

STANDING OPERATING PROCEDURES FOR MILITARY MAGISTRATES



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TABLE OF CONTENTS

SECTION I General Provisions	1
1. Purpose and Scope	1
2. Military Judges	1
3. Military Magistrates	1
4. Supervision of Magistrates.....	4
SECTION II Authority to Issue Search and Seizure Authorizations	5
1. Procedures	5
2. Guidance	5
3. Conducting a Search or Seizure Authorization.....	5
4. Execution	6
5. Scope of Authority of a Military Magistrate to Issue Search, Seizure, and Apprehension Authorizations.....	7
6. Apprehension Authorizations	11
SECTION III Pretrial Confinement	12
1. The Procedure	12
2. The Review	13
3. Centralization of Responsibility for Confinement	16
4. Interview	16
5. Conditional Release	17
6. Reconsideration of Continued Confinement and Reconfinement After Release.....	17
7. Memorandum	18
8. Confinees From Another Service	19
9. Military Judge Review of Pretrial Confinement Decisions.....	19
SECTION IV Interviews of Military Magistrates	20
1. Being Interviewed by Counsel about Search Authorizations and Pretrial Confinement Review Decisions.....	20
2. Media Requests	20

ENCLOSURES

ENCL 1 Delegation of Authority to Appoint Military Magistrates.....21

ENCL 2 SJA Nomination Memorandum.....22

ENCL 3 Military Magistrate Nomination Data Sheet23

ENCL 4 Memorandum of Appointment of Military Magistrate24

ENCL 5 Circuit Magistrate Roster.....25

ENCL 6 Military Magistrate Quarterly Report26

Instructions for Preparation of Military Magistrate Report27

ENCL 7 Chief Circuit Judge Semi-Annual Report.....28

ENCL 8 Guide to Articulating Probable Cause to Search29

ENCL 9 Notes on Request for Search Authorization.....30

ENCL 10 Pretrial Confinees Log (Optional Form).....31

ENCL 11 Checklist for Review of Pretrial Confinement32

ENCL 12 Pretrial Confinement Interview Script35

ENCL 13 Memorandum of Military Magistrate’s Conclusions37

ENCL 14 PTMM Deployment / Redeployment Memorandum 38

APPENDIX (FORMS)

DA Form 3881 Rights Warning Procedure/Waiver Certificate41

DA Form 3745 Search and Seizure Authorization.....42

DA Form 3745-1 Apprehension Authorization.....43

**DA Form 3744 Affidavit Supporting Request for Authorization to Search
and Seize or Apprehend44**

**ADMINISTRATIVE STANDING OPERATING PROCEDURES (SOP)
FOR THE MILITARY MAGISTRATE PROGRAM
(superseding the SOP dated 15 October 2006)**

1 September 2013

**Section I
General Provisions**

1. Purpose and Scope. These Administrative Standing Operating Procedures (SOP) establish policies to be followed by military judges and military magistrates when performing duties pursuant to the Military Magistrate program. The Military Magistrate Program is an Army-wide program that is responsible for the review of continued pretrial confinement and the issuance of search, seizure and apprehension authorizations. With approval of the Chief Trial Judge (CTJ), this SOP may be supplemented by Chief Circuit Judges (CCJs) to meet unique local conditions and to address military magistrate responsibilities concerning custody reviews exercised pursuant to Status of Forces agreements.

2. Military Judges.

a. Each trial judge certified IAW Article 26(b), UCMJ and assigned to the US Army Trial Judiciary is authorized to perform military magistrate duties. US Army Reserve (USAR) military judges certified IAW Article 26(b), UCMJ and assigned to either the US Army Legal Services Agency (USALSA) as an Individual Mobilization Augmentee or the 150th LSO (Military Judge) also may perform military magistrate duties.

b. A military judge is not automatically disqualified from presiding in a case where he or she has previously reviewed the propriety of continued pretrial confinement or issued a search and seizure authorization and should recuse himself or herself only when the military judge's impartiality might reasonably be questioned.

3. Military Magistrates.

a. Military magistrates are active duty or USAR judge advocates nominated by a Staff Judge Advocate and appointed by TJAG or TJAG's designee (AR 27-10, paragraph 8-1f and 8-2b). While TJAG has designated the USALSA Commander, the CTJ and CCJs as appointing authorities (Encl 1), the CCJ will normally act on a nomination. Nominees cannot be involved in criminal investigations or the prosecuting function, nor can they be related to persons involved in such functions in the same General Court-Martial (GCM) jurisdiction, as spouse, child, parent or sibling. Judge advocates who perform duties as legal advisors to Article 32 investigating officers or on-call duty officers are not disqualified from appointment as a military magistrate but providing substantive advice to command or law enforcement personnel in criminal

matters as a part of such duty will ordinarily disqualify them from acting as a military magistrate on that case. Performing duties as a Special Victim Advocate (SVA) is inconsistent with the duties of a PTMM. Performing duties as an Article 32 investigating officer is not inconsistent with the duties of a PTMM, but a judge advocate cannot act as both a PTMM and an Article 32 investigating officer in the same case or related case (such as that of a co-accused). To satisfy the requisite training, knowledge, judgment and maturity requirements for the position, nominees should have prior trial or defense counsel experience and ordinarily not be on their initial judge advocate tour.

b. The Staff Judge Advocate (SJA) must forward a nomination memorandum (Encl 2) and a signed Military Magistrate Nomination Data Sheet (Encl 3) through the military judge assigned to the installation, if any, to the CCJ. The CCJ's notification of appointment memorandum (Encl 4) will be sent to the nominee, with a courtesy copy provided to the appropriate supervising military judge. The newly appointed military magistrate must contact the supervising military judge and arrange an initial training session before performing any magisterial duties.

c. The military magistrate will contact the supervising military judge with any questions concerning performance of military magistrate duties or the propriety of any action considered taking. Both may consult with other judges. Advice will not be sought outside of trial judiciary channels in order to avoid compromising a military magistrate's impartiality.

d. In accordance with the Code of Judicial Conduct for Army Trial and Appellate Judges, military magistrates shall comply with Canon 1, and with Rules 2.2 (Impartiality and Fairness), 2.3 (Bias, Prejudice and Harassment), 2.4 (External Influences on Judicial Conduct), 2.5(A) (Competence, Diligence and Cooperation), 2.6 (Ensuring the right to be Heard), 2.7 (Responsibility to Decide), 2.8 (Decorum, Demeanor, and Communication with Court Members), 2.9 (Ex Parte Communications 2.10 (Judicial Statements on Pending and Impending Cases), 3.5 (Use of Nonpublic Information) and 3.6(A) (Affiliation with Discriminatory Organizations).

e. Military magistrates are not advisors to the SJA office and should remember that they are performing a quasi-judicial function. Whether reviewing a request for a search authorization or when reviewing pretrial confinement, in each case the military magistrate is determining whether the government has carried its burden. In the former, the burden is to establish probable cause. In the latter, the burden is to establish the RCM 305(h)(2)(B) factors by a preponderance of the evidence. The military magistrate is neither an investigator nor an advocate in either case and must be careful not to assist the government in carrying its burden. For example, if the military magistrate finds the government's evidence insufficient to meet its burden, the military magistrate must not suggest additional evidence or areas of inquiry to cure the deficiency.

f. Each military magistrate should ensure that timely notice is provided to the supervising military judge of the following actions:

(1) Leave, pass, temporary duty (TDY), deployment, re-deployment, or other temporary absence from their post. (This is particularly important for military magistrates that may be rotating in and out of theater routinely. See paragraph 4.c. below.)

(2) When assigned to or performs duties in law enforcement, defense or prosecution functions (such as trial counsel or SAUSA), when performs duties as a Special Victim Advocate (SVA), or when performs other duties inconsistent with his or her military magistrate position, when a spouse, child, parent or sibling begins performing such duties in the same GCM jurisdiction or when moving under permanent change of station (PCS) orders.

g. Should any of the actions in 3.f.(2) occur, the military magistrate's authority shall be automatically terminated. When the disqualifying duties end or upon arrival at the new PCS duty station, the former military magistrate may be reappointed for further service. In other words, when the circumstances in paragraph 3.f.(2) occur, the military magistrate's status is not simply "suspended" but is instead terminated, pending reappointment. A new Data Sheet and nomination memorandum must be submitted and approved by the CCJ. Military magistrates should be particularly sensitive to deployment situations, where they will be more likely to come into contact with commanders seeking their advice on military justice matters.

h. Military Magistrate Reports. Each CCJ will provide a semi-annual military magistrate roster reflecting the names of current military magistrates in the circuit, date of appointment, date of training and contact information, to the Office of the CTJ (OCTJ) NLT than 1 February and 1 August (Encl 5). All military magistrates will file an individual quarterly report with their Chief Circuit Judge, NLT 15 April, 15 July, 15 October and 15 January (Encl 6, JALS-TJ Form 55-R (1 Jul 76, Rev. June 2006)). (CCJs can require more frequent reports from their military magistrates, as conditions dictate.) Each CCJ will then submit a semi-annual report to the OCTJ reflecting the consolidated number of confinement reviews and search authorizations conducted within the circuit during the January-June and July-December timeframes, respectively (Encl 7). This semi-annual report will be submitted to the OCTJ NLT 1 February and 1 August.

i. References. Military magistrates should prepare their own "resource" binder with the following items:

- (1) Appointment Memorandum;
- (2) Manual for Courts-Martial (the most current edition);
- (3) Code of Judicial Conduct for Army Trial and Appellate Judges
- (4) AR 27-10 (most current version);

(5) Blank forms to include: DA Form 3881 (Rights Warning Procedure/Waiver Certificate); DA Form 3744 (Affidavit Supporting Request for Authorization to Search and Seize or Apprehend); DA Form 3745 (Search and Seizure Authorization); DA Form 3745-1 (Apprehension Authorization). These forms are available in the Appendix and in PDF format on the USAPA website at <http://www.army.mil/usapa/eforms>; and

(6) This SOP.

Military magistrates should produce a duplicate binder for use at home.

4. Supervision of Military Magistrates.

a. Supervising Military Judge. Each military magistrate will be supervised in performing magisterial functions by a military judge assigned to the US Army Trial Judiciary and designated as the supervising military judge by a CCJ or the CTJ. Supervising military judges should periodically review pretrial confinement memoranda and search authorizations issued by military magistrates to ensure that they contain sufficient information and are properly maintained. Supervising military judges will train military magistrates upon appointment and assist military magistrates thereafter by providing advice and counsel as needed.

b. CCJs have responsibility for the overall supervision of the Military Magistrate Program within their respective circuits. Each CCJ will ensure that military magistrate services are provided in an efficient and economic manner and that military magistrates are properly trained, supported, and supervised.

c. When military magistrates deploy or redeploy between circuits, their authority as a military magistrate does not terminate, absent one of the conditions listed in paragraph 3.f.(2). As a matter of policy, military magistrates physically located with the Soldier about whom a matter relates will address any issues regarding that Soldier, even if the matter originated when that Soldier was in another location and was originally handled by another PTMM at that location. To clarify the military magistrate's status on deployment or redeployment, the CCJs should use the memorandum below at Encl 14.

Section II

Authority to Issue Search, Seizure and Apprehension Authorizations

1. Procedures. All military magistrates are authorized to issue search and seizure or apprehension authorizations upon a showing of probable cause. AR 27-10, paragraph 8-7. This authority is not specific to any particular military installation. A military magistrate stationed at one installation may issue authorizations, upon request, for another installation. Notwithstanding the lack of geographic limitations, however, military magistrates should be cautious when it appears that law enforcement or command personnel may be engaged in “forum shopping” (the attempt to seek authority from one military magistrate after being denied authority by another military magistrate). Authorizations to search and seize or apprehend may be issued on the basis of unsworn written or oral statements. However, absent extraordinary circumstances, a military magistrate should issue only written search authorizations based on written, sworn statements. DA Form 3744 (Affidavit Supporting Request for Authorization to Search and Seize or Apprehend) should be used unless impractical. In cases where oral search and seizure authorizations are given, written authorizations must be subsequently issued or detailed memoranda of record prepared as soon as possible. DA Form 3745 (Search and Seizure Authorization) or DA Form 3745-1 (Apprehension Authorization) should be used to memorialize written authorizations.

2. Guidance. Searches, seizures and apprehensions will be authorized by military magistrates and executed in accordance with RCM 302, MRE 315 and 316, applicable case law, and AR 27-10.

3. Conducting a Search or Seizure Authorization.

a. Frame the request.

(1) Identify who is requesting the authorization and place that individual under oath, (Chapter 10, AR 27-10):

“Do you swear (or affirm) that the information you are providing is, to the best of your knowledge, information, and belief, the truth? (so help you God)?”

(2) Ask what offense is being investigated, what the requestor wants to search for, where he or she wants to search for it, and why he or she believes it will be found at that location at this particular time, or at that location at a time specific in the future. Determine whether the requestor has asked another military magistrate, a military judge, or a commander to grant the request, and, if so, whether new information has been added since the previous request. This information must be disclosed. AR 27-10, paragraph 8-12. If the requestor has asked another military magistrate, military judge or commander to grant the request, the requestor should normally be referred back to that military magistrate, military judge or commander, absent exigent

circumstances. (An exception to this referral rule exists when the Soldier subject to the search has been transferred from one location to another – particularly between CONUS and OCONUS. In that case, a military magistrate at the Soldier’s new location should handle the search authorization request, even if that request has been presented to another military magistrate at the Soldier’s previous location. See Section I, paragraph 4.c. above.)

b. Review all written matters presented by the requestor including any affidavit prepared in support of the request.

c. Examine individuals who appear before you to make statements in support of the authorization. Swear anyone who makes such a statement. Hearsay may be considered but give it the weight you believe it deserves. Ask specific questions about the source of any information described by the person appearing before you to determine who told the person the information, how current the information is, how the person knows that information, whether the information was provided under oath, and how the person is related to the matter under investigation or persons being investigated (accomplice, related suspect, paid informant, good citizen, family or friend, anonymous tip, eye-witness, or victim). In regard to informants, ask whether the person provided information before, how reliable or believable the other information was, and why you should believe the informant.

d. Determine whether probable cause exists. Probable cause to search exists when there is a “reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched.” MRE 315(f)(2), (See Encl 8, Guide to Articulating Probable Cause). In deciding whether probable cause exists, you are performing a quasi-judicial function. If you deny a request for lack of probable cause, you may tell the requestor in general terms why the request is being denied. As a military magistrate, however, you should not tell the requestor how to cure any deficiencies in the request or what else is needed to establish probable cause in the case at hand. You should simply refer the requestor to a legal advisor.

e. Take notes during the entire process of receiving information. List documents reviewed; copies of documents reviewed may be maintained with the notes. See Encl 9 for a suggested format for taking notes on a request for a search authorization. Safeguard these notes in case needed later (to include using them to refresh your recollection or as exhibits).

4. Execution.

a. MRE 315(h) governs execution of authorizations to search and seize.

b. Record decisions on DA Form 3745, “Search and Seizure Authorization.” Authorizations to search or seize should be executed within ten days after issuance (AR 27-10, paragraph 8-10).

c. If search authorizations are to be executed during nighttime or as an exception to “knock and announce” requirements, the search authorization should explicitly so state.

d. An inventory of the property seized will be made at the time of the seizure or as soon as practicable. A copy of the inventory will be delivered to the person from whose possession or premise the property was taken (DA Form 4137 (Evidence/Property Custody Document) may be used).

e. After the authorization has been executed, the authorization, which should be written (absent extraordinary circumstances), together with a copy of the inventory (DA Form 4137 may be used), will be returned to the military magistrate (AR 27-10, paragraph 8-10). Thereafter, all documents and papers relative to the search or seizure will be transmitted to the SJA or appropriate law enforcement office, as local procedures dictate. The military magistrate will keep a file copy of each authorization and any inventories resulting therefrom.

f. AR 195-5 governs recovery and disposition of property seized pursuant to an authorization to search and seize conducted by US Army criminal investigators. Chapter 3, AR 190-22, governs recovery and disposition of property seized pursuant to a search or seizure by other authorized persons.

g. Failure to comply with any of the above administrative guidelines will not render a search or seizure unlawful within the meaning of MRE 311 or MRE 315(h)(4).

5. Scope of Authority of a Military Magistrate to Issue Search and Seizure Authorizations.

a. Upon application and determination of probable cause, a military magistrate may issue search and seizure authorizations under MRE 315 and 316.

b. Interception of Wire, Electronic and Oral Communications for Law Enforcement Purposes. IAW Department of Defense (DoD) Directive 5505.9 (20 Apr 95), military magistrates do not have authority to approve such interceptions. See also AR 190-53. Requests pursuant to MRE 317 should be immediately referred to the supervising military judge.

c. Counterintelligence (CI) Search Authorizations. Executive Order 12333 (8 Dec 1981) and AR 381-10, Procedure 7, place limitations on search authorizations granted to CI agents. Notwithstanding the provisions of AR 381-10, authorizations for nonconsensual physical searches of military personnel (in the United States or abroad) by military CI agents for intelligence purposes will only be authorized by commanders or active duty military judges, and then only after a finding that there is probable cause to believe that the subject of the search is acting as an agent of a foreign power. Although authorized by AR 381-10, as a matter of policy, requests for CI search authorizations submitted to a military magistrate should be immediately referred to the supervising

military judge. These restrictions do not apply to search authorizations requested by non-CI agents for evidence of violations of criminal statutes not gathered for intelligence purposes, even if the CI agents accompany the other agents on the search. However, military magistrates should be wary of subterfuge search authorization requests designed to skirt the above requirements.

d. In CONUS, the nonconsensual search of off-post private property occupied by military members requires authorization from a duly appointed United States Magistrate Judge or local civilian judge. Do not grant authorization to search in these circumstances. Military magistrates may grant authorization to search privatized housing located on an Army installation, including quarters erected or managed by a private corporation, such as Residential Communities Initiative (RCI) housing.¹ Military magistrates may even grant search authorization of RCI housing occupied by civilian personnel as long as the housing is located on an Army installation.² While case law may support a military magistrate granting search authorizations for off-post residences leased by the Government for military members,³ the better practice is for a United States Magistrate Judge or local civilian judge to authorize a search of such structures. In certain OCONUS locations, a military magistrate may also grant search authorizations of private property occupied by military personnel under the applicable status of forces agreement (SOFA) with that country and existing case law.⁴ When questions arise concerning an overseas search, the military magistrate should consult with a military judge.

e. Financial Information. Search authorizations signed by installation commanders, military judges, or military magistrates will not be used to gain access to financial records from financial institutions in any State or territory of the United States.⁵ See DoD Instruction 5400.15, 2 DEC 04 and AR 190-6, Obtaining Information from Financial Institutions (9 FEB 06). Military magistrates may grant search authorizations for financial records retained by institutions located on DoD installations outside the United States when the financial institution does not have a home office in the United States,⁶ it would not be appropriate to obtain consent from the individual whose records are sought or such consent is refused, and the financial institution is unwilling to

¹ The “privatization” of on-post housing and other facilities in no way diminishes the authority of military judges and military magistrates, garrison commanders or installation commanders to authorize searches of on-post housing or facilities whether “privatized” or not. AR 27-10, Paragraph 8-13.

² MRE 315c states: “A search authorization may be issued under this rule for a search of: ...Persons or property situated on or in a military installation, encampment, vessel, aircraft, vehicle, or any other location under military control.” See also *United States v. Rogers*, 388 F. Supp. 298 (E.D. Va. 1975).

³ *United States v. Reppert*, 76 F. Supp. 2d 185 (D. Conn 1999) (property leased by the Government in the civilian community to house sailors and their families under “military control”).

⁴ MRE 315(c)(4) and *United States v. Chapple*, 36 M.J. 410 (C.M.A. 1993).

⁵ It is DoD policy that authorization of the customer to whom the financial records pertain shall be sought unless doing so compromises or harmfully delays either a legitimate law enforcement inquiry or a lawful intelligence activity. DoDI 5400.15, 2 DEC 04.

⁶ If the OCONUS branch office of a bank or credit union is headquartered in the United States, a federal magistrate or state court judge where the headquarters is located should be approached to obtain a search authorization for financial records of one of its member institutions.

voluntarily provide access to its records. Such information must be identified as financial information and must be protected with limited access. However, failure to identify or limit access does not render the information inadmissible as evidence in courts-martial or other proceedings.⁷

f. Search and Seizure of Electronic Evidence. Electronic media⁸ can contain evidence relevant to a criminal offense in several ways. For example, (1) the electronic media can be contraband because it is stolen property; (2) electronic media can be a repository for data that is contraband (such as child pornography); (3) electronic media can be a repository for data that is evidence of a crime (such as pictures of individuals with weapons used in criminal acts, video clips of illegal drug use, or log files showing relevant Internet Protocol (IP) addresses, websites and email addresses accessed); and (4) electronic media can be the instrumentality of a crime (such as when used to illegally download and distribute copyrighted songs or electronic games, or to hack into websites).⁹ Military magistrates must understand what they intend to authorize -- whether it is the hardware or the information contained within the hardware, or elsewhere, that is to be seized.

Conducting a search of a computer hard drive or other media, such as a cellular phone, is generally a time-consuming process which requires a forensic expert familiar with the particular operating system. In addition, electronic media can store the equivalent of millions of pages of information and the information being sought can be mislabeled, hidden, encrypted or otherwise obfuscated. In other cases, the evidence may be contained in system logs, an operating system or malicious code artifacts, or be otherwise difficult to locate and analyze. For these and other reasons, it may be impossible to conduct a search on site within a reasonable time. The requestor may request authorization to either image the media or to seize the media and search it off-site in a controlled environment. The military magistrate should ensure that the affidavit provides reasonable justification for requesting an off-site search but normally should not put any time limits on the search.¹⁰

⁷ See The Right to Financial Privacy Act of 1978 (12 U.S.C. 3401 et seq.); *United States v. Moreno*, 23 M.J. 622 (A.F.C.M.R. 1986).

⁸ U.S. DEP'T OF ARMY, AR 195-5, EVIDENCE PROCEDURES, para.2-7g (25 June 2007), states that electronic media includes computer hard drives, magnetic media (for example, floppy diskettes and tapes), optical media (for example, compact discs and digital versatile discs), flash media (for example, thumb drives, camera memory cards, and video game media), pagers, cellular telephones, electronic planners, personal digital assistants, music players, data watches, tape recorders, et cetera.

⁹ Adapted from federal search warrant comparable concepts expressed in *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations*, <http://www.justice.gov/criminal/cybercrime/ssmanual/ssmanual2009.pdf>, p. 61-2. Retrieved December 13, 2010.

¹⁰ But see AR 27-10, paragraph 8-10 which indicates that search authorizations should be executed within 10 days of issuance. While physical seizure of the electronic media itself should occur within that time frame, a more expansive time frame for off-site copying / review / electronic search would be consistent with federal practice and the 2009 update to Federal Rule of Criminal Procedure 41(d)(2)(B) which provides that the time for execution of a warrant "refers to the seizure or on-site copying of the media or information, and not to any later off-site copying or review."

Military magistrates must recognize that when electronic media is to be searched because it stores information that is evidence of a crime, the items to be seized under the warrant should focus on the electronic information/data, rather than the physical storage media. For example, the requestor's properly drafted request to search may be "for all information, in whatever form found, to include records, documents, and materials, whether electronic or physical, related to the offenses previously described."

The following are some possible issues to consider regarding search and seizure of electronic evidence:

(1) Is the seizable property the electronic media hardware or merely the information that the hardware contains? For instance, is the computer stolen property or does it contain images which are illegal? If the hardware is contraband, evidence, fruits, or instrumentalities of crime, the search authorization should describe the hardware itself. If the probable cause relates only to information, the search authorization should describe the information to be seized, and then request the authority to seize the information in whatever form it may be stored (whether electronic or not). See *United States v. Clayton*, 68 M.J. 419 (C.A.A.F. 2010); *United States v. Macomber*, 67 M.J. 214 (C.A.A.F. 2009).

(2) What is the experience level of the requestor/agent? Does the agent have experience and training in computer crimes or child pornography? See *United States v. Leedy*, 65 M.J. 208 (C.A.A.F. 2007); *United States v. Gallo*, 55 M.J. 418 (C.A.A.F. 2001).

(3) Will the search of the electronic media require imaging and/or an off-site examination?

(4) Will there be a limitation on the time period of the forensic search?

An effective approach when authorizing a search for information contained within electronic media is to begin with an "all records" description; add limiting language stating the crime, the suspects, and relevant time period, if applicable. Include explicit examples of the records to be seized; and then indicate that the records may be seized in any form electronic or non-electronic.

CAVEAT: When applying the above, the military magistrate always must be cognizant of the military magistrate's role: to review what is presented and determine if the government has carried its burden to establish probable cause. The military magistrate must be careful NOT to "guide" the official seeking the search authorization to the "correct answer." The above guidance is solely to assist the military magistrate in evaluating what has been presented; it must NOT be used to assist the official presenting it.

6. Apprehension Authorizations.

a. A military magistrate may issue apprehension¹¹ authorizations for persons subject to the Uniform Code of Military Justice based on probable cause. RCM 302(a)(2) and (b). Probable cause to apprehend exists when there are reasonable grounds to believe that the subject of the authorization has committed or is committing an offense triable by courts-martial. RCM 302(c).

b. Neither a warrant nor other authorization is necessary in order to effect an apprehension occurring in a public place.¹² Authorization is required to apprehend military members in private dwellings.¹³ Thus, a military magistrate's authority to issue an apprehension authorization is generally limited to military residents or military overnight guests in private dwellings located on military property or under military control. MRE 302(e). Requests made to a military magistrate to issue apprehension authorizations for civilians on or off-post or military members in off-post dwellings should be referred to a United States Magistrate Judge or local civilian judge.

¹¹ The taking of a person into custody is referred to in the military as an "apprehension." RCM 302(a)(1). "Apprehension" is the equivalent of "arrest" in civilian terminology. In military terminology, "arrest" is a form of restraint. See Article 9, UCMJ; RCM 304.

¹² *United States v. Watson*, 423 U.S. 411 (1976).

¹³ See, e.g., *United States v. Khamsov*, 57 M.J. 282 (C.A.A.F. 2002).

Section III Pretrial Confinement

1. The Procedure. All military magistrates are authorized to review the propriety of continued pretrial confinement. This authority is not geographically limited. A military magistrate at one installation may lawfully review the pretrial confinement of military personnel assigned to a different installation. The following procedures apply to Soldiers placed into pretrial confinement and the military magistrate's review thereof:

a. When a Soldier is ordered into pretrial confinement, the trial counsel must provide the military magistrate with the confinement order and any documentation supporting pretrial confinement by noon of the day following confinement, unless local policy requires otherwise.

b. The trial counsel will also provide the military magistrate a copy of:

- (1) The commander's 72-hour review IAW RCM 305(h)(2)(C);
- (2) The 48-hour review IAW RCM 305(i)(1), if already completed; and
- (3) The preferred charges.

If these documents are not immediately available, the trial counsel will forward them to the military magistrate the same day as completed. This is especially important in cases where charges have not been preferred. As the probable cause standard for ordering a Soldier into pretrial confinement is the same standard used in preferring charges, a trial counsel should be able to provide a military magistrate with a copy of the preferred charge sheet prior to the actual review. There is no requirement that all charges be preferred at a single time. New charges discovered during the course of any continuing investigation can always be the basis for additional charges.

c. The trial counsel will also provide to the defense counsel representing the confined Soldier (if a defense counsel has been detailed), or the senior defense counsel (if a defense counsel has not been detailed) the documents reflected in paragraphs 1a. and 1b., during the same time periods.

d. Upon receipt of the information in subparagraph 1a., the military magistrate will expeditiously set the time, date and location of the pretrial confinement review. The pretrial confinement review will take place as scheduled, absent a showing of good cause.

e. Unless personal appearance is waived or determined by the military magistrate to be impracticable, the Government shall produce a Soldier in pretrial confinement for appearance before the military magistrate at the time, date, and

location set for the review by him or her (RCM 305(i)(2)(A)(i)). If the Soldier is not produced, the military magistrate will note the reasons why in his or her memorandum.

f. At installations where the confinement population so warrants, the supervising military judge may appoint a senior military magistrate. It is the senior military magistrate's responsibility to track the status of all Soldiers in pretrial confinement and to report that information to the supervising military judge on a periodic basis, as set by the supervising military judge. A sample format is included at Encl 10.

2. The Review.

a. Within 48 hours of a Soldier being ordered into pretrial confinement, a neutral and detached officer must determine if probable cause exists to continue confinement. Within 7 days of the imposition of confinement, a military magistrate shall review the necessity for continued pretrial confinement. The military magistrate may, for good cause, extend the time for completion of this review to 10 days. If the 7 day review is held within 48 hours of the Soldier being ordered into pretrial confinement, the neutral and detached officer's review is not required.

b. For pretrial confinement to continue, the military magistrate must be convinced by a preponderance of the evidence that:

- (1) An offense triable by court-martial has been committed;
- (2) The Soldier committed it;
- (3) Continued confinement is necessary because it is foreseeable that:
 - (a) the Soldier will not appear at trial, pretrial hearing, or investigation; or
 - (b) the Soldier will engage in serious criminal misconduct; and
- (4) Less severe forms of restraint are inadequate. RCM 305(h)(2)(B).

The law favors release of the Soldier pending determination of guilt or innocence (AR 27-10, paragraph 5-15a). The Government bears the burden of establishing the requirements for pretrial confinement under RCM 305(h)(2)(B) above, by a preponderance of the evidence. RCM 305(i)(2)(A)(iii). A fact is established by a preponderance of the evidence when it is more likely than not to be true.

c. A military magistrate does not decide to confine a Soldier. The military magistrate's duty is to review another's decision to do so. The review must include a review of the memorandum submitted by the Soldier's commander under RCM 305(h)(2)(C). The military magistrate may also consider any other information helpful to making an informed decision (*see below*). The review, including the pretrial

confinement hearing, is not adversarial in nature. The Soldier, and the Soldier's defense counsel must be allowed to appear, if practicable, and make a statement. A command representative, usually the trial counsel, may be allowed to attend, but the hearing should not be delayed solely to allow attendance of a command representative. The RCM 305 review is not a court-martial and the military magistrate should not allow counsel to turn the proceedings into one. (See RCM 305(i)(2)(A)(ii) and (iii) concerning rules of evidence and standard of proof applicable to a review of pretrial confinement.) The scope of the proceeding is within the military magistrate's discretion and may be tailored to the individual case and local conditions. The Checklist for Review of Pretrial Confinement at Encl 11 should be used, as appropriate. It is not the military magistrate's duty to determine whether the conditions of confinement or actions by the chain of command entitle the Soldier to administrative credit towards any subsequent court-martial sentence.

(1) In addition to the commander's memorandum required by RCM 305(h)(2)(C), other information to be reviewed should include, but is not limited to:

- (a) Sworn charge sheets (DD Form 458);
- (b) Confinement order (DD Form 2707);
- (c) Documentary evidence concerning the charges, e.g., signed witness statements, DA Forms 4187, CID reports; and
- (d) Checklist for confinement.

(2) Some factors to be considered in determining the need for continued pretrial confinement are set forth in the discussion to RCM 305(h)(2)(B):

- (a) The nature and circumstances of the offenses charged or suspected, including extenuating circumstances;
- (b) The weight of the evidence against the Soldier;
- (c) The Soldier's ties to the locale, including family, off-duty employment, financial resources, and length of residence;
- (d) The Soldier's character and mental condition;
- (e) The Soldier's service record, including any record of previous misconduct;
- (f) The Soldier's record of appearance at or flight from other pretrial investigations, trials, and similar proceedings; and

(g) The likelihood that the Soldier can and will commit further serious criminal misconduct if allowed to remain at liberty.

(3) In addition, factors concerning the likelihood of obstruction of justice should be considered, such as:

(a) The case depends mainly on the testimony of witnesses rather than documentary evidence;

(b) The witnesses are members of the Soldier's unit, live in the Soldier's barracks, or have a common place of duty with the Soldier;

(c) The Soldier's reputation, if any, for violence, bribery, or false statements;

(d) Reliable information demonstrating threats or acts of violence against witnesses by or at the behest of the Soldier; and

(e) The Soldier's violations of conditions previously established for the protection of witnesses or others.

(4) The military magistrate should not question the Soldier, absent extraordinary circumstances. The military magistrate's function is to review the evidence presented and determine whether the RCM 305(h)(2)(B) factors have been established by a preponderance of the evidence; the military magistrate's function is not to investigate. The Soldier may elect to make a statement. Possible defenses may be relevant to whether the preponderance of the evidence indicates the RCM 305(h)(2)(B) factors exist, however, the review is not a trial. If a government representative is present at the review, that representative may not question the Soldier. Generally the written documentation submitted by the parties is sufficient to satisfy any evidentiary needs. While the military magistrate may determine that witnesses are necessary to resolve a substantial factual issue materially affecting the military magistrate's ability to perform a legally sufficient review, it is the exception to the rule.

(5) If the government does not meet its burden, pretrial confinement will be ordered terminated. The confining commander or his or her representative must be informed immediately. This notification is the Government representative or trial counsel's responsibility and not the responsibility of confinement facility personnel.

d. Pretrial confinement should not be used as a matter of convenience. A Soldier will not ordinarily be placed in pretrial confinement when charged with an offense normally tried by summary court-martial (SCM). As part of the review, the military magistrate will ask the trial counsel or commander ordering confinement the anticipated level of disposition. If the charges are already referred to a SCM or the Government representative indicates that the anticipated level of disposition is SCM, the Soldier should be ordered released, absent "extraordinary circumstances" in evidence

establishing the RCM 305(h)(2)(B) factors by a preponderance of the evidence. See Article 10, UCMJ.

e. The military magistrate must note in the decision memorandum, along with supporting reasons, if the 48-hour review required by RCM 305(i)(1) was either not conducted or conducted by a person the military magistrate believes may not be neutral and detached.

f. While the Soldier may “waive” appearance at the review, the review itself cannot be waived. Should the Soldier and the Soldier’s defense counsel indicate they will waive personal appearance, the military magistrate must still conduct the review, using the procedures outlined herein.

3. Centralization of Responsibility for Confinement. Military magistrates should require jurisdictions in which they conduct confinement reviews to follow uniform policies in evaluating the need for such confinement. This goal can generally be attained by centralizing the evidence-gathering function in the Military Justice/Criminal Law Section of the Office of the SJA. The Chief of Criminal Law has a critical “need to know” whether pretrial confinement is lawfully imposed. The procedural framework to be employed will depend on local conditions. With approval of the CTJ, each CCJ may promulgate additional uniform rules for the processing of pretrial confinement reviews within their circuit beyond those requirements set forth in Section III, paragraph 1 above.

4. Interview. The term “interview” includes the entire process by which the military magistrate considers the legality of a new instance of pretrial confinement.

a. The military magistrate should become familiar with all materials furnished by the Government as a basis for confinement prior to meeting with the Soldier. The military magistrate should also notify the Soldier’s detailed defense counsel, prior to the meeting with the Soldier, of the scheduled time and place of the meeting, ensure the Government has provided the defense counsel with a copy of the materials furnished by the Government to the military magistrate, and should ascertain whether the defense counsel desires to attend.

b. The place of the meeting should be that designated by the military magistrate. At a minimum, a private office with a desk and a sufficient number of chairs should be used. The courtroom should not be used and the military magistrate will not wear a judicial robe. Unless warranted by unusual conditions, confinement facility personnel or guards should not normally be present. A Government representative may be present and the Soldier’s defense counsel must be permitted to attend the interview. Questions about those permitted to attend should be addressed to the supervising military judge.

c. The meeting between the Soldier and the military magistrate should be informal. As an aid in conducting the interview, the military magistrate should follow the suggested script at Encl 12.

d. The military magistrate should not normally volunteer that he or she has the power to order the Soldier released from confinement, though he or she should tell the Soldier this if asked. The military magistrate's tone should be receptive and concerned, though not overly friendly. The military magistrate should not be judgmental of the Soldier's conduct, nor should the military magistrate counsel the Soldier concerning behavioral or personal problems that may surface during the meeting.

e. When defense counsel is present during the meeting, he or she may fully advise the Soldier concerning answers to the military magistrate's questions and may assist the Soldier in formulating replies. Defense counsel may also submit written statements pertaining to any aspect of the magisterial function, including the substance of the offenses charged. The defense counsel may also make a statement for the Soldier but should not be permitted to call defense witnesses, cross-examine any witnesses, or otherwise seek to convert the interview into an adversarial proceeding. At the military magistrate's discretion, the Government representative may be allowed to make a statement on behalf of the command, but should not be permitted to call witnesses, cross-examine witnesses, or otherwise seek to convert the interview into an adversarial process.

f. In those cases where the military magistrate, based on an initial inquiry or subsequent information, determines that there is a basis for further inquiry, additional information may be gathered from commanders, supervisors in the confinement facility, the SJA office, or others having relevant information. The matters considered should be noted as enclosures to the military magistrate's decision memorandum (see Encl 13).

g. If the military magistrate determines that the Soldier should be released from confinement, the Soldier's unit commander will be notified immediately. See RCM 305(g). Again, this is the responsibility of the trial counsel or Government representative and not the responsibility of confinement personnel or the military magistrate. If the Soldier is present when a decision is made, the military magistrate should ordinarily inform the Soldier. However, the military magistrate may properly defer announcing such a decision until after the commander is informed. The military magistrate should include in the decision memorandum any reluctance or hesitation by command or confinement personnel to release the Soldier at the military magistrate's direction.

5. Conditional Release. Notwithstanding AR 27-10, paragraph 8-5b(3), military magistrates may not recommend appropriate conditions of release if it is determined that continued pretrial confinement is not warranted. The military magistrate is not the command's legal advisor; as such, the trial counsel must make any such recommendations.

6. Reconsideration of Continued Confinement and Reconfinement After Release.

a. Until referral of charges, the military magistrate shall upon request, and after notice to the parties, reconsider a decision to continue pretrial confinement. RCM

305(i)(2)(E). Reconsideration can be based on any significant information not previously considered and will be made on the same basis as any other review of pretrial confinement, to include failure to prefer charges within 7 days of confinement.

b. Once a Soldier is released from pretrial confinement, he or she may not be ordered returned to pretrial confinement except when an additional offense is committed or upon receipt of newly discovered information, either alone or in conjunction with all other available evidence, justifies confinement (RCM 305(l)). The trial counsel will immediately notify the military magistrate who conducted the initial review of any reconfinement and the reasons thereof. AR 27-10, paragraph 8-5b(4). The military magistrate will then expeditiously review the decision. The determination whether continued pretrial confinement is warranted in such cases will be made on the same basis as in any other case (RCM 305(l)).

c. The military magistrate should consult the supervising military judge when a request for a supplemental review is based on a complaint of illegal pretrial confinement. See *United States v. Palmiter*, 20 M.J. 90 (C.M.A. 1985) and *United States v. McCarthy*, 47 M.J. 162 (C.A.A.F. 1997).

d. A military magistrate who is receiving repeated or questionable requests should contact the supervising military judge.

e. If the commander who directed pretrial confinement decides that the Soldier should be released, the military magistrate has no role or review responsibilities in regards to the Soldier's release from confinement.

7. Memorandum. The military magistrate will communicate the decision in each case to the Soldier confined. This may be accomplished by a copy of the written memorandum (AR 27-10, paragraph 8-5). All decisions of military magistrates will be set forth in a written memorandum. A sample memorandum is at Encl 13. The memorandum may be in any form as long as it is written and contains the following minimum information:

- a. Soldier's name and identification data;
- b. The military magistrate's decisions;
- c. The factual findings upon which the conclusions are based. Findings should be based on the circumstances of each case. Avoid using rote and standard language;
- d. A copy of all documents considered;
- e. Date, time, and manner in which Soldier was notified of military magistrate's decision; and

f. Date, time, and name of detention facility individual notified when military magistrate orders release.

Copies should be made available to the defense counsel and trial counsel. Upon request, a copy of the memorandum should be provided the same day to the Soldier. See RCM 305(i)(2)(D); *United States v. McCants*, 39 M.J. 91 (C.M.A. 1994); *United States v. Burgett*, Army 9501941 (Army Ct. Crim. App. 19 June 1997)(order)(unpub.) (the Soldier is entitled to day-for-day credit under RCM 305(k) for each day of noncompliance after the defense requests a copy of the reviewing officer's memorandum; there are no deductions for preparation time). One copy will be provided to the commander of the military confinement facility for inclusion in the Soldier's Correctional Treatment File or to the installation confinement liaison official if the Soldier is being held in a civilian confinement facility. One copy will be forwarded to the trial counsel for inclusion in the allied papers of any subsequent record of trial (AR 27-10, paragraph 5-41a). The military magistrate will retain a copy of the memorandum (with all enclosures) for one year. The military magistrate also will forward a copy to the supervising military judge.

8. Confinees From Another Service.

a. Other service confinement rules. Confinement rules in the Navy, Marine Corps, Air Force, and Coast Guard may differ from rules applicable to Soldiers confined in Army Confinement Facilities. The place of confinement governs the rules that will be used in reviewing the propriety of continued pretrial confinement. (See AR 27-10, paragraph 8-5a(4)).

b. Before conducting a pretrial confinement review on a military member from another Service, a military magistrate should notify the supervising military judge and the military member's commander. Arrangements for pretrial confinement review by a member of the confinee's service should be made whenever possible. Pretrial confinement review, however, will not be delayed beyond the time required for review by RCM 305 solely to obtain pretrial confinement review by a member of the confinee's service. Military members of other Armed Forces ordered into pretrial confinement in Army confinement facilities shall be subject to the provisions of Chapter 8, AR 27-10, unless an officer of the other Armed Force requests specific exceptions consistent with RCM 305.

9. Military Judge Review of Pretrial Confinement Decisions. Once charges have been referred, upon a motion for appropriate relief under RCM 305(j), the military judge has authority to release a Soldier from pretrial confinement.¹⁴ A military judge does not have the authority to reverse the decision of a military magistrate to release a Soldier from pretrial confinement absent new evidence or new misconduct. *Keaton v. Marsh*, 43 M.J. 757 (A.C.M.R. 1996).

¹⁴ This can be done in an 802 session or in an Article 39a session.

Section IV
Interview of Military Magistrates

1. Being Interviewed by Counsel about Search Authorizations and Pre-trial Confinement Review Decisions.

a. Military magistrates may be contacted by counsel during preparation for litigation or pursuant to some other investigation (for example, Inspector General Complaint or an AR 15-6 investigation). Military magistrates must take requests for information seriously and remember to adhere to their quasi-judicial role as a military magistrate.

b. At the request of counsel, a military judge, a law enforcement official or an Article 32 investigating officer, military magistrates will provide a copy of the affidavit, authorization, notes and any other documents prepared as part of the military magistrate's duties at issue. If requests are received from other sources, the military magistrate should contact the supervising judge. If someone wishes to inspect copies of document reviewed by the military magistrate, but not kept in the military magistrate's possession, the person making the request should be referred to the custodian of the document in question (such as CID).

c. Trial and defense counsel may request to interview a military magistrate. Before and during the interview, the military magistrate should take time to review his or her notes, as necessary, and be as accurate and precise as possible. Military magistrates should keep a copy of any written statement he or she makes.

2. Media Requests. Military magistrates will not speak to the media about the performance of their duties as a military magistrate. Answer all inquiries by referring the requestor to the local public affairs office. If a military magistrate receives a media inquiry, the military magistrate should notify the supervising judge.

14 Encls
as

MICHAEL J. HARGIS
COL, JA
Chief Trial Judge



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
2200 ARMY PENTAGON
WASHINGTON, DC 20310-2200



DAJA-ZA

26 MAY 2006

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Appointment of Part-Time Military Magistrates

Pursuant to paragraph 9-2b, AR 27-10, you are hereby designated as an appointing authority for part-time military magistrates.

SCOTT C. BLACK
Major General, USA
The Judge Advocate General

DISTRIBUTION:
COMMANDER, USALSA
CHIEF TRIAL JUDGE, US ARMY TRIAL JUDICIARY
CHIEF CIRCUIT JUDGE, FIRST JUDICIAL CIRCUIT
CHIEF CIRCUIT JUDGE, SECOND JUDICIAL CIRCUIT
CHIEF CIRCUIT JUDGE, THIRD JUDICIAL CIRCUIT
CHIEF CIRCUIT JUDGE, FOURTH JUDICIAL CIRCUIT
CHIEF CIRCUIT JUDGE, FIFTH JUDICIAL CIRCUIT
CHIEF CIRCUIT JUDGE, SIXTH JUDICIAL CIRCUIT

XXXX-XX

MEMORANDUM FOR Chief Circuit Judge, First Judicial Circuit, Fort Campbell, Kentucky
42223

SUBJECT: Appointment of Military Magistrate

1. I nominate **[NAME(s) OF APPOINTEE]** for appointment as (a) military magistrate(s) UP Army Regulation 27-10. **[NAME(s) OF APPOINTEE]** will not be involved in criminal investigations or prosecutorial functions.
2. **[NAME(s) OF APPOINTEE]** possess(es) the requisite training, experience and maturity to perform the duties of a part-time military magistrate, IAW AR 27-10, paragraph 8-2(b)(2).
3. Point of contact for this action is the undersigned at **(PHONE NUMBER)**

JOHN M. DOE
COL, JA
Staff Judge Advocate

Encl 2

Military Magistrate Nomination Data Sheet

RANK and NAME:		Age:
Current Duty Position:		
Phone - Voice:	Phone Voice - FAX:	
Email Address:		
Postal Address:		
Total Military Service, Active Duty:		
Total Military Service, USAR/NG:		
AD Experience as a Trial Counsel: _____ Years _____ Months None		
AD Experience as a Defense Counsel: _____ Years _____ Months None		
Has the officer ever been a Part-Time Military Magistrate before? Yes No		
Other experience in Criminal Law (military or civilian):		
Legal Experience (military or civilian) other than as indicated above:		
Pertinent Military Experience (officer or enlisted) other than that listed above:		
SJA comments on nominee's maturity, judgment, or temperament (optional):		
Other comments (Optional):		
Staff Judge Advocate's Signature		

Encl 3



DEPARTMENT OF THE ARMY
OFFICE OF THE CHIEF CIRCUIT JUDGE
FIRST JUDICIAL CIRCUIT
FORT CAMPBELL, KENTUCKY 42223

REPLY TO
ATTENTION OF

JALS-TJ (27)

15 October 2006

MEMORANDUM FOR Staff Judge Advocate, 10th Mountain Division (LI) and Fort Drum,
Fort Drum, New York 13602

SUBJECT: Appointment of Military Magistrate

1. I hereby appoint MAJ Florence Henderson as a military magistrate pursuant to AR 27-10, paragraph 8-2b, and the Administrative Standing Operating Procedures for Military Magistrates, Section I, paragraph 3. MAJ Henderson will perform magisterial duties under the supervision of LTC Christopher Knight. MAJ Henderson's authority as a military magistrate is without geographical limitation.
2. Military magistrates cannot be involved in criminal investigations or the prosecution function. You must notify me if MAJ Henderson begins to perform duties inconsistent with her magisterial role. Unless sooner relieved by me, her tenure as a military magistrate will end upon her PCS or assignment to duties inconsistent with her magisterial role.
3. MAJ Henderson must contact LTC Knight to schedule the required training. She will read and become familiar with Rule for Court-Martial 305, MCM; Section III, Military Rules of Evidence; AR 27-10, Chapter 8; the applicable portions of the Code of Judicial Conduct for Army Trial and Appellate Judges; and the Administrative SOP for Military Magistrates. The last document can be downloaded on the Military Justice Database (Army Trial Judiciary Webpage) on JAGCNET at <http://jagcnet.army.mil/USATJ>.

ANN B. DAVIS
Colonel, JA
Chief Circuit Judge

Encl 4

MILITARY MAGISTRATE QUARTERLY REPORT

1. MAGISTERIAL ACTIVITIES:

a. Names/Locations of Confinement Facilities Used for Pretrial Confinement :
(e.g., Regional Confinement Facility, Ft Knox; Jefferson Co. Jail, Watertown, NY)

b. Number of pretrial confinement (PTC) reviews conducted _____

c. Number of persons released after PTC review: _____

d. Search/seizure/apprehension authorizations:
(1) Requested _____; (2) Issued _____

2. TIME ACCOUNTABILITY:

a. Number of days in which some magisterial duties
were performed: _____

b. Hours performing magisterial duties: _____

c. Hours of travel in connection with magisterial duties: _____

3. REMARKS:

NAME AND RANK: _____

DUTY STATION: _____

JUDICIAL CIRCUIT: _____

PERIOD COVERED: _____

**INSTRUCTION FOR PREPARATION OF
MILITARY MAGISTRATE REPORT**

- 1c. Any command releases directly or indirectly caused by the magistrate will be reported in these items.

- 2a. Include as a day any day a portion of which magisterial duties, including acting on search/seizure/apprehension authorizations, were performed.

- 2b & c Round to full hours.

- 2c Total travel hours includes travel to and from airport or terminal and waiting time at terminals. Round out to next full hour. Do not include travel time from quarters to place of duty.

- 3. Include in remarks:
 - a. A resume of any special problems.

 - b. Comments on support rendered by local command.

 - c. Other pertinent comments regarding improvements in the program, special recognition that should be accorded or systemic problems that should be addressed.

**SEMI-ANNUAL PART TIME MILITARY MAGISTRATES REPORT – Month /Year
2nd Judicial Circuit**

Installation	PTC Reviews Conducted	Persons Released	Search & Seizure/Apprehension Req'd/Auth		# Days Mag Duties	# Hrs Mag Duties	# Hrs Travel
Fort Bragg	1	0	1	1	3	10	0
Fort Gordon	2	0	1	1	4	15	0

Encl 7

GUIDE TO ARTICULATING PROBABLE CAUSE TO SEARCH

1. Probable cause to authorize a search exists if there is a *reasonable belief, based on facts*, that the person or evidence sought is at the place to be searched. Reasonable belief is more than mere suspicion. The witness or source should be asked three questions:

A. What is where and when? Get the facts!

1. Be specific: how much, size, color, etc.

2. Is it still there (or is information stale)?

a. If the witness saw a joint in barracks room two weeks ago, it is probably gone; the information is stale.

b. If the witness saw a large quantity of marijuana in barracks room one day ago, probably some is still there; the information is not stale.

B. How do you know? Which of these apply:

1. "I saw it there." Such personal observation is extremely reliable.

2. "He [the suspect] told me." Such an admission is reliable.

3. "His [the suspect's] roommate/wife/ friend told me." This is hearsay. Get details and call in the source if possible.

4. "I heard it in the barracks." Such rumor is unreliable unless there are specific corroborating and verifying details.

C. Why should I believe you? Which of these apply:

1. The witness is a good, honest Soldier; you know him from personal knowledge or by reputation or opinion of chain of command.

2. The witness has given reliable information before; he has a good track record (CID may have records).

3. The witness has no reason to lie.

4. The witness has a truthful demeanor.

5. The witness made a statement under oath. ("Do you swear or affirm that any information you give is true to the best of your knowledge, so help you God?")

6. Other information corroborates or verifies details.

7. The witness made an admission against his or her own interests.

2. The determination that probable cause exists must be based on facts, not only on the conclusion of others.

3. The determination should be a common sense appraisal of the totality of all the facts and circumstances presented.

Encl 8

NOTES ON REQUEST FOR SEARCH AUTHORIZATION

Date/Time Called: _____

Called By: _____ of the _____ office.

The requester **did/did** not present an affidavit.

The requester **was/was not** sworn. (The requester was not sworn because _____).

The requester **had/had not** previously requested another magistrate, judge or commander, to grant the same request. (If such a previous request was made, what new information - if any - has been obtained? _____)

The offense being investigated was: _____

The requester requested to search for the following items: _____

The requester wanted to search for the items at/in following place(s) or upon the following person: _____

Why does the requester believe that what he/she wants to search for is located at the place(s) he/she wishes to search? (Indicate here a narrative of the information the requester presents. If an affidavit is attached, indicate only information that is not contained in the affidavit. Use "Fact Notes" sheets to detail information.)

Documents or reports **were/were not** reviewed in making my decision. The names of the items I reviewed **are/are not** listed on reverse. I **did/did not** initial all pages of documents I reviewed.

Probable cause to search exists when there is a reasonable belief that the property, or evidence sought is located in the place or on the person to be searched.

The request was **approved/disapproved/approved with the following modifications:** _____

A written search authorization **was/was not** executed.

Encl 9

CHECKLIST FOR REVIEW OF PRETRIAL CONFINEMENT

1. Is the Soldier subject to the UCMJ?
2. Was the Soldier confined by order of a commissioned officer of the Armed Forces?
3. Was the Soldier previously confined for the same offense(s) and released by any person authorized under R.C.M. 305(g)?
4. Did the Soldier's commander decide within 72 hours of ordering the Soldier into pretrial confinement, or receipt of a report that a member of his unit was confined, whether pretrial confinement would continue?
5. Did the commander prepare a memorandum of his reasons for approving continued pretrial confinement?
6. Has a charge sheet been prepared?
7. Is the Soldier charged only with an offense normally tried by summary court-martial?
8. Did the Soldier have or request military counsel prior to this review or meeting with the prisoner?
9. Was the Soldier's counsel informed of the date, time and place of any meeting with the prisoner?
10. Has the Soldier been informed of:
 - a. The nature of the offenses for which held;
 - b. The right to remain silent and that any statement made by the Soldier may be used against the Soldier;
 - c. The right to retain civilian counsel at no expense to the United States, and the right to request assignment of free military counsel; and
 - d. The procedures by which continued pretrial confinement will be reviewed?
11. Is there a reasonable belief that:
 - a. An offense triable by court-martial has been committed;
 - b. The Soldier committed it; and
 - c. Pretrial confinement is required?
12. Has a written memorandum of the decision to approve continued pretrial confinement or order immediate release, including the factual findings upon which they were based, been prepared?
13. Have the Soldier and the commander been informed of the decision?
14. Has a copy of the memorandum of the decision with all documents considered been kept on file?

Encl 11

List of nonexclusive factors to consider in determining whether continued PTC is warranted		
Factor	Discussion	Magistrate's Notes
The nature and circumstances of the offenses charged or suspected, including extenuating circumstances.	The more serious the offense(s), the more likely it may be the Soldier might want to avoid prosecution	
The weight of the evidence against the Soldier	The more likely there will be a conviction, the more likely it may be the Soldier might avoid trial	
The Soldier's ties to the community, including house, family, off-duty employment, financial resources, and length of residence	Where is home? What does the Soldier have to gain or lose by leaving the area?	
The Soldier's character and mental condition.	Law abiding? Follows orders? Violent? Peaceful? Stable?	
The Soldier's service record, including any record of previous misconduct. Consider counseling statements if part of the commander's packet.	If the unit is to use conditions on liberty, those conditions are often enforceable only by moral suasion on the Soldier. Is the Soldier the kind of Soldier that follows orders?	
Has the Soldier been disciplined before? How did (s)he respond to corrective action?	Soldiers who respond favorable to corrective action are less likely to engage in future misconduct.	
The Soldier's record of appearance at or flight from other pretrial investigations, trials and similar proceedings.	Is there evidence the Soldier has missed appointments or hearings?	
The likelihood the Soldier can and will commit further criminal misconduct if allowed to remain at liberty pending trial?	This is a combination of a lot of other factors.	
What other forms of restraint have been tried, if any, and found to be ineffective?	The commander is not required to actually try lesser forms of restraint but the magistrate should not continue confinement unless lesser forms of restraint won't work. If the unit has tried lesser forms of restraint, how did the Soldier respond to them?	
If AWOL before being confined, how did the Soldier come under military control and how long was the absence?	Was the AWOL terminated by apprehension or did the Soldier turn himself in. Is there evidence the AWOL was a desertion or just cold feet.	
Does the Soldier have a history of AWOL, desertion, FTRs?		

List of nonexclusive factors that might indicate whether the Soldier may or may not interfere with trial preparation or obstruct justice

Factor	Discussion	Magistrate's Notes
Does the case depend mainly on witness testimony rather than documentary or physical evidence?	Documents don't change. Witnesses can.	
Are the witnesses members of the Soldier's unit, live in the Soldier's barracks or have a common place of duty with the confine?	Does the Soldier have access to the witnesses?	
What is the Soldier's reputation, if any, for violence, bribery or false statements.		
Is there reliable information demonstrating threats or acts of violence against witnesses by or at the behest of the Soldier?		
Has the confinee violated conditions of any previously established no contact or protective orders.		

Other Notes

PRETRIAL CONFINEMENT INTERVIEW SCRIPT

NOTE: This “suggested” script is provided for use by military magistrates conducting pretrial confinement reviews under RCM 305. While the review is not adversarial, the accused has limited rights. See RCM 305(i)(2)(A)(i). The military magistrate in his/her discretion may permit greater involvement by counsel so that the magistrate has sufficient information upon which to base a decision. Nothing requires that the review be conducted in the presence of both the Government Representative and the defense; however, this suggested script assumes all parties are present at one time and one location. Magistrates should adapt the script to how they desire to conduct the interview.

Military Magistrate (MM): My name is _____. I have been appointed as a military magistrate by order of the Chief Circuit Judge, ___ Judicial Circuit, US Army Trial Judiciary.

MM: (To the accused) As a military magistrate, it is my duty to thoroughly and impartially review the matters associated with your case to determine if your pretrial confinement will continue. This review will include an examination of the relevant facts surrounding the offense(s) of which you (*are suspected of having committed*) (*have been charged*). My review is not a trial, nor is it an adversarial proceeding or hearing. However, it is my duty to review, evaluate, and weigh the evidence to determine whether there is probable cause to believe an offense under the Uniform Code of Military Justice has been committed and whether probable cause exists to believe that you committed such offense(s). Based upon my review, I will determine whether you should remain in pretrial confinement as ordered by _____. Do you understand the purpose of my review and my role?

Accused (ACC): _____.

MM: At this time, it is appropriate that I advise you of your rights during this review. First, you have the following rights granted you by Article 31 of the Uniform Code of Military Justice (UCMJ):

- (a) You do not have to answer my questions or say anything.
- (b) Anything you say or do can be used as evidence against you in a criminal trial.
- (c) You have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with you during questioning. This lawyer can be a civilian who you arrange for at no expense to the Government or a military lawyer detailed for you at no expense to you, or both.
- (d) If you are now willing to discuss the offense(s) under investigation, with or without a lawyer present, you have a right to stop answering questions at any time, or you can speak privately with a lawyer before answering further, even if you agree to talk about the offenses.

MM: Do you understand these rights?

ACC: _____

MM: If you do wish to make a statement, it can be a sworn or unsworn statement, it can be done orally or in writing, and it can be about the offenses or why your pretrial confinement should not continue. Do you understand that?

ACC: _____.

Encl 12

MM: You may submit written matters from you or others for my consideration. Do you understand these rights?

ACC: _____.

MM: You are (suspected of committing) (charged with) the offense(s) of _____

_____ in violation of Article(s) _____ of the UCMJ.
(For cases where charges have been preferred: The name of the accuser is _____).

MM: (*Right to counsel*) With regard to counsel during this pretrial confinement review, you have the following rights: First, you have the right to be represented free of charge by military counsel. Additionally, you have the right to a civilian attorney at no cost to the Government. If you choose to be represented by a civilian lawyer, you can excuse your military counsel and be represented only by your civilian lawyer, or you can keep your military lawyer to assist your civilian lawyer. Do you understand your rights to counsel?

ACC: _____.

MM: By whom do you wish to be represented during this pretrial confinement review?

ACC: _____.

MM: Also present for this review is _____, the government representative (*GR*)

MM: I intend to consider or have considered the following documentary evidence _____ (*list exhibits to be considered*). (I also intend to interview or have interviewed the following witnesses: _____.)

Is there anything you wish me to consider?

ACC/DC: _____.

MM: (To the accused) Do you wish to remain silent or make a sworn or unsworn statement for my consideration in this review?

ACC/DC: _____.

MM: Defense counsel, do you desire to make a statement on behalf of the accused?

DC: _____.

MM: Does the Government Representative desire to make a statement?

GR: _____.

[NOTE: The military magistrate may make an oral decision before concluding the session or conclude the session and make the decision at a later time. In either event, the military magistrate's conclusions must be set forth in a written memorandum. The memorandum must be provided to the parties upon request. RCM 305(i)(2)(D).]

MM: This interview is concluded.



**DEPARTMENT OF THE ARMY
U.S. Army Trial Judiciary, 5th Judicial Circuit
Area Support Group Kuwait
APO AE 09366**

REPLY TO
ATTENTION OF:

JALS-CJ5

30 March 2020

MEMORANDUM FOR Captain John Doe

SUBJECT: (Redeployment) (Deployment) as a Part-Time Military Magistrate (PTMM)

1. I understand that you are (redeploying back to your home station) (deploying to a location) in the (___) Circuit and will remain in duties not inconsistent with your role as a PTMM. Accordingly, your appointment as a PTMM remains effective.
2. Upon arrival in the (___) Circuit, you must contact COL John E. BeGood, who will be your supervising military judge for the duration of your stay at (indicate redeployment / deployment location). You can reach him at john.e.begood@us.army.mil. You will take all guidance in performing your PTMM duties from him while in the (___) Circuit. When monthly/quarterly reports are due, you will file one in each Circuit in which you performed duties as a PTMM, each report covering only the duties performed as a PTMM within that Circuit. Please file your (enter losing Circuit number) Circuit close-out report with the Clerk, (___) Judicial Circuit, Ms. Ima Clerk, at ima.clerk@us.army.mil, and your (enter gaining Circuit number) Circuit report with the Clerk, (___) Judicial Circuit, Ms. Ano Therclerk, at ano.therclerk@us.army.mil.
3. Even though there are no geographic limitations to your authority as a PTMM, after you (redeploy) (deploy) you will not perform PTMM duties in cases back in the (enter losing Circuit number) Circuit (even if you have previously performed PTMM duties in the case) without express permission from me. (As a matter of policy, PTMMs physically located with the Soldier about whom the matter relates will address any issues regarding that Soldier, even if the matter originated when that Soldier was in another location and was originally handled by another PTMM at that location.) If you have questions, you should consult with your supervising military judge.

JALS-CJ5

SUBJECT: (Redeployment) (Deployment) as a Part-Time Military Magistrate
(PTMM)

4. Thank you for your service and best of luck. If you have any questions,
please do not hesitate to contact your supervising military judge.

CHIEF C. JUDGE
COL, JA
Chief Circuit Judge

CF:
COL BeGood
SJA
Ms. Clerk
Ms. Therclerk

Encl 14

APPENDICES

RIGHTS WARNING PROCEDURE/WAIVER CERTIFICATE			
For use of this form, see AR 190-30; the proponent agency is CDCSOPS			
DATA REQUIRED BY THE PRIVACY ACT			
AUTHORITY:	Title 10, United States Code, Section 3012(g)		
PRINCIPAL PURPOSE:	To provide commanders and law enforcement officials with means by which information may be accurately identified.		
ROUTINE USES:	Your Social Security Number is used as an additional/alternate means of identification to facilitate filing and retrieval.		
DISCLOSURE:	Disclosure of your Social Security Number is voluntary.		
1. LOCATION	2. DATE	3. TIME	4. FILE NO.
5. NAME (Last, First, MI)	6. ORGANIZATION OR ADDRESS		
6. SSN	7. GRADE/STATUS		
PART I - RIGHTS WAIVER/NON-WAIVER CERTIFICATE			
Section A. Rights			
<p>The investigator whose name appears below told me that he/she is with the United States Army _____ and wanted to question me about the following offense(s) of which I am suspected/accused: _____</p> <p>Before he/she asked me any questions about the offense(s), however, he/she made it clear to me that I have the following rights:</p> <ol style="list-style-type: none"> 1. I do not have to answer any question or say anything. 2. Anything I say or do can be used as evidence against me in a criminal trial. 3. <i>(For personnel subject to the UCMJ)</i> I have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with me during questioning. This lawyer can be a civilian lawyer I arrange for at no expense to the Government or a military lawyer detailed for me at no expense to me, or both. <p style="text-align: center;">- or -</p> <p><i>(For civilians not subject to the UCMJ)</i> I have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with me during questioning. I understand that this lawyer can be one that I arrange for at my own expense, or if I cannot afford a lawyer and want one, a lawyer will be appointed for me before any questioning begins.</p> <ol style="list-style-type: none"> 4. If I am now willing to discuss the offense(s) under investigation, with or without a lawyer present, I have a right to stop answering questions at any time, or speak privately with a lawyer before answering further, even if I sign the waiver below. 			
5. COMMENTS (Continue on reverse side)			
Section B. Waiver			
I understand my rights as stated above. I am now willing to discuss the offense(s) under investigation and make a statement without talking to a lawyer first and without having a lawyer present with me.			
WITNESSES (if available)		3. SIGNATURE OF INTERVIEWEE	
1a. NAME (Type or Print)			
b. ORGANIZATION OR ADDRESS AND PHONE			
		4. SIGNATURE OF INVESTIGATOR	
2a. NAME (Type or Print)			
b. ORGANIZATION OR ADDRESS AND PHONE			
		5. TYPED NAME OF INVESTIGATOR	
		6. ORGANIZATION OF INVESTIGATOR	
Section C. Non-waiver			
1. I do not want to give up my rights <input type="checkbox"/> I want a lawyer <input type="checkbox"/> I do not want to be questioned or say anything			
2. SIGNATURE OF INTERVIEWEE			
ATTACH THIS WAIVER CERTIFICATE TO ANY SWORN STATEMENT (DA FORM 2823) SUBSEQUENTLY EXECUTED BY THE SUSPECT/ACCUSED			

SEARCH AND SEIZURE AUTHORIZATION	
For use of this form, see AR 27-10; the proponent agency is OTJAG	
TO: <i>(Name and Organization of the person to whom authorization is given)</i>	
<i>(An affidavit) (A (sworn) or (unsworn) oral statement) having been made before me by _____</i> <i>(Name of Affiant)</i>	
<i>(Organization or Address of Affiant)</i>	
<i>(which affidavit is attached hereto and made a part of this authorization), and as I am satisfied that there is probable cause to believe that the matters mentioned in the affidavit are true and correct, that the offense set forth therein has been committed, and that the property to be seized is located (on the person) (at the place) to be searched, you are hereby ordered to search the (person) (place) known as</i>	

for the property described as _____	

<i>bringing this order to the attention of the (person searched) (person in possession, if any person be found at the place or on the premises searched). The search will be made in the (daytime) (nighttime), and if the property is found there, you shall seize it, issue a receipt therefor to the person from whom the property is taken or in whose possession the property is found, deliver the property to:</i>	

<i>(Name and Organization of Authorized Custodian)</i>	
<i>and prepare a written inventory of the property. If there is no person at the searched place to whom the receipt may be delivered, the receipt will be left in a conspicuous location at the place or on the premises where the property is found.</i>	
Dated this _____ day of _____, _____.	
TYPED NAME AND GRADE OF AUTHORIZING OFFICIAL	DUTY POSITION OF AUTHORIZING OFFICIAL
ORGANIZATION OF AUTHORIZING OFFICIAL	SIGNATURE OF AUTHORIZING OFFICIAL

DA FORM 3745, SEP 2002

DA FORM 3745-R, MAR 85, IS OBSOLETE

USAPA V1.01ES

APPREHENSION AUTHORIZATION

For use of this form, see AR 27-10; the proponent agency is OTJAG

TO: *(Name and organization of the person to whom authorization is given)*

(An affidavit) (A (sworn) or (unsworn) oral statement) having been made before me by _____
(Name of Affiant)

(Organization or Address of Affiant)

(which affidavit is attached hereto and made a part of this authorization), and as I am satisfied that there is probable cause to believe that the matters mentioned in the affidavit are true and correct, that the offense set forth therein has been committed, and the person to be apprehended committed the offense and is located at the place to be searched, you are hereby ordered to search the place known as

for the person described as _____

bringing this order to the attention of the *(person apprehended) (person in possession, if any person be found at the place or on the premises searched)*. The search will be made in the *(daytime) (nighttime)*, and if the person described above is found there, you shall apprehend him/her.

Dated this _____ day of _____, _____.

TYPED NAME AND GRADE OF AUTHORIZING OFFICIAL

DUTY POSITION OF AUTHORIZING OFFICIAL

ORGANIZATION OF AUTHORIZING OFFICIAL

SIGNATURE OF AUTHORIZING OFFICIAL

AFFIDAVIT SUPPORTING REQUEST FOR AUTHORIZATION TO SEARCH AND SEIZE OR APPREHEND

For use of this form, see AR 27-10; the proponent agency is OTJAG.

BEFORE COMPLETING THIS FORM, SEE INSTRUCTIONS ON PAGE 2

1. I, _____, _____
(Name) (Organization or Address)

having been duly sworn, on oath depose and state that:

2. The affiant further states that:

3. In view of the foregoing, the affiant requests that an authorization be issued for a search of _____
(the person) (and)

_____ (the quarters or billets) (and)

_____ and (seizure) (apprehension) of _____
(the automobile) () (items/persons searched for)

TYPED NAME AND ORGANIZATION OF AFFIANT	SIGNATURE OF AFFIANT
SWORN TO AND SUBSCRIBED BEFORE ME THIS _____ DAY OF _____ AT _____	
TYPED NAME, ORGANIZATION AND OFFICIAL CAPACITY OF AUTHORITY ADMINISTERING THE OATH	SIGNATURE OF AUTHORITY ADMINISTERING THE OATH

INSTRUCTIONS FOR
AFFIDAVIT SUPPORTING REQUEST FOR AUTHORIZATION TO SEARCH AND SEIZE OR APPREHEND

1. In paragraph 1, set forth a concise, factual statement of the offense that has been committed or the probable cause to believe that it has been committed. Use additional page if necessary.

2. In paragraph 2, set forth facts establishing probable cause for believing that the person, premises, or place to be searched and the property to be seized or the person(s) to be apprehended are connected with the offense mentioned in paragraph 1, plus facts establishing probable cause to believe that the property to be seized or the person(s) to be apprehended are presently located on the person, premises, or place to be searched. Before a person may conclude that probable cause to search exists, he or she must first have a reasonable belief that the person, property or evidence sought is located in the place or on the person to be searched. The facts stated in paragraphs 1 and 2 must be based on either the personal knowledge of the person signing the affidavit or on hearsay information which he/she has plus the underlying circumstances from which he/she has concluded that the hearsay information is trustworthy. If the information is based on personal knowledge, the affidavit should so indicate. If the information is based on hearsay information, paragraph 2 must set forth some of the underlying circumstances from which the person signing the affidavit has concluded that the informant (whose identity need not be disclosed) or his/her information was trustworthy. Use additional pages if necessary.

3. In paragraph 3, the person, premises, or place to be searched and the property to be seized or the person(s) to be apprehended should be described with particularity and in detail. Authorization for a search may issue with respect to a search for fruits or products of an offense, the instrumentality or means of committing the offense, contraband or other property the possession of which is an offense, the person who committed the offense, and under certain circumstances for evidentiary matters.