



JEANNE M. HOLM CENTER

Military Justice

Cognitive Lesson Objectives:

- Know the basic elements of the Military Justice system.

Cognitive Samples of Behavior:

- Differentiate between Uniform Code of Military Justice (UCMJ) and Manual for Courts-Martial (MCM).
- Describe the need for a separate legal system for the military.
- Identify your rights in the Military Justice system.
- Identify the methods used to maintain discipline.
- Describe the purpose of non-judicial punishment.
- Identify the three types of courts-martial.
- Describe the functions of the Staff Judge Advocate (SJA) and the Area Defense Counsel (ADC).

Affective Lesson Objective:

- Value the Military Justice system.

Affective Sample of Behavior:

- Assert the importance of a separate legal system.

When you take the oath of office, you raise your right hand and say that you will support and defend the Constitution of the United States. Are you fully aware of what that entails? Many of the Air Force's governing documents, like Air Force Instructions (AFIs), stem from the Uniform Code of Military Justice (UCMJ) and the Manual for Courts-Martial (MCM). The UCMJ and the MCM stem from the Constitution. By raising your right hand, you're stating that you'll abide by the Constitution, the UCMJ, the MCM, and all other instructions and directives that apply to the military. That's a big commitment. As an officer, you're expected to uphold and enforce military standards; the military justice system will help you enforce those standards.

Much of what will be discussed in this lesson is interrelated with the *Uniform Code of Military Justice (UCMJ)* reading. Use the UCMJ reading as a cross-reference to help build your foundation of the military justice system.

THE MILITARY JUSTICE SYSTEM

To ensure an orderly existence, a society must have sound laws that are administered fairly. In a civil society, many governing bodies—city, county, state, and federal—make and administer laws. But in addition to civil laws, the US military society has its own laws.

Because of the vital services the military performs, there must be a high level of morale and good order and discipline. While effective leadership is the most desirable means of maintaining these qualities, it doesn't work in all cases. It's unfortunate, but true, that there are people who don't respond to any type of leadership and who commit offenses for which they must be punished. For the military to continue functioning smoothly, we must have a separate judicial system that allows us to enforce our laws, punishing members who violate them.

As an officer, you will have an important role in military justice. You must prepare yourself to accept the responsibilities of this role and perform the duties necessary to administer military justice. There may come a time when you'll have to prefer charges against a person who has committed an offense, investigate such offenses, or serve as a member on a court-martial. All of these tasks carry with them a great deal of responsibility. To execute them correctly, you must have a fundamental understanding of the military justice system.

Foundations and History of Military Justice

Military criminal law, or military justice as it's more popularly called, is closely related to civilian criminal law. Its sources are many and varied, some considerably older than the United States and its Constitution. However, the Constitution is the primary source of the law governing our military establishment.

Early Codes

The first governing document used by our forces, the Articles of War (1775), was taken directly from the existing British Articles of War, which had been used in Great Britain since 1765. The Second Continental Congress adopted these articles after they were prepared by a committee consisting of George Washington, Philip Schuyler and others, three days before Washington took command of the Continental Army. These articles, with some amendments, remained in effect until 1806.

The Constitution

Although the Articles of War preceded the Constitution by more than 10 years, the Constitution is the true source of our military law. This was well emphasized by Salmon P. Chase after he became Chief Justice of the United States in 1864. He stated that “the Constitution itself provides for military government as well as for civilian government... There is no law for the government of the citizens, the Army, or the Navy of the United States, within American jurisdiction, which is not contained in or derived from the Constitution.”

The writers of the Constitution decided that the military should operate under a separate judicial system based upon a system of balanced controls. Therefore, the Constitution was designed to give the President and Congress certain, yet distinctive, powers. Specifically, the Constitution designates the President as Commander in Chief of the armed forces, and vests in him the power necessary to carry out the responsibilities of this position. The Constitution gives Congress the power to raise and support an Army, provide and maintain a Navy, and make rules for governing the land, air, and naval forces. This separation of power is an important element of our military justice system.

Articles of War (1920)

The aftermath of World War I brought about the Articles of War (1920) and a more strict review procedure. In 1906 and 1917 in Brownsville, Texas, and Houston, Texas, respectively, soldiers were accused of starting riots which resulted in the death of one person in Brownsville and several people in Houston. The soldiers had prompt trials in both instances and were found guilty. The court dishonorably discharged those involved in the Brownsville riots and handed down death and life imprisonment sentences to those involved in the Houston riots. Within a matter of months, the field commanders carried out the sentences. Although the commanders acted in accordance with existing laws, many people believed the sentences were carried out much too quickly without adequate appellate review. The demands for reform following these incidents prompted the War Department to issue General Order 7 in January 1918. This order provided that all severe sentences such as death, dismissal, or dishonorable discharge, be reviewed by the Judge Advocate General in Washington, D.C. The final ruling, which resulted after this review,

could then be carried out. To implement this order, the War Department established a Board of Review (or the Judge Advocate General's Office) in Washington, D.C. This marked the beginning of automatic appellate review of certain court-martial cases.

Other key articles forbade referral of a case for trial by general court-martial until after a thorough and impartial investigation with the accused present. These articles also gave the accused the opportunity to present evidence and cross-examine witnesses. Later, the Articles of 1920 resulted in the creation of the court-martial manuals of 1921 and 1928 that set forth "company punishment" procedures.

Elson Act (1949 Manual)

The Elson Act brought about further reform to the Army judicial system by amending the 1920 Articles. By a separate congressional bill passed in 1948, all laws affecting the Army military justice system were applied to the now separate Air Force and published in a 1949 manual. This legislation provided for enlisted people to serve as court members in certain cases, and placed a lawyer on the court as a law member. If the trial counsel was a lawyer, the law required the defense counsel to be similarly qualified. It also established petitions for new trials and, for the first time, prohibited criticism of courts by commanders. The Act introduced bad conduct discharges as a form of punishment and established higher-level review boards composed of three general officers.

Uniform Code of Military Justice (UCMJ) and Manual for Courts-Martial (MCM)

In 1948, the Secretary of Defense, James V. Forrestal, appointed a committee of civilian and military lawyers to create a military justice system that would apply to all branches of the armed forces and would be uniform in interpretation and construction. Upon this committee's recommendation, Congress passed an act on May 5, 1950, entitled the Uniform Code of Military Justice (UCMJ). The new code modified and consolidated the Army Articles of War, Articles for the Government of the Navy, and Disciplinary Laws of the Coast Guard.

When Congress enacted the UCMJ in 1950, it used its constitutional authority to make laws to govern the armed forces. Despite the comprehensive legal coverage the UCMJ provides, no legislation can provide for all contingencies likely to arise in the actual operation of a judicial system. For this reason, Congress gave the President authority to issue implementing instructions to put the UCMJ into operation. Consequently, on February 8, 1951, President Harry S. Truman issued an executive order to put into effect the MCM, United States, 1951. As an order of the President, this manual had the full force and effect of law, and was binding on all people subject to the UCMJ. Later, executive orders by Presidents Eisenhower, Kennedy, and Johnson revised certain provisions of the 1951 Manual; President Johnson replaced the 1951 Manual with the MCM, 1969. President Reagan published the MCM, 1984. The manual is periodically republished when authorized by Congress and the President.

The intent of the MCM is to address the field of military justice as thoroughly as possible under the restrictions of a working manual. The MCM contains a wide range of materials, including the full texts of the US Constitution, UCMJ, and authority, composition, and procedures of court-martial. It also includes texts on rules of evidence applicable in court-martial and on the punitive articles and guides for writing most charges and specifications to state an offense according to the UCMJ. The design of the MCM is such that it doesn't require frequent reference to the UCMJ. You will, likely, have to refer to the UCMJ when you have an active duty legal problem involving the military justice system.

From this review of the history of our military justice system, you can see that the basic ideas of our modern articles evolved through tests by military forces for over 200 years. The UCMJ reflects centuries of experience in criminal law and military justice.

REASONS FOR A SEPARATE JUSTICE SYSTEM

What we've discussed so far gives you some background information on the evolution of our military justice system. Let's now consider the need for a justice system separate from the civilian sector.

Discipline

The first argument in favor of a separate military justice system concerns discipline. Although one might argue that civil law could serve as a substitute for military law in enforcing discipline, certain factors underlie the provision for a separate justice system for service-connected offenses. To begin with, the military community differs in some ways from the civilian community in its view of what is and isn't a crime. Absent without leave (AWOL) is an example of a uniquely military crime. Civilians absent without an excuse from their jobs have not committed a crime; rather, they've performed an act that has primarily personal consequences. Members of the armed forces who are AWOL could endanger their unit's mission and place the lives of others in jeopardy. The consequences of being AWOL clearly identify it as a criminal offense.

To ensure effective discipline in the armed forces, justice must be administered by people familiar with the military system and its needs. Military members are better able than civilians to understand and respond to problems involving military offenses. Consequently, they're more qualified to serve on courts trying these offenses. For example, in a trial for dereliction of duty, a civilian may consider it unreasonable to sentence the defendant to a lengthy period of confinement. In contrast, a military member tends to view the offense differently, being more inclined to see how the offender might have endangered the mission and lives of others.

Along these same lines, fair and equitable punishment for military members depends upon a clear understanding of the offender, and the circumstances surrounding the offense. On the basis of the member's past military record, training, experience, and potential value, military court members can then impose a suitable punishment. These and other considerations enable military courts to deal with military offenses more effectively than civilian courts.

Military Justice Worldwide

The second argument supporting a separate military justice system springs from the mobile nature of our military establishment. Military personnel are always subject to deployment across state or national boundaries on short notice. Since military justice is an essential tool for maintaining discipline, commanders must have a judicial system available whenever and wherever their units and personnel are deployed. They can't afford to be restricted by judicial districts or any other territorial limitations.

Another consideration is that the Constitution doesn't extend the power of the US federal judicial system to foreign soil. It's politically impossible to have US civilian courts meet and try cases in foreign sovereign territories. Therefore, the military must take along laws that can be administered solely by and for the military. The UCMJ was designed to meet this requirement. It's worldwide in jurisdiction and applicable wherever members of the armed forces are stationed.

YOUR LEGAL RIGHTS

As a member of the armed forces, you retain mainly the same legal rights you had as a civilian. The Constitution and the UCMJ guarantee and protect your legal rights. The most important of these rights are the rights to remain silent and to see an attorney. Your legal rights will be discussed further in this section.

Rights Advisement

When a suspect is interrogated about an offense, the official must advise the suspect of certain rights. These are the rights set forth in Article 31 of the UCMJ for military suspects and in the Fifth Amendment (also known as Miranda warnings) for civilian suspects. Rights advisements were made applicable to military personnel in *United States v. Tempia*, 16 Court of Military Appeals 629, 37 Court Martial Reports 249 (1967).

Depending on the circumstances and status of the suspect (military or civilian), either the Article 31 rights or Fifth Amendment rights (Miranda rights) are required. If the civilian suspect is being questioned and is in a custodial setting, placed in pretrial restraint, or charges have been preferred, a Fifth Amendment rights advisement must be given. In

certain circumstances, only Article 31 rights advisement is required. Article 31 advises individuals of their right against self-incrimination but does not provide any right to counsel for requests of voice or handwriting samples and requests for bodily fluids.

Before any voluntary confession may be made, an individual must be advised under Article 31 of the following:

- The nature of the accusation.
- The right to remain silent; that is, say nothing at all.
- The fact that any statement the individual makes, orally or in writing, may be used as evidence in a trial by court-martial or in any other judicial or administrative proceedings. In a custodial interrogation:
- The right to consult with a lawyer.
- The right to have a lawyer present during the interview.
- The right to obtain a civilian lawyer of the individual's own choosing and at the individual's own expense.
- The right to have a government-appointed military lawyer.
- The right to request a lawyer at any time during the interview.
- The right to stop the questioning at any time if the individual decides not to answer questions.
- The fact that if the individual requests a lawyer during questioning, the interview will be suspended until a lawyer is made available.

Advisement of rights should not be given to a person who is not a suspect. If it becomes evident during a conversation that someone is a suspect, cease all questioning and advise the individual of his/her rights. Rights advisement is also not required when executing a search authorization or when requesting consent to search.

A suspect can waive his/her Article 31 rights. If a suspect wishes to waive his/her rights, he/she must give an affirmative acknowledgment to the following three waiver questions:

- Do you understand your rights?
- Do you want a lawyer?
- Are you willing to make a statement?

A suspect has a constitutional and statutory right to exercise his/her rights. A suspect can voluntarily waive these rights after advisement and make a statement, but at any time the suspect can exercise his/her rights. If he/she does so, all interrogation must cease. No reprisal action can be taken or threatened if a person asserts these rights. However, the statements made prior to exercising these rights are admissible.

Compulsory Self-Incrimination Prohibited

The Fifth Amendment of the US Constitution holds that “no person shall be compelled to be a witness against himself.” Self-incrimination is an admission or confession of guilt, oral or written. To ensure this right against self-incrimination, it is required to advise all suspects questioned or taken into custody of certain rights under Article 31 of the UCMJ, as discussed in the prior section. Any statement made without advisement of these rights would be considered compulsory.

Following rights advisement, any voluntary statement a member makes can be used against him/her in a trial by court-martial. If a statement is obtained that violates the Article 31 rights or if coercion, unlawful influence, or unlawful inducement are used to obtain a statement, the evidence is not admissible in a court-martial.

Whether a service member asserts these rights against self-incrimination is his/her choice. There can be no reprisal action against a member who exercises these rights. A member who isn’t a suspect is not entitled to an advisement of rights and can be ordered to produce a statement of his/her observation or knowledge of a crime. Failure to give a statement in such a case violates Article 92. If a member gives a false sworn statement, Article 134 has been violated.

Right to Counsel

A counsel is an attorney who, among other duties, may advise a person suspected of committing a crime. Civilian court decisions established that in certain types of cases, the accused should be given counsel by the court free of charge if he/she can’t afford to obtain one at his/her own expense. Long before these civilian court decisions, the Air Force provided legal counsel free of charge to all accused before summary, special, and general courts-martial, and to those being offered Article 15, UCMJ punishment. This lawyer is the Area Defense Counsel (ADC). Without a lawyer’s assistance and advice, those accused could be at a disadvantage if they don’t understand their rights. Members also have the right to obtain civilian counsel, at the member’s expense.

The ADC is explained in further detail in this chapter in the *Legal Support* section.

Procedures for Apprehension and Restraint

Apprehension is the taking of a person subject to the UCMJ into custody. Any person, regardless of rank, who is assigned and performing duty as guard or police is authorized to apprehend anyone subject to the UCMJ if there is reasonable belief that an offense was committed and if the person being apprehended committed it. This means facts and circumstances must satisfy a reasonable belief to conclude an offense was or is being committed. Additionally, commissioned officers, warrant officers, petty officers, and noncommissioned officers have the authority to “quell quarrels, frays, and disorders” among persons subject to the UCMJ and to apprehend persons who take part therein.

Civilian law enforcement officials also generally have the power to arrest military members for offenses committed in their presence and for felonies upon probable cause. Resisting or fleeing apprehension is a punishable offense under Article 95.

When placing an individual under apprehension, the simple statement, “You’re under apprehension,” is usually sufficient. If a member places an offender into apprehension and he/she resists, use only the minimal amount of force necessary to secure custody.

Search, Seizure, and Inspection

First of all, it is important to define what searches, seizures, and inspections, since they all play a very different, but important, role in the military justice system. A *search* is an examination of a person, property, or premises to uncover evidence of a crime or criminal intent, such as stolen goods, burglary tools, weapons, or other evidence. A *seizure* is the taking of such items by authorities for evidence at a court-martial. An *inspection* is an examination of the whole or part of a unit, organization, installation, aircraft, or vehicle to determine and to ensure the security, military fitness, or good order and discipline of the unit, organization, or installation.

Search, Seizure, and Inspection Authority. Before any search, seizure, or inspection can be conducted, it must be authorized by the proper authority. Most searches and inspections (and henceforth seizures) must be authorized by the express permission, written or oral, issued by a commander, military judge, or magistrate, depending on the circumstances, to search a person or an area. Civilian authorities issue search warrants, which authorize the same. Regardless, in most cases, the Staff Judge Advocate (SJA) should be consulted before a search, seizure, or inspection is authorized.

The Constitution requires the issuance of a warrant or permission before any search or seizure; however, there are exceptions. For example, if the search and seizure are incidental to an arrest or if a person consents to it, which will be explained in further detail later in this section, no warrant or permission prior to the search and seizure is required.

Commanders have the authority to authorize searches, seizures, and inspections for areas in which they have authority. For example, a commander has the authority to authorize an inspection in any building his/her squadron has operations out of. Additionally, a commander can authorize a search or inspection to be held in the dormitory that his/her personnel reside. To inspect the living quarters of personnel, a health and welfare inspection is typically used.

Health and Welfare Inspection. A commander, first sergeant, or designated representative may inspect a dormitory room where a unit member resides for morale, health, welfare, and cleanliness under the pretense that the inspection is being performed with the intention to ascertain and ensure the readiness of personnel and equipment. This can be done without the occupant’s permission. Contraband that is discovered may be confiscated. Contraband is defined as material that the possession of is, by its very nature,

unlawful. Material may be declared to be unlawful by appropriate statute, regulation, or order. For example, if alcohol is prohibited in a dormitory, it is considered contraband. Evidence discovered in plain view is admissible for an Article 15 action or a court-martial.

There are instances when a health and welfare inspection is considered illegal. Inspections are not authorized that are used primarily to obtain evidence for use in a trial. Inspections directed immediately following a report of a specific offense in the unit, organization, dormitory, etc. that were not previously scheduled are also illegal. Additionally, inspections cannot be targeted at specific individuals who may be under investigation or suspicion of an offense. Any property seized during these illegal searches/inspections cannot be used for an Article 15 or court-martial. However, all evidence found can be used for administrative purposes, e.g., reprimands, control roster, drug rehabilitation, etc.

Consent Search. A search of a person or property may be conducted with consent of the person or occupant of the place to be searched. The occupant has the right to refuse consent and may limit the scope of consent or withdraw it at any time. If there are at least two occupants of a room, a single occupant can consent to a search of his or her part of the room and the common areas of the room. A consent search may be illegal if consent is not freely and voluntarily given.

There is a difference between voluntary consent and acquiescence to an authority figure. The former is legal; the latter is illegal. Acquiescence can be demonstrated by the following examples:

- After smelling marijuana, the commander knocks on the dormitory door. When the occupant opens the door, the commander declares that he wants to search the room. If the occupant steps back, remains silent, and waves in the commander, this is acquiescence.
- A 1st Lt asks the occupant for permission to search, and the occupant asks, "What if I refuse?" If the lieutenant says, "We will just get a search warrant," or a similar statement showing no free choice of the occupant, and the occupant then submits.

To get effective consent, the individual requesting to search a room should say something like, "I request your permission to search your room." The occupant's consent, if given, can be verbal or written, although the latter is preferred. If consent is verbally given, ensure the conversation is heard by an independent witness, not only the occupant's roommate or friend. Do not accept an ambiguous reply like a shrugging of the shoulders, a waving of the hand, or "Uh-huh." In such cases, seek clarification. It is best for consent to be obtained in writing.

Probable Cause Search. Probable cause to search exists when there is a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched. A probable cause search is authorized by either a commander, military judge, or magistrate.

Investigations and Inquiries

Investigations into matters are an essential piece in the due process of military law and in maintaining good order and discipline. Before commanders or other officials can make any decisions, all of the facts must be presented and evaluated. There are various means to investigate matters depending on the nature of the allegations and severity, but before any investigation begins, it is best to contact the Staff Judge Advocate (SJA) for legal advice regarding the situation.

In some instances, commanders have the authority to investigate matters within their command. These investigations are implemented by a commander and are called Commander Directed Investigations (CDI). A CDI should be utilized when another investigative channel does not exist or is less suitable. A CDI can be used to investigate such matters as a violation of a standard of conduct, such as a member violating a standard set in an Air Force Instruction (AFI), or abuse of authority within an organization.

In other instances, the matter being investigated needs to be elevated to a higher level and a CDI is not an appropriate means of investigation. When an issue is discovered that is usually dealt with by an otherwise established grievance or appeals channel, such as the Inspector General (IG) or the Office of Special Investigations (OSI), that office is responsible for investigating the issue. For example, in matters of reprisal or restriction a CDI is never appropriate and the IG is the delegated investigating authority. Also, in all matters where sexual assault or domestic abuse are being investigated, the OSI is the lead investigating agency.

Some matters can be investigated using a CDI or an investigation by another agency. When these instances that are in the “gray area” occur, it is always best to air on the side of caution and contact the SJA or other appropriate agency prior to beginning an investigation. For example, when investigating UCMJ offenses, SJA should be contacted to determine if the investigation should be handled at the Commander’s level or higher. Law enforcement will typically investigate serious offenses for which the punishment is likely to be non-judicial punishment (NJP) or court-martial but for less serious offenses a CDI may be appropriate. For allegations of discrimination based on color, national origin, race, ethnic group, religion or sex, including sexual harassment, the issue should be brought to the attention of the Equal Opportunity (EO) office prior to deciding who the investigating authority is and in some cases, the EO office will lead the investigation.

For additional information on the roles and responsibilities of the IG and investigations, please refer to AFI 90-301.

Understanding Your Responsibilities in Military Justice

The military justice system is one tool used to maintain good order and discipline. In meeting your responsibilities as an officer, you may have the opportunity to take certain actions either administratively or under the UCMJ. Officers have a general responsibility to give their full support to the UCMJ when a breach in discipline occurs. The following are some specific responsibilities that you have as an officer:

- Support your commander in the application of the military justice system.
- Become involved when breaches of discipline occur in your presence and report all such violations to the proper authorities.
- Be prepared to investigate incidents when ordered to do so. (This means you should be familiar with the rules of evidence and resources available to assist you in conducting the investigation)
- Familiarize yourself with the rules in the UCMJ for apprehending, arresting, and confining violators of the code.
- Be prepared to counsel Airmen on their legal rights under the UCMJ, or refer them to proper legal authorities for guidance.
- Provide leadership and counseling to obtain the maximum positive behavior change in the individual receiving non-judicial punishment.
- Be prepared to recommend disciplinary courses of action under the UCMJ.

The primary purpose of military law is to enforce discipline, which can be defined in the military sense as “an attitude that encourages everyone to work voluntarily and enthusiastically toward organizational goals.” Officers should do everything within their power to uphold good order and discipline and prevent breaches in discipline. If all efforts at prevention fail, the next most reasonable step is correction through expressions of disapproval, verbal reprimands, or remedial training.

Commanders can choose an escalated response to discipline within a unit. A variety of administrative tools are available to identify deficiencies to Airman and hopefully rehabilitate them, without using punishment. An Article 15, or non-judicial punishment, is also a rehabilitative tool, but carries consequences such as reduction in rank, money or restriction to base. Judicial action (summary, special, or general court-martial) is used as a last resort to punish those who repeatedly or seriously violate the standards of conduct required in military life. The readiness and strength of each organization largely depends on how you accept your responsibility and use your authority in relation to the military justice system to maintain discipline. If you don’t become an active member in supporting the military justice system, the system, as well as the capabilities of the organization to perform its mission, will suffer.

MAINTAINING DISCIPLINE

The main purpose of military law is to enforce discipline. Discipline, in the military sense, does not simply imply punishment for wrongdoing. It’s a broad concept that implies a state of mind, or an attitude that prompts people to work eagerly and voluntarily to accomplish organizational goals. This kind of self-motivated discipline is essential to the effectiveness and efficiency of the Air Force. For this reason, Air Force

leaders are vitally concerned with maintaining a work environment characterized by good order and discipline. When people do not comply with expected standards, however, there are three broad methods of helping commanders maintain discipline: *administrative tools, non-judicial punishment, and judicial actions*.

Sometimes, when a service member's behavior is disruptive, or performance is unacceptable, discipline is required. Simply defined, discipline is "management action to encourage compliance with organizational standards." It's a type of training that strives to correct and mold personal knowledge, attitudes, and behavior so that workers exert themselves willingly for better cooperation and performance.

Undoubtedly, the way of maintaining discipline is through prevention. It represents all the essential qualities of good leadership because it places primary emphasis on eliciting the highest performance from each person. Unfortunately, there will occasionally be an individual who violates a regulation in spite of sound leadership practices.

Preventive discipline is action taken to encourage members to follow standards and regulations to prevent infractions. The overall objective is to encourage self-discipline rather than having discipline imposed by superiors. Preventive discipline communicates standards to personnel and encourages members to adhere to them. The intent is to explain the reasons behind standards and to build a positive spirit of self-discipline. In addition, it encourages members' participation in setting standards. Members will be more supportive of standards stated positively instead of negatively, such as "safety first!" rather than "don't be careless!" Members usually want to know the reasons behind a rule so it'll make more sense to them.

Recognizing Individual Differences

It's particularly important that an officer knows and appreciates the fact that in all walks of life, including the Air Force, individual differences in personality and ability must be considered. The Manual for Courts-Martial (MCM) recognizes these individual differences by requiring commanders to evaluate each offense on an individual basis. It prohibits policies where certain categories of offenses must be disposed of by an Article 15, regardless of the circumstances. It also prohibits the establishment of predetermined punishments for certain classifications of offenses. Preventive discipline must take into account human variations in personality and behavior.

Outstanding performance must be recognized and commended. This means establishing high standards, measuring performance against these standards, and rewarding those personnel who measure up. The reverse is also true. A leader must have explicit standards, reliable measurements of performance, and a procedure for taking remedial action against those personnel who refuse to measure up. The establishment of these standards should recognize individual differences.

Administrative Tools

Administrative tools are available to a commander to discipline members for various rule infractions. These tools help a commander discourage further infractions and to ensure that further acts are in compliance with standards.

An Airman's immediate supervisor usually initiates administrative tools, but some actions may require action and/or approval by the commander. There are three objectives of taking administrative action:

- To reform the offender
- To deter others from similar actions
- To maintain consistent, effective group standards

Administrative tools have a positive impact. They are educational and corrective, rather than a negative retaliation at personnel who have done wrong (though some do carry career impacting consequences). A negative, punishing approach introduces undesirable side effects such as apathy and fear of the supervisor. The goal of discipline is to improve the future rather than punish for the past.

This approach is exemplified by an anecdote told by General C. Kenny. The event took place in the summer of 1942.

General Kenny, then Commanding General of the Fourth Air Force, headquartered in San Francisco, had before him a young officer who had been reported to the general because of certain misconduct. This blond youngster, hardly out of his teens, was a fighter pilot. He'd been reported for looping the Golden Gate Bridge in a P-38, then flying so low through San Francisco that people in office buildings had to look down to see the buzzing airplane. Then he hedgehopped across some clotheslines and the prop wash blew a housewife's washing from the clothesline. The investigating officer recommended trial by general court-martial.

General Kenny sized up the culprit and decided on a disciplinary method other than punishment. He tried correction. He gave the young pilot a verbal dressing down and then sent him to help the housewife wash her laundry. In that instance, corrective action paid off dramatically; the pilot went to combat in the Pacific and gained Air Force immortality as the leading ace in World War II. His name? Richard I. Bong.

The measure that General Kenny used as correction could be identified as admonition, or reprimand. It's one of the best administrative tools one can apply. Administrative tools emphasize a corrective way of dealing with discipline problems versus taking punitive action.

There are a variety of administrative tools available, but this lesson will focus on *unfavorable information files (UIF), control rosters, counseling, admonitions, and reprimands*.

Unfavorable Information Files (UIFs)

The UIF is an official record of unfavorable information concerning an Air Force member's personal conduct and duty performance. It documents administrative, judicial, or nonjudicial censures concerning the member's performance, responsibility, behavior, and so on. What documents go in a UIF depends on the rank of the offender (officer versus enlisted), what action was taken (court versus non-judicial punishment), and the punishment that was given (duration of punishment administered in an Article 15). Some items are required to be included while others are optional and the commander's discretion for filing in the UIF. Documents such as an Article 15 under the UCMJ, a record of conviction from a court-martial, or a letter of reprimand (LOR), are some of the documents that are required to be filed in a UIF. When a document is filed into the UIF, the member must be informed and allowed a chance to respond.

Responsibilities. In the UIF process, different personnel fill various roles. The following paragraphs will explain the duties of certain personnel in the UIF process.

Commanders. Commanders at all levels may take action to establish, remove, or destroy UIFs for all personnel within their jurisdiction. It's important that commanders guard against referring trivial unfavorable information for file in the UIF. Depending on the nature of the document and the document's disposition dates, a file can be held in the UIF anywhere from 6 months to 4 years.

Supervisors. Commanders may refer documents written by the supervisor for filing in the UIF. Letters of counseling (LOC), letters of admonishment (LOA), and letters of reprimand (LOR) are types of documents that will be or may be referred by the commander to be filed in the UIF. As a supervisor, it is your responsibility to correctly document a subordinate's unacceptable performance, as it may be filed in a UIF. You must also remember to keep your commander informed of unfavorable incidents or behavior problems involving members under your supervision, especially those who already have UIFs.

UIF Monitor. The Military Personnel Section (MPS) will appoint an individual to act as the base UIF monitor. Individual units will appoint a unit UIF monitor as well. UIF monitors are responsible for the overall maintenance and disposition of UIF, both hardcopy and electronically, whatever is used in that location.

Additionally, the UIF monitor will ensure only authorized personnel view UIFs. Commanders and first sergeants may access the files of the personnel in their jurisdiction at any time: commanders can access all members' files, first sergeants can only access those of enlisted members. OPR and EPR rating officials, when preparing to write or endorse a performance report, may view a UIF as well.

For more information on the UIF process, refer to AFI 36-2907 *Unfavorable Information File (UIF) Program*.

Control Roster

Like UIFs, control rosters are an important management tool to foster rehabilitation of personnel. Commanders may use the control roster to set up an observation period for individuals whose duty performance is substandard or who fail to meet or maintain Air Force standards of conduct, bearing, and integrity, on- or off-duty. A control roster is a physical list with the names of personnel who are under this observation status; this list assists commanders and supervisors in controlling and managing such members. When considering if placement on a control roster is proper or necessary, consideration should be given to prior incidents, acts, failures, counseling, and rehabilitative efforts.

Control rosters give members the chance to improve in their deficient area during a specific time period. Commanders must ensure members on the control roster understand that they expect improvement during the observation period. Placement on the control roster isn't a punishment, but it does affect the individual in certain personnel programs. For example, as long as members are on a control roster, they're ineligible for reenlistment, promotion, or permanent change of station (PCS) reassignment (except for a mandatory move).

Commanders may take action to place, continue, or remove personnel on the control roster; however, they should never use the control roster when administrative, personnel, judicial, or non-judicial action is more appropriate. The commander may have an individual removed from the control roster before the end of the observation period. The commander should do this when retention on the roster no longer serves a useful management purpose, or if the commander determines the control roster action was based on false information.

The commander has most of the responsibility in the control roster process, but you, as a supervisor, play a vital role. As an individual's supervisor, you're in the best position to effectively monitor and evaluate the member's performance and conduct during the observation period. In your day-to-day contact with the individual, you should note any improvement or deterioration in performance to warrant either the removal or continuation of the control roster.

For more information on the control roster process, refer to AFI 36-2907 *Unfavorable Information File (UIF) Program*.

Counseling, Admonitions, and Reprimands

Oral and written counselings, and written reprimands and admonitions, are management tools that commanders and supervisors use to take corrective action on subordinates. An oral or written counseling is usually the first step in attempting to correct an individual's behavior. It calls attention to the deficiency and gives the individual an attempt to correct the behavior without severe consequences. An administrative admonition carries a stronger degree of censure than a counseling. An administrative reprimand is similar to an admonition, but it carries a more serious degree of severity.

Commanders and supervisors at all levels have the responsibility to ensure subordinates maintain Air Force standards. You should bring any deviations from these standards to the attention of the individual concerned. Usually commanders will use a graduated approach and only after taking lesser actions, such as counseling, to correct a problem, will they use the more formal admonitions or reprimands. However, depending on the infraction, a reprimand may certainly be an appropriate first step. Authority for using counselings, admonitions, and reprimands is inherent, and comes from the responsibilities of commanders and supervisors to correct subordinates' behavior.

While they can be done orally, counselings, admonitions, and reprimands should usually be written to document the corrective action. As a supervisor, if you issue a letter of counseling (LOC), letter of admonishment (LOA), or letter of reprimand (LOR), you may elect to send it to the unit commander for information or conversely, keep it private and wait to see if the member improves or continues his/her substandard performance. The unit commander may decide to keep a document for future reference or have the document entered into a member's UIF. A recommendation concerning the disposition of the letter may be included in the letter. You should always retain a copy of the LOC, LOA, or LOR, and send copies to other superiors of the individual as you see appropriate.

If the unit commander intends to place a written admonition or reprimand in a person's UIF, the commander must notify the member in writing of this action. The individual has the option of providing the commander with any comments or documents for reconsideration of the proposed UIF action. Also, the individual must acknowledge, in writing, that notification was made.

Counselings, administrative admonitions, and reprimands are not punitive in nature. You shouldn't confuse these with punitive reprimands that may result from court-martial convictions or acceptance of non-judicial punishment under Article 15, UCMJ.

Written letters of counseling, admonition, and reprimand can be used as evidence in punitive actions, and therefore, must be written correctly and follow certain requirements. Failure to follow the requirements for drafting and maintaining these documents could limit the use of the documents in a subsequent proceeding.

The following are requirements for drafting and maintaining a letter of counseling (LOC), letter of admonishment (LOA), or letter of reprimand (LOR):

Drafting the Letter—LOCs, LOAs, and LORs must state the following:

- What the member did or failed to do, citing specific incidents and their dates.
- What improvement is expected.
- That further deviation may result in more severe action.
- That the member has three duty days to respond and provide rebuttal matters.
- That all supporting documents become part of the record.

- That the person who initiates the LOC, LOA, or LOR has three duty days to advise the individual of their decision regarding any comments submitted by the individual

Privacy Act Requirements: Written counselings, admonitions, and reprimands are subject to the rules of access, protection, and disclosure outlined in AFI 33-332, Air Force Privacy Act Program. Therefore, all LOCs, LOAs, and LORs must contain a paragraph outlining the applicability of the Privacy Act to the document. Copies held by supervisors, commanders, and those filed in a member's UIF or personnel information file (PIF) are subject to the same Privacy Act rules.

Procedures: A person intending to issue an LOC, LOA, or LOR should:

- Investigate to determine the infraction occurred.
- Draft the letter according to the requirements of AFI 36-2907 as set forth above.
- Read the individual the letter and have the member immediately acknowledge receipt on the original letter by filling in the date received and signing.
- If the member refuses to acknowledge receipt, the person who issued the letter should write on the original letter beneath the member's signature block in the acknowledgement section, "<<Rank and Name of Member>> refused to acknowledge receipt."
- Give the member a copy of the letter.
- After three duty days from the date the letter was issued, have the member indicate in an indorsement (example in attachment at end of this section) of the original letter whether or not the member is submitting a response to the letter. Have the member fill in the date of the indorsement, strike through the inapplicable language in parentheses, and sign the indorsement.
- Attach any matters the member submits in response to the original letter.
- If the member refuses to complete or sign the indorsement, the person who issued the letter should write on the original letter beneath the member's signature block, "<<Rank and Name of Member>> failed to provide matters in response to this letter within three duty days (or 30 days for reservists not serving on extended active duty) and refused to complete the 1st Ind," along with the issuer's signature block, signature, and the date.
- If the member submits a response, advise the member within three duty days of the submission of the response of the final decision concerning information submitted by the member in an indorsement (example in attachment at end of this section). See AFI 36-2907, para 3.5.1.6, concerning this requirement. If using an indorsement similar to that in the attachment, the issuer of the letter should fill in the date of the indorsement, strike through the inapplicable language in parentheses, and sign the indorsement.

- Inform the member's chain of command of the letter. If appropriate or requested, send the letter with all indorsements, and any documents submitted by the member to the member's superiors or commander for information, action, or approval for entry in the member's PIF, UIF, or both.

A sample template of a letter of counseling or letter of reprimand is at the end of this reader.

Non-Judicial Punishment

What is non-judicial punishment? One of the definitions Webster gives for the word "judicial" is "of or pertaining to courts of justice." On the basis of this definition, we can conclude that non-judicial punishment is punishment not imposed by a court of justice. In the armed forces, Article 15 of the UCMJ authorizes commanders to impose punishment for minor offenses upon military members under their command. In the Air Force, this means any Air Force member from Airman Basic to General can be punished under the provisions of this article.

Purpose and Implications. Article 15 of the UCMJ gives commanders a tool for maintaining morale, discipline, and efficiency within their units. Article 15 gives commanders the flexibility to punish military members for offenses not serious enough to warrant the stigma attached to a court-martial conviction, but more serious than a letter of counseling, admonishment, or reprimand. Commanders should use Article 15 punishment to correct or rehabilitate offenders. Commanders must also take into account what other disciplinary actions have been considered. They should also ensure that other corrective actions have already been taken, if appropriate, and were proven ineffective as a means of rehabilitation.

Although Article 15 punishment is imposed by the commander, it can be recommended by other officers or NCOs. Action under Article 15 of the UCMJ is a serious matter with critical and lasting effects on military members and their careers. For this reason, caution should be used when making recommendations, ensuring that less severe corrective actions have been exhausted first.

Minor Offense. A key word in Article 15 is that the offense must be "minor," but the term "minor" can be misleading. A minor offense depends on multiple factors including the offender's age, rank, record, duty assignment, and experience. Ordinarily, a minor offense is an offense for which the maximum sentence imposable would not include dishonorable discharge or confinement for longer than 1 year.

Punishments Under Article 15. Under Article 15 of the UCMJ, if a military member is found guilty of an offense, the commander has the authority to administer such nonjudicial punishment actions as reduction in grade, forfeiture of pay, restriction to base, extra duty, or other punishment. The amount of punishment has limitations based upon the rank of both the commander and the offender. These non-judicial tools under Article 15 are an important corrective action which maintains effective and efficient good order and discipline within an organization.

Procedures. Imposing non-judicial punishment is simple and direct. The commander initially collects evidence, reviews the offender's unfavorable information file (UIF), if applicable, and personnel records, and consults with the base staff judge advocate (SJA). The SJA provides advice and guidance on the drafting of the allegations of misconduct, adequacy of the evidence in support of the action, and amount of punishment being imposed in similar cases. The SJA also assists in preparing the initial notification to the offender. This notification serves to inform members of their basic rights. Members are advised that the decision to accept non-judicial punishment is a serious matter that may adversely affect their careers. Although it won't create a court conviction record or go into a member's criminal record, it will remain a part of his/her permanent military records and may affect future opportunities for training, assignments, and promotions.

A member has certain rights when being offered an Article 15. The member has the right to demand a trial by court-martial in lieu of accepting the Article 15. Additionally, it is important for military members of all ranks to know of their right to consult the Area Defense Counsel (ADC) for legal advice prior to accepting nonjudicial punishment or demanding trial by court-martial.

Judicial Punishment

As mentioned earlier, the term "judicial" is "of or pertaining to the courts of justice." When we speak of judicial punishment, we mean punishment determined by a court-martial. There are three types of courts-martial: *summary, special, and general*.

Summary Court-Martial. A summary court-martial (SCM) tries minor offenses. In conducting the trial, the summary court-martial acts promptly. It normally consists of one officer who develops the evidence for both the accused and the government, finds the accused guilty or not guilty, and imposes sentence on the guilty. Air Force policy dictates provision of counsel to the accused, if requested. Like an Article 15, an accused can refuse to be tried by a summary court-martial and demand a trial before a special court-martial. If found guilty, however, the accused must bear the burden of a federal conviction and much higher punishment possibilities. Article 20, UCMJ, and paragraph 16b of the MCM expressly limit the summary court's power to punish offenders. The summary court-martial is for enlisted members only.

Special Court-Martial. A special court-martial (SPCM) normally tries offenses of intermediate severity. It usually consists of a military judge and panel of not less than three court members. (Enlisted accused may request that one-third of the panel consist of enlisted members.) The proceedings also include a military judge, trial counsel (prosecutor), defense counsel, the accused, and a court reporter to record the proceedings. The accused may make an oral or written request for trial by military judge alone and, if approved by the military judge, the court-members are excused. The military judge presides over the trial, instructing the court-members on the law, and ruling on motions and objections by the counsel. Air Force policy provides for a military judge on every special court-martial.

General Court-Martial. A general court-martial (GCM) tries the most serious offenses and is convened by a Numbered Air Force commander (or equivalent). Cases can't be referred for trial by general court-martial without a thorough investigation pursuant to Article 32 of the UCMJ, which is similar to a grand jury hearing but with greater rights for the accused. The general court-martial is composed of a military judge and not less than a five-member panel, which may include at least one-third enlisted members at the request of an enlisted accused. It also includes a military judge, trial counsel, defense counsel, the accused, and a court reporter. The accused may request trial by military judge alone, by oral or written application, except in a capital case. The maximum authorized punishment this court-martial may impose is limited only by the maximum allowable for the offenses under consideration. It may extend to death.

MILITARY LEGAL SUPPORT

Air Force bases have two servicing legal counsels to provide legal assistance to Air Force personnel: the Staff Judge Advocate (SJA) and Area Defense Counsel (ADC). Both the SJA and ADC are comprised of licensed attorneys, who are commissioned officers, and trained paralegals. The difference between the two offices is with who the two offices represent. The SJA is the commander's legal staff who represents the Air Force in all legal matters ranging from courts-martial to government procurement and environmental issues. The SJA also provides legal assistance to the military members at that base in areas such as wills, powers of attorneys, and civil matters, to name a few. The opposing counsel is the Area Defense Counsel (ADC), who represents all active duty Air Force personnel in criminal defense matters. The ADC's office and chain of command are separate from those of the Staff Judge Advocate, to avoid even the slightest perception that the commander or the Staff Judge Advocate could influence how the counsel represented their clients. Let's take a closer look at the roles and responsibilities of these two offices:

Staff Judge Advocate (SJA)

The Staff Judge Advocate (SJA) is the commander's lawyer at each Air Force base and runs the installation legal office. Most legal offices are divided into the following areas of responsibility:

Military Justice. This section prosecutes all courts-martial, gives legal advice to police investigators and commanders concerning criminal investigations, advises and assists the unit commanders with Article 15s and other administrative disciplinary actions, and reviews all of these procedures for completeness and legal sufficiency.

Claims. This section settles claims filed against the Government for such things as damage to household goods during PCS moves, damage to private property caused by the Air Force (such as damages caused by aircraft accidents), and medical malpractice. This office also files claims on behalf of the government against those who injure military members or their dependents (in order to recover hospital costs incurred by the Government) or who damage or destroy Government property.

Civil Law. This section provides notary service, wills and powers of attorneys, and provides legal assistance to all military members and their dependents, free of charge. This section also conducts legal reviews for commanders, ranging from government contracts and fiscal issues to environmental law issues. Most civil law sections conduct administrative discharge boards. Attorneys from the civil law section also spend a great deal of time on preventive law issues. During tax season, the civil law section helps military members fill out and file their tax returns. This is one busy section of the legal office!

Area Defense Counsel (ADC)

The Area Defense Counsel program was created in 1974 to “improve the credibility of the military justice system by removing any appearance that military defense counsels are constrained professionally because they’re assigned to the command of the convening authority.” Each Area Defense Counsel (ADC) office is a tenant unit on the installation and its chain of command runs through a Chief Circuit Defense Counsel to the Chief of Defense Services in Washington, D.C. Each Area Defense Counsel is selected by the Judge Advocate General, based on his/her legal experience and courtroom skills. The ADC provides legal advice and representation to military members under the following circumstances:

Criminal Investigation. When a military member becomes the subject of a criminal investigation and is called in for interrogation, he or she has the right to speak to a lawyer. The ADC will advise suspects of their rights and what actions they might take.

Letters of Reprimand. When a military member receives a letter of reprimand (LOR), the ADC can assist in preparing a response to the reprimand. Sometimes it can help the situation if the ADC talks to the commander on behalf of the member.

Article 15. The ADC will review the evidence and advise the member whether to accept the Article 15 or demand a trial by court-martial. The ADC can assist the member in preparing a presentation for the commander, including gathering statements from witnesses and helping write a statement from the member.

Administrative Demotions and Separations. The ADC will help prepare a response and presentation for a member facing an administrative separation or demotion. If the member is entitled to a board, the ADC will represent the member before the board.

Courts-Martial. The ADC will represent the accused before all courts-martial. They will investigate the charges, review the evidence and interview witnesses, and then prepare the defense that will be presented at trial. They will advise the accused of their rights and help them in making important decisions, such as whether to plead guilty or not guilty, and whether they should testify at trial.

“I sometimes wish that people would put a little more emphasis upon the observance of the law than they do upon its enforcement.”

—Calvin Coolidge

Bibliography:

1. AFI 36-2907. *Unfavorable Information File (UIF) Program*, 26 November 2014.
2. AFP 36-2241, Vol 1. *Promotion Fitness Examination*, 1 Jul 03. (old version intentionally used)
3. *Manual for Courts-Martial*, United States Government Printing Office, 2012.
4. *The Military Commander and the Law*, 2014.



**DEPARTMENT OF THE AIR FORCE
AIR UNIVERSITY (AETC)**

DATE

MEMORANDUM FOR INDIVIDUAL'S RANK NAME

FROM: OFFICE SYMBOL OR RANK NAME

SUBJECT: Letter of Counseling/Reprimand

1. An investigation has disclosed that you, (insert misconduct). Your conduct violated the Uniform Code of Military Justice, Articles xx and xx
2. Explain the misconduct. Use separate paragraphs for different misconduct.
3. You are hereby counseled/reprimanded! Insert counseling/reprimand language. The language should be tailored to the individual and the act.
4. The following information required by the Privacy Act is provided for your information. **AUTHORITY:** 10 U.S.C. 8013. **PURPOSE:** To obtain comments or documents you desire to submit (on a voluntary basis) for consideration concerning this action. **ROUTINE USES:** Provides you an opportunity to submit comments or documents for consideration. If provided, the comments and documents you submit become part of this action. **DISCLOSURE:** Your written acknowledgement of receipt and signature are mandatory. Any other comments or documents you provide are voluntary.
5. You will acknowledge receipt of this letter immediately by signing below. Any comments or documents you wish to be considered concerning this Letter of Counseling/Reprimand must be submitted to me within three (3) duty days from receipt of this letter. Any requests for additional time must be approved by me prior to the due date/time for your response.

YOUR NAME, Rank, USAF
Duty Title

1st Ind, RANK NAME

Date:

ACKNOWLEDGEMENT

Receipt of this letter acknowledged on _____ at _____ hours. I have reviewed the allegations contained in this Letter of Counseling/Reprimand. I understand

PRIVACY ACT: Privacy Act of 1974 as Amended may apply. This communication could contain information protected IAW DoD 5400.11R, For Official Use Only (FOUO)

that I have three (3) duty days from receipt of this letter to provide a response, and that I must include in my response any comments or documents I wish to be considered concerning this letter. I understand that this Letter of Counseling/Reprimand, if upheld, will be included in my Personal Information File (PIF) and/or my Unfavorable Information File (UIF). I understand that I may consult the Area Defense Counsel in this matter.

NAME, Rank, USAF
Duty Title

2nd Ind, RANK/NAME

Date: _____

I have reviewed the allegation(s) contained in this letter.

____ (initial) I am submitting the attached documents in response.

____ (initial) I hereby waive my right to respond.

NAME, Rank, USAF
Duty Title

3rd Ind, OFFICE SYMBOL or RANK NAME

____ (initial) The member did not submit matters in response. My decision stands and (will) (will not) be filed in the member's (PIF) (UIF).

____ (initial) The member submitted matters in response. I have reviewed the response. My final decision is: this letter stands as written and (will) (will not) be filed in the member's (PIF) (UIF).

____ (initial) The member submitted matters in response. I have reviewed the response. My final decision is: this letter is withdrawn.

YOUR NAME, Rank, USAF
Duty Title

PRIVACY ACT: Privacy Act of 1974 as Amended may apply. This communication could contain information protected IAW DoD 5400.11R,
For Official Use Only (FOUO)

4th Ind, RANK/NAME

ACKNOWLEDGMENT

Final action acknowledged on _____ at _____ hours.

NAME, Rank, USAF
Duty Title

PRIVACY ACT: Privacy Act of 1974 as Amended may apply. This communication could contain information protected IAW DoD 5400.11R,
For Official Use Only (FOUO)