

# 52<sup>nd</sup> MILITARY JUDGE COURSE

## CONTEMPT OF COURT

### Outline of Instruction

#### I. INTRODUCTION.

#### II. SOURCES.

- A. Art. 48, UCMJ. “A court-martial, provost court, or military commission may punish for contempt any person who uses any menacing word, sign, or gesture in the presence, or who disturbs its proceedings by any riot or disorder. The punishment may not exceed confinement for 30 days or a fine of \$100, or both.”
- B. R.C.M. 809.
- C. R.C.M. 801(a)(2). “The military judge shall ensure that the dignity and decorum of the proceedings are maintained.
- D. DA Pam 27-9, Military Judges’ Benchbook (15 Sep 02), Appendix E.
- E. Art. 47, UCMJ (Refusal or Failure to Testify).
- F. Colonel David A. Anderson, *Summary Contempt Power in the Military: A Proposal to Amend Article 48, UCMJ*, 160 MIL.L.REV. 158 (1999).

#### III. WHAT IS CONTEMPT?

- A. Menacing word, sign or gesture. UCMJ, art. 48.
- B. Causing disorder.
- C. Types of contempt.
  - 1. “Direct contempt”: what you see.
    - a. *See Cooke v. United States*, 267 U.S. 517 (1925).

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- b. *See also* William Winthrop, *MILITARY LAW AND PRECEDENTS*, 301-302 (2d ed. 1920 reprint).
  - 2. “Indirect contempt”: you don’t see it, but it disturbs the proceedings (flutist in the waiting room, demonstrators outside, etc.).
- D. Sometimes it’s annoying, but not (legally) contemptuous.
  - 1. Refusal by CA to provide funds to implement ruling of MJ does not constitute contempt. *United States v. Scaff*, 29 M.J. 60 (C.M.A. 1989).
  - 2. “Just as Congress never intended that every ‘irregular or improper act on the part of a member of the military service’ would be punishable as a disorder under Article 134...undoubtedly it also did not contemplate that every heated exchange between a lawyer and a military judge would be punishable as a ‘contempt’ under Article 48.” *United States v. Burnett*, 27 M.J. 99, 105 (C.M.A. 1988).
  - 3. Failure of witness to testify – handled under Article 47 (Refusal or Failure to Testify), not Article 48. *Cf. United States v. Ferdinand*, 29 M.J. 164 (C.M.A. 1979).
- E. By whom committed? **All persons**, whether or not subject to military law, except military judge, members, and foreign nationals outside the territorial limits of the U.S. who are not subject to the code. R.C.M. 809(a) discussion.

#### IV. PROCEDURE.

- A. Mechanics: *See* Benchbook, Appendix E.
- B. R.C.M. 809 provides options.
  - 1. Summary punishment.
  - 2. Why summary? “[T]he very practical reasons which have led every system of law to vest a contempt power in one who presides over judicial proceedings also are the reasons which account for it being made summary. The nature of [adversarial] proceedings presupposes, or at least stimulates, zeal in the opposing lawyers.” *United States v. DeAngelis*, 12 C.M.R. 54, 60 (C.M.A. 1953).
  - 3. Employing summary punishment:

- a. Only when you see it.
  - b. Judge and witness.
  - c. Stop everything and resolve.
  - d. Must recite facts for record and state directly witnessed. R.C.M. 809(c).
    - (1) *United States v. Cole*, 31 C.M.R. 16 (1961). In trial for rape, prosecuting witness refused to submit to cross-examination..., though court noted questions “were not insulting” and counsel “did not use harassing methods.” Court noted situation could have been avoided. “Had the law officer taken a firm position at the beginning of the controversy and insisted that the witness answer, she might well have complied with his directions. We recommend that law officers of general courts-martial not hesitate to employ the powers conferred upon them by Congress in order that military trials may proceed in a fair and orderly manner.” *Id.* at 20.
    - e. Can defer proceeding. *United States v. Burnett*, 27 M.J. 99 (C.M.A. 1988). Art 48. Contemplates suspending trial to conduct contempt hearing. Military judge can delay contempt proceeding until end of trial if he chooses, as here would have avoided panel rendering contempt finding in midst of trial, and thus arguably impinge on accused’s right to a fair trial.
4. Notice and hearing.
- a. You are not witness (indirect contempt).
  - b. Inform orally and in writing.
  - c. Right to counsel, present evidence, witnesses.
  - d. Standard of proof – beyond a reasonable doubt.
5. Making a record.
- a. Must put within ROT of the court-martial in which it occurred.
  - b. Also make separate ROT if held in contempt.

- (1) To CA for action.
  - (2) *Not* further reviewable.
6. Sentence.
- a. Confinement starts immediately (unless deferred, suspended, or disapproved).
  - b. Fine not imposed until CA acts.
  - c. May delay announcing sentence to permit convicted person to continue to participate in court-martial.
7. Person held in contempt informed of holding and sentence in writing by CA.
8. Important options.
- a. Try contempt immediately.
  - b. Try after trial.
  - c. Immediately?
    - (1) Judge alone court-martial.
    - (2) Deter further misconduct in the court-martial.
    - (3) Risk prejudice to accused, especially in panel case.
    - (4) Give instruction. *See e.g., United States v. Burnett*, 27 M.J. 99, 109, n.3 (Cox, J., dissenting).
  - d. After trial?
    - (1) Virtually eliminate risk to accused.
    - (2) Lose some deterrent value.

## **V. A LOUSY \$100?**

- A. Potential ethics ramifications.

1. AR 27-1 does not require self-reporting of “censure by a judge during a proceeding *unless made a matter of record* in the proceeding.” (emphasis added).
  2. Rule 8.3. Any lawyer should report violation of the rules which raise a substantial question as to the other lawyer’s honesty, trustworthiness, or fitness to practice law.
  3. Army: Judge or SJA can contact Standards of Conduct Office, Professional Conduct Branch, with report of misconduct.
- B. Certification to practice in military courts, determined by Judge Advocates General.
- C. “If the contemner is a military person, Articles 89, 90, and 91 as well as Articles 133 and 134, UCMJ respectively, provide ample authority for dealing with the contemptuous conduct and handle it much more severely than does Article 48.” *Burnett*, 27 M.J. at 108 (Cox, J., dissenting).
- D. Court-martial for separate offenses. *United States v. Gray*, 14 M.J. 551 (A.C.M.R. 1982). Accused charged with disrespect to commissioned officer and communication of threat for comments to trial counsel in prior court-martial. Court found charges not solely governed by contempt proceedings (with lesser punishments). Could also punish by preferring charges, and words here may not have even constituted contempt since not disruptive conduct as required by Article 48. Court-martial discretion to use summary contempt power, initiate charges, or report to proper commander for his action, whichever is appropriate.

## **VI. CONCLUSION.**

- A. Your courtroom.
- B. No one has absolute right to presence.
- C. Don’t exclude accused lightly.
- D. Counsel must follow your reasonable rules.
- E. Valuable sanctions beyond contempt itself.