CHAPTER 4

CONSTITUTIONAL CONSIDERATIONS

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

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

ARTICLE 31, UCMJ, AND THE FIFTH AMENDMENT

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

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

PREINTERROGATION WARNINGS

Before an individual can be questioned on an alleged crime that the individual is suspected of committing, that person's rights as afforded by the *U.S. Constitution* must be explained. This explanation of the individual's rights is called a preinterrogation warning. To help you understand this warning, you will examine what is required by the Fifth Amendment, how Article 31 of the UCMJ incorporates the Fifth Amendment, and what procedures must be followed to properly administer a warning under Article 31, UCMJ.

Fifth Amendment Rights

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

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

Article 31, UCMJ

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Procedures for Administering a Warning Under Article 31, UCMJ

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

Who Must Be Warned?

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

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

Who Must Give the Warning?

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

When Are Warnings Required?

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

Fair Notice as to the Nature of the Offense

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

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

Cleansing Warnings

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

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

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

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

> "You are advised that the statement you made on _____ cannot and will not be used against you in a subsequent trial by court-martial."

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

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

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

Acts as Statements

Up to this point, you may have assumed that Article 31 concerns only statements of a suspect or an accused. This is correct, but the term *statement* means more than just the written or spoken word.

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

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

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

Body Fluids

The Court of Military Appeals has ruled that the taking of blood and urine specimens is not protected by Article 31 and, hence, Article 3 l(b) warnings are not required before taking such specimens. The Military Rules of Evidence (Mil.R.Evid.) treat the taking of all body fluids as nontestimonial and neutral acts and thus not protected by Article 31. Although the extraction of body fluids no longer falls within the purview of Article 31, the laws on search and seizure and inspection remain applicable, and compliance with Mil.R.Evid. 312 is a prerequisite for the admissibility in court of involuntarily obtained body fluid samples. Furthermore, even though urinalysis results are not subject to the requirements of Article 31(b), they sometimes may not be admissible in courts-martial because of administrative policy restraints imposed by departmental or service regulations.

Other Nontestimonial Acts

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

Applicability to NJP Hearings

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

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

Article 15 hearings are usually custodial situations. As discussed later, when a suspect is in custody, the law requires that certain counsel warnings be given to make sure of the admissibility of statements at a later court-martial. Therefore, since counsel rights will not usually be given at an NJP hearing, statements made by the accused during NJP might not be admissible against him or her at a later court-martial.

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

THE RIGHT TO COUNSEL

Besides a suspect's or accused's Article31 (b) rights, a service member who is in custody must be advised of additional rights. These rights, sometimes called *Miranda/Tempia* warnings, are codified and somewhat extended by Mil.R.Evid. 305. Counsel warnings should be stated as follows:

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

2. You have the right to have such retained civilian lawyer or appointed military lawyer or both present during this or any other interview."

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

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

Custodial Interrogations

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

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

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

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

Scope of the Right to Counsel

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

Spontaneous Confessions

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

RIGHT TO TERMINATE THE INTERROGATION

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

FACTORS AFFECTING VOLUNTARINESS

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

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

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

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

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

CONSEQUENCES OF VIOLATING THE RIGHTS AGAINST SELF-INCRIMINATION

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

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

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

The opposite of this situation also represents the same principle. As the result of an illegal search, marijuana is found in Seaman Stupid's locker. Seaman Stupid confesses because he was told that they had the goods on him and was confronted with the marijuana that was found in his locker. This confession is not admissible because it was obtained by exploiting the unlawfully obtained evidence.

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

HOW TO GIVE THE WARNINGS

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

Warning the Witness

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

Warning the Suspect

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

1. You are suspected of committing the following offenses(s): (Here describe the offense[s])

2. You have the right to remain silent.

3. Any statement you do make may be used as evidence against you in trial by court-martial.

4. You have the right to obtain and consult with a lawyer, either a civilian lawyer retained by you at your own expense, or, if you wish, a military lawyer who will be appointed to act as your counsel without cost.

5. You have the right to have a retained civilian lawyer or an appointed military lawyer present with you during this interview.

6. You have the right to terminate this interview at any time and for any reason.

7. Do you understand?

8. Do you waive your right to counsel? (If the accused has such a right.)

9. Do you consent to make a statement?

Ascertaining that the accused or suspect fully understands his or her rights is particularly important, for in the absence of understanding there can be no intelligent choice to exercise or waive the rights. A court may later look not only to the words used in giving the warning, but also to the suspect's age, intelligence, and experience in this regard.

Documenting the Warning

Your command will likely have preprinted local forms that detail these rights. Typically the accused will be advised according to the form and will sign on the form to indicate that he or she has been advised of his or her rights. The form is then retained in case it becomes necessary to prove in court that the warnings were properly given. If your command does not have a preprinted form, a sample appears in appendix A-1-m of the *JAG Manual.*

When only the Article 31 warning is required (that is, when the accused is going to NJP and has no right to counsel), the warning will eliminate references to the right to counsel and is given in the manner prescribed by the article itself. Article 31(b) imposes the three following requirements:

1. That the accused or suspect be informed of the nature of the accusations against him or her

2. That the accused be told that he or she has the right to remain silent

3. That the accused be advised that any statement made by him or her maybe used as evidence against him or her at a trial by court-martial

It is essential not only that the accused understands the advice given, but also that the person giving the advice makes certain (1) the accused understands this advice and (2) the accused affirmatively waives his or her rights before any statement is obtained. Accordingly, a proper Article 31 warning could be phrased as follows:

Example: (The accused is suspected of stealing two wallets that contained a total of $30.) "Seaman Thief, I advise you that I suspect you of stealing two wallets from the lockers of Seaman One and Seaman Two last night. I advise you that you have the right to remain silent and if you do say anything, what you say may be used against you as evidence in a trial by court-martial. Do you understand? Do you waive your rights and desire to make a statement?"

It is <u>not</u> sufficient merely to read Article 31 to the suspect or the accused. Neither is it in compliance with Article 31 to tell the suspect or accused that he or she need not incriminate himself or herself.

SEARCH AND SEIZURE

What is a search? What are the rights of an individual being searched? What procedures must be followed in requesting and conducting a search? What are the different types of searches? You may not be involved in conducting a search, but you should be familiar with the procedures for preparing the paper work associated with searches and the rights of individuals being searched. The following discussions are intended to help you answer the previous questions and become familiar with the standards that must be followed to make sure a search has been conducted properly. In addition to these discussions, you should familiarize yourself with the applicable command instructions and JAG directives on search and seizure procedures.

Each military member has a constitutionally protected right of privacy. However, a service member's expectation of privacy must occasionally be infringed upon because of military necessity. Military law recognizes that the individual's right of privacy is balanced against the command's legitimate interests in maintaining health, welfare, discipline, and readiness, as well as by the need to obtain evidence of criminal offenses.

Searchcs and seizures conducted according to the requirements of the *United States Constitution* will generally yield admissible evidence. On the other hand, evidence obtained in violation of constitutional mandates will not be admissible in any later criminal

prosecution. With this in mind, the most productive approach for you is to develop a thorough knowledge of what actions are legally permissible (producing admissible evidence for trial by court-martial) and what actions are not. This understanding will enable the command to determine, before acting in a situation, whether prosecution will be possible. The legality of the search or seizure depends on what was done by the command at the time of the search or seizure. No amount of legal brilliance by a TC at trial can undo an unlawful search and seizure.

SOURCES OF THE LAW OF SEARCH AND SEIZURE

United States Constitution— Although enacted in the 18th century, the language of the Fourth Amendment has never changed. The Fourth Amendment was not an important part of American jurisprudence until this century when courts created an exclusionary rule based on its language:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

An important concept contained in the Fourth Amendment is that of probable cause. This concept is not particularly complicated, nor is it as confusing as often assumed.

In deciding whether probable cause exists, you must first remember that conclusions of others do not comprise an acceptable basis for probable cause. The person who is called upon to determine probable cause must, in all cases, make an independent assessment of facts presented before a constitutionally valid finding of probable cause can be made. The concept of probable cause arises in many different factual situations. Numerous individuals in a command may be called upon to establish its presence during an investigation. Although the reading of the *U.S. Constitution* would indicate that only searches performed pursuant to a warrant are permissible, there have been certain exceptions carved out of that requirement, and these exceptions have been classified as searches otherwise reasonable. Probable cause plays an important role in some of these searches that will be dealt with individually in this chapter.

Although the Fourth Amendment mandates that only information obtained under oath may be used as a basis for probable cause, military courts traditionally ignored this requirement. Still, it is strongly recommended that the information be given under oath. The oath is one factor that can add to the believability of the person given the oath, the importance of which will be discussed as follows.

The Fourth Amendment also provides that no search or seizure will be reasonable if the intrusion is into an are a not particularly described. This requirement requires a particular description of the place to be searched and items to be seized. Thus, the intrusion by government officials must be as limited as possible in areas where a person has a legitimate expectation of privacy,

The exclusionary rule of the Fourth Amendment is a judicially created rule based upon the language of the Fourth Amendment. The United States Supreme Court considered this rule necessary to prevent unreasonable searches and seizures by government officials. In more recent decisions, the Supreme Court has reexamined the scope of this suppression remedy and concluded that the rule should only be applied where the Fourth Amendment violation is substantial and deliberate. So, where government agents are acting in an objectively reasonable manner (in good faith), the evidence seized should be admitted despite technical violations of the Fourth Amendment.

Manual for Courts-Martial— Unlike the area of confessions and admissions covered in Article 31, UCMJ, there is no basis in the UCMJ for the military law of search and seizure. By a 1980 amendment to the MCM, the Military Rules of Evidence were enacted. The Military Rules of Evidence provide extensive guidance in the area of search and seizure in rules 300-317. Anyone charged with the responsibility y for authorizing and conducting lawful searches should be familiar with those rules.

THE LANGUAGE OF THE LAW OF SEARCH AND SEIZURE

Certain words and terms must be defined to properly understand their use in this chapter. These definitions are set forth as follows:

Search—A search is a quest for incriminating evidence. It is an examination of a person or an area

with a view to the discovery of contraband or other evidence to be used in a criminal prosecution. Three factors must exist before the law of search and seizure will apply. Does the command activity constitute:

- a quest for evidence;
- a search conducted by a government agent; or
- a search conducted in an area where a reasonable expectation of privacy exists.

If, for example, it were shown that the evidence in question has been abandoned by its owner, the quest for such evidence by a government agent that led to the seizure of the evidence would present no problem, since there was no reasonable expectation of privacy of such property.

Seizure—A seizure is taking possession of a person or some item of evidence in conjunction with the investigation of criminal activity. The act of seizure is separate and distinct from the search; the two terms varying significantly in legal effect. On some occasions a search of an area may be lawful, but not a seizure of certain items thought to be evidence. Examples of this distinction will be seen later in this chapter, Mil.R.Evid. 316 deals specifically with seizures and creates some basic rules for application of the concept. Additionally, a proper person, such as anyone with the rank of E-4 or above, or any criminal investigator, such as an NCIS special agent, generally must be used to make the seizure, except in cases of abandoned property.

Probable cause to search—Probable cause to search is a reasonable belief, based upon believable information having a factual basis, that a crime has been committed and the person, property, or evidence sought is located in the place or on the person to be searched.

Probable cause information generally comes from any of the following sources:

- Written statements
- Oral statements communicated in person, via telephone, or by other appropriate means of communication
- Information known by the authorizing officer (the CO)

Probable cause to apprehend—Probable cause to apprehend an individual is similar in that a person must conclude, based upon facts, that a crime was committed and the person to be apprehended is the person who committed the crime.

A detailed discussion of the requirement for a finding of probable cause to search appears later in this chapter. Further discussion of the concept of probable cause to apprehend also appears later in this chapter in connection with searches incident to apprehension.

OBJECTS OF A SEARCH OR SEIZURE

In carrying out a lawful search or seizure, agents of the government are bound to look for and seize only items that provide some link to criminal activity. Mil.R.Evid. 316 provides, for example, that the following categories of evidence may be seized:

- Unlawful weapons made unlawful by some law or regulation
- Contraband or items that may not legally be possessed
- Evidence of a crime that may include such things as instrumentalities of crime, items used to commit crimes, fruits of crime, such as stolen property, and other items that aid in the successful prosecution of a crime
- Persons, when probable cause exists for apprehension
- Abandoned property that may be seized or searched for any or no reason, by any person
- Government property

With regard to government property, the following rules apply:

- Generally, government agents may search for and seize such property for any or no reason, and there is a presumption that no privacy expectation attaches.
- Footlockers or wall lockers are presumed to carry with them an expectation of privacy; thus they can be searched only when the Military Rules of Evidence permit.

CATEGORIZATION OF SEARCHES

In discussing the law of search and seizure, we can divide all search and seizure activity into two broad areas-those that require prior authorization and those that do not. Within the latter category of searches, there are two types-searches requiring probable cause and searches not requiring probable cause. The constitutional mandate of reasonableness is most easily met by those searches predicated on prior authorization, and thus authorized searches are preferred. The courts have recognized, however, that some situations require

immediate action, and here the reasonable alternative is a search without prior authorization. Although this second category is more closely scrutinized by the courts, several valid approaches can produce admissible evidence.

Probable Cause Searches Based Upon Prior Authorization

Military search authorization—This type of prior authorization search is akin to that described in the text of the Fourth Amendment, but is the express product of Mil.R.Evid. 315. Although the prior military law contemplated that only officers in command could authorize a search, Mil.R.Evid. 315 clearly intends that the power to authorize a search follows the billet occupied by the person involved rather than being founded in rank or officer status. Thus, in those situations where senior noncommissioned or petty officers occupy positions as officers in charge (OICs) or positions similar to command, they are generally competent to authorize searches absent contrary direction from the Secretary of the Navy.

In the typical case, the commander or other competent military authority, such as an OIC, decides whether probable cause exists when issuing a search authorization. Although there is no per se exclusion of COs, courts will decide, on a case-by-case basis, whether a particular commander was in fact neutral and detached. Mil.R.Evid. 315(d) provides that:

> An otherwise impartial authorizing official does not lose that character merely because he or she is present at the scene of a search or is otherwise readily available to persons who may seek the issuance of a search authorization; nor does such an official lose impartial character merely because the official previously and impartially authorized investigative activities when such previous authorization is similar in intent or function to a pretrial authorization made by the United States district courts.

JURISDICTION TO AUTHORIZE SEARCHES.— Before any competent military authority can lawfully order a search and seizure, he or she must have the authority necessary over both the person and/or place to be searched, and the persons or property to be seized. This authority, or jurisdiction, is most often a dual concept—jurisdiction over the place and over the person. Any search or seizure authorized by one not having jurisdiction is a nullity, and even though otherwise valid, the fruits of any seizure would not be admissible in a trial by court-martial if objected to by the defense.

Jurisdiction Over the Person.— It is critical to any analysis of the authority of the CO over persons to determine whether the person is a civilian or military witness.

Civilians— The search of civilians is now permitted under Mil.R.Evid. 315(c) when they are present aboard military installations. This gives the military commander an additional alternative in such situations where the only possibility before the Mil.R.Evid. was to detain that person for a reasonable time while a warrant was sought from the appropriate federal or state magistrate. Furthermore, a civilian desiring to enter or exit a military installation maybe subject to a reasonable inspection as a condition precedent to entry or exit. Such inspections have recently been upheld as a valid exercise by the commander of the administrative need for security of military bases. Inspections will be discussed later in this chapter.

Military— MiL.R.Evid. 315 indicates two categories of military persons who are subject to search by the authorization of competent military authority— members of that CO's unit and others who are subject to military law when in places under that CO's jurisdiction; for example, aboard a ship or in a command area. There is military case authority for the proposition that the commander's power to authorize searches of members of his or her command goes beyond the requirement of presence within the area of the command, In one case, the court held that a search authorized by the accused's CO, although actually conducted outside the squadron area, was nevertheless lawful. Although this search occurred within the confines of the Air Force base, a careful consideration of the language of Mil.R.Evid. 315(d)(1) indicates that a person subject to military law could be searched even while outside the military installation. This would hold true only for the search of the person, since personal property, located off base is not under the jurisdiction of the CO if situated in the United States, its territories, or possessions.

Jurisdiction Over the Property.— Several topics must be considered when determining whether a CO can authorize the search of property. It is necessary to decide first if the property is government-owned and, if so, whether it is intended for governmental or private use. If the property is owned, operated, or subject to the control of a military person, its location determines whether a commander may authorize a search or seizure.

If the private property is owned or controlled by a civilian, the commander's authority does not extend beyond the limits of the pertinent command area.

Property that is government-owned and not intended for private use may be searched at any time, with or without probable cause, for any reason, or for no reason at all. Examples of this type of property include government vehicles, aircraft, ships, and so on.

Property that is government-owned and that has a private use by military persons (for example, expectation of privacy) maybe searched by the order of the CO having control over the area, but probable cause is required. An example of this type of property is a BOQ/BEQ room.

Mil.R.Evid. 314 attempts to remove the confusion about which kinds of government property involve expectations of privacy. The intent of the rule in this area is to affirm that there is a presumed right to privacy in wall lockers, footlockers, and in items issued for private use. With other government equipment, there is a presumption that no personal right to privacy exists.

Property that is privately owned and controlled or possessed by a military member within a military command area (including ships, aircraft, and vehicles) within the United States, its territories, or possessions, may be ordered searched by the appropriate military authority with jurisdiction, if the probable cause requirement is fulfilled. Examples of this type of property include automobiles, motorcycles, and luggage.

Private property that is controlled or possessed by a civilian (any person not subject to the UCMJ,) may be ordered searched by the appropriate military authority only if such property is within the command area (including vehicles, vessels, or aircraft). If the property ordered searched is, for example, a civilian banking institution located on base, attention must be given to any additional laws or regulations that govern those places.

Searches outside the United States, its territories or possessions, constitute special situations. Here the military authority or his or her designee may authorize searches of persons subject to the UCMJ, their personal property, vehicles, and residences, on or off a military installation. Any relevant treaty or agreement with the host country should be complied with. The probable cause requirement still exists. Except where specifically authorized by international agreement, foreign agents do not have the right to search areas considered extensions of the sovereignty of the United States.

DELEGATION OF THE POWER TO AUTHORIZE SEARCHES.— Traditionally, commanders have delegated their power to authorize searches to their chief of staff, command duty officer (CDO), or even the officer of the day (OOD). This practice was held to be illegal, as the Court of Military Appeals has held that a CO may not delegate the power to authorize searches and seizures to anyone except a military judge or military magistrate. The court decided that most searches authorized by delegees such as CDOs would result in unreasonable searches or seizures in violation of the Fourth Amendment. If full command responsibility devolves upon a subordinate, that person may authorize searches and seizures since the subordinate in such cases is acting as the CO. General command responsibility does not automatically devolve to the CDO, OOD, or even the executive officer (XO) simply because the CO is absent. Only if full command responsibilities devolve to a subordinate member of the command may that person lawfully authorize a search. If, for example, the CDO or OOD must contact a superior officer or the CO before acting on any matter affecting the command, full command responsibilities will not have devolved to that person and, therefore, he or she could not lawfully authority a search or seizure. Guidance on this matter has been issued by the Commander in Chief Atlantic Fleet (CINCLANTFLT), Commander in Chief Pacific Fleet (CINCPACFLT), and Commander in Chief U.S. Naval Forces, Europe (CINCUSNAVEUR). Until the courts provide further guidance on this issue, you should follow the guidance set forth by your respective CINCs.

THE REQUIREMENT OF NEUTRALITY AND DETACHMENT.— A commander must be neutral and detached when acting on a request for search authorization. The courts have issued certain rules that, if violated, will void any search authorized by a CO on the basis of lack of neutrality and detachment. These rules are designed to prevent an individual who has entered the evidence gathering process from thereafter acting to authorize a search. The intent of both the courts' decisions and the rules of evidence is to maintain impartiality in each case. When a commander has become involved in any capacity concerning an individual case, the commander should carefully consider whether his or her perspective can truly be objective when reviewing later requests for search authorization.

If a commander is faced with a situation in which action on a search authorization request is impossible because of a lack of neutrality or detachment, a superior commander in the chain of command or another commander who has jurisdiction over the person or place should be asked to authorize the search.

THE REQUIREMENT OF PROBABLE CAUSE.— As discussed earlier, the probable cause determination is based upon a reasonable belief that a crime was committed and certain persons, property, or evidence related to that crime will be found in the place or on the persons to be searched.

Before a person may conclude that probable cause to search exists, he or she should have a reasonable belief that the information giving rise to the intent to search is believable and has a factual basis.

The portion of Mil.R.Evid. 315 dealing with probable cause recognizes the proper use of hearsay information in the determination of probable cause and allows such determinations to be based either wholly or in part on such information.

Probable cause must be based on information provided to or already known by the authorizing official. Such information can come to the commander through written documents, oral statements, messages relayed through normal communications procedures such as the telephone or by radio, or may be based on information already known by the authorizing official.

In all cases, both the factual basis and believability basis should he satisfied. The factual basis requirement is met when an individual reasonably concludes that the information, if reliable, adequately apprises him or her that the property in question is what it is alleged to be and is located where it is alleged to be. Information is believable when an individual reasonably concludes that it is sufficiently reliable to be believed.

The method of application of the tests will differ, however, depending upon circumstances. The following examples are illustrative:

- An individual making a probable cause determination who observes an incident firsthand must determine only that the observation is reliable and that the property is likely to be what it appears to be. For example, an officer who believes that he or she sees an individual in possession of heroin must first conclude that the observation was reliable; for example, whether his or her eyesight was adequate and the observation was long enough, and that he or she has sufficient knowledge and experience to be able reasonably to believe that the substance in question is in fact heroin.

- An individual making a probable cause determination who relies upon the in-person report of an informant must determine both that the informant is believable and that the property observed is likely to be what the observer believes it to be. The determining individual may consider the demeanor of the informant to help determine whether the informant is believable. An individual known to have a clean record and no bias against the suspect is likely to be credible.

- An individual making a probable cause determination who relies upon the report of an informant not present before the authorizing official must determine both that the informant is believable and that the information supplied has a factual basis. The individual making the determination may use one or more of the following factors to decide whether the informant is believable.

  Prior record as a reliable informant—Has the informant given information in the past that proved to be accurate?

  Corroborating detail—Has enough detail of the informant's information been verified to imply that the remainder can reasonably be presumed to be accurate?

  Statement against interest—Is the information given by the informant sufficiently adverse to the pecuniary or penal interest of the informant to imply that the information may reasonably be presumed to be accurate?

  Good citizen—Is the character of the informant, as a person known by the individual making the probable cause determination, such as to make it reasonable to presume that the information is accurate?

The factors listed previously are not the only ways to determine an informant's believability. The commander may consider any factor tending to show believability, such as the informant's military record, his or her duty assignments, and whether the informant has given the information under oath.

Mere allegations, however, may not be relied upon. Thus, an individual may not reasonably conclude that an informant is reliable simply because the informant is described as such by a law enforcement agent. The individual making the probable cause determination should be supplied with specific details of the informant's past actions to allow that individual to

personally and reasonably conclude that the informant is reliable. The informant's identity need not be disclosed to the authorizing officer, but it is often a good practice to do so.

FORMS.— Although written forms to record the terms of the authorization or to set forth the underlying information relied upon in granting the request are not mandatory, the use of such memorandums is highly recommended for several reasons. Many cases may take some time to get to trial. It is helpful to the person who must testify about actions taken in authorizing a search to review such documents before testifying. Further, these records may be introduced to prove that the search was lawful.

The Judge Advocate General of the Navy has recommended the use of the standard record of search authorization form set forth in appendix A-1-n to the *JAG Manual* and as shown in figure 4-1. Should the

RECORD OF AUTHORIZATION TO SEARCH
(SEE JAGMAN 0170)

1. At _____ on _____ I was approached by _____
Time Date Name, rate, service

in his or her capacity as _____ who having been first
Duty

duly sworn, advised me that he or she suspected _____
Name

of _____ and requested permission to search his
Offense

or her _____ for _____
Object or Place Items

2. The reasons given to me for suspecting the above named person were:

_____

_____

_____

_____

_____

3. After carefully weighing the foregoing information, I was of the belief that the crime of _____ [had been] [was being] [was about to be] committed, that _____ was the likely perpetrator thereof, that a search of the object or area stated above would probably produce the items stated and that such items were [the fruits of crime] [the instrumentalities of a crime] [contraband] [evidence].

4. I have therefore authorized _____ to search the place named for the property specified, and if the property be found there, to seize it.

_____
Grade Signature Title

_____
Date and Time

Fibure 4-1.—Record of authorization to search.

INSTRUCTIONS

1. Although the person bringing the information to the attention of the individual empowered to authorize the search will normally be one in the execution of investigative or police duties, such need not be the case. The information may come from one as a private individual.

2. Other than his or her own prior knowledge of facts relevant thereto, all information considered by the individual empowered to authorize a search on the issue of probable cause must be provided under oath or affirmation. Accordingly, before receiving the information that purports to establish the requisite cause, the individual empowered to authorize the search will administer an oath to the person(s) providing the information. An example of an oath is as follows: Do you solemnly swear (or affirm) that the information you are about to provide is true to the best of your knowledge and belief, so help you God? (This requirement does not apply when all information considered by the individual empowered to authorize the search, other than his or her prior personal knowledge, consists of affidavits or other statements previously duly sworn to before another official empowered to administer oaths.)

3. The area or place to be searched must be specific, such as wall locker, wall locker and locker box, residence, or automobile.

4. A search may be authorized only for the seizure of certain classes of items: (1) fruits of a crime (the results of a crime such as stolen objects); (2) instrumentalities of a crime (example: search of an automobile for a crowbar used to force entrance into a building that was burglarized);(3) contraband (items the mere possession of which is against the law); or (4) evidence of crime (example: bloodstained clothing of an assault suspect).

5. Before authorizing a search, probable cause must exist. This means reliable information that would lead a reasonably prudent and cautious man or woman to a natural belief that:

a. an offense probably is about to be, or has been committed;

b. specific fruits or instrumentalities of the crime, contraband, or evidence of the crime exist; and

c. such fruits, instrumentalities, contraband, or evidence are probably in a certain place.

In arriving at the above determination it is generally permissible to rely on hearsay information, particularly if it is reasonably corroborated or has been verified in some substantial part by other facts or circumstances. However, unreliable hearsay cannot alone constitute probable cause, such as where the hearsay is several times removed from its source or the information is received from an anonymous telephone call. Hearsay information from an informant maybe considered if the information is reasonably corroborated or has been verified in some substantial part by other facts, circumstances, or events. The mere opinion of another that probable cause exists is not sufficient; however, along with the pertinent facts, it may be considered in reaching the conclusion as to whether or not probable cause exists. If the information available does not satisfy the foregoing, an additional investigation to produce the necessary information may be ordered.

Figure 4-1.—Record of authorization to search—Continued.

exigencies of the situation require an immediate determination of probable cause, with no time to use the form, make a record of all facts used and actions taken as soon as possible after the events have occurred.

Finally, probable cause must be determined by the person who is asked to authorize the search without regard to the prior conclusions of others on the question to be answered. No conclusion of the authorizing official should ever be based on a conclusion of some other person or persons. The determination that probable cause exists can be arrived at only by the officer charged with that responsibility,

EXECUTION OF THE SEARCH AUTHORIZATION— Mil.R.Evid. 315(h) provides that a search authorization or warrant should be served upon the person whose property is to be searched if that person is present. Further, the persons who actually perform the search should compile an inventory of items seized and should give a copy of the inventory to the person whose property is seized. If searches are carried out in foreign countries, the rule provides that actions should conform to any existing international agreements. Failure to comply with these provisions, however, will not necessarily render the items involved inadmissible at a trial by court-martial,

Probable Cause Searches Without Prior Authorization

As discussed earlier, there are two basic categories of searches that can be lawful if properly executed. Our discussion to this point has centered on those types of searches that require prior authorization. We will now discuss those categories of searches that have been recognized as exceptions to the general rule requiring authorization before the search. Recall that within this category of searches there are searches requiring probable cause and searches not requiring probable cause.

Exigency Searches

This type of search is permitted by Mil.R.Evid. 315(g) under circumstances demanding some immediate action to prevent removal or disposal of property believed, on reasonable grounds, to be evidence of a crime. Although the exigencies may permit a search to be made without the requirement of a search authorization, the same amount of probable cause required for search authorizations must be found to justify an intrusion based on exigency. Prior authorization is not required under Mil.R.Evid. 315(g) for a search based upon probable cause under the following circumstances:

Insufficient time—No authorization need be obtained where there is probable cause to search and there is a reasonable belief that the time required to obtain an authorization would result in the removal, destruction, or concealment of the property or evidence sought. Although both military and civilian case law, in the past, have applied this doctrine almost exclusively to automobiles, it now seems possible that this exception may be a basis for entry into barracks and apartments in situations where drugs are being used. The Court of Military Appeals found that an OOD, when confronted with the unmistakable odor of burning marijuana outside the accused's barracks room, acted correctly when he demanded entry to the room and placed all occupants under apprehension without first obtaining the CO's authorization for his entry. The fact that he heard shuffling inside the room, and was on an authorized tour of living spaces, was considered crucial, as well as the fact that the unit was overseas. The court felt that this was a present danger to the military mission, and thus military necessity warranted immediate action.

Lack of communication—Action is permitted in cases where probable cause exists and destruction, concealment, or removal is a genuine concern, but communication with an appropriate authorizing official is prevented by reasons of military operational necessity. For instance, where a nuclear submarine, or a Marine Corps unit in the field maintaining radio silence lacks a proper authorizing official (perhaps due to some disqualification on neutrality grounds), no search would otherwise be possible without breaking the silence and perhaps endangering the unit and its mission.

Search of operable vehicles—This type of search is based upon the United States Supreme Court's creation of an exception to the general warrant requirement where a vehicle is involved. Two factors are controlling. First, a vehicle may easily be removed from the jurisdiction if a warrant or authorization were necessary; and second, the court recognizes a lesser expectation of privacy in automobiles. In the military, the term *vehicle* includes vessels, aircraft, and tanks, as well as automobiles, trucks, and so on. If probable cause exists to stop and search a vehicle, then authorities may search the entire vehicle and any containers found therein in which the suspected item might reasonably be found. All this can be done without an authorization. It is not

necessary to apply this exception to government vehicles, as they may be searched any time and any place under the provisions of Mil.R.Evid. 314(d).

Searches Not Requiring Probable Cause

Mil.R.Evid. 314 lists several types of lawful searches that do not require either a prior search authorization or probable cause.

SEARCHES UPON ENTRY TO OR EXIT FROM U.S. INSTALLATIONS, AIRCRAFT, AND VESSELS ABROAD.— Commanders of military installations, aircraft, or vessels located abroad may authorize personnel to conduct searches of persons or property upon entry to or exit from the installation, aircraft, or vessel. The justification for the search is the need to make sure the security, military fitness, or good order and discipline of the command is maintained.

CONSENT SEARCHES.— If the owner, or other person in a position to do so, consents to a search of his or her person or property over which he or she has control, a search maybe conducted by anyone for any reason (or for no reason) pursuant to Mil.R.Evid. 314(e). If a free and voluntary consent is obtained, no probable cause is required. For example, where an investigator asks the accused if he or she "might check his or her personal belongings" and the accused answers, "Yes . . . it's all right with me," the Court of Military Appeals has found that there was consent. The court has also said, however, that mere agreement in the face of authority is not consent. Thus, where the CO and the chief master-at-arms appeared at the accused's locker with a pair of bolt cutters and asked if they could search, the accused's affirmative answer was not consent. The question in each case will be whether consent was freely and voluntarily given. Voluntary consent can be obtained from a suspect who is under apprehension if all other facts indicate it is not mere acquiescence.

Except under the Navy's urinalysis program, there is no absolute requirement that an individual who is asked for consent to search be told of the right to refuse such consent, nor is there any requirement to warn under Article 31(b), even when the individual is a suspect before requesting consent. (OPNAVINST 5350.4B currently requires the Navy to inform a member of his or her right to refuse a consent urinalysis.) Both warnings can help show that consent was voluntarily given. The courts have been unanimous in finding such warnings to be strong indicia that any waiver of the right to privacy thereafter given was free and voluntary.

Additionally, use of a written consent to search form is a sound practice. JAGMAN, appendix A-1-o, and figure 4-2 illustrate the consent to search form that should be used. Remember that since the consent itself is a waiver of a constitutional right by the person involved, it may be limited in any manner, or revoked at anytime. The fact that you have the consent in writing does not make it binding on a person if a withdrawal or limitation is communicated. Refusing to give consent or revoking it does not then give probable cause where none existed before. You cannot use the legitimate claim of a constitutional right to infer guilt or that the person must be hiding something.

Even where consent is obtained, if any other information is solicited from one suspected of an offense, proper Article 31 warnings and, in most cases, counsel warnings must be given.

As previously noted, we use the term *control* over property rather than ownership. For instance, if Seaman Frost occupies a residence with her male companion, John Doe, John can consent to a search of the residence. Suppose, however, that Seaman Frost keeps a large tin box at the residence to which John is not allowed access. The box would not be subject to a search based upon John's consent. He could only consent to a search of those places or areas where Seaman Frost has given him control. Likewise, if Seaman Frost maintained her own private room within the residence, and John was not permitted access to the room by her, John could not give consent for a search of that room.

STOP AND FRISK.— Although most often associated with civilian police officers, this type of limited seizure of the person is specifically included in Mil.R.Evid. 314(f). It does not require probable cause to be lawful and is most often used in situations where an experienced officer, chief petty officer, or petty officer is confronted with circumstances that just do not seem right. This articulable suspicion allows the law enforcement officer to detain an individual to ask for identification and an explanation of the observed circumstances. This is the stop portion of the intrusion. Should the person who makes the stop have reasonable grounds to fear for his or her safety, a limited frisk or pat down of the outer garments of the person stopped is permitted to find out whether a weapon is present. If any weapon is discovered in this pat down, its seizure can provide probable cause for apprehension and a later search incident thereto. There is, however, no right to frisk or pat down a suspect in situations where no

CONSENT TO SEARCH
(SEE JAGMAN 0170)

I, _____, have been advised that inquiry is being made in connection with _____ I have been advised of my right not to consent to a search of [my person] [the premises mentioned below]. I hereby authorize _____ and _____ who [has] [have been] identified to me as _____ to' conduct a
Position(s)

complete search of my [person] [residence] [automobile] [wall locker] [_____] located at

_____

_____

_____

I authorize the above listed personnel to take from the area searched any letters, papers, materials, or other property which they may desire. This search may be conducted on _____
Date

This written permission is being given by me to the above named personnel voluntarily and without threats or promises of any kind.

_____
Signature

WITNESSES

_____

_____

Figure 4-2.-Consent to search.

apprehension of personal danger is involved, nor can the frisk be conducted in a more than cursory manner to ensure safety. Further, any detention must be brief and related to the original suspicion that underlies the stop.

SEARCHES INCIDENT TO LAWFUL APPREHENSION.— A search of an individual's person, of the clothing he or she is wearing, and of the places into which he or she could reach to obtain a weapon or destroy evidence is a lawful search if conducted incident to a lawful apprehension of that individual and pursuant to Mil.R.Evid. 314(g).

Apprehension is the taking into custody of a person. This means the imposition of physical restraint and is substantially the same as civilian arrest. It differs from military arrest which is merely the imposition of moral restraint.

A search incident to a lawful apprehension will be lawful if the apprehension is based upon probable cause. This means that the apprehending official is aware of facts and circumstances that would justify a reasonable person to conclude that an offense has been or is being committed and the person to be apprehended committed or is committing the offense.

The concept of probable cause as it relates to apprehension differs somewhat from that associated with probable cause to search. Instead of concerning oneself with the location of evidence, the second inquiry concerns the actual perpetrator of the offense.

An apprehension may not be used as a subterfuge to conduct an otherwise unlawful search. Furthermore, only the person apprehended and the immediate area where that person could easily obtain a weapon or

destroy evidence may be searched. For example, a locked suitcase next to the person apprehended may not be searched incident to the apprehension, but it may be seized and held pending authorization for a search based on probable cause.

Until recently, the extent to which an automobile might be searched incident to the apprehension of the driver or passengers therein was unsettled. In 1981, however, the United States Supreme Court firmly established the lawful scope of such apprehension searches. The court held that when a law enforcement officer lawfully apprehends the occupants of an automobile, the officer may conduct a search of the entire passenger compartment, including a locked glove compartment, and any containers found therein, whether opened or closed.

Decisions of the United States Supreme Court have further limited the scope of a search incident to apprehension where the suspect possesses a briefcase, duffel bag, footlocker, suitcase, and soon. If it is shown that the object carried or possessed by a suspect was searched incident to the apprehension; that is, at the same time as the apprehension, then the search of that item is likely to be upheld. If, however, the suspect is taken away to be interrogated in room 1 and the suitcase is taken to room 2, a search of the item would not be incident to the apprehension since it is outside the reach of the suspect. Here, search authorization would be required.

EMERGENCY SEARCHES TO SAVE LIFE OR FOR RELATED PURPOSES.— In emergency situations, Mil.R.Evid. 314(i) permits searches to be conducted to save lives or for related purposes. The search may be performed in an effort to render immediate medical aid, to obtain information that will assist in the rendering of such aid, or to prevent immediate or ongoing personal injury. Such a search must be conducted in good faith and may not be a subterfuge to circumvent an individual's Fourth Amendment protections.

Plain View Searches

When a government official is in a place where he or she has a lawful right to be, whether by invitation or official duty, evidence of a crime observed in plain view may be seized according to Mil.R.Evid. 316. An often repeated example of this type of lawful seizure arises during a wall locker inspection. While looking at the uniforms of a certain service member, a baggie of marijuana falls to the deck. Its seizure as contraband is justifiable under these circumstances as having been observed in plain view. Another situation could arise while a searcher is carrying out a duly authorized search for stolen property and comes upon a gun in the search area. Since it is contraband, it is both seizable and admissible in court-martial proceedings.

Body Views and Intrusions

Under certain circumstances defined in Mil.R.Evid. 312, evidence that is the result of a body view or intrusion will be admissible at court-martial. There are also situations where such body views and intrusions may be performed in a nonconsensual manner and still be admissible.

Visual examination of the unclothed body may be made with the consent of the individual subject to the inspection. An involuntary display of the unclothed body, including a visual examination of body cavities, may be required only if conducted in reasonable fashion and authorized under the following provisions of the Military Rules of Evidence:

- Inspections and inventories under Mil.R.Evid. 313
- Searched under Mil.R.Evid. 314(b) and 314(c) if there is a reasonable suspicion that weapons, contraband, or evidence of a crime is concealed on the body of the person to be searched
- Searched within jails and similar facilities under Mil.R.Evid. 314(h) if reasonably necessary to maintain the security of the institution or its personnel
- Searched incident to lawful apprehension under Mil.R.Evid. 315

An examination of the unclothed body under this rule should be conducted whenever practical by a person of the same sex as that of the person being examined, provided, however, that failure to comply with this requirement does not make an examination an unlawful search within the meaning of Mil.R.Evid. 311.

A reasonable nonconsensual physical intrusion into the mouth, nose, and ears may be made when a visual examination of the body is permissible. Nonconsensual intrusions into other body cavities may be made under the following categories.

For purposes of seizure—When there is a clear indication that weapons, contraband, or other evidence of a crime is present, to remove weapons, contraband, or evidence of a crime discovered if such intrusion is

made in a reasonable fashion by a person with appropriate medical qualifications.

For purposes of search—To search for weapons, contraband, or evidence of a crime if authorized by a search warrant or search authorization and conducted by a person with appropriate medical qualifications.

Notwithstanding this rule, a search under Mil.R.Evid. 314(h) may be made without a search warrant or authorization if such search is based on a reasonable suspicion that the individual is concealing weapons, contraband, or evidence of a crime.

Extraction of bodily fluids—The nonconsensual extraction of body fluids; for example, blood, is permissible under the two following circumstances:

- Pursuant to a lawful search authorization
- Where the circumstances show a clear indication that evidence of a crime will be found, and that there is reason to believe that the delay required to seek a search authorization could result in the destruction of the evidence

Involuntary extraction of body fluids, whether conducted pursuant to either situations mentioned previously, must be done in a reasonable fashion by a person with the appropriate medical qualifications. (It is likely that physical extraction of a urine sample would be considered a violation of constitutional due process, even if based on an otherwise lawful search authorization.) Note that an order to provide a urine sample through normal elimination, as in the typical urinalysis inspection, is not an extraction and need not be conducted by medical personnel.

Intrusions for valid medical purposes—The military may take whatever actions are necessary to preserve the health of a service member. Thus, evidence or contraband obtained from an examination or intrusion conducted for a valid medical purpose maybe seized and will be admissible at a court-martial.

THE USE OF DRUG-DETECTOR DOGS

Military working dogs can be used as drug-detector dogs. As such, they can be used to assist in the obtaining of evidence for use in courts-martial. Some of the ways they can be used include their use in gate searches or other inspections under Mil.R.Evid. 313 and to establish the probable cause necessary for a later search.

One situation where the use of the dog was considered permissible was during a gate search conducted on an overseas installation. The dog's alert could be used to establish probable cause to apprehend the accused. All evidence obtained was held to be admissible. Recently, the Court of Military Appeals held that the use of detector dogs at gate searches in the United States was also reasonable.

In another case, the Court of Military Appeals permitted a detector dog to be brought to an automobile believed to contain marijuana. The dog alerted on the car's rear wheels and exterior and that prompted the police to detain the accused. The proper commander was then notified of this alert and the other circumstances surrounding the case. The search of the vehicle was then conducted pursuant to the authorization of the commander.

The court held that the use of the marijuana dog in an area surrounding the car was lawful. The mere act of monitoring airspace surrounding the vehicle did not involve an intrusion into an area of privacy. Thus, the dog's alert was not a search, but a fact that could be relayed to the proper commander for a determination of probable cause. The Supreme Court has also held that using a dog in a common area to sniff a closed suitcase is not a search at all.

Close attention must be given to establishing the reliability of the informers in this situation; for example, the dog and doghandler. The drug-detector dog is simply an informant, albeit with a longer nose and a somewhat more scruffy appearance. As in the usual informant situation, there must be a showing of both factual basis; for example, the dog's alert and surrounding circumstances and the dog's reliability. This reliability may be determined by the CO through either of two commonly used methods. The first method is for the CO to observe the accuracy of a particular dog's alert in a controlled situation. The second method is for the CO to review the record of the particular dog's previous performance in actual cases. Although either of these methods may be sufficient by itself for a determination that a dog is reliable, both should be used whenever practical. For more information on the use of military working dogs as drug detectors and establishing their reliability as such, see *Military Working Dog Manual,* OPNAVINST 5585.2A.

A few words of caution about the use of drug dogs. One court has stated that a military commander who participates in an inspection involving the use of detector dogs in the command area cannot later authorize a search based upon later alerts by the same dogs during that use. This illustrates the point that any person swept into the evidence-gathering process may find it impossible later to be considered an impartial

official. The provisions of the Military Rules of Evidence are geared to lessen the effect in this type of case, in that mere presence at the scene is not per se disqualifying; but again, the line is difficult to draw.

In summary, the use of dogs for the purpose of ferreting out drugs or contraband that threaten military security and performance is reasonable means to provide probable cause when:

- the dog alerts in a common area, such as a barracks passageway, or
- the dog alerts on the airspace extending from an area where there is an expectation of privacy.

INSPECTIONS AND INVENTORIES

Although not within either category of searches (prior authorization/without prior authorization), administrative inspections and inventories conducted by government agents may yield evidence admissible in trials by court-martial. Mil.R.Evid. 313 codifies the law of military inspections and inventories. Traditional terms that were formerly used to describe various inspections; for example, shakedown search or gate search, have been abandoned as being confusing. If carried out lawfully, inspections and inventories are not designed to be quests for evidence and are thus not searches in the strictest sense. It follows that items of evidence found during these inspections are admissible in court-martial proceedings. If either of these administrative activities is primarily a quest for evidence directed at certain individuals or groups, the inspection is actually a search and evidence seized will not be admissible.

Inspections

Mil.R.Evid. 313(b) defines inspection as an "examination... conducted as an incident of command the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the unit, organization, installation, vessel, aircraft, or vehicle." Thus, an inspection is conducted to make sure mission readiness is part of the inherent duties and responsibilities of those in the military chain of command. Because inspections are intended to discover, correct, and deter conditions detrimental to military efficiency and safety, they are considered as necessary to the existence of any effective armed force and inherent in the very concept of a military organization.

Mil.R.Evid. 313(b) makes it clear that "an examination made for the primary purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings is not an inspection within the meaning of this rule." An otherwise valid inspection is not rendered invalid solely because the inspector has as his or her secondary purpose that of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings.

For example, assume Captain Deck suspects Seaman Doe of possessing marijuana because of an anonymous tip received by telephone. Captain Deck cannot proceed to Seaman Doe's locker and inspect it because what he is really doing is searching it—looking for the marijuana. How about an inspection of all lockers in Seaman Doe's wing of the barracks? This will afford Captain Deck an opportunity to get into Seaman Doe's locker on a pretext. Because it is a pretext for a search, it would be invalid; in fact, it is a search. And note that this is not a lawful probable cause search because the captain has no underlying facts and circumstances from which to conclude that the informer is reliable or that his or her information is believable.

Suppose, however, that Captain Deck, having no information concerning Seaman Doe, is seeking to remove contraband from his command, prevent removal of government property, and reduce drug trafficking. He establishes inspections at the gate. Those entering and leaving through the gate have their persons and vehicles inspected on a random basis. Captain Deck is not trying to get goods on Seaman Doe or any other particular individual. Seaman Doe carries marijuana through the gate and is inspected. The inspection is a reasonable one; the trunk of the vehicle, under its seats, and Seaman Doe's pockets are checked. Marijuana is discovered in Seaman Doe's trunk. The marijuana was discovered incident to the inspection. Seaman Doe was not singled out and inspected as a suspect. Here, the purpose was not to get Seaman Doe, but merely to deter the flow of drugs or the contraband. The evidence would be admissible.

An inspection maybe made of the whole or any part of a unit, organization, installation, vessel, aircraft, or vehicle. Inspections are quantitative examinations because they do not single out specific individuals or very small groups of individuals. There is, however, no legal requirement that the entirety of a unit or organization be inspected. An inspection should be totally exhaustive (for example, every individual of the chosen component is inspected) or it should be done on a random basis, by inspecting individuals according to

some rule of chance. Such procedures will be an effective means to avoid challenges based on grounds that the inspection was a subterfuge for a search. Unless authority to so do has been withheld by competent superior authority, any individual placed in a command or appropriate supervisory position may inspect the personnel and property within his or her control.

An inspection also includes an examination to locate and confiscate unlawful weaponss and other contraband. Contraband is defined as material the possession of which is by its very nature unlawful. Material may be declared to be unlawful by appropriate statute, regulation, or order. For example, liquor is prohibited aboard ship and would be contraband if found in Seaman Doe's seabag aboard ship, although it might not be contraband if found in Seaman Jones' BEQ room.

Mil.R.Evid. 313(b) indicates that certain classes of contraband inspections are especially likely to be subterfuge searches and thus not inspections at all. If the contraband inspection (1) occurs immediately after a report of some specific offense in the unit and was not previously scheduled; (2) singles out specific individuals for inspection; or (3) inspects some people substantially more thoroughly than others, then the government must prove that the inspection was not actually a subterfuge search.

As a practical matter, the rule expresses a clear preference for previously scheduled contraband inspections. Such scheduling helps make sure the inspection is a routine command function and not an excuse to search specific persons or places for evidence of a crime. The inspection should be scheduled sufficiently far enough in advance to eliminate any reasonable chance that the inspection is being used as a subterfuge. Such scheduling may be made as a matter of date or event. In other words, inspections may be scheduled to take place on any specific date, or on the occurrence of a specific event beyond the usual control of the commander. The previously scheduled inspection, however, need not be preannounced need.

Mil.R.Evid. 313(b) permits a person acting as an inspector to use any reasonable natural or technological aid in conducting an inspection. The marijuana detection dog, for instance, is a natural aid that may be used to assist an inspector in more accurately discovering marijuana during an inspection of a unit for marijuana. If the dog should alert on an area that is not within the scope of the inspection, however, that area may not be searched without a prior authorization. Also, where the CO is conducting the inspection when the dog alerts, he or she should not authorize the search himself or herself, but should seek authorization from some other competent authority. This is because the commander's participation in the inspection may render him or her disqualified to authorized searches.

Inventories

Mil.R.Evid. 313(c) codifies case law by recognizing that evidence seized during a bona fide inventory is admissible. The rationale behind this exception to the usual probable cause requirement is that such an inventory is not prosecutorial in nature and is a reasonable intrusion. Commands may inventory the personal effects of members who are on an unauthorized absence, placed in pretrial confinement, or hospitalized. Contraband or evidence incidentally found during such a legitimate inventory will be admissible in a later criminal proceeding. However, an inventory may not be used as a subterfuge for a search.

DRUG ABUSE DETECTION

Not in My Navy and Zero Tolerance are the Navy's call to arms in the war on drugs. These statements reflect our commitment to the elimination of illicit drugs and drug abusers from the Naval Establishment and the continued emphasis placed on deterrence, leadership, and expeditious action. While the options available to commanders in combating drug abuse are many and varied, this section deals only with the urinalysis program and its limitations.

GENERAL GUIDANCE

The urinalysis program of the Navy was established to provide a means for the detection of drug abuse and to serve as a deterrent against drug abuse. OPNAVINST 5350.4B contains guidelines on alcohol and drug abuse prevention and control. Additional guidance is found in the Military Rules of Evidence. These rules and directives contain detailed guidelines for the collection, analysis, and use of urine samples.

The positive results of a urinalysis test may be used for a number of distinct purposes, depending on how the original sample was obtained. Therefore, it is important to be able to recognize when, and under what circumstances, a command may conduct a proper urinalysis.

TYPES OF TESTS

OPNAVINST 5350.4B directs that commanders, COs, and OICs should conduct an aggressive urinalysis

testing program, adapted as necessary to meet unique unit and local situations. The specific types of urinalysis testing and authority to conduct them are outlined as follows.

Search and Seizure

Tests conducted with member's consent. Members suspected of having unlawfully used drugs may be requested to consent to urinalysis testing. For consent to be valid, it must be freely and voluntarily given. In this regard, OPNAVINST 5350.4B provides that, before requesting consent, commands should advise the member that he or she is suspected of drug use and may decline to provide a sample. A recommended urinalysis consent form is shown in figure 4-3.

Probable cause and authorization. Urinalysis testing may be ordered, according to Mil.R.Evid 312(d) and 315, whenever there is probable cause to believe that a member has wrongfully used drugs and that a test will produce evidence of such use. For example, during a routine locker inspection in the enlisted barracks, you find an open baggie of what appears to be marijuana under some clothes in Petty Officer Doe's wall locker. Along with the marijuana you find a roach clip and some rolling papers. You notify the CO of your find and he sends for Doe. A few minutes later, Petty Officer Doe staggers into the CO's office-eyes red and speech slurred. He is immediately apprehended and searched. A marijuana cigarette is found in his shirt pocket. Under these facts, a commander would have little trouble finding probable cause to order that a urine sample be given.

Probable cause and exigency. Mil.R.Evid 315 recognizes that there may not always be sufficient time or means available to communicate with a person empowered to authorize a search before the evidence is lost or destroyed. While more commonly seen in the operable vehicle setting, facts could give rise to support an exigency search of a member's body fluids.

URINALYSIS CONSENT FORM

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

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

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

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

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

_____
Signature

_____
Date

_____
Witness' signature

_____
Date

Figure 4-3.—Urinalysis consent form.

Remember, to be lawful, an exigency search must still be based upon a finding of probable cause. Because drugs tend to remain in the system in measurable quantities for some time, it is unlikely that this theory will be the basis of many urinalysis tests.

Inspections Under Mil.R.Evid. 313

Commanders may order urinalysis inspections just as they may order any other inspection to determine and make sure of the security, military fitness, and good order and discipline of the command. Urinalysis inspections may be ordered for the primary purpose of obtaining evidence for trial by court-martial or for other disciplinary purposes. This would defeat the purpose of an inspection and make it a search. Commands may use a number of methods of selecting service members or groups of members for urinalysis inspection, including, but not limited to the following:

- Random selection of individual service members from the entire unit or from an identifiable segment or class of that unit. Random selection is achieved by making sure each service memher has an equal chance of being selected each time personnel are chosen.

- Selection, random or otherwise, of an entire subunit or identifiable segment of a command. Examples of such groups include an entire department, division, or watch section; all personnel within specific paygrades; all newly reporting personnel; or all personnel returning from leave, liberty, or unauthorized absence (UA).

- Urinalysis testing of an entire unit. As a means of quota control, Navy commands are required to obtain second-echelon approval before conducting all unit sweeps and random inspections involving more than 20 percent of a unit, or 200 members. Failure to obtain such approval, however, will not invalidate the results of the testing.

Service-Directed Testing

Service-directed testing is actually nothing more than inspections of units expressly designated by the Chief of Naval Operations (CNO). These include rehabilitation facility staff; security personnel; A school candidates; officers and enlisted in the accession pipeline; and those executing permanent change of station (PCS) orders to an overseas duty station.

Valid Medical Purposes

Blood tests or urinalyses also may be performed to assist in the rendering of medical treatment (for example, emergency care, periodic physical examinations, and such other medical examinations as are necessary for diagnostic or treatment purposes). Do not confuse this with a fitness-for-duty examination ordered by a service member's command.

Fitness-for-Duty Testing

Categories of fitness-for-duty urinalysis testing are briefly described as follows. Generally, all urinalyses not the product of a lawful search and seizure, inspection, or valid medical purpose fall within fitness-for-duty/comand-directed categories.

Command-directed testing. A command-directed test will be ordered by a member's CO or OIC, or other authorized individual whenever a member's behavior, conduct, or involvement in an accident or other incident gives rise to a reasonable suspicion drug abuse and a urinalysis has not been conducted on a probable cause or consensual basis. Command-directed tests are often ordered when suspicious or bizarre behavior does not amount to probable cause.

Aftercare and surveillance testing. Aftercare testing is periodic command-directed testing of identified drug abusers as part of a plan for continuing recovery following a rehabilitation program. Surveillance testing is periodic command-directed testing of identified drug abusers who do not participate in a rehabilitation program as a means of monitoring for further drug abuse.

Evaluation testing. This refers to command-directed testing when a commander has doubt as to the member's wrongful use of drugs following a laboratory-confirmed urinalysis result. Evaluation testing should be conducted twice a week for a maximum of 8 weeks and is often referred to as a two-by-eight evaluation.

Safety investigation testing. A CO or any investigating officer may order urinalysis testing in connection with any formally convened mishap or safety investigation.

USES OF URINALYSIS RESULTS

Of' particular impportance to the command is what use may be made of a positive urinalysis. The results of a lawful search and seizure, inspection, or a valid

medical purpose may be used to refer a member to a Department of Defense (DOD) treatment and rehabilitation program, to take appropriate disciplinary action, and to establish the basis for a separation and characterization in a separation proceeding.

The results of a command-directed/fitness-for-duty urinalysis may not be used against the member for any disciplinary purposes, not on the issue of characterization of service in separation proceedings, except when used for impeachment or rebuttal in any proceeding that evidence of drug abuse has been first introduced by the member. In addition, positive results obtained from a command-directed fitness-for-duty urinalysis may not be used as a basis for vacation of the suspension of execution of punishment imposed under Article 15, UCMJ, or a result of court-martial. Such result may, however, serve as the basis for referral of a member to a DOD treatment and rehabilitation program and as a basis for administrative separation.

What administrative or disciplinary action can be taken against service members identified as drug abusers through service-directed urinalysis testing varies, depending upon which CNO-designated unit was tested. The only constant is that all service-directed testing may be considered as the basis for administrative separation.

THE COLLECTION PROCESS

The weakest link in the urinalysis program chain is in the area of collection and custody procedures. Commands should conduct every urinalysis with the full expectation that administrative or disciplinary action might result. The use of chiefs and officers as observers and unit coordinators is strongly encouraged. Strict adherence to direct observation policy during urine collection to prevent substitution, dilution, or adulteration is an absolute necessity. Mail samples immediately after collection to reduce the possibility of tampering. Make sure all documentation and labels are legible and complete. Special attention should be given to the ledger and chain of custody to make sure they are all accurate, complete, and legible. Additional guidance is provided in OPNAVINST 53530.4B.

SUMMARY

The information that has been presented to you in this chapter is complex and difficult. You must be knowledgeable, however, of the importance of properly advising accused's of their rights, the types of and the requirements for conducting a lawful search and seizure, and drug abuse detection. This chapter has given you a basic understanding of these issues.