

UNITED STATES MARINE CORPS
Marine Corps University
Corporals Noncommissioned Officers Program

CPL 0105
Jan 99

STUDENT HANDOUT

Military Justice

LEARNING OBJECTIVES:

a. TERMINAL LEARNING OBJECTIVES:

(1) Given a suspect apprehension situation and with the aid of references, apprehend the suspect, per the references. (CPL 1.1)

(2) Given a lawful inspection situation and with the aid of references, conduct an inspection per the references. (CPL 1.2)

(3) Given a chain of custody situation and with the aid of references, maintain the chain of custody for evidence per the references. (CPL 1.3)

b. ENABLING LEARNING OBJECTIVES (CE). Without the aid of but per the references, identify the following:

(1) Definition of matters relating to lawful searches. (CPL 1.2a)

(2) Procedures for apprehension of a suspect. (CPL 1.1a)

(3) Characteristics of the lawful types of searches. (CPL 1.2b)

(4) Legal objects of a search. (CPL 1.2c)

(5) Definition of legal inspections and inventories. (CPL 1.2d)

(6) Property/evidence subject to a lawful seizure. (CPL 1.2e)

(7) Steps for preserving and safeguarding evidence. (CPL 1.3a)

OUTLINE

1. GENERAL:

a. The Fourth Amendment to the U.S. Constitution, adopted in 1791, safeguards the individual's right to privacy by stating that:

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.

b. How the Fourth Amendment is to be applied today is constantly being reexamined by cases in both civilian and military courts. From those cases, the Military Rules of Evidence (MRE) (Part III, Manual for Court Martials [MCM]) are derived. The MRE provide a codification of the rules governing us when we execute a search or seizure.

2. DEFINITIONS OF MATTERS RELATING TO LAWFUL SEARCHES:

a. Search: This is an examination of property or a person, for the purpose of discovering contraband, illicit or stolen property, or some other evidence to be used in the event a court martial or other legal proceeding becomes necessary. Simply stated, a search is a quest whose principle purpose is to obtain incriminating evidence. The different types of searches will be discussed later in this lesson.

b. Probable Cause: As it applies to searches, this means there is a reasonable belief that a crime has been committed, and items connected with the crime, or evidence of the crime, are located on a certain person or in a certain place. Probable cause must be based either on personal prior knowledge (rarely does the C.O. have personal knowledge of a crime) or on information provided under oath or affirmation. With only a few exceptions which will be discussed later, probable cause must exist before a lawful search can be conducted.

c. Seizure: Seizure is defined as: "The taking or dispossession by an authorized person, of property or evidence which is reasonably believed to be an unlawful weapon, contraband, evidence of a crime, or which might be used to resist apprehension or to escape." This can also be an apprehension of a person. As a general rule, if a person is "authorized" to be where they are when they find evidence, including during an authorized search, then they are authorized to seize the evidence.

d. Exclusionary Rule: MRE 311 states that evidence obtained as a result of an unlawful search or seizure made by a person acting in a governmental capacity is inadmissible in a trial by court martial. For example, the Company Gunnery Sergeant conducts an illegal search of a Marine's wall locker and discovers marijuana. The marijuana seized could not be used as evidence in a trial because it was seized as a result of an unlawful search.

e. "Fruits of the Poison Tree:" The "Poisonous Tree" doctrine carries the exclusionary rule one step farther by making inadmissible any evidence which is discovered as a result of an earlier unlawful search or seizure. Take for example the case described above. After seizing the marijuana, the Company Gunnery Sergeant, under oath, reports the drugs he found to the C.O. and gets authorization for a probable cause urinalysis, and the Marine pops positive on the urinalysis for marijuana and cocaine. Since the evidence which led to the discovery of the marijuana and cocaine in the Marine's urine, the marijuana in the wall locker, was illegally seized, the marijuana and cocaine discovered in the urine is inadmissible (although the command could

use the results as a basis for administrative separation). In this example, the illegally obtained evidence at the "root" of the case, "poisoned" all the "fruits" of that evidentiary "tree."

f. Authorization to Search: An "authorization to search" is an express permission, written or oral, issued by a Commanding Officer (and some detached OICs) to search a specified person or area for specified evidence or a specific person and to seize such evidence or person.

g. Search Warrant: A search warrant is an express permission to search and seize issued by competent civilian authority. Although a search warrant may be issued based upon probable cause supplied by military authorities, search warrants are requested and executed by civilian law enforcement authorities.

h. Apprehension: This is the taking of a person into custody. It is the civilian equivalent of "arrest." An apprehension is not required in every case. It is different from detention of a person for investigative purposes and thus does not necessarily require applying physical restraints such as handcuffs.

3. PROCEDURES FOR APPREHENSION OF A SUSPECT:

a. Who May Apprehend: Any commissioned or warrant officer, noncommissioned officer, and military law enforcement official, in the performance of their duties, may apprehend persons subject to military jurisdiction.

b. Grounds for Apprehension: Probable cause to apprehend exists when there are reasonable grounds to believe that an offense has been or is being committed and the person to be apprehended committed or is committing it. These offenses include quarrels, frays, disorders, and other violations of the UCMJ.

EXAMPLE: During the course of his rounds during liberty hours, a DNCO notices the smell of marijuana coming from someone's room. He tells his ADNCO to call the OD (or MP's). He then enters the room and apprehends the Marines in the room. This apprehension places a moral restriction on the detainees and prevents them from leaving. If the DNCO did not apprehend the Marines, they would be under no obligation to remain within the confines of the room.

c. Procedures:

(1) Halt the Suspect: Halt the suspect by the use of verbal commands or of force. If force is required, only the minimum force necessary to control or restrain an individual will be used. While the use of reasonable physical force may be necessary in situations which cannot be otherwise controlled, force may not be resorted to unless other reasonable alternatives have been exhausted or would clearly be ineffective under the particular circumstances.

(2) Inform the Suspect: Inform the suspect of the reason for apprehension. This must be very plain and clear for example "Marine you are being apprehended for pulling the fire alarm" or "PFC you are being apprehended for assault."

(3) Advise the Suspect of Their Rights: Advise the suspect of their rights under Article 31 UCMJ (Appendix A). Once again these sound like simple steps to follow; however, when you are on duty at 0330 and you need to recall this information, there may not be time to go look it up.

(a) First, identify yourself, Cpl Smith ADNCO etc.

(b) Second, state the reason you are reading their rights to them, just like you did in step (2) above.

(c) Third, explain the nature of the offense. Now you can break the offense down into understandable terms. Be as specific as possible. You do not have to state the exact article of the UCMJ that they are suspected of violating.

(d) Finally, read the suspect the Article 31 warning without error. You can do this by reading from a "rights advisement card." The example of a rights advisement card which is found in Appendix A is suitable for you to cut out, laminate, and carry with you.

- * The warning: Before asking a suspect a question, he must be warned and advised of his rights as follows:
 - * You are suspected of the offense of _____.
 - * You have the right to remain silent.
 - * Any statement you make may be used against you in a trial by court-martial.
 - * You have the right to consult with a lawyer before any questioning. The lawyer may be a civilian lawyer retained by you at your own expense, a military lawyer appointed to act as your lawyer without cost to you, or both.
 - * You have the right to have such retained civilian lawyer and/or appointed military lawyer present during this interview.
 - * If you decide to answer questions now without a lawyer present, you will have the right to stop this interview at any time. You also have the right to stop answering questions at any time in order to obtain a lawyer.
- * The waiver: After the above warning has been given, ascertain whether the suspect understands his rights and will be able to freely, knowingly, and intelligently waive them. If he so understands his rights, then specifically ask him:
 - * Do you want a lawyer?
 - * Do you understand that if you should decide to answer questions you may stop at any time?
 - * Do you want to answer questions and make a statement?

NOTE: In most cases, all you have to do is give the warning since you will usually leave the questioning phase to the OD, MP's, or higher authority.

(4) Search: Search the suspect.

(a) By this time you should have the individuals attention and cooperation; however, you must maintain control of the suspect. Use only the necessary force to place the suspect in the proper search position. Normally the best positions are the kneeling, prone or standing.

- * Kneeing - Place the suspect 2-3 feet from a wall and have him place his hands against the wall so that the suspect is off balance.
- * Prone - This position is used when suspects are believed to be concealing a weapon or a dangerous object.
- * Standing - Place the suspect far from but facing a wall, and have him place his hands on the wall, again keeping them off balance.

(b) Search the following:

- | | |
|---------------------|----------------------------------|
| * Hair | * Armpits |
| * Inside legs | * Hands |
| * Medical dressings | * Bags |
| * Shoes or boots | * Walking sticks, umbrellas etc. |

NOTE: You may find it necessary to search the suspect before advising him of his rights, such as when you think that he may be armed. In such cases, you are not expected to leave yourself in danger by having to advise the suspect of his rights before you search him.

(5) Transfer the Suspect: Transfer the suspect to the appropriate authority.

4. CHARACTERISTICS OF THE LEGAL TYPES OF SEARCHES: There are several types of searches which may be used in the military. Each type has certain requirements and limitations which must be considered when deciding which type is appropriate to the situation (All types of searches are discussed in detail in MRE's 314 and 315).

a. Search Authorized by the Commanding Officer: The general rule is: A legal search requires probable cause and authorization from the commanding officer.

(1) Power to Authorize: Any commanding officer can authorize a search of people or places under his control. *This authority may not be delegated.*

(2) Basis for Authorization: This type of search must be based on probable cause. Probable cause exists when there is reasonable belief that the person or evidence sought is located in the place or on the person to be searched. The Commanding Officer ordering the search may

determine probable cause based on written or oral statements taken under oath or sworn to, or on personal knowledge of the situation. The C.O. authorizing the search must act in a neutral and detached manner when issuing a search authorization and must assume a "judicial," rather than a "police" attitude. Therefore, the C.O. authorizing the search, should never personally participate in conducting the search. In this respect a search authorization is issued in much the same manner as a civilian judge issues a search warrant.

(3) Scope of the Search: The C.O. can only authorize searches of areas when it is reasonably believed the sought after evidence will be found in that time and place. If probable cause exists, the CO has the authority to authorize a search of any person in the command, or any area under that CO's control, as long as that area or person is located on military property.

(4) Issuing the Authorization to Search: The C.O. may issue search authorization orally, but the authorization should be given in writing when possible. The authorization to search must state precisely what person or place is to be searched and the objects of the search.

(5) Conduct of the Search: Once authorized, any commissioned or warrant officer, noncommissioned officer, or member of the military police may conduct the search. The commanding officer may witness the search; however, the C.O. may not personally conduct a search that the C.O. authorized. If the person whose property is to be searched is present during the search, notification of the general substance of the search authorization should be provided, but failure to do so does not make the search unlawful.

b. Necessity Search: A necessity search may be conducted when immediate action is necessary to prevent the removal or destruction of evidence.

(1) Basis for the Search: This type of search must be based on probable cause.

(2) Search Authorization: A search warrant or search authorization is not required when there is a reasonable belief that the delay necessary to obtain search authorization would result in the removal, destruction, or concealment of the property or evidence sought.

(3) Authority to Conduct: Any commissioned or warrant officer, noncommissioned officer, or member of the military police, in the performance of military duties, may conduct a necessity search.

(4) Burden of Proof: The person conducting a necessity search must be able to clearly establish that there was probable cause to conduct the search. Additionally, it must be clearly demonstrated that there was no possible way to receive proper authorization from the commanding officer before the evidence sought was removed, destroyed, or concealed. In most cases the officer's or staff NCO's inherent authority to issue orders and "freeze" the situation/secure the area until search authorization can be obtained, will eliminate the need for this legally risky search.

c. Search Pursuant to a Warrant: Occasionally a commander may find that there is probable cause to search an area outside the jurisdiction. If the area is subject to military control, the appropriate commanding officer, contacted and given the evidence for probable cause, can authorize the search. In the case of off-base civilian property, the evidence must be brought to the attention of the civilian authorities having judicial powers over the suspected area. Upon being convinced that probable cause does exist, a civilian judge may issue a search warrant, which is then executed by civilian law enforcement authorities. Military personnel may act as observers, but may not take part in the search.

d. Consent Search: Just as Marines may waive Article 31 rights to remain silent, they may also waive rights regarding searches. A consent search is a search that is authorized by the individual being searched. Always ask for consent, even if there is another basis for the search such as the C.O.'s authorization.

(1) Basis for Search: Probable cause is not required for a consent search.

(2) Authority to Conduct: Any commissioned or warrant officer, noncommissioned officer, or member of the military police, in the performance of their military duties, may conduct a consent search.

(3) Voluntary Requirement: For a consent search to be valid, the owner of the property or the person to be searched must consent freely. Promises, threats, coercion, or inducements may not be used to get the suspect's consent. Mere acquiescence in the face of authority is not "freely given consent." For example, a "request" from a superior officer or superior enlisted man to search a locker would not be sufficient, if the accused understood that the search would be made even without consent. Therefore, even if you have another basis for the search (such as the C.O.'s authorization) ask for permission to conduct the search (being specific about what you want to search) without letting them know that you have another basis for the search. If consent is freely given, then conduct the search without letting them know you had the backup basis for the search. If consent is not given to conduct the search, then use your backup basis for the search.

EXAMPLE: If a Marine gives his consent after he knows that you have another basis for the search and if that other basis is thrown out (such as because the C.O. did not have probable cause to authorize the search), then the Marine can argue that he gave consent only because he thought that you were going to do it anyway, i.e., his consent was not freely given. Any fruits of the search can not be used as evidence. On the other hand, if he gives his consent and does not know about the backup basis for the search, the question of the legality of the backup is immaterial because you have a valid consent.

Therefore, although it is not required by law, it is strongly recommended that, before an accused gives consent, the following information should be provided:

- * The reason for the search;
- * That the Marine has a right to refuse to give consent for the search. (If the Marine refuses consent to the search, advise that, "Appropriate action will be taken.")

(4) Scope of the Consent: Consent may be limited in any way by the suspect. For example, a person may grant permission for a search of his wall locker, but refuse a personal search. He may withdraw his consent at any time, thereby requiring a search in progress to be terminated.

(5) Burden of Proof: Although the person conducting a consent search does not have to prove probable cause, he must prove that consent to search was freely given by the suspect. It is advisable to have a witness present when a suspect consents to a search. When possible, the consent should be granted in writing.

e. Search Incident to Lawful Apprehension: A person being lawfully apprehended may be searched for weapons and destructible or disposable evidence. This search should be conducted as soon as possible after the apprehension.

(1) Basis for the Search: Although this is classified as a search not requiring probable cause, the apprehension must be based on a reasonable belief that the suspect has committed or is committing an offense.

(2) Scope of the Search: The person being apprehended and the area within his immediate control may be searched. The area within a person's "immediate control" (or "wingspan") is defined as the area a person could reach to either obtain a weapon or dispose of evidence.

EXAMPLE: If you apprehend someone who is sitting in the driver's seat of a car, you could not search the trunk of the car without some other valid basis for a search.

(3) Who May Apprehend: Any commissioned or warrant officer, noncommissioned officer, and military law enforcement official, in the performance of their duties, may apprehend persons subject to military jurisdiction. Apprehensions are covered in detail in Rules for Courts-Martial (RCM) 302, MCM.

f. Searches of Government Property: The right to be free from unreasonable searches applies only to an individual's body and property in which one has a reasonable expectation to privacy. Absent special circumstances, a Marine does not have a reasonable expectation of privacy in government property issued to or used by the individual in the performance of duty. Therefore, a "search" of government property, is not an unreasonable "search" as defined by the Fourth Amendment. Generally, areas such as offices and government vehicles may be legally searched without consent or probable cause. On the other hand, wall or foot lockers in living quarters issued for the purpose of storing personal gear, are considered to be for personal use and

therefore searches of these areas may require an alternate basis to search. If in doubt about whether government property can be searched, as always, ask your legal section.

NOTE: Body views and intrusions deal with viewing the unclothed body (strip searches), visual intrusions into body cavities, and the extraction of body fluids. These are not a separate classification of searches in themselves, but may be conducted as a part of the other types of lawful searches discussed in paragraphs 4.a through 4.f of this lesson. This area is one of the most difficult areas in the military rules of evidence because the personal privacy and dignity of the individual is involved. It is beyond the scope of this lesson to discuss these procedures in detail; however, they are covered in MRE 312, MCM.

5. LEGAL OBJECTS OF A SEARCH: Keeping in mind that a "search" is a quest for incriminating evidence, only certain items may be declared as legal objects of a search. In a lawful search the objects of the search fall into one of the following categories:

a. Instruments of the Crime: These are items which were used to commit a crime, but which are not otherwise illegal to possess. Items such as a stocking mask and hunting knife used in a robbery would fall into this category.

b. Evidence of the Crime: These are items which could link the accused to the crime, but are not instruments used to commit it. Items such as blood stained clothing, muddy boots, or a gunshot wound would fall into this category.

c. Fruits of the Crime: This category includes items in the possession of the accused as a result of the crime, such as stolen jewelry or a stolen car.

d. Contraband: These are items which are illegal for the individual to possess. Examples of such things are explosives, automatic weapons, or illegal drugs. Even if these items are not related to the crime, if found legally, they can always be seized.

NOTE: In a search incident to a lawful apprehension, the accused may be searched for any items which may be used to resist arrest or aid an escape. If found, these items may be seized.

6. INSPECTIONS AND INVENTORIES: A search is a direct quest with the specific purpose of obtaining incriminating evidence to be used in criminal prosecution. Occasionally, in the course of their normal duties, military personnel may discover incriminating evidence of a crime. The most common acts which produce this type evidence are inspections and inventories. The purpose of this portion of the lesson is not to show how an inspection or inventory may be used as a substitute for a legal search but to show that evidence obtained at inspections and inventories may be considered admissible at a trial. Inspections and inventories are thoroughly discussed in MRE 313, MCM.

a. Inspections: Inspections are necessary and legitimate exercises of a commander's powers and responsibilities. They are vital to the very existence of an effective armed force. They do not infringe upon the limited reasonable expectation of privacy held by service personnel. Evidence obtained from an inspection conducted in accordance with MRE 313, MCM is admissible at a trial.

(1) Definition: An "inspection" is an examination of the whole or part of a unit, installation, vessel, aircraft, or vehicle, including an examination conducted at entrance and exit points.

(2) Purpose: An inspection is conducted to determine and to ensure the security, military fitness, or good order and discipline of the unit, installation, vessel, aircraft, or vehicle.

(3) Objectives: An inspection may include but is not limited to an examination to determine and to ensure that any or all of the following requirements are met: that the command is properly equipped; functioning properly; maintaining proper standards of readiness, sanitation, and cleanliness; and that personnel are present, fit, and ready for duty. An inspection also includes an examination to locate and confiscate unlawful weapons and other contraband.

(4) Limitations: An examination made under the following circumstances would be considered a search and not an inspection.

(a) An examination made for the primary purpose of obtaining evidence for use in a trial by court martial or in other disciplinary proceedings.

(b) If the purpose of the examination is to locate weapons or contraband and if:

- * The examination was directed immediately following a report of a specific offense in the unit and the inspection was not previously scheduled; or
- * Specific individuals are selected for examination; or
- * Certain persons examined are subjected to substantially different intrusions during the same examination.

(5) Inspection Policies: The motivation which prompts an inspection, and the manner in which it is conducted, will frequently determine whether courts view such action as an inspection or an unlawful search. Considering this, the commander should establish a standard inspection policy for a command.

(a) Publishing an Inspection Policy: By publishing an inspection policy the commander serves notice on the members of the command of the nature, purpose, scope, and frequency of inspections. While not extinguishing the right to privacy, such notice will enhance the commander's appearance of reasonableness and reduce, to a degree, the expectation of privacy.

(b) Schedule Inspections: By scheduling an inspection, even if unannounced, well in advance of its execution, the commander is insulated from an allegation that the inspection was a pretext for an unlawful search. If the commander decides to inspect only certain elements of the unit at different occasions, the schedule should specify which elements are to be inspected.

(c) Scope of the Inspection: The scope and purpose of the inspection should be determined beforehand and expressed in the inspection policy. The legitimate "targets" of an inspection could include weapons, contraband, readiness, security, maintenance of facilities and living conditions, personal appearance, and the presence and condition of individual equipment. The execution of the inspection must conform with its intended scope and purpose. For example, a "health and comfort" inspection would be unreasonable where the stated purpose was to check cleanliness of rooms and the inspecting official examined the contents of a Marine's pockets, wallet, etc.

b. Inventories:

(1) An inventory is a survey of items conducted pursuant to law, regulation, or military custom. Marine Corps regulations require that when a Marine goes UA, is hospitalized, or otherwise absent from the command for a significant period of time, personal effects must be inventoried and stored in supply for safekeeping. The courts have agreed that there are legitimate reasons for inventories in the military.

EXAMPLE: In the 1967 case of U.S. v. Kazmierczak, the court points out obvious and legitimate reasons for regulations authorizing inventory of the absentee's property saying: "Even the temporary absence of a member of the unit may require an immediate replacement. If the absent member has left private possessions in the unit, these must be removed to make room for those of the replacement. Common sense indicates the absentee's effects cannot be tossed casually into a sack and stored. Common sense also indicates that each article stored for the absentee should be listed."

(2) Unlawful weapons, contraband, or other evidence of a crime, discovered in the process of an administrative inventory, may be seized. An examination made for the primary purpose of obtaining evidence for use in a trial or other disciplinary proceeding would be considered a search and not an inventory.

EXAMPLE: While conducting an inventory of the personal effects of a Marine who has gone UA, you discover a plastic bag of leafy herbs laying in the bottom of the wall locker. This bag can be seized and tested for potential use as evidence in a trial by court martial because it was discovered incidental to an inventory required by regulation.

(3) Military courts analyze various factors in determining whether an inventory was really a search. They consider whether the person who did the inventory was looking for evidence of crime, and whether he conducted a more thorough inventory than usual. If these factors are

present, the courts will more than likely view the inventory as a disguised search and apply the rules of search and seizure in determining whether to admit the evidence in a trial.

7. PROPERTY/EVIDENCE SUBJECT TO A LAWFUL SEIZURE: In accordance with MRE 316, MCM, evidence obtained from lawful seizures is admissible at trial if the evidence was not obtained as a result of an unlawful search.

a. Probable Cause: Probable cause to seize property or evidence exists when there is a reasonable belief that the property or evidence is an unlawful weapon, contraband, evidence of crime, or might be used to resist apprehension or to escape.

b. Power to Seize: Any commissioned or warrant officer, noncommissioned officer, and when in the execution of guard or police duties, any member of the military police or individual designated to perform guard duties, may seize property.

c. Seizure of Property or Evidence:

(1) Abandoned Property: Abandoned property may be seized without probable cause and without a search warrant or search authorization. Such seizure may be made by any person.

(2) Government Property: Government property may be seized without probable cause and without a warrant or search authorization, unless the person to whom the property is issued or assigned has a reasonable expectation to privacy therein.

(3) Other Property: Property not covered in paragraphs (1)-(2) above may be seized by any person listed in subparagraph 4.e.3 if any of the following conditions are met:

- * The person is authorized to seize the property or evidence by a search warrant or a search authorization.
- * The person has probable cause to seize the property or evidence as the result of a necessity search.
- * The person, while in the course of otherwise lawful activity, observes in "plain view," in a reasonable fashion, property or evidence that there is probable cause to seize.

8. STEPS FOR PRESERVING AND SAFEGUARDING EVIDENCE: For seized property or evidence to hold up in a trial, the prosecution has to prove that the items introduced in court are the same ones which were seized in the first place. This means that positive control must be maintained on the seized items all the way from the initial seizure to the evidence table in court.

a. Mark the Evidence: If possible, the person who first takes custody of evidence should immediately mark directly on the item, to ensure that it will be identifiable at trial. The mark should consist of their initials and the date, time, and place of discovery. If the item cannot be marked, it should be placed in a sealed container and the container should be marked. As an additional precaution, the person discovering the evidence should study the item carefully and

write a memo to their self as to what the item looks like. This practice will be very helpful in the event the case comes to trial and they are called upon to testify.

b. Maintain the Chain of Custody: The chain of custody provides a written record of all those who have handled the item from the time it was originally identified as possible evidence until the time of the trial. Anyone who handles the evidence, no matter how briefly, should sign the chain of custody. An item of evidence should be handled by as few persons as possible, since anyone who touches it may be required to appear at the trial. The chain of custody is very important in drug cases. Since many drugs look alike, the chain of custody is the best method of proving that the drugs presented to the court are the same drugs that were found on the accused.

9. ALTERNATIVES TO NJP: In many cases, discipline can be maintained through effective leadership, including the use of non-punitive measures which are designed to correct behavioral or performance deficiencies.

a. NCO's: A question that many new NCO's have is "What actions, short of NJP (Appendix B), can I take to maintain the discipline of my Marines?" Without a proper answer to this question, Marine leaders often resort to actions that are illegal and that can be considered hazing in nature. You have two forms of "action" that you can take to "correct" deficiencies in your Marines. If you feel that neither of these actions is adequate for the situation, your only other option is to "recommend" other actions be taken, such as NJP (you can write a charge sheet on someone, but it is still the CO's decision whether to run NJP).

(1) Verbal Reprimand: Of the two types of corrective action you may take, only a verbal reprimand should be used as "punishment."

(2) Extra Military Instruction (EMI): EMI is defined as instruction in a phase of military duty in which an individual is deficient. It is a training technique designed to correct a deficiency in the individual's performance of duty. EMI is not to be assigned as punishment and the task assigned must be logically related to the deficiency for which it was assigned. For example: A Marine who falls out with a dirty rifle may be ordered to clean it and stand another inspection or could be given a block of unassigned rifles to clean. This extra work, since it is related to the apparent inability to clean weapons is corrective and therefore legal. On the other hand, an assignment to mow the grass around the CP for failing a rifle inspection would be inappropriate, since mowing grass is not directly related to cleaning weapons. EMI should normally not be assigned for more than two hours per day. It may be accomplished during or after normal working hours. The time designated for performance of EMI after hours should not be assigned with a view toward punishing a Marine by restricting normal liberty. For instance, ordering a Marine who failed a room inspection, to report at 1600 on Saturday to pick up cleaning gear is inappropriate because obviously, the time prescribed was for maximum harassment and serves no useful purpose. EMI should not be assigned on the individual's Sabbath. Anyone in a supervisory position, NCO's, staff NCO's, warrant and commissioned officers, may assign EMI to be performed during normal working hours. Only commanding officers and OIC's may assign EMI to be accomplished after normal working hours.

b. CO's: CO's may use these additional alternatives to NJP.

(1) Administrative Withholding of Privileges: Another non-punitive measure is the withholding of privileges. For instance, liberty is a right which may only be withheld by punitive action; however, special liberty and out-of-bounds passes are privileges, and may be denied without punitive action being taken.

(2) Non-punitive Censure: Still another effective non-punitive measure is non-punitive censure. This can be in the form of an admonition, reprimand, criticism, or rebuke and may be given either orally or in writing. These measures are private in nature and will not be included in the individual's official records or quoted in or appended to fitness reports.

NOTE: Appendix B contains information about the types and limits of punishment which may be awarded during NJP.

REFERENCES: MCO P5580.2, Law Enforcement Manual
JAGINST 5800.7_, Judge Advocate Generals Manual
MCO 5800.8_, Marine Corps Manual for Legal Administration
MCM, 1995, Manual for Court-Martial
MCO 5580.2_, Law Enforcement Manual
FM 19-10, MP Administration and Operation
FM 19-20, Military Police Investigations

APPENDIX A

RIGHTS ADVISEMENT CARD

The Warning: Before asking a suspect a question, he must be warned and advised of his rights as follows:

- * You are suspected of the offense of _____.
- * You have the right to remain silent.
- * Any statement you make may be used against you in a trial by court-martial.
- * You have the right to consult with a lawyer before any questioning. The lawyer may be a civilian lawyer retained by you at your own expense, a military lawyer appointed to act as your lawyer without cost to you, or both.
- * You have the right to have such retained civilian lawyer and/or appointed military lawyer present during this interview.
- * If you decide to answer questions now without a lawyer present, you will have the right to stop this interview at any time. You also have the right to stop answering questions at any time in order to obtain a lawyer.

The Waiver: After the above warning has been given, ascertain whether the suspect understands his rights and will be able to freely, knowingly, and intelligently waive them. If he so understands his rights, then specifically ask him:

- * Do you want a lawyer?
- * Do you understand that if you should decide to answer questions you may stop at any time?
- * Do you want to answer questions and make a statement?

APPENDIX B

PUNISHMENT

1. TYPES OF PUNISHMENT AUTHORIZED: The types of Non-Judicial punishment which may be imposed by commanding officers and OIC's are briefly discussed below. A more thorough discussion of these punishments is found in Part V, MCM.

a. Admonition and Reprimand: These punishments constitute adverse reflections upon or criticisms of an individual's character, conduct, or performance. A reprimand is a formal act that rebukes an offender for misconduct. An admonition is a warning or reminder given to deter the offender from committing another offense. Of the two, a reprimand is considered more serious. In the case of an officer, the admonition or reprimand must be administered in writing. In the case of enlisted personnel, it may be oral or written.

b. Restriction: This is the least severe form of punishment used to deprive the offender of liberty. It is a moral rather than a physical restraint which is imposed by an order directing the offender to remain within specified limits. Restriction may be awarded to both officers and enlisted.

c. Arrest in Quarters: As in the case of restriction, the restraint involved in arrest in quarters is enforced by moral obligation rather than physical means. This punishment may only be imposed upon officers.

d. Correctional Custody: This is the physical restraint of a person during duty or non-duty hours, or both, and may include hard labor. This punishment may not be imposed upon corporals or above, unless the offender was reduced below the grade of corporal and the reduction was not suspended.

e. Confinement on Bread and Water or Diminished Rations: This punishment may not be imposed unless the offender is attached to or embarked aboard a U. S. Navy ship. This punishment may not be imposed upon corporals or above and it may be awarded for only three consecutive days or less.

f. Extra Duties: This punishment involves the performance of duties in addition to those normally assigned the enlisted person undergoing punishment. The MCM states that "military duties of any kind may be assigned;" however, guard duty shall not be assigned as punishment. Additionally, duties assigned to noncommissioned officers should not demean the individual's grade or position. Extra duties assigned as punishment should be accomplished before or after routine duties. The extra duties should not normally last longer than two hours a day. Extra duties should not be performed on Sunday although Sunday counts in the computation of the period for which punishment is imposed.

g. Reduction in Grade: This is one of the most severe forms of Non-Judicial punishment and should be used with discretion. This punishment can only be imposed to the next inferior grade.

Further, the pay grade from which demoted must be within the promotion authority of the officer imposing the reduction or any officer subordinate to the officer who imposes the reduction. Only sergeants or below may be reduced at NJP. This punishment may not be imposed on enlisted personnel in pay grades E-6 through E-9 or commissioned or warrant officers.

h. Forfeiture of Pay: Forfeiture involves a permanent loss of pay. When punishment includes reduction, the forfeiture is based on the grade to which reduced.

2. LIMITATIONS ON COMBINATIONS OF PUNISHMENTS:

a. Confinement on bread and water or diminished rations may not be imposed in combination with correctional custody, extra duties, or restriction.

b. Correctional custody may not be imposed in combination with restriction or extra duties.

c. Restriction and extra duties may be combined to run concurrently, but the combination may not exceed the maximum possible for extra duties.

3. MAXIMUM PUNISHMENT AUTHORIZED AT NJP: In addition to admonition and reprimand, commanding officers may impose upon enlisted members of their command the kinds and amounts of punishment listed in the chart below. As you can see by this chart, the amount of punishment a commander can impose is based upon his rank and, in cases of reduction, his authority to promote.

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TYPE OF PUNISHMENT	COMPANY GRADE AND OICs	FIELD GRADE
Confinement on Bread and Water/Diminished Rations (*1)	3 days	3 days
Correctional Custody (*2)	7 days	30 days
Restriction (*3)	14 days	60 days
Extra Duties (*3)	14 days	45 days
Reduction in Grade (*4)	1 rank	1 rank
Forfeiture of Pay (*5)	7 days' pay	1/2 months' pay for 2 months

NOTES:

(*1) May only be imposed at sea. May not be imposed upon corporal and above (unless reduced below corporal at NJP). May not be combined with correctional custody, extra duties, or restriction.

(*2) May not be imposed upon corporal and above. May not be combined with restriction or extra duties.

(*3) Restriction and extra duties may be combined to run concurrently, but the combination may not exceed the maximum possible for extra duties.

(*4) Offender can only be reduced 1 rank. May not be imposed upon staff sergeant and above. Rank from which demoted must be within the promotion authority of the commanding officer.

(*5) When punishment includes reduction (whether or not suspended), forfeiture is based on base pay of the grade to which reduced. The amount forfeited will be expressed in whole dollar amounts.

4. DETERMINING APPROPRIATE PUNISHMENT: At NJP, no particular amount of punishment is prescribed for any offense. In determining the appropriate kind and amount of punishment to impose, commanding officers should consider all matters relating to the commission of the offense, and the age, experience, intelligence, and prior record of the offender.

a. Matters in Aggravation: These are circumstances relating to the commission of the crime which increase its severity. For example, the offense may have had a significant adverse impact on the mission, discipline, or efficiency of the command.

b. Matters in Extenuation: These are circumstances which serve to explain the commission of the offense which tend to decrease its severity. For example, a Marine stole money to feed his family.

c. Matters in Mitigation: These are facts about the accused which may serve to lessen the punishment imposed. In this case, particular acts of good conduct or bravery and information showing prior good service should be considered.

5. SUSPENSION, MITIGATION, AND REMISSION OF PUNISHMENT: The commanding officer's authority and responsibilities do not end with the awarding of Non-Judicial punishment. His power to reduce part or all of the punishment imposed can be a principal means of accomplishing the primary objective of NJP - rehabilitation of the offender. A commanding officer's use of power to suspend, mitigate, or remit punishment imposed at NJP can enhance his position as a leader and often results in a favorable and lasting impact upon the offender. Paragraph 6 in Part V of the MCM gives a thorough explanation of these actions.

a. Authority: The officer imposing the Non-Judicial punishment, a successor in command, or the commanding officer of a unit the offender has been transferred to, may suspend, mitigate, or remit Non-Judicial punishments.

b. Suspension: "Suspension" of punishment in the military is similar to "probation" in civilian criminal law. Suspension gives the offender the opportunity to show sincere desire for rehabilitation. All or part of a punishment may be suspended at the time the punishment is imposed, or later after a portion of the punishment has been served. The duration of suspensions may not exceed six months. A suspension may be vacated (meaning the punishment must now be served) by the offender's commanding officer if the offender is involved in another incident of misconduct during the suspension period.

c. Mitigation: Mitigation means a reduction in either the quantity or quality of the punishment. This action may be appropriate when the offender's good conduct since NJP merits a reduction in the punishment.

d. Remission: Remission is an action whereby any portion of the punishment is canceled. Remission is appropriate under the same circumstances as mitigation.