

108. (ALL) Please describe what the “Good Soldier Defense” is and what types of evidence it permits. What impact would it have to eliminate the admissibility of character evidence submitted as the “Good Soldier Defense” on the merits of courts-martial, or evidence relating to the service of the accused as permitted by RCM 1001 in the sentencing phase of courts-martial?

DoD	<p>Response: The “Good Soldier Defense” is more appropriately called “good military character” evidence. Evidence of an accused’s good military character is admissible under Military Rule of Evidence 404(a)(1) if it is pertinent. The military appellate courts have interpreted that requirement in a manner that makes good military character evidence broadly admissible. Where such evidence is admissible, it is generally limited to reputation and opinion evidence. See Mil. R. Evid. 405(a); see also <i>United States v. Schelkle</i>, 47 M.J. 110, 112 (C.A.A.F. 1997); <i>United States v. Brewer</i>, 61 M.J. 425, 428 (C.A.A.F. 2005).</p> <p>Eliminating the defense’s ability to present good military character evidence would have an unfavorable effect on a broad range of courts-martial. The military justice system may be the only criminal justice system in the country in which defendants are convicted solely on the basis of positive results upon suspicionless drug testing. Military courts have held that good military character evidence is admissible where the accused is charged with wrongful use of a controlled substance. See, e.g., <i>United States v. Vandelinder</i>, 20 M.J. 41 (C.M.A.1985). One defense that is often advanced in cases based solely on a positive urinalysis is that an accused’s good military character makes it unlikely that he or she would have knowingly ingested a controlled substance. Military accused should not be deprived of offering such evidence when defending against drug charges. The members are instructed that they may apply a permissive inference of wrongful drug use based merely on a positive urinalysis result and find the accused guilty beyond a reasonable doubt based on that permissive inference alone. It is fair to allow the defense to attempt to defeat such a permissive inference by presenting good military character evidence and arguing that a good Soldier, Sailor, Marine, Airman, or Coastguardsman would not knowingly use drugs. The fact finder is free to give that evidence whatever weight it deserves. But preventing the defense from offering any such evidence would deprive the fact finder of important information when deciding whether to convict the accused. Good military character is also pertinent in many other contexts, such as when deciding whether disobedience of an order was knowing and willful. A service member with exemplary military service should be allowed to present evidence to the finder of fact to support an argument that someone with his or her record of military service would not knowingly violate an order.</p> <p>It is important to remember that the military justice system deals with a wide variety of offenses, including both common law crimes and purely military offenses. Good military character evidence promotes fair and just outcomes in many of those cases. It is important to avoid changes to the military justice system designed to have a particular impact on sexual assault prosecutions without a full understanding and appreciation of how those changes would affect the system’s fairness when trying cases presenting a vast array of criminal charges.</p>
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	<p>During sentencing proceedings, both the prosecution and the defense may present evidence about the accused’s service record within the context of an adversarial sentencing hearing. Where an accused’s service record includes admissible adverse information, the prosecution almost invariably presents that information to the sentencing authority, be it members or military judge alone. Similarly, where favorable evidence exists, the defense almost invariably presents that information to the defense. Sometimes the presentation of such evidence leads to the presentation of otherwise inadmissible negative information during the prosecution’s rebuttal sentencing case. Such evidence is important to the sentencing authority’s ability to render an appropriate sentence. The decision whether to adjudge a punitive discharge and, if so, its characterization is often influenced by an assessment of the accused’s previous service.</p> <p>Significantly, the federal sentencing guidelines recognize the appropriateness of considering military service when determining an appropriate sentence: “Military service may be relevant in determining whether a departure is warranted, if the military service, individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines.” United States Sentencing Guidelines, § 5H1.11; see also United States v. Ortiz, Fed. Appx. ___, No. 13-1453, 2013 WL 5833306 (3d Cir. Oct. 31, 2013).</p>
USA	<p>The “Good Soldier Defense” is a misnomer as it is not an affirmative defense, but merely a judicial interpretation of Military Rule of Evidence 404. Military Rule of Evidence 404 allows for the admission of pertinent character evidence by the defense. It is analogous to Federal Rule of Evidence (FRE) 404, which permits “evidence of a defendant’s pertinent trait.” . See generally MRE 404(a)(1). Military jurisprudence has recognized that the “good military character” of an accused is a pertinent character trait generally in cases in which a “military offense” is alleged. It is a recognition that there can be a nexus between the alleged military offense and the accused’s military character. While it may be a “pertinent trait” in most cases, the defense raises “good military character” at their own peril, as it allows the government to present character evidence to directly rebut good military character. On rebuttal, the government may offer evidence including witness testimony, letters of reprimand, nonjudicial punishment, counseling statements, opinion or reputation evidence, and may even include specific bad acts. In practice, the government’s ability to admit this rebuttal evidence results in a strategic decision in the vast majority of cases by defense counsel not to introduce “good military character” evidence.</p> <p>In a case where “good military character” evidence is presented, the military judge will tailor an instruction based on evidence admitted. The military judge may instruct:</p> <p>Evidence of the accused’s character for _____ may be sufficient to cause a reasonable doubt as to (his) (her) guilt. On the other hand, evidence of the accused’s (good character for _____) (and) (good military record) may be outweighed by other evidence tending to show the accused’s guilt (and the prosecution’s evidence of the accused’s ((bad) (_____) (character for _____) (and) ((bad)</p>

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	<p>(_____) military record). Military Judge’s Benchbook, DA Pam 27-9, Instruction 7-8-1.</p> <p>In sentencing proceedings, evidence of good military character may be presented as mitigating evidence. (R.C.M. 1001(c)(1)(B)). Additionally, it is a sentencing consideration that may trigger a specific sentencing instruction from a military judge. United States v. Wheeler, 17 U.S.C.M.A. (C.M.A. 1967), established sentencing factors referred to as the “Wheeler Factors” in the Military Judge’s Benchbook. (See DA PAM 27-9, instruction 2-6-11). Again, as on the merits, the government is permitted to introduce rebuttal evidence.</p> <p>Eliminating the admissibility of character evidence submitted would not impact the vast majority of courts-martial on the merits because the evidence is not commonly used. However, there would certainly be an impact in cases in which the accused is charged with a purely “military offense” such as dereliction of duty. In these “purely” military offenses, evidence of the accused’s good military character is highly relevant and can be compelling evidence. Amending the rules of evidence to preclude “good military character” evidence in all cases could have constitutional implications on an accused’s right to present a defense.</p> <p>Eliminating the admissibility of “good military character” evidence at sentencing, however, would have a significant impact on the ability of an accused Soldier to present evidence in mitigation or extenuation. Virtually every accused offers evidence of his duty performance during sentencing proceedings. Elimination of an accused’s right to present a specific type of extenuation or mitigation evidence during a sentencing proceeding would most likely lead to extensive post-trial litigation.</p>
USAF	DoD is collecting and consolidating the answer to this question from all of the services and will provide a single response.
USN	Responses are to be provided by OSD.
USMC	DoD Office of General Counsel will provide this answer.
USCG	<p>Although the title indicates that this is a unique defense in the military, it is similar to any good character defense used in a civilian criminal trial. In fact, it is not really a “defense” as much as a “character” rule emanating from the rules of evidence. Generally, evidence of a person’s character is not admissible to show that the person acted in conformity with that character on a particular occasion. M.R.E. 404(a). However, an accused can offer evidence of a character trait that is “pertinent” to the charged offense to show that the accused did act in conformity with that character trait. M.R.E. 404(a)(1). The M.R.E. in this regard correspond to F.R.E. 404.</p> <p>Admissibility of good character evidence is premised on a belief that a person who has uniformly pursued an honest and upright course of conduct will not depart from it and do an act inconsistent with it.</p> <p>The character defense may be used by the defense to create reasonable doubt that a person who has a history of law-abiding behavior and exceptional performance in the military would commit the charged offenses. Defense attorneys may deploy this defense particularly in cases where the accused is charged with a uniquely military</p>

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	<p>offense, and where there is little or no forensic evidence, and conviction largely, if not exclusively, depends on the character and credibility of witnesses. In an Article 112a case, for example, an accused might use this defense to show that it would be unlikely that he or she would intentionally decide to use drugs, thereby risking a long and distinguish career.</p> <p>Eliminating the ability to introduce character on the terms provided in the M.R.E. would raise a substantial constitutional issue insofar as it would impede the accused's right to present a defense.</p> <p>Similarly, at sentencing, the defendant is entitled to present evidence to mitigate the crimes and to request mercy from the court. This again is not unique to the military system, as many individuals convicted of a crime in civilian court ask family members, co-workers, pastors, and friends to speak about the good things they have done in their life prior to the crime, in an attempt to lessen the sentence.</p>
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