

LEGADMINMAN

CHAPTER 1

MILITARY JUSTICE

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CHAPTER 1

MILITARY JUSTICE

1000. SCOPE. This chapter describes major source materials for military justice; sets forth goals for trial and defense counsel conducting a trial by court-martial; provides guidance to prevent unlawful command influence; offers guidance for high-profile military justice cases; sets forth procedures and administrative instructions relating to retention of Marines on active duty pending trial by court-martial or accused of committing an offense over which a foreign country has jurisdiction; consular protection of foreign nationals subject to the UCMJ; clemency review; extension of enlistment to serve probation; instruction on the UCMJ; and signing military justice documents; and suggests the use of depositions for civilian witnesses whose evidence is needed before referral of court-martial charges.

1001. Major Source Materials. Major source materials for military justice are the Constitution, the UCMJ, the Manual for Courts-Martial, the Manual of the Judge Advocate General, Military Justice Regulations issued by the Judge Advocate General (currently in the form of letter-type JAG instructions), and this Manual. Major secondary sources include the Military Judges' Benchbook (currently Department of the Army Pamphlet 27-9), the commercially published Military Rules of Evidence Manual, and the Rules of Court and trial guides promulgated by the Navy-Marine Corps Trial Judiciary.

1002. GOALS OF A TRIAL BY COURT-MARTIAL

1. Operating within an adversarial system of justice, the goal of a trial is the search for the truth. To provide the best opportunity to find the truth and deliver justice, a trial should have an efficient presentation of evidence and arguments to the trier of fact in a setting that promotes a sense of the importance of the outcome.

2. Counsel for both sides are expected to strive to conduct an exemplary trial. In an exemplary trial, trial time is regarded by all as precious. The members are rarely sent out for extensive arguments of counsel on points of law. Counsel are able to frame their opening statements by properly balancing fact and emotion. Direct examination educates the members step-by-step about the essential facts and circumstances of the case. Exhibits are handled expeditiously. Visual evidence is planned and prepared in advance. Objections are ruled upon promptly without excessive arguments and are limited in number. Succeeding witnesses are presented without the need for recesses and their testimony is not dragged out to fill time. A schedule of witnesses is set and respected as much as possible.

3. Cross-examination by counsel, who have fully investigated the issues, is focused, succinct, and avoids the quality of a rambling debate with the witness. Everyone has a sense that counsel know exactly where they are going. Redirect examination maintains its proper scope and further examination is rare and limited. Counsel do not vie to have the last word.

4. Closing arguments stick to the evidence and do not invite objections. Counsel are well prepared with requests for rulings or members' instructions far in advance of the time for closing arguments. Objections to the military judge's instructions are made efficiently.

1003. COMMAND INFLUENCE

1. Courts-martial are instruments of leadership and command that have been balanced to ensure fairness to accused servicemembers. The UCMJ preserved a substantial amount of command control over military justice proceedings, but the UCMJ requires independent discretion and judgment on the part of court-martial participants. This is how the UCMJ seeks to ensure fairness while preserving the Code as an instrument of command. Unlawful command influence occurs when senior personnel, wittingly or unwittingly, act to influence court-martial members, witnesses, defense counsel, or the military judge in a court-martial case. Unlawful command influence not only jeopardizes the validity of the judicial process, it undermines the morale of military members, their respect for the chain of command, and public confidence in the military.

2. While some types of influence are unlawful and prohibited by the UCMJ, other types of influence are lawful, proper, and a necessary part of command and leadership. The prohibition against unlawful command influence does not mean that a commander may abdicate responsibility for correcting disciplinary problems or administering justice. Rather, the commander must be vigilant to ensure that command action does not encroach upon the independence of the other participants in the military justice system.

3. Lawful Command, Control and Influence. A commander may:

a. Personally dispose of a case at the level authorized for that commander.

b. Send a case to a lower level commander for that subordinate's independent action.

c. Send a case to a higher commander with a recommendation for disposition.

d. Withdraw subordinate court-martial convening authority in whole or for particular classes or categories of cases.

e. Order charges pending at a lower level transmitted up for further consideration, including, if appropriate, referral.

f. Mentor and train subordinates in military justice, but must do so recognizing that there exists the potential for misinterpreting the commander's intentions.

4. Unlawful Command Influence. A commander may not:

a. Order a subordinate to dispose of a case in a certain way. The law gives independent discretion to each commander at every level possessing authority to convene courts-martial.

b. Select or remove court-martial members in order to obtain a particular result in a particular trial. Selection of members must be based on the criteria contained in UCMJ, Article 24. Those criteria include age and experience, education and training, length of service, and judicial temperament.

c. Pressure the military judge or court members to arrive at a particular decision or harass defense counsel.

d. Intimidate or discourage witnesses from testifying or retaliate against a witness for testifying.

e. Criticize military judges, court members, witnesses, or defense counsel in a manner that may influence them or other military judges, court members, witnesses, or defense counsel in future cases.

f. Consider or evaluate, in a fitness report, the court-martial performance of any court member or give a less favorable rating or evaluation to a defense counsel because of the zeal with which the defense counsel represented an accused servicemember.

5. Though not, strictly speaking, unlawful "command influence," commanders should not have an inflexible policy on the disposition of a court-martial case or the punishment to be imposed. A convening authority must consider each case individually on its own merits. When a convening authority considers the post-trial submissions of the accused and acts on the sentence of a court-martial, s/he may not have an inflexible attitude toward clemency.

6. A commander who is an "accuser" may not thereafter act as a convening authority. A commander who is an accuser is disqualified to act as a convening authority and must forward the charges to a superior convening authority. A commander is considered to be an accuser when s/he:

- a. Formally signs and swears to the charges on a charges sheet,
- b. Directs that charges be signed and sworn to by another, or
- c. Has an interest, other than an official interest, in the prosecution of the accused.

1004. PUBLIC AFFAIRS AND MILITARY JUSTICE

1. Military justice matters have sometimes become the subject of intense national, regional, and local media interest. Commanders, staff judge advocates, legal team leaders, military justice officers, and public affairs officers must be prepared to manage a court-martial or other military justice matters so that they do not become public affairs crises.

2. The following principles for managing high profile military justice matters are provided as guidance:

- a. If a matter under investigation is of such significance and potential public interest that it is virtually certain to be covered by the media, consider making the matter public before the matter "leaks" to the media.

- b. Assume that the media is more nimble than the command is; has sources of information the command does not have; and needs immediate education on the military justice system. Education of the media should begin immediately in the form of briefings and fact sheets available from HQMC (JAM).

- c. Get control of the facts. Initially, families, the media, or law enforcement agencies may have control of the facts, leading to a series of surprises. Use every lawful power at the command's disposal to get control of the facts. Once the parties have to come to the command for information, a high profile case can be successfully managed.

- d. Establish a lawyer-public affairs team to manage the high profile case. The team must have ready access to the commander. If necessary, establish an operations center.

- e. Consider obtaining a protective order from the convening authority or military judge relating to pretrial publicity.

- f. Engage the media. While all information released to the media must be put through the "filters" of unlawful command influence, the Privacy Act, and rules pertaining to the release of pretrial information, often much relevant information can be released to the media. Once it is clear that the media will cover a case to its

conclusion, it is generally a mistake not to engage the media or respond immediately to misinformation.

(1) If large numbers of media are in attendance, establish a media center. Assign a neutral third-party judge advocate to advise the media on military justice matters.

(2) Conduct press briefings before the proceedings in the morning and after the proceedings in the afternoon and evening.

(3) Coordinate with defense counsel and allow defense counsel to participate in the press briefings.

g. Maintain the integrity of the command, the military justice system, and the Marine Corps.

h. Keep HQMC informed and allow the Commandant and his staff to participate in the public affairs aspects of cases that affect the Marine Corps as a whole.

1005. EFFECT OF EXPIRATION OF ACTIVE SERVICE OF MARINES PENDING OR UNDERGOING SENTENCE OF COURT-MARTIAL OR ACCUSED OF COMMITTING AN OFFENSE OVER WHICH A FOREIGN COUNTRY HAS JURISDICTION

1. When, upon expiration of active service, a Marine has not been tried, or has been tried but the entire sentence has not been executed, the period of active service must be extended to complete trial, sentence and punishment, if any. The appropriate duty status code must be reported. In order to effect the extension, administrative action must be taken in accordance with MCO P1080.40A, MCTFSPRIM. The authority to cite in such cases is R.C.M. 202, MCM, 1998.

2. A Marine may not be involuntarily retained in the service beyond normal EAS for the purpose of being a witness at a trial by court-martial.

3. Marines awaiting disposition of criminal proceedings by a foreign jurisdiction are accorded statutory and regulatory protections and benefits attendant to their status as members of the armed forces. The policy of the Marine Corps is to ensure both that the member is accorded the fullest possible protection and that the Marine Corps meets its international obligations. In implementation of this policy, the following procedures will be applied in all cases where foreign criminal jurisdiction is being, or may be, exercised over a member of the naval service (by action such as apprehension, arrest, investigation, or a filing of charges that may result in trial), and where the foreign criminal proceedings are not likely to be completed prior to the date of the member's release from service because of EAS.

a. At least one month before EAS, Marines will be offered the opportunity to extend their enlistment voluntarily for the duration of legal proceedings and any subsequent punishment. Individuals will be informed of the protections and benefits they will receive as members of the Marine Corps during foreign criminal proceedings. For example: counsel may be provided at Marine Corps expense; court costs (but not fines) paid; an interpreter made available; and, in most countries, the Marine will remain in United States, vice foreign, custody at least during the trial proceedings. Marines will also be informed that they will remain subject to the UCMJ and may be subject to processing for administrative discharge. In some situations, advice of Article 27b, UCMJ, counsel will be provided when exposure to military criminal charges is possible. Additionally, the Marine will be advised that an election not to extend the enlistment voluntarily shall result in the following:

(1) Foreign authorities will be advised of the impending EAS and the inability of the Marine Corps to guarantee the Marine's presence after discharge;

(2) Foreign authorities will be offered custody of the Marine immediately prior to EAS; and

(3) Assuming foreign authorities accept custody, the Marine will be discharged from the naval service as soon thereafter as practicable, thereby terminating any special considerations that the Marine would be entitled to as a member of the armed forces.

b. If the Marine elects to extend the enlistment voluntarily, such request will be honored, and an appropriate page 11 entry will be made in the Marine's service record book and acknowledged by the Marine's signature. (See MCO P1040.31H, Enlisted Career Planning and Retention Manual.)

c. Should the Marine elect not to extend voluntarily, foreign authorities will be notified of the inability of the Marine Corps to guarantee the presence of the member after discharge due to the Marine's impending EAS. The foreign authorities will then be afforded the opportunity to take custody of the Marine at a mutually agreed time immediately prior to EAS. If the foreign authorities desire custody, the Marine will be transferred to the foreign authorities at the agreed time. After such transfer of custody, the Marine's commanding officer will, at EAS, discharge the Marine and so notify the Judge Advocate General of the Navy, the CMC (MMSR), and the U.S. Embassy or Consul.

d. Should the foreign authorities, upon being notified of the Marine's impending EAS and the inability of the Marine Corps to maintain custody after discharge, state that the Marine need not be present within the jurisdiction and is not required nor desired to be available for any further criminal proceedings, the Marine should be

returned to CONUS for separation. In such cases, foreign authorities have in effect released the Marine Corps from any obligation to keep the Marine within the foreign jurisdiction or to make the Marine available for foreign criminal proceedings. This communication from appropriate foreign authorities should be in writing, if possible; if not, a memorandum for the record should be made to memorialize the agreement. In any event, all action taken must be in accordance with the terms of any applicable Status of Forces Agreement or other similar applicable agreement or treaty.

e. The foregoing policy does not apply to a Marine who is in the custody of/confined by foreign authorities prior to the approach of EAS. In that situation, the provisions of SECNAVINST 5820.4G continue to apply and, except under extraordinary circumstances approved by the Secretary of the Navy, the Marine will not be discharged while in custody or confinement of the foreign authorities.

1006. CONSULAR PROTECTION OF FOREIGN NATIONALS SUBJECT TO THE UCMJ

1. When a Marine who is not a citizen of the United States, and who claims foreign citizenship, is apprehended by military authorities under circumstances likely to result in confinement, or is ordered into military confinement, or is referred to trial by court-martial, the officer exercising general court-martial jurisdiction (OEGCMJ) is required to notify the nearest consular office of the foreign country concerned. This requirement is subject, in certain cases, to the objection of the Marine, depending on the applicable treaty, if any. Amplifying information is contained in SECNAVINST 5820.6.

2. In the event of the aforementioned, a copy of the notification must be incorporated into the record of trial. The commander on whose rolls the Marine is carried is responsible for informing the OEGCMJ over a Marine who is a foreign national whenever circumstances arise indicating that consular notification may be required.

1007. CLEMENCY REVIEW

1. Individuals whose court-martial sentence includes confinement for 12 months or more, or an unsuspended punitive discharge, are eligible for clemency review by the Naval Clemency and Parole Board (NC&PB) in accordance with SECNAVINST 5815.3H.

2. The commander on whose rolls the person is carried or, in the case of a Marine serving sentence in a Marine Corps brig, the commanding officer thereof, shall:

a. Provide a person eligible for clemency review the opportunity and free choice to request or waive clemency review before each annual review by NC&PB. Individuals should be encouraged to consult with

assigned defense counsel prior to making their initial review decision.

b. Ensure that members waiving clemency review understand clearly the consequences of their choice, as outlined on the waiver form, and that, unless subsequent review is scheduled or directed, their cases will not again be subject to review by the Naval Clemency and Parole Board.

3. The vehicle for clemency review is the court-martial progress report, which will include:

- a. The basic report;
- b. The request for clemency; and
- c. Endorsements of officials in the chain of review.

4. Only the following forms will be used in connection with clemency review:

- a. To prepare the court-martial progress report - DD Forms 1476, 1477, 1478, and 1479 for the basic report, and NAVSO 5815/2 for the Marine's clemency request.
- b. To waive clemency review - NAVSO 5815/4.

5. The commander on whose rolls the Marine is carried or, in the case of an individual serving sentence in a Marine Corps brig, commanding officer thereof, shall submit the original and two copies of the court-martial progress report to the President, NC&PB on all members who do not waive clemency review. A copy of the report will be furnished to the OEGCMJ (Attn: SJA). The time of submission shall be in accordance with the schedule established in SECNAVINST 5815.3H. Progress reports are to be completed as follows:

a. All required DD forms comprising the basic report, plus the Marine's clemency request, shall be completed in their entirety.

b. Psychiatric evaluations shall be in narrative form and normally typewritten. A military psychiatrist, a clinical psychologist, or a medical officer must make the evaluation.

c. Detailed information required to be included in psychiatric evaluations is contained in SECNAVINST 5815.3H.

1008. AGREEMENT TO EXTEND ENLISTMENT FOR THE PURPOSE OF SERVING A PERIOD OF SUSPENSION

1. Even though a Marine does not have sufficient time remaining on an enlistment to serve the period of suspension specified by the Secretary of the Navy or NC&PB, the Marine may be restored to duty, provided the Marine consents in writing to an extension of enlistment for the required suspension period.

2. The agreement to be executed shall be as follows:

"With full knowledge that the unexecuted portion of my sentence may be suspended for the purpose of allowing me to serve on active duty during the period of suspension, I hereby agree to be retained on active duty for the period of suspension, such period not to exceed 1 year. I further understand that the suspension may be vacated in accordance with R.C.M. 1109, MCM, 1998, in which event the unexecuted portion of my sentence shall be executed."

If the Marine has lost time that must be made good, add the following:

"I further understand that, pursuant to 10 U.S.C. § 972 and implementing directives, I shall also be required to make up _____ days time lost from my enlistment unless I am sooner discharged."

3. The following shall be accomplished relative to this agreement:

a. The information contained in the agreement shall be carefully explained to the Marine.

b. The Marine will sign the original and duplicate original.

c. The original agreement shall be retained in the SRB. The duplicate original will be forwarded to the Secretary of the Navy (Naval Clemency and Parole Board) via the CMC (JAM), with the Request for Restoration/Clemency, NAVSO 5815/2. The Marine should be advised that execution of an agreement to remain on active duty for the suspension period is not a form of clemency action, and that only the Naval Clemency and Parole Board may restore the Marine to duty.

1009. CIVILIAN WITNESSES. Gathering evidence from civilian witnesses is sometimes impossible because military criminal investigative organizations, preliminary inquiry officers, UCMJ, Article 32 investigation officers, and trial counsel cannot compel the attendance of civilian witnesses until court-martial charges are referred to trial. When evidence from a civilian witness is needed before referral of charges, an oral or written deposition under UCMJ, Article 49 and Rule for Court-Martial 702 should be considered. A deposition may be taken after charges have been preferred. A subpoena is available to compel the attendance of a civilian witness at a deposition.

1010. INSTRUCTION ON THE UCMJ

1. The UCMJ, Article 137, requires that Articles 2, 3, 7 through 15, 25, 27, 31, 38, 55, 77 through 134, and 137 through 139 of the UCMJ be explained to enlisted Marines at the time of (or within six days after):

a. The Marine's initial entrance on active duty; or

b. The Marine's initial entrance into a duty status with a Reserve component; and

c. After the Marine has completed 6 months of active duty or, in the case of a Marine of a Reserve component, after the Marine has completed recruit training; and

d. At the time the Marine reenlists.

2. Instructions for recording the foregoing explanation in the service records of Marines are contained in MCO P1070.12J (IRAM).

1011. SIGNING OF DOCUMENTS AND CORRESPONDENCE RELATED TO MILITARY JUSTICE MATTERS. The authority to convene courts-martial may not be delegated. Only the commander or the successor to command, as defined by Article 1026, U.S. Navy Regulations, 1990, and Marine Corps Manual, paragraph 1007, may sign court-martial convening orders, the referral block for charge sheets, and certain other court-martial documents. Documents will not be signed "acting" or "by direction."