

# CHAPTER 1

## MISCONDUCT: OPTIONS AND DUTIES OF THE COMMANDER

### PART I - COMMANDER'S OPTIONS

#### Introduction

At every level of command a number of options are available to a commander who is confronted by a military justice problem. This part concerns the various measures for dealing with an accused prior to trial as well as an examination of the various forums and administrative measures which a commander may use.

#### A. **Pretrial Restraint**

1. In General. Pretrial restraint is an actively developing area of the law. Also, some locations have other specific rules or procedures. Consult your local judge advocate. What if a soldier in your unit has committed an offense under the Uniform Code of Military Justice? What do you do with him or her pending court-martial? The short answer is "[a]n accused pending charges should ordinarily continue the performance of normal duties within his or her organization while awaiting trial." AR 27-10, para. 5-14. Specific circumstances, such as the need to ensure the soldier's presence at trial, to prevent criminal misconduct such as intimidation of witnesses, injury to others, or threatening the safety of the community or the effectiveness, morale, or discipline of the command, may move a commander to place a soldier under pretrial restraint. UCMJ art. 10; R.C.M. 305(h)(2)(B). As the soldier is presumed innocent until convicted, the restraint may not be punishment and must be the least restrictive restraint adequate to meet the circumstances which require the restraint. UCMJ art. 13; R.C.M. 305(h)(2)(B)(iv).

2. Types of Pretrial Restraint. There are four types of pretrial restraint. From least severe to most severe they are:

a. Conditions on liberty. Conditions on liberty are defined as "orders directing a person to do or refrain from doing specified acts." R.C.M. 304(a)(1). Conditions on liberty would include orders to a soldier not to go to the location of an offense or not to approach a victim of an offense or witnesses. Conditions may be imposed separately or with other forms of restraint. Imposing conditions on liberty does not trigger the 120-day speedy trial rule.

b. Restriction. Formally called "restriction in lieu of arrest," restriction is "the restraint of a person by oral or written orders directing the person to remain within specified limits." R.C.M. 304(a)(2). A soldier under restriction normally performs his or her usual duties. Common terms of restriction are, "to your place of duty, company (or battalion) area, dining facility, and chapel." Restriction triggers the 120-day speedy trial rule. (If "tantamount" to confinement, it may trigger more stringent rules; see Part II, paragraph F).

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c. Arrest. "Arrest" is defined as orders "directing the person to remain within specified limits." R.C.M. 304(a)(3). The limits of arrest are generally tighter than those of restriction and a person in arrest does not perform "full military duties," such as commanding, bearing arms, or serving guard, but may "do ordinary cleaning or policing, [or] routine training and duties." R.C.M. 304(a)(3). The distinction between "arrest" and "restriction" is largely a matter of degree and is important as arrest triggers more stringent speedy trial requirements. The term of "arrest" as a form of pretrial restraint is distinguishable from the common civilian meaning, which is to take into custody. In military usage "apprehension" is the equivalent of "arrest" in civilian terminology. Arrest triggers the 120-day speedy trial rule and may trigger more stringent rules (see Part II, paragraph F).

d. Pretrial Confinement. Pretrial confinement is the physical restraint of a soldier pending trial. It also triggers the 120-day speedy trial rule and may trigger more stringent rules. (see Part II, paragraph F).

3. Administrative restraint. Administrative restraint is not the same as pretrial restraint. Limitations placed on a soldier for operational, medical, or other military purposes, independent of military justice are not pretrial restraint. "Administrative restraint" placed on a soldier pending trial, however, will be scrutinized to ensure it serves purposes wholly independent of military justice.

4. Authority to Order Pretrial Restraint. Generally, any commissioned officer may order the pretrial restraint of an enlisted soldier. Only the commander may order pretrial confinement of officers within his command. Authority may also be withheld by a superior commander, which frequently occurs pursuant to local regulations. The commander must review the decision to order to pretrial confinement within 72 hours. Consultation with your legal advisor is always appropriate prior to imposing pretrial restraint.

5. Pretrial Confinement.

a. In General. As pretrial confinement is the most stringent pretrial restraint, specific procedures must be followed in putting a soldier in pretrial confinement. "In any case of pretrial confinement, the SJA concerned, or that officer's designee, will be notified prior to the accused's entry into confinement or as soon as practicable afterwards." AR 27-10, para. 5-14. Upon confinement, the soldier must be informed of the nature of the offenses for which held, the right to remain silent and that any statement made may be used against him, the right to civilian counsel at no expense to the United States and to assignment of military counsel, and the procedures by which the confinement will be reviewed. R.C.M. 305(e). A soldier charged only with an offense normally tried by a summary court-martial will not ordinarily be put in pretrial confinement. When no court-martial charges are pending, a person pending administrative separation will not be placed in pretrial confinement.

b. Requisites For Pretrial Confinement. Pretrial confinement of a soldier is illegal unless:

[T]he commander has probable cause (reasonable grounds) to believe that

- (i) An offense triable by a court-martial has been committed;
- (ii) The person to be confined committed it; and
- (iii) Confinement is necessary because it is foreseeable that:
  - (a) The person to be confined will not appear at a trial, pretrial hearing, or investigation, or
  - (b) The person to be confined will engage in serious criminal misconduct; **AND**
- (iv) Less severe forms of restraint are inadequate.

In Europe and some other places, the power of subordinate commanders to order pretrial confinement is withheld by the General Court-Martial Convening Authority and delegated to the SJA. The rationale for this delegation is that a military magistrate (usually a military judge) must review the pretrial confinement within 7 days of imposition to ensure it is legal. If illegal, the soldier will be released.

"'Serious criminal misconduct' includes intimidation of witnesses or other obstruction of justice, seriously injuring others, or other offenses which pose a serious threat to the safety of the community or to the effectiveness, morale, discipline, readiness, or safety of the command, or to the national security of the United States." R.C.M. 305(h)(2)(B).

The soldier who is an "irritant" and a "pain in the neck" in the unit may not be confined on that basis, but the soldier who is a "quitter," who disobeys orders and refuses to perform duties, is an "infection" in the unit and may properly be confined. R.C.M. 305(h) analysis. **Less severe forms of restraint must be considered first.**

c. Commander's Memorandum. When the commander (or the SJA, depending on local procedures) determines that the requisites for pretrial confinement are met, the commander must document the determination in a memorandum. Trial counsel should assist in the drafting or editing of this important document, to which the reviewing magistrate gives great weight. The "Checklist for Pretrial Confinement," DA Form 5112-R, satisfies the memorandum requirement. AR 27-10, para. 9-5b(2).

d. Prompt Determination of Probable Cause. Within 48 hours after a soldier enters pretrial confinement, a neutral and detached probable cause review of a warrantless apprehension must occur. A commander who is not an accuser or otherwise involved in the case or by an official designated to approve a commander's pretrial confinement decision may conduct the review. Local procedures will normally prescribe how the 48-hour review will be conducted.

e. Review of Pretrial Confinement by the Military Magistrate (the "neutral and detached officer" of R.C.M. 305(i)(2)). Within 7 days after a soldier enters pretrial confinement, a military magistrate who will approve continued confinement or order the release of the soldier will review the confinement. If a soldier is ordered released from pretrial

confinement, he may not be confined again before completion of trial except upon discovery of new evidence or misconduct which justifies confinement either alone or together with all other available information.

6. Sentence Credit for Pretrial Restraint. A commander should consider that, if convicted and sentenced, a soldier will receive day for day credit on the sentence for pretrial confinement and for restriction or arrest which is "tantamount" to confinement. Restriction or arrest is "tantamount" or equivalent to confinement when the limits and conditions of restriction, taken together, show circumstances amounting to physical restraint. When a soldier is restricted to a relatively small area (such as to a floor of a barracks), has sign-in requirements each hour, is escorted from place to place, and does not perform normal duties, the restriction is likely tantamount to confinement.

In addition to the day for day sentence credit, a soldier will receive additional credit for pretrial restraint, which violates R.C.M. 305 or Article 13, UCMJ. R.C.M. 305 is violated when pretrial confinement or restriction tantamount to confinement is served as a result of an abuse of discretion or in violation of the procedural requirements of R.C.M. 305. Procedural requirements include providing military counsel to a confinee upon request, a commander's properly applying the standard for restraint and documenting the decision in a memorandum. R.C.M. 305(j)(2) and (k). Further, imposing restriction tantamount to confinement may result in the soldier receiving day-for-day credit for the restriction tantamount to confinement, plus an additional day for day credit for failing to follow the procedural rules for confinement.

A soldier will also receive credit for pretrial restraint, which violates Article 13, UCMJ, which prohibits punishment prior to trial. When the conditions of pretrial restraint do not serve a legitimate, nonpunitive purpose, the restraint will be found to be punishment. Specifically prohibited is wear of a special uniform, punitive labor, duty hours, or training. R.C.M. 304(f). Other forms of improperly singling soldiers out, *e.g.*, mass apprehensions, may also violate Art. 13.

7. Conclusion. A soldier pending charges should ordinarily continue performing normal duties in the unit while awaiting trial. If specific circumstances require pretrial restraint, the commander has ample tools available to meet the circumstances. If a soldier is put in pretrial confinement or under restriction tantamount to confinement, he or she will receive day for day credit on their sentence. If restraint is imposed in violation of certain procedural rules, or as punishment, the soldier will receive additional credit toward the sentence.

**B. Nonjudicial Punishment Under Article 15, UCMJ** (see separate outline).

**C. Preferring Charges**

Any person subject to the Uniform Code of Military Justice may prefer charges; commonly, however, the unit commander prefers charges. A person subject to the Uniform Code of Military Justice "cannot be ordered to prefer charges to which he is unable truthfully to make the required oath on his own responsibility." Thus, a superior commander may not order a subordinate to prefer charges in a particular case. If a superior authority directs that charges be preferred, that superior authority becomes the accuser and, as explained later, is barred from

convening a court-martial to try the charges. When a superior authority has only an official interest in a case, he or she ordinarily will transmit the available information about the case to an officer of the command "for preliminary inquiry and report, including, if appropriate in the interest of justice and discipline, the preferring of any charges which appear to you to be sustained by the expected evidence."

#### **D. Summary Court-Martial**

1. Function. The summary court-martial is the lowest level trial court in the military legal system. A summary court-martial is designed for disposition of minor offenses under simple procedures. It is composed of one commissioned officer. The law specifies no particular grade for a summary court officer, and the powers are the same regardless of the individual's grade. Ordinarily, the summary court officer is a senior captain or a field grade officer.

A battalion commander normally convenes a summary court-martial. It may also be convened by anyone having the authority to convene a special or general court-martial. The summary court officer is detailed by personal direction of the convening authority.

A summary court-martial may try only enlisted soldiers for any non-capital offense punishable under the Uniform Code of Military Justice; that is, for any offense for which the punishment is something less than death. The summary court-martial, however, should be limited to relatively minor military offenses and often is used after an accused has been offered and refused nonjudicial punishment for the offense.

A summary court-martial may not try an accused over his or her objection. Prior to trial, an accused should indicate on the summary court form in writing an acceptance of disciplinary action under summary court-martial. If the accused objects to trial by summary court-martial, the summary court officer will note the objection and return the charge sheet to the convening authority for disposition. If the accused consents to trial by summary court-martial, the summary court officer will proceed with the trial.

The punishment powers of the summary court-martial are outlined in the chart on page 1-22. A summary court-martial may only confine enlisted soldiers who are serving in the grade of E-4 or below.

In a trial by summary court-martial, an accused is not entitled to be represented by military counsel but he does have the right to consult military counsel before the proceeding.. If the accused desires to be represented by a civilian attorney at no expense to the Government, the summary court officer should allow such counsel to be present.

2. Mechanics of Referral. Charges are referred to summary court-martial by the convening authority. This is accomplished by completing Section V (Referral; Service of Charges) on page 2 of the charge sheet (DD Form 458). Completion of Section V is particularly important if charges are returned to the summary court-martial convening authority by a superior command with instructions to handle the matter at the lowest level. Even if the case was referred to a higher court and subsequently withdrawn, the summary court-martial convening authority must actually refer the case to a summary court-martial by completing Section V.

3. Summary Court-Martial Procedure. Trial by summary court-martial is conducted according to the procedure outlined in R.C.M. 1301-1306 of the Manual for Courts-Martial. This has been incorporated into DA Pam 27-7, which also provides a script that should be used if an accused pleads guilty, to ensure that the accused understands the meaning and effect of the plea. The Military Rules of Evidence and the standard of proof of beyond a reasonable doubt do apply to summary courts-martial.

4. Review. At the conclusion of a trial by summary court-martial, the record of trial is forwarded to the convening authority for review. Following this initial review and action by the convening authority, the summary court-martial record is forwarded to the staff judge advocate at the supervisory general court-martial jurisdiction, usually division or installation level, for a further review.

#### **E. Special Court-Martial (Non-BCD)**

1. Functions. The special court-martial is the intermediate court in our system. A brigade commander normally convenes it. It has more sentencing power than the summary court-martial, but less than the general court-martial. Unlike the Article 15 and summary court-martial, an accused may not turn down a special or higher court-martial.

The punishment powers of the non-BCD special court-martial are outlined on page 1-22. A special court-martial may not confine an officer.

The membership of a non-BCD special court-martial may take any one of three different forms. It may consist of (1) at least three members; (2) at least three members and a military judge; or (3) solely of a military judge if the accused so requests. Special courts-martial are not currently tried without military judges. In some instances the military judge may deny an accused's request for trial by military judge alone, but special courts-martial are tried by military judge alone in the vast majority of cases when requested. If an enlisted accused requests that the court have enlisted membership, at least one-third of the court members must be enlisted soldiers.

The U.S. Army Trial Judiciary details the military judge of a special court-martial. AR 27-10, chapter 8, covers the detailing of military judges and their administrative and logistical support.

Trial and defense counsel are detailed for each special court-martial. The trial counsel need not be a lawyer (though in practice virtually always is); however, the accused has a right to representation by counsel who is a lawyer and certified by The Judge Advocate General. As a matter of practice, both counsel are lawyers. The administrative task of making counsel available is generally handled through the offices of the responsible staff judge advocate and senior defense counsel.

A special court-martial may try anyone subject to the Uniform Code of Military Justice for any non-capital offense made punishable by the Uniform Code of Military Justice; that is, for any offense for which the maximum punishment is less than death. Special rules apply to referral of capital offenses to a special court-martial. R.C.M. 201(f)

Charges are referred for trial by a special court-martial by completing the referral portion of Section V on page 2 of the charge sheet, as in the summary court-martial described above.

2. Procedure for the Special Court-Martial. Ordinarily, a military judge presides over the special court-martial. In the rare event a judge is unavailable, the senior officer member present presides as president.

#### **F. "BCD" Special Court-Martial**

1. Distinctive Features of a "BCD" Special Court-Martial. The "BCD" special court-martial is the same as the special court-martial outlined above except that this court-martial has the power to impose a bad-conduct discharge as punishment. There are certain requirements, which must be met before such punishment may be imposed.

For a special court-martial to have the authority to impose a BCD, a qualified defense counsel and a military judge must be detailed (unless a military judge could not be detailed because of physical conditions or military exigencies), and a verbatim record must be made. In practice, all Army special courts-martial will have a military judge detailed to them. The SJA will prepare a pretrial advice IAW R.C.M. 406(b). AR 27-10, para. 5-27b.

2. "BCD" Special as an Option. The BCD special court-martial option provides a forum for cases in which a convening authority deems a punitive discharge warranted but does not feel that the charges are serious enough to deserve more than one year in confinement. Where the discharge is warranted and the case is referred to a special rather than general court, the effort that would have been expended by the Article 32 investigation process described below is saved.

#### **G. General Court-Martial**

1. Function. The general court-martial is the highest-level trial court in the military legal system and must be convened by a general court-martial convening authority after receiving the formal pretrial advice of the staff judge advocate. This court-martial tries military personnel for the most serious types of crimes.

The punishment powers of the court are limited only by the maximum punishments for each offense found in Part IV of the Manual for Courts-Martial. A general court-martial is the only court that can sentence an officer to confinement or a punitive discharge.

The general court-martial may take either of two forms. It may consist of a military judge and not less than five members, or solely of a military judge, if the accused so requests. The accused may elect trial by judge alone in all cases except those, which are referred to trial as capital cases. In all cases a military judge must be detailed to the court. An enlisted soldier is also entitled to at least one-third enlisted membership upon request.

Trial and defense counsel are detailed for each general court-martial. Both the detailed trial counsel and defense counsel at a general court-martial must be lawyers certified by The Judge Advocate General.

2. Article 32 Investigation. No charge may be referred to a general court-martial until a thorough and impartial investigation has been made in accordance with Article 32, UCMJ or the accused waives the investigation. The officer appointed to conduct this investigation should be a field grade officer or an officer with legal training and experience. Many commanders appoint line officers in all cases except the most complex in order to educate young officers in the procedures of our military justice system. The purposes of the investigation are to inquire into the truth of the matters set forth in the charge sheet, to determine the correctness of the form of the charges, and to secure information upon which to determine the proper disposition of the case. The Article 32 investigating officer performs a judicial function and must obtain legal advice from a source not involved in prosecution or defense functions.

The investigation will be conducted with the accused present and represented by a defense counsel. After the investigation, a report of investigation will be made to the officer directing the investigation. The recommendations of the Article 32 investigating officer are advisory only. The Article 32 investigation is discussed more fully in Part II of this chapter.

## **H. Dismissing Charges**

Charges should be dismissed whenever the preliminary investigation reveals that the charges are trivial or unfounded. They should also be dismissed when no further action is deemed warranted; for example, if administrative separation is more appropriate, the charges should be dismissed. Dismissal of charges is within command discretion and if such dismissal is later deemed inappropriate, the charges may be restored.

## **I. Discharge In Lieu of Court-Martial (Chapter 10)**

1. General. Administrative separations are important tools for dealing with minor offenses. Most separations are accomplished before charges are ever preferred against a soldier. One separation, the Chapter 10, is especially designed to operate after charges are preferred, but before action by the convening authority.

2. Discharge in Lieu of Court-Martial. AR 635-200, chapter 10, provides that an individual who is charged with an offense or offenses punishable by a bad-conduct discharge or dishonorable discharge may submit a request for discharge in lieu of trial by court-martial. The general court-martial convening authority is the approval and disapproval authority for these requests. A single exception allows delegation of approval authority to the special court-martial convening authority in limited cases.

The request is initiated by the accused and is forwarded through channels, with intermediate commanders recommending approval or disapproval. If approval is recommended, the type of discharge also is recommended. A discharge under other than honorable conditions normally is issued, but either an honorable or general discharge is also authorized. Several items ordinarily accompany the form; the individual's unit commander is responsible for aiding the accused in obtaining this information. For example, the request should include a copy of the court-martial charge sheet (DD Form 458), a medical report, all reports of investigation, a statement as to the accused's mental responsibility (often a psychiatric evaluation), and the recommendations of subordinate commanders.

This administrative option must not be used indiscriminately. In the words of the regulation:

Commanders . . . must be selective in approving of requests for discharges in lieu of trial by courts-martial. The discharge authority should not be used when the nature, gravity and circumstances surrounding an offense require a punitive discharge and confinement. Nor should it be used when the facts do not establish a serious offense, even though the punishment, under the Uniform Code of Military Justice, may include a bad-conduct or dishonorable discharge. Consideration should be given to the soldier's potential for rehabilitation and his or her entire record should be reviewed before taking action. . . . Use of this discharge authority is encouraged when the commander determines that the offense is sufficiently serious to warrant separation from the Service and the member has no rehabilitation potential. (AR 635-200, para. 10-4)

## **J. Pretrial Agreements with the Accused**

1. Definition. Negotiated pleas are an integral part of the military justice system. A negotiated plea is an agreement between the accused and the convening authority to the effect that the accused will plead guilty in exchange for some favorable action by the convening authority--generally a promise to limit an approved sentence.

2. Advantages. A commander may question why to agree to anything if the chances are good that the Government will prevail. One obvious advantage is that a plea of guilty results in saving time and personnel involved in processing charges. Also, there are specific considerations in some trials, such as the fact that a distant witness will not have to appear at trial. Thus, economy results from such an agreement. The chance for reversible error in a guilty plea case is considerably less than it is in a contested case.

3. The Rights of the Accused. An accused's guilty pleas must be entirely voluntary. Because of the possibility of abuse, it is essential that the accused's rights are fully protected when entering into a pretrial agreement. The agreement is written so that the court and the reviewing authorities know exactly what was agreed upon. In addition, because the agreement involves the rights and prerogatives of both the accused and the convening authority, both individuals must personally sign the agreement.

4. Illegal Actions. An accused may not be forced to plead guilty to any specification. For example, it is illegal for a convening authority to prefer a number of multiplicitous charges and then drop some of them in exchange for a plea of guilty. Only the convening authority can enter into a pretrial agreement with the accused. Subordinate commanders must avoid "promises" or "deals" that could be construed to bind the convening authority in some sort of pretrial agreement.

5. Permissible Agreements. In exchange for a plea of guilty by the accused, the convening authority will often agree to (a) reduce the offense charged to a lesser included offense; (b) withdraw certain specifications; or (c) agree to approve only a particular sentence. If the convening authority agrees to approve a particular sentence, such as confinement for two

months, the accused gets the advantage of the agreed-upon sentence or the sentence of the court, whichever is less. Thus, if the court imposes a sentence of three months, the accused is confined for only two months because of the agreement. If, on the other hand, the court imposes a sentence of only one month, the accused is confined for one month because he gets the advantage of whichever sentence is less.

6. Criticism. Critics generally object to plea bargaining for two reasons: (1) it forces innocent people to plead guilty to offenses they did not commit; and (2) serious criminals get off with light sentences. In the military, a service member must admit under oath in open court every element of the offense before the military judge will accept his guilty plea. This process is called the providence inquiry. To prevent agreeing to a light sentence for a serious criminal, convening authorities should approve only those sentence limitations that are just and appropriate under the circumstances. Your legal advisor will assist you in making this determination.

## **PART II - COMMANDER'S DUTIES**

### **Introduction**

Upon receiving a charge sheet with its allied papers, a commander must examine the file and determine a proper course of action. If the commander decides to refer a case to trial, the commander must perform the duties described below.

#### **A. Ensure There Is a Case**

1. Ensure That Charges Allege Offenses. One of a commander's most irritating experiences is to send charges to trial only to have the military judge dismiss the case for failure to state an offense. The result is that the soldier who is a disciplinary problem will return to the unit. The responsibility for properly alleging an offense rests at the company level. Your trial counsel must check all specifications prior to preferral.

If all elements of the offense are not implied or specifically alleged in the specification, the specification is deficient and subject to dismissal by the military judge. Even if the military judge does not dismiss the specification, findings of guilty to specifications that do not allege an offense will be reversed on appeal. Failure to allege an offense is not remedied by a plea of guilty or proof of guilt beyond a reasonable doubt, nor is it waived by a failure to object. Careful examination of the specification before trial prevents this error and permits corrective action.

Part IV of the Manual for Courts-Martial contains a description of the various offenses under the Uniform Code of Military Justice. Each description also includes a discussion of the proof required for a conviction. The elements of the offense are those facts that the Government must prove beyond a reasonable doubt.

The practice of charging several separate offenses from what is basically a single transaction is called multiplicitous charging and is prohibited. For example, if a soldier enters a billet at night and steals three items from someone's locker, charge the soldier with one larceny of three items, not three separate larcenies. Multiplicity is a difficult area of the law and the trial counsel should review all charges prior to preferral to prevent multiplicitous charging.

Also avoid duplicity, that is, alleging more than one offense in a single specification. If a soldier assaults Jones at 1500 and at 1530 assaults Smith, he has committed two separate offenses and should be charged with two different specifications of assault. Again, if there is doubt as to what to charge, consult your trial counsel.

2. Ensure Thorough Investigation. Trial results are based upon evidence admitted at trial. Without enough evidence, there is no conviction. Too often a case will seem to fit together immediately based upon the circumstantial evidence of the moment or the commander's close proximity to the situation. It is natural to suspect that a soldier who has been a disciplinary problem is the one who committed a particular offense. It is even more inviting to assume that this soldier can be convicted of that offense. In fact, there must be admissible evidence to support each of the allegations in the specification.

At trial each element of an offense must be established by competent evidence beyond a reasonable doubt. Many proof problems concern witnesses. A witness who is not available or not credible is of little use. A convening authority should inquire of the S-I or legal specialist as to the nature and whereabouts of the witnesses. It is also important to ensure that key witnesses do not PCS or ETS prior to trial. Immediately notify the trial counsel of witnesses who may be unavailable for trial because of separation from the unit so they may legally preserve the evidence for example via deposition. The law requires the presence of material witnesses when requested by an accused, so potential defense witnesses should also be identified and their evidence preserved. If a material defense witness was properly requested but not produced at trial, the case is subject to abatement or dismissal.

Although an investigation must be thorough, it is not necessary for a commander to await the results of a CID laboratory analysis before forwarding the charge sheet. If a soldier has been found in possession of marijuana and the company commander desires to charge the soldier with a violation of Article 112a, UCMJ, the commander should process the charge sheet and send it forward even though the lab analysis is not completed. The notion that one must await the lab analysis is common in the Army and superior commanders should make their subordinates aware that there is no such requirement. Of course, the lab analysis frequently is required for proof of the offense at trial, but this is not a reason to delay processing the charge sheet.

Command emphasis is required for expeditious and accurate processing of charges. Military Police and CID Reports of Investigation, if available, should be forwarded with the charges. If these investigative reports are not completed when the company commander is ready to forward the charges, forward the charges with a statement saying that the reports will follow when they are available. Initial and interim reports, as well as the underlying witness statements, should accompany the charge sheet. Under no circumstances should a commander delay the forwarding of charges until completion of the final MP or CID Report.

## **B. Disposition of Charges**

1. Referral to Trial. Where trial by court-martial is warranted because of the accused's prior record, the seriousness of the offense, and the needs of justice and discipline, the convening authority may dispose of the charge by referring it for trial by court-martial. The referral of a case to trial is accomplished by an appropriate endorsement on page 2 of the charge sheet, authenticated by the signature of an adjutant under the command line of the convening authority.

The determination to refer a case to trial is not governed by any hard and fast rules. Each accused's case must be separately studied, and disposition made on an individual basis. The application of policies requiring that the cases of all persons committing certain offenses be referred for trial to a particular type of court is forbidden. The determination to refer a case to trial must be based on probable cause that an offense was committed and the accused did it. The convening authority must personally make the decision to refer a case to trial; delegation of this decision-making authority is not allowed.

2. Considerations Affecting the Decision. In deciding what options are appropriate for disposition of alleged misconduct, a commander must consider several factors. The Manual

for Courts-Martial mandates referral to the lowest court-martial, which can adjudge an appropriate punishment.

In determining which court is the lowest court-martial, which can adjudge an appropriate punishment, consult the Maximum Punishments Chart in Appendix 12 of the Manual for Courts-Martial. It lists the maximum punishments for each offense. A quick look at this table will indicate that a violation of Article 121, UCMJ, larceny, is more serious than a three-day AWOL. The amount of punishment is one factor that the convening authority should consider.

It is also necessary to understand the jurisdictional limitation of the court to which a case is referred. For example, a case that warrants referral to a court that can confine an officer should not be referred to a special court-martial, which cannot confine an officer. Court-martial jurisdictional punishment limitations are set out on page 1-22.

The commander must carefully analyze the nature of the offense and must treat the offense in a manner that ensures that the policies described above are implemented; a summary court-martial is not appropriate for a serious civilian-type offense, nor is a BCD special court-martial normally appropriate for a minor military-type offense. Balancing discipline and justice, there should be consistency in military justice matters.

A commander should analyze the offense to determine if an individual victim is involved, as in an assault, or if the crime has no individual victim, such as AWOL. Also, a commander should look to see what injury or threat, if any, was inflicted upon the victim. An assault that results from an argument in the NCO Club in which the victim initiated the argument is perhaps not as serious as an assault where the victim was minding his or her own business and was assaulted for no reason at all. Whether a commander administers equal and effective justice to the unit depends in large measure upon how well the commander comes to a reasoned decision based on proper analysis. A commander who sends a simple military disorder to a general court-martial because the accused is a chronic troublemaker but disposes of a serious aggravated assault by special court-martial creates an impression that military justice is not fairly administered.

In deciding upon an action or a recommendation, a commander should take into account the character and prior service of the accused. A number of the soldiers who commit offenses are very young and on their own for the first time. Many still have a good deal of maturing to do. Thus, in some cases, a 30-year-old who becomes involved in the black market on his third tour to Korea should be dealt with more severely than an 18-year-old who had never left home before being assigned to Korea. In other cases, an older soldier with a long record of good service may merit a less severe disposition.

In addition to the soldier's age, a commander should look into the accused's military and civilian history. If a commander pursues a policy of giving everyone the "max," that commander's military justice system will have no flexibility. Soldiers who have never been in trouble before may become a permanent problem to the command if they do not feel that they were dealt with fairly by the system. Thus, it generally is unwise to impose the "max" under Article 15, UCMJ, upon a soldier who has committed his first offense by failing to report to a formation. The offender's prior military and civilian record is, of course, only one of a number of factors that the commander must consider.

An offender's mental state is also a matter to consider. This may include mental disease, intoxication, or merely low intelligence. A commander, upon examining a file, may discover that a chronic AWOL offender has a GT score of 80 and, upon interviewing the individual, may find that the soldier just does not understand the responsibilities to the unit. If there is reason to believe that an individual is not mentally responsible, a sanity board should be convened under the provisions of R.C.M. 706 of the Manual for Courts-Martial.

A number of environmental factors may have influenced the actions of an accused. Before referring a case to trial, the convening authority should inquire into any problems the soldier has. Perhaps the accused stole a small amount of money because of family financial problems. While a "personal history" is often included with the allied papers, it is sometimes incomplete and inaccurate. The convening authority should carefully review the personal history and make an additional inquiry into the soldier's background if warranted.

The convening authority should consider any rehabilitation the soldier demonstrates. In the case of a chronic offender with no hope of rehabilitation, it may be appropriate to refer the case to a court-martial that can adjudge a punitive discharge. If the soldier has performed well since the commission of the offense and seems to have rehabilitation potential, a referral to special court-martial might be appropriate.

In addition to considering the nature of the offense and the background of the offender, a commander should consider a number of command factors in disposing of a case. The recommendations of subordinates should be given due weight. The subordinates are closest to the situation and most likely know the facts. Generally, commanders rely greatly upon recommendations of their subordinates. As with everything else in military justice, however, such reliance should be tempered by caution. In addition to being closer to the facts, subordinates are also plagued by having troublemakers in their units. A court-martial may just be an easy way to get rid of an unwanted soldier.

Consider the previous disposition of similar offenses within the same command. The administration of justice should be even-handed. If one soldier is given an Article 15 for an offense and another soldier is given a special court-martial for the same offense under the same circumstances, soldiers may perceive the justice system within a command as unfair.

A commander should determine whether or not an offense is a product of ineptness or unsuitability. If this is the case, perhaps an administrative separation is the proper course of action. Consider also whether the individual can continue to perform in the Army or whether separation is appropriate. If a separation is appropriate, the next inquiry is whether a punitive or administrative separation is warranted.

Another consideration is what impact, if any, the offense under consideration has had on unit morale. A commander may be confronted with an 18-year-old accused of low intelligence who has written several bad checks at the very time that the bad check rate of the command is higher than it has ever been. A commander should consider all of the factors involved and avoid the temptation to jump immediately to the discipline and morale of the unit as the primary reason for a decision to court-martial the accused.

3. Alternative Dispositions. Upon receipt of a charge sheet and allied papers, a battalion or brigade commander has three basic choices in disposing of the charges:

a. The commander may return the charges to the subordinate commander for whatever action the subordinate deems appropriate. This action would follow in a situation where the battalion or brigade commander did not feel the offense was as serious as did the subordinate commander. Remember that the higher commander cannot direct the lower commander to take a particular action, *e.g.*, give an Article 15.

b. The battalion or brigade commander may dispose of the charges at his own level. A commander who pursues this course should review the options outlined in this chapter and select the one most appropriate for disposition of the charges.

c. The commander may feel that his or her power is inadequate to handle the case. If so, the commander must forward the case to a superior authority whose judicial powers are greater. For example, if a special court-martial convening authority believes that a punitive discharge is warranted, he can convene a "BCD" special or forward to the general court-martial convening authority and recommend trial by general court-martial.

### **C. Article 32 Investigating Officer**

1. Before Referral to General Court-Martial. An Article 32 investigation, or defense waiver thereof, is required before any charge may be referred to a general court-martial. Any convening authority may appoint an Article 32 investigating officer, but in practice it is the special court-martial convening authority who normally performs this duty.

2. Functions and Duties. The investigating officer's functions are: (1) to make a thorough and impartial investigation into the truth of the matters; (2) to consider the correctness and the form of the charges; and (3) to recommend a proper disposition of the charges in the interest of justice and discipline.

The duties of an Article 32 investigating officer should take precedence over other military duties. Officers detailed to perform these duties must be familiar with the contents of DA Pam 27-17, Article 32, UCMJ, and R.C.M. 405, Manual for Courts-Martial. In preparing for and conducting the investigation, the investigating officer must bear in mind that he or she is performing a judicial function. The investigating officer must be impartial in appearance and in actuality.

3. Legal Advice. The Article 32 investigating officer should seek legal advice from an impartial judge advocate, who is assigned by the staff judge advocate to perform this function. This judge advocate officer should be consulted prior to the investigation and whenever advice is needed thereafter. The investigating officer must not rely upon the trial or defense counsel for legal advice. The investigating officer must make his own conclusions and recommendations.

The accused may be represented at the Article 32 investigation by (1) a detailed military lawyer, (2) a military lawyer of the accused's own selection if that counsel is reasonably available, or (3) a civilian lawyer provided by the accused at no expense to the Government.

Counsel may also be detailed to represent the Government at the Article 32 investigation. Such counsel represents a party to the investigation just as the defense counsel and should not be relied upon by the investigating officer for legal advice. Remember, the investigating officer should obtain legal advice from a judge advocate that does not represent either party.

4. Procedure. Generally, a legal specialist summarizes the testimony of the witnesses given at the investigation. In certain instances an accused may be entitled to the presence of live witnesses in lieu of sworn statements in the file. The investigating officer should have the services of a clerk to summarize the substance of what the witnesses say. A verbatim record is not required. In certain cases, however, the officer appointing the Article 32 investigating officer may desire to have the entire proceedings tape-recorded or reported verbatim by a court reporter. Where the proceedings are taped, great care should be taken to safeguard the tapes until after the accused's trial. In addition to hearing witnesses, the investigating officer will examine any documentary evidence in the case.

The Article 32 investigating officer considers the evidence from both sides and makes recommendations based upon that evidence. The conclusions and recommendations of the Article 32 investigating officer along with a report of investigation and attached exhibits are submitted on DD Form 457 to the officer who directed the investigation. This officer is free to accept or reject the recommendations; they are advisory only.

#### **D. Appointment of Court Members**

1. Basic Policies. Some commanders regard court-martial duty as an unnecessary burden. They may seek to avoid this important duty or select members whose absence will least disrupt unit operations. Such members are normally those least useful to the command. A commander can make no greater mistake than to disregard the primary policy for selection of members, that is, those with the best qualifications. Appoint as court members those who are best qualified by reason of age, education, training, experience, length of service, and judicial temperament. Note that rank is not a permissible qualification. The convening authority makes this selection personally. As a general rule, a convening authority will avoid the appearance of "packing" the court-martial if he or she selects court members with a wide variety of ranks, ages, and job positions.

Certain individuals may not serve as court members. For example, an accuser (one who prefers charges), an investigating officer, or one who has acted as counsel for either side in the case. In addition, AR 27-10, chap. 7 prohibits chaplains and inspectors general from serving as court members, and generally precludes the selection of officers in medical fields.

2. Other Considerations. Attempt to appoint officers from another unit who are unfamiliar with the accused and the offense. The accused is entitled to an impartial court. To avoid the appearance of evil, officers who deal closely with disciplinary matters within the command, such as military police, should not normally be selected as court members. For these same reasons it is unwise for a summary court-martial convening authority to appoint his or her executive officer as the summary court officer. Arrangements should be made to appoint an impartial officer from another battalion. Upon request, an enlisted accused is entitled to have at

least one-third of the membership of the court composed of enlisted soldiers, from a different company-sized unit.

The selection of court members by convening authorities is the focus of much criticism by civilians, and every effort should be made to avoid any charge of unlawful command influence in the selection of court members (see Chapter 3).

#### **E. Pretrial Requests of the Convening Authority**

1. Severance. A request for severance may arise where two or more accused are being tried together. In such a case, one accused may ask to be tried separately by requesting a severance.

An accused may seek a pretrial severance for several reasons. For example, the evidence against one co-accused may be more prejudicial. An accused may also want a separate trial in a case where the defense desires to use the testimony of the co-accused. In such a case the accused does not want the defense witnesses being judged by the same court hearing his or her case. If one accused is also charged with an unrelated offense, the co-accused may desire a separate trial.

The convening authority should carefully consider the reasons set forth by the accused for a severance and grant the request on a showing of good cause.

2. Change of Venue. A request for a change of venue is a request to move the location of the trial. Once a case is before a military judge, the judge decides such requests. Initially, however, the convening authority selects the trial site. The reasons an accused might make such a request include an allegation that the accused cannot get a fair trial at the present location of the trial due to local publicity. The burden rests with the accused to convince the convening authority that local prejudice exists, but a convening authority should seek the advice of a judge advocate before making a determination.

3. Amendment of the Specification. Occasionally a case will work its way through the entire pretrial process and still contain a defective specification. In this event the trial counsel may request to amend the specification to correct the defect. If trial counsel recommends dismissal or amendment of a specification due to insufficient evidence, the convening authority should normally accede to this request. If the specification will mislead the accused or fail to protect against a second trial for the same offense, the request to amend should be granted.

4. Immunity. Witnesses whose testimony may incriminate themselves have a right to refuse to testify; a grant of immunity, however, can overcome this right. Once immunity is properly granted, it is possible to order a witness to testify. Only the general court-martial convening authority has the power to grant immunity, although there are circumstances where the Department of Justice must approve such a grant.

5. Psychiatric Examination. In some cases it is desirable to have the accused examined by a psychiatrist to determine if he or she was mentally responsible at the time of the act or at time of trial. The law does not permit the conviction of one who was not mentally

responsible at the time of the act or at time of trial. If there is any question as to the mental status of the accused at the time of the commission of the offense or at the time of trial, the convening authority should arrange for a psychiatric examination of the accused.

Either counsel or some other appropriate party may bring the question of an accused's mental status to the attention of the convening authority, *e.g.*, the Article 32 investigating officer. The board is composed of physicians and conducts an inquiry into the mental condition of the accused. At least one member of the board should be a psychiatrist. Any request for such a board should be coordinated with the judge advocate serving the command.

## **F. Speedy Trial**

1. In General. After an offense occurs, effective law enforcement and discipline require that a timely inquiry be made into the incident by the company commander while the facts are fresh and any appropriate charges be brought and expeditiously resolved. Delay in investigation and disposition of offenses undercuts morale and discipline. Also, an accused soldier has a right to a speedy trial. If the government violates an accused's right to a speedy trial, the charges may be dismissed.

2. Speedy Trial Rules. There are several rules that define an accused's right to a speedy trial. Under R.C.M. 707 all accused soldiers must be brought to trial within 120 days after the earlier of imposition of restraint, preferral of charges, or entry on active duty under R.C.M. 204. Prior to referral of the charges, the convening authority may grant delays requested in advance by either the government or defense. Prior to granting a delay, the opposing party must be given an opportunity to respond. The convening authority should reduce to writing any decision to grant a delay, the supporting reasons, and the applicable dates. Any period of an approved delay may be excluded from the 120-day period.

Although R.C.M. 707 prescribes a 120-day rule, Article 10, UCMJ, has a more stringent rule if an accused is in pretrial confinement, arrest, or restriction tantamount to confinement. The government has no grace period. From the first day of confinement or arrest, it must exercise reasonable diligence in bringing the charges to trial.

3. Avoiding Speedy Trial Problems. As a general rule, the commander should seek to have cases resolved within 90 days of the day of an incident, and even more quickly if circumstances permit. Immediately upon learning of an incident, the company commander should begin the preliminary inquiry called for by R.C.M. 303. As appropriate, law enforcement assistance should be requested. Early coordination should be made with the unit's supporting judge advocate. If pretrial restraint is necessary, the commander should coordinate with the judge advocate prior to imposing pretrial confinement or as soon as practicable after imposing arrest or restriction. Any witnesses needed for trial must be identified and put on hold. Case files should be handcarried. Necessary charges should be forwarded without waiting for final MP or CID reports. Timely action from incident to final disposition will best serve law enforcement, discipline, and the right to a speedy trial.

## CHAPTER 1

### MISCONDUCT: OPTIONS AND DUTIES OF THE COMMANDER

#### TEACHING OUTLINE

#### I. INTRODUCTION.

#### II. TRENDS.

#### III. PROCESS AND OPTIONS.

A. Act of misconduct occurs.

B. Investigate.

1. Preliminary (informal) investigation. R.C.M. 303 (aka “Commander’s Inquiry”).

“Upon receipt of information that a member of the command is accused or suspected of committing an offense . . . triable by court-martial, the immediate commander shall make or cause to be made a preliminary inquiry into the charges or suspected offenses.”

2. AR-15-6 Investigation alternative.

3. Distinguish from Article 32, UCMJ; R.C.M. 405.

“[N]o charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made in substantial compliance with this rule.” R.C.M. 405(a).

- a) May be directed by any court-martial convening authority, but usually directed by Special Court-Martial Convening Authority.

- b) Accused and defense counsel entitled to be present. Trial counsel may attend.
- c) Commander's call:
  - (1) Investigating Officer (company or field grade, JAG or line).
  - (2) Delays
  - (3) Witness Requests
  - (4) Open or closed?

4. **BOTTOM LINE.** Get the facts expeditiously . Company commander can do some investigations; okay to do 15-6 investigation if not sure a criminal offense has been committed.

C. Consider command alternatives. **Who** decides **what**, and **when**, and **why**?  
*See* R.C.M. 306(b) factors.

- 1. No action/dismissal.
- 2. Nonpunitive/adverse administrative action.
  - a) Flag.
  - b) Letter of reprimand (local/OMPF).
  - c) Bar to Reenlistment (impose/appeal/lift).
  - d) Relief for cause.
  - e) Administrative separation (which chapter, type of discharge, notification or board).

3. Nonjudicial punishment (summarized, company-grade, field-grade, suspend punishment, filing determination, appellate action).
4. Judicial action. Summary, Special, BCD Special, General Court-Martial
5. RCM 306(b) Factors:
  - a) character and service of accused
  - b) nature of offense,
  - c) effect on unit good order and discipline,
  - d) appropriateness of punishment allowed,
  - e) motive of accuser/victim,
  - f) reluctance of victim to testify
  - g) cooperation of accused
  - h) treatment of similar offenses
  - i) admissibility of evidence
  - j) other issues

D. Pretrial Restraint. R.C.M. 304.

1. Types of pretrial restraint. R.C.M. 304(a).
  - a) Conditions on liberty (versus corrective training).

- b) Restriction (versus pulling pass privileges).
  - c) Arrest.
  - d) Pretrial confinement.
  - e) **BOTTOM LINE.** Restriction starts 120-day speedy trial clock. Pretrial confinement, arrest or restriction tantamount to confinement start a more stringent clock.
2. Only grounds for pretrial confinement: accused likely to flee or to commit additional serious criminal misconduct.
  3. Who may order pretrial restraint? R.C.M. 304(b).
    - a) Of officers - commander to whose authority they are subject. May not be delegated.
    - b) Of enlisted soldiers - any commissioned officer. May be delegated to NCO.
    - c) Magistrate and Judicial Review.
  4. Credit for Pretrial Restraint.
    - a) Accused in pretrial confinement receives day for day credit against sentence to confinement.
    - b) Accused also receives day-for-day credit against sentence to confinement for restriction “tantamount to confinement,” *e.g.*, sign in every hour, escort to leave room, etc.

E. Speedy Trial Discussion.

1. ”120-Day Rule.” R.C.M. 707.

a) The accused shall be brought to trial within 120 days after the earlier of:

(1) preferral of charges, or

(2) the imposition of restriction, arrest or pretrial confinement.

(Note: Conditions on liberty do not start 120-day clock)

(3) Entry on active duty under R.C.M. 204 (Reservists).

b) Defense delays are excludable.

c) Request and approval of delays must be in writing and approved by convening authority (pre-referral) or the military judge (post-referral).

d) Remedy - dismissal of charges.

2. Pretrial confinement, arrest, or restriction tantamount to confinement require government to bring charges to trial in a reasonably diligent manner. Can have a speedy trial violation in less than 120 days. Remedy is dismissal.

3. Fewer rules for administrative action. Standards are due process, fundamental fairness, and reasonableness.

F. Trial Options:

1. Request for Discharge in Lieu of Court-Martial. Chapter 10, AR 635-200.

a) Requirements.

(1) Offense must carry a punitive discharge as a possible punishment or,

(2) Combination of charges would permit a BCD under R.C.M. 1003(d) and case is referred to a court authorized to adjudge a punitive discharge.

b) Only a GCM convening authority may approve or disapprove.

c) Type of discharge - usually Under Other than Honorable Conditions.

d) When to recommend/accept?: Some examples: Unlikely court will give much of a sentence; saves child victims from testifying; precludes massive outlay of resources; unit preparing to deploy, if no negative effect on command disciplinary climate.

2. Pretrial Agreements. R.C.M. 705.

a) Made between accused and convening authority.

b) When to accept? Some examples: good sentence; saves resources; speeds process, reluctant witnesses.

c) Increasing flexibility regarding possible terms of agreement: e.g. reduction, confinement or forfeitures, rehabilitation, restitution, deferral, unlawful command influence.

d) Counter-offers permitted.

G. Court and Board Member Selection. R.C.M. 502, 503.

1. Court Members.

- a) Convening authority shall detail as members those who are “best qualified . . . by reason of age, education, training, experience, length of service, and judicial temperament.” Art. 25(d), UCMJ.
  - b) Rank is an impermissible consideration.
  - c) Considering race and gender are permissible if motivation is legal (proper).
- 2. Administrative Board Members.  
  
Different rules: minority member, MOS member, reserve member.
- 3. Other officer selections:
  - a) Summary Court Officer.
  - b) Article 32b Investigating Officer.
  - c) AR 15-6 Investigating Officer.
- 4. Other Military Justice Personnel:
  - a) Trial Counsel - detailed by SJA.
  - b) Defense Counsel - detailed by Senior Defense Counsel.
  - c) Military Judge - detailed by Trial Judiciary.
- H. Post-Trial/Board Action on Findings and Sentence. R.C.M. 1107.
  - 1. Appellate authority for many adverse administrative actions.
  - 2. Administrative Board discretionary powers.

3. Article 15 appellate authority.
4. Article 32b discretionary review and recommendation.
5. Post-trial authority: (consult JA first).
  - a) Convening authority must take action on the sentence; action on the findings is discretionary. Personal to convening authority.
  - b) Clemency:

Findings - convening authority may set aside finding of guilty or change to lesser-included offense.

Sentence - convening authority may disapprove sentence in whole or part. Cannot increase sentence.

Submissions by defense: must review.

Do not consider adverse matters outside record unless defense is notified.
  - c) Post-trial confinement begins on date it is adjudged. Convening authority or, if authority is delegated, trial counsel orders soldier into post-trial confinement.
  - d) Forfeitures. Automatic maximum forfeitures if more than six months confinement or any confinement and discharges.
    - (1) Start 14 days after sentence or CA's action.
    - (2) CA may waive forfeitures for additional six months for accused with dependents and order money be paid directly to them.
  - e) Excess leave.
  - f) Post-trial sessions—fix trial mistakes prior to initial action.



#### **IV. FINAL THOUGHTS.**

- A. Commander owned and operated system.
- B. Dual goals: Justice and Discipline.
- C. Quasi-judicial role.
- D. Each case individually considered in the context of a consistent disciplinary philosophy.

## COURTS-MARTIAL IN THE ARMY

	Summary	Regular Special (SPCM)	Bad-Conduct Discharge (BCD) SPCM	General
Convening Authority	Battalion Cdr	Brigade Cdr	Bde Cdr (SPMCA) or Division/Corps/Major (GCM CA)	Div/Corps/Installation Cdr***
Composition alone*, of	One Commissioned Officer	Military Judge alone* , or MJ and minimum of 3 court members	Military Judge alone* or MJ and minimum of 3 court members	Military Judge or MJ and minimum 5 court members
Counsel	None detailed. Accused may consult with military lawyer prior to trial. May hire civilian lawyer.	Trial Counsel (lawyer)** Defense Counsel (lawyer). Accused may request individual military legal counsel or hire civilian lawyer.	Same as SPCM	Same as SPCM (trial counsel must be a lawyer)
Accused's Options	May refuse SCM.	May request enlisted personnel on court (minimum of 1/3 must be enlisted); may request trial by MJ alone.	Same as SPCM	Same as SPCM
Jurisdiction	Only enlisted personnel Noncapital offenses	All personnel Noncapital offenses	All personnel Noncapital offenses	All personnel All offenses
"Reporter"	Legal Specialist	Legal Specialist	Court Reporter	Court Reporter
Record of Trial	Abbreviated	Summarized	Verbatim	Verbatim

\*There are provisions for convening a regular special court-martial without a military judge. A military judge must be detailed to a BCD SPCM unless prohibited by physical conditions or military exigencies. In practice, military judges are detailed to all special courts-martial. SJA must give pretrial advice for BCD Special.

\*\*The trial counsel in a special court-martial need not be a lawyer. In practice a lawyer always represents the government.

\*\*\*A formal investigation under Art. 32, UCMJ and a written pretrial advice by the SJA are prerequisites for referral to a GCM.

## MAXIMUM PUNISHMENT CHART

Type	Confinement	Forfeitures	Reduction <sup>1</sup>	Punitive Discharge
Summary	1 Month <sup>2</sup>	2/3 pay per month for 1 month	E5 and above - one grade E4 and below - lowest Enlisted grade	None
Special	1 year <sup>3</sup>	2/3 pay per month for 1 year	Lowest Enlisted Grade	None
BCD Special	1 year	2/3 pay per month for 1 year	Lowest Enlisted Grade	BCD <sup>4</sup> (enlisted)
General <sup>5</sup>	See Part IV, MCM, 1984 and Maximum Punishment Chart, Appendix 12, MCM	Total forfeitures of pay and allowances	Lowest Enlisted Grade	BCD (enlisted DD enlisted, warrant officer) Dismissal (officer)

<sup>1</sup>**Only enlisted soldiers may be reduced by courts-martial.**

<sup>2</sup>**A Summary Court-Martial may impose confinement and hard labor without confinement only on soldiers in the grade of E-4 and below.**

<sup>3</sup>**A Special Court-Martial may impose confinement only on enlisted soldiers.**

<sup>4</sup>In order to impose a BCD, A Special Court-Martial must:

- (1) Be convened by a General Court-Martial Convening Authority.
- (2) Have a military judge detailed (Unless a military judge cannot be detailed because of physical conditions or military exigencies).
- (3) Have a defense counsel within the meaning of Article 27(b), U.C.M.J., detailed.
- (4) Have a verbatim record of trial prepared.
- (5) SJA must provide pretrial advice

<sup>5</sup>A General Court-Martial may impose the death penalty when authorized by Part IV, MCM, 1984, and the conditions in R.C.M. 1004 are met.