADIGAN, Capt, USAF
Trial Counsel

Figure 4-9b. Motion for judicial notice part two.

Relief sought

Here you tell the judge what you are asking for. In the example, we are asking the court to take judicial notice of a base instruction that was in effect at the time of the offenses. Judicial notice is a rule in the law of evidence that allows a fact to be introduced into evidence if the truth of that fact is so notorious or well known, it cannot be refuted, in this case, a base instruction.

Burden of proof and standard of proof

Here, you put who has the burden of proof (i.e., the moving party, prosecution) and what the standard of proof is. Be sure to reference the proper R.C.M. for this section.

Facts

In the example, the facts are the accused is charged with violating the base instruction, and the instruction was in effect at the time of that violation. Ensure you put the date the instruction was approved if you are asking for something similar to this in your motion.

Law

In this section, you type the authority used to support the motion. Not all motions will be as short as the example in this section. Some motions rely on other court cases, different rules of evidence, and so forth. Be sure to include everything you are relying on to persuade the judge to rule in your favor in this section.

Witnesses/evidence

In the example, there are no witnesses required; however, be sure to attach a copy of the base instruction for review by the military judge. It is also possible this section will refer to a prosecution or defense witness list.

Argument

This section lays out your argument for the court. For example, there are two arguments: the existence of the instruction and the fact the instruction was in effect at the time of the violation. Again, if you are quoting an instruction as a part of your motion, be sure to include the date it was approved.

Conclusion

The conclusion is normally a short request for the court to approve the requested relief. Under the conclusion is a statement the motion was served on the other party (defense) and the court, how it was served, and the date it was served. The last part of the motion is the signature line of the person submitting the motion; normally, this will be either prosecution or defense counsel.

Self-Test Questions

After you complete these questions, you may check your answers at the end of the unit.

625. Stipulations and motions

1. What does the term *stipulation* mean?
2. Why are stipulations of fact important?
3. What type of stipulation may be attacked, contradicted, or explained?
4. Why do we write motions?
5. Why are motions important?
6. Who is allowed to make pretrial motions or raise motions during the trial?

626. Plea agreements

A plea agreement is an agreement between the accused and the convening authority to fulfill terms or conditions agreed upon before trial. A plea agreement is appropriate when there are benefits to the government and the accused. It may include the accused's promise to plead guilty to, or to enter a confessional stipulation as to one or more charges and specifications, and to fulfill such additional terms or conditions, which may be included in the agreement. It may include the convening authority's promise to do the following:

- Refer the charges to a certain type of court-martial.
- Refer a capital offense as noncapital.
- Withdraw one or more charges or specifications from the court-martial.
- Have the trial counsel present no evidence as to one or more specifications or portions thereof.
- Take specified action on the sentence adjudged by the court-martial, including sentencing minimums and maximums.

For example, the convening authority may agree to approve a sentence adjudged above a specified minimum and not approve a sentence in excess of a specified maximum, to suspend all or part of a sentence, to defer confinement, or to mitigate certain forms of punishment into less severe forms.

Submitting plea agreements

Normally, the accused and the defense counsel initiate proposed plea agreements; however, the trial counsel, SJA, convening authority, or their duly authorized representatives can initiate plea agreements. If initiated by the trial counsel, SJA, or convening authority, a paralegal assigned to the military justice division may be required to prepare the plea agreements. AFI 51-201 provides a sample plea agreement for use. The proposed plea agreements must be in writing and signed by the accused and defense counsel. The SJA recommends the proposed plea agreement be accepted or rejected; then the SJA forwards it to the convening authority. If the agreement contains any specified action on the adjudged sentence, that action is set forth on a page separate from the other portions of the agreement and labeled as Appendix A to the agreement. Oral plea agreements are prohibited, as are promises to intervene on the accused's behalf in any manner in exchange for a guilty plea.

Acceptance by the CA

GCMCAs and SPCMCAs are authorized to enter into or reject offers to enter into plea agreements with the accused unless a superior commander withholds such authority. The convening authority may also propose by counteroffer any terms or conditions not prohibited by law or public policy. The decision to accept or reject a plea agreement offer is within the sole discretion of the convening authority that referred the case to trial. The accused is entitled to have the convening authority personally act upon the offer before trial. If the plea agreement is accepted, the convening authority personally signs it, unless the convening authority previously authorized another individual (e.g., the SJA or trial counsel) to sign. In such a case, the authorized individual uses the authority line, "FOR THE COMMANDER."

In-court inquiry

The military judge is notified of plea agreements before arraignment. The military judge must question the accused before accepting the plea in order to determine if the accused understands and agrees to the meaning and effect of each plea agreement condition and the agreed-upon sentence limitations. (R.C.M. 910(f)(3)) Include all documentation and correspondence about a plea agreement, including changes or modifications approved by the military judge, in the ROT.

Withdrawal from plea agreements

A party may withdraw from a plea agreement at any time before it is accepted. After a stipulation has been accepted, a party may withdraw from it only if permitted to do so by the military judge. Withdrawals by the accused should be in writing and given to the SJA or trial counsel.

A convening authority may withdraw from a plea agreement at any time before the accused begins performance of promises contained in the agreement; upon the failure by the accused to fulfill any material promise or condition in the agreement; when inquiry by the military judge discloses a disagreement as to a material term in the agreement; or if findings are set aside because a plea of guilty entered pursuant to the agreement is held improvident on appellate review. The convening authority should exercise this authority with due regard for fairness. The convening authority's withdrawal must be in writing and signed by the convening authority. A copy is provided to the accused and defense counsel. The plea agreement and withdrawal, by either side, should be included in the ROT as a pretrial allied paper.

Self-Test Questions

After you complete these questions, you may check your answers at the end of the unit.

626. Plea agreements

1. Define a plea agreement.
2. Who may initiate a plea agreement?
3. Who is authorized to enter into or reject offers to enter into plea agreements with the accused?
4. When is the military judge notified of plea agreements?
5. How is withdrawal of a plea agreement by the accused submitted?

Answers to Self-Test Questions

620

1. AFI 51-110.
2. The information must be turned over automatically by both sides; no request is required.
3. The military judge.

621

1. CDO.
2. Immediately notify the CDO of the referred charges and detailed counsel by email.
3. The Clerk of Trial Courts or the docketing judge. The docketing conference should be held within two duty days following the day of notice of referral.
4. To promote a fair and expeditious trial and discuss issues that are outstanding or foreseeable and capable of early resolution, such as approval of experts, discovery, evidentiary motions, requests for sanity boards, and so forth.
5. During the Article 39(a) proceeding and only after the military judge has made certain inquiries of the accused and is convinced the accused understands the meaning and effect of trial by military judge alone.
6. The date, time, place, and the uniform required for courts-martial.

622

1. The detailed military judge.
2. To determine proper notification procedures ensuring his or her presence at trial and to determine who will be responsible for funding his or her travel.
3. The trial counsel.
4. When the witness is unwilling to testify.
5. Determine who will provide the funding.

6. Complete a request via the WFMS at least ten days before the proceed date entered in WFMS.
7. The GCMCA.
8. The AFLOA/JAJM.
9. \$1,000 per day with a maximum of \$4,000 per case.
10. Within five calendar days of returning from TDY.
11. The SF 1034, Public Voucher for Purchases and Services Other Than Personal.

623

1. An out-of-court testimony of a witness under oath in response to questions by the parties, which is transcribed or recorded on videotape, audiotape, or similar material.
2. To preserve the testimony of a witness who is likely to be unavailable at the investigation under Article 32 or at the time of trial.
3. Failure to state a proper ground for taking a deposition, failure to show the probable relevance of the witness' testimony, or that the witness' testimony would be unnecessary.
4. Military judge.

624

1. We request immunity when we need a witness to testify without fear that his or her testimony may be used against him or her.
2. Transactional immunity and testimonial immunity.
3. A GCMCA; it may be delegated and may be limited by a superior authority.
4. Any person subject to the code, unless specifically authorized to do so by the Attorney General of the United States or other authority designated under 18 U.S.C. 6004. A GCMCA may grant immunity to persons not subject to the code only when specifically authorized to do so by the Attorney General of the United States or other authority designated under 18 U.S.C. § 6004.

625

1. An agreement between two or more parties.
2. They can reduce the time and expense of a court-martial.
3. Stipulations of expected testimony.
4. Because we want the court to rule in our favor on a particular issue.
5. They can influence the kind of evidence either party can present at trial.
6. Either party; the prosecution and/or the defense.

626

1. An agreement between the accused and the convening authority to fulfill terms or conditions agreed upon prior to trial.
2. The trial counsel, SJA, convening authority, and duly authorized representatives, or defense counsel and accused.
3. GCMCAs and SPCMCAs, unless a superior commander withholds such authority.
4. Before arraignment.
5. In writing and given to the SJA or trial counsel.

Student Notes

Unit 5. Trial and Post-trial Procedures

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THE PRECEDING UNITS of this volume covered the duties of paralegals regarding pretrial administration. This unit will cover the trial and post-trial administration duties. As you can see from the table of contents, the unit is divided into three sections dealing with different aspects as you proceed to trial through disclosure of information that may occur after trial. While these areas may not be as clearly divided in your day-to-day operations as they are here, the grouping was chosen to help you progress through the information.

5-1. Trial

This section focuses on tasks accomplished a day or two before trial and courtroom procedures within the actual trial. At this point, you have been working very hard for several months, ensuring you have accomplished all of your pretrial duties. Now, you are days away from the trial where you want to finalize those last-minute details and make sure everyone and everything is in its place when the trial begins. It is now time to see your hard work in action. See figure 5-1 for the trial process.

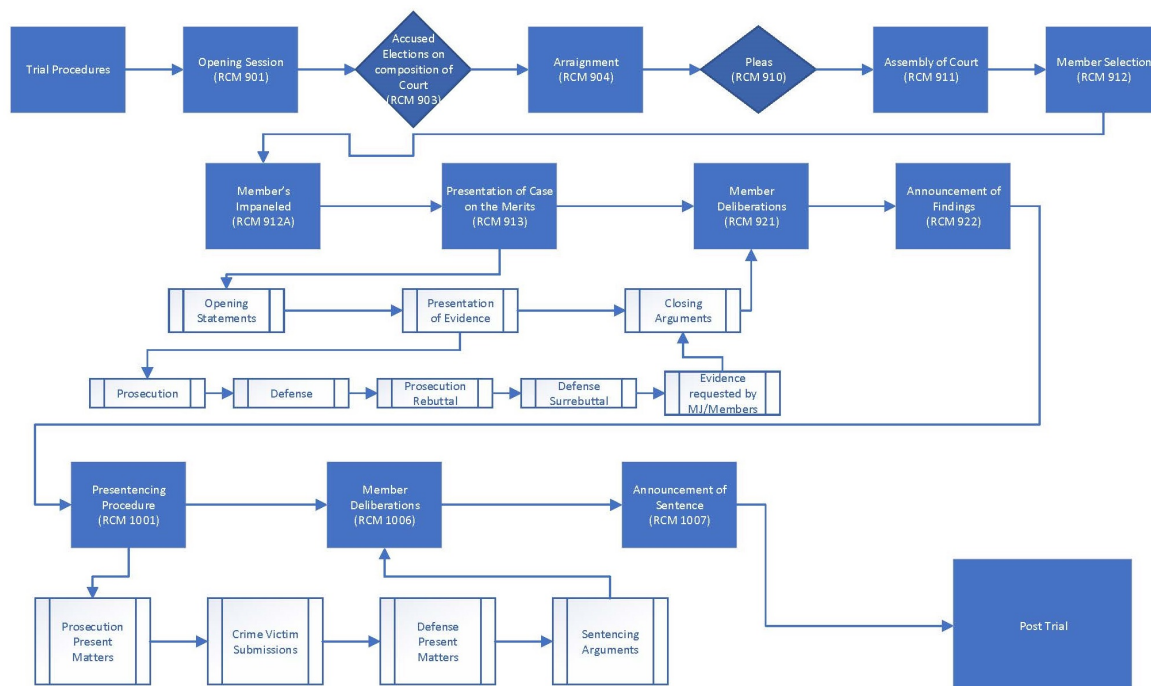


Figure 5-1. Trial process.

627. Trial preparation

Although you may consider preparing your courtroom as “pretrial,” it is an area worth separating from the rest of your pretrial duties. It is imperative the bailiff and the court members understand their responsibilities. Additionally, the courtroom must be set up in a specific manner with no room for error. As you prepare the courtroom and interact with others assisting with the court process, remember first impressions and your efforts will be a direct reflection upon you and your legal office.

Courtroom preparation

One of the paralegal’s duties is to prepare the courtroom; including the arrangement and proper seating of members and other participants. The first step is to verify the courtroom has a neat, clean, and orderly appearance. Remember, trials are open to the public, and we want to maintain a professional appearance. Even though they are not in the public view, the jury deliberation room and judges area must be neat and clean as well.

When preparing the courtroom, there is a specific seating arrangement for court members. The president is seated in the middle of the members, and the next senior ranking member is seated to the right of the president. The next senior ranking member is seated to the left of the president. Alternate the remaining members from right to left in this manner until all the members have been seated appropriately. If you have more than one row of seats in your jury box, always begin in the front row and move back to other rows when necessary, following the same pattern. The president of the panel sits front row and center.

Provide each member, counsel, judge, and court reporter with appropriate supplies (i.e., paper, pencils, etc.), and a copy of the convening order with any amendments. Check that the jury deliberation room also has paper, pencils, and any other necessary supplies. There are no written rules on what to provide the members, but remember the members can be in the deliberation room for hours and you want to make sure they are comfortable and have what they need. It is also a good idea to ask the judge if there is anything you can provide him/her before trial.

Before the trial officially begins, copies of the charges and specifications (flyers) must be prepared and given to the trial counsel for distribution to the court members during the open session of the court. The original copy of the flyers ultimately becomes an appellate exhibit; it attaches to the completed ROT.

Probably the most critical aspect of preparing the courtroom for trial is setting up the court-reporting equipment. You should seek guidance from your court reporter before setting up any equipment. In most cases, the court reporter will take on this responsibility himself/herself so he or she can be sure all equipment is in proper working order. Whether it is you or the court reporter, it is imperative you always verify the equipment is operative before trial. Generally, a reporter’s gear includes a recorder, stenographers mask, recording tapes, a headset, a laptop computer, microphones, court reporter’s worksheet, exhibit stamps, and sufficient supply of pencils and paper. Most AF courtrooms have digital recording equipment; however, if you find yourself in a courtroom with an analog (cassette tape) recording system, confirm you have enough tape and related supplies to last an entire day. Generally, this involves about eight hours of recording. In addition, double-check your video teleconference equipment in cases where you may have witnesses or experts testifying by video teleconference.

Assemble trial folders

Prior to trial, another item of importance is the trial folders. Prepare a trial folder for each counsel. The trial folder contains documents such as a copy of the Article 32 investigation (if applicable); a copy of the transmittal (first indorsement to the charge sheet); a copy of the charge sheet; a copy of the convening order and any amendments; any allied papers—statements of witnesses, extracts of AFOSI reports of investigation, photographs, and so forth—and the names of potential witnesses and location of any evidence forwarded with the charges. It is important to remember that each counsels

must have the same documentation in their respective folder. Also, maintain copies of all documents in a working file for use in office administration of the case.

Bailiff's responsibilities

A trial is the most visible function of our military justice system. A trial must safeguard the liberties of the accused and protect the members of the community. The level of professionalism that must be maintained requires that nothing detract from an orderly atmosphere of respect for the law and authority of the court. The bailiff's function is to assist the military judge in conducting an orderly trial and to relieve the military judge and counsel of the burden of minor administrative matters.

Duties prior to trial

The bailiff has the following responsibilities prior to trial:

- Reports to the base legal office before the day of trial to receive a bailiff's guide, a briefing, and a walk-through of the office. The walk-through is intended to familiarize the bailiff with the office. The bailiff must have a neat, up-to-date service dress uniform and have a professional appearance.
- Reports to the trial counsel in the proper uniform at least 30 minutes before the start of the first day's proceedings. Thereafter, the bailiff reports to the military judge at least 15 minutes before the start of the day's proceedings.
- Sees that the courtroom and jury deliberation room have a neat, clean, and orderly appearance and the furniture is in proper arrangement. The bailiff assists the paralegal in preparing the courtroom each morning before the day's proceedings.

Entry and departure of the MJ

When counsel for both sides, the accused, and the reporter are all present in the courtroom, the bailiff notifies and then escorts the military judge to the courtroom. Upon entering the courtroom, the bailiff stops and states, "All rise." When the military judge announces a recess, adjournment, or closing of the court, the bailiff stands and states, "All rise." If need be, the bailiff also instructs the spectators to stand until the military judge departs from the courtroom. The military judge will advise the bailiff if there is to be any departure from this procedure.

The entry of court members

When one or more court members enter or stand to leave the courtroom—even if the trial is in session—the bailiff will clearly state, "All rise." All persons present in the courtroom (except the court reporter and judge) should remain standing until the judge asks them to be seated or until the judge and the court members have left the courtroom.

Spectators and members of the news media

The bailiff should be aware that military trials are open to the public. Unless otherwise instructed by the military judge, spectators and members of the news media are welcome in the courtroom to hear and observe the trial proceedings. The bailiff must ensure they can enter, sit, and leave the courtroom quietly while court is in session.

Because the law does not generally permit picture taking, mechanical or digital recordings, or any broadcast of the trial proceedings, the bailiff must not allow anyone to bring such equipment into the courtroom.

Courtroom rules also do not permit spectators to eat, sleep, smoke, or drink anything other than water. They also should not engage in conversation while the court is in session. Cell phones must be turned off. The bailiff is responsible for informing any offenders of these rules quietly and diplomatically. It is the bailiff's responsibility to take appropriate measures that noises taking place inside and outside the courtroom do not interrupt court proceedings.

Rowdiness and violence are possible during the court-martial. The bailiff must remain alert and be prepared to take immediate steps to suppress unruly behavior, including removing people from the courtroom.

Court members in closed session

Only members are permitted in the deliberation room when the court members are in closed session. The bailiff will not enter that room nor permit anyone else to enter it during the closed session. The bailiff is the only contact between the court members and the parties to the trial during the periods the court members are deliberating. The bailiff must be available to the court members outside their deliberation room. The bailiff immediately notifies the trial counsel, defense counsel, court reporter, and military judge when the court members are ready for the court to be reopened. If the bailiff is instructed to deliver any item or message to the court members in closed session, the bailiff must inform the military judge before doing so to obtain his or her approval. Phones (cellular or otherwise) are prohibited in the deliberation room.

Miscellaneous duties during the trial

The bailiff must be prepared to perform the following duties:

- Summon the court members, counsel, and all required parties to the courtroom at the beginning of each session of court when advised by the military judge or trial counsel to do so.
- Summon witnesses to the courtroom when requested by counsel.
- Deliver items to the court when instructed to do so (e.g., evidence, findings, and sentence worksheets).
- Deliver items of evidence to the deliberation room, if instructed to do so by the military judge, when the court members retire to the deliberation room.
- Perform administrative errands during the trial as requested by the military judge and counsel.

Relation of the bailiff to the issues and parties of the trial

The bailiff is to remain neutral throughout the trial. The bailiff never participates in any discussion of the details of the case. The bailiff avoids making comments on the performance of counsel for either side or on the testimony of witnesses. The bailiff must not engage in conversations with the accused, counsel, or court members, except in the performance of his or her duties. The bailiff is not excused from those duties without the direction of the military judge or trial counsel.

628. Understanding trial procedures

When you are working on a case, it is helpful to understand each step of the trial process. You may have to explain to witnesses, victims, or family members what is happening in the court.

Article 39(a) sessions

Trial begins with the Article 39(a) session. The military judge, accused, trial counsel, defense counsel, court reporter, and bailiff are present during the Article 39(a) session. The military judge hears and determines motions; hears and rules on matters authorized under the UCMJ; conducts arraignment, and the entering of pleas. In a guilty plea case, the judge also decides whether to accept or reject the accused's plea of guilty during an Article 39(a) session. After arraignment, if the accused does not enter his or her plea of guilty, the military judge calls the court to order with members. Remember, the case may also be tried by judge alone, subject to the approval of the military judge.

Voir dire

In a case with court members, the next trial phase is voir dire. During voir dire, court members are individually screened to determine whether they can try the case fairly and impartially. For example, in a case of involuntary manslaughter that involves drunk driving, a defense counsel may challenge a court member for cause, if that member personally experienced a death in his or her family due to a drunk driver. Court members are encouraged to be candid and open during the questioning that

determines their qualifications to sit. Such candor is desirable, and a member who displays such frankness is not disqualified automatically as long as it is clear that any personal bias he or she possesses will yield to the evidence and the judge's instructions.

Arraignment

Under R.C.M. 904, arraignment is conducted in a court-martial session and consists of reading the charges and specifications to the accused and calling on the accused to plead. The trial counsel reads the charges and specifications in open court, and the accused enters their pleas. The accused may choose to waive the reading. The military judge, when authorized to do so by the Secretary concerned, may hold the arraignment at an Article 39(a) session out of the presence of the court members; this is now the customary procedure when a military judge presides over the trial. During an arraignment, the defense will be asked whether it has any motions to make before pleas are entered, as some motions must be made before entering a plea. Arraignment is complete when the accused is called upon to plead; the entry of pleas is not part of arraignment.

Care inquiry (guilty pleas inquiry)

For a guilty plea case, the next step after arraignment is the *Care* inquiry. The purpose of a *Care* inquiry is to verify that the accused understands what he or she is pleading guilty to and that he or she is, in fact, guilty of each element of each charge and specification. This inquiry stems from the case *U.S. v Care*, 40 C.M.R. 247 (C.M.A. 1969). In that case, the Court of Military Appeals, the predecessor of the Court of Appeals for the Armed Forces (CAAF), found two primary deficiencies in the providence inquiry. The first deficiency, the military judge did not explain the elements of the offense to the accused on the record. The second deficiency was that the military judge did not question the accused on the record to establish that a factual basis for the guilty pleas existed.

To remedy these deficiencies, and to preclude post-trial claims of innocence or misunderstanding of the nature of the offense, the court's decision provided that all ROTs for courts-martial convened more than 30 days after the date of the *Care* opinion (29 August 1969) must reflect not only the elements of each offense charged have been explained to the accused but also the military judge or president of the court has questioned the accused about what he or she did or did not do and what he or she intended to do. This is to make clear the basis for a determination by the military judge or president whether the acts or the omissions of the accused constitute the offense or offenses to which the accused is pleading guilty.

Care requires the military judge personally advise the accused *on the record* of the following:

- The elements of the offense.
- That his or her plea admits every element, act, or omission contained in the offense.
- That the plea authorizes conviction without further proof.
- The maximum sentence.
- The fact that maximum punishment can be imposed if the judge accepts the plea.
- That a plea of guilty waives the right against self-incrimination, the right to trial by court-martial on the merits, and the right to confrontation.

The inquiry must include a significant interchange directly with the accused. When the accused has entered into a stipulation of fact describing the commission of the offense, the judge may and should use the stipulation in the factual inquiry.

Presentation of evidence

Once the court is assembled, the prosecution and defense each present their case. This phase includes opening statements, calling witnesses, presentation of all evidence, and closing arguments. The military judge exercises control over the mode and order of witnesses; presenting evidence to make the presentation effective for ascertaining the truth; avoiding unnecessary waste of time; and

protecting witnesses from harassment or undue embarrassment. Ordinarily, this phase follows the sequence listed:

1. Presentation of evidence for the prosecution.
2. Presentation of evidence for the defense.
3. Presentation of prosecution evidence in rebuttal.
4. Presentation of defense evidence in surrebuttal.
5. Additional rebuttal evidence at the discretion of the military judge.
6. Presentation of evidence requested by the military judge or members.

After the trial and defense fully present their case, the members must reach findings. This is the deliberation process where the members decide if the accused is guilty or not guilty. The president, who is the senior court member, announces the findings in open session.

Findings

After the presentation of the evidence on findings, but before the sentencing portion of a court-martial, the trial counsel, defense counsel, military judge, and members may take certain actions. These include motions for a finding of not guilty; closing arguments on findings; instructions on findings; findings concerning guilt or innocence; deliberations and voting procedures on findings; announcements, and reconsideration. All of these are part of the trial proceedings.

Motions for findings of not guilty

The defense may make the motion at the close of the government's case, the defense's case, or both. The military judge may also grant the motion for a finding of not guilty at his or her discretion. When making a motion for a finding of not guilty, the motion must specify how the evidence is insufficient. A military judge's ruling to grant a motion for a finding of not guilty is determined before the findings by the members. If granted, the finding is final when announced and is *not* subject to reconsideration or government appeal.

Closing arguments on findings

Trial counsel always speaks first in closing arguments, followed by the defense counsel's reply. Trial counsel is then permitted rebuttal. The military judge has no discretion to alter this order of argument. Closing arguments may properly include reasonable comments on the evidence in the case, including inferences to be drawn from it.

Instructions on findings

The military judge orally gives instructions on findings on the record in the presence of all parties and the members. Instructions can be given before or after trial counsel and defense counsel arguments, or at both times, and before the members close to deliberate. When instructions are given, is a matter within the sole discretion of the military judge. Written copies of the instructions, or portions of them, may also be given to the members for their use during deliberations. Mark copies of any written instructions delivered to the members as appellate exhibits.

Findings concerning the charges

General findings state whether the accused is guilty of each offense charged. Findings must be made with respect to each charge and each specification. If two or more accused are tried together, separate findings as to the guilt of each are made. Guilty findings may be reached only upon proof beyond a reasonable doubt and may be based on direct or circumstantial evidence. In weighing and evaluating evidence, members are expected to use their common sense and their knowledge of human nature and the ways of the world.

Generally, findings as to a specification may be guilty; not guilty of an offense as charged, but guilty of a named LIO; guilty with exceptions, with or without substitutions; not guilty of the exceptions, but guilty of the substitutions, if any; or not guilty.

Deliberations and voting procedures

Deliberations and voting are conducted in closed session and a full and free discussion of the merits of the case is included. Unless otherwise directed by the military judge, members may take their notes, appellate exhibits such as instructions, the flyer, and other nontestimonial documents, and written instructions into deliberations. Members may request the court-martial be reopened and portions of the record read to them, or additional evidence introduced.

All members present vote by secret written ballot for each charge and specification. The junior member of the court collects and counts the ballots, and the president of the court checks the count and informs the members of the result. Failure to follow correct procedures can be found to be prejudicial error on appeal.

A finding of guilty requires at least three-quarters of the members voting for a finding of guilty. Once the court members or military judge have reached their decision regarding guilt or innocence of the accused, their findings are announced in the presence of all parties. The president announces the findings by the members. The military judge announces the findings when the trial is by military judge alone. If the accused is found not guilty of all charges and specifications, the court-martial is adjourned at this point. Otherwise, the trial moves to presentencing procedures.

Sentencing

The sentencing phase of a court-martial is to determine the type of punishment an accused will receive after he or she is found guilty. Sentencing begins immediately after the court announces a finding as to guilt. This is unlike many civilian jurisdictions because there are no delays between these two phases.

The default-sentencing forum is by the military judge. This means that in a litigated case, where members are the finders of fact, a military judge will determine the sentence unless the accused elects to have members also sentence them. However, in a guilty plea case, the accused can choose to have either a military judge or a panel of court members to determine the sentence. If the accused elects to be tried by a military judge, and that judge finds the accused guilty, the accused cannot later request member sentencing.

Presentencing procedure

During presentencing, the prosecution presents matters such as the accused's personnel records, evidence of previous convictions, evidence in aggravation, and evidence of rehabilitative potential. The defense may present matters in rebuttal, extenuation, and mitigation. The accused may exercise the right to testify under oath, make an unsworn statement, or remain silent. Testimony under oath is subject to cross-examination, whereas an unsworn statement is not.

The structure of the sentencing phase is much like the findings phase. Trial counsel presents the evidence first, and it must fit into one of the following categories:

- Service data relating to the accused taken from the charge sheet. This document is called the PDS. The defense generally reviews it prior to trial for accuracy.
- Personal data relating to the accused and of the character of the accused's prior service as reflected in the personnel records of the accused:
 - Performance reports.
 - Prior NJP actions and vacation of suspended NJP actions.
 - Other disciplinary actions (i.e., letters of reprimand, admonition, and counseling).
However, trial counsel may only offer the documents as evidence. The supervisor cannot be called to testify about the specific incident that occurred.
- Evidence of prior convictions, military or civilian. A conviction in a court-martial is when a sentence has been adjudged. In a civilian case, a conviction includes any disposition of the case following a determination of guilt (i.e., guilty plea, trial, or no contest plea).

- Evidence of aggravation, which is evidence as to any aggravating circumstance directly relating to or resulting from the offenses of which the accused was found guilty. This includes, but is not limited to:
 - Financial, social, psychological, and medical impact on, or cost to any person or entity who was the victim of an offense.
 - Evidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense.
 - Evidence the accused intentionally selected any victim or any property as the object of the offense because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person.
 - Impact on the victim, family, and the community, including expert testimony concerning the impact.
 - Impact on the mission, discipline, or efficiency of the command.
 - Uncharged misconduct.
 - Statements the accused made.
 - Relaxed rules of evidence. Except in capital cases (death penalty), a written or oral deposition taken according to R.C.M. 702.
- Evidence of rehabilitative potential. This refers to the accused's potential to be restored, through vocational, correctional, or therapeutic training, or other corrective measures to a useful and constructive place in society.

At the conclusion of the trial counsel's presentation of evidence, the defense counsel has the opportunity to present evidence on behalf of his or her client. Matters in extenuation serve to explain the circumstances surrounding the commission of the offense, including those reasons that do not constitute a legal justification or excuse.

Matters in mitigation are introduced to lessen the punishment to be adjudged by the court or to furnish grounds for a recommendation of clemency. For example, acts of good conduct, bravery, or evidence the accused's reputation or record is a trait the AF desires to have in its members.

Rebuttal or surrebuttal

Once the defense has completed presenting evidence, the trial counsel may provide additional information to the court to dispute what the defense has presented. The trial counsel may introduce other evidence to discredit a witness' testimony or any other evidence the defense has offered. After the trial counsel has concluded with his or her rebuttal, the defense may also dispute the trial counsel's evidence.

Sentencing instructions

The standard sentencing instructions are found in DA Pamphlet 27-9. These standard instructions are based on a careful analysis of current case law and statutes. The military judge should explain on the record if he or she deviates significantly from the standard instructions. For example, in *US v. Rush*, 54 M.J. 313 (2001), the military judge erred by failing to explain why he did not tell the court panel members the consequences of the accused receiving a punitive discharge or the stigma of a punitive discharge. These instructions are required to be given to the court in all courts-martial:

- The *maximum* authorized sentence and the *mandatory minimum*, if any.
- A statement of the effect any sentence announced will have on the accused's entitlement to pay and allowances.
- The procedures to be followed during deliberations and voting.
- A statement informing the members they are solely responsible for selecting an appropriate sentence and that they may *not* rely on any possible mitigating action by higher headquarters

(i.e., the convening authority may change the sentence to confinement to a lesser length of time than the court members adjudged).

- The members should consider all matters in extenuation, mitigation, and aggravation introduced before or after the findings.
- The impact of a punitive discharge on retirement benefits, if there is an evidentiary predication (a possibility of retiring) for the instruction and a party requests it.

Arguments

Once the military judge instructs the members on the sentencing procedures, both counsels are allowed to argue their opinion on an appropriate sentence. Trial counsel first presents their closing argument, followed by defense counsel.

Trial counsel

Trial counsel presents their argument first. To prevent the hint of command influence, a trial counsel may *not* claim to speak for the convening authority or refer to the views of the convening authority or higher authorities on any policy directive relating to the punishment (i.e., the AF's "zero tolerance" policy on sexual harassment).

Trial counsel should refer to generally accepted sentencing philosophies. In sentencing an accused, the court-martial shall impose punishment that is sufficient, but not greater than necessary, to promote justice and to maintain good order and discipline in the armed forces, taking into consideration the following:

- The nature and circumstances of the offense and the history and characteristics of the accused;
- The impact of the offense on—
 - the financial, social, psychological, or medical well-being of any victim of the offense.
 - the mission, discipline, or efficiency of the command of the accused and any victim of the offense.
- The need for the sentence to—
 - reflect the seriousness of the offense.
 - promote respect for the law.
 - provide just punishment for the offense.
 - promote adequate deterrence of misconduct.
 - protect others from further crimes by the accused.
 - rehabilitate the accused.
 - provide, in appropriate cases, the opportunity for retraining and returning to duty to meet the needs of the service and the sentences available under R.C.M. 1002.

Defense counsel

Defense counsel's role is to try to get a lesser sentence for the accused. The defense should *not* concede the accused's guilt when the accused pled *not guilty*. The defense should argue whether a punitive discharge is appropriate; ask the court to reconsider the findings of guilty; argue command policy, and compare sentences to other cases. Sentence comparisons are limited to post-trial relief and only in cases where there is a direct correlation between the offense and the offender.

Rebuttal

The prosecution may rebut matters presented by the defense. The defense in surrebuttal may then rebut any rebuttal offered by the prosecution. Rebuttal and surrebuttal may continue at the discretion of the military judge.

Deliberations and voting

The next step after the sentencing argument is deliberation and voting. Once the military judge instructs the members on the sentence, the members begin to deliberate. Deliberation may include full and free discussion of the sentence to be imposed in the case. Only the members are present during deliberations and voting. Superiority in rank *cannot* be used in any manner to control the members' decision-making.

Once the deliberations have concluded, each member must vote for a proper sentence for the offenses of which the court-martial found the accused guilty, regardless of the member's vote or opinion as to the guilt of the accused. The proposal must be in writing and is submitted to the president of the panel. The members then vote by secret ballot on each sentence proposal from the least severe, continuing with the next severe until a sentence is adopted by the concurrence of the number of members required.

A sentence, which includes death, may only be adjudged if all members present a vote for that sentence, due to the mandatory composition of both the SPCM and GCM panels (three-quarters concurrence is required for all other sentences). The junior member on the panel collects the ballots and counts the votes. The president checks the count and informs the other members of the result.

Announcement of sentence

The final step in the sentencing phase is the sentence announcement. Regardless of who determined sentencing in the case, the military judge announces the sentence, in the presence of all parties as soon as the determination has been reached. Unlike a civilian court, polling of the members is prohibited, except when a panel member's competency is in question. Normally, the members are excused after sentence announcement. The military judge then advises the accused of his or her post-trial and appellate rights, and any additional matters, such as punishment limitations in a plea agreement. Finally, the court is adjourned.

When the sentence is announced, one of your military justice paralegal duties is to write down the sentence exactly as it is announced in court. This information is used to transfer the accused to confinement and to notify the unit commander of the outcome of the trial.

On its surface, the trial process appears fairly simple; however, it can become quite complicated. It is imperative all rules and laws be followed, so the accused receives a fair trial. For further information on findings and sentencing procedures, refer to the MCM and DA Pamphlet 27-9.

Self-Test Questions

After you complete these questions, you may check your answers at the end of the unit.

627. Trial preparation

1. What is the first step in preparing the courtroom?
2. What should be provided to the trial participants before the court convenes?
3. When does trial counsel provide the flyers to the members of the court?

4. What is probably the most important aspect of preparing the courtroom?
5. What must you remember in preparing trial folders?
6. What are the bailiff's duties before trial?
7. What responsibility does the bailiff have regarding spectators?
8. If the bailiff is instructed to deliver an item to a court member in closed session, what must the bailiff do first?
9. What miscellaneous duties may the bailiff have during the trial?

628. Understanding trial procedures

1. What takes place during the Article 39(a) session of a court-martial?
2. What is the purpose of voir dire?
3. What is the customary procedure concerning arraignment when a military judge presides over a trial?
4. What is the purpose of a *Care* inquiry?
5. What is the usual sequence followed during the presentation of evidence?
6. When is it appropriate to motion for a finding of not guilty?
7. What must the defense specify when making a motion for a finding of "not guilty"?

8. What standard of proof is applied for guilty findings?
9. How do court members vote?
10. What is the purpose of the sentencing phase of the court-martial?
11. What categories of evidence may the trial counsel submit during sentencing?
12. What should the military judge do if he or she deviates significantly from the standard sentencing instruction?
13. Why may a trial counsel not claim to speak for the convening authority?
14. What should a defense counsel not do when giving the sentencing argument?
15. What is one of your paralegal duties when the sentence is announced in court?

5-2. Post-sentencing Activities

You have worked very hard to ensure the case made it through trial without error; however, your job is far from over. The post-sentencing process is extremely important, and where many needless errors occur. In fact, some errors found by the appellate courts have resulted in adjudged sentences being overturned. This unit begins by covering the post-sentencing process, then the documents you must prepare when confinement is ordered, and who must be notified of the results of trial. The unit then moves to a submission of matters by the accused, submission of matters by the victim, the convening authorities action, discussion of ROTs, and concludes with a section on the entry of judgement (EOJ).

629. Post-sentencing process

Immediately following the announcement of the sentence, the ten-day clock starts for the accused and the victim to submit matters to the convening authority's consideration prior to action. If the victim submits matters to the convening authority those matters must be served on the accused, and the accused gets five calendar days to rebut those matters. The ten days to submit matters, and the five days to submit a rebuttal do not run consecutively, they can run concurrently. Meaning, if a victim submits matters on day three, the accused has until day eight to submit a rebuttal to the victim's matters, but retains the ability to submit his matters until day ten. After final adjournment, you must begin preparing the statement of trial results for the military judge to publish. At this stage, the ten days and additional five days for the accused's rebuttal have lapsed at this point the parties submit their matters to the convening authority. At day 14 after the sentence is announced, forfeitures of pay

and allowances and reduction in rank take effect. Then, the convening authority takes action on the finding and sentence or takes no action on the findings or sentence, either way this must be documented and sent through the SJA to the military judge so the EOJ can be published. Once the transcript of the court-martial is completed and authenticated by the court reporter, and the ROT is assembled, the completed ROT with the attachments is forwarded to AFLOA/JAJM to begin the appellate process. See figure 5-2 for a breakdown of this process.

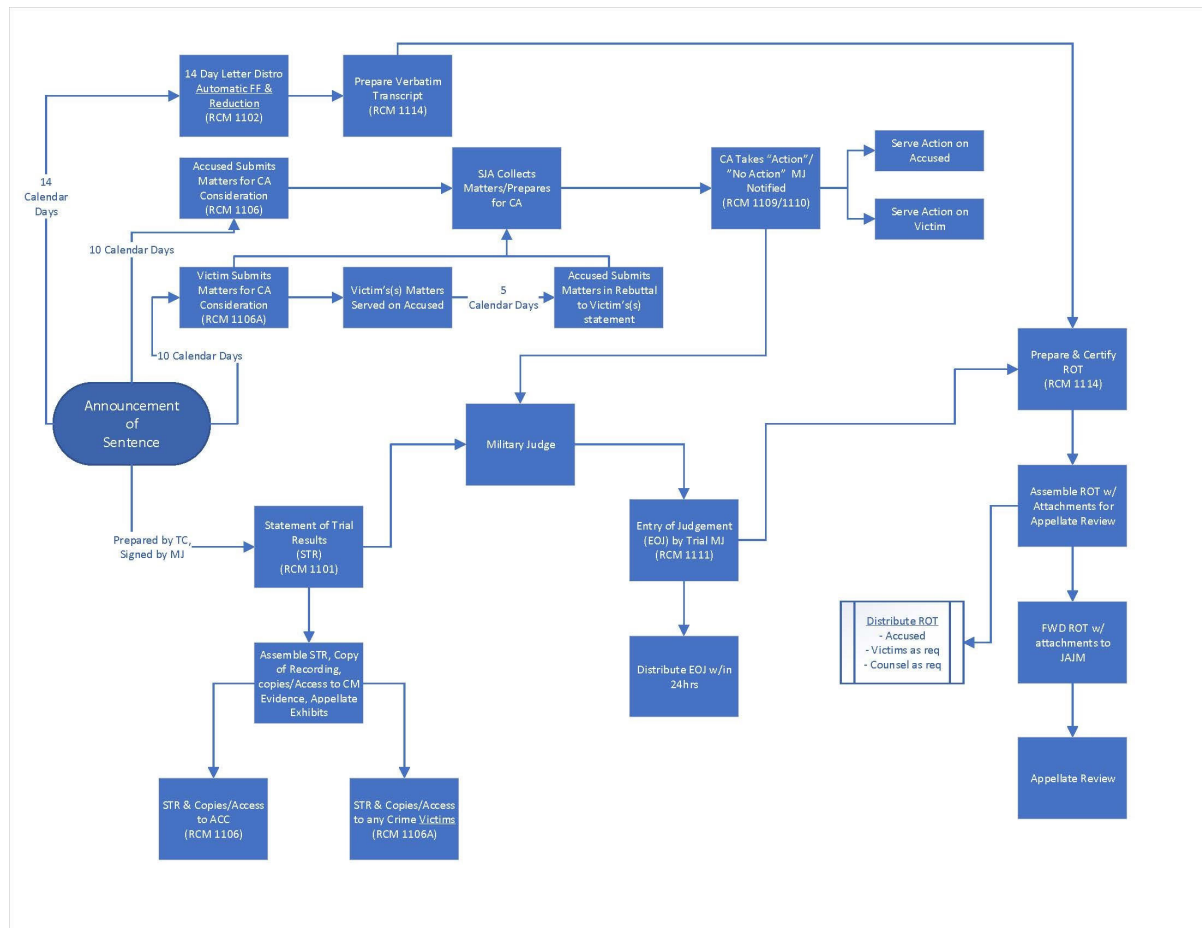


Figure 5-2. Post-sentencing process.

630. Post-sentencing documents

According to R.C.M. 1101, after final adjournment of a general or special court-martial, the military judge shall sign a statement of trial results to promptly notify specific individuals of the pleas, findings, sentence, forum, plea agreement, suspension recommendation, and other information directed by the military judge. As with the DD Form 2707, the memorandum will reflect the accused's rank at the time of arraignment. There are two versions of the statement of trial results (unitary and segmented) hence, before drafting the statement of trial results, a thorough review of each options checklist must be accomplished in order to choose the correct version that fits your assigned court-martial.

Statement of trial results

The specifications on the statement of trial results are written in a similar manner to those on the DD Form 458, Charge Sheet, but the specifications on this memorandum may be summarized. The pleas and findings are indicated by the letter "G" for guilty and "NG" for not guilty. You may also see an abbreviation "NG, but G of the lesser included offense of (name of offense)," indicating that the accused was found not guilty of a greater offense but was found guilty of a lesser included offense.

As the case paralegal, you will be charged with drafting the initial statement of trial results. Attention to detail is paramount as the statement of trial results will be reviewed by numerous personnel. The statement of trial results should be distributed in accordance with the statement of trial results and EOJ distribution list, which is located on the Virtual Military Justice Deskbook.

The statement of trial results contents include:

- Findings.
- Sentence.
- Forum.
- Plea agreements.
- Suspension recommendations.
- Other information the military judge deems necessary.

Once drafted, trial counsel will submit the statement of trial results to the military judge for date and signature. Once the statement of trial results is signed by the military judge and returned to the appropriate office, the SJA will complete and sign a first indorsement to the statement of trial results.

The first indorsement will indicate “Yes or No” for the following:

- Sex offender notification required.
- DNA processing required.
- Crime of domestic violence notification.
- Firearm prohibition triggered.
- Fingerprint card and final disposition notification.

A thorough review of the post-sentencing criminal indexing and notification matrix should be accomplished in order to make the correct indication on the first indorsement. Always review AFI 51-201, and its referenced paragraphs to ensure you accurately prepare this important document.

Distributing the statement of trial results

The SJA distributes the statement of trial results and first indorsement to those recipients identified in the statement of trial results/EOJ distribution list on the Virtual Military Justice Deskbook.

After final adjournment, the military judge signs the statement of trial results.

DD Form 2707, Confinement Order

Several things need to happen right after the military judge adjourns the court. Advance preparation on the part of the military justice paralegal goes a long way towards ensuring the post-trial process goes as smoothly as possible. As you probably recall, confinement is an authorized punishment for all types of courts-martial. If confinement is part of the adjudged sentence, normally, the accused will be ordered into confinement immediately after trial. Normally, security forces personnel are notified of upcoming courts-martial; they usually are standing by for prisoner transport when the sentence is announced.

The authority to order the accused into confinement as a result of a court-martial sentence is documented on the DD Form 2707 (fig. 1-3). As a paralegal you will be responsible for preparing this form and will normally have most of the form completed before trial to provide for timely completion after sentence is announced.

When filling out a DD Form 2707, the grade block (block 1(d)) should reflect the accused’s grade at time of arraignment. This is important because the only portion of an adjudged sentence that is executed immediately upon adjournment of the court is confinement, so any adjudged reduction in grade is not yet effective. You may also summarize the offenses in block 4 of the DD Form 2707. For

example, instead of writing out the entire specification where the accused stole a government computer, you can simply put in “Article 121 – Larceny of Government Property.”

The person directing the confinement (typically the trial counsel), will sign the DD Form 2707 in block 7(b). Another judge advocate signs in block 8(d) as the officer conducting a legal review and approval. Before signing the legal review, the judge advocate should ensure the form is properly completed and the individual directing confinement actually has authority to direct confinement. The same person cannot sign blocks 7(b) and 8(d).

Once the DD Form 2707 has been completed, security forces personnel will receipt for the prisoner in block 11 of the DD Form 2707. This form is completed in an original and one copy. Security forces will receive the original DD Form 2707 and the servicing legal office must retain a signed copy. Security forces personnel must ensure the prisoner receives a medical examination within 24 hours or the next duty day after entry into confinement. They also ensure medical personnel complete items 9 and 10 of the DD Form 2707, and ensure a completed copy is returned to the legal office for insertion in the ROT.

If the accused was in pretrial confinement, no action is normally necessary to continue that confinement. The statement of trial results may serve in lieu of the DD Form 2707 in those cases.

Deferment of confinement

When confinement is adjudged, the sentence to confinement begins immediately upon adjournment of the court-martial. However, under Article 57a, UCMJ, an accused under sentence to confinement that has not been ordered executed, may apply for a deferment. The application for deferment is made through the servicing SJA to the convening authority. If the accused is no longer under the convening authority's jurisdiction, then application is made to the officer exercising GCM jurisdiction over the command to which the accused is currently assigned. Either of these may, in their sole discretion, defer service of the sentence to confinement.

The accused may make an application for deferment of the service of confinement at any time after the sentence is announced and before action by the convening authority. The defense counsel must explain the right to request the convening authority to defer service of the sentence to confinement and assist the accused in making such a request if the accused chooses to make one. The application for deferment and the granting or denying of such application must be in writing. Prior to the convening authority taking any action on a deferment of confinement, the request is first sent through the servicing SJA where he or she reviews and makes a written recommendation to the convening authority. Once the convening authority makes the decision, the accused is notified in writing.

The action granting deferment must be reported in the convening authority's initial action and will include the date of the action on the request when it occurs prior to or concurrently with the convening authority's action. Action granting deferment after the convening authority's initial action will be reported in supplementary orders and included in the ROT.

The deferment of a sentence to confinement ends when the convening authority takes initial action, unless the convening authority specifies in the action that service of confinement after action is deferred; confinement is suspended; deferment expired on its own terms; or the deferment is otherwise rescinded. Deferment of confinement may not continue after the conviction is final under R.C.M. 1209 (appellate review).

The deferment may be rescinded at any time by the officer who granted it or, if the accused is no longer under that individual's jurisdiction, by the officer exercising GCM jurisdiction over the command to which the accused is currently assigned. Deferment may be rescinded when additional information is presented to a proper authority which, when considered with all other information in the case, is grounds for denial of deferment. The accused will be informed promptly of the basis for the rescission and of the right to submit written matters in his or her behalf and request the rescission.

be reconsidered. The accused may be required to serve the sentence to confinement pending action on the rescission.

Rescission of a deferment before or concurrently with the initial action in the case must be reported in the convening authority's initial action, with the dates of the granting of the deferment and the rescission. Rescission of a deferment after the convening authority's initial action must be reported in supplementary orders and state whether the approved period of confinement is to be executed or whether all or part of it is to be suspended.

When you are deferring confinement or taking any other action in regards to a court-martial sentence, take extreme care to prevent unnecessary errors. Correspondence associated with deferment of confinement is included in or forwarded for inclusion in the ROT.

Deferment/waiver of forfeitures under Articles 57(a), UCMJ and 58b, UCMJ

Before covering deferment/waiver of forfeitures, it is important for you to understand the difference between Article 57(a), UCMJ and 58b, UCMJ:

- Article 57(a), UCMJ mandates the effective date of any forfeiture of pay and allowances or reduction in grade that is included in the sentence of a court-martial. The forfeitures/reduction takes effect on the date that is 14 calendar days after the date on which the sentence is adjudged; or in the case of a summary court-martial, the date on which the sentence is approved by the convening authority.
- Article 58b requires forfeiture of pay, or of pay and allowances due a member during qualified periods of confinement or parole. These mandatory forfeitures automatically take effect if the adjudged sentence includes confinement for more than six months or death, or confinement for any period and a dishonorable discharge, bad conduct discharge, or dismissal. The amount of automatic forfeitures in a GCM is all pay and allowances otherwise due to the accused. The amount of automatic forfeitures in a SPCM is two-thirds pay otherwise due to the accused.

The accused can submit a request to defer (Article 57(a)) or waive (Article 58b) part of the sentence. If an accused requests deferment (under Article 57(a)) of his/her sentence of forfeiture of pay and allowances or a reduction in grade, the convening authority may defer adjudged or automatic forfeitures and an adjudged reduction in grade from taking effect until the entry of judgment is on record. The convening authority may rescind the deferment at any time.

The only time automatic forfeitures under Article 58b can be waived is in cases where the accused has dependents. In these cases, if the convening authority approves the accused request for waiver, the forfeitures must be paid to the accused's dependents. The convening authority can only waive these forfeitures for a period not to exceed six months.

DD Form 2704, Victim/Witness Certification and Election Concerning Prisoner Status

For all cases resulting in a sentence to confinement, the trial counsel or designee will complete the DD Form 2704. The purpose is to:

- Inform victims and witnesses of their post-trial rights.
- Determine if the victims or witnesses of a crime elect to be notified of any changes in the accused's confinement status.
- Record any election by the victims or witnesses of their desire to be notified of any subsequent changes to the accused's status.

In most cases, it will be your responsibility to fill out the DD Form 2704; however, the trial counsel signs the form certifying the victims or witnesses will be notified of any changes in the accused's status (i.e., release, transfer to another facility, or parole hearing). If there are no victims or witnesses in the case, the trial counsel signs the DD Form 2704 certifying no notification is required. Each victim and witness involved in the case is listed on the reverse side of the form by name, address, and

telephone number. This area is where they will make elections as to whether or not they wish to be notified. The accuracy of the witness and victim information is vitally important here because this is what the confinement facility will use to notify them of changes in the inmate's status.

This form is sent to the Central Repository at the Air Force Security Forces Center, Confinement and Corrections Directorate (AFSFC/FC) at Joint Base San Antonio-Lackland, Texas. Copies are forwarded to the confinement facility where the accused is in post-trial confinement, the investigating agency (security forces or AFOSI), and a redacted copy to each of the victims and witnesses. You must pay particular attention when providing the redacted copy to the victim and witness. The redacted copy must not contain the accused's SSN or any information concerning other victims or witnesses.

You must not attach a copy of the DD Form 2704 to any portion of any record to which the convicted member has access, including the ROT. Doing so could endanger the victims or witnesses. Additionally, due to the sensitive information it contains, this form is exempt from any FOIA release.

Action of the convening authority

The purpose of the action of the convening authority is for the convening authority to approve or disapprove all or part of the findings or sentence, or both. The convening authority may grant post-sentencing relief on the findings and/or sentence of a court-martial in accordance with the applicable versions of Articles 60, 60a, and 60b, UCMJ. There are limitations on findings that the convening authority can change. Most notably the convening authority can never alter findings in Article 120 violations, offenses for which the maximum sentence of confinement authorized exceeds two years, offenses for which the adjudged sentence includes a punitive discharge or, an adjudged term of confinement, or terms of confinement that runs consecutively, exceeding six months. There are also limitations on when the convening authority can alter the sentence in action. The convening authority cannot modify a sentence of confinement, if the total period of confinement imposed for all offenses involved, running consecutively, is greater than six months, and a sentence of dismissal, dishonorable discharge, or bad-conduct discharge unless:

- A recommendation from the military judge is made;
- The accused provides substantial assistance; or
- There is plea agreement.

A convening authority's action is not required in cases where the accused was acquitted (found not guilty of all charges and specifications).

The convening authority must generally act before the EOJ. Before taking action, the convening authority:

- Must consult with a SJA or legal advisor;
- Must consider matters timely submitted by the accused and the victim;
- May consider other matters he or she deems appropriate such as the statement of trial results, appellate exhibits, recording or transcription of the proceedings, and personnel records of the accused; and
- May not consider matters adverse to the accused not admitted at trial unless the accused is notified and has gotten an opportunity at rebuttal or matters that relate to the victim's character unless admitted at trial.

Action is taken by the appropriate level convening authority for the court-martial concerned (i.e., SCMCA, SPCMCA, or GCMCA).

The convening authority has the power to do away with or reduce any portion of the adjudged findings and/or sentence (subject to the limitations listed above), but the sentence can never be increased in any manner. Therefore, it is important for you, as a military justice paralegal, to pay

careful attention to the adjudged sentence and compare that sentence with the wishes of the convening authority before preparing the action.

The convening authority can approve all punishments, which will be established in an EOJ. However, he or she cannot order a punitive discharge or the death penalty executed until the case has gone through all levels of appellate review. It is important to understand that approving the sentence and ordering it executed are two separate actions. In cases with a punitive discharge or the death penalty, a *final order* will be issued after all required appellate reviews are complete.

Entry of judgment

According to R.C.M. 1111, the military judge of a general or special court-martial shall enter into the ROT the judgment of the court.

The EOJ reflects the result of the court-martial, as modified by any post-trial actions, rulings, or orders. As previously discussed, once the convening authority signs the action memorandum, the SJA will ensure a copy is emailed to the military judge promptly so he or she may review it before signing the EOJ. The EOJ terminates the trial proceedings and initiates the appellate process. Trial counsel is responsible for providing the military judge a draft of the EOJ; however, you will be responsible for completing the initial draft.

There are two versions of the EOJ (unitary and segmented) hence, before drafting the EOJ, a thorough review of each options checklist must be accomplished in order to choose the correct version that fits your assigned court-martial. Attention to detail is paramount, as numerous personnel will review the EOJ. The EOJ should be distributed in accordance with the statement of trial results and EOJ distribution list, which is located on the Virtual Military Justice Desk book.

The body of the EOJ contains the findings for each charge and specification referred to trial; to include (1) a summary of each charge and specification (arraigned offenses); (2) the plea(s) of the accused; (3) the finding or other disposition of each charge and specification; and (4) the sentence adjudged. Following the findings for each charge and specification referred to trial and sentence adjudged, annotate the date of the statement of trial results.

Once drafted, trial counsel will submit the EOJ to the military judge for date and signature in accordance with guidance provided by the Air Force Trial Judiciary (AF/JAT). Once the EOJ is signed by the military judge and returned to the appropriate office, the SJA will complete and sign a first indorsement to the EOJ. Typically, the statement of trial results, convening authority's decision on action, and any additional attachments as directed by the military judge will be attached to the EOJ.

The first indorsement (signed by the convening authority's SJA) will indicate "Yes or No" for the following:

- Sex offender notification required.
- DNA processing required.
- Crime of domestic violence notification.
- Firearm prohibition triggered.
- Fingerprint card and final disposition notification.

A thorough review of the post-sentencing criminal indexing and notification matrix should be accomplished in order to make the correct indication on the first indorsement.

In a summary court-martial, the findings and sentence of the court-martial, as modified or approved by the convening authority, constitute the judgment of the court-martial; hence, a separate document need not be issued.

Distributing the EOJ

The EOJ and first indorsement must be distributed in accordance with the statement of trial results/EOJ distribution list on the Virtual Military Justice Deskbook.

Making corrections or modifying EOJs

The military judge who entered a judgment may modify the judgment to correct computational or clerical errors within 14 days after the judgment was entered initially. During the appellate process, The TJAG, the Air Force Court of Criminal Appeals (AFCCA), and the CAAF may modify a judgment in the performance of their duties and responsibilities. Additionally, if a case is remanded to a military judge, the military judge may modify the judgment consistent with the purposes of the remand. If there is any modification to the judgment of a court-martial it must be included in the record of trial and be redistributed to the appropriate parties.

Notification of adjudged sentence or entry of judgment

If the convening authority decides to take any action on a sentence more than 14 days after the sentence is announced, in any case where the approved sentence includes a reduction in grade or forfeitures (mandatory or adjudged), the SJA of the convening authority must send a second memorandum within twenty-four hours after the EOJ.

If any portion of the punishment or automatic forfeiture is deferred, or if the convening authority waives any portion of the automatic forfeitures prior to the date of the message, the message must include the terms of such deferment or waiver (see AFI 51-201 for further guidance on deferment and waiver).

The message should be sent to the same addressees listed on the statement of trial results/entry of judgment distribution list found in the Virtual Military Justice Deskbook, if the accused is confined, to the confinement facility. A template is on AFI 51-201, Figure A9.7, Notification of Adjudged Sentence or Entry of Judgment. For members who enter a prisoner status requiring a permanent change of station, the memorandum should also be sent to the gaining AFO.

631. Record of trial

As a military justice paralegal, your involvement in preparing and processing ROTs might vary based largely on if you have a full-time court reporter assigned to your office. Regardless, you need to be familiar with the formats, contents, and procedures involved in seeing the ROT through to completion.

Assembly of records of trial for special and general courts-martial

In most cases, the court reporter will transcribe the ROT and assemble the transcription portion and exhibits prior to certification. However, in some situations, such as if your office had to use a TDY court reporter, this responsibility might fall on your shoulders.

Air Force Manual (AFMAN) 51-203, *Records of Trial*, is the governing directive and tells you virtually everything you need to assemble a ROT properly. The only pages in the ROT that are numbered are the transcript pages of the court-martial proceedings. When preparing a ROT for assembly and duplication, it will be necessary to make copies of all exhibits introduced at trial. Documentary exhibits should be photocopied and real evidence must be photographed. The photographs of the real evidence will be included in the ROT and the real evidence must be returned to the evidence custodian (e.g., security forces, AFOSI). The evidence custodian will dispose of the property after the appellate review process is complete.

Items included in the record of trial

Following the front cover (DD Form 490, Certified Record of Trial) the ROT will include the following documents:

- The judgment entered into the record by the military judge (EOJ).
- The statement of trial results.
- Any action by the convening authority under R.C.M. 1109 or 1110.
- A substantially verbatim recording of the court-martial proceedings except sessions closed for deliberations and voting.
- The original charge sheet or a duplicate.
- A copy of the convening order and any amending order.
- The request, if any, for trial by military judge alone; the accused's election, if any, of members under R.C.M. 903; and, when applicable, any statement by the convening authority required under R.C.M. 503(a)(2).
- The election, if any, for sentencing by members in lieu of sentencing by military judge under R.C.M. 1002(b).
- Exhibits
 - Prosecution exhibits admitted during trial. Prosecution exhibits are numbered using Arabic numbers (1, 2, 3, and so on). They are numbered in the order they are introduced during trial, with one exception (see the note below).
 - Defense exhibits admitted during trial. Defense exhibits are marked with capital letters (A, B, C, and so on). If there were more than 26 defense exhibits, you would start over after Defense Exhibit Z with Defense Exhibit AA, then Defense Exhibit AB, etc. They are numbered in the order they are introduced during trial.
- Prosecution exhibits marked, but not offered and/or admitted into evidence
- Defense exhibits marked, but not offered and/or admitted into evidence.
- Appellate exhibits.
 - Appellate exhibits deal with legal matters as opposed to evidentiary matters; therefore, all appellate exhibits will be admitted into the ROT.
 - Appellate exhibits are numbered using Roman numerals (I, II, III, and so on) and are numbered in the order they were introduced at trial.

NOTE: The military judge may prevent exhibits offered by the trial counsel or defense counsel from being admitted into evidence. All prosecution and defense exhibits are annotated in the order they are introduced during trial. This may result in some exhibits being “out of order” when assembling the ROT. Exhibits offered, but not admitted into evidence are important to note in the ROT because the appellate judges must be aware of all of the evidence available in the initial court-martial. This is the only way the appellate judges can truly determine if the military judge should have excluded the evidence.

Items attached to the record of trial

The ROT will include the following documents as attachments or allied papers. These documents will proceed after a heavy stock divider titled “attachments and allied papers:”

- PHO report.*
- Pretrial advice.*
- Record of former hearings (retrials).*
- Exhibits not in evidence.
- R.C.M. 1106/1106A matters.
- Deferment requests and action.
- Waiver/withdrawal of appellate review.
- Transcript.

- Other items as required by AFMAN 51-203.

*If not admitted as an exhibit.

Assembly of the record of trial

Now that all the necessary documents are in order, it is time to assemble the ROT. Use a two-hole punch at the top of all pages and bind the volume(s) of the ROT using Acco-type prong and clamp fasteners. You must ensure that the volumes are the correct thickness. Initially, the first volume of the ROT will not exceed one inch in bulk; this will allow for inclusion of other post-trial documents. Any subsequent volumes of the ROT must be 1 ½ inches in bulk or smaller; however, if a subsequent volume is less than ½ inch thick, it may be combined with the previous volume.

Records of trial for summary courts-martial

Use the DD Form 2329, Record of Trial by Summary Court-Martial, (AFMAN 51-203) as the ROT in all summary courts-martial. A complete SCM ROT includes a DD Form 490 as the front cover; the DD Form 2329; and the following documents, if applicable: charge sheet, convening order and amendments, R.C.M. 1106/1106A matters, exhibits, and other documents required by AFMAN 51-203, such as the accused receipt for the ROT. The SCMO will certify the ROT and cause a copy of the ROT to be served on the accused while forwarding the original ROT and one copy to the convening authority.

Certification of records of trial

After the record has been transcribed, it must be thoroughly reviewed by the court reporter to note any transcription errors. In addition, before the court reporter certifies the ROT, he or she should forward the ROT to the trial counsel, who examines it for accuracy and signs a certification verifying the examination as accomplished. A sample certification is located in AFMAN 51-203. It is also important to point out that except when unreasonable delay will result, the SJA must generally permit the defense counsel the reasonable opportunity to examine the ROT before certification. The military judge will then review the exhibits to ensure exhibits are accurate and in the proper order prior to the court reporter's certification of the ROT.

Once the trial counsel, defense counsel and military judge reviews the ROT, the court reporter will certify that the ROT includes all items required such as the recording of the court-martial proceedings, the original charge sheet or a duplicate, a copy of the convening order and any amending order, and so forth. The military judge certifies the ROT if the court reporter cannot certify the ROT because of the court reporter's death, disability, or absence.

The detailed SCMO certifies the ROT for all SCM cases by signing each copy.

Service of the record of trial

Once the record of trial is assembled, you will be required to provide a copy to the accused, or their Defense Counsel; we call this service of the record of trial. The paragraphs below contain more details.

Summary courts-martial

As soon as the ROT (DD Form 2329) is certified by the SCMO, he or she serves a copy on the accused and obtains a receipt. If a copy cannot be served on the accused, serve it on the defense counsel and attach to the ROT an explanation as to why it cannot be served on the accused.

Special and general courts-martial

According to AFI 51-201, Chapter 13, *Post-Sentencing Process*, and R.C.M. 1112(e), in every general and special court-martial, a court reporter shall notify trial counsel and the case paralegal that the ROT is ready for service. The SJA serves a copy of the certified record of trial on (1) the accused; (2) the victim of an offense of which the accused was charged if the victim testified during the proceedings; and (3) any victim named in a specification of which the accused was charged, upon

request, without regard to the findings of the court-martial. The SJA will ensure the receipt of the ROT is included as an attachment to the ROT.

If it is impracticable to serve the ROT on the accused because of (1) the unauthorized absence of the accused; (2) military exigency, or (3) if the accused requests substitute service at trial or later in writing, the accused's copy of the record is forwarded to their defense counsel.

The accused must receipt for his or her copy of the certified ROT (unless substitute service is accomplished).

If for any reason service cannot be made on the accused or the accused's defense counsel, then the accused's copy of the record will be forwarded with the original ROT to higher headquarters with an attached written explanation of the reasons for non-delivery.

After the EOJ is complete, the servicing SJA or the convening authority's SJA should promptly forward the original ROT and required copies with the required attachments for appellate review.

As you can see, your duties are demanding and require full attention to detail. Whether reporting the proceedings of a court-martial or transcribing/assembling the ROT, there is no room for carelessness. The convening authority, higher headquarter legal offices, and possibly the appellate courts will review every document you prepare, therefore, those documents should reflect favorably upon your office. Take your time when preparing each case and have pride in your work product – do not rely on someone else to catch your errors.

Types of transcripts

Shortly after the conclusion of a trial, the court reporter begins transcribing the official transcript of the trial proceedings, formally known as the ROT. For military courts-martial, the transcript will be in one of two formats, "Verbatim" or "Summarized" ROT. The transcription format is based on the sentence adjudged.

Verbatim ROT

According to Webster's II, New Riverside University Dictionary, verbatim is defined as "Using precisely the same words: word for word" – a verbatim ROT transcription holds true to this definition. It captures everything that went on during trial and witness testimony word-for-word.

According to R.C.M. 1114(a)(1)(2) a certified verbatim transcript of the ROT shall be prepared when the judgment entered into the ROT includes a sentence of:

- Death.
- Dismissal of a commissioned officer, cadet, or midshipman.
- Dishonorable or a bad-conduct discharge.
- Confinement for more than six months.
- Otherwise required by court rule, court order, or under regulations prescribed by the SAF.

Summarized ROT

In cases where a verbatim transcript is not required (to include acquittals), the transcript may be "summarized." It is very important to understand that even in a summarized ROT there are parts that must be verbatim. These areas are (1) findings on the jurisdictional basis for prosecution of the offenses, if any; (2) findings; (3) sentence; and (4) any other verbatim portions requested by reviewers SJA, counsel, military judge, and so forth).

Self-Test Questions

After you complete these questions, you may check your answers at the end of the unit.

629. Post-sentencing process

1. From what point in the post-sentencing procedure does the accused have to submit matters for consideration by the convening authority?
2. Matters submitted by the crime victim are served on the accused. How long does the accused have to submit a rebuttal for consideration of the convening authority?

630. Post-sentencing documents

1. What is the purpose of the statement of trial results?
2. How are the specifications in the statement of trial results written?
3. List the contents of the statement of trial results.
4. Who may rescind a deferment of confinement?
5. When can automatic forfeitures under Article 58b, UCMJ be waived?
6. What is the purpose of action by the convening authority?
7. What punishments can the convening authority approve in the action by the convening authority?
8. What is the purpose of the EOJ?

631. Record of trial

1. What items are included in the ROT?

2. What items are attached to the ROT?
3. Explain the process for certifying the ROT after the record has been transcribed.

5-3. Appellate Review, Other Proceedings, and Disclosure of Information

At this point in the process, your work in the court-martial case is finished until completion of the appellate review process. The individual appellate levels each have specific authority to act on a court-martial case. They review the case for legal sufficiency, make changes to the outcome of a court-martial, and/or direct rehearings, just to name a few. In this section, we cover the appellate process, some different types of hearings you may be involved in after the conclusion of a court-martial, inquiries from outside agencies, and disclosure of ROTs.

632. Appellate review

According to Black's Law Dictionary, Eighth Edition, appellate review is the examination of a lower court's decision by a higher court, which can affirm, reverse, or modify the decision. As you may recall from the paralegal apprentice course, there are three levels of appellate review within the AF and additional levels of appellate review available to all branches of the service. This lesson will cover all levels of appellate review.

Article 64 review

A judge advocate at the GCM level is required to perform appellate review under Article 64, UCMJ, in every SCM resulting in a guilty finding. If the judge advocate recommends no corrective action the appellate review process is over and the case is finalized by stamping or typing "Article 64, UCMJ, Review" on the cover of the original ROT, and on the back of the DD Form 2329. If the judge advocate conducting the review recommends corrective action, the judge advocate forwards the ROT to the GCMCA for action. Once the convening authority takes action on the case, the original ROT is sent to AFLOA/JAJM.

The purpose of the Article 64 review is to determine if the findings and sentence are correct in law and fact. The SJA of the officer exercising GCMCA over the accused at the time the court-martial was convened appoints a judge advocate from the SJA's staff to conduct a review.

NOTE: No review is required if the accused was found not guilty of all offenses, or if the accused was found not guilty only by reason of lack of mental responsibility for all offenses.

Article 65(d) review

TJAG appoints a judge advocate at the GCM level to perform appellate review under Article 65(d), UCMJ, for every GCM and SPCM resulting in a finding of guilty that is not reviewed by the AFCCA.

Additionally, an Article 65(d), UCMJ, review is required for:

- any GCM or SPCM where the accused waived or withdrew an Article 66 appeal to the AFCCA;
- failed to file a timely Article 66 appeal; and
- any GCM or SPCM not eligible for an Article 66 appeal (i.e., where the confinement was six months or less and no punitive discharge was adjudged).

If the judge advocate recommends no corrective action, the appellate review process is over and the cases is finalized by stamping or typing "Article 65(d), UCMJ, Review" on the cover of the original ROT and on the EOJ for non-punitive discharge SPCMs and GCMs. If the judge advocate conducting

the review recommends corrective action, the record is forwarded to the JAG, through AFLOA/JAJM. Once action has been made, the original ROT and four copies of the revised EOJ are forwarded to AFLOA/JAJM, who then notifies the accused of the action via first class certified mail. One copy of the revised EOJ, indicating compliance with Article 65(d), is distributed to the parties listed on the EOJ distribution checklist.

Article 69 review

The TJAG office is required to perform appellate review under Article 69, UCMJ, on the following GCM cases (fig. 5-3):

- Following an Article 64 or Article 65(d) review, the accused submits an application to TJAG to modify or set aside, in whole or in part, the findings and sentence in a C-M; and
- A judge advocate conducting an Article 64 review of an SCM states that corrective action is required as a matter of law and the GCMCA does not take action.

The accused or the defense counsel must submit a hardcopy application to AFLOA/JAJM by certified mail on or before the 30th day after the date the GCMCA approved the sentence, unless the accused establishes good cause for not filing matters within that time.

If TJAG does not direct a rehearing or a review by the AFCCA, AFLOA/JAJM annotates the results of the Article 69 review and whether TJAG took any action on the initial EOJ or DD Form 2329. AFLOA/JAJM then forwards the annotated judgement or DD Form 2329 to the convening authority's SJA. Additionally, they will serve a copy on the accused. If TJAG forwards the case for review by the AFCCA, AFLOA/JAJM notifies the convening authority's SJA and the accused of TJAG's decision to order a rehearing or forward the case to the AFCCA.

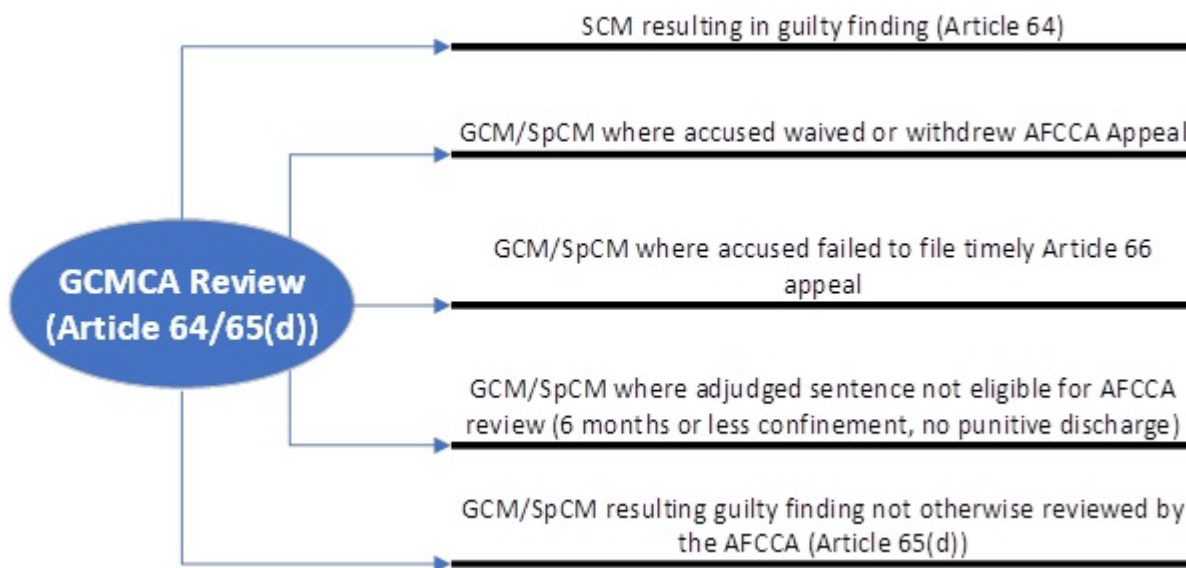


Figure 5-3. Article 69 review.

Article 66 review

The AFCCA is established by TJAG with not less than three appellate military judges. The qualifications for appellate military judges are outlined in Article 66, UCMJ. The judges may be commissioned officers or civilians, each of whom must be a member of a bar of a federal court or the highest court of a state. TJAG prescribes uniform rules of procedure for the AFCCA and meets periodically to formulate policies and procedures for review of court-martial cases in the office of TJAG and by the AFCCA.

TJAG refers to the AFCCA a record in every case of trial by court-martial in which the sentence as approved does any of the following (fig 5-4):

- Extends to death (automatic review).
- Includes a dismissal of a commissioned officer, cadet, and midshipman, dishonorable or bad-conduct discharge (automatic review).
- Includes confinement for two years or more (automatic review).
- Timely appeals submitted by an accused under Article 66(b)(1)(A) in which the sentence extends to confinement for more than six months and is not subject to automatic review.
- Cases referred to it by TJAG under R.C.M. 1201(k)(1)(A) following an Article 69 review.
- Timely appeals by an accused in a case where TJAG sent the case to the AFCCA for review.

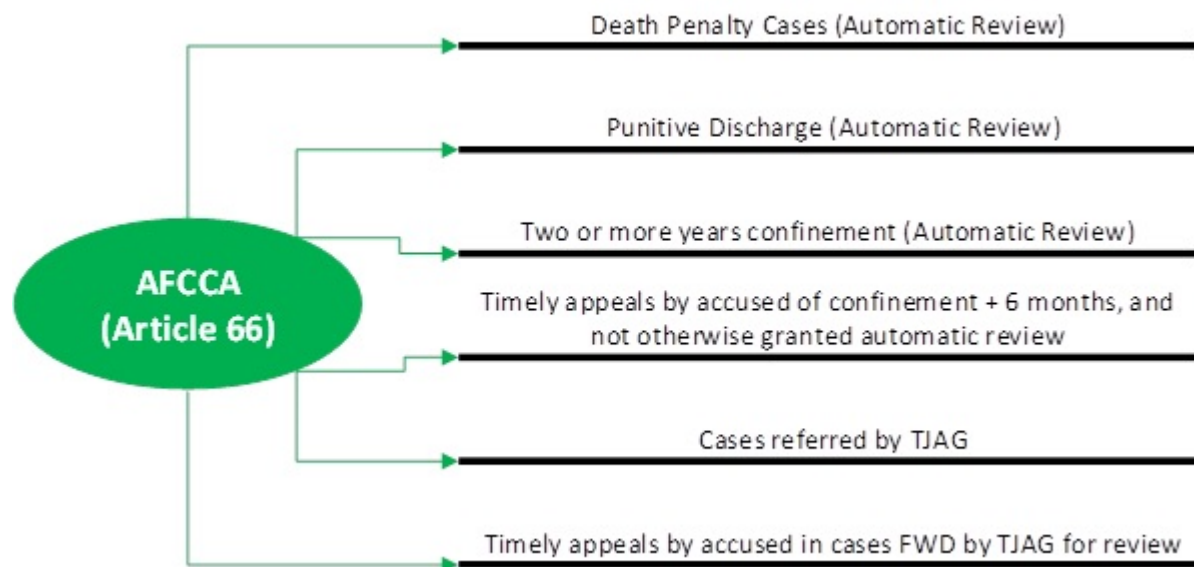


Figure 5-4. Article 66 review.

If TJAG does not certify issues to the CAAF, and there is to be no further action by the President, SAF, the CAAF, or the Supreme Court, TJAG instructs the appropriate convening authority to take action in accordance with the decision of the AFCCA. If the AFCCA has ordered a rehearing and the convening authority finds a rehearing impracticable, the convening authority may dismiss the charges. If the charges are dismissed, all rights, privileges, and property affected by any portion of the sentence are restored.

An accused has 60 days from the time he or she is personally notified of the AFCCA decision or the date a copy of the decision, after being served on appellate defense counsel, was deposited in the US mail for delivery by first-class certified mail, whichever is earlier, to petition the CAAF to review his or her case.

Article 67 review

The CAAF is the next appellate court within the military justice system for reviewing courts-martial. It consists of five judges appointed from the civilian sector by the President, with the advice and consent of the Senate. The term of appointment for the judges on the CAAF is 15 years. When appointed, no more than three of the judges may be appointed from the same political party. Each person appointed as a CAAF judge must be a member of the bar of a federal court or the highest court of a state. Each judge is eligible for reappointment. A vacancy in the court does *not* impair the right of the remaining judges to exercise the power of the court.

Article 67, UCMJ, provides the CAAF must review the ROT in all cases (fig. 5-5):

- in which the sentence, as affirmed by the AFCCA, extends to death.
- reviewed by the AFCCA that TJAG orders sent to the CAAF for review.
- reviewed by the AFCCA in which, upon petition of the accused and on good cause shown, the CAAF has granted review.

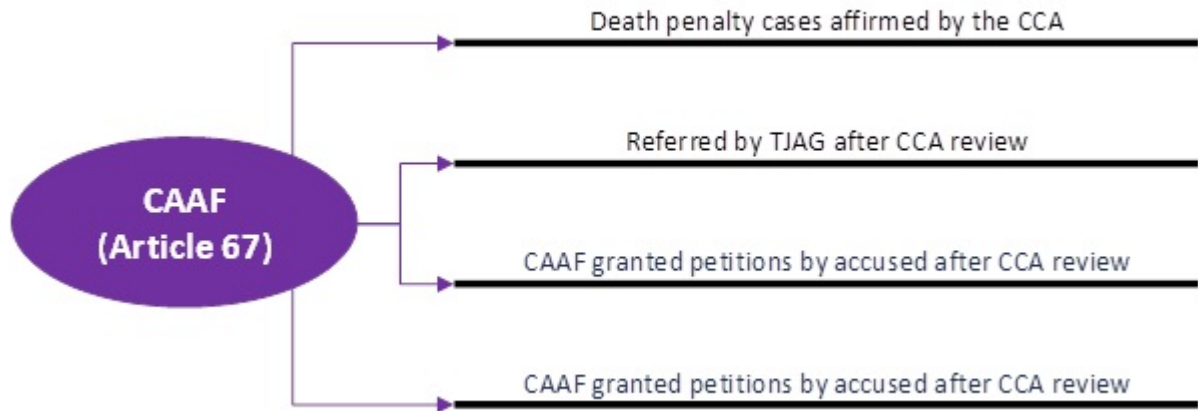


Figure 5-5. Article 67 review.

As mentioned earlier, the accused has 60 days to petition the CAAF for a grant of review. A petition is considered filed on the date the accused mails or delivers the petition to the court. Upon receipt of a copy of a petition for grant of review filed by an accused not represented by military appellate defense counsel, TJAG appoints counsel to represent the accused, unless the accused is already represented by civilian counsel and has expressly waived representation by appointed military appellate defense counsel.

In a case reviewed by it, the CAAF may act only with respect to the findings and sentence as approved by the convening authority, and as affirmed or set aside as incorrect in law by the AFCCA. In a case which TJAG orders are sent to the CAAF, action is taken only with respect to the issues raised by TJAG. In a case reviewed upon petition of the accused, action is taken only with respect to issues specified in the grant of interview. The CAAF may take action only with respect to matters of law.

Just like the AFCCA, if the CAAF sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order the charges be dismissed.

After it acts on a case, the CAAF may direct TJAG to return the record to the AFCCA for further review in accordance with the decision of the CAAF. Otherwise, unless there is to be further action by the President or the SAF, TJAG instructs the convening authority to take action in accordance with that decision. If the CAAF orders a rehearing and the convening authority finds a rehearing impracticable, the convening authority may dismiss the charges.

The Supreme Court may review decisions of the CAAF by writ of certiorari (a writ from a higher court to a lower court) in cases:

- Reviewed by CAAF in which the sentence extends to death.
- Reviewed by AFCCA, which TJAG certifies to the CAAF.

- Where the CAAF granted a petition for review for good cause.
- In which the CAAF granted relief.

Article 67(a) review

Petitions for Supreme Court review by writ of certiorari may be filed by the accused or the United States in those cases specified in Article 67a(a) and R.C.M. 1205(a), as outlined above. The Supreme Court may not review by writ of certiorari any action of the CAAF in refusing to grant a petition for review. Such petitions are filed according to the rules of the Supreme Court of the United States. Military appellate defense counsel may assist the accused in preparing a petition for writ of certiorari and provide representation before the Supreme Court when requested by the accused. When requested to do so by the Attorney General of the United States, TJAG appoints appellate government counsel to represent the United States in any cases filed under a petition for Supreme Court review by writ of certiorari.

Appeals by the government

Under Article 56(d) with respect to a charge or specification:

- Excludes evidence of substantial proof of a fact material in the proceeding.
- Directs the disclosure of classified information.
- Imposes sanctions for nondisclosure of classified information.
- Refuses to issue or enforce a protective order to prevent the accused from disclosing classified information.

An appeal of an order or ruling may not be taken unless the trial counsel provides the military judge with written notice of appeal within 72 hours of the order or ruling. The record of proceedings and a statement of the appeal are forwarded to the AFCCA for review. The appeal, whenever practicable, has priority over all other proceedings before the court. The AFCCA may act only with respect to matters of law on the appeal.

NOTE: The government may *not* appeal a finding of *not guilty* with respect to the charge or specification.

Appeals by the United States from an adverse ruling by a military judge

Trial counsel may file a notice of appeal by the United States under Article 62, UCMJ, and R.C.M. 908, only after consultation with the Air Force Legal Operations Agency/Government Trial and Appellate Counsel Division (AFLOA/JAJG). The SJA decides whether to file such notice of appeal with the convening authority's concurrence.

After filing a notice of appeal conforming to the requirements of R.C.M. 908(b) with the military judge, trial counsel sends notice to AFLOA/JAJG within 20 days, requesting that office file the appeal with the AFCCA. In the request, trial counsel will identify the ruling or order to be appealed and include the following:

- A copy of the charges and specifications;
- An original and two copies of the verbatim record of the applicable proceedings, or, if not available, a summary of the evidence and facts;
- Trial counsel's certification that the appeal is not taken to delay the case;
- Trial counsel's certification that, if the order or ruling excludes evidence, the excluded evidence is substantial proof of a fact material in the proceeding; and
- A memorandum opinion on the law applicable to the issues appealed, including an explanation why the issues appealed are significant enough to require appeal by the United States.

AFLOA/JAJG decides whether to file the appeal with AFCCA, and notifies the trial counsel, SJA, and AFLOA/JAJM.

Appeals of sentence by the United States

With the approval of TJAG, the government may appeal a sentence to the AFCCA on the grounds that the sentence violates the law or is plainly unreasonable. See Article 56(d), UCMJ. The government may only file such an appeal if all specifications allege offenses that were committed on or after 1 January 2019. A government appeal of the sentence must be filed within 60 days after the EOJ is complete. Prior to filing a notice of appeal, the government must receive convening authority concurrence, consult with AFLOA/JAJG, and receive TJAG approval through their functional chain. The government must reserve adequate time after coordination to allow AFLOA/JAJG to prepare the required appellate briefs within the 60-day window. To seek TJAG approval, the requesting legal office must submit to AFLOA/JAJM:

- A statement of reasons that meets the requirements of R.C.M. 1117(c)(1)-(3).
(NOTE: The statement of reasons may not include facts outside the record established at the time the sentence was announced.);
- The EOJ;
- The transcript of the proceedings or, if the transcript is not available at the time of the request, a summary of the evidence and facts established at the time the sentence was announced;
- Convening authority concurrence, which may be established in the statement of reasons;
- AFLOA/JAJG coordination, which may be established in the statement of reasons; and
- Documentation showing concurrence and coordination with the functional chain-of-command. This coordination may be established in the statement of reasons.

Prior to acting, TJAG forwards the request to the military judge who presided over the proceedings for the purpose of allowing the military judge, the parties, and the victim(s) to make a submission addressing the government's request. Upon receiving TJAG approval, trial counsel may file a notice of appeal with the military judge. After filing a notice of appeal, trial counsel requests AFLOA/JAJG promptly file the appeal with the AFCCA. In the request, trial counsel will identify the sentence to be appealed and include the following:

- The statement of approval from TJAG.
- The government's request and statement of reasons.
- Any submissions made by the military judge, the defense, or the victim(s).
- Any other documentation required by AFLOA/JAJG.

AFLOA/JAJG decides whether to file the appeal with the AFCCA, and notifies the requesting party and AFLOA/JAJM.

633. Other proceedings

We have covered several types of proceedings from an administrative discharge board to Article 32 investigations and finally courts-martial; however, there are other proceedings with which you may be involved. Higher courts, military judges, or TJAG can direct these proceedings. In this lesson, we look at rehearings, *DuBay* hearings, and in-camera proceedings.

Rehearings

Rehearings, new trials, and other trials occur when the prior trial proceedings are declared invalid by and of the following:

- An order of a reviewing or convening authority.

- An order of TJAG.
- A decision of the AFCCA.
- A mandate issued CAAF.
- A judgment of the Supreme Court.

In accordance with R.C.M. 810, the rehearings, new trials, or other trials are conducted much the same as the original trial.

They are broken into the following categories:

- Rehearings in full and new or other trials. In rehearings, which require findings on all charges and specifications referred to a court-martial, and in new or other trials, the procedure will be the same as in an original trial.
- Rehearings on sentence only. In a rehearing on sentence only, the procedure will be the same as in an original trial, except the portion of the procedure that ordinarily occurs after challenges and through and including findings is omitted.

Several actions must be accomplished upon notification of a rehearing:

1. AFLOA/JAJM or the Article 64, UCMJ, reviewing officer, as appropriate, sends a transmittal letter and a copy of the decision, mandate, or order to the original convening authority's SJA (or the current convening authority if the original convening authority no longer exists). If the accused is no longer within the command of the original convening authority, a courtesy copy is forwarded to the accused's current convening authority with jurisdiction to convene the type of court-martial involved.
 - The original court-martial convening authority is the convening authority who approved the accused's sentence. The original convening authority is the responsible convening authority if the accused is still under his or her jurisdiction.
 - If the accused is no longer under the jurisdiction of the original convening authority, the original convening authority decides whether to remain the responsible convening authority or transfer responsibility for the case to the officer presently exercising authority over the accused to convene the type of court-martial involved. If transferred, the current convening authority becomes the responsible convening authority.
 - If the original convening authority remains the responsible convening authority and determines that a rehearing should be held, that convening authority requests the accused be returned for rehearing or reaches an understanding as to where the rehearing will take place with the officer presently exercising court-martial convening authority over the accused.
 - If the original convening authority no longer exists, the accused's current convening authority exercising authority over the accused to convene the type of court-martial involved is the responsible convening authority.
2. Receipt of decision by the original convening authority's (or the current convening authority if the original convening authority no longer exists) SJA triggers the speedy trial clock for both rehearings on findings and rehearings on sentence only. In a sentence-only rehearing, an accused is "brought to trial" at the first Article 39a session.
3. When a post-trial review or action directs or authorizes further proceedings, the responsible convening authority's SJA must make reasonable efforts to locate and provide both the accused and defense counsel with a copy of the document requiring additional action. Ensure receipts are accomplished.

4. The responsible convening authority should ensure action taken is consistent with the post-trial directions from the reviewing or appellate authority. The responsible convening authority will publish a supplementary court-martial order indicating:
 - a rehearing is ordered before another court-martial to be designated; or
 - if a rehearing on sentence is impracticable, that the sentence has been set aside and a sentence of no punishment is approved; or
 - if a rehearing on findings is impracticable, that the findings of guilt and the sentence have been set aside and the charges are dismissed.
5. Ensure appropriate coordination is made with all counsel and the military judge.
6. When partial findings have been approved and a rehearing as to other offenses and the sentence ordered, the convening authority may, if specifically authorized by either the AFCCA or the CAAF, reassess the sentence based on the approved findings of guilty and dismiss the remaining charges, if any.
7. The responsible convening authority directs the rehearing. This may be done at any location the convening authority determines to be appropriate. If the rehearing is held at a location requiring the accused to travel, the accused should be placed on TDY.
8. A military judge is detailed. This may be the same military judge as in the original trial, or a new one may be detailed.
9. A new convening order is published with all new members.
10. A new referral indorsement in the same form as on page 2 of the DD Form 458 is completed following the normal rules of referral. The appropriate instructions concerning the rehearing are incorporated on the referral form, and the new referral is attached to the original referral.

NOTE: Steps 7–10 are accomplished when re-referring the matter to a rehearing in full or for a limited purpose.

11. The original ROT and any copies must remain intact, except for documents needed for reintroduction at rehearsals, such as the charge sheet and exhibits, if required.
 - Any documents withdrawn from the original ROT and used at the rehearing should be substituted in the record and all copies with a description of the document, reasons for withdrawal, and the new location of the document should be included. Do *not* withdraw the original copies of a decision of a court, action of a convening authority, post-trial review or recommendation, pretrial advice, and Article 32 ROI.
12. If the accused served confinement resulting from the original trial, the convening authority's new action must reflect that the accused will be credited for the time served.
13. The promulgating order must indicate the case is a rehearing.
14. The record of the rehearing is a separate volume from the original ROT. Place the record of rehearing on top of the original ROT. Renumber other volumes as appropriate. A verbatim transcript is required for a rehearing proceeding.
15. Forward the original and two copies of the rehearing record along with the original ROT to AFLOA/JAJM.

As you can see, a rehearing is similar to a new trial; however, there are more notifications required and additional rules apply to the ROT.

***DuBay* hearings**

Sometimes the appellate courts are faced with factual disputes. When an appeal cannot be resolved without factual clarification, a *DuBay* hearing may be ordered (*United States v. DuBay*, 37 C.M.R. 411 [1967]). A *DuBay* hearing is a post-trial hearing ordered by an appellate court for the limited purpose of obtaining further evidence on a matter under consideration by the court. This type of

hearing is a well-established means to address an ambiguity or omission in the record or to dispose of a claim of error before necessary witnesses disperse, memories fade, or witnesses become unavailable.

DuBay hearings on various matters may be directed by CAAF, AFCCA, convening and supervisory authorities, or the detailed military judge on his or her own motion prior to authentication of the ROT, so long as the subject of the proceeding is one that can be verified without material prejudice to the substantial rights of the accused.

A *DuBay* hearing is conducted by a military judge and is limited to the questions set forth by the appellate court in its order. These hearings are the appropriate vehicle to determine facts when issues, such as unlawful command influence or ineffective assistance of counsel, are raised at the appellate level. However, there must be more than a bare allegation or mere speculation before the threshold triggering further inquiry is reached.

The following procedures apply upon notification of a *DuBay* hearing:

- AFLOA/JAJM sends a letter of transmittal and a copy of the mandate or order to the SJA of the convening authority who exercised authority over the accused at the time of trial (or the current convening authority). If the accused is no longer within the command of the original convening authority, a courtesy copy is forwarded to the accused's current convening authority who has the authority to convene the type of court-martial involved.
 - The responsible convening authority must ensure action is taken consistent with the post-trial directions from the authority directing a *DuBay* hearing. The responsible convening authority will publish a supplementary court-martial order reflecting post-trial actions on the case.
 - There are no formal time standards for the completion of a hearing; however, the matter should be expedited as an appellate review is pending. The appellate court directing the hearing generally specifies a date by which the process must be completed. Any time extensions require coordination with the AFLOA/JAJG through AFLOA/JAJM.
- When a post-trial review or action directs a *DuBay* hearing, the responsible convening authority's SJA must make reasonable efforts to locate and provide both the accused and defense counsel with a copy of the document requiring additional action. Ensure receipts are accomplished.
 - The accused should be returned to active duty status for the limited purpose of participating in the hearing.
 - The SJA prepares a letter for the responsible convening authority to sign directing a *DuBay* hearing to take place.
- After appropriate coordination, the SJA drafts a letter for the convening authority requesting a military judge be detailed and directing a hearing date to be scheduled. A military judge is detailed to a *DuBay* hearing in the same manner as detailed to any court-martial.
- *DuBay* hearings are conducted in accordance with Article 39(a), UCMJ.
- Number items admitted as evidence at the hearing numerically, starting with "Hearing Exhibit 1."
- Prepare a verbatim record of the hearing, unless otherwise directed by the authority ordering the hearing. Authenticate the transcript of the hearing in the same format as required for ROTs. Return the original ROT, the original *DuBay* transcript, and two copies of the *DuBay* transcript to AFLOA/JAJM.

While you will not see many of these types of hearings, AFI 51-201 and AFLOA/JAJM will help you through the process and answer any questions you may have.

In-camera proceedings

An in-camera proceeding is an Article 39(a) session which excludes the public. Normally, this hearing is held to determine the extent of disclosure of classified information. Classified information is not subject to disclosure unless the information is relevant and necessary to an element of the offense or a legally cognizable defense and is otherwise admissible in evidence. The record of the in-camera proceeding is sealed and attached to the ROT as an appellate exhibit.

Further information can be found in the MCM, M.R.E. 505.

634. Disclosure of military justice information

Many of the military justice matters you will deal with generate public interest. Often times you will receive requests for information and/or court documents from various outside agencies or individuals. It is your responsibility to understand the rules regarding what information may be released and to whom.

Inquiries

Frequently, AFLOA/JAJM is asked to help answer inquiries from the White House, members of Congress, and the SAF about disciplinary action against members of the Air Force. Sometimes information is requested concerning criminal proceedings taken by civilian authorities against members of the AF. Usually, the necessary information is not available at AFLOA/JAJM; in these cases, AFLOA/JAJM's first action is to request the information from the organization involved. In some cases, AFLOA/JAJM makes the request by mail and encloses a copy of the original inquiry. In other cases, the request is made by electronic means. Inquiries may also be received by field commanders directly from the White House or members of Congress.

When you have received this type of inquiry, send a reply to the request for information as quickly as possible. If the inquiry includes a suspense date and the headquarters receiving the inquiry cannot furnish all the information requested within the specified time, forward the information then available to AFLOA/JAJM and indicate when the rest of the information will be forwarded. Do not request an extension of the suspense date. When providing information, send informational copies of replies to intermediate levels of command and through MAJCOM level to AFLOA/JAJM. For *all* responses, ensure to include the following:

- Detailed response to specific inquiries.
- Narrative of the activity, including dates, resulting in the action in question.
- Any other unique or significant aspects.

In addition to the information above, AFI 51-201 outlines specific information that must be included in a response dependent upon the nature of the request. Follow the guidance provided to send AFLOA/JAJM a thorough and complete response to the inquiry.

Some agencies or persons requesting the information may not be authorized or cleared to receive classified information; therefore, ensure replies to requests for information containing classified material, in addition to the usual requirements, clearly indicate the information that is classified. In the case of letter replies, you may do this by careful paragraphing, with separate classifications for each paragraph.

Disclosure of unclassified ROTs after court-martial

ROTs, including documents, which will become part of an ROT, are public records and subject to disclosure under the PA and FOIA. Information marked as classified, controlled, or sealed by judicial order should not be released absent an authoritative determination of releasability. A transcript of oral proceedings is not a record until authenticated. When releasing records of trial, redact all VWPA and PA-protected data, to include the names of victims of sex offenses, the names of children, and the identity of victims who could be harmed by disclosure of their identity.

When the charges against an accused are disposed of by an action other than a court-martial, or when a court-martial results in an acquittal, consideration must be given to the likelihood the accused may have increased privacy interests in the protection of information contained in military justice documents or records. Less serious misconduct, which is handled administratively rather than judicially, generally is not considered of sufficient public interest to outweigh the privacy interest of the individual.

The request for an ROT must contain as complete identification of the record as possible. If the requester submits only part of the identifying details, the AF makes a reasonable effort to locate the record requested. The requester states whether he or she wants to inspect or to obtain copies of the ROT.

The disclosure authority for the ROT is the SJA for the convening authority responsible for the criminal proceeding, unless this authority has been withheld by AFLOA/JAJM or other higher authority. When releasing records, file a copy of letters releasing documents or records with allied papers and immediately notify AFLOA/JAJM of any release. However, once a completed record is forwarded, AFLOA/JAJM is the disclosure authority for all records and associated documents.

Self-Test Questions

After you complete these questions, you may check your answers at the end of the unit.

632. Appellate review

1. What is the purpose of the Article 64 review?
2. What cases require an Article 64 review?
3. Under an Article 69 review, when must the accused submit matters for TJAG's consideration and to whom are they submitted?
4. Within what period of time may an accused petition the CAAF?
5. When must the CAAF review ROTs?
6. When are decisions of the CAAF reviewed by the Supreme Court by writ of certiorari?
7. When may the Supreme Court *not* review by writ of certiorari?
8. When may a trial counsel appeal an order or ruling by the military judge?

633. Other proceedings

1. What is the procedure for a rehearing on sentence only?
2. What triggers the speedy trial clock for a rehearing?
3. What is the disposition of a DD Form 458 for a rehearing?
4. What kind of hearing is ordered when an appeal cannot be resolved without factual clarification?
5. Who may direct a *DuBay* hearing?
6. Why are in-camera proceedings normally held?
7. What is the disposition of the record of the in-camera proceeding?

634. Disclosure of military justice information

1. What information must all inquiry responses include?
2. What governs the disclosure of ROTs to the public?
3. Who is the disclosure authority for ROTs?

Answers to Self-Test Questions**627**

1. To ensure the courtroom has a neat, clean, and orderly appearance.
2. Appropriate supplies (e.g., paper and pencils), a copy of the convening order, and any amendments.
3. During the open session of the court when members are present.
4. Setting up the court-reporting equipment.
5. Trial counsel and defense counsel must have the same exact documentation within their respective folders.

6. Reports to the base legal office prior to the day of trial to receive a bailiff's guide, a briefing, and walk-through of the office; reports to the trial counsel in proper uniform at least 30 minutes before commencement of each day's procedures; ensures courtroom and jury deliberation room have a neat, clean, and orderly appearance, and furniture is in proper arrangement.
7. See that they can enter the courtroom, be seated, and leave quietly.
8. Must inform the military judge and obtain approval.
9. Summon the court members, counsel, and all required parties to the courtroom when needed; summon witnesses when requested; deliver items to the court (e.g., evidence, findings, and sentence worksheets); deliver items of evidence to any deliberation room if instructed by the military judge; and perform administrative errands as requested.

628

1. The military judge hears and determines motions; hears and rules on matters authorized under the UCMJ; conducts arraignment, and the entering of pleas.
2. Court members are examined to determine whether they can try the case fairly and impartially.
3. To hold the arraignment at an Article 39(a) session out of the presence of the court members.
4. To ensure the accused understands what he or she is pleading guilty to, and that he or she is, in fact, guilty of each element of each charge and specification.
5. 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 at the discretion of the military judge; presentation of evidence requested by the military judge or members.
6. After presentation of the evidence on findings, but before the sentencing portion of a court-martial.
7. How the evidence is insufficient.
8. Proof beyond a reasonable doubt based on direct or circumstantial evidence.
9. By secret written ballot for each charge and specification.
10. To determine the type of punishment the accused will receive after a finding of guilty.
11. The PDS; character of the accused's prior service; prior convictions from a military court-martial or civilian court; evidence of aggravation; and evidence of rehabilitative potential.
12. State on the record the reason(s) for the deviation.
13. To prevent any hint of command influence.
14. Not concede the accused guilt if the accused pled not guilty during arraignment.
15. Write down the sentence exactly as it is announced in court.

629

1. The clock for submission of matters starts immediately following the announcement of sentence.
2. Five calendar days.

630

1. To promptly notify specific individuals of the pleas, findings, sentence, forum, plea agreement, suspension recommendation and other information directed by the military judge.
2. The specifications on the STR are written in a similar manner to those on the DD Form 458, Charge Sheet, but the specifications on this memorandum may be summarized.
3. Findings, sentence, forum, plea agreements, suspension recommendations, other information the military judge deems necessary
4. The deferment may be rescinded at any time by the officer who granted it or, if the accused is no longer under that individual's jurisdiction, by the officer exercising GCM jurisdiction over the command to which the accused is currently assigned.
5. Only in cases where the accused has dependents.
6. To approve or disapprove all or part of the findings or sentence, or both.

7. It can approve all punishments that will be established in an Entry of Judgment but it cannot order a punitive discharge or the death penalty executed until the case has gone through all levels of appellate review.
8. It reflects the result of the court-martial, as modified by any post-trial actions, rulings, or orders.

631

1. (1) The judgment entered into the record by the EOJ.
 (2) The STR.
 (3) Any action by the convening authority under R.C.M. 1109 or 1110.
 (4) A substantially verbatim recording of the court-martial proceedings except sessions closed for deliberations and voting.
 (5) The original charge sheet or a duplicate.
 (6) A copy of the convening order and any amending order.
 (7) The request, if any, for trial by military judge alone; the accused's election, if any, of members under R.C.M. 903; and, when applicable, any statement by the convening authority required under R.C.M. 503(a)(2).
 (8) The election, if any, for sentencing by members in lieu of sentencing by military judge under R.C.M. 1002(b).
 (9) Exhibits.
 (10) Prosecution exhibits admitted during trial.
2. (1) PHO report.*
 (2) Pretrial advice.*
 (3) Record of former hearings (retrials).*
 (4) Exhibits not in evidence.
 (5) RCM 1106/1106A matters.
 (6) Deferment requests and action.
 (7) Waiver/withdrawal of appellate review.
 (8) Transcript.
 (9) Other items as required by AFMAN 51-203.
3. The court reporter notes any transcription errors then forwards it to trial counsel and signs a certification verifying the examination, the record is then sent to the defense counsel, and finally to the military judge.

632

1. To determine if the findings and sentence are correct in law and fact.
2. SCMs with a finding of guilty.
3. Matters must be submitted directly to AFLOA/JAJM on or before the 30th day after the date the GCMCA approved the sentence, unless the accused establishes good cause for not filing matters within that time.
4. 60 days from the time he or she is personally notified of the AFCCA decision or the date a copy of the decision, after being served on appellate defense counsel, was deposited in the US mail for delivery by first-class certified mail, whichever is earlier.
5. In all cases in which the sentence, as affirmed by the AFCCA, extends to death; cases reviewed by the AFCCA that TJAG orders sent to the CAAF for review; and cases reviewed by the AFCCA in which, upon petition of the accused and on good cause shown, the CAAF has granted review.
6. In cases reviewed by CAAF in which the sentence extends to death; cases reviewed by AFCCA, which TJAG certifies to the CAAF; all cases where the CAAF granted a petition for review for good cause; and cases in which the CAAF granted relief.
7. Any action of the CAAF in refusing to grant a petition for review.
8. With the approval of TJAG, the government may appeal a sentence to the AFCCA on the grounds that the sentence violates the law or is plainly unreasonable.

633

1. The same as in an original trial, except the portion of the procedure that ordinarily occurs after challenges and through and including findings is omitted.
2. Receipt of decision by the original convening authority's SJA.
3. The new referral is attached to the original referral.
4. A *DuBay* hearing.
5. The CAAF, AFCCA, convening and supervisory authorities, or a detailed military judge.
6. To determine the extent of disclosure of classified information.
7. It is sealed and attached to the ROT as an appellate exhibit.

634

1. A detailed response to specific inquiries; narrative of the activity, including dates, resulting in the action in question; and any other unique or significant aspects.
2. PA and FOIA.
3. The SJA for the convening authority responsible for the criminal proceeding, unless this authority has been withheld by AFLOA/JAJM or other higher authority.

Glossary of Abbreviations and Acronyms

4 AF/CC	Fourth Air Force commander
10 AF/CC	Tenth Air Force commander
22 AF/CC	Twenty-second Air Force commander
A1C	airman first class (E-3)
AAC	assignment availability code
AB	airman basic (E-1)
ADC	area defense counsel
AF	Air Force
AFCCA	Air Force Court of Criminal Appeals
AFI	Air Force instruction
AF/JAT	Air Force Trial Judiciary
AFLOA/JAJG	Air Force Legal Operations Agency/Government Trial and Appellate Counsel Division
AFLOA/JAJM	Air Force Legal Operations Agency, Military Justice Division
AFMAN	Air Force manual
AFO	accounting and finance office
AFOSI	Air Force office of special investigations
AFOSI/XI	Air Force Office of Special Investigations Warfighting Integration Directorate
AFPC	Air Force Personnel Center
AFPC/DPSOS	Air Force Personnel Center, Separations Branch
AFR	Air Force Reserve
AFRC/CC	Air Force Reserve Command commander
AFSFC/FC	Air Force Security Forces Center, Confinement and Corrections Directorate
AFVA	Air Force visual aid
AMC	Air Mobility Command
AMJAMS	Automated Military Justice Analysis and Management System
Amn	Airman (E-2)
AWOL	absent without leave
BCD	bad conduct discharge
CAAF	Court of Appeals for the Armed Forces
CDI	commander-directed investigation
CDO	Central Docketing Office
C.M.A.	Court of Military Appeals
C.M.R.	Court Martial Report

CMSgt	chief master sergeant (E-9)
CONUS	continental United States
CRMJ	chief regional military judge
CTJ	chief trial judge
CWF	central witness funding
DA	Department of the Army
DAF	Department of the Air Force
DCTJ	deputy chief trial judge
DD	dishonorable discharge, Department of Defense (form)
DNA	deoxyribonucleic acid
DOD	Department of Defense
DOR	date of rank
DRU	direct reporting unit
DSJA	deputy staff judge advocate
DTS	Defense Travel System
EEO	equal employment opportunity
EOJ	entry of judgement
ETS	expiration of term of service
FSS	force support squadron
FOIA	Freedom of Information Act
FOA	field operating agency
FSS	force support squadron
GCM	general court-martial
GCMCA	general court-martial convening authority
GSA	General Services Administration
HN	host nation
HQ	headquarters
HQ AFPC/DPAPP	Headquarters Air Force Personnel Center, Assignment Programs and Processing Branch
HQ AFPC/DPSOS	Headquarters Air Force Personnel Center, Separations Branch
HQ AFSFC/SFC	Headquarters Air Force Security Forces Center, Corrections Division
HQ USAF	Headquarters United States Air Force
HQ USAF/JAO	Headquarters United States Air Force, Operations and International Law Directorate
HQ USAF/JAT	Headquarters United States Air Force, Air Force Trial Judiciary

IDA	initial disposition of a sexual assault allegation
IDT	inactive duty training
IG	inspector general
JAG	judge advocate general
LIO	lesser included offense
LRO	local responsible official
MAJCOM	major command
MCM	Manual for Courts-Martial
MOA	memorandum of agreement
MPS	military personnel section
M.R.E.	Military Rules of Evidence
MSgt	master sergeant (E-7)
N/A	not applicable
NAF	non-appropriated fund, numbered air force
NCO	noncommissioned officer
NCOIC	noncommissioned officer in charge
NJP	nonjudicial punishment
OCONUS	outside the continental United States
OSI	office of special investigations
PA	Privacy Act
PCRO	pretrial confinement review officer
PCS	permanent change of station
PDS	personal data sheet
PHO	preliminary hearing officer
PTC	pretrial confinement
RA	resource advisor
R.C.M.	Rules for Courts-Martial
RILO	resignation in lieu of
RIP	report on individual person
RO	responsible official
ROI	report of investigation
ROT	record of trial
SCM	summary court-martial
SCMCA	summary court-martial convening authority
SCMO	summary court-martial officer

SAF	Secretary of the Air Force
SF	standard form
SFS	security forces squadron
SJA	staff judge advocate
SMSgt	senior master sergeant (E-8)
SNCO	senior noncommissioned officer
SOFA	status-of-forces agreement
SOMA	status-of-mission agreement
SPCM	special court-martial
SPCMCA	special court-martial convening authority
SrA	senior airman (E-4)
SSgt	staff sergeant (E-5)
SSN	social security number
SVC	special victim's counsel
TAFMSD	total active federal military service date
TDY	temporary duty
TJAG	The Judge Advocate General
TSgt	technical sergeant (E-6)
UCMJ	Uniform Code of Military Justice
UIF	unfavorable information file
UOTHC	under other than honorable conditions
US	United States
USAF	United States Air Force
USAFA	United States Air Force Academy
U.S.C.	United States Code
VOCA	Victims of Crime Act
VRRA	Victims' Rights and Restitution Act
VWAP	Victim and Witness Assistance Program
VWPA	Victim and Witness Protection Act
WFMS	Witness Funding Management System

Student Notes

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