

CHAPTER 5  
SEARCH AND SEIZURE, INSPECTIONS AND INVENTORIES, AND  
APPREHENSIONS.

DEFINITIONS

a. Officer or apprehending officer, includes commissioned officers, warrant officers, NCOs and law enforcement personnel.

b. Jurisdiction. Search and seizure rules apply to areas under the control of commanders and law enforcement personnel, thus applying to on-post incidents in the 50 continental states and overseas. They may also apply to off-post situations overseas, depending upon treaty agreements.

c. Noncommissioned Officers, includes corporals, but does not include specialists.

PROBABLE CAUSE SEARCHES BASED ON WARRANT OR AUTHORIZATION.

a. The authorization

(1) Commander's authorization. A company commander or higher, may authorize searches of a person or place under his command or control when there is probable cause to believe that items connected with criminal activity are located in the place or on the person to be searched. Voluntary consent should always be sought prior to actual execution of the search. See paragraph 5-4d. When time permits, the commander should also consult a trial counsel or the SJA duty officer. A commander may not delegate the authority to authorize a search to anyone, including the staff duty officer. However, the power to authorize a search may devolve to the next senior person present when the commander is absent or when circumstances are such that the commander cannot be contacted. Thus, an acting commander may authorize a search.

(2) Military judge or military magistrate authorization. A military judge or a military magistrate can authorize a search based on probable cause regardless of where on post the search will occur. Thus, usually a military judge or a military magistrate's authorization is obtained for the search of on-post quarters, because the Installation Commander, FSH, or the Commander, USAG, FSH, is the only commander who can authorize such a search.

(3) Procedures for obtaining an authorization to search. Paragraphs 9-7 to 9-13, AR 27-10, sets out the procedures for obtaining an authorization to search. Statements, either written or oral (even by telephone or radio), sworn or unsworn, must be

presented to a commander, military judge or military magistrate. A DA Form 3744-R, Affidavit Supporting Request for Authorization to Search and Seize, may be used if the supporting information is to be sworn. The authorizing official will then decide, based upon the statements, whether probable cause to search exists. An authorizing official who determines that probable cause exists will issue either a written authorization, DA Form 3745-R, Search and Seizure Authorization, may be used, or an oral authorization to search. The authorizing official must specify the place to be searched and the things to be seized.

(4) Scope of an authorized search. Once authorization to search has been obtained, the person conducting the search must carefully comply with the limitations imposed by the authorization. Only those locations which are described in the authorization may be searched, and the search may be conducted only in areas where it is likely the object of the search will be found. For example, if an investigator has authority to search the quarters of a suspect, the investigator may not search a car parked on the road outside. Likewise, if an authorization states that an investigator is looking for a 25-inch television, the investigator may not look into areas unlikely to contain a television, such as a medicine cabinet or desk drawer.

(5) Detention pending execution of search authorizations. An authorization to search for contraband implicitly carries with it limited authority to detain the occupants of a home or barracks room while the search is conducted. The officer may also detain occupants leaving the premises at the time the officer arrives to execute the search authorization. The detention of the occupants is not dependent on reasonable suspicion of criminal activity.

(6) Authorization outside of military control. Some situations may arise where the proposed search is to be conducted on property outside of military control. In that situation, a search warrant must be obtained from a civilian judge or magistrate and civilian police will carry out the search.

b. Establishing probable cause

(1) There is probable cause to search when there are reasonable grounds to believe that items connected with criminal activity are located in the place or on the person to be searched. A commander who is determining whether probable cause exists may receive information from a variety of sources. It may consist of the commander's personal observations and knowledge, provided that the information would not preclude the officer from acting in an impartial manner. Informants who have seen certain things may actually appear before the commander, or the information may come

in the form of hearsay (passed from person to person until reported to the commander). The commander's task is to determine, from the totality of the circumstances, whether it is reasonable to conclude that items related to criminal activity are in a given place. To assist in determining probable cause, the following is a suggested method for evaluating the factual basis (basis of knowledge test) and the believability (reliability test) of the information.

(2) Basis of knowledge test. The commander should be satisfied that the information was obtained in a trustworthy manner. This has been called the basis of knowledge test and may be satisfied in any of the following ways:

(a) Personal observation. The trustworthiness of information can be established by showing that the commander, or other observer, personally saw the criminal activity. Third party facts must be presented to the commander. If possible, corroboration or substantiating information should be sought. In the drug area, personal observation should describe the basis for the belief that the observed substance was an illegal drug (for instance, the observer has had a class on drug identification, or has other past experience as to the particular drug).

(b) Statement of person to be searched or of accomplice. Trustworthy information that items connected with criminal activity are located in the place to be searched may also be based on information obtained from a statement of the individual to be searched or of an accomplice of the individual to be searched. Always ensure that suspects are properly warned under Article 31, UCMJ, prior to questioning about the location(s) of evidence of criminal activity.

(c) Self-verifying detail. The basis of knowledge test can be met by showing that the tip was so detailed that the information must have been obtained as a result of a personal observation by the informant.

(d) Corroboration. Where the officer can verify a number of the facts included in the informant's tip, the conclusion can be drawn that the other items in the tip can reasonably be presumed to be accurate.

(3) Reliability test. The commander should also be satisfied as to the credibility of the person furnishing the information. This has been called the reliability test and may be established by one or more of the following:

(a) Demeanor. When the information is personally given to the commander by the witness who obtained the information

(i.e., not through a third party, such as an MP or the 1SG), the commander can personally judge the witness' reliability. In many cases the individual may be a member of the commander's unit; thus, the commander is in the best situation to judge the credibility of the witness. Even when the witness is not a member of the authorizing commander's unit, the commander can personally question the individual and determine the consistency of the witness' statement. This face-to-face situation may either lend to, or detract from, the witness' credibility.

(b) Past reliable statements. There should be some indication as to the underlying circumstances of past reliability, such as, whether or not this witness has furnished correct information in the past about wrongful possession of illegal drugs.

(c) Corroboration. Corroboration and demeanor of the person are particularly important when questioning first-time informants with no established record of past reliability. Corroboration is discussed above under the basis of knowledge test.

(d) Declaration against interest. The person furnishing information to CID and then to the commander may furnish information that is against that person's interest, e.g., he's aware he's admitting to an offense and he has not been promised any benefit. Thus, he could be prosecuted himself. This lends a great degree of reliability to the information furnished.

(e) Good citizen informants. Often, the informant's character or background renders him or her credible. For instance, a victim or a bystander, with no reason to lie, may be considered reliable. In addition, law enforcement officers and "good soldiers" are generally considered reliable sources of information.

### 5-3. PROBABLE CAUSE SEARCHES WITHOUT WARRANTS ("EXIGENCIES").

a. Insufficient time. There is reasonable belief that the delay necessary to obtain a search warrant or search authorizations would result in the removal, destruction, or concealment of the property or evidence sought.

b. Automobile searches.

(1) Generally an apprehending officer may make a warrantless search of a car at the time and place of apprehension if there is probable cause to believe the vehicle contains sizable items. The warrantless search need not take place where the apprehension of the occupants took place if there is a valid

reason for conducting the search at another place such as at an MP station.

(2) When an individual in an automobile is stopped for an offense, such as a robbery that has occurred on post, and the driver is taken to the MP station, the car may also be taken to the MP station. If the robbery has recently taken place, there may be probable cause to believe it contains evidence of the offense and the car may be searched at the MP station, even without authorization from the commanding officer.

(3) An individual may be stopped for a traffic offense and the officer may see items in plain view, such as drugs or drug paraphernalia or evidence of another crime. This would give the officer probable cause to believe that other evidence is located in the vehicle. Thus, without obtaining a warrant or authorization, the vehicle can be searched there or it can be taken to the MP station where a search of the entire vehicle may be made.

(4) When a search for identification is permitted, the scope of the search is limited to those areas where identification of owners of vehicles is normally found, such as glove compartments, consoles, or what appears to be documents lying in open view in the car. Once identification has been established, the search must end.

c. Identification search. An officer may examine the personal effects of any person who appears to be incapacitated to learn either the cause of the incapacitation, or the identity of the individual. If the identity of the individual seems important--as in a desertion case or a case involving forged identity papers--Article 31 and Miranda warnings must be given before the suspect can be questioned, to include asking for his name or identification card.

d. Abandoned property. A police officer lawfully in any place may, without an authorization to search, recover any abandoned property and examine its contents for sizable items. While on patrol, a police officer may arrest an individual for a traffic offense. Prior to the vehicle coming to a complete halt, if the offender throws something from the vehicle, the officer may recover the object and examine its contents. The same applies to a soldier who throws an object out of a barracks window. He has abandoned the property, which may be recovered, examined, and seized.

e. Trash and garbage containers. An officer lawfully in any place may, without obtaining authorization to search, examine the

contents of a trash or garbage container that is not located next to on-post quarters or not located in the driveway of the on-post quarters. Thus, the garbage cans located on any street near the curb may be searched without authorization to search.

5-4. OTHER REASONABLE SEARCHES AND SEIZURES (PROBABLE CAUSE NOT REQUIRED).

a. Emergency searches. An officer may make a warrantless entry into any premises whenever he has reason to believe that it is necessary to prevent injury to persons or to prevent serious damage to property, or to render aid to someone in danger.

b. Government property. A commander, officer, NCO, or law enforcement personnel may freely search government property in which a soldier has no reasonable expectation of privacy, such as a government vehicle or desk, or a brief case or tool box issued to be used in connection with a soldier's duties. However, if government property is issued and set aside for the personal (as opposed to official) use of the soldier, he may have a reasonable expectation of privacy in the property, and probable cause or some other basis is required before searching it. The most common examples of this type of property are desks, footlockers, and wall lockers issued to soldiers for use in their billets rooms.

c. Search incident to apprehension. At the time of an apprehension or immediately after the apprehension, the apprehending officer should notify the individual that he or she is being apprehended for a specific offense. The apprehending officer may then search the person and the immediate area surrounding the apprehended person. This search is made to detect weapons, destructible evidence, or means that might be used to effect an escape.

(1) Search of an apprehended person and the area subject to his immediate control at the time of the apprehension is lawful only where there is probable cause for the apprehension. This rule establishes both time and geographical limitations.

(2) The geographical limitation means that the officer is limited to a search of the immediate area. That is the area within which an individual may grab a weapon or destructible evidence. This area may include any area from which an individual may grab a weapon with a sudden lunge, leap or dive from where he is. If the driver or passenger of an automobile is apprehended, a search of the closed and locked trunk cannot be justified as incident to that apprehension. That area is not considered to be under the individual's immediate control. The officer may search the passenger compartment of the automobile and all containers

found in the passenger compartment; however, a container is any object capable of holding another object. This search may include closed or open glove compartments, consoles or other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, bags, clothing, and the like.

(3) An individual who is apprehended at his quarters or place of duty may have to obtain wearing apparel or a change of clothing for a stay at the detention cell, if detention is thought to be necessary. Where the apprehended person requests permission to gather other things to bring with him, the officer may search the immediate area where these things are obtained, both to protect the apprehending officer, and to prevent the destruction of evidence.

(4) When additional information gathered at the time of apprehension establishes probable cause to believe that sizable items are on the premises and in immediate danger of destruction, concealment, or removal, the officer may immediately search for and seize these items.

(5) When an officer makes an apprehension at a location where the apprehended person has no reasonable expectation of privacy, the apprehending officer may inspect the entire area. For example, an officer investigating a break-in of the auto craft shop, finds the door jimmied, and enters to find an individual in the garage itself, may inspect the entire craft shop looking for other evidence of a crime, because the suspect cannot have a reasonable expectation of privacy in the craft shop.

d. Consent searches. An officer may make a search that is not otherwise authorized if the person or persons in control of the immediate area or object to be searched voluntarily give their consent. To insure that the consent is voluntary, the officer should tell the individual, "I have no authorization to search you. I would like your consent to search you (or a particular place) for contraband."

(1) If the person consents to the search, it probably would be considered voluntary. A refusal to consent to search, like evasive answers to questions, may arouse suspicion, but it does not amount to probable cause to search. If the individual refuses to consent, an individual may be detained while proper authorization based upon probable cause to search is sought.

(2) One question the individual may ask is "what will happen if I do not consent to search?" The answer should be that appropriate action will be taken. There is no need to specify what "appropriate action" is. A person should never be told: "I

am going to search you anyway." Consent that is the product of coercion is invalid.

e. Plain view. An officer who is lawfully in any place may, without obtaining a warrant or a commander's authorization, seize any item in plain view or smell, which he has reasonable grounds to believe will aid in a criminal prosecution. This is so even if the sizable item is not related in any way to the crime which the officer was investigating.

(1) When an individual smells marijuana in the barracks, an authorization to search may be necessary under some circumstances. For example, an NCO who smells marijuana in the barracks hallway may be able to make an apprehension on his own authority, but would ordinarily have to get an authorization from the commander to search the room. Any items in plain view in the room could be seized when the NCO makes the apprehension. Seeing an item in plain view in proximity to an individual may justify an apprehension, or further search of the same area or another area.

(2) An officer may extend his natural senses by using devices such as binoculars, flashlights, or in some cases, ladders or stools. The same rationale applying to plain view also applies to plain smell.

(3) Here are a few situations in which the commander or police could lawfully apprehend or search (and could also seize any items in plain view):

(a) Areas of public or private property normally accessible to the public or to the public view.

(b) Any place with the consent of the person empowered to give such consent.

(c) Any place pursuant to an authorization to search that particular place.

(d) Any place where the circumstances dictate an immediate response to protect life or prevent serious damage to property.

(e) Any place to effect a lawful arrest, such as a business, home, on the street, or in a vehicle.

(f) While conducting an investigation at a unit or office premises.

(4) An officer who is lawfully at a place to make an arrest may not examine the entire premises solely to look for

evidence. An officer may go to on-post quarters to arrest an individual for an offense. While standing in the entryway of the quarters, if the officer sees some item that will aid in a criminal prosecution, the item may be seized. Although the item that is visible from the entryway may be seized, the officer may not, without consent or invitation, go to the other rooms of the house.

#### 5-5. INSPECTIONS AND INVENTORIES.

##### a. Inspections

(1) The commander has the inherent right to inspect the barracks in which individual soldiers are housed to ensure the command is properly equipped, functioning properly, maintaining standards of readiness, sanitation, cleanliness, and that personnel are present, fit, and ready for duty.

(2) Inspections may include an examination to locate and confiscate unlawful weapons and other contraband if the primary purpose of the inspection is to determine whether the unit is functioning properly, maintaining standards of readiness, and is fit for duty. Inspections may also include an order to produce body fluids, such as urine.

(3) A commander conducting an inspection may find items that could aid in a criminal prosecution. These items may be seized. The inspection may only cover those areas that will enable the commander to achieve the purpose and scope of the inspection. When inspecting for food or flammable products, such as lighter fluid, the person inspecting may look in small boxes or other suitable containers.

(4) Commanders normally conduct periodic security checks to insure that wall lockers and footlockers are locked. If the commander or a representative conducts a security inspection and notices a wall locker or foot locker unsecured, the valuables from the locker may be secured and kept in the unit supply room until the individual returns to the unit. The person conducting the inspection may seize any items that would aid in a criminal prosecution, if they are seen while securing the valuables.

(5) The commander has the right to conduct an inspection for weapons after a unit has been firing and a weapon is missing after returning to the unit area. The commander or a designated representative may conduct an inspection of all persons who were on the range and others who were in a position to steal the weapon, including barracks living areas and private automobiles.

(6) Evidence obtained from an inspection or an inventory used as a subterfuge for a search may not be admissible at a court-martial. If the commander is looking for evidence of a specific crime, or suspects that an individual or group of individuals are in possession of drugs, an inspection of the unit should not be used as a subterfuge for a search of the individuals. Subterfuge can occur when a commander "feels" an individual has contraband in his possession or living area but lacks sufficient information to amount to probable cause, and uses an "inspection" to search for the contraband.

b. Use of narcotic and marijuana detection dogs. A commander conducting an inspection may use a narcotics/contraband detector dog to extend the natural senses of the individuals conducting the inspection, provided the dog is shown to be reliable.

(1) When a request is made to the Provost Marshal Office (PMO) for a handler and dog to go to a particular unit, the commander requesting the team should inquire from the PMO or Noncommissioned Officer in Charge (NCOIC), about the reliability of the handler and the dog.

(2) Before the dog is used in a unit, the handler should demonstrate the reliability of the dog to the requesting commander. The test for reliability consists of certification from an approved training course, the training and utilization alert record, and performance demonstrated to the commander.

c. Inventories. A commander may direct an inventory of an individual soldier's property when the soldier is absent from the unit without authority or when hospitalized in excess of 120 hours. Such inventories are authorized under the provisions of paragraphs 12-12 and 12-14, AR 700-84, Issue and Sale of Personal Clothing, and should follow normal unit policies for such an inventory. The commander or a designated representative may also conduct an inventory of the property of an individual who has been placed in military or civilian confinement. If, while conducting an inventory, the primary purpose of which is administrative in nature, the commander or a designated representative discovers items that would aid in a criminal prosecution, the items may be seized and used as evidence.

#### 5-6. INVESTIGATIVE DETENTION: STOP AND FRISK.

##### a. Contacts and stops.

(1) Initiating a contact. The MP may initiate contact with persons in any place they are lawfully situated. A contact does not authorize the MP to restrict the individual's freedom of movement or to compel answers from the individual. It is

sometimes difficult to define when a MP is lawfully situated. Generally, this may include inspecting the barracks, making a walk-through of the barracks, or being in the unit area, any place with the consent or authorization of a commander, or any place in which the officer is present to effect a lawful apprehension.

(2) Basis for a stop. A MP who has information or observes unusual conduct that leads him to reasonably suspect that a person has committed, is committing, or is about to commit a crime, has the obligation to temporarily stop that person. This obligation must be exercised in a place the MP has a right to be. Both pedestrians and occupants of vehicles may be stopped. If the individual is a suspect and is to be questioned, Article 31 and Miranda warnings should be read. The stop must be based on more than a hunch. The MP making the stop should be able to state specific facts to support the decision to stop an individual. Does the person's appearance generally fit the description of a person wanted for a known offense? Does the individual appear to be suffering from a recent injury or to be under the influence of alcohol or drugs? Is the person running away from an actual or possible crime scene? Is he otherwise behaving in a manner to indicate possible criminal conduct? The reputation of the person (whether he has an arrest or conviction record) is another factor to be considered, together with the individual's reputation on post or in the unit. The demeanor of the person during the stop is important. Does the individual respond to questions in an evasive or suspicious manner, or knowingly give false information? Is the person near an area known for the commission of certain crimes? Is the area a high crime area? The time of day may be an important factor. Is it a very late hour? Is it unusual for people to be in the area at this particular time? Is it the time of day during which criminal activity of the kind suspected usually occurs?

(3) Stops must be of a limited duration. The MP is limited in taking steps that either confirm or dispel the original suspicion. Stops which are lengthy in duration may be classified as seizures of the person(s), thus necessitating probable cause. Of course, the information gained during a stop may be sufficient to establish probable cause for apprehension.

#### b. Frisk.

(1) An MP may frisk any person whom he has lawfully stopped when the officer reasonably suspects the person is carrying a concealed weapon or dangerous object, and the frisk is necessary to protect the officer or others. The frisk may be conducted immediately upon making the stop or at any time during the stop, whenever a reasonable suspicion to frisk arises.

(2) If, while conducting the frisk, an MP feels an object he reasonably believes to be a weapon or dangerous item, or reasonably believes to be contraband that will aid in a criminal prosecution, he may seize the evidence.

#### 5-7. APPREHENSION.

a. Probable cause to apprehend. Probable cause to apprehend exists when there are reasonable grounds to believe that an offense has been committed, and that the individual to be apprehended has committed the offense. All commissioned officers, warrant officers, petty officers, NCOs, and law enforcement personnel may apprehend individuals when there is probable cause to apprehend. Examples: There is a difference between probable cause to search, and probable cause to apprehend. One of the key factors in the probable cause to search equation is the timeliness of the information. For example, suppose a reliable informant has given personally obtained information that a suspect committed a specific offense 30 days ago at the NCO Club. The fact that the offense was committed 30 days ago, and was based on personal observation from a reliable informant, gives sufficient probable cause to apprehend the suspect, but it likely does not give probable cause to search any area under the suspect's exclusive control, because the information is too old or is stale. Even if a small quantity of drugs was seen in the suspect's possession 30 days ago in the company billets, this would not give probable cause to search the billets because there would be no basis to believe that the drugs were still present. There would still be a basis for an apprehension and a search incident to apprehension, however. The geographic limitations on searches incident to apprehension would apply.

b. Procedures. The procedure for making an apprehension is to notify the individual why he is being apprehended. The apprehension can be accomplished in a number of ways. First, tell the individual he is being apprehended, and then search the individual incident to apprehension. Second, ask the individual to come to a particular office with the apprehending officer. The search can be made at the office. A third possibility is to ask individuals in the area to assist in the apprehension. If the suspect is uncooperative, the apprehending officer should try to subdue the individual or pay particular attention to any means of identifying the individual in case of his escape.

c. Authorization to apprehend soldiers in private dwellings on post.

(1) Apprehension of soldiers in private dwellings on post is provided for in the rules on apprehensions found in

RCM 302(e), MCM 1984; paragraphs 9-7 to 9-13, AR 27-10.

(2) The term private dwelling is defined to include, but is not necessarily limited to, single- and multi-family quarters and temporary quarters such as the Foulois House, FSH Guest House, and other bachelor enlisted quarters (BEQs), bachelor officers quarters (BOQs), and visiting officers quarters (VOQs). Private dwellings do not include living areas in military barracks, vehicles, tents, or field encampments, and similar places, whether or not they are subdivided into individual units.

(3) Proper authorization must be obtained before any person may enter a private dwelling on post to apprehend anyone, except pursuant to consent or under exigent circumstances. This is not intended to affect the legality of an apprehension which is incident to otherwise lawful presence in a private dwelling. Examples of such lawful presence are:

(a) When military law enforcement personnel respond to a domestic disturbance, or other call for assistance, and are admitted to the private dwelling with the consent of the occupant, the occupant's spouse, or other resident, or

(b) when called to the scene by neighbors or others, the MPs have probable cause to believe that a suspect poses an immediate, significant threat to them, or to others, or could escape, or in good faith perceive a need to render immediate medical aid, or prevent imminent or ongoing personal injury, or

(c) when military law enforcement personnel are in "hot pursuit" of a fleeing suspect who enters a private dwelling on post.

(4) Authority to issue authorizations. Only a military judge, military magistrate or the Commander, USAG, FSH, may authorize the apprehension of a soldier in a private dwelling on FSH. Military law enforcement officials seeking to enter a private dwelling on post to apprehend a soldier will first contact the military magistrate or a military judge to obtain proper authorization. In the event that the military judge or the military magistrate are unavailable, military law enforcement officials will coordinate with the Chief, Criminal Law Division, Office of the SJA to obtain appropriate authorization from the commander. After normal duty hours, telephone the USAG, FSH, on-call SJA duty officer.

(5) Procedures. Law enforcement officials may request authorizations to apprehend soldiers in private dwellings on post

orally or in writing. A DA Form 3744-R, Affidavit Supporting Request for Authorization to Search and Seize, may be used if the request is made in writing. Authorizing officials may issue authorizations to apprehend orally or in writing. A DA Form 3745-1-R, Apprehension Authorization, may be used if the authorization is issued in writing.

d. Apprehensions in private dwellings off-post. Military personnel do not have authority to authorize apprehension of soldiers in private dwellings off a military installation. Such apprehension must be authorized by warrants issued by competent civilian authorities.

**5-8. RESERVE CONSIDERATIONS.** The roles listed in this chapter apply to RC commanders as well as AC commanders. If the immediate commander, or his superior, cannot authorize the search on-post, or apprehension, he must contact the military magistrate or military judge. This can be done through the SJA on-call officer and the search can be authorized telephonically. Reserve component commanders may need to use local police and local judges for search warrants and apprehensions.

**CHAPTER 6****CONFESSIONS AND THE RIGHT AGAINST SELF-INCRIMINATION.**

**6-1. INTRODUCTION.** It is a basic feature of American law, civilian and military, that an individual cannot be forced to incriminate himself. A soldier is protected from self-incrimination by both the Fifth Amendment to the United States Constitution and Article 31 of the UCMJ. Interrogations of criminal suspects are often a critical matter in criminal investigations. While the right against self-incrimination bars the coercion of statements, it does not prevent the use of voluntary admissions and confessions. In the military, the government must prove not only that such a statement was voluntary in the usual sense of the word, but also that it complied with the warning requirements of Article 31(b) of the UCMJ and certain Constitutional rights to counsel. Should a statement be made without the necessary rights warnings, both the statement and any evidence derived from it may be inadmissible at trial.

**6-2. ARTICLE 31, UCMJ.** Most problems in this area come from the Article 31(b) requirement that rights warnings precede any official questioning of a criminal suspect or accused. The major questions raised by Article 31(b) can be derived directly from the terms of the Article itself.

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

For ease of analysis, the major questions posed by Article 31 (b) are best considered in the following sequence: Who must give warnings, when must warnings be given, who must be warned, and what warnings are required?

**6-3. WHO MUST GIVE THE WARNING?**

a. Persons subject to the UCMJ (Military Rule of Evidence 305 (b)). A person subject to the UCMJ, including a person acting as a knowing agent of a military unit or of a person subject to the UCMJ, is required to give warnings under Article 31 prior to requesting a statement or interrogating an accused or a person suspected of an offense. This requirement would also be mandatory for Post Exchange store detectives as agents of the military.

b. Persons in a private capacity. Although a person subject to the UCMJ may request a statement from, or conduct an interrogation of an accused or suspect, he does not come within the operation of Article 31 if he is doing so in a purely private capacity and not as an agent of the military and is not in authority over the subject. For example, the victim of a barracks larceny who is attempting to recover his money has no duty to warn a suspect prior to questioning him. The victim is acting solely for his own benefit and without official sanction and under these circumstances any pretext of officiality is missing, and a warning is not demanded. However, if the victim is a platoon leader questioning someone from his platoon whom he suspects, warnings should be given.

**6-4. WHEN MUST WARNINGS BE GIVEN?** Generally, when a suspect is required to say or do anything incriminating, the suspect must be warned. The time it takes to give a warning is insignificant compared to the results which may follow in the event a warning is required and if not given. **WHEN IN DOUBT, ADMINISTER THE WARNINGS REQUIRED BY ARTICLE 31, UCMJ.** Warnings must be given before a suspect or an accused is asked to give a "statement." The word "statement" has been interpreted by the Court of Military Appeals as being more expansive than just a verbal utterance.

a. The scope of the word "statement."

(1) The constitutional protection against compulsory self-incrimination protects a person only from being compelled to testify against himself or herself, or to provide the Government with evidence of a testimonial or communicative nature. It does not, for example, protect one from being compelled by an order to exhibit one's body.

(2) During an investigation a suspect can be required (using reasonable force, if necessary) to put on a coat to determine if it fits, and a witness to the involuntary fitting can testify at the subsequent trial of the suspect. Article 31 does not prohibit the examination without consent of a suspect's hands or clothes being worn for the purpose of locating traces of certain powder with which the place of the suspected larceny had been dusted. Requiring a person to place his or her feet in tracks or plaster molds of footprints may be compelled without an Article 31 warning. Article 31 does not forbid taking fingerprints of a suspect, blood samples, or handwriting or voice exemplars (a search authorization, however, may be required).

b. Interrogation. In the military, the warning requirements must be stressed at all levels of command. As a practical matter, any time an accused or suspect is questioned concerning an offense, the warning must be given, even if the question is as

simple as, "what were you wearing last night?" Article 31 rights are required prior to counseling a soldier suspected of an offense. This includes minor offenses, such as missing formations and disrespect.

(1) Written statements. A statement following a proper warning need not be in writing and signed before it can be used. Oral admissions can be as incriminating as written ones. Written statements are preferred because there is less dispute later about the content of the statement. If an individual voluntarily initiates a conversation amounting to a confession, there is no requirement that the military authorities stop the individual and give the warnings. If a commander, who does not suspect an individual of an offense, questions that individual for a legitimate purpose other than to elicit an admission, any incriminating statements made by the individual are admissible. However, once the commander begins to suspect the soldier of an offense, warnings should be given prior to further interrogation.

(2) Verbal acts. Because of the definition of "statement," a problem arises when a suspect is not asked to make a statement, but is asked to provide the investigators with physical evidence, or to assist them in obtaining it. In this situation it may be said that if the suspect is being asked to furnish information to the investigator, by conduct or by conduct plus words, the suspect is being interrogated. Thus, if the actions of the suspect in complying with the particular request are capable of being construed as any admission on the suspect's part, such as an acknowledgment of ownership of the item sought, or an awareness of its whereabouts, the suspect has been asked to make a "statement," and should be advised of his rights under Article 31, UCMJ.

c. Interrupted interrogations. The prohibition in Article 31 against interrogating a suspect without first informing him or her does not mean that a warning must be given prior to each and every occasion on which an interrogation takes place. It is necessary only that a warning be given at the outset of the particular investigation and it need not be repeated merely because the interrogation is briefly interrupted and then renewed. Any significant delay between sessions usually requires a new set of warnings.

#### 6-5. WHO MUST BE WARNED?

a. An accused or suspect. Article 31 requires that a warning be given to those accused of a crime and those suspected of an offense prior to asking questions about the offense. A statement by an individual to his commander is admissible evidence without an Article 31 warning if the commander had no reason to suspect

the soldier of an offense. The same rule applies to any other interrogator who would be required to give a warning.

(1) The following examples show soldiers who were not suspects:

(a) A gate air policeman examined the accused's pass, later found to be false, during a routine check of personnel leaving the base. The soldier was not a suspect and there was no requirement to warn.

(b) The accused's 1SG saw him in a soiled uniform the day following a rape, and asked the accused why his uniform was dirty purely as a part of his routine duties as 1SG.

(2) The following scenarios show soldiers who were suspects:

(a) An MP, in pursuit of some soldiers who had been firing weapons in a Korean town, lost contact with them, and found the accused nearby holding a carbine which had been recently fired.

(b) An investigator found the accused's billfold at the scene of an arson.

(c) A company commander was informed by a soldier from whom a watch had been stolen that the accused was wearing a similar watch.

b. Accounts and records. There is no need to warn an individual when requesting accounts and records from the custodian of those records holding them in an official capacity. For example, in United States vs. Haskins, an officer asked the accused whether his accounts were in order. The inquiry was made solely for accounting purposes, and the officer was neither conducting an investigation for the purpose of fixing responsibility for an offense which was known to have been committed, nor was he a law enforcement agent or an officer detailed to collect evidence to aid in solving a crime. No Article 31 warning was required.

#### 6-6. THE CONTENT OF THE WARNING (MILITARY RULE OF EVIDENCE 305 (C)).

a. Article 31, UCMJ.

(1) The nature of the offense. The purpose of the requirement that the suspect be advised "of the nature of the accusation" does not demand that the specific offense(s) be named

with technical completeness and accuracy. It is enough that the suspect be made aware of the general nature and purpose of the investigation as it is known to the interrogator. The nature of the accusation must be in terms which the suspect can understand

(2) The right to remain silent. The suspect must be informed he has an unqualified right to remain silent. If the warning, as given, is so worded as to cause the subject to believe that he has any obligation whatsoever to answer any question or make any statement, it is defective. Furthermore, an adequate warning can be nullified by subsequent maladvice so that any ensuing statements will be deemed unwarned. The great danger in this area is the commander who tries to embellish this portion of the warning. The best course is for the commander to use DA Form 3881, Rights Warning Procedure/Waiver Certificate, and read it to the accused verbatim.

(3) Although a suspect must be given an Article 31 warning before being asked to perform any act which he cannot lawfully be required to perform, he need not be separately advised as to each particular item of evidence requested by his interrogators, as long as the requests take place at a single interrogation preceded by proper warnings.

(4) Availability of statements as evidence. The suspect must be warned that any statement he makes may be used against him in a criminal trial. A subsequent promise, expressed or implied, not to utilize them as evidence against the suspect will nullify the warning. However, a suspect's self-created, erroneous belief, not communicated to his interrogator, will not make defective an otherwise adequate warning.

(5) The failure to use the words "in a court-martial" will not be fatal. On the other hand, where a line-of-duty investigating officer leads the accused to believe that his statement would be used only for the purpose of determining line of duty, there is a failure to comply with Article 31.

b. Right to Counsel.

(1) When required. While the MCM calls for the counsel warning prior to interrogating a suspect who is in custody, charged, or restrained, it is advisable to give such a counsel warning every time an Article 31 warning is given. Remember this counsel warning is in addition to the Article 31 warning.

(2) Content of warning. An effective warning to a military suspect or accused must consist of at least the

following:

(a) That the suspect has the right to consult with counsel, and to have counsel present with him during questioning; and

(b) that this counsel can be civilian counsel retained at his own expense, military counsel appointed for him free of charge, or both.

(3) The accused must be made aware that the term "counsel" means lawyer. This is to prevent confusion and clarify that he is entitled to legal counsel, not a chaplain or a social worker, but a lawyer. The accused must be informed, in concise terms, that he has a right to a military lawyer, free of charge.

(4) An inadequate Article 31 warning prior to obtaining a confession will make the confession inadmissible and may deprive the government of the proof which it needs to convict the accused.

(5) Waiver. An accused can waive his self-incrimination rights if the waiver is made voluntarily, knowingly and intelligently. If the accused makes a statement without an attorney present during the interrogation, the prosecution must show a knowing and intelligent waiver of his right against self-incrimination and his right to appointed or retained counsel. If the accused indicates in any manner that he does not wish to be interrogated, he should not be. A waiver must be clearly expressed by the accused and must not be presumed. The fact that an accused has answered some questions or volunteered some information does not deprive him of his right to stop answering questions until he has consulted an attorney. It is a good idea to obtain a waiver of these rights in writing prior to interrogation if the accused in fact desires to waive his rights. DA Form 3881, should be used to record the waiver.

c. Prior incriminating statements:

(1) When needed. In addition to the Article 31 warnings and the advisement of counsel rights, it may be necessary to warn a suspect that a prior incriminating statement cannot be used against him. If a soldier has made a statement or performed some incriminating act without adequate Article 31 and counsel warnings, the evidence may be excluded from use at court-martial. If the suspect is then later properly advised of his rights and makes a statement, the courts have often considered this second statement to have been induced by the first and because of the taint, equally inadmissible as evidence. When, however, the

rights warning is accompanied by a clear, direct warning that prior incriminating statements may not be used against the suspect, the taint from the first interrogation if attenuated, and any later statement or act may be admissible as evidence.

(2) Content of warning. The back of the DA Form 3881, contains the requisite warnings concerning prior statements. If the form is not used, the suspect should be clearly informed, in front of witnesses after all other rights have been read, that:

(a) Any prior spontaneous incriminating statement made before being properly advised of his rights does not obligate the suspect to answer further questions.

(b) If any prior statements were made without a proper advisement of Article 31 and counsel rights, determine whether the suspect was influenced by his earlier unwarned statements. The suspect must agree, without inducement, to waive his rights before any further statement is taken.

#### 6-7. HOW TO TAKE A STATEMENT

a. Voluntariness. To be admissible against the accused, a pretrial statement must be voluntary. A statement is not voluntary if it has been obtained or induced by the use of a threat, promise, inducement, duress, or physical or mental abuse amounting to coercion, unlawful influence, or unlawful inducement. A statement is not voluntary unless it has been obtained following proper procedures. When an accused or suspect is deprived of his freedom of action in any significant way during the course of an investigation, all warning and waiver requirements apply to statements made by him in response to any interrogation. A confession will automatically be excluded unless the warnings are given; on the other hand, it will not be automatically admitted merely because the warnings have been given. Generally speaking, a pretrial statement is involuntary, and hence inadmissible, if it was not the product of the free will of the accused or if it was obtained under such circumstances as to cast serious doubt on whether it was voluntary. The following are examples of the kind of conduct which can cause a confession to be inadmissible: (1) the use of physical violence; (2) prolonged confinement; (3) prolonged interrogation; (4) deprivation of comforts and necessities; (5) unlawful inducement such as a promise not to press charges. The area of confessions is plagued with a number of legal niceties and a commander should hesitate to wrestle with these problems without first consulting his trial counsel.

b. Procedures. The best procedure to follow in taking a statement is to start with the DA Form 3881. Where possible, a professionally trained military investigator should be used to

take statements. A trained investigator, rather than a commander, AR 15-6 officer, or anyone else, should always question suspects of serious offenses. If a commander, officer, or NCO chooses to question a suspect, the questioner ideally should have a witness available when he advises an individual of his rights. The questioner should also take notes to refresh his memory should he later have to testify about how the statement was obtained. However, the questioner should be careful to comply with the following steps:

(1) Inform the suspect of the nature of the offense and his rights (Article 31(b) and the rights to counsel) using DA Form 3881.

(2) Ask the suspect if he understands his rights. Only if he affirmatively acknowledges his rights can you proceed.

(3) Ask the suspect if he wants a lawyer. Only if the suspect affirmatively states that he does not want a lawyer can you proceed.

(4) Ask the suspect if he is willing to make a statement. Only if he affirmatively indicates that he is willing to talk can you proceed.

(5) Complete DA Form 3881 (if available).

(6) Interrogate the suspect

(7) Stop the interrogation immediately if the suspect changes his mind and decides to stop talking or says that he wants a lawyer. Questioning must cease immediately if this occurs.

**6-8. RIGHTS, WARNINGS AND SEARCHES.** There is no requirement that an individual be given an Article 31 warning prior to a search. However, if he is a suspect and provides incriminating answers during the search, such answers will not be admissible in evidence. If a search is based on consent, the consent must be knowing and voluntary. While there is no requirement to give a warning prior to conducting a search, there is nothing which forbids such a warning and often it is a good idea. The lack of a warning will not make the results of the search inadmissible, but it may make any incriminating statements made by the accused inadmissible.

**6-9. SUMMARY.**

a. Confessions must be preceded by proper Article 31 and counsel warnings.

- b. Confessions must be voluntary.
- c. Consult your trial counsel if you have any questions

**6-10. RESERVE CONSIDERATIONS.** Article 31(b) and the guarantees of the Constitution apply to RC soldiers in the same fashion as their AC counterparts. Commanders and leaders must comply with this chapter whenever information is sought from a soldier suspected of an offense, even if the offense is absent without leave. Article 31(b), UCMJ, warnings should be provided to a RC soldier, whether or not he is in a Title 10 status, before any questioning that might lead to incriminating statements. The status of the questioner is also irrelevant. Soldiers asking questions are always required to read warnings even if the questioner is on free time - not on IDT, AT, ADT, etc.