

RIGHT TO COUNSEL

"I want to talk to a lawyer." Those simple words should terminate all interrogation. Don't be ambiguous, and if they don't listen and try to ask you further questions, just repeat those words again.

The military provides its personnel with defense counsel free of charge - the first step upon interrogated or apprehended should be to visit your local Trial/Area Defense Counsel office. You have the right to hire a civilian defense counsel of your own choice, keep your military counsel, or have both on the case. The choice you make will depend upon the complexity of your case, your military counsel's level of experience, and how comfortable you feel with your military or civilian lawyer.

ARTICLE 31

Often called the military version of "Miranda", Article 31 of the UCMJ applies to any questioning of a service member suspected of an offense, even if you are not in custody. In short, you have the right:

1. To be advised of the offense you are suspected of committing,
2. To be advised of your right to remain silent, and
3. To be advised that anything you say may be used against you.

ADMINISTRATIVE SEPARATIONS

A lot is at stake when the military decides to separate a service member. Unlike corporate America, the military has a unique ability to stigmatize its personnel with different characterizations of discharge, which can also affect your legal rights.

Typically, you are entitled to a separation board if you (1) are an officer, (2) have more than 6 years of service, (3) are being considered for an Other than Honorable Conditions discharge, or (4) are being separated for homosexual conduct.

Here are the types of discharge you could face at a show cause board (officers) or with an administrative separation (enlisted):

Honorable

Often, personnel who have no misconduct in their record but are simply not cut out for the military receive an honorable discharge. Note that the DD-214 will still reflect a separation code which, when translated into English, alerts employers to the reason for separation. Typical reasons include APFT failure, failure to meet body fat standards, personality disorder, failure to have a family care plan, etc. One caveat - the regulations allow lower characterizations of discharge for some of these, and some commanders may decide that an honorable discharge is not warranted.

General (Under Honorable Conditions)

Some stigma invariably attaches to an ex-service member who does not have an honorable discharge, and it may hinder your ability to join the reserves, obtain a security clearance, or even hinder your professional or educational opportunities. Additionally, there is the loss of a few benefits - notably, civil service retirement credit (in case you subsequently work for the feds), or the GI Bill, if this is your first term of enlistment.

Under Other than Honorable Conditions

This is the lowest administrative discharge, and reserved for the most egregious misconduct. With this discharge, you would lose virtually all of your military and veteran's benefits, and the stigma is tremendous (after all, employers who have never served in the military may tend to confuse this with a Dishonorable Discharge (which is a potential court-martial punishment)).

ARTICLE 15: NON-JUDICIAL PUNISHMENT

For minor offenses, commanders will generally impose punishment under Article 15, UCMJ. Procedurally, the commander will review the file, and then sign the Article 15. Though a senior NCO will often do the initial reading, the commander must have already signed the paperwork, and will ultimately conduct the hearing.

Upon being read an Article 15, the service member is escorted with the packet to see a military defense counsel. Unless you are a senior enlisted (E-7 or above) or officer, you will typically watch a video with other service members, then have the opportunity to consult with a military attorney if you have further questions.

Accepting Article 15 jurisdiction does NOT mean you are pleading guilty or accepting guilt. You still have the right to put on a defense, call witnesses, and establish your innocence. Though the commander must find you guilty beyond a reasonable doubt, the rules of evidence do not generally apply to Article 15 proceedings.

You have the right to reject an Article 15 and demand a trial by court-martial (except sailors aboard a ship). Doing this may or may not result in court-martial charges, depending upon the strength of the evidence against you, and your prior disciplinary record. Think carefully before rejecting an Article 15, and never do it without personally talking to an attorney.

COURTS-MARTIAL

Courts-martial charges are reserved for more serious offenses or personnel who allegedly commit repeat offenses. There are three broad levels of courts-martial:

General Courts-Martial

This is the highest level, with whatever maximum punishment is allowed by The Uniform Code of Military Justice (UCMJ) for each offense (i.e. could be death, or life imprisonment, dishonorable discharge, total forfeiture of all pay and allowances, and reduction to E1 if enlisted). Before charges can be referred to a general court-martial, you have the right to an Article 32 pretrial investigation. This is analogous to a civilian preliminary hearing, but you have more rights to confront witnesses, see the evidence against you, and, if tactically appropriate, present a defense. The trial itself is presided over by a military judge (typically a JAG O-5 or O-6), and you have the right to a panel of at least five officers, or officers and enlisted combined (typically, a panel will start with at least 10 members before challenges).

Special Courts-Martial

The maximum punishment is currently six months imprisonment (will soon increase to 12), reduction to E-1, forfeiture of 2/3 pay per month for six months, and, a bad conduct discharge (if referred to a court-martial authorized to adjudge a BCD). Unlike general courts-martial, special courts-martial do not require an Article 32 pretrial investigation. The trial itself is presided over by a military judge (typically a JAG O-5 or O-6), and you have the right to a panel of at least three officers, or officers and enlisted combined.

Summary Courts-Martial

Sometimes used as a replacement for a field grade Article 15, you have the right to reject summary court jurisdiction, in which case your case may go to a special or general court-martial. The maximum punishment is analogous to a field grade Article 15, though confinement may be a potential punishment. Unlike the higher level courts, you have no right to a panel - the case is heard before an officer (typically an O-3 or O-4 line officer). You also have the right to hire civilian counsel of your own choice, but typically not the rights to have a military defense counsel represent you at the hearing.

MILITARY SEARCHES

Soldiers, sailors, airmen and marines still possess a 4th Amendment right against unlawful search and seizure, but because of the unique nature of the military, this right is diminished.

Commanders can order random or 100% inspections of areas under their control (i.e. barracks and parking lots). The stated purpose of inspections is to preserve good order and discipline, not to gather evidence, which means they cannot be used as a pretense for searching specific service members.

While a service member cannot generally refuse an inspection, if asked, you may decline a search. If the commander, MP or CID/OSI agent searches anyway, an attorney can advise you later whether the search was lawful under the circumstances.

URINALYSIS

Under the Constitution and military law, a urinalysis is regarded as a search. However, just as commanders can order barracks inspections, that same commander can order a random urinalysis or a 100% urinalysis (typically done at a change of command).

Unless the commander has probable cause, he/she cannot target a specific service member. So if asked for consent to a urinalysis, just say no! And like a search, if you are ordered to submit anyway, go ahead and do it - your attorney can advise you later whether it was lawful. The alternative is worse - refusing a urinalysis could lead to punishment for violating a lawful order or, in limited situations, forcible extraction of your urine with a catheter.

If you are enrolled in ADAPT (formerly ADAPCP) or another service's drug & alcohol program, military regulations require periodic urinalyses and provide that the results may not be used against you punitively. Consult with an attorney if you test positive while enrolled.

For more information, contact experienced Colorado Springs military lawyers at Anderson & Travis:

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